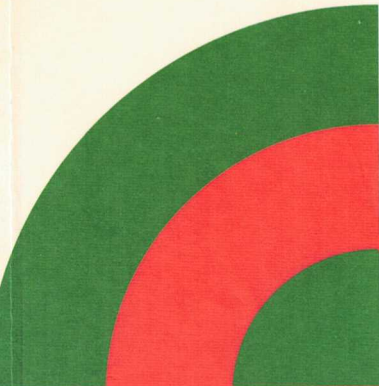




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Ley Orgánica 3/2005, de 8 de julio, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para perseguir extraterritorialmente la práctica de la mutilación genital femenina.

(BOE núm. 163 Sábado 9 julio 2005)

EXPOSICIÓN DE MOTIVOS

La mutilación genital femenina constituye un grave atentado contra los derechos humanos, es un ejercicio de violencia contra las mujeres que afecta directamente a su integridad como personas. La mutilación de los órganos genitales de las niñas y las jóvenes debe considerarse un trato «inhumano y degradante» incluido, junto a la tortura, en las prohibiciones del artículo 3 del Convenio Europeo de Derechos Humanos. Los Estados miembros de la Unión Europea, cuyas Constituciones reconocen el derecho a la integridad personal, tanto física como mental, como un derecho fundamental, se han visto enfrentados a un fenómeno de exportación de la práctica de mutilaciones genitales femeninas debido a la inmigración de personas procedentes de países donde estas prácticas constituyen una costumbre tradicional aún en vigor. El hecho de que las mutilaciones sexuales sean una práctica tradicional en algunos países de los que son originarios los inmigrantes en los países de la Unión Europea no puede considerarse una justificación para no prevenir, perseguir y castigar semejante vulneración de los derechos humanos. La OMS estima que en el mundo hay 130 millones de mujeres víctimas de mutilaciones genitales practicadas en nombre de culturas y tradiciones religiosas. La Convención de las Naciones Unidas para la Eliminación de todas las formas de Discriminación contra la Mujer, en su artículo 2.f prevé que los Estados parte adopten medidas adecuadas, incluso de carácter legislativo, para modificar o derogar leyes, reglamentos, usos y prácticas que constituyan una discriminación contra las mujeres. Asimismo, el Programa de Acción de la Conferencia Internacional sobre Población y Desarrollo (Cairo 1994) y el Programa de Pekín (1995) incluyen recomendaciones a los Estados a fin de erradicar las mutilaciones genitales femeninas y para modificar los comportamientos sociales y culturales y acabar así con los perjuicios y prácticas lesivos para las personas. En esta línea se inscribe la presente Ley Orgánica al posibilitar la persecución extraterritorial de la práctica de la mutilación genital femenina cuando la comisión del delito se realiza en el extranjero, como sucede en la mayor parte de los casos, aprovechando viajes o estancias en los países de origen de quienes se encuentran en nuestro país.

Artículo único.

Se añade un nuevo epígrafe g) al apartado 4 del artículo 23 de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, que queda redactado como sigue:

«4. Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos: a)

Genocidio; b) Terrorismo; c) Piratería y apoderamiento ilícito de aeronaves; d) Falsificación de moneda extranjera;

e) Los delitos relativos a la prostitución y los de corrupción de menores o incapaces.

f) Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.

g) Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España; h) Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.»

Disposición derogatoria única. Quedan derogadas cuantas disposiciones de igual o inferior rango se opongan a lo establecido en la presente Ley Orgánica.

(Omissis)

Ley Orgánica 2/2006, de 3 de mayo, de Educación

(B.O.E. 4 mayo 2006, núm. 106)

(Omissis)

Disposición adicional segunda. Enseñanza de la religión.

1. La enseñanza de la religión católica se ajustará a lo establecido en el Acuerdo sobre Enseñanza y Asuntos Culturales suscrito entre la Santa Sede y el Estado español. A tal fin, y de conformidad con lo que disponga dicho acuerdo, se incluirá la religión católica como área o materia en los niveles educativos que corresponda, que será de oferta obligatoria para los centros y de carácter voluntario para los alumnos.

2. La enseñanza de otras religiones se ajustará a lo dispuesto en los Acuerdos de Cooperación celebrados por el Estado español con la Federación de Entidades Religiosas Evangélicas de España, la Federación de Comunidades Israelitas de España, la Comisión Islámica de España y, en su caso, a los que en el futuro puedan suscribirse con otras confesiones religiosas.

Disposición adicional tercera. Profesorado de religión.

1. Los profesores que impartan la enseñanza de las religiones deberán cumplir los requisitos de titulación establecidos para las distintas enseñanzas reguladas en la presente Ley, así como los establecidos en los acuerdos suscritos entre el Estado Español y las diferentes confesiones religiosas.

2. Los profesores que, no perteneciendo a los cuerpos de funcionarios docentes, impartan la enseñanza de las religiones en los centros públicos lo harán en régimen de contratación laboral, de conformidad con el Estatuto de los Trabajadores, con las respectivas Administraciones competentes. La regulación de su régimen laboral se hará con la participación de los representantes del profesorado. Se accederá al destino mediante criterios objetivos de igualdad, mérito y capacidad. Estos profesores percibirán las retribuciones que correspondan en el respectivo nivel educativo a los profesores interinos. En todo caso, la propuesta para la docencia corresponderá a las entidades religiosas y se renovará automáticamente cada año. La determinación del contrato, a tiempo completo o a tiempo parcial según lo que requieran las necesidades de los centros, corresponderá a las Administraciones competentes. La remoción, en su caso, se ajustará a derecho.

Disposición adicional cuarta. Libros de texto y demás materiales curriculares.

1. En el ejercicio de la autonomía pedagógica, corresponde a los órganos de coor-

dinación didáctica de los centros públicos adoptar los libros de texto y demás materiales que hayan de utilizarse en el desarrollo de las diversas enseñanzas.

2. La edición y adopción de los libros de texto y demás materiales no requerirán la previa autorización de la Administración educativa. En todo caso, éstos deberán adaptarse al rigor científico adecuado a las edades de los alumnos y al currículo aprobado por cada Administración educativa. Asimismo, deberán reflejar y fomentar el respeto a los principios, valores, libertades, derechos y deberes constitucionales, así como a los principios y valores recogidos en la presente Ley y en la Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, a los que ha de ajustarse toda la actividad educativa.

3. La supervisión de los libros de texto y otros materiales curriculares constituirá parte del proceso ordinario de inspección que ejerce la Administración educativa sobre la totalidad de elementos que integran el proceso de enseñanza y aprendizaje, que debe velar por el respeto a los principios y valores contenidos en la Constitución y a lo dispuesto en la presente Ley.

(*Omissis*)

Disposición final primera. Modificación de la Ley Orgánica 8/1985, de 3 de julio, reguladora del Derecho a la Educación.

1. El artículo 4 de la Ley Orgánica 8/1985, de 3 de julio, reguladora del Derecho a la Educación, queda redactado de la siguiente manera: «1. Los padres o tutores, en relación con la educación de sus hijos o pupilos, tienen los siguientes derechos: a) A que reciban una educación, con la máxima garantía de calidad, conforme con los fines establecidos en la Constitución, en el correspondiente Estatuto de Autonomía y en las leyes educativas. b) A escoger centro docente tanto público como distinto de los creados por los poderes públicos. c) A que reciban la formación religiosa y moral que esté de acuerdo con sus propias convicciones. d) A estar informados sobre el progreso del aprendizaje e integración socio-educativa de sus hijos. e) A participar en el proceso de enseñanza y aprendizaje de sus hijos. f) A participar en la organización, funcionamiento, gobierno y evaluación del centro educativo, en los términos establecidos en las leyes. g) A ser oídos en aquellas decisiones que afecten a la orientación académica y profesional de sus hijos.

2. Asimismo, como primeros responsables de la educación de sus hijos o pupilos, les corresponde:

a) Adoptar las medidas necesarias, o solicitar la ayuda correspondiente en caso de dificultad, para que sus hijos o pupilos cursen las enseñanzas obligatorias y asistan regularmente a clase.

b) Proporcionar, en la medida de sus disponibilidades, los recursos y las condiciones necesarias para el progreso escolar. c) Estimularles para que lleven a cabo las actividades de estudio que se les encomienden. d) Participar de manera activa en las actividades que se establezcan en virtud de los compromisos educativos que los centros establezcan con las familias, para mejorar el rendimiento de sus hijos. e) Conocer, participar y apoyar la evolución de su proceso educativo, en colaboración con los profesores y los centros. f) Respetar y hacer respetar las normas establecidas por el centro, la autoridad y las indicaciones u orientaciones educativas del profesorado. g) Fomentar el respeto por todos los componentes de la comunidad educativa.»

2. El artículo 5.5 de la Ley Orgánica 8/1985, de 3 de julio, reguladora del Dere-

cho a la Educación, queda redactado de la siguiente manera: «Las Administraciones educativas favorecerán el ejercicio del derecho de asociación de los padres, así como la formación de federaciones y confederaciones.»

3. El artículo 6 de la Ley Orgánica 8/1985, de 3 de julio, reguladora del Derecho a la Educación, queda redactado de la siguiente manera: «1. Todos los alumnos tienen los mismos derechos y deberes, sin más distinciones que las derivadas de su edad y del nivel que estén cursando.

2. Todos los alumnos tienen el derecho y el deber de conocer la Constitución Española y el respectivo Estatuto de Autonomía, con el fin de formarse en los valores y principios reconocidos en ellos. 3. Se reconocen a los alumnos los siguientes derechos básicos: a) A recibir una formación integral que contribuya al pleno desarrollo de su personalidad ; b) A que se respeten su identidad, integridad y dignidad personales; c) A que su dedicación, esfuerzo y rendimiento sean valorados y reconocidos con objetividad ; d) A recibir orientación educativa y profesional; e) A que se respete su libertad de conciencia, sus convicciones religiosas y sus convicciones morales, de acuerdo con la Constitución; f) A la protección contra toda agresión física o moral; g) A participar en el funcionamiento y en la vida del centro, de conformidad con lo dispuesto en las normas vigentes; h) A recibir las ayudas y los apoyos precisos para compensar las carencias y desventajas de tipo personal, familiar, económico, social y cultural, especialmente en el caso de presentar necesidades educativas especiales, que impidan o dificulten el acceso y la permanencia en el sistema educativo; i) A la protección social, en el ámbito educativo, en los casos de infortunio familiar o accidente.

4. Son deberes básicos de los alumnos: a) Estudiar y esforzarse para conseguir el máximo desarrollo según sus capacidades; b) Participar en las actividades formativas y, especialmente, en las escolares y complementarias; c) Seguir las directrices del profesorado ; d) Asistir a clase con puntualidad ;

e) Participar y colaborar en la mejora de la convivencia escolar y en la consecución de un adecuado clima de estudio en el centro, respetando el derecho de sus compañeros a la educación y la autoridad y orientaciones del profesorado ; f) Respetar la libertad de conciencia, las convicciones religiosas y morales, y la dignidad, integridad e intimidad de todos los miembros de la comunidad educativa; g) Respetar las normas de organización, convivencia y disciplina del centro educativo, y

h) Conservar y hacer un buen uso de las instalaciones del centro y materiales didácticos.»

(Omissis)

Racial and Religious Hatred Act 2006

An Act to make provision about offences involving stirring up hatred against persons on racial or religious grounds (16th February 2006)

(...)

1. Hatred against persons on religious grounds

The Public Order Act 1986 (c.64) is amended in accordance with the Schedule to this Act, which creates offences involving stirring up hatred against persons on religious grounds

2. Racial and religious hatred offences: powers of arrest

In section 24A of the Police and Criminal Evidence Act 1984 (c.60) (arrest without warrant by person other than constables) after subsection (4) add – “(5) This section does not apply in relation to an offence under Part 3 or 3A of the Public Order Act 1986”.

3. Short title, commencement and extent

(1) This Act may be cited as the Racial and Religious Hatred Act 2006

(2) This Act comes into force on such day as the Secretary of State may appoint by order made by statutory instrument.

(3) An order under subsection (2) may make – (a) such supplementary, incidental or consequential provision, or (b) such transitory, transitional or saving provision, as the Secretary of State considers appropriate in connection with the coming into force of this Act

(4) This Act extends to England and Wales only.

SCHEDULE

HATRED AGAINST PERSON ON RELIGIOUS GROUNDS

In the Public Order Act 1986 (c.64), after Part 3 insert–

“Part 3A - HATRED AGAINST PERSON ON RELIGIOUS GROUNDS

Meaning of “religious hatred”

29A Meaning of “religious hatred”

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Acts intended to stir up religious hatred

29B Use words or behaviour or display of written material

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or

behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

29 C Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.

(2) References in this Part the publication or distribution of written material are to its publication or distribution to the public or a section of the public;

29D Public performance of a play

(1) If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred.

(2) This section does not apply to a performance given solely or primarily for one or more of the following purposes –

- (a) rehearsal,
- (b) making a recording of the performance, or
- (c) enabling the performance to be included in a programme service;

but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the thing mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above.

(3) For the purposes of this section –

(a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,

(b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and

(c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(4) In this section “play” and “public performance” have the same meaning as in the Theatres Act 1968

(5) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act –

- section 9 (script as evidence of what was performed),
- section 10 (power to make copies of script),
- section 15 (powers of entry and inspection).

29E Distributing showing or playing a recording

(1) A person who distributes, or shows or plays, a recording of visual images or sound which are threatening is guilty of an offence if he intends thereby to stir up religious hatred.

(2) In this Part “recording” means any record from which visual images or sounds may by any means, be reproduced; and references to the distribution, showing or playing to the public or a section of the public.

(3) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

29F Broadcasting or including programme in programme service

(1) If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up religious hatred.

(2) The persons are

- (a) the person providing the programme service,
- (b) any person by whom offending words or behaviour are used.

Inflammatory material

29G Possession of inflammatory material

(1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to –

(a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another,

is guilty of an offence if he intends religious hatred to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may be reasonably be inferred that he has, in view.

29H Powers of entry and search

(1) If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 29G, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

(2) If in Scotland a sheriff or justice of the peace is satisfied by evidence on oath that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 29G, the sheriff or justice may issue a warrant authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

(3) A constable entering or searching premises in pursuance of a warrant issued under this section may use reasonable force if necessary.

(4) In this section “premises” means any place and, in particular, includes

(a) any vehicle, vessel, aircraft or hovercraft

(b) any offshore installation as defined in section 12 of the Mineral Working (Offshore Installations) Act 1971, and

(c) any tent or movable structure.

29I Power to order forfeiture

(1) A court by or before which a person is convicted of –

(a) an offence under section 29B relating to the display of written material, or

(b) an offence under section 29C, 29E or 29G, shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.

(2) An order made under this section shall not take effect –

(a) in the case of an order made in proceedings in England and Wales, until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned;

(b) in the case of an order made in proceedings in Scotland, until the expiration of the time within which, by virtue of any statute, an appeal may be instituted or, where

such an appeal is duly instituted, until the appeal is finally decided or abandoned.

(3) For the purposes of subsection (2)(a) –

(a) an application for a case stated or for leave to appeal shall be treated as the institution of an appeal, and

(b) where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.

(4) For the purposes of subsection (2)(b) the lodging of an application for a stated case or note of appeal against sentence shall be treated as the institution of an appeal.

29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the belief or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Supplementary provisions

29K Savings for reports of parliamentary or judicial proceedings

(1) Nothing in this Part applies to a fair and accurate report of proceedings in Parliament or in the Scottish Parliament.

(2) Nothing in this Part applies to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.

29L Procedure and punishment

(1) No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General.

(2) For the purposes of the rules in England and Wales against charging more than one offence in the same count or information; each of section 29B to 29G creates one offence.

(3) A person guilty of an offence under this Part is liable –

(a) on conviction on indictment to imprisonment for a term not exceeding seven years or a fine or both;

(b) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

29M Offences by corporations

(1) Where a body corporate is guilty of an offence under this Part and it is shown that the offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director.

29N Interpretation

In this Part –

“distribute”, and related expressions, shall be construed in accordance with section 29C(2) (written material) and section 29E(2) (recording);

“dwelling” means any structure or part of a structure occupied as a person’s home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure;

“programme” means any item which is included in a programme service;

“programme service” has the same meaning as in the Broadcasting Act 1990;

“publish”, and related expressions, in relation to written material, shall be construed in accordance with section 29C(2);

“religious hatred” has the meaning given by section 29A;

“recording” has the meaning given by section 29E(2), and “play” and “show”, and related expressions, in relation to a recording, shall be construed in accordance with that provision;

“written material” includes any sign or other visible representation”.

Corte Europea dei diritti dell'uomo – 10 novembre 2005- affaire Leyla Sahin c. Turquie – req. n. 44774/98

Il regolamento dell'Università di Istanbul – che sottopone l'uso del foulard, per le studentesse, ad alcune restrizioni – costituisce un'ingerenza nel diritto di manifestazione della libertà religiosa. Tale ingerenza è, tuttavia, prevista dalla legge, persegue scopi legittimi ex art. 9.2 della Convenzione Europea, è giustificata nel suo principio e proporzionata negli scopi. Pertanto può essere considerata una misura "necessaria in una società democratica"

(Omissis)

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

14. La requérante est née en 1973 et vit à Vienne depuis 1999, année où elle a quitté Istanbul pour poursuivre ses études de médecine à la faculté de médecine de l'université de cette ville. Elle est issue d'une famille traditionnelle pratiquant la religion musulmane et porte le foulard islamique afin de respecter un précepte religieux.

A. La circulaire du 23 février 1998

15. Le 26 août 1997, la requérante, alors étudiante en cinquième année à la faculté de médecine de l'université de Bursa, s'inscrit à la faculté de médecine de Cerrahpaşa de l'Université d'Istanbul. Elle affirme avoir porté le foulard islamique pendant ses quatre années d'études de médecine à l'université de Bursa ainsi que pendant la période qui s'ensuit et jusqu'en février 1998.

16. Le 23 février 1998, le recteur de l'Université d'Istanbul adopta une circulaire. La partie pertinente de celle-ci est libellée comme suit:

«En vertu de la Constitution, de la loi, des règlements, et conformément à la jurisprudence du Conseil d'Etat, de la Commission européenne des droits de l'homme et aux décisions adoptées par les comités administratifs des universités, les étudiantes ayant la «tête couverte» (portant le foulard islamique) et les étudiants portant la barbe (y compris les étudiants étrangers) ne doivent pas être acceptés aux cours, stages et travaux pratiques. En conséquence, le nom et le numéro des étudiantes revêtues du foulard islamique ou des étudiants barbus ne doivent pas être portés sur les listes de recensement des étudiants. Toutefois, si des étudiants dont le nom et le numéro ne figurent pas sur ces listes insistent pour assister aux travaux pratiques et entrer dans les salles de cours, il faut les avertir de la situation et s'ils ne veulent pas sortir, il faut relever leur noms et numéros et les informer qu'ils ne peuvent assister aux cours. S'ils persistent à ne pas vouloir sortir de la salle de cours, l'enseignant dresse un procès-verbal constatant la situation et son impossibilité de faire cours et il porte aussi d'urgence la situation à la connaissance des autorités de l'université pour sanction.»

17. Conformément à la circulaire précitée, le 12 mars 1998, l'accès aux épreuves écrites du cours d'oncologie fut refusé à la requérante par les surveillants au motif

qu'elle portait le foulard islamique. Par ailleurs, le 20 mars 1998, M^{lle} Şahin s'adressa au secrétariat de la chaire de traumatologie orthopédique pour son inscription administrative, qui lui fut refusée pour cause de port du foulard. De même, les 16 avril et 10 juin 1998, toujours pour le même motif, elle ne fut pas admise au cours de neurologie et aux épreuves écrites du cours de santé populaire.

B. Le recours en annulation introduit par la requérante contre la circulaire du 23 février 1998

18. Le 29 juillet 1998, la requérante introduisit un recours en annulation contre la circulaire du 23 février 1998. Dans son mémoire, elle soutenait que la circulaire en question et son application constituaient une atteinte à ses droits garantis par les articles 8, 9 et 14 de la Convention ainsi que par l'article 2 du Protocole n° 1 dans la mesure où, d'une part, la circulaire n'avait pas de base légale et, d'autre part, le rectorat ne disposait pas de pouvoir de réglementation en la matière.

19. Par un jugement rendu le 19 mars 1999, le tribunal administratif d'Istanbul débouta la requérante, considérant qu'en vertu de l'article 13 b) de la loi n° 2547 relative à l'enseignement supérieur (paragraphe 52 ci-dessous), le recteur d'une université, en tant qu'organe exécutif d'un tel établissement, disposait d'un pouvoir réglementaire en matière de tenue vestimentaire des étudiants en vue d'assurer le maintien de l'ordre. Ce pouvoir réglementaire devait être exercé conformément à la législation pertinente ainsi qu'aux arrêts rendus par la Cour constitutionnelle et le Conseil d'État. Se référant à la jurisprudence constante de ces derniers, le tribunal administratif conclut que ni la réglementation litigieuse ni les mesures individuelles ne pouvaient être considérées comme illégales.

20. Le 19 avril 2001, le Conseil d'État rejeta le pourvoi de la requérante.

C. Les sanctions disciplinaires infligées à la requérante

21. En mai 1998, une procédure disciplinaire fut engagée contre la requérante en vertu de l'article 6 a) du règlement sur la procédure disciplinaire des étudiants (paragraphe 50 ci-dessous) en raison de l'inobservation par celle-ci des règles portant sur la tenue vestimentaire.

22. Le 26 mai 1998, eu égard au fait que M^{lle} Şahin manifestait par son comportement la volonté de continuer à participer aux cours et/ou aux travaux pratiques en portant le foulard, le doyen de la faculté déclara que l'attitude de la requérante et le non-respect par celle-ci des règles portant sur la tenue vestimentaire ne seyaient pas à la dignité que nécessite la qualité d'étudiant. Il décida en conséquence de lui infliger un avertissement.

23. Le 15 février 1999, un rassemblement non autorisé tendant à protester contre les règles portant sur la tenue vestimentaire eut lieu devant le décanat de la faculté de médecine de Cerrahpaşa.

24. Le 26 février 1999, le doyen de la faculté entama une procédure disciplinaire dirigée entre autres contre la requérante en raison de sa participation au rassemblement en question. Le 13 avril 1999, après l'avoir entendue, le doyen de la faculté lui infligea une exclusion d'un semestre, en application de l'article 9 j) du règlement sur la procédure disciplinaire des étudiants (paragraphe 50 ci-dessous).

25. Le 10 juin 1999, la requérante introduisit un recours en annulation contre cette sanction disciplinaire devant le tribunal administratif d'Istanbul. Ce recours fut rejeté le 30 novembre 1999 par le tribunal administratif d'Istanbul au motif que la mesure litigieuse ne pouvait être considérée comme illégale, compte tenu des pièces du dossier et de la jurisprudence établie en la matière.

26. A la suite de l'entrée en vigueur le 28 juin 2000 de la loi n° 4584 prévoyant l'amnistie des sanctions disciplinaires prononcées contre les étudiants et l'annulation des conséquences y relatives, toutes les sanctions infligées à la requérante furent amnistiées et toutes les conséquences y relatives effacées.

27. Le 28 septembre 2000, se fondant sur la loi n° 4584, le Conseil d'Etat décida qu'il n'y avait pas lieu d'examiner le fond du pourvoi de la requérante contre l'arrêt du 30 novembre 1999.

28. Entre-temps, le 16 septembre 1999, la requérante abandonna ses études en Turquie et s'inscrivit à l'université de Vienne pour y poursuivre ses études supérieures.

II. LE DROIT ET LA PRATIQUE PERTINENTS

A. La Constitution

29. Les dispositions pertinentes de la Constitution sont libellées en ces termes:

Article 2

«La République de Turquie est un Etat de droit démocratique, laïque et social, respectueux des droits de l'homme dans un esprit de paix sociale, de solidarité nationale et de justice, attaché au nationalisme d'Atatürk et reposant sur les principes fondamentaux énoncés dans le préambule.»

Article 4

«Les dispositions de l'article premier de la Constitution stipulant que la forme de l'Etat est celle d'une république, ainsi que les dispositions de l'article 2 relatives aux caractéristiques de la République et celles de l'article 3 ne peuvent être modifiées et leur modification ne peut être proposée.»

Article 10

«Tous les individus sont égaux devant la loi sans aucune discrimination fondée sur la langue, la race, la couleur, le sexe, l'opinion politique, la croyance philosophique, la religion, l'appartenance à un courant religieux ou d'autres motifs similaires.

Les femmes et les hommes ont des droits égaux. L'Etat est tenu d'assurer la mise en pratique de cette égalité.

On ne peut accorder de privilège à un individu, une famille, un groupe ou une classe quelconques.

Les organes de l'Etat et les autorités administratives sont tenus d'agir conformément au principe de l'égalité devant la loi en toute circonstance.»

Article 13

«Les droits et libertés fondamentaux ne peuvent être limités que pour des motifs prévus par des dispositions particulières de la Constitution et en vertu de la loi, et pour autant que ces limitations ne portent pas atteinte à l'essence même des droits et libertés. Les limitations dont les droits et libertés fondamentaux font l'objet ne peuvent être en contradiction ni avec la lettre et l'esprit de la Constitution, ni avec les exigences d'un ordre social démocratique et laïque, et elles doivent respecter le principe de proportionnalité.»

Article 14

«Les droits et libertés mentionnés dans la Constitution ne peuvent être exercés

dans le but de porter atteinte à l'intégrité territoriale de l'Etat et l'unité de la nation, de supprimer la République démocratique et laïque fondée sur les droits de l'homme.

Aucune disposition de la Constitution ne peut être interprétée en ce sens qu'elle accorderait à l'Etat ou à des individus le droit de mener des activités destinées à anéantir les droits et libertés fondamentaux inscrits dans la Constitution ou à limiter ces droits et libertés dans une mesure dépassant celle qui est stipulée par la Constitution.

La loi fixe les sanctions applicables à ceux qui mènent des activités contraires à ces dispositions.»

Article 24

«Chacun a droit à la liberté de conscience, de croyance et de conviction religieuse.

Les prières, les rites et les cérémonies religieux sont libres à condition de ne pas violer les dispositions de l'article 14.

Nul ne peut être contraint de participer à des prières ou à des cérémonies et rites religieux ni de divulguer ses croyances et ses convictions religieuses; nul ne peut être blâmé ni inculpé à cause de ses croyances ou convictions religieuses.

L'éducation et l'enseignement religieux et éthique sont dispensés sous la surveillance et le contrôle de l'Etat. L'enseignement de la culture religieuse et de la morale figure parmi les cours obligatoires dispensés dans les établissements scolaires du primaire et du secondaire. En dehors de ces cas, l'éducation et l'enseignement religieux sont subordonnés à la volonté propre de chacun et, en ce qui concerne les mineurs, à celle de leurs représentants légaux.

Nul ne peut, de quelque manière que ce soit, exploiter la religion, les sentiments religieux ou les choses considérées comme sacrées par la religion, ni en abuser dans le but de faire reposer, même partiellement, l'ordre social, économique, politique ou juridique de l'Etat sur des préceptes religieux ou de s'assurer un intérêt ou une influence sur le plan politique ou personnel.»

Article 42

«Nul ne peut être privé de son droit à l'éducation et à l'instruction.

Le contenu du droit à l'instruction est défini et réglementé par la loi.

L'éducation et l'enseignement sont assurés sous la surveillance et le contrôle de l'Etat, conformément aux principes et réformes d'Atatürk et selon les règles de la science et de la pédagogie contemporaines. Il ne peut être créé d'établissement d'éducation ou d'enseignement en opposition avec ces principes.

La liberté d'éducation et d'enseignement ne dispense pas du devoir de loyauté envers la Constitution.

L'enseignement primaire est obligatoire pour tous les citoyens des deux sexes et il est gratuit dans les écoles de l'Etat.

Les règles auxquelles doivent se conformer les écoles privées des degrés primaire et secondaire sont déterminées par la loi d'une manière propre à garantir le niveau fixé pour les écoles de l'Etat.

L'Etat accorde aux bons élèves qui sont dépourvus de moyens financiers l'aide nécessaire pour leur permettre de poursuivre leurs études, sous forme de bourses ou par d'autres voies. L'Etat prend les mesures appropriées en vue de rendre les personnes dont l'état nécessite une éducation spéciale utiles à la société.

On ne peut poursuivre dans les établissements d'éducation et d'enseignement que des activités se rapportant à l'éducation, à l'enseignement, à la recherche et à l'étude. Aucune entrave ne peut être apportée à ces activités de quelque manière que ce soit (...))»

Article 153

«Les arrêts de la Cour constitutionnelle sont définitifs. Les arrêts d'annulation ne peuvent être rendus publics avant d'avoir été motivés par écrit.

Lorsque la Cour constitutionnelle annule l'ensemble ou un article d'une loi ou d'un décret-loi, elle ne peut pas se substituer au législateur en établissant une disposition susceptible d'entraîner une application nouvelle.

(...)

Les arrêts de la Cour constitutionnelle sont immédiatement publiés au *Journal officiel* et lient les organes du législatif, de l'exécutif et du judiciaire ainsi que les autorités administratives et les personnes physiques et morales.»

B. Historique et contexte

1. Le principe de laïcité et le port de tenues religieuses

30. La République turque s'est construite autour de la laïcité. Avant et après la proclamation de la République le 29 octobre 1923, la séparation des sphères publique et religieuse fut obtenue par plusieurs réformes révolutionnaires: le 3 mars 1923, le califat fut aboli; le 10 avril 1928, la disposition constitutionnelle selon laquelle l'islam était la religion d'Etat fut supprimée; enfin, par une révision constitutionnelle intervenue le 5 février 1937, le principe de laïcité acquit valeur constitutionnelle (article 2 de la Constitution de 1924 et article 2 des Constitutions de 1961 et 1982, repris au paragraphe 29 ci-dessus).

31. Le principe de laïcité s'inspirait de l'évolution de la société ottomane au cours de la période qui se situe entre le XIX^e siècle et la proclamation de la République. L'idée de créer un espace public moderne où l'égalité était assurée à tous les citoyens sans distinction de religion, de confession et de sexe avait déjà trouvé un écho dans les débats ottomans du XIX^e siècle. Les droits des femmes ont connu un grand progrès durant cette période (l'égalité de traitement dans l'enseignement, l'interdiction de la polygamie en 1914, le transfert de la compétence juridique en matière d'affaires familiales aux tribunaux séculiers instaurés au XIX^e siècle).

32. L'idéal républicain était défini à travers la visibilité publique de la femme et sa participation active à la société. Par conséquent, à l'origine, l'émancipation de la femme du religieux et la modernisation de la société ont été pensées ensemble. Ainsi, le 17 février 1926, fut adopté le code civil, qui prévoit l'égalité des sexes dans la jouissance des droits civiques, notamment dans le domaine du divorce et de la succession. Ensuite, par la révision constitutionnelle du 5 décembre 1934 (article 10 de la Constitution de 1924), les droits politiques des femmes furent reconnus au même titre que ceux des hommes.

33. En ce qui concerne la tenue vestimentaire, la première disposition adoptée fut la loi n° 671 du 28 novembre 1925 relative au port du chapeau, qui envisageait la tenue comme une question relative à la modernité. De même, le port d'un habit religieux, quelle que soit la religion ou la croyance concernée, fut interdit en dehors des lieux de culte et des cérémonies religieuses par la loi n° 2596 du 3 décembre 1934 sur la réglementation du port de certains vêtements.

34. Par ailleurs, en vertu de la loi n° 430 adoptée le 3 mars 1924 portant sur la fusion des services d'éducation, les écoles religieuses furent fermées et toutes les écoles furent rattachées au ministère de l'Education. Cette loi fait partie des lois ayant valeur constitutionnelle, protégées par l'article 174 de la Constitution turque.

35. En Turquie, le port du foulard islamique à l'école et à l'université est un phénomène récent, qui s'est manifesté notamment à partir des années 1980. Le sujet est largement débattu et continue à être l'objet de vifs débats dans la société turque.

Pour les partisans du foulard islamique, il s'agit d'une obligation et/ou manifestation liées à l'identité religieuse. En revanche, les tenants de la laïcité, qui font une différence entre le *başörtüsü* (foulard traditionnel anatolien, porté lâche) et le *türban* (foulard noué serré qui cache les cheveux et la gorge), considèrent le foulard islamique comme un symbole de l'islam politique. Notamment, l'arrivée au pouvoir le 28 juin 1996 d'un gouvernement de coalition constitué par le *Refah Partisi*, de tendance islamiste, et le *Do ru Y ol Partisi*, de tendance de centre droit, a donné un aspect particulièrement politique à ce débat. L'ambiguïté de l'attachement aux valeurs démocratiques qui ressort des prises de position des dirigeants du *Refah Partisi*, y compris de celle du premier ministre de l'époque issu de ce parti, et des discours de ces dirigeants prônant un système multi-juridique fonctionnant selon des règles religieuses différentes pour chaque communauté religieuse, fut perçue dans la société comme une menace réelle pour les valeurs républicaines et la paix civile (voir *Refah Partisi (Parti de la prospérité) et autres c. Turquie* [GC], n^{os} 41340/98, 42342/98, 41343/98 et 41344/98, CEDH 2003-II).

2. La réglementation de la tenue vestimentaire dans les établissements de l'enseignement supérieur et la jurisprudence constitutionnelle

36. Le premier texte en la matière fut le règlement du 22 juillet 1981 adopté par le Conseil des ministres, lequel imposait une tenue vestimentaire simple, sans excès et contemporaine au personnel travaillant dans les organismes et institutions publiques ainsi qu'aux agents et étudiantes des établissements rattachés aux ministères. De même, selon ce règlement, les femmes, lors de l'exercice de leur fonction, et les étudiantes devaient être non voilées dans les établissements d'enseignement.

37. Le 20 décembre 1982, une circulaire relative au port du foulard dans les établissements de l'enseignement supérieur fut adoptée par le Conseil de l'enseignement supérieur. Ce texte interdisait le port du foulard islamique dans les salles de cours. Le Conseil d'Etat, dans son arrêt du 13 décembre 1984, confirma la légalité de cette réglementation et considéra que:

«Au-delà d'une simple habitude innocente, le foulard est en train de devenir le symbole d'une vision contraire aux libertés de la femme et aux principes fondamentaux de la République.»

38. Le 10 décembre 1988 entra en vigueur l'article 16 provisoire de la loi n° 2547 portant sur l'enseignement supérieur («loi n° 2547»). La disposition en question était ainsi libellée:

«Une tenue ou une apparence contemporaine est obligatoire dans les locaux et couloirs des établissements de l'enseignement supérieur, écoles préparatoires, laboratoires, cliniques et polycliniques. Le port d'un voile ou d'un foulard couvrant le cou et les cheveux pour des raisons de conviction religieuse est libre.»

39. Par un arrêt du 7 mars 1989 publié au *Journal officiel* le 5 juillet 1989, la Cour constitutionnelle déclara la disposition précitée contraire aux articles 2 (laïcité), 10 (égalité devant la loi) et 24 (liberté de religion) de la Constitution. De même, elle considéra que cette disposition ne saurait non plus se concilier avec le principe d'égalité des sexes qui se dégageait, entre autres, des valeurs républicaines et révolutionnaires (préambule et article 174 de la Constitution).

Dans leur arrêt, les juges constitutionnels expliquèrent tout d'abord que la laïcité avait acquis valeur constitutionnelle en raison de l'expérience historique du pays et des particularités de la religion musulmane par rapport aux autres religions, et qu'elle constituait l'une des conditions indispensables de la démocratie et le garant de la liberté de religion et du principe d'égalité devant la loi. La laïcité interdisait aussi à

l'Etat de témoigner une préférence pour une religion ou croyance et, en conséquence, un Etat laïque ne pouvait pas invoquer la conviction religieuse dans sa fonction législative. Ils considérèrent notamment:

«La laïcité est l'organisatrice civique de la vie politique, sociale et culturelle, qui se fonde sur la souveraineté nationale, la démocratie, la liberté et la science. La laïcité est le principe qui offre à l'individu la possibilité d'affirmer sa personnalité propre grâce à la liberté de pensée et qui, en réalisant la distinction entre la politique et les croyances religieuses, rend effectives les libertés de conscience et de religion. Dans les sociétés fondées sur la religion, qui fonctionnent avec la pensée et les règlements religieux, l'organisation politique a un caractère religieux. Dans le régime laïque, la religion est préservée d'une politisation. Elle n'est plus un outil de l'administration et se maintient à sa place respectable, qui est à évaluer par la conscience de tout un chacun (...).»

Soulignant le caractère inviolable de la liberté de religion, de conscience et de culte, les juges constitutionnels observèrent que cette liberté, qui ne pouvait pas être assimilée au port d'un habit religieux spécifique, garantissait avant tout la liberté d'adhérer ou non à une religion. Ils relevèrent que, en dehors du cadre intime réservé à l'individu, la liberté de manifester la religion pouvait être restreinte pour des raisons d'ordre public dans le but de préserver le principe de laïcité.

Selon les juges constitutionnels, chacun peut s'habiller comme il le veut. Il convient aussi de respecter les valeurs et traditions sociales et religieuses de la société. Toutefois, lorsqu'une forme de tenue est imposée aux individus par référence à une religion, celle-ci est perçue et présentée comme un ensemble de valeurs incompatible avec les valeurs contemporaines. Au surplus, en Turquie, où la majorité de la population est de confession musulmane, le fait de présenter le port du foulard islamique comme une obligation religieuse contraignante entraînerait une discrimination entre les pratiquants, les croyants non pratiquants et les non croyants en fonction de leur tenue, et signifierait indubitablement que les personnes qui ne portent pas le foulard sont contre la religion ou sans religion.

Les juges constitutionnels soulignèrent aussi que les étudiants doivent pouvoir travailler et se former ensemble dans un climat de sérénité, de tolérance et d'entraide sans que le port de signes d'appartenance à une religion les en empêche. Ils estimèrent que, indépendamment de la question de savoir si le foulard islamique était un précepte de la religion musulmane, la reconnaissance juridique d'un tel symbole religieux dans ces établissements n'était pas non plus compatible avec la neutralité de l'enseignement public, dans la mesure où une telle reconnaissance était de nature à générer des conflits entre les étudiants en fonction de leurs idées ou croyances religieuses.

40. Le 25 octobre 1990 entra en vigueur l'article 17 provisoire de la loi n° 2547, ainsi libellé:

«A condition de ne pas être contraire aux lois en vigueur, la tenue est libre dans les établissements de l'enseignement supérieur.»

41. Dans son arrêt du 9 avril 1991, publié au *Journal officiel* le 31 juillet 1991, la Cour constitutionnelle déclara la disposition précitée conforme à la Constitution, considérant qu'à la lumière des principes qui se dégagent de son arrêt du 7 mars 1989, celle-ci n'autorisait pas le port du foulard pour des motifs religieux dans les établissements de l'enseignement supérieur. Elle déclara notamment:

«(...) l'expression «lois en vigueur» vise avant toute chose la Constitution (...) Dans les établissements de l'enseignement supérieur, se couvrir le cou et les cheveux avec un voile ou un foulard pour des raisons de conviction religieuse est contraire

aux principes de laïcité et d'égalité. Dans cette situation, la liberté vestimentaire dans les établissements de l'enseignement supérieur reconnue dans la disposition litigieuse «ne concerne pas les vêtements de caractère religieux ni le fait de se couvrir le cou et les cheveux avec un voile et un foulard» (...) La liberté reconnue par cet article [article 17 provisoire] est subordonnée à la condition de ne pas être contraire «aux lois en vigueur». Or l'arrêt de la Cour constitutionnelle [du 7 mars 1989] établit que le fait de se couvrir le cou et les cheveux avec un foulard est avant tout contraire à la Constitution. Par conséquent, la condition énoncée à l'article précité de ne pas être contraire aux lois en vigueur place en dehors du champ d'application de la liberté vestimentaire le fait de «se couvrir le cou et les cheveux avec un foulard» (...)

3. Application à l'Université d'Istanbul

42. Créée au XV^e siècle, l'Université d'Istanbul forme un des principaux pôles d'enseignement supérieur public en Turquie. Elle est composée de dix-sept facultés dont deux de médecine, à savoir la faculté de médecine de Cerrahpaşa et celle de Çapa, et de douze écoles supérieures. Elle accueille environ 50 000 étudiants.

43. En 1994, à la suite d'une campagne de pétitions lancée par les étudiantes inscrites au programme de formation des sages-femmes de l'Ecole supérieure des métiers de la santé de l'université, le recteur diffusa une note d'information par laquelle il exposait le contexte dans lequel se situe la question du foulard islamique et le fondement juridique de la réglementation en la matière. Il déclara notamment:

«L'interdiction du port du foulard par les étudiantes inscrites au programme de formation des sages-femmes pendant les cours pratiques n'a pas pour objet de porter atteinte à leur liberté de conscience et de religion, mais d'agir conformément aux lois et règlements en vigueur. Lorsqu'elle exerce sa profession, une sage-femme ou une infirmière est en uniforme. Cet uniforme est décrit et identifié par les règlements adoptés par le ministère de la Santé (...) Les étudiantes qui souhaitent intégrer cette profession le savent. Imaginez une étudiante sage-femme avec un manteau à manches longues qui veut retirer un bébé d'une couveuse ou l'y installer ou qui assiste un médecin dans une salle d'opération ou dans une salle d'accouchement.»

44. Considérant que la manifestation visant à obtenir l'autorisation de porter le foulard islamique dans tous les espaces de l'université tendait à prendre une tournure susceptible de porter atteinte à l'ordre et à la paix de l'université, de la faculté et de l'hôpital Cerrahpaşa ainsi que de l'Ecole supérieure des métiers de la santé, et invoquant notamment les droits des malades, le recteur pria les étudiants de respecter les règles relatives à la tenue vestimentaire.

45. La décision concernant la tenue vestimentaire des étudiants et agents publics adoptée le 1^{er} juin 1994 par la direction de l'université est rédigée comme suit:

«Dans les universités, la tenue vestimentaire est définie par les lois et règlements. La Cour constitutionnelle a rendu un arrêt empêchant le port d'une tenue religieuse dans les universités.

Cet arrêt vaut pour tous les étudiants de notre université ainsi que pour le personnel académique, administratif et autre, à tous les niveaux. En particulier, les infirmières, sages-femmes, médecins et vétérinaires sont tenus de respecter, au cours des travaux pratiques de santé et de science appliquée (travaux d'infirmier, de laboratoire, de salle d'opération, de microbiologie), la réglementation portant sur la tenue vestimentaire telle que définie par les exigences scientifiques et la législation. Ceux qui ne se conforment pas à cette tenue vestimentaire ne seront pas acceptés aux travaux pratiques.»

46. Le 23 février 1998 fut diffusée une circulaire régissant l'entrée des étudiants

barbus et des étudiantes portant le foulard islamique, signée par le recteur de l'Université d'Istanbul (voir le texte de cette circulaire au paragraphe 16 ci-dessus).

47. La décision n° 11 du 9 juillet 1998 adoptée par l'Université d'Istanbul est rédigée en ces termes:

«1. Les étudiants de l'Université d'Istanbul sont tenus de respecter les principes juridiques et les règles relatives à la tenue vestimentaire définies dans les décisions de la Cour constitutionnelle et des hauts organes judiciaires.

2. Les étudiants de l'Université d'Istanbul ne peuvent porter aucune tenue vestimentaire symbolisant ou manifestant une quelconque religion, confession, race, inclination politique ou idéologique dans aucun établissement et département de l'université d'Istanbul et dans aucun espace appartenant à cette université.

3. Les étudiants de l'Université d'Istanbul sont tenus de se conformer, dans les établissements et départements auxquels ils sont inscrits, aux règles qui prescrivent des tenues vestimentaires particulières pour des raisons liées à la profession.

4. Les photographies remises par les étudiants de l'Université d'Istanbul à leur établissement ou département [doivent être prises] de «face», «la tête et le cou découverts», doivent dater de moins de six mois et permettre d'identifier facilement l'étudiant.

5. Ceux qui ont une attitude contraire aux points énoncés ci-dessus ou qui encouragent par leurs paroles, leurs écrits ou leurs activités une telle attitude feront l'objet d'une procédure en vertu des dispositions du règlement sur la procédure disciplinaire des étudiants.»

4. Le règlement sur la procédure disciplinaire des étudiants

48. Le règlement sur la procédure disciplinaire des étudiants, publié au *Journal officiel* le 13 janvier 1985, prévoit cinq sanctions disciplinaires, à savoir l'avertissement, le blâme, l'exclusion temporaire d'une semaine à un mois, l'exclusion temporaire d'un à deux semestres et l'exclusion définitive.

49. Le simple fait de porter le foulard islamique dans l'enceinte des universités n'est pas constitutif d'une infraction disciplinaire.

50. En vertu de l'article 6 a) du règlement «le fait d'avoir un comportement et une attitude qui ne siéent pas à la dignité que nécessite la qualité d'élève» constitue un acte ou comportement appelant un avertissement. Un blâme sera infligé entre autres lorsqu'un étudiant a une attitude de nature à ébranler le sentiment d'estime et de confiance que nécessite la qualité d'étudiant ou lorsqu'il dérange l'ordre des cours, séminaires, travaux pratiques, en laboratoire ou en atelier (article 7 a) et e)). Un étudiant qui restreint directement ou indirectement la liberté d'apprendre et d'enseigner et qui a une attitude de nature à rompre le calme, la tranquillité et l'atmosphère de travail des établissements de l'enseignement supérieur ou qui se livre à des activités politiques dans un tel établissement est sanctionné par une exclusion temporaire allant d'une semaine à un mois (article 8 a) et c)). En vertu de l'article 9 j), le fait d'organiser ou de participer à des réunions non autorisées dans l'enceinte universitaire est puni d'une exclusion d'un à deux semestres.

51. La procédure d'enquête disciplinaire est régie par les articles 13 à 34 du règlement en question. Selon les articles 16 et 33, les droits de la défense des étudiants doivent être respectés et le conseil disciplinaire doit prendre en considération la raison qui a conduit l'étudiant à se livrer à une activité contraire au règlement. Par ailleurs, toutes les sanctions disciplinaires peuvent être soumises au contrôle des tribunaux administratifs.

5. Le pouvoir réglementaire des organes de direction des universités

52. Les universités étant des personnes morales de droit public en vertu de l'article 130 de la Constitution, elles sont dotées d'une autonomie, sous le contrôle de l'Etat, qui se traduit par la présence à leur tête d'organes de direction, tel le recteur, disposant des pouvoirs dévolus par les lois.

L'article 13 de la loi n° 2547, dans ses parties pertinentes, est ainsi libellé:

«(...) b. Pouvoirs, compétences et responsabilités du recteur:

1. Présider les conseils de l'université, exécuter les décisions de ces derniers, examiner les propositions des conseils universitaires et prendre les décisions nécessaires, et assurer le fonctionnement coordonné des établissements rattachés à l'université; (...)

5. Assurer la surveillance et le contrôle des unités de l'université et de son personnel de tous niveaux.

C'est le recteur qui est principalement compétent et responsable pour prendre, le cas échéant, des mesures de sécurité; pour assurer la surveillance et le contrôle administratifs et scientifiques dans le fonctionnement de l'enseignement (...)»

53. Le pouvoir de contrôle et de surveillance accordé au recteur par l'article 13 de la loi n° 2547 est soumis au principe de légalité et au contrôle du juge administratif.

C. La force contraignante de la motivation des arrêts de la Cour constitutionnelle

54. Dans son arrêt du 27 mai 1999 (E. 1998/58, K. 1999/19), publié au *Journal officiel* le 4 mars 2000, la Cour constitutionnelle déclara notamment:

«Le législatif et l'exécutif sont liés tant par le dispositif des arrêts que par leur motivation dans son ensemble. Les arrêts, avec leur motivation, contiennent les critères d'appréciation des activités législatives et en définissent les lignes directrices.»

D. Droit comparé

55. Depuis plus d'une vingtaine d'années, la place du voile islamique dans l'enseignement public suscite en Europe la controverse. Dans la majorité des pays européens, le débat concerne principalement les établissements d'enseignement du primaire et du secondaire. En revanche, en Turquie, en Azerbaïdjan et en Albanie, ce débat tourne non seulement autour de la liberté personnelle mais également de la signification politique du voile islamique. En effet, dans ces trois seuls pays, le port de celui-ci est réglementé dans l'espace universitaire.

56. En France, où la laïcité est considérée comme un des fondements des valeurs républicaines, a été adoptée la loi du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. Cette loi insère dans le code de l'éducation un article L. 141-5-1 ainsi rédigé: «Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en œuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève.»

La loi s'applique à l'ensemble des écoles et établissements scolaires publics, y compris aux formations post-baccalauréat (classes préparatoires aux grandes écoles, sections de technicien supérieur). Elle n'est pas applicable aux universités publiques. En outre, elle ne concerne, comme l'indique la circulaire du 18 mai 2004, que «les signes (...) dont le port conduit à se faire immédiatement reconnaître par son appartenance religieuse, tels que le voile islamique, quel que soit le nom qu'on lui donne, la kippa ou une croix de dimension manifestement excessive.»

57. En Belgique, il n'existe pas de norme générale d'interdiction du port de signes religieux dans les écoles. Dans la communauté française, le décret du 13 mars 1994 définit la neutralité de l'enseignement. Les élèves sont en principe autorisés à arborer un signe religieux. D'une part, cette liberté s'exerce à la seule condition que soient sauvegardés les droits de l'homme, la réputation d'autrui, la sécurité nationale, l'ordre public, la santé et la moralité publique, et que soit respecté le règlement d'ordre intérieur. D'autre part, l'enseignant doit veiller à ce que, sous son autorité, ne se développe ni le prosélytisme religieux ou philosophique ni le militantisme politique organisés par ou pour les élèves. Ce décret mentionne comme motif de restriction admissible le règlement d'ordre intérieur de l'établissement. En outre, le 19 mai 2004, la communauté française a adopté un décret relatif à la mise en œuvre de l'égalité de traitement. En ce qui concerne la communauté flamande, la situation des établissements n'est pas uniforme quant à la question de l'acceptation du port de signes religieux. Certains établissements l'interdisent, d'autres l'autorisent. Dans ce dernier cas, des restrictions sont admises sur la base de critères d'hygiène et de sécurité.

58. Dans d'autres pays, parfois après un long débat juridique, l'enseignement public accepte en principe les jeunes filles musulmanes qui portent le foulard islamique (Allemagne, Autriche, Espagne, Pays-Bas, Royaume-Uni, Suède et Suisse).

59. En Allemagne, où le débat s'était concentré sur le port du foulard islamique par les enseignantes, la Cour constitutionnelle a indiqué le 24 septembre 2003 dans une affaire opposant l'une d'elles au Land de Bade-Wurtemberg que l'absence d'interdiction législative explicite permettait le port du foulard par les enseignantes. Par conséquent, elle a imposé aux *Länder* l'obligation de réglementer la tenue vestimentaire des enseignants quand ils veulent leur interdire le port du foulard islamique dans les écoles publiques.

60. En Autriche, il n'y a pas de législation spécifique sur le port du foulard, du turban et de la kippa. Il est en général considéré que l'interdiction du port du voile est uniquement justifiée lorsque la santé ou la sécurité des élèves est en cause.

61. Au Royaume-Uni, une attitude tolérante prévaut à l'égard du port de signes religieux par les élèves. Des difficultés en relation avec le port du voile islamique ne surviennent que rarement. La question a également été débattue dans le cadre du principe d'élimination de la discrimination raciale à l'école en vue de protéger le caractère multiculturel des établissements d'enseignement (voir notamment l'affaire *Mandla v. Dowell*, *The Law Reports* 1983, 548-570). La Commission pour l'égalité raciale, dont les avis ne constituent que des recommandations, s'est également prononcée sur la question du foulard islamique en 1988 à l'occasion de l'affaire de la *grammar school* de D'Altrincham qui a abouti à un compromis entre l'école et la famille de deux sœurs souhaitant porter le foulard islamique dans une école privée. L'école a accepté le port du voile islamique, à condition que celui-ci soit dépourvu de toute décoration et soit de couleur bleu marine, comme l'uniforme de l'école, et maintenu serré au niveau du cou.

Dans l'affaire *R. (On the application of Begum) v. Headteacher and Governors of Denbigh High School* [2004], la *High Court of Justice* de Londres a été appelée à trancher une affaire opposant une élève musulmane souhaitant porter le *jilbab* (ample tige couvrant tout le corps) à l'école. Cette dernière imposait aux élèves un uniforme, dont une des options correspondait au port du voile et une longue tenue traditionnelle du sous-continent indien (*shalwar kameez*). En juin 2004, le tribunal a débouté l'élève et n'a discerné aucune violation de la liberté de religion. Toutefois, ce jugement a été infirmé en appel en mars 2005 par la *Court of Appeal*, qui a accepté l'existence d'une ingérence dans la liberté de religion de l'élève, étant donné qu'une

minorité des musulmans au Royaume-Uni estimait qu'il y avait une obligation religieuse de porter le *jilbab* à partir de l'âge de la puberté et que l'élève s'y ralliait sincèrement. Cette ingérence n'avait pas été justifiée par les autorités scolaires parce que la procédure de décision n'était pas compatible avec la liberté de religion.

62. En Espagne, la législation n'interdit pas d'une façon expresse le port de couvre-chefs religieux par les élèves dans l'enseignement public. Deux décrets royaux du 26 janvier 1996, applicables par défaut dans l'enseignement primaire et secondaire en l'absence de mesures prises par les communautés autonomes, compétentes en la matière, accordent aux conseils d'établissement la compétence pour adopter le règlement intérieur, qui peut notamment comporter des dispositions sur la tenue vestimentaire. Dans l'ensemble, le port du foulard est accepté par les établissements scolaires publics.

63. En Finlande et en Suède, le foulard islamique a été admis à l'école. Toutefois, une distinction est faite entre la *bourca* (désigne le voile intégral couvrant l'ensemble du corps et du visage) et le *niqab* (voile recouvrant tout le haut du corps à l'exception des yeux). Notamment en Suède, des directives contraignantes ont été adoptées en 2003 par l'agence nationale de l'éducation. Elles autorisent une école à interdire la *bourca* et le *niqab*, mais à condition que pareille mesure soit prise dans un esprit de dialogue sur les valeurs communes d'égalité des sexes et de respect du principe démocratique sur lequel se base le système éducatif.

64. Aux Pays-Bas, où la question du foulard islamique est appréhendée non pas sous l'angle de la liberté de religion mais sous celui de la discrimination, le foulard islamique est généralement toléré. En 2003, une directive non contraignante a été élaborée. Les écoles peuvent imposer des uniformes aux élèves à condition que les exigences ainsi prévues ne soient pas discriminatoires, qu'elles figurent dans le guide de l'école et que leur méconnaissance ne soit pas sanctionnée de manière disproportionnée. Par ailleurs, il est considéré que l'interdiction de la *bourca* est justifiée pour permettre d'identifier les élèves ou d'assurer la communication avec elles. En outre, la commission pour l'égalité de traitement a estimé, en 1997, qu'interdire le port du voile durant des cours de gymnastique pour des motifs de sécurité n'était pas discriminatoire.

65. Il apparaît que, dans plusieurs autres pays, le foulard islamique n'a encore jamais été l'objet d'une discussion juridique approfondie, et il est admis dans l'école (Russie, Roumanie, Hongrie, Grèce, République tchèque, Slovaquie, Pologne).

E. Les textes pertinents du Conseil de l'Europe relatifs à l'enseignement supérieur

66. Concernant les divers textes adoptés par le Conseil de l'Europe dans le domaine de l'enseignement supérieur, il y a lieu tout d'abord de citer, parmi les travaux de l'Assemblée parlementaire, la Recommandation 1353 (1998) portant sur l'accès des minorités à l'enseignement supérieur, adoptée le 27 janvier 1998, ainsi que, parmi les travaux du Comité des ministres, la Recommandation n° R (98) 3 sur l'accès à l'enseignement supérieur, adoptée le 17 mars 1998.

En la matière, il convient également de mentionner une convention conjointe du Conseil de l'Europe et de l'UNESCO, à savoir la Convention sur la reconnaissance des qualifications relatives à l'enseignement supérieur dans la région européenne, qui a été signée à Lisbonne le 11 avril 1997 et est entrée en vigueur le 1^{er} février 1999.

67. Dans son préambule, la Convention sur la reconnaissance des qualifications relatives à l'enseignement supérieur dans la région européenne énonce:

«Conscientes du fait que le droit à l'éducation est un droit de l'homme et que l'enseignement supérieur, qui joue un rôle éminent dans l'acquisition et dans le pro-

grès de la connaissance, constitue une exceptionnelle richesse culturelle et scientifique, tant pour les individus que pour la société (...)»

68. Le Comité des Ministres du Conseil de l'Europe a adopté le 17 mars 1998 la Recommandation n° R (98) 3 sur l'accès à l'enseignement supérieur. En vertu du préambule de ce texte:

«l'enseignement supérieur a un rôle essentiel à jouer dans la promotion des droits de l'homme et des libertés fondamentales, et dans le renforcement de la démocratie pluraliste et de la tolérance [et] (...) l'élargissement des possibilités de participation à l'enseignement supérieur aux membres de tous les groupes de la société peut contribuer à garantir la démocratie et à instaurer la confiance dans des situations de tension sociale (...)»

69. De même, l'article 2 de la Recommandation 1353 (1998) portant sur l'accès des minorités à l'enseignement supérieur, adoptée le 27 janvier 1998 par l'Assemblée parlementaire du Conseil de l'Europe, est ainsi libellé:

«L'éducation est un droit fondamental de la personne et, par conséquent, l'accès à tous les niveaux d'enseignement, y compris supérieur, devrait être ouvert dans les mêmes conditions à tous les résidents permanents des Etats signataires de la Convention culturelle européenne.»

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 9 DE LA CONVENTION

70. La requérante soutient que l'interdiction de porter le foulard islamique dans les établissements de l'enseignement supérieur constitue une atteinte injustifiée à son droit à la liberté de religion, en particulier à son droit de manifester sa religion.

Elle invoque l'article 9 de la Convention, ainsi libellé:

«1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.

2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui.»

A. Arrêt de la Chambre

71. La chambre a constaté que la réglementation de l'Université d'Istanbul, qui soumet le port du foulard islamique à des restrictions, et les mesures d'application y afférentes ont constitué une ingérence dans l'exercice par la requérante du droit de manifester sa religion. Elle a conclu que cette ingérence était prévue par la loi, poursuivait l'un des buts légitimes énoncés dans le deuxième paragraphe de l'article 9 et était justifiée dans son principe et proportionnée aux buts poursuivis, et pouvait donc être considérée comme «nécessaire dans une société démocratique» (paragraphe 66-116 de l'arrêt de la chambre).

B. Thèses des parties devant la Grande Chambre

72. Dans sa demande de renvoi à la Grande Chambre du 27 septembre 2004 et

dans sa plaidoirie à l'audience, la requérante a contesté les considérations qui ont conduit la chambre à conclure à l'absence de violation de l'article 9 de la Convention.

73. En revanche, dans ses observations présentées à la Grande Chambre le 27 janvier 2005, la requérante a combattu l'idée d'obtenir la reconnaissance juridique du port du foulard islamique en tout lieu pour toutes les femmes, et a notamment dit ceci: «L'arrêt de section implique l'idée que le port du foulard n'est pas toujours protégé par la liberté de religion. [Je] ne conteste pas cette approche.»

74. Le Gouvernement demande à la Grande Chambre d'entériner le constat de la chambre selon lequel il n'y a pas eu violation de l'article 9.

C. Appréciation de la Cour

75. La Cour doit rechercher s'il y a eu ingérence dans le droit de la requérante garanti par l'article 9 et, dans l'affirmative, si cette ingérence était «prévues par la loi», poursuivait un but légitime et était «nécessaire dans une société démocratique» au sens de l'article 9§ 2 de la Convention.

1. Sur l'existence d'une ingérence

76. La requérante déclare que son habillement doit être traité comme l'observance d'une règle religieuse, qu'elle considère comme une «pratique reconnue». Elle soutient que la restriction litigieuse, à savoir la réglementation du port du foulard islamique dans l'enceinte universitaire, constitue une ingérence manifeste dans son droit à la liberté de manifester sa religion.

77. Le Gouvernement ne s'est pas prononcé sur cette question devant la Grande Chambre.

78. En ce qui concerne l'existence d'une ingérence, la Grande Chambre souscrit aux constats suivants de la chambre (paragraphe 71 de son arrêt):

«Selon la requérante, en revêtant un foulard, elle obéit à un précepte religieux et, par ce biais, manifeste sa volonté de se conformer strictement aux obligations de la religion musulmane. Dès lors, l'on peut considérer qu'il s'agit d'un acte motivé ou inspiré par une religion ou une conviction et, sans se prononcer sur la question de savoir si cet acte, dans tous les cas, constitue l'accomplissement d'un devoir religieux, la Cour partira du principe que la réglementation litigieuse, qui soumet le port du foulard islamique à des restrictions de lieu et de forme dans les universités, a constitué une ingérence dans l'exercice par la requérante du droit de manifester sa religion.»

2. Prévue par la loi

a) Thèses des parties devant la Grande Chambre

79. La requérante fait valoir l'absence de règle de «droit écrit» interdisant à une femme vêtue d'un foulard islamique de poursuivre ses études à l'université, au moment de son inscription à l'université en 1993 et dans la période qui s'en est suivie. Elle explique notamment qu'en vertu du règlement sur la procédure disciplinaire des étudiants, le simple fait de porter le foulard islamique n'est pas constitutif d'une infraction (paragraphe 49 et 50 ci-dessus). En effet, le premier acte réglementaire restrictif applicable à son égard sera, quatre ans et demi plus tard, la circulaire du rectorat du 23 février 1998.

80. Selon la requérante, l'on ne peut pas prétendre que la source légale de la réglementation litigieuse était la jurisprudence des tribunaux turcs, étant donné que ces derniers, seuls habilités à appliquer la loi, n'ont pas compétence pour élaborer de

nouvelles règles de droit. Dans ses arrêts des 7 mars 1989 et 9 avril 1991 (paragraphes 39 et 41 ci-dessus), la Cour constitutionnelle n'a certes pas excédé ses pouvoirs en posant une interdiction à l'égard des particuliers. Toutefois, le législateur n'a pas déduit du premier arrêt de la Cour constitutionnelle une injonction d'interdire le port du foulard islamique. Or, aucune disposition des lois en vigueur n'interdit aux étudiantes de porter un foulard dans l'enceinte des établissements de l'enseignement supérieur, et la motivation développée par la Cour constitutionnelle pour appuyer sa conclusion n'a pas de valeur juridique.

81. Selon la requérante, il ne fait aucun doute que les autorités universitaires, y compris les rectorats et décanats, peuvent exercer les compétences qui leur sont attribuées par le droit. Par ailleurs, l'étendue, les limites, les procédures d'exercice ainsi que les mesures destinées à éviter un exercice abusif de ces compétences sont également définies par le droit. Or en l'espèce, ni les lois en vigueur ni le règlement sur la procédure disciplinaire des étudiants n'attribuent au rectorat la compétence et le pouvoir de refuser aux étudiantes «portant le foulard» l'accès aux locaux de l'établissement ou aux salles d'examen. Au demeurant, selon elle, le pouvoir législatif n'a jamais adopté une position générale interdisant le port de signes religieux dans les écoles et les universités et, à aucun moment, ne s'est constituée au Parlement une telle volonté, nonobstant le fait que le port du foulard islamique était l'objet d'une très vive controverse. Par ailleurs, dans aucun règlement d'ordre général les autorités administratives n'ont adopté de dispositions prévoyant l'application de sanctions disciplinaires aux étudiantes portant un foulard dans un établissement de l'enseignement supérieur, ce qui signifie l'absence d'une telle interdiction.

82. Aux yeux de la requérante, l'ingérence dans son droit n'avait pas de caractère prévisible et ne reposait pas sur une «loi» au sens de la Convention.

83. Le Gouvernement s'est borné à demander à la Grande Chambre d'entériner le constat de la chambre sur ce point.

b) Appréciation de la Cour

84. La Cour rappelle sa jurisprudence constante selon laquelle l'expression «prévue par la loi» veut d'abord que la mesure incriminée ait une base en droit interne, mais a trait aussi à la qualité de la loi en question: cette expression exige l'accessibilité de la loi aux personnes concernées et une formulation assez précise pour leur permettre – en s'entourant, au besoin, de conseils éclairés – de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences pouvant résulter d'un acte déterminé et de régler leur conduite (*Gorzelik et autres c. Pologne* [GC], n° 44158/98, § 64, CEDH 2004-...).

85. La Cour observe que les arguments de la requérante relatifs à l'imprévisibilité alléguée du droit turc ne concernent pas la circulaire du 23 février 1998 sur laquelle était fondée l'interdiction d'accès aux cours, stages et travaux pratiques aux étudiantes voilées. En effet, ce texte émanait du recteur de l'Université d'Istanbul, qui a agi en tant que personne principalement compétente et responsable, chargée d'assurer la surveillance et le contrôle administratifs et scientifiques dans le fonctionnement de l'université; il a adopté la circulaire en question dans le cadre légal défini par l'article 13 de la loi n° 2547 (paragraphe 52 ci-dessus) et conformément aux textes réglementaires adoptés antérieurement.

86. Selon la requérante, toutefois, ce texte n'est pas compatible avec l'article 17 provisoire de la loi n° 2547 dans la mesure où ledit article n'interdisait pas le port du foulard islamique, et il n'existe aucune règle législative susceptible de constituer la source légale d'une disposition réglementaire.

87. La Cour doit donc rechercher si l'article 17 provisoire de la loi n° 2547 peut constituer le fondement légal de la circulaire en question. Elle rappelle à cet égard qu'il incombe au premier chef aux autorités nationales, et singulièrement aux cours et tribunaux, d'interpréter et appliquer le droit interne (*Kruslin c. France*, arrêt du 24 avril 1990, série A n° 176-A, p. 21, § 29). Or, les tribunaux administratifs, pour écarter le moyen tiré de l'illégalité du texte litigieux, se sont appuyés sur la jurisprudence constante du Conseil d'Etat et de la Cour constitutionnelle (paragraphe 19 ci-dessus).

88. Par ailleurs, en ce qui concerne l'expression «prévue par la loi» figurant aux articles 8 à 11 de la Convention, la Cour rappelle avoir toujours entendu le terme «loi» dans son acception «matérielle» et non «formelle»; elle y a inclus à la fois du «droit écrit», comprenant aussi bien des textes de rang infralégislatif (*De Wilde, Ooms et Versyp c. Belgique*, arrêt du 18 juin 1971, série A n° 12, p. 45, § 93) que des actes réglementaires pris par un ordre professionnel, par délégation du législateur, dans le cadre de son pouvoir normatif autonome (*Bartold c. Allemagne*, arrêt du 25 mars 1985, série A n° 90, p. 21, § 46) et le «droit non écrit». La «loi» doit se comprendre comme englobant le texte écrit et le «droit élaboré» par les juges (voir, entre autres, *Sunday Times c. Royaume-Uni* (n° 1), arrêt du 26 avril 1979, série A n° 30, p. 30, § 47, *Kruslin*, précité, § 29 *in fine*, et *Casado Coca c. Espagne*, arrêt du 24 février 1994, série A n° 285-A, p. 18, § 43). En résumé, la «loi» est le texte en vigueur tel que les juridictions compétentes l'ont interprété.

89. Il convient dès lors d'examiner la question sur la base, non seulement du libellé de l'article 17 provisoire de la loi n° 2547, mais aussi de la jurisprudence pertinente des tribunaux internes.

A cet égard, à la lecture dudit article, comme la Cour constitutionnelle l'a souligné dans son arrêt du 9 avril 1991 (paragraphe 41 ci-dessus), la liberté vestimentaire dans les établissements de l'enseignement supérieur n'est pas absolue. Aux termes dudit article, la tenue des étudiants est libre «à condition de ne pas être contraire aux lois en vigueur».

90. Le différend porte alors sur la signification des mots «lois en vigueur» figurant dans la disposition précitée.

91. La Cour rappelle que la portée de la notion de prévisibilité dépend dans une large mesure du texte dont il s'agit, du domaine qu'il couvre ainsi que du nombre et de la qualité de ses destinataires. Il faut en plus avoir à l'esprit qu'aussi clair que le libellé d'une disposition légale puisse être, il existe immanquablement un élément d'interprétation judiciaire, car il faudra toujours élucider les points obscurs et s'adapter aux circonstances particulières. A lui seul, un certain doute à propos de cas limites ne suffit pas à rendre l'application d'une disposition légale imprévisible. En outre, une telle disposition ne se heurte pas à l'exigence de prévisibilité aux fins de la Convention du simple fait qu'elle se prête à plus d'une interprétation. La fonction de décision confiée aux juridictions sert précisément à dissiper les doutes qui pourraient subsister quant à l'interprétation des normes, en tenant compte des évolutions de la pratique quotidienne (*Gorzelik et autres*, précité, § 65).

92. La Cour note à cet égard que, dans son arrêt précité, la Cour constitutionnelle a considéré que les termes «lois en vigueur» englobent nécessairement la Constitution. Il ressort par ailleurs de cet arrêt que le fait d'autoriser les étudiantes à «se couvrir le cou et les cheveux avec un voile ou un foulard pour des raisons de conviction religieuse» dans les universités était contraire à la Constitution (paragraphe 41 ci-dessus).

93. Cette jurisprudence de la Cour constitutionnelle, ayant force contraignante

(paragraphe 29 et 54 ci-dessus) et étant accessible dès lors qu'elle avait été publiée au *Journal officiel* le 31 juillet 1991, complétait la lettre de l'article 17 provisoire et s'alignait sur la jurisprudence constitutionnelle antérieure (paragraphe 39 ci-dessus). Au surplus, depuis de longues années déjà, le Conseil d'Etat considérait que le port du foulard islamique par les étudiantes n'était pas compatible avec les principes fondamentaux de la République, dès lors que celui-ci était en passe de devenir le symbole d'une vision contraire aux libertés de la femme et aux principes fondamentaux (paragraphe 37 ci-dessus).

94. Pour ce qui est de l'argument de la requérante selon lequel le pouvoir législatif n'a jamais adopté une telle interdiction, la Cour rappelle qu'il ne lui appartient pas de se prononcer sur l'opportunité des techniques choisies par le législateur d'un Etat défendeur pour réglementer tel ou tel domaine; son rôle se limite à vérifier si les méthodes adoptées et les conséquences qu'elles entraînent sont en conformité avec la Convention (*Gorzelik et autres*, précité, § 67).

95. En outre, la Cour estime que, si l'Université d'Istanbul ou d'autres universités ont appliqué plus ou moins strictement une règle existante, tel l'article 17 provisoire de la loi n° 2547, lu à la lumière de la jurisprudence pertinente, en fonction du contexte et des particularités des formations proposées, une telle pratique, à elle seule, ne rend pas cette règle imprévisible. En effet, dans le système constitutionnel turc, les organes directeurs des universités ne peuvent en aucun cas apporter une restriction aux droits fondamentaux sans une base légale (voir l'article 13 de la Constitution, paragraphe 29 ci-dessus). Leur rôle se limite à adopter les règles internes d'un établissement d'enseignement dans le respect du principe de légalité et sous le contrôle des juges administratifs.

96. Par ailleurs, la Cour peut admettre que, dans un domaine tel que les règles internes d'une université, il peut se révéler difficile d'élaborer des lois d'une très grande précision, voire inopportun de formuler des règles rigides (voir, *mutatis mutandis*, *Gorzelik et autres*, précité, § 67).

97. De même, il est hors de doute que le port du foulard islamique était réglementé au moins dès 1994 à l'Université d'Istanbul, soit bien avant que la requérante ne s'y inscrive (paragraphe 43 et 45 ci-dessus).

98. Dans ces conditions, la Cour conclut que l'ingérence litigieuse avait une base légale en droit turc, à savoir l'article 17 provisoire de la loi n° 2547, lu à la lumière de la jurisprudence pertinente des tribunaux internes. La loi était aussi accessible et peut passer pour être libellée avec suffisamment de précision pour satisfaire à l'exigence de prévisibilité. En effet, la requérante pouvait prévoir, dès son entrée à l'Université d'Istanbul, que le port du foulard islamique par les étudiantes était réglementé dans l'espace universitaire et, à partir du 23 février 1998, qu'elle risquait de se voir refuser l'accès aux cours et aux épreuves si elle persistait à porter le foulard.

3. But légitime

99. Eu égard aux circonstances de la cause et aux termes des décisions des juridictions internes, la Cour peut accepter que l'ingérence incriminée poursuivait pour l'essentiel les buts légitimes que sont la protection des droits et libertés d'autrui et de l'ordre, ce qui ne prête pas à controverse entre les parties.

4. «Nécessaire dans une société démocratique»

a) Thèses des parties devant la Grande Chambre

i. La requérante

100. La requérante conteste les considérations de la chambre. Dans ses observa-

tions du 27 septembre 2004 et dans sa plaidoirie à l'audience, elle a souligné notamment que les notions de «démocratie» et de «république» ne sont pas similaires. Alors que beaucoup de régimes totalitaires se réclament de «la République», seule une véritable démocratie peut être fondée sur les principes de pluralisme et d'esprit d'ouverture. Selon elle, en Turquie, l'organisation des systèmes judiciaire et universitaire a été façonnée au gré des coups d'Etat militaires de 1960, 1971 et 1980. En outre, se référant à la jurisprudence de la Cour et à la pratique adoptée dans plusieurs pays européens, la requérante soutient que les Etats contractants ne doivent pas disposer d'une large marge d'appréciation en matière de tenue vestimentaire des étudiants. Elle explique notamment que dans aucun pays européen il n'est interdit aux étudiantes de porter le foulard islamique dans les universités. Par ailleurs, elle soutient qu'aucune tension n'est survenue dans les établissements de l'enseignement supérieur pour justifier une telle mesure radicale.

101. Toujours dans ses observations précitées, la requérante explique que les étudiantes sont des adultes disposant d'une faculté d'appréciation, de leur pleine capacité juridique et de celle de décider librement de la conduite à tenir. Est par conséquent dénuée de tout fondement l'allégation selon laquelle, en revêtant le foulard islamique, elle se montrerait irrespectueuse envers les convictions d'autrui ou chercherait à influencer les autres et à porter atteinte aux droits et libertés d'autrui. Elle n'a créé aucune entrave externe à une quelconque liberté avec le soutien ou l'autorité de l'Etat. Il s'agit en effet d'un choix fondé sur sa conviction religieuse, laquelle constitue le droit fondamental le plus important que lui accorde la démocratie pluraliste et libérale. Il est à ses yeux incontestable qu'une personne est libre de s'imposer des restrictions si elle les juge appropriées. Par ailleurs, il est injuste de considérer que le port du foulard islamique par elle-même est contraire au principe d'égalité des hommes et des femmes, étant donné que toutes les religions imposent de telles restrictions vestimentaires et que les individus sont libres de s'y conformer ou non.

102. En revanche, dans ses observations du 27 janvier 2005, la requérante a dit pouvoir accepter l'idée que le port du foulard islamique n'est pas toujours protégé par la liberté de religion (paragraphe 73 ci-dessus).

ii. Le Gouvernement

103. Le Gouvernement souscrit à la conclusion de la chambre (paragraphe 71 ci-dessus).

b) Appréciation de la Cour

i. Principes généraux

104. La Cour rappelle que, telle que la protège l'article 9, la liberté de pensée, de conscience et de religion représente l'une des assises d'une «société démocratique» au sens de la Convention. Cette liberté figure, dans sa dimension religieuse, parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie, mais elle est aussi un bien précieux pour les athées, les agnostiques, les sceptiques ou les indifférents. Il y va du pluralisme – chèrement conquis au cours des siècles – qui ne saurait être dissocié de pareille société. Cette liberté implique, notamment, celle d'adhérer ou non à une religion et celle de la pratiquer ou de ne pas la pratiquer (voir, entre autres, *Kokkinakis c. Grèce*, arrêt du 25 mai 1993, série A n° 260-A, p. 17, § 3, et *Buscarini et autres c. Saint-Marin* [GC], n° 24645/94, § 34, CEDH 1999-I).

105. Si la liberté de religion relève d'abord du for intérieur, elle implique égale-

ment celle de manifester sa religion individuellement et en privé, ou de manière collective, en public et dans le cercle de ceux dont on partage la foi. L'article 9 énumère les diverses formes que peut prendre la manifestation d'une religion ou conviction, à savoir le culte, l'enseignement, les pratiques et l'accomplissement des rites (voir, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek c. France* [GC], n° 27417/95, § 73, CEDH 2000-VII).

L'article 9 ne protège toutefois pas n'importe quel acte motivé ou inspiré par une religion ou conviction (voir, parmi plusieurs autres, *Kalaç c. Turquie*, arrêt du 1^{er} juillet 1997, *Recueil des arrêts et décisions* 1997-IV, p. 1209, § 27, *Arrowsmith c. Royaume-Uni*, n° 7050/75, décision de la Commission du 12 octobre 1978, Décisions et Rapports (DR) 19, p. 5, *C. c. Royaume-Uni*, n° 10358/83, décision de la Commission du 15 décembre 1983, DR 37, p. 142, et *Tepeli et autres c. Turquie* (déc.), n° 31876/96, 11 septembre 2001).

106. Dans une société démocratique, où plusieurs religions coexistent au sein d'une même population, il peut se révéler nécessaire d'assortir la liberté de manifester sa religion ou ses convictions de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun (*Kokkinakis*, précité, p. 18, § 33). Cela découle à la fois du paragraphe 2 de l'article 9 et des obligations positives qui incombent à l'Etat en vertu de l'article 1 de la Convention de reconnaître à toute personne relevant de sa juridiction les droits et libertés définis dans la Convention.

107. La Cour a souvent mis l'accent sur le rôle de l'Etat en tant qu'organisateur neutre et impartial de l'exercice des diverses religions, cultes et croyances, et indiqué que ce rôle contribue à assurer l'ordre public, la paix religieuse et la tolérance dans une société démocratique. Elle estime aussi que le devoir de neutralité et d'impartialité de l'Etat est incompatible avec un quelconque pouvoir d'appréciation de la part de celui-ci quant à la légitimité des croyances religieuses ou des modalités d'expression de celles-ci (voir *Manoussakis et autres c. Grèce*, arrêt du 26 septembre 1996, *Recueil* 1996-IV, p. 1365, § 47, *Hassan et Tchaouch c. Bulgarie* [GC], n° 30985/96, § 78, CEDH 2000-XI, *Refah Partisi et autres*, précité, § 91), et considère que ce devoir impose à l'Etat de s'assurer que des groupes opposés se tolèrent (*Parti communiste unifié de Turquie et autres c. Turquie*, arrêt du 30 janvier 1998, *Recueil* 1998-I, § 57). Dès lors, le rôle des autorités dans ce cas n'est pas de supprimer la cause des tensions en éliminant le pluralisme, mais de s'assurer que des groupes opposés l'un à l'autre se tolèrent (*Serif c. Grèce*, n° 38178/97, § 53, CEDH 1999-IX).

108. Pluralisme, tolérance et esprit d'ouverture caractérisent une «société démocratique». Bien qu'il faille parfois subordonner les intérêts d'individus à ceux d'un groupe, la démocratie ne se ramène pas à la suprématie constante de l'opinion d'une majorité mais commande un équilibre qui assure aux individus minoritaires un traitement juste et évitant tout abus d'une position dominante (voir, *mutatis mutandis*, *Young, James et Webster c. Royaume-Uni*, arrêt du 13 août 1981, série A n° 44, p. 25, § 63, et *Chassagnou et autres c. France* [GC], n° 25088/94, 28331/95 et 28443/95, § 112, CEDH 1999-III). Le pluralisme et la démocratie doivent également se fonder sur le dialogue et un esprit de compromis, qui impliquent nécessairement de la part des individus des concessions diverses qui se justifient aux fins de la sauvegarde et de la promotion des idéaux et valeurs d'une société démocratique (voir, *mutatis mutandis*, *Parti communiste unifié de Turquie et autres*, précité, pp. 21-22, § 45, et *Refah Partisi et autres*, précité, § 99). Si les «droits et libertés d'autrui» figurent eux-mêmes parmi ceux garantis par la Convention ou ses Protocoles, il faut admettre que la nécessité de les protéger puisse conduire les Etats à restreindre d'autres droits ou

libertés également consacrés par la Convention: c'est précisément cette constante recherche d'un équilibre entre les droits fondamentaux de chacun qui constitue le fondement d'une «société démocratique» (*Chassagnou et autres*, précité, § 113).

109. Lorsque se trouvent en jeu des questions sur les rapports entre l'Etat et les religions, sur lesquelles de profondes divergences peuvent raisonnablement exister dans une société démocratique, il y a lieu d'accorder une importance particulière au rôle du décideur national (voir, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, précité, § 84, et *Wingrove c. Royaume-Uni*, arrêt du 25 novembre 1996, *Recueil* 1996-V, p. 1958, § 58). Tel est notamment le cas lorsqu'il s'agit de la réglementation du port de symboles religieux dans les établissements d'enseignement, d'autant plus, comme le démontre l'aperçu de droit comparé (paragraphe 55-65 ci-dessus), au vu de la diversité des approches nationales quant à cette question. En effet, il n'est pas possible de discerner à travers l'Europe une conception uniforme de la signification de la religion dans la société (*Otto-Preminger-Institut c. Autriche*, arrêt du 20 septembre 1994, série A n° 295-A, p. 19, § 50) et le sens ou l'impact des actes correspondant à l'expression publique d'une conviction religieuse ne sont pas les mêmes suivant les époques et les contextes (voir, par exemple, *Dahlab c. Suisse* (déc.) n° 42393/98, CEDH 2001-V). La réglementation en la matière peut varier par conséquent d'un pays à l'autre en fonction des traditions nationales et des exigences imposées par la protection des droits et libertés d'autrui et le maintien de l'ordre public (voir, *mutatis mutandis*, *Wingrove*, précité, p. 1957, § 57). Dès lors, le choix quant à l'étendue et aux modalités d'une telle réglementation doit, par la force des choses, être dans une certaine mesure laissé à l'Etat concerné, puisqu'il dépend du contexte national considéré (voir, *mutatis mutandis*, *Gorzelik*, précité, § 67 et *Murphy c. Irlande*, n° 44179/98, § 73, CEDH 2003-IX (extraits)).

110. Cette marge d'appréciation va de pair avec un contrôle européen portant à la fois sur la loi et sur les décisions qui l'appliquent. La tâche de la Cour consiste à rechercher si les mesures prises au niveau national se justifient dans leur principe et sont proportionnées (*Manoussakis et autres*, précité, § 44). Pour délimiter l'ampleur de cette marge d'appréciation en l'espèce, la Cour doit tenir compte de l'enjeu, à savoir la protection des droits et libertés d'autrui, les impératifs de l'ordre public, la nécessité de maintenir la paix civile et un véritable pluralisme religieux, indispensable pour la survie d'une société démocratique (voir, *mutatis mutandis*, *Kokkinakis*, précité, § 31, *Manoussakis et autres*, précité, p. 1364, § 44, et *Casado Coca*, précité, § 55).

111. La Cour rappelle également que, dans les décisions *Karaduman c. Turquie* (n° 16278/90, décision de la Commission du 3 mai 1993, DR 74, p. 93) et *Dahlab*, précitée, les organes de la Convention ont considéré que, dans une société démocratique, l'Etat peut limiter le port du foulard islamique si cela nuit à l'objectif visé de protection des droits et libertés d'autrui, de l'ordre et de la sécurité publique. Dans l'affaire *Karaduman* précitée, des mesures prises dans les universités en vue d'empêcher certains mouvements fondamentalistes religieux d'exercer une pression sur les étudiants qui ne pratiquent pas la religion en cause ou sur ceux adhérant à une autre religion ont été considérées comme justifiées au regard de l'article 9 § 2 de la Convention. Par conséquent, il a été établi que des établissements de l'enseignement supérieur peuvent réglementer la manifestation des rites et des symboles d'une religion en fixant des restrictions de lieu et de forme, dans le but d'assurer la mixité d'étudiants de croyances diverses et de protéger ainsi l'ordre public et les croyances d'autrui (voir, également, *Refah Partisi et autres*, précité, § 95). Dans le cadre de l'affaire *Dahlab* précitée, qui concernait une enseignante chargée d'une classe de jeunes enfants, la Cour a notamment mis l'accent sur le «signe extérieur fort» que

représentait le port du foulard par celle-ci et s'est interrogée sur l'effet prosélytique que peut avoir le port d'un tel symbole dès lors qu'il semblait être imposé aux femmes par un précepte religieux difficilement conciliable avec le principe d'égalité des sexes. Elle a également noté la difficulté de concilier le port du foulard islamique par une enseignante avec le message de tolérance, de respect d'autrui et surtout d'égalité et de non-discrimination que, dans une démocratie, tout enseignant doit transmettre à ses élèves.

ii. Application de ces principes au cas d'espèce

112. L'ingérence litigieuse que constitue la réglementation du 23 février 1998, qui soumet le port du foulard islamique par les étudiantes, telle M^{lle} Şahin, à des restrictions de lieu et de forme dans l'enceinte universitaire, était fondée, selon les juridictions turques (paragraphe 37, 39 et 41 ci-dessus) notamment sur les deux principes de laïcité et d'égalité.

113. Dans leur arrêt du 7 mars 1989, les juges constitutionnels ont estimé que la laïcité, qui constitue le garant des valeurs démocratiques, est au confluent de la liberté et de l'égalité. Ce principe interdit à l'Etat de témoigner une préférence pour une religion ou croyance précise, guidant ainsi l'Etat dans son rôle d'arbitre impartial, et implique nécessairement la liberté de religion et de conscience. Il vise également à prémunir l'individu non seulement contre des ingérences arbitraires de l'Etat mais aussi contre des pressions extérieures émanant des mouvements extrémistes. Selon ces juges, par ailleurs, la liberté de manifester la religion peut être restreinte dans le but de préserver ces valeurs et principes (paragraphe 39 ci-dessus).

114. Comme la chambre l'a souligné à juste titre (paragraphe 106 de son arrêt), la Cour trouve une telle conception de la laïcité respectueuse des valeurs sous-jacentes à la Convention. Elle constate que la sauvegarde de ce principe, assurément l'un des principes fondateurs de l'Etat turc qui cadrent avec la prééminence du droit et le respect des droits de l'homme et de la démocratie, peut être considérée comme nécessaire à la protection du système démocratique en Turquie. Une attitude ne respectant pas ce principe ne sera pas nécessairement acceptée comme faisant partie de la liberté de manifester la religion et ne bénéficiera pas de la protection qu'assure l'article 9 de la Convention (*Refah Partisi et autres*, précité, § 93).

115. Après avoir examiné les arguments des parties, la Grande Chambre ne voit aucune raison pertinente de s'écarter des considérations suivantes de la chambre (paragraphe 107-109 de son arrêt):

«(...) La Cour note que le système constitutionnel turc met l'accent sur la protection des droits des femmes. L'égalité entre les sexes, reconnue par la Cour européenne comme l'un des principes essentiels sous-jacents à la Convention et un objectif des Etats membres du Conseil de l'Europe (voir, par exemple, *Abdulaziz, Cabales et Balkandali c. Royaume-Uni*, arrêt du 28 mai 1985, série A n° 77, p. 38, § 78, *Schuler-Zraggen c. Suisse*, arrêt du 24 juin 1993, série A n° 263, pp. 21-22, § 67, *Burghartz c. Suisse*, arrêt du 22 février 1994, série A n° 280-B, p. 27, § 27, *Van Raalte c. Pays-Bas*, arrêt du 21 février 1997, *Recueil* 1997-I, p. 186, § 39 *in fine*, et *Petrovic c. Autriche*, arrêt du 27 mars 1998, *Recueil* 1998-II, p. 587, § 37), a également été considérée par la Cour constitutionnelle turque comme un principe implicitement contenu dans les valeurs inspirant la Constitution.

(...) En outre, à l'instar des juges constitutionnels (...), la Cour estime que, lorsque l'on aborde la question du foulard islamique dans le contexte turc, on ne saurait faire abstraction de l'impact que peut avoir le port de ce symbole, présenté ou perçu comme une obligation religieuse contraignante, sur ceux qui ne l'arbo-

pas. Entrent en jeu notamment, comme elle l'a déjà souligné (*Karaduman*, décision précitée, et *Refah Partisi et autres*, précité, § 95), la protection des «droits et libertés d'autrui» et le «maintien de l'ordre public» dans un pays où la majorité de la population, manifestant un attachement profond aux droits des femmes et à un mode de vie laïque, adhère à la religion musulmane. Une limitation en la matière peut donc passer pour répondre à un «besoin social impérieux» tendant à atteindre ces deux buts légitimes, d'autant plus que, comme l'indiquent les juridictions turques (...), ce symbole religieux avait acquis au cours des dernières années en Turquie une portée politique.

(...) La Cour ne perd pas de vue qu'il existe en Turquie des mouvements politiques extrémistes qui s'efforcent d'imposer à la société tout entière leurs symboles religieux et leur conception de la société, fondée sur des règles religieuses (...). Elle rappelle avoir déjà dit que chaque Etat contractant peut, en conformité avec les dispositions de la Convention, prendre position contre de tels mouvements politiques en fonction de son expérience historique (*Refah Partisi et autres*, précité, § 124). La réglementation litigieuse se situe donc dans un tel contexte et elle constitue une mesure destinée à atteindre les buts légitimes énoncés ci-dessus et à protéger ainsi le pluralisme dans un établissement universitaire»

116. Vu le contexte décrit ci-dessus, c'est le principe de laïcité tel qu'interprété par la Cour constitutionnelle (paragraphe 39 ci-dessus) qui est la considération primordiale ayant motivé l'interdiction du port de symboles religieux dans les universités. Dans un tel contexte, où les valeurs de pluralisme, de respect des droits d'autrui et, en particulier, d'égalité des hommes et des femmes devant la loi, sont enseignées et appliquées dans la pratique, l'on peut comprendre que les autorités compétentes aient voulu préserver le caractère laïque de leur établissement et ainsi considéré comme contraire à ces valeurs d'accepter le port de tenues religieuses, y compris, comme en l'espèce, celui du foulard islamique.

117. Il reste à déterminer si, en l'occurrence, il existait un rapport raisonnable de proportionnalité entre les moyens employés et les objectifs légitimes poursuivis par l'ingérence contestée.

118. D'emblée, à l'instar de la chambre (paragraphe 111 de son arrêt), il convient de constater que les parties admettent que, dans les universités turques, les étudiants musulmans pratiquants, dans les limites apportées par les exigences de l'organisation de l'enseignement, peuvent s'acquitter des formes habituelles par lesquelles un musulman manifeste sa religion. Il ressort par ailleurs de la décision du 9 juillet 1998 adoptée par l'Université d'Istanbul que toutes sortes de tenues religieuses sont également interdites dans l'enceinte universitaire (paragraphe 47 ci-dessus).

119. Il importe aussi d'observer que, lorsque la question du port du foulard islamique par les étudiantes s'est posée en 1994 à l'Université d'Istanbul dans le cadre des formations de santé, le recteur de l'université a rappelé aux étudiants la raison d'être des règles régissant la tenue vestimentaire. Soulignant le dévoiement de la revendication visant à obtenir l'autorisation de porter le foulard islamique dans tous les espaces de l'université et faisant valoir les exigences liées au maintien de l'ordre public imposées par les formations de santé, il a demandé aux étudiants de respecter ces règles, qui étaient en conformité avec la législation et la jurisprudence des hautes juridictions (paragraphes 43-44 ci-dessus).

120. Par ailleurs, le processus de mise en application de la réglementation en question ayant débouché sur la décision du 9 juillet 1998 s'est déroulé sur plusieurs années et a été marqué par un large débat au sein de la société turque et du monde éducatif (paragraphe 35 ci-dessus). Les deux hautes juridictions, le Conseil d'Etat et

la Cour constitutionnelle, ont pu élaborer une jurisprudence constante en la matière (paragraphe 37, 39 et 41 ci-dessus). Force est de constater que, tout au long de ce processus décisionnel, les autorités universitaires ont cherché à adapter leur attitude à l'évolution du contexte pour ne pas fermer leurs portes aux étudiantes voilées, en continuant à dialoguer avec celles-ci tout en veillant au maintien de l'ordre public et, en particulier, des exigences imposées par la formation dont il s'agit.

121. A cet égard, la Cour ne souscrit pas à l'argument de la requérante selon lequel le fait que le non-respect du code vestimentaire n'était pas passible de sanction disciplinaire équivaut à l'absence de règle (paragraphe 81 ci-dessus). S'agissant des moyens à employer pour assurer le respect des règles internes, il n'appartient pas à la Cour de substituer sa propre vision à celle des autorités universitaires. Ces dernières, étant en prise directe et permanente avec la communauté éducative, sont en principe mieux placées qu'une juridiction internationale pour évaluer les besoins et le contexte locaux ou les exigences d'une formation donnée (voir, *mutatis mutandis*, *Valsamis c. Grèce*, arrêt du 18 décembre 1996, *Recueil* 1996-VI, p. 2325, § 32). Du reste, ayant constaté la légitimité du but de la réglementation, la Cour ne saurait appliquer le critère de proportionnalité de manière à rendre la notion de «norme interne» d'un établissement vide de sens. L'article 9 ne garantit pas toujours le droit de se comporter d'une manière dictée par une conviction religieuse (*Pichon et Sajous c. France* (déc.), n° 49853/99, CEDH 2001-X) et il ne confère pas aux individus agissant de la sorte le droit de se soustraire à des règles qui se sont révélées justifiées (voir l'avis de la Commission, § 51 – formulé dans son rapport du 6 juillet 1995 –, arrêt *Valsamis*, précité, p. 2337).

122. A la lumière de ce qui précède et compte tenu de la marge d'appréciation des États contractants en la matière, la Cour conclut que l'ingérence litigieuse était justifiée dans son principe et proportionnée à l'objectif visé.

123. Partant, il n'y a pas eu violation de l'article 9 de la Convention.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 2 DU PROTOCOLE N° 1

A. Sur la nécessité d'un examen séparé du présent grief

1. Position des parties

124. La Cour constate que si, devant la chambre, la requérante a invoqué certains articles de la Convention (articles 8, 10 et 14 ainsi que 2 du Protocole n° 1), l'intéressée a plaidé pour l'essentiel la violation de l'article 9 de la Convention. Dans sa demande de renvoi, M^{lle} Şahin a prié la Grande Chambre de conclure à la violation des articles 8, 9, 10 et 14 de la Convention ainsi que de l'article 2 du Protocole n° 1, en ne présentant aucun argument juridique quant à l'article 10.

125. Dans son mémoire du 27 janvier 2005, la requérante semble toutefois placer son argumentation concernant la réglementation du 23 février 1998 sous un éclairage différent de celui qu'elle avait adopté notamment devant la chambre. Dans son mémoire précité, elle a «[allégué] au principal une violation de l'article 2 du premier protocole et demand[é] à la Grande Chambre de trancher en ce sens». Elle a notamment prié la Cour de «constater que la décision litigieuse d'interdire l'accès de l'université à la requérante portant, le cas échéant, le voile islamique, constitue en l'espèce une violation du droit à l'instruction, tel que garanti par l'article 2 du premier protocole lu à la lumière des articles 8, 9 et 10 de la Convention».

126. Quant au Gouvernement, il soutient qu'il n'y a pas eu violation de la première phrase de l'article 2 du Protocole n° 1.

2. Arrêt de la Chambre

127. La chambre a conclu que nulle question distincte ne se posait sous l'angle des articles 8, 10 et 14 de la Convention ainsi que de l'article 2 du Protocole n° 1, invoqués par la requérante, les circonstances pertinentes étant les mêmes que pour l'article 9, au sujet duquel elle a conclu à l'absence de violation.

3. Appréciation de la Cour

128. La Cour rappelle que, selon sa jurisprudence désormais bien établie, «l'affaire» renvoyée devant la Grande Chambre englobe nécessairement tous les aspects de la requête que la Chambre a examinés précédemment dans son arrêt, aucun fondement ne permettant un renvoi simplement partiel de l'affaire (voir, en dernier lieu, *Cumpăna et Mazăre c. Roumanie* [GC], n° 33348/96, § 66, CEDH 2004-... et, *K. et T. c. Finlande* [GC], n° 25702/94, § 140-141, CEDH 2001-VII). L'«affaire» dont est saisie la Grande Chambre est la requête telle qu'elle a été déclarée recevable.

129. La Cour estime que le grief tiré de la première phrase de l'article 2 du Protocole n° 1 peut être considéré comme distinct de celui tiré de l'article 9 de la Convention, compte tenu des circonstances propres à l'affaire et de la nature fondamentale du droit à l'instruction ainsi que de la position des parties, nonobstant le fait que ce grief équivaut en substance à une critique de la réglementation du 23 février 1998 comme cela était le cas au regard de l'article 9.

130. En conclusion, la Cour examinera ce grief séparément (voir, *mutatis mutandis*, *Göç c. Turquie* [GC], n° 36590/97, § 46, CEDH 2002-V).

B. Sur l'applicabilité

131. La requérante allègue la violation de la première phrase de l'article 2 du Protocole n° 1, ainsi libellée:

«Nul ne peut se voir refuser le droit à l'instruction. (...)»

1. Champ d'application de la première phrase de l'article 2 du Protocole n° 1

a) Thèses des parties devant la Grande Chambre

132. La requérante ne doute pas que le droit à l'instruction, tel que prévu par la première phrase de l'article 2 du Protocole n° 1, s'applique à l'enseignement supérieur, étant donné que cette disposition concerne l'ensemble des établissements existant à un moment donné.

133. Le Gouvernement ne s'est pas prononcé sur cette question.

b) Appréciation de la Cour

134. Aux termes de la première phrase de l'article 2 du Protocole n° 1, nul ne peut se voir refuser le droit à l'instruction. Bien que ce texte ne fasse aucune mention de l'enseignement supérieur, rien ne tend non plus à indiquer qu'il n'est pas applicable à tous les niveaux d'enseignement, y compris le supérieur.

135. En ce qui concerne le contenu du droit à l'instruction et l'étendue de l'obligation qui en découle, la Cour rappelle avoir dit dans l'affaire *Linguistique belge* ((au principal), arrêt du 23 juillet 1968, série A n° 6, p. 31, § 3) que «[l]a formulation négative signifie, et les travaux préparatoires le confirment, que les Parties contractantes ne reconnaissent pas un droit à l'instruction qui les obligerait à organiser à leurs frais, ou à subventionner, un enseignement d'une forme ou à un échelon déterminés. L'on ne saurait pourtant en déduire que l'Etat n'a aucune obligation positive d'assurer le respect de ce droit, tel que le protège la première phrase de l'article 2 du

Protocole n° 1. Puisque «droit» il y a, celui-ci est garanti, en vertu de l'article 1 de la Convention, à toute personne relevant de la juridiction d'un Etat contractant.»

136. La Cour ne perd pas de vue que le développement du droit à l'instruction, dont le contenu varierait dans le temps et dans l'espace en fonction des circonstances économiques et sociales, dépend essentiellement des besoins et des ressources de la communauté. Cependant, il est d'une importance cruciale que la Convention soit interprétée et appliquée d'une manière qui en rende les garanties concrètes et effectives et non pas théoriques et illusoires. En outre, elle est un instrument vivant à interpréter à la lumière des conditions actuelles (*Marckx c. Belgique*, arrêt du 13 juin 1979, série A n° 31, p. 19, § 41, *Airey c. Irlande*, arrêt du 9 octobre 1979, série A n° 32, pp. 14-15, § 26, et en dernier lieu, *Mamatkulov et Askarov c. Turquie* [GC], n° 46827/99 et 46951/99, § 121, 4 février 2005). Or si la première phrase de l'article 2 énonce pour l'essentiel l'accès aux établissements de l'enseignement du primaire et du secondaire, nulle cloison étanche ne sépare l'enseignement supérieur du domaine de l'instruction. En effet, dans plusieurs textes adoptés récemment, le Conseil de l'Europe a souligné le rôle essentiel et l'importance du droit à l'accès à l'enseignement supérieur dans la promotion des droits de l'homme et des libertés fondamentales et le renforcement de la démocratie (voir notamment la Recommandation R (98) 3 et la Recommandation 1353 (1998), paragraphes 68 et 69 ci-dessus). Comme le souligne la Convention sur la reconnaissance des qualifications relatives à l'enseignement supérieur dans la région européenne (paragraphe 67 ci-dessus), l'enseignement supérieur «joue un rôle éminent dans l'acquisition et dans le progrès de la connaissance» et «constitue une exceptionnelle richesse culturelle et scientifique tant pour l'individu que pour la société».

137. Partant, on concevrait mal que les établissements de l'enseignement supérieur existant à un moment donné échappent à l'empire de la première phrase de l'article 2 du Protocole n° 1. Ledit article n'astreint certes pas les Etats contractants à créer des établissements d'enseignement supérieur. Néanmoins, un Etat qui a créé de tels établissements a l'obligation de veiller à ce que les personnes jouissent d'un droit d'accès effectif à ceux-ci. Dans une société démocratique, le droit à l'instruction, indispensable à la réalisation des droits de l'homme, occupe une place si fondamentale qu'une interprétation restrictive de la première phrase de l'article 2 ne correspondrait pas au but et à l'objet de cette disposition (voir, *mutatis mutandis*, *Linguistique belge*, précité, p. 33, § 9, et *Delcourt c. Belgique*, arrêt du 17 janvier 1970, série A n° 11, p. 14, § 25).

138. Cette approche est conforme à la position retenue dans l'affaire *Linguistique belge* (arrêt précité, p. 22) par la Commission qui, dès 1965, déclarait que, bien que le champ d'application du droit protégé par l'article 2 du Protocole n° 1 ne soit pas défini ou précisé par la Convention, celui-ci comprenait, «aux fins de l'examen de la présente affaire», «l'accès à l'enseignement gardien, primaire, secondaire et supérieur».

139. Plus tard, dans plusieurs décisions, la Commission a relevé que «le droit à l'instruction, au sens de l'article 2, vise au premier chef l'instruction élémentaire et pas nécessairement des études supérieures comme celles de technologie» (*X. c. Royaume-Uni*, n° 5962/72, décision de la Commission du 13 mars 1975, DR 2, p. 50, et *Kramelius c. Suède*, n° 21062/92, décision de la Commission du 17 janvier 1996). Dans les affaires plus récentes, en laissant la porte ouverte à l'application de l'article 2 du Protocole n° 1 à l'enseignement universitaire, elle s'est penchée sur la légitimité de certaines restrictions à l'accès aux établissements de l'enseignement supérieur (voir, en ce qui concerne un système d'enseignement supérieur limité, *X. c. Royaume-Uni*, n° 8844/80, décision de la Commission du 9 décembre 1980, DR 23, p. 228;

en ce qui concerne des mesures d'exclusion temporaire ou définitive d'un établissement d'enseignement, *Yanasik c. Turquie*, n° 14524/89, décision de la Commission du 6 janvier 1993, DR 74, p. 14, et *Sulak c. Turquie*, n° 24515/94, décision de la Commission du 17 janvier 1996, DR 84, p. 98).

140. Quant à la Cour, à la suite de l'affaire *Linguistique belge*, elle a déclaré irrecevables plusieurs affaires concernant l'enseignement supérieur, non parce que la première phrase de l'article 2 du Protocole n° 1 ne s'y appliquait pas mais en se fondant sur un autre motif d'irrecevabilité (grief d'une personne handicapée n'ayant pas rempli les conditions d'accès à l'université, *Lukach c. Russie* (déc.), n° 48041/99, 16 novembre 1999; absence d'autorisation de se préparer et de se présenter à l'examen final du diplôme de droit à l'université pendant une détention, *Georgiou c. Grèce* (déc.), n° 45138/98, 13 janvier 2000; interruption des études supérieures en raison d'une condamnation régulière, *Durmaz et autres c. Turquie* (déc.), n° 46506/99, 4 septembre 2001).

141. De l'ensemble des considérations qui précèdent, il ressort que les établissements de l'enseignement supérieur, s'ils existent à un moment donné, entrent dans le champ d'application de la première phrase de l'article 2 du Protocole n° 1, étant donné que le droit à l'accès à ces établissements constitue un élément inhérent au droit qu'énonce ladite disposition. Il ne s'agit pas là d'une interprétation extensive de nature à imposer aux États contractants de nouvelles obligations: elle se fonde sur les termes mêmes de la première phrase dudit article, lue dans son contexte et à la lumière de l'objet et du but de ce traité normatif qu'est la Convention (voir, *mutatis mutandis*, *Golder c. Royaume-Uni*, arrêt du 21 février 1975, série A n° 18, p. 18, § 36).

142. Partant, la première phrase de l'article 2 du Protocole n° 1 trouve à s'appliquer en l'espèce. La manière dont elle le fait dépend toutefois à l'évidence des particularités du droit à l'instruction.

C. Sur le fond

1. Thèses des parties devant la Grande Chambre

a) La requérante

143. Pour la requérante, il est évident que l'interdiction du port du foulard islamique émanant des autorités publiques constitue une ingérence dans son droit à l'instruction, qui a consisté dans le refus de l'accès aux épreuves d'oncologie le 12 mars 1998, le refus de l'inscription administrative le 20 mars 1998 et le refus de l'accès au cours de neurologie le 16 avril 1998 et aux épreuves écrites du cours de santé populaire le 10 juin 1998.

144. La requérante admet que, de par sa nature, le droit à l'instruction nécessite d'être réglementé par l'Etat. A ses yeux, la réglementation doit suivre les mêmes critères que ceux valant pour les ingérences autorisées par les articles 8 à 11 de la Convention. A cet égard, elle souligne l'absence d'une disposition en droit interne turc empêchant la poursuite d'études supérieures, et déclare que les lois en vigueur n'attribuent pas au rectorat la compétence et le pouvoir de refuser l'accès à l'université aux étudiantes revêtues du foulard.

145. L'intéressée souligne avoir pu s'inscrire à l'université alors qu'elle portait le foulard et y poursuivre ses études de la sorte sans encombre pendant quatre ans et demi. Ainsi, elle soutient qu'il n'existait aucune source juridique interne qui, au moment de son inscription à l'université et pendant la période où elle poursuivait ses études, aurait permis de prévoir que, quelques années plus tard, elle ne pourrait plus accéder aux salles de cours.

146. Tout en réaffirmant que les moyens employés en l'espèce étaient disproportionnés au but poursuivi, la requérante admet que les établissements de l'enseignement supérieur peuvent, en principe, aspirer à fournir un enseignement dans un climat de sérénité et de sécurité. Toutefois, comme en témoigne l'absence de poursuite disciplinaire à son encontre, elle affirme qu'en portant le foulard islamique, elle n'a nullement troublé l'ordre public ni porté atteinte aux droits et libertés des autres étudiants. En outre, selon elle, les autorités compétentes de l'université ont à leur disposition suffisamment d'instruments pour garantir la protection de l'ordre public, tels que des mécanismes disciplinaires ou la saisine des juridictions répressives, si le comportement de l'étudiant est constitutif d'une infraction pénale.

147. La requérante soutient que le fait de conditionner la poursuite de ses études à la suppression du foulard et de lui refuser l'accès aux établissements d'enseignement en cas de non-respect de cette condition porte effectivement et abusivement atteinte à la substance du droit à l'instruction et rend ce droit inutilisable. Cela vaut d'autant plus qu'elle est une jeune adulte ayant construit sa personnalité et intégré des valeurs de nature sociale et morale et qu'elle s'est vue privée de toute possibilité de continuer ses études en Turquie en accord avec ses convictions.

148. Pour l'ensemble de ces raisons, la requérante soutient que, quelle que soit la portée de la marge d'appréciation qui lui a été accordée, l'Etat défendeur en a outrepassé les limites et a violé son droit à l'instruction, lu à la lumière des articles 8, 9 et 10 de la Convention.

b) Le Gouvernement

149. Se référant à la jurisprudence de la Cour, le Gouvernement rappelle que les Etats contractants disposent d'une marge d'appréciation pour adopter des réglementations en matière d'enseignement.

150. Il fait valoir également que la requérante s'était inscrite à la faculté de médecine de Cerrahpaşa de l'Université d'Istanbul alors qu'elle poursuivait depuis cinq ans ses études à la faculté de médecine de l'université de Bursa, où elle portait le voile. Par une circulaire, le recteur de l'Université d'Istanbul avait interdit le port du voile dans l'université. Cette interdiction se fondait sur les arrêts de la Cour constitutionnelle et du Conseil d'Etat. Comme l'indiquent la requête et la demande de renvoi, l'intéressée ne s'est heurtée à aucun obstacle lorsqu'elle s'est inscrite à la faculté de médecine de Cerrahpaşa. Cela prouve qu'elle a bénéficié de l'égalité de traitement en matière de droit d'accès aux établissements d'enseignement. Quant à l'ingérence qu'elle a subie en raison de la mise en œuvre de la circulaire du 23 février 1998, le Gouvernement se contente de souligner que celle-ci avait été contrôlée par les instances judiciaires.

151. En conclusion, en demandant que soit confirmé l'arrêt de la chambre, le Gouvernement soutient que la réglementation litigieuse n'était pas contraire à la jurisprudence de la Cour, compte tenu de la marge d'appréciation accordée aux Etats contractants.

2. Appréciation de la Cour

a) Principes généraux

152. Le droit à l'instruction, tel qu'il est prévu par la première phrase de l'article 2 du Protocole n° 1, garanti à quiconque relève de la juridiction des Etats contractants «un droit d'accès aux établissements scolaires existant à un moment donné»; mais l'accès à ces derniers ne forme qu'une partie de ce droit fondamental. Pour

que ce droit «produise des effets utiles, il faut encore, notamment, que l'individu qui en est titulaire ait la possibilité de tirer un bénéfice de l'enseignement suivi, c'est-à-dire le droit d'obtenir, conformément aux règles en vigueur dans chaque Etat, sous une forme ou une autre, la reconnaissance officielle des études accomplies» (*Linguistique belge*, précité, pp. 30-32, § 3-5; voir également *Kjeldsen, Busk Madsen et Pedersen c. Danemark*, arrêt du 7 décembre 1976, série A n° 23, pp. 25-26, § 52). De même, le membre de phrase «nul ne peut (...)» implique le principe d'égalité de traitement de tous les citoyens dans l'exercice du droit à l'instruction.

153. Le droit fondamental de chacun à l'instruction vaut pour les élèves des établissements de l'enseignement public comme des établissements privés, sans aucune distinction (*Costello-Roberts c. Royaume-Uni*, arrêt du 25 mars 1993, série A n° 247-C, p. 58, § 27).

154. Pour important qu'il soit, ce droit n'est toutefois pas absolu; il peut donner lieu à des limitations implicitement admises car il «appelle de par sa nature même une réglementation par l'Etat» (*Linguistique belge*, précité, p. 32, § 5; voir aussi, *mutatis mutandis*, *Golder*, précité, pp. 18-19, § 38, et *Fayed c. Royaume-Uni*, arrêt du 21 septembre 1994, série A n° 294-B, pp. 49-50, § 65). Certes, des règles régissant les établissements d'enseignement peuvent varier dans le temps en fonction entre autres des besoins et des ressources de la communauté ainsi que des particularités de l'enseignement de différents niveaux. Par conséquent, les autorités nationales jouissent en la matière d'une certaine marge d'appréciation, mais il appartient à la Cour de statuer en dernier ressort sur le respect des exigences de la Convention. Afin de s'assurer que les limitations mises en œuvre ne réduisent pas le droit dont il s'agit au point de l'atteindre dans sa substance même et de le priver de son effectivité, la Cour doit se convaincre que celles-ci sont prévisibles pour le justiciable et tendent à un but légitime. Toutefois, à la différence des articles 8 à 11 de la Convention, elle n'est pas liée par une énumération exhaustive des «but(s) légitime(s)» sur le terrain de l'article 2 du Protocole n° 1 (voir, *mutatis mutandis*, *Podkolzina c. Lettonie*, n° 46726/99, § 36, CEDH 2002-II). En outre, pareille limitation ne se concilie avec ledit article que s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé.

155. De telles limitations ne doivent pas non plus se heurter à d'autres droits consacrés par la Convention et les Protocoles (*Linguistique belge*, précité, p. 32, § 5, *Campbell et Cosans c. Royaume-Uni*, arrêt du 25 février 1982, série A n° 48, p. 19, § 41, et *Yanasik*, décision précitée). Les dispositions de ceux-ci doivent être envisagées comme un tout. Dès lors, il faut lire, le cas échéant, la première phrase de l'article 2 à la lumière, notamment, des articles 8, 9 et 10 de la Convention (*Kjeldsen, Busk Madsen et Pedersen*, précité, p. 26, § 52 *in fine*).

156. Le droit à l'instruction n'exclut pas en principe le recours à des mesures disciplinaires, y compris des mesures d'exclusion temporaire ou définitive d'un établissement d'enseignement en vue d'assurer l'observation des règles internes des établissements. L'application de sanctions disciplinaires constitue l'un des procédés par lesquels l'école s'efforce d'atteindre le but dans lequel on l'a créée, y compris le développement et le façonnement du caractère et de l'esprit des élèves (voir, notamment, *Campbell et Cosans*, précité, p. 14, § 33; voir aussi, en ce qui concerne l'exclusion d'un élève de l'école militaire, *Yanasik*, décision précitée, ou l'exclusion d'un étudiant pour fraude, *Sulak*, décision précitée).

b) Application de ces principes au cas d'espèce

157. Par analogie avec son raisonnement concernant l'existence d'une ingérence sur le terrain de l'article 9 (paragraphe 78 ci-dessus), la Cour peut admettre que la

réglementation litigieuse sur laquelle était fondé le refus d'accès à plusieurs cours ou épreuves opposé à l'intéressée en raison de son foulard islamique a constitué une limitation au droit de celle-ci à l'instruction, nonobstant le fait que l'intéressée a eu accès à l'université et pu suivre le cursus de son choix en fonction de ses résultats à l'examen d'entrée à l'université. Cependant, une analyse de l'affaire au regard du droit à l'instruction ne saurait en l'espèce se dissocier de la conclusion à laquelle la Cour est parvenue plus haut sous l'angle de l'article 9 (paragraphe 122 ci-dessus). En effet, les considérations énoncées à cet égard valent à l'évidence pour le grief tiré de l'article 2 du Protocole n° 1, lequel constitue une critique de la réglementation incriminée présentée dans une optique semblable à celle formulée au regard de l'article 9.

158. A ce sujet, la Cour a déjà établi que la limitation litigieuse était prévisible pour le justiciable et poursuivait les buts légitimes que sont la protection des droits et libertés d'autrui et le maintien de l'ordre public (paragraphe 98 et 99 ci-dessus). Cette limitation avait manifestement pour finalité de préserver le caractère laïque des établissements d'enseignement.

159. En ce qui concerne le principe de proportionnalité, la Cour rappelle avoir jugé aux paragraphes 118 à 121 ci-dessus qu'il existait un rapport raisonnable de proportionnalité entre les moyens employés et le but visé, en se fondant notamment sur les éléments suivants qui sont, à l'évidence, pertinents en l'espèce. D'une part, il est manifeste que les mesures en question ne constituent pas une entrave à l'exercice par les étudiants des obligations qui constituent les formes habituelles d'une pratique religieuse. D'autre part, le processus décisionnel concernant la mise en application des règlements internes a satisfait, dans toute la mesure du possible, à un exercice de mise en balance des divers intérêts en jeu. Les autorités universitaires ont judicieusement cherché à trouver des moyens appropriés sans préjudice de l'obligation de protéger les droits d'autrui et les intérêts du monde éducatif pour ne pas fermer les portes des universités aux étudiantes voilées. Enfin, il apparaît aussi que ce processus était assorti de garanties – principe de légalité et contrôle juridictionnel – propres à protéger les intérêts des étudiants (paragraphe 95 ci-dessus).

160. Il est par ailleurs artificiel de penser que la requérante, étudiante en médecine, ignorait les règles internes de l'Université d'Istanbul qui apportaient une restriction de lieu au port des tenues religieuses, et n'était pas suffisamment informée de leur justification. Elle pouvait raisonnablement prévoir qu'elle risquait de se voir refuser l'accès aux cours et épreuves si elle persistait à porter le foulard islamique à partir du 23 février 1998, comme cela s'est produit plus tard.

161. Partant, la limitation en question n'a pas porté atteinte à la substance même du droit à l'instruction de la requérante. En outre, à la lumière de ses conclusions au regard des autres articles invoqués par la requérante (paragraphe 122 ci-dessus et 166 ci-dessous), la Cour observe que la limitation en question ne se heurte pas davantage à d'autres droits consacrés par la Convention et ses Protocoles.

162. En conclusion, il n'y a pas eu violation de la première phrase de l'article 2 du Protocole n° 1.

III. SUR LA VIOLATION ALLÉGUÉE DES ARTICLES 8, 10 ET 14 DE LA CONVENTION

163. Comme devant la chambre, la requérante allègue une violation des articles 8, 10 et 14 de la Convention: la réglementation dont elle se plaint porterait atteinte à son droit au respect de sa vie privée ainsi qu'à son droit à la liberté d'expression, et

constituerait également un traitement discriminatoire.

164. La Cour ne discerne cependant nulle violation des articles 8 et 10 de la Convention, l'argumentation tirée de ceux-ci n'étant que la reformulation du grief exprimé sur le terrain de l'article 9 de la Convention et de l'article 2 du Protocole n° 1, aux sujets desquels la Cour a conclu à l'absence de violation.

165. En ce qui concerne le grief tiré de l'article 14, pris isolément ou combiné avec l'article 9 de la Convention et la première phrase de l'article 2 du Protocole n° 1, la Cour relève que celui-ci n'a pas été exposé de manière approfondie dans les plaidoiries de la partie requérante présentées à la Grande Chambre. Par ailleurs, comme cela a déjà été noté (paragraphe 99 et 158 ci-dessus), la réglementation concernant le port du foulard islamique ne vise pas l'appartenance de la requérante à une religion, mais poursuit notamment le but légitime de protection de l'ordre et des droits et libertés d'autrui et a manifestement pour finalité de préserver le caractère laïque des établissements d'enseignement. Par conséquent, les considérations à l'appui des conclusions de la Cour selon lesquelles nulle violation ne peut être constatée au regard de l'article 9 de la Convention et de l'article 2 du Protocole n° 1 valent sans conteste pour le grief tiré de l'article 14, pris isolément ou combiné avec lesdites dispositions.

166. Partant, la Cour conclut que les articles 8, 10 et 14 de la Convention n'ont pas été enfreints.

PAR CES MOTIFS, LA COUR

1. *Dit*, par seize voix contre une, qu'il n'y a pas eu violation de l'article 9 de la Convention;

2. *Dit*, par seize voix contre une, qu'il n'y a pas eu violation de la première phrase de l'article 2 du Protocole n° 1;

3. *Dit*, à l'unanimité, qu'il n'y a pas eu violation de l'article 8 de la Convention;

4. *Dit*, à l'unanimité, qu'il n'y a pas eu violation de l'article 10 de la Convention;

5. *Dit*, à l'unanimité, qu'il n'y a pas eu violation de l'article 14 de la Convention.

(omissis)

OPINION CONCORDANTE COMMUNE À M. LE JUGE ROZAKIS ET M^{me} LA JUGE VAJI

(Traduction)

Nous partageons l'avis de la majorité selon lequel il n'y a pas eu en l'espèce violation de l'article 9 de la Convention. Nous avons également voté pour le constat de non-violation de la première phrase de l'article 2 du Protocole n° 1, principalement au motif que le texte de l'arrêt est libellé de telle sorte qu'il est difficile de séparer ces deux conclusions. Comme indiqué au paragraphe 157 de l'arrêt: «une analyse de l'affaire au regard du droit à l'instruction ne saurait en l'espèce se dissocier de la conclusion à laquelle la Cour est parvenue plus haut sous l'angle de l'article 9 (...) En effet, les considérations énoncées à cet égard valent à l'évidence pour le grief tiré de l'article 2 du Protocole n° 1, lequel constitue une critique de la réglementation incriminée présentée dans une optique semblable à celle formulée au regard de l'article 9.»

Toutefois, nous estimons qu'il aurait été préférable de traiter l'affaire sous le seul angle de l'article 9, comme cela a été fait dans l'arrêt de la chambre. Selon nous, la question principale qui se pose à la Cour est celle de l'ingérence de

l'Etat dans le droit de la requérante de porter le foulard à l'université et de manifester ainsi en public ses convictions religieuses. La question centrale en l'occurrence est donc celle de la protection de la liberté de religion de l'intéressée telle que garantie par l'article 9 de la Convention. Cette disposition est dans ces conditions à l'évidence la *lex specialis* applicable aux faits de la cause; le grief corollaire concernant les mêmes faits tiré de l'article 2 du Protocole n° 1, quoiqu'indubitablement recevable, ne soulève aucune questions distincte sur le terrain de la Convention.

OPINION DISSIDENTE DE M^{me} LA JUGE TULKENS

Pour un ensemble de raisons qui se prêtent un appui mutuel, je n'ai pas voté avec la majorité ni en ce qui concerne l'article 9 de la Convention, ni en ce qui concerne l'article 2 du Protocole n° 1 relatif au droit à l'instruction, même si je suis entièrement d'accord avec la confirmation, par la Cour, du champ d'application de cette disposition à l'enseignement supérieur et universitaire.

A. La liberté de religion

1. Sur le plan des principes généraux rappelés par l'arrêt, j'ai avec la majorité des points d'accord profonds (§§104 à 108). Le droit à la liberté de religion garanti par l'article 9 de la Convention est un «bien précieux» aussi bien pour les croyants que pour les athées, les agnostiques, les sceptiques ou les indifférents. Certes, l'article 9 de la Convention ne protège pas n'importe quel acte motivé ou inspiré par une religion ou une conviction et, dans une société démocratique, où plusieurs religions coexistent, il peut se révéler nécessaire d'assortir la liberté de manifester sa religion de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun (§ 106). Par ailleurs, pluralisme, tolérance et esprit d'ouverture sont les caractéristiques essentielles d'une société démocratique et certains effets en découlent. D'une part, ces idéaux et ces valeurs d'une société démocratique doivent se fonder sur le dialogue et un esprit de compromis, ce qui implique nécessairement de la part des personnes des concessions réciproques. D'autre part, le rôle des autorités n'est pas d'enrayer la cause des tensions en éliminant le pluralisme mais de veiller, comme la Cour vient encore de le rappeler, à ce que les groupes opposés ou concurrents se tolèrent les uns les autres (*Ouranio Toxo et autres c. Grèce*, arrêt du 20 octobre 2005, § 40).

2. A partir du moment où la majorité accepte que l'interdiction de porter le foulard islamique dans l'enceinte de l'université constitue une ingérence dans le droit de la requérante de manifester sa religion garanti par l'article 9 de la Convention, que celle-ci était prévue par la loi et poursuivait un but légitime, en l'espèce la protection des droits et libertés d'autrui et de l'ordre, l'essentiel du débat porte sur le point de savoir si cette ingérence était «nécessaire dans une société démocratique». Par nature, un tel contrôle, par la Cour, s'effectue *in concreto*, en principe au regard de trois exigences, à savoir le caractère approprié de l'ingérence qui doit pouvoir protéger l'intérêt légitime mis en danger, le choix de la mesure qui est la moins attentatoire au droit ou à la liberté en cause et, enfin, sa proportionnalité qui requiert une balance des intérêts en présence¹.

¹ S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Bruxelles, Bruylant, 2001.

En l'espèce, l'approche de la majorité est sous-tendue par la marge d'appréciation reconnue aux autorités nationales et qui consacre, notamment, l'idée de la «meilleure position» dans laquelle celles-ci se trouvent pour apprécier la manière d'exécuter les obligations découlant de la Convention dans un domaine sensible (§ 109). Bien sûr, l'intervention de la Cour est subsidiaire et son rôle n'est pas d'imposer des solutions uniformes, surtout dans «l'établissement des délicats rapports entre l'État et les religions» (*Cha'are Shalom Ve Tsedek c. France*, arrêt du 27 juin 2000, § 84), même si, dans certains autres arrêts concernant des conflits entre communautés religieuses, elle n'a pas toujours adopté la même retenue judiciaire (*Serif c. Grèce*, arrêt du 14 décembre 1999; *Eglise métropolitaine de Bessarabie et autres c. Moldova*, arrêt du 13 décembre 2001). Je partage donc entièrement l'idée que la Cour doit tenter de concilier l'universalité et la diversité et qu'elle n'a pas à se prononcer sur quelque modèle religieux que ce soit.

3. J'aurais peut-être pu suivre l'approche fondée sur la marge d'appréciation si deux éléments ne venaient, en l'espèce, en affaiblir singulièrement la pertinence. Le premier concerne l'argument utilisé par la majorité pour justifier l'ampleur de la marge, à savoir la diversité des pratiques nationales quant à la question de la réglementation du port de symboles religieux dans les établissements d'enseignement et donc l'absence de consensus européen en ce domaine. Or, l'aperçu de droit comparé ne permet pas une telle conclusion: dans aucun des États membres, l'interdiction du port de signes religieux ne s'est étendue à l'enseignement universitaire qui s'adresse à un public de jeunes adultes où le risque de pression est plus atténué. Le second concerne le contrôle européen dont doit s'accompagner la marge d'appréciation, qui va de pair avec celle-ci, même si ce contrôle est plus limité que lorsque aucune marge d'appréciation n'est laissée aux autorités nationales. En fait, il ne trouve tout simplement pas sa place dans l'arrêt si ce n'est en référence au contexte historique propre de la Turquie. Or, la question soulevée dans la requête, dont la portée au regard du droit à la liberté de religion garanti par la Convention est évidente, est une question qui n'est pas seulement «locale» mais qui revêt une importance commune aux États membres. La marge d'appréciation ne peut dès lors suffire à la soustraire à tout contrôle européen.

4. Quels sont les motifs sur lesquels est fondée l'ingérence que constitue l'interdiction du port du foulard dans le droit à la liberté de religion de la requérante ? En l'espèce, en s'appuyant exclusivement sur la position des autorités et juridictions nationales, la majorité développe, sur un plan général et abstrait, deux arguments principaux: la laïcité et l'égalité. J'adhère entièrement et totalement à chacun de ces principes. Mon désaccord porte sur la manière dont ils reçoivent ici application et sur la signification qui leur est donnée par rapport à la pratique litigieuse. Dans une société démocratique, je pense qu'il faut chercher à accorder – et non à opposer – les principes de laïcité, d'égalité et de liberté.

5. En ce qui concerne, tout d'abord, la *laïcité*, il s'agit à mes yeux, je le répète, d'un principe essentiel et sans doute nécessaire, comme la Cour constitutionnelle le souligne dans son arrêt du 7 mars 1989, à la protection du système démocratique en Turquie. Mais la liberté religieuse est, elle aussi, un principe fondateur des sociétés démocratiques. Dès lors, reconnaître la force du principe de laïcité ne dispense pas d'établir que l'interdiction de porter le foulard islamique qui frappe la requérante était nécessaire pour en assurer le respect et répondait, dès lors, à un «besoin social impérieux». Seuls des faits qui ne peuvent être contestés et des raisons dont la légitimité ne fait pas de doute – et non pas des inquiétudes ou des craintes – peuvent répondre à cette exigence et justifier une atteinte à un droit garanti par la Conven-

tion. En outre, en présence d'une ingérence dans un droit fondamental, la jurisprudence de la Cour est clairement établie en ce sens qu'il ne suffit pas d'affirmer mais qu'il faut étayer les affirmations par des exemples concrets (*Smith et Grady c. Royaume-Uni*, arrêt du 27 septembre 1999, § 89). Tel ne me paraît pas être le cas en l'espèce.

6. Au regard de l'article 9 de la Convention, la liberté qui est ici en cause n'est pas celle d'avoir une religion (le for interne) mais de manifester sa religion (le for externe). Si la Cour est allée très (peut-être trop) loin dans la protection des sentiments religieux (*Otto-Preminger-Institut c. Autriche*, arrêt du 20 septembre 1994; *Wingrove c. Royaume-Uni*, arrêt du 25 novembre 1996), elle s'est montrée plus restrictive en ce qui concerne les pratiques religieuses (*Cha'are Shalom Ve Tsedek c. France*, arrêt du 27 juin 2000; *Dahlab c. Suisse*, décision du 15 février 2001), qui ne paraissent d'ailleurs être protégées que de manière subsidiaire (□ 105). En fait, il s'agit d'un aspect de la liberté de religion auquel la Cour a été peu confrontée jusqu'à présent et qui ne lui a pas encore permis de se situer par rapport aux signes extérieurs des pratiques religieuses, comme par exemple le port d'un vêtement, dont la portée peut être très différente selon les confessions².

7. En se référant à l'arrêt *Refah Partisi et autres c. Turquie* du 13 février 2003, l'arrêt soutient qu'«[u]ne attitude ne respectant pas ce principe [de laïcité] ne sera pas nécessairement acceptée comme faisant partie de la liberté de manifester la religion» (§ 114). La majorité estime donc que le port du foulard est, en soi, une atteinte au principe de laïcité, prenant ainsi parti sur une question controversée, à savoir le sens du port du foulard et le lien qu'il entretient avec le principe de laïcité³.

En l'espèce, dans sa généralité, cette appréciation soulève au moins trois difficultés. D'une part, l'arrêt ne répond pas à l'argument de la requérante, non contesté par le Gouvernement, faisant valoir qu'elle n'entendait pas mettre en cause le principe de laïcité auquel elle adhère. D'autre part, rien n'établit que son attitude, son comportement ou ses actes aient constitué des atteintes à ce principe, une approche que la Cour a toujours suivie dans sa jurisprudence (*Kokkinakis c. Grèce*, arrêt du 25 mai 1993; *Parti communiste unifié de Turquie et autres c. Turquie*, arrêt du 30 janvier 1998). Enfin, l'arrêt ne fait aucune distinction entre les enseignants et les enseignés alors que dans la décision *Dahlab c. Suisse* du 15 février 2001 qui concernait une enseignante la dimension d'exemplarité du port du foulard était expressément invoquée par la Cour (p. 14). Si le principe de laïcité requiert un enseignement affranchi de toute manifestation religieuse et doit s'imposer aux enseignants, comme à tous les agents des services publics, qui se sont engagés volontairement dans un espace de neutralité, la situation des élèves et des étudiants me semble différente.

8. Le sens de la liberté de manifester sa religion est de permettre à chacun de l'exercer, individuellement ou collectivement, dans un lieu privé ou dans l'espace commun, à la double condition de ne pas porter atteinte aux droits et libertés d'autrui et de ne pas troubler l'ordre (article 9 § 2).

S'agissant de la première condition, celle-ci aurait pu se trouver remplie si le port

² E. Brems, «The Approach of the European Court of Human Rights to Religion», in Th. Marauhn (éd.), *Die Rechtsstellung des Menschen im Völkerrecht. Entwicklungen und Perspektiven*, Tübingen, Mohr Siebeck, 2003, pp. 1 et s.

³ E. Bribosia et I. Rorive, «Le voile à l'école: une Europe divisée», *Revue trimestrielle des droits de l'homme*, 2004, p. 958.

du foulard par la requérante, comme signe religieux, avait revêtu un caractère ostentatoire ou agressif ou avait constitué un acte de pression, de provocation, de prosélytisme ou de propagande portant atteinte – ou susceptible de porter atteinte – aux convictions d'autrui. Mais cet argument n'est pas soutenu par le Gouvernement et rien ne l'établit en l'espèce dans le chef de M^{lle} Şahin. S'agissant de la seconde condition, il n'est pas davantage avancé ni démontré que le port du foulard par la requérante ait perturbé l'enseignement ou la vie universitaire ni qu'il ait provoqué quelque désordre. Aucune poursuite disciplinaire n'a d'ailleurs été engagée contre celle-ci.

9. La majorité soutient cependant que «lorsque l'on aborde la question du foulard islamique dans le contexte turc, on ne saurait faire abstraction de l'impact que peut avoir le port de ce symbole, présenté ou perçu comme une obligation religieuse contraignante, sur ceux qui ne l'arborent pas» (§ 115).

Sauf à abaisser le niveau d'exigence du droit à la liberté de religion en fonction du contexte, l'effet éventuel que le port du foulard, présenté comme un symbole, pourrait avoir sur celles qui ne le portent pas ne me paraît pas, à la lumière de la jurisprudence de la Cour, répondre à l'exigence d'un besoin social impérieux. *Mutatis mutandis*, dans le domaine de la liberté d'expression (article 10), la Cour n'a jamais accepté que des ingérences dans l'exercice de ce droit soient justifiées par le fait que les idées ou les discours ne sont pas partagés par tous et pourraient même heurter certains. Récemment, dans l'arrêt *Gündüz c. Turquie* du 4 décembre 2003, la Cour a jugé contraire à la liberté d'expression le fait qu'un dirigeant religieux musulman avait été condamné pour avoir violemment critiqué le régime laïc en Turquie, appelé à l'instauration de la Charia et qualifié de «bâtards» les enfants nés d'unions consacrées par les seules autorités laïques. Ainsi, la manifestation d'une religion par le port paisible d'un foulard peut être interdite alors que, dans le même contexte, des propos qui pourraient être entendus comme une incitation à la haine religieuse sont couverts par la liberté d'expression⁴.

10. En fait, c'est la menace «des mouvements politiques extrémistes» qui entendent «imposer à la société toute entière leurs symboles religieux et leur conception de la société, fondée sur des règles religieuses» qui justifie, pour la Cour, la réglementation litigieuse laquelle constitue une «mesure destinée à protéger le pluralisme dans un établissement universitaire» (§ 115 *in fine*). La Cour avait déjà annoncé sa position dans l'arrêt *Refah Partisi et autres c. Turquie* du 13 février 2003 lorsqu'elle estime que «[d]ans un pays comme la Turquie, où la grande majorité de la population adhère à une religion précise, des mesures prises dans les universités en vue d'empêcher certains mouvements fondamentalistes religieux d'exercer une pression sur les étudiants qui ne pratiquent pas la religion en cause ou sur ceux adhérant à une autre religion peuvent être justifiées au regard de l'article 9 § 2 de la Convention. Dans ce contexte, des universités laïques peuvent réglementer la manifestation des rites et des symboles de cette religion, en apportant des restrictions de lieu et de forme, dans le but d'assurer la mixité des étudiants de croyances diverses et de protéger ainsi l'ordre public et les croyances d'autrui» (§ 95).

Si tout le monde s'accorde sur la nécessité d'empêcher l'islamisme radical, une telle justification se heurte néanmoins à une sérieuse objection. Le port du foulard

⁴ S. Van Drooghenbroeck, «Strasbourg et le voile», *Journal du juriste*, 2004, n° 34, p. 10.

ne peut, en tant que tel, être associé au fondamentalisme et il est essentiel de distinguer les personnes qui portent le foulard et les «extrémistes» qui veulent l'imposer, comme d'autres signes religieux. Toutes les femmes qui portent le foulard ne sont pas des fondamentalistes et rien ne l'établit dans le chef de la requérante. Elle est une jeune femme majeure et universitaire dont on peut supposer une capacité de résistance plus forte aux pressions dont l'arrêt ne fournit, au demeurant, aucun exemple concret. Son intérêt individuel à exercer le droit à la liberté de religion et à la manifester par un signe extérieur ne peut être entièrement absorbé par l'intérêt public à lutter contre les extrémistes⁵.

11. En ce qui concerne ensuite l'égalité, la majorité met l'accent sur la protection des droits des femmes et le principe de l'égalité entre les sexes (§§ 115 et 116). *A contrario*, le port du foulard serait la marque de l'aliénation de la femme et, dès lors, l'interdiction assurerait la promotion de l'égalité entre les hommes et les femmes. Mais, quel est le lien entre le port du foulard et l'égalité des sexes ? L'arrêt n'en dit rien. Par ailleurs, quel est le sens du port du foulard ? Comme le relève la Cour constitutionnelle allemande dans son arrêt du 24 septembre 2003⁶, le port du foulard n'a pas de signification univoque et cette pratique répond à des motivations variables. Elle ne symbolise pas nécessairement la soumission de la femme à l'homme et, dans certains cas, certains soutiennent qu'elle pourrait même être un instrument d'émancipation de la femme. Dans ce débat, la voix des femmes est absente, celles qui portent le foulard comme celles qui choisissent de ne pas le porter.

12. L'arrêt de la Grande Chambre se réfère ici à la décision *Dablab c. Suisse* du 15 février 2001 en reprenant la partie de la motivation de cette décision qui est la plus contestable à mes yeux, à savoir que le port du foulard est un «signe extérieur fort», un symbole qui «semble être imposé aux femmes par un précepte religieux difficilement conciliable avec le principe d'égalité des sexes» et que cette pratique est difficile à «concilier (...) avec le message de tolérance, de respect d'autrui et surtout d'égalité et de non-discrimination que, dans une démocratie, tout enseignant doit transmettre à ses élèves» (§ 111 *in fine*).

Il n'appartient pas à la Cour de porter une telle appréciation, en l'occurrence unilatérale et négative, sur une religion et une pratique religieuse, tout comme il ne lui appartient pas d'interpréter, de manière générale et abstraite, le sens du port du foulard ni d'imposer son point de vue à la requérante. Celle-ci – qui est une jeune femme adulte et universitaire – a fait valoir qu'elle portait librement le foulard et rien ne contredit cette affirmation. A cet égard, je vois mal comment le principe d'égalité entre les sexes peut justifier l'interdiction faite à une femme d'adopter un comportement auquel, sans que la preuve contraire ait été apportée, elle consent librement. Par ailleurs, l'égalité et la non-discrimination sont des droits subjectifs qui ne peuvent être soustraits à la maîtrise de ceux et de celles qui sont appelés à en bénéficier. Une telle forme de «paternalisme» s'inscrit à contre-courant de la jurisprudence de la Cour qui a construit, sur le fondement de l'article 8, un véritable droit à l'autonomie personnelle (*Keenan c. Royaume-Uni*, arrêt du 3 avril 2001, § 92; *Pretty c. Royaume-Uni*, arrêt du 29 avril 2002, §§ 65-67; *Christine Goodwin c. Royaume-Uni*, arrêt

⁵ E. Bribosia et I. Rorive, «Le voile à l'école: une Europe divisée», *op. cit.*, p. 960.

⁶ Cour constitutionnelle fédérale d'Allemagne, arrêt de la Deuxième Chambre du 24 septembre 2003, 2BvR 1436/042.

du 11 juillet 2002, § 90)⁷. Enfin, si vraiment le port du foulard était contraire en tout état de cause à l'égalité entre les hommes et les femmes, l'État serait alors tenu, au titre de ses obligations positives, de l'interdire dans tous les lieux, qu'ils soient publics ou privés⁸.

13. Dans la mesure où l'interdiction de porter le foulard islamique dans l'enceinte universitaire n'est pas, à mes yeux, fondée sur des motifs pertinents et suffisants, elle ne peut être considérée comme une ingérence «nécessaire dans une société démocratique» au sens de l'article 9 § 2 de la Convention. Dans ces conditions, il y a atteinte au droit à la liberté de religion de la requérante garanti par la Convention.

B. Le droit à l'instruction

14. A partir du moment où la majorité estime qu'il convient aussi d'examiner le grief de la requérante fondé sur l'article 2 du Protocole n° 1, je suis entièrement d'accord avec l'applicabilité à l'enseignement supérieur et universitaire de cette disposition, laquelle était d'ailleurs déjà inscrite dans le rapport de la Commission dans l'*Affaire «relative à certains aspects du régime linguistique de l'enseignement en Belgique»* du 24 juin 1965. L'arrêt souligne à juste titre que «nulle cloison étanche ne sépare l'enseignement supérieur du domaine de l'instruction» et il rappelle aussi, avec le Conseil de l'Europe, «le rôle essentiel et l'importance du droit à l'accès à l'enseignement supérieur dans la promotion des droits de l'homme et des libertés fondamentales et le renforcement de la démocratie» (§ 136). Par ailleurs, dans la mesure où le droit à l'instruction est le droit de toute personne à bénéficier des moyens d'instruction, l'arrêt précise qu'un État qui a créé des établissements d'enseignement supérieur «a l'obligation de veiller à ce que les personnes jouissent d'un droit d'accès effectif à ces établissements», sans discrimination (§ 137).

15. Toutefois, alors que l'arrêt insiste sur le fait que dans une société démocratique le droit à l'instruction est indispensable à la réalisation des droits de l'homme (§ 137), il est étonnant et regrettable qu'aussitôt après il prive la requérante de ce droit pour des motifs qui ne me paraissent ni pertinents, ni suffisants. La requérante n'est pas une étudiante qui sollicite, en se fondant sur sa conviction religieuse, des dispenses ou des modifications du programme d'enseignement de l'université dans laquelle elle est inscrite (ce qui était l'hypothèse dans l'arrêt *Kjeldsen, Busk, Madsen et Pedersen c. Danemark* du 7 décembre 1976). Elle souhaite simplement terminer ses études dans les mêmes conditions que celles qui existaient au moment de son inscription à l'université et à l'époque où elle les poursuivait sans que le port du foulard pose problème. Je pense qu'en refusant à la requérante l'accès aux cours et aux épreuves inscrits au programme de la Faculté de médecine, celle-ci a été privée *de facto* du droit d'accès à l'université et, partant, du droit à l'instruction.

16. L'arrêt de la Grande Chambre adopte «par analogie» son raisonnement concernant l'existence d'une ingérence sur le terrain de l'article 9 de la Convention et estime qu'une analyse au regard du droit à l'instruction «ne saurait en l'espèce se dissocier de la conclusion à laquelle elle est parvenue sous l'angle de cette disposition». En effet, les considérations énoncées à cet égard «valent à l'évidence pour le

⁷ S. Van Drooghenbroeck, «Strasbourg et le voile», *op. cit.*

⁸ E. Bribosia et I. Rorive, «Le voile à l'école: une Europe divisée», *op. cit.*, p. 962.

grief tiré de l'article 2 du Protocole n° 1» (§ 157). Dans ces conditions, je pense que l'arrêt de la Chambre du 30 novembre 2004 avait sans doute raison de décider qu'aucune «question distincte» ne se posait sous l'angle de l'article 2 du Protocole n° 1, les circonstances pertinentes et les arguments étant les mêmes que pour l'article 9 au sujet duquel elle avait conclu à l'absence de violation.

Quoi qu'il en soit, je ne suis pas convaincue que le raisonnement en matière de liberté religieuse «vaut à l'évidence» dans le cadre du droit à l'instruction. Certes, ce dernier droit n'est pas un droit absolu et il peut être soumis à des limitations implicites mais celles-ci ne peuvent pas le réduire au point de l'atteindre dans sa substance même ni de le priver de son effectivité. En outre, ces limitations ne peuvent pas non plus se heurter à d'autres droits consacrés par la Convention dont les dispositions doivent être envisagées comme un tout. Par ailleurs, quand il s'agit d'une obligation négative, la marge d'appréciation est moins large et il appartient, en tout état de cause, à la Cour de statuer en dernier ressort sur le respect des exigences de la Convention. Enfin, toute limitation ne peut se concilier avec le droit à l'instruction que s'il existe un rapport raisonnable de proportionnalité entre les moyens et le but visé.

17. Qu'en est-il en l'espèce ? Je ne reprendrai pas ici la discussion portant sur le droit à la liberté de religion et je me limiterai à souligner des éléments additionnels qui concernent la proportionnalité des limitations apportées au droit à l'instruction de la requérante.

Tout d'abord, avant de refuser l'accès de la requérante aux cours et aux épreuves, les autorités auraient dû avoir recours à d'autres moyens soit pour tenter de convaincre la requérante de poursuivre ses études en ôtant le foulard (par exemple par une médiation), soit pour garantir la protection de l'ordre dans l'enceinte de l'université si celui-ci était effectivement mis en péril⁹. En fait, nulle autre mesure moins attentatoire au droit à l'instruction n'a été utilisée en l'espèce. Ensuite, il n'est pas contesté qu'en subordonnant la poursuite de ses études à la suppression du foulard et en lui refusant l'accès à l'université en cas de non-respect de cette exigence, la requérante a été contrainte de quitter le pays et de terminer ses études à l'université de Vienne. Aucune alternative ne s'offrait donc à elle alors que cet élément a été pris en considération dans l'arrêt *Cha'are Shalom Ve Tsedek c. France* du 27 juin 2000 pour conclure à la non-violation de la Convention (§§ 80 et 81). Enfin, l'arrêt de la Grande Chambre n'opère aucune mise en balance des intérêts en présence: d'un côté, le préjudice causé à la requérante qui non seulement s'est vue privée de toute possibilité de terminer ses études en Turquie en raison de ses convictions religieuses mais qui soutient aussi que le retour dans son pays pour y exercer sa profession sera problématique en raison des difficultés de la reconnaissance des diplômes étrangers; d'un autre côté, l'avantage qui résulte pour la société turque de l'interdiction du port du foulard par celle-ci dans l'enceinte universitaire.

Dans ces conditions, on peut raisonnablement soutenir que l'exclusion de la requérante des cours et des épreuves et, partant, de l'université a privé son droit à l'instruction de toute effectivité et, dès lors, a porté atteinte à la substance de celui-ci.

18. Il faut d'ailleurs se demander si pareille atteinte au droit à l'instruction ne revient pas, en définitive, à accepter, implicitement, pour la requérante, une discri-

⁹ O. De Schutter et J. Ringelheim, «La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l'échange», Cridho Working paper series 1/2005.

mination fondée sur la religion. Dans la résolution 1464 (2005) du 4 octobre 2005, l'Assemblée parlementaire du Conseil de l'Europe rappelle aux États membres qu'il importe «de protéger pleinement toutes les femmes vivant sur le territoire contre toute violation de leurs droits fondée sur ou attribuée à la religion».

19. Plus fondamentalement, en acceptant l'exclusion de la requérante de l'université au nom de la laïcité et de l'égalité, la majorité accepte son exclusion d'un lieu d'émancipation où précisément le sens de ces valeurs peut se construire et prendre sens. L'université donne l'expérience concrète d'un savoir libre et affranchi de toute autorité. C'est une telle expérience qui forme les esprits à la laïcité et à l'égalité plus efficacement qu'une obligation imposée sans adhésion. Le dialogue interreligieux et interculturel, fondé sur la tolérance, est une éducation et il est dès lors paradoxal de priver de cette éducation les jeunes filles qui portent le foulard et en raison de celui-ci. Vouloir la liberté et l'égalité pour les femmes ne peut signifier les priver de la chance de décider de leur avenir. L'interdiction et l'exclusion résonnent en écho au fondamentalisme que ces mesures veulent combattre. Ici comme ailleurs, les risques en sont connus: la radicalisation des croyances, les exclusions silencieuses, le retour vers les écoles religieuses. Rejetées par la loi, les jeunes femmes sont renvoyées vers leur loi. Or, nous le savons tous, l'intolérance nourrit l'intolérance.

20. Enfin, l'ensemble de ces questions doit aussi être lu à la lumière des observations contenues dans le rapport annuel d'activités de juin 2005 de la Commission européenne contre le racisme et l'intolérance (ECRI) qui s'inquiète du climat d'hostilité contre les personnes qui sont ou qui croient en la religion musulmane et estime que cette situation requiert attention et action dans le futur¹⁰. Je pense qu'il faut rappeler, encore et toujours, que ce sont les droits de l'homme qui sont les meilleurs moyens de prévenir et de combattre le fanatisme et l'extrémisme.

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¹⁰ Commission européenne contre le racisme et l'intolérance, *Rapport annuel sur les activités de l'ECRI couvrant la période du 1^{er} janvier au 31 décembre 2004*, doc. CRI (2005)36, Strasbourg, juin 2005.

La libertà di religione, di manifestazione del credo religioso e il rispetto dell'ordine pubblico. Riflessioni in margine all'affaire Leyla Sabin davanti alla Corte Europea dei diritti dell'uomo.

GERMANA CAROBENE

1. I percorsi della laicità. Genesi e strutturazione del diritto di libertà religiosa e di coscienza in ambito europeo

1. La recente sentenza della Corte Europea dei diritti dell'uomo¹ ricentralizza l'attenzione sulla difficile problematica dei simboli religiosi, tematica particolarmente delicata in Paesi, quali la Francia e la Turchia, che hanno ascritto tra i propri valori costituzionali il chiaro principio di laicità dello Stato, ma con evidenti riflessi all'interno di qualsiasi società che si voglia strutturare secondo modalità democratiche e pluraliste². La laicità diviene così non soltanto un principio, un ideale obiettivo tendenziale, ma un *metodo*, un percorso delineato per una convivenza pacifica e costruttiva del tessuto sociale³. Ed è in tal senso che le concettualizzazioni legate all'identificazione religiosa dovrebbero essere correttamente inquadrare, disancorando le analisi da sterili disquisizioni su discriminazioni interne alla società o su possibili devianze fondamentaliste. Evitare l'implosione del tessuto sociale, attraverso il

¹ Sentenza della *Grande Chambre* della Corte Europea dei diritti dell'uomo, *Leyla Sabin c. Turquie*, 10 novembre 2005, req.n. 44774/98. Tale decisione è successiva ad una precedente pronuncia della IV Commissione della Corte del 29 giugno 2004. Ambedue i testi sono pubblicati sul sito della Corte Europea www.coe.eu.int.

² Cfr. A. Ferrari, *Libertà scolastica e laicità dello Stato in Italia e Francia*, Torino, 2002; P. Cavana, *Interpretazioni della laicità. Esperienza francese ed esperienza italiana a confronto*, Roma, 1998 e ID., *I segni della discordia. Laicità e simboli religiosi in Francia*, Torino, 2004; J. Bauberot, *Laicità e pluralismo in Francia*, in *Coscienza e libertà*, 1997, pp. 73-85; G. Caputo, *La questione del velo islamico*, in *Quad. dir.pol.eccl.*, 1990, I, pp. 507-509; G. Catalano, *Libertà religiosa e diritti fondamentali nelle società pluraliste*, in *Dir.Eccl.*, 1997, III, pp. 597-616; F. Onida, *Nuove problematiche religiose per gli ordinamenti laici contemporanei*, in *Quad.dir.pol.eccl.*, 1998, I, pp. 279-293; M. Tedeschi, *I problemi attuali della libertà religiosa*, in *Studi di diritto ecclesiastico*, Napoli, 2002, pp. 1-22; P. Stefani, *La laicità dello Stato come problema giuridico. Prime riflessioni*, Bari, 2000; E. Poulat, *Liberté, laïcité. La guerre des deux France et le principe de modernité*, Paris, 1987 e, dello stesso autore, *La solution laïque et ses problèmes*, Paris, 1997.

³ Cfr. AA.VV., *Il principio di laicità nello Stato democratico*, a cura di M. Tedeschi, Soveria Mannelli (CZ), 1996; AA. VV., *Ripensare la laicità. Il problema della laicità nell'esperienza giuridica contemporanea*, a cura di G.Dalla Torre, Torino, 1993; R. Acciai, *La necessità di una ridefinizione del concetto di laicità*, in *Dir.Eccl.*, 1991, I, pp. 507- 511; P. Bellini, *Riflessioni sull'idea di laicità*, in AA.VV., *La questione della tolleranza e le confessioni religiose*, Napoli, 1991, pp. 29-50.

contemperamento delle diverse istanze culturali e culturali provenienti dai gruppi che agiscono al suo interno, è fondamentale compito del legislatore ma anche dell'interprete del diritto ed in particolare di quegli organi, come quelli europei, che dovrebbero individuare linee guida paradigmatiche alla costruzione di una comune *idea* di Europa. Una società aperta non può semplicisticamente arroccarsi sulla difesa delle proprie radici culturali, limitando l'esercizio dei diritti delle minoranze, poiché questo atteggiamento potrebbe essere ribaltato in una diversa, e futura, strutturazione degli equilibri maggioranze/minoranze⁴.

È noto che il diritto di libertà religiosa ha costituito il primo passo delle rivendicazioni in tema di diritti dell'uomo, legato all'espressione più intima delle libertà individuali, alla coscienza del singolo e al rapporto con il trascendente. La genesi del diritto di libertà religiosa potrebbe farsi coincidere con lo sviluppo delle ideologie dello Stato laico illuminista, ma la sua prima manifestazione potrebbe essere rinvenuta in una fase storica ancora antecedente e, precisamente, nell'affermazione del principio *cuius regio eius et religio*, sancito sin dal Trattato di Augusta del 1555, ribadito ed ampliato da quello di Westfalia del 1648, che estese la tutela giuridica – sempre limitatamente agli Stati tedeschi – alle confessioni cattolica, luterana e calvinista. Affermatosi come semplice diritto di scelta del sovrano di aderire ad una o ad altra confessione religiosa, cui seguiva la più limitata facoltà concessa ai sudditi di accettare la fede del sovrano o trasferirsi in un altro Paese, tale principio, che si sviluppava nell'alveo di una società non ancora secolarizzata, cominciava a minare le fondamenta del confessionismo di Stato. La definitiva frattura avvenne, tuttavia, soltanto nel periodo illuminista in cui si “recuperava appieno l'autonomia del potere civile e (si) sanciva l'irrelevanza civile più completa degli ordinamenti confessionali”⁵.

Questo fenomeno nasceva, comunque, all'interno di un'area geografica che, al di là dei particolarismi politici, aveva conosciuto quella grande forza coagulante esercitata dal dominio del pensiero cattolico nel corso dei secoli, strettamente compenetrato alle differenti compagini politiche e sociali che agivano nell'Europa occidentale. Non è certo da sottovalutare che le prime richieste di tutela della libertà religiosa furono avanzate soltanto quando si spaccò l'unitarietà del mondo cristiano nel suo interno, attraverso la rivoluzione attuata da Martin Lutero. È dalla dirompente capacità di rottura delle idee allora propugnate che cominciarono a porsi le premesse per lo sconvolgimento successivamente attuato dalle *lumières*, all'interno dell'occidente cristiano.

Nasce il concetto di Stato laico e separatista in cui si scinde la precedente unitarietà e si evidenzia la dicotomica contrapposizione potere politico/potere religioso; conseguentemente si sviluppa il concetto di religione come fenomeno assolutamente

⁴ Cfr. A. Pizzorusso, *Minoranze e maggioranze*, Torino, 1993 il quale sottolinea che “presupposto essenziale del riconoscimento che anche le minoranze hanno diritto di esistere, di esprimere i loro punti di vista e di valorizzare le loro particolarità è, da un lato, la sconfessione di qualunque dottrina la quale si proponga come portatrice della verità assoluta e, dall'altro, l'accettazione di una concezione relativistica secondo la quale, non solo non esistono verità che non possono essere utilmente messe in discussione, ma le soluzioni più valide possono emergere soltanto dal confronto di una pluralità di opinioni diverse” (p. 44).

⁵ C. Cardia, *Stato laico*, in *Enc.dir.*, vol. XLIII, Milano, 1990, pp. 874; M. Tedeschi, *Secolarizzazione e libertà religiosa*, in *Dir.Eccl.*, 1986, I, pp. 44-54.

individuale e l'estraneità della società si manifesta come unico strumento in grado di garantire la pax sociale, di fronte al contrapporsi di ideologie differenti⁶. A livello pratico questo dibattito condizionò una serie di postulati, confluiti nella *Déclaration des droits de l'homme et du citoyen*, scritta all'indomani della Rivoluzione francese, modello ispiratore dei successivi documenti internazionali sui diritti dell'uomo, con la rivendicazione del *diritto alla differenza* all'interno dell'ideologia dei diritti individuali⁷.

Risulta, tuttavia, particolarmente difficile un'analisi sul tema della libertà di religione, a livello unitario ma, soprattutto, *universale*, di fronte all'assoluta inadeguatezza dell'archetipo metodologico, che vorrebbe impostare l'intera problematica entro i parametri elaborati dalla cultura occidentale, europea. È però agli stessi, ma non solo a questi, che occorre necessariamente risalire per una ricostruzione sistematica ed una corretta definizione di tale concetto-valore⁸, perché è all'interno dello schema paradigmatico dei rapporti costruiti dagli Stati occidentali con il potere religioso che esso è nato ed è stato riconosciuto, in particolare, sulle macerie delle lunghe guerre combattute, per secoli, in nome dell'intolleranza religiosa.

La libertà di coscienza è stata tradizionalmente definita come un aspetto della libertà di religione, consistente nella facoltà di manifestare liberamente il proprio credo, considerando così il suo pieno dispiegarsi solo all'interno di una credenza religiosa⁹. Più corrette appaiono, tuttavia, le impostazioni che ne hanno ampliato il contenuto, inquadrandola come la "libertà di seguire la religione che si voglia o di non seguire alcuna religione o di avere una visione del tutto laica ed immanentistica del mondo e della vita"¹⁰ o che la definiscono "come un presupposto che attiene

⁶ C. Cardia, *Stato laico...* cit. Per l'a. è a questo momento storico che occorre risalire per rintracciare l'inclusione, nel concetto di libertà di religione, di quello di libertà di coscienza "nella quale trovano tutela tutti gli orientamenti religiosi e filosofici, di carattere confessionale, agnostico, artistico, immanentistico ecc... si afferma lo Stato agnostico non solo verso ciascuna istituzione ecclesiastica, ma verso lo stesso fattore religioso" (p. 879). Cfr. anche G. de Lagarde, *Alle origini dello spirito laico*, Brescia, 1961 e H. Kamen, *Nascita della tolleranza*, Milano, 1967.

⁷ Già undici anni dopo la morte di Voltaire il dibattito sulla tolleranza arrivò sino al punto di poter includere la critica alla tolleranza stessa, sia in nome della libertà sia addirittura in nome dell'intolleranza. Sull'importanza di questo documento cfr. N. Bobbio, *L'eredità della grande Rivoluzione*, in *Nuova Antologia*, n.2172, ott.-dic. 1989, pp. 87-100.

⁸ Cfr. M. Tedeschi, *Per uno studio del diritto di libertà religiosa*, in AA.VV., *Libertad y derecho fundamental de libertad religiosa*, Madrid, 1989, pp. 213-239 sottolinea la pericolosità insita nella definizione di tale libertà come diritto pubblico soggettivo che ha portato larga parte della dottrina a trascurare aspetti che certamente non erano di secondaria importanza per un'analisi dello stesso, quali la sua valutazione come concetto o come valore.

⁹ Cfr. P.A. D'Avack, *Libertà di coscienza, di culto e di propaganda*, in *Enc.dir.*, vol. XXIV, Milano, 1974, p. 593 ss. Per una ricostruzione del concetto cfr. T. Martines, *Libertà religiosa e libertà di formazione della coscienza*, in AA.VV., *Libertad y derecho fundamental*, cit., Madrid, p. 45 ss; P. Di Marzio, *La libertà di coscienza come diritto soggettivo*, in *Dir.Eccl.*, I, 1989, pp. 267-295.

¹⁰ F. Finocchiaro, *Art. 19 Cost.*, in *Commentario della Costituzione*, a cura di G. Branca, p. 261 il quale sottolinea anche la necessità dell'individuo di essere posto in grado di poter formare liberamente la propria coscienza. Cfr. anche ID., *Lo Stato e la formazione delle coscienze*, in AA.VV., *Libertad religiosa...* cit., p. 176 ss. Nei confronti di quest'ultima affermazione *contra* G. Catalano, *La libertà religiosa*, Milano, 1967 il quale, definendo la libertà di coscienza come la "libertà di manifestare il proprio pensiero in materia religiosa con atti, con parole, con scritti" (p. 36), sostiene che

all'interna volontà", ponendola a base delle manifestazioni esterne della libertà religiosa¹¹, "diritto 'naturale' primordiale ed essenziale"¹². In questo senso tale libertà può essere associata a quella di pensiero, attenendo alla più intima ed inviolabile sfera dell'uomo, all'interno di uno spazio che non ammette limitazioni o ingerenze da parte dell'ordinamento giuridico perché non deve necessariamente estrinsecarsi all'esterno, diversamente dalla libertà di manifestazione, sia del pensiero che della religione, attraverso il culto e le pratiche che comporteranno, di necessità, il rispetto di canoni comportamentali comuni.

Se, tuttavia, i poteri dello Stato non possono spingersi sino al momento dell'intramissione diretta nella coscienza individuale, il pericolo di coazione della stessa sussiste sempre, esercitabile attraverso forme, più o meno occulte, di penetrazione e di manipolazione. Ed è per questo motivo che larga parte della dottrina ha evidenziato come il punto di partenza di tale diritto sia da individuarsi, alla base, nell'essenziale libertà di formare liberamente la propria coscienza che, pur se di dubbia consistenza ed identificazione normativa, in un sistema democratico "riposa nella struttura pluralistica dello Stato e della società"¹³, escludendo "indottrinamenti forzati da parte dei poteri pubblici e privati"¹⁴.

In un settore così delicato, attinente alle facoltà ed agli strumenti di cui un individuo può liberamente disporre per una valutazione del reale, è importante, dunque, non sottovalutare il ruolo essenziale che i poteri dello Stato e della società possono esercitare – e di fatto esercitano¹⁵ – chiedendo, quanto meno a livello teorico, l'attuazione di forme di intervento che, lasciando esprimere il pluralismo ideologico, consentano la formazione di una coscienza critica¹⁶. La scomposizione del diritto di

essa "non avrebbe senso sul piano giuridico, se si risolvesse entro la sfera individuale, poiché il diritto non si occupa di quanto si svolge esclusivamente in interiore hominis"; ma cfr. anche F. Ruffini, *La libertà religiosa. Storia di un'idea*, Torino, 1901, per il quale tale libertà non "cade nel campo giuridico sotto questo suo aspetto di facoltà essenzialmente umana" (p. 11).

¹¹ M. Tedeschi, *Per uno studio...* cit., il quale parte dalla considerazione che nella nostra normativa costituzionale manca qualsiasi definizione di tale libertà ed ancora è in fase progettuale una legge sulla libertà di coscienza e di religione. In tal senso anche P. Bellini, *Principi di diritto ecclesiastico*, Bresso, 1972, in particol. p. 155.

¹² S. Lariccia, *La libertà religiosa tra garanzie costituzionali, discipline giuridiche positive e processi di trasformazione sociale*, in AA. VV., *Nuovi studi di diritto canonico ed ecclesiastico*, Salerno-Napoli, 1990, in particol. p. 359.

¹³ G. Casuscelli, *Il diritto di formare liberamente la coscienza: la libertà dalla paura*, in particol. p. 131 ma anche P. Bellini, *Centralità della coscienza e condizionamenti dell'ambiente*, in particol. p. 87 ss, ambedue pubblicati in AA.VV., *Libertad...* cit.

¹⁴ M. Tedeschi, *Per uno studio...* cit., sottolinea che "tale tutela non può sostanziarsi né in comportamenti omissivi né nel suo disconoscimento, ma in comportamenti commissivi e positivi, sia dello Stato che dei singoli" (p. 234). *Contra* P.A. D'Avack, *Libertà di coscienza...* cit., in particol. p. 593.

¹⁵ "Libertà' nel linguaggio filosofico moderno non significa indifferenza dell'arbitrio ma 'autonomia'... il che vuol dire non già 'non riconoscere alcuna norma' ma 'non riconoscere alcuna norma che quella che ciascuno di noi dà a se stesso': N. Bobbio, *Della libertà dei moderni comparata a quella dei posteri*, in *Nuovi Argomenti*, 1954, fasc. 11, pp. 54-86, in particol. p. 56; ma anche ID., *Difesa della libertà*, in *Società*, 1952, pp. 512-520.

¹⁶ Per H. Kelsen, *Teoria generale del diritto e dello Stato*, trad. it. di S. Cotta e G. Treves, Torino, 1952 "una democrazia senza opinione pubblica è una contraddizione in termini. In quanto l'opinione

libertà religiosa in ambito interno/esterno evidenzia come, nelle moderne strutture democratiche, si sia in presenza di una totale libertà nella sfera che si sviluppa *in interiore hominis* ma che limiti possono, e devono, essere previsti nell'estrinsecarsi esterno, nella "manifestazione" di tale fondamentale diritto. Ed è, altresì, evidente il pericolo di arbitrarie ingerenze da parte dei pubblici poteri, che la legislazione europea ha tentato di limitare attraverso l'introduzione dell'inciso "misure necessarie in una società democratica"¹⁷, che sembrerebbe attualmente individuabile nella tutela e nel rispetto dell'identità dei singoli Stati¹⁸.

2. L'affaire Leyla Sabin c. Turchia davanti alla Corte Europea dei diritti dell'uomo

2. Le problematiche dell'identificazione religiosa si sono prepotentemente evidenziate all'attenzione dell'opinione pubblica – ed alla riflessione normativa e giurisprudenziale – con particolare vigore soprattutto all'interno di strutture costituzionalmente laiche. Il richiamo è, naturalmente, alla legge francese del 2004 sull'interdizione dei simboli religiosi all'interno delle scuole pubbliche¹⁹ ma anche a recenti interventi di giurisdizioni statali, come in Inghilterra e in Germania²⁰, sino alle posizioni assunte dalla Corte europea sul diniego all'uso del foulard, che hanno negato la possibilità di ravvisare una violazione dell'art. 9 della Convenzione, concernente la libertà di pensiero, coscienza e religione.

pubblica può sorgere dove sono garantite la libertà di pensiero, la libertà di parola, di stampa e di religione, la democrazia coincide con il liberalismo politico" (p. 293).

¹⁷ Art. 9/2 della Convenzione europea: "La libertà di manifestare la propria religione o il proprio credo può essere oggetto di quelle sole restrizioni che, stabilite per legge, costituiscono misure necessarie in una società democratica, per la protezione dell'ordine pubblico, della salute o della morale pubblica, o per la protezione dei diritti e della libertà altrui". Tali previsioni non sono, invece, state incluse nell'art. 10 della Carta dei diritti fondamentali dell'Unione Europea, proclamata a Nizza nel 2000.

¹⁸ Art. I-5 TCUE: "identità degli Stati membri legata alla loro struttura fondamentale, politica e costituzionale".

¹⁹ La legge 2004-228 del 15 marzo 2004 che inquadra, in applicazione del principio di laicità, "*le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées public*" è pubblicata sul sito del governo francese www.legifrance.gouv.fr. Cfr. B. Basdevant-Gaudemet, *Commentaire de la loi du 15 mars 2004*, in *Quad.dir.pol.eccl.*, 2, 2004, p. 413 ss.

²⁰ Cfr. A. Di Martino, *La "decisione sul velo" del Bundesverfassungsgericht*, nel sito www.associazionedeicostituzionalisti.it/redazione.html. Nell'articolo un richiamo consente di leggere integralmente il testo della sentenza tedesca in questione e quello di un'altra pronuncia del BVerfG, del 30 lugl. 2003, in cui il supremo Tribunale aveva giudicato illegittimo il licenziamento di una dipendente di un grande magazzino che intendeva indossare il velo. Cfr. anche *House of Lord. Opinions of Appeal for judgment in the case R (on the application of Begun (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School*, 22 mar. 2006, in olir/jiab.htm. In tale caso (in cui l'avvocato difensore era la moglie dell'attuale primo ministro inglese) è stato negato il diritto ad indossare un abito diverso dall'uniforme scolastica dato che la stessa era prevista, in forma speciale, anche per le studentesse mussulmane, la maggioranza all'interno della scuola.

La prima sentenza, *Dahlab c. Svizzera*²¹, riguardava un'insegnante di scuola elementare licenziata perché, indossando il velo, un chiaro simbolo religioso, rischiava di ingerire indebitamente nella fase formativa delle coscienze di alunni ancora piccoli, iscritti alla scuola pubblica, costituzionalmente definita laica e neutrale. Nella seconda ipotesi il caso, già deciso da un primo intervento giurisprudenziale, è stato ulteriormente ribadito da una sentenza successiva della *Grande Chambre* che, come nella prima pronuncia, ha dichiarato la legittimità dell'allontanamento dai corsi della facoltà di medicina di una studentessa che rivendicava, contrariamente alle istruzioni di abbigliamento, il diritto ad indossare il foulard²². Sono, tuttavia, molteplici gli interventi giurisprudenziali che hanno interessato la Commissione e la Corte Europea negli ultimi anni e che riguardavano il diritto di manifestazione del proprio credo religioso, inteso in senso ampio, casi nei quali gli organismi europei non hanno riconosciuto una violazione dell'art. 9 nel suo complesso²³.

È noto che la Turchia delinea una particolare tipologia di Stato a maggioranza musulmana, dal momento che l'art. 2 della Costituzione espressamente definisce la Repubblica uno Stato di diritto, laico e sociale. L'art. 10 sancisce il principio di uguaglianza senza distinzione di lingua, razza, colore, sesso, opinioni politiche, credenze filosofiche, religione, appartenenza a una corrente religiosa o motivi simili; ribadisce, inoltre, l'uguaglianza uomo-donna ed impone allo Stato l'obbligo di mettere in pratica tale fondamentale diritto. In tema di abbigliamento l'ultimo intervento legislativo è della legge del 25 ottobre 1990 che ha sancito piena libertà dello stesso nelle scuole superiori, purchè non in contrasto con norme di legge e tale disposizione è stata ribadita da un successivo intervento della Corte Costituzionale turca, la quale ha sottolineato che tale norma non autorizza a portare il velo per motivi religiosi.

Molteplici sono stati, a partire da tale momento, le richieste di intervento degli organi europei. La Commissione, nel caso *Karaduman* del 1993 ha respinto il ricorso

²¹ *Dahlab c. Suisse*, 15 fev. 2001, pubblicata sul sito della Corte Europea, www.echr.coe.int. Cfr. A. Loretan – K.W. Sahlfeld, *L'Islam pone nuove sfide alla Svizzera. La Corte europea dei Diritti umani in due casi contro la Svizzera*, in *Quad.dir.pol.eccl.*, 2002/3, pp. 825-846.

²² Nella prima decisione, del 29 giugno 2004, la IV sezione della Corte aveva affermato, all'unanimità, di non aver ravvisato violazione dell'art. 9 della Convenzione e che non si ponevano problematiche con riferimento agli artt. 8-10-14 in combinato disposto con l'art. 9 Conv. e art. 2, Protocollo n. 1. Ad identica risoluzione è pervenuta la *Grande Chambre* con la decisione del 10 novembre 2005. Abedue i testi delle sentenze sono pubblicate su www.echr.coe.int.

²³ Cfr. *Ahmand v. United Kindom*, 1981, in cui si sottolineò che il lavoro del soggetto non consentiva allontanamento per le preghiere, v. in particol. par. 11; *Karaduman c. Turchia*, n. 16278/90 in cui l'Università negava il rilascio di un diploma perché la ricorrente aveva presentato una foto con velo; *Kottinen v. Finland*, 1996 in cui un Avventista del settimo giorno, dipendente di una compagnia aerea rifiutava di lavorare dopo il tramonto del venerdì; *Stedman v. United Kindom*, 1997; *Valsamis v. Greece*, in particol. par. 38, in cui un alunno, Testimone di Geova, si rifiutava di partecipare alla parata del National Day; *Kalaç v. Turchia*, 1997, in cui al par. 27 si sottolinea che le regole militari possono produrre un ridimensionamento legittimo dei diritti di libertà dal momento che nel caso de quo si vietava ad un militare l'appartenenza ad un movimento fondamentalista; *Cha'are Shalom Ve Tsedek v. France*, 2000, in particol. par.81. Tutte le sentenze sono pubblicate su www.echr.coe.int. Interessante un recente Parere dell'U.N. Human Rights Committee, del 18 gennaio 2005, pubblicato su www.ohr.it, in cui si sottolinea che il divieto di indossare il velo integra violazione dell'art. 18 del Patto sui diritti civili e politici (riguardante la libertà di religione).

ritenendo che il rifiuto dell'Università di Ankara di rilasciare il diploma con una foto del soggetto "velata" non può costituire violazione dell'art. 9, non potendosi ritenere inquadrabile in una pratica religiosa qualsiasi condotta ispirata da motivazioni religiose²⁴.

È importante sottolineare che il parametro della laicità ha caratterizzato l'evoluzione in senso democratico e moderno del Paese²⁵, mirando all'affrancamento da ataviche ingerenze religiose e ad un progressivo avvicinamento con il mondo occidentale, *ralliement* divenuto attualmente di primo piano data la chiara volontà politica di adesione all'Unione Europea. È importante, inoltre, sottolineare che la strutturazione del Paese ha avuto quale perno centrale l'emancipazione femminile e, chiaramente, il rifiuto del velo, simbolo di una anacronistica sottomissione della donna²⁶. L'abbandono del religioso dalla sfera pubblica, come il processo di secolarizzazione evidenziano una chiara volontà politica, definita, sulla scia del concetto francese di laicità, con il termine *laiklik*, strutturatosi attraverso una serie di interventi in campo giuridico che partono dall'insegnamento laico impartito dalle scuole pubbliche e dalle regole in tema di abbigliamento²⁷. La laicità "alla turca" è stata, dunque, imposta a livello legislativo determinando, o cercando di determinare, una presa di coscienza da parte della società civile, seguendo, quindi, un percorso giuridico e culturale diametralmente opposto a quello delle culture occidentali.

Il processo di modernizzazione del Paese è, tuttavia, continuamente minacciato da manifestazioni a carattere dichiaratamente conservatore che, utilizzando il richiamo religioso ed il progetto di una riacquisizione di una propria identità, rischiano di destabilizzare l'ordine sociale. Ed è in questo senso che il principio di laicità, così

²⁴ In Italia il Ministero dell'interno ha autorizzato l'uso del velo per i documenti di identità. In Germania è noto un intervento del Verwaltungsgerichtshof dell'Assia che ha confermato che le autorità non possono rifiutare foto con il velo, purché sia consentita l'identificazione del soggetto: sent. 7 giu. 2004, AZ: 7 TG 448/04. Con due ordinanze del 2 luglio 2002 la Corte ha giudicato ammissibili i ricorsi di Zeynep Tekin contro la riforma del 1990, causa poi cancellata dal ruolo, e di Leyla Sahin.

²⁵ Corte Cost. Turca aveva affermato in una sentenza del 1989 che «la laïcité est l'organisatrice civique de la vie politique, sociale et culturelle, qui se fonde sur la souveraineté nationale, la démocratie, la liberté et la science. La laïcité est le principe qui offre à l'individu la possibilité d'affirmer sa personnalité propre grâce à la liberté de pensée et qui, en réalisant la distinction entre la politique et les croyances religieuses, rend effectives les libertés de conscience et de religion. Dans les sociétés fondées sur la religion, qui fonctionnent avec la pensée et les règlements religieux, l'organisation politique a un caractère religieux. Dans le régime laïque, la religion est préservée d'une politisation. Elle n'est plus un outil de l'administration et se maintient à sa place respectable, qui est à évaluer par la conscience de tout un chacun». Tale passo è esplicitamente citato nella sentenza della Corte Europea del 10 nov. 2005, par. 39.

²⁶ Le donne hanno ottenuto il diritto di voto, e di elegibilità, in Turchia nel 1936, quindi, molti anni prima di molte donne europee! Il dibattito sul rapporto donne-religione è attualmente al centro dell'attenzione europea come dimostra una recente Risoluzione del Consiglio di Europa, 4 ottobre 2005, n. 1464, "Femmes et Religion in Europe". Cfr. anche Risoluzione del 6 luglio 2005 del Parlamento Europeo, "Ruolo delle donne in Turchia nella vita sociale, economica e politica". Ambedue i documenti sono pubblicati su www.olir.it.

²⁷ J.P. Burdy – J. Marcou, *Laïcité/Laiklik: Introduction*, in *Cahier d'études sur la Méditerranée orientale et le monde turco-iranien*, n. 19, 1995, p. 45 ss.

come il divieto di discriminazioni sessiste, faticosamente delineatisi a livello normativo, sembrano non sufficientemente realizzati all'interno della compagine sociale, in cui forze centripete agiscono per la loro erosione.

Alla luce di queste osservazioni è possibile tentare di comprendere, da un lato le motivazioni dell'enorme numero di richieste turche di intervento agli organismi europei, *super partes*, per presunte violazioni dell'art. 9 e, nel caso *de quo*, le motivazioni della sentenza che non appaiono pienamente condivisibili. Se, infatti, nell'*affaire Dahalab* si sottolineava la particolare funzione pubblica svolta da un insegnante ed il delicato ruolo di veicolo culturale e di formazione dell'individuo che la scuola laica vuole costruire, più complesso appare spiegare la legittimità dell'intervento nel caso Leyla Sahin.

L'opinione dissenziente alla decisione della Corte, espressa dal giudice Tulken ha sottolineato che in un caso recente «la Cour a jugé contraire à la liberté d'expression le fait qu'un dirigeant religieux musulman avait été condamné pour avoir violemment critiqué le régime laïc en Turquie, appelé à l'instauration de la Charia et qualifié de "bâtards" les enfants nés d'unions consacrées par les seules autorités laïques. Ainsi, la manifestation d'une religion par le port paisible d'un foulard peut être interdite alors que, dans le même contexte, des propos qui pourraient être entendus comme une incitation à la haine religieuse sont couverts par la liberté d'expression»²⁸.

Nel caso di specie l'uso del velo non poteva assumere alcun tipo di incidenza nella sfera di altri soggetti, ma avrebbe potuto, più correttamente, essere inquadrato come una forma di manifestazione del proprio credo che non minava l'ordine sociale né politico. In tale ipotesi la studentessa chiedeva semplicemente di poter indossare il velo per seguire delle lezioni universitarie senza che questo potesse costituire alcuna forma di ostentazione o di imposizione. Appare pertanto poco giustificabile il richiamo alle norme sulla laicità delle strutture scolastiche che potrebbero probabilmente incidere sul corpo docente ma non limitare i diritti degli studenti. Il ruolo della scuola, infatti, è indubbiamente legato alla formazione, non soltanto dal punto di vista culturale-educativo dell'alunno ma alla costruzione della personale ed incorribile *identità* dello stesso che può e deve rispettare le diversità del singolo e dei gruppi. Obiettivo tendenziale dovrebbe essere un'integrazione che non mortifichi le divergenze ma che sia in grado di contenerle tutte senza assimilarle e snaturarle²⁹.

²⁸ «En fait, c'est la menace 'des mouvements politiques extrémistes' qui entendent 'imposer à la société toute entière leurs symboles religieux et leur conception de la société, fondée sur des règles religieuses' qui justifie, pour la Cour, la réglementation litigieuse laquelle constitue une «mesure destinée à protéger le pluralisme dans un établissement universitaire» (§ 115). La Cour avait déjà annoncé sa position dans l'arrêt Refah Partisi et autres c. Turquie du 13 février 2003 lorsqu'elle estime que «[d]ans un pays comme la Turquie, où la grande majorité de la population adhère à une religion précise, des mesures prises dans les universités en vue d'empêcher certains mouvements fondamentalistes religieux d'exercer une pression sur les étudiants qui ne pratiquent pas la religion en cause ou sur ceux adhérant à une autre religion peuvent être justifiées au regard de l'article 9.2 de la Convention. Dans ce contexte, des universités laïques peuvent réglementer la manifestation des rites et des symboles de cette religion, en apportant des restrictions de lieu et de forme, dans le but d'assurer la mixité des étudiants de croyances diverses et de protéger ainsi l'ordre public et les croyances d'autrui» (§ 95). Cfr. anche par. 96.

²⁹ F. Radnay, *Culture, Religion and Gender*, in *International Journal of Constitutional Law*, 1, 2003, in particul. p. 663 sottolinea che "genuine individual consent to a discriminatory practice or dissent

Nel caso *de quo* la Corte ha sostanzialmente riconosciuto la violazione della prima parte dell'art. 9 della Convenzione ma la ha ritenuta giustificabile ex par. 2 della stessa disposizione normativa³⁰. Nelle sue motivazioni, richiamando la necessità di una sempre maggiore tolleranza e sottolineando le diverse concezioni europee in tema di religione, ha ridimensionato le possibilità di un proprio intervento, chiarendo che «la tâche de la Cour consiste à rechercher si les mesures prises au niveau national se justifient dans leur principe et sont proportionnées»³¹. Alla luce del particolare background culturale della Turchia la Corte evidenzia il forte impatto sociale dell'uso del foulard e che «on ne saurait faire abstraction de l'impact que peut avoir le port de ce symbole, présenté ou perçu comme une obligation religieuse contraignante, sur ceux qui ne l'arborent pas»³².

È noto che in relazione alla tutela della libertà di religione il controllo degli organismi europei deve essere indirizzato ad una valutazione, *in concreto*, del rispetto di

from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions... A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families... a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students". Cfr. anche F. Shirazi, *The Veil Unveiled. The Hijab in Modern Culture*, Gainesville, University Press of Florida, 2001, per una ricostruzione delle origini religiose del velo.

³⁰ Cfr. par. 100-102 della sentenza cit.

³¹ Par. 110. Al paragrafo successivo prosegue sottolineando che «dans les décisions Karaduman c. Turquie (no 16278/90, décision de la Commission du 3 mai 1993, DR 74, p. 93) et Dahlab, précitée, les organes de la Convention ont considéré que, dans une société démocratique, l'Etat peut limiter le port du foulard islamique si cela nuit à l'objectif visé de protection des droits et libertés d'autrui, de l'ordre et de la sécurité publique. Dans l'affaire Karaduman précitée, des mesures prises dans les universités en vue d'empêcher certains mouvements fondamentalistes religieux d'exercer une pression sur les étudiants qui ne pratiquent pas la religion en cause ou sur ceux adhérant à une autre religion ont été considérées comme justifiées au regard de l'article 9.2 de la Convention. Par conséquent, il a été établi que des établissements de l'enseignement supérieur peuvent réglementer la manifestation des rites et des symboles d'une religion en fixant des restrictions de lieu et de forme, dans le but d'assurer la mixité d'étudiants de croyances diverses et de protéger ainsi l'ordre public et les croyances d'autrui (voir, également, Refah Partisi et autres, précité, § 95). Dans le cadre de l'affaire Dahlab précitée, qui concernait une enseignante chargée d'une classe de jeunes enfants, la Cour a notamment mis l'accent sur le «signe extérieur fort» que représentait le port du foulard par celle-ci et s'est interrogée sur l'effet prosélytique que peut avoir le port d'un tel symbole dès lors qu'il semblait être imposé aux femmes par un précepte religieux difficilement conciliable avec le principe d'égalité des sexes. Elle a également noté la difficulté de concilier le port du foulard islamique par une enseignante avec le message de tolérance, de respect d'autrui et surtout d'égalité et de non-discrimination que, dans une démocratie, tout enseignant doit transmettre à ses élèves».

³² «Entrent en jeu notamment, comme elle l'a déjà souligné ... la protection des «droits et libertés d'autrui» et le «maintien de l'ordre public» dans un pays où la majorité de la population, manifestant un attachement profond aux droits des femmes et à un mode de vie laïque, adhère à la religion musulmane. Une limitation en la matière peut donc passer pour répondre à un «besoin social impérieux» tendant à atteindre ces deux buts légitimes, d'autant plus que, comme l'indiquent les juridictions turques ..., ce symbole religieux avait acquis au cours des dernières années en Turquie une portée politique : par. 111.

tre esigenze fondamentali: il carattere dell'ingerenza, con riferimento al diritto/interesse danneggiato; la scelta tra le misure adottate, privilegiando la meno invasiva e, il rispetto della proporzionalità. Nella lettura della sentenza in oggetto si evidenzia, più del rispetto di tali fondamentali principi, una pericolosa associazione tra l'uso del foulard e il pericolo del fondamentalismo che, se in talune ipotesi potrebbe risultare giustificato, non appare tale nel caso *de quo* e, in linea generale, non può costituire un criterio nella valutazione della possibile compressione dei diritti fondamentali dell'individuo³³.

3. Tolleranza, diritto all'identità e tutela della diversità: le sfide delle società 'moderne'

3. L'analisi della sentenza europea impone, quindi, un'attenta riflessione sul contenuto *attuale* del diritto/ideale di libertà religiosa ed il corretto inquadramento di tale libertà nelle categorie concettuali della laicità.

I diritti dell'uomo sono comunemente inquadrati nell'ideale della libertà – libertà *di*, libertà *da* – quale diretta ed immediata conseguenza della fase storica delle loro rivendicazioni, spinta propulsiva alla costruzione degli Stati in senso moderno, nei quali fu condotta una lotta tenace contro le prevaricazioni dell'assolutismo regio e del connubio trono-altare. Identificare i diritti dell'uomo soltanto quale difesa delle libertà sembrerebbe riduttivamente limitare la *facultas agendi* al rispetto di determinati valori, eticamente condivisi o condivisibili rispetto ai quali si impone il dovere, da parte degli altri, di rispetto di tale diritto. I diritti dell'uomo devono, tuttavia, presentare un *quid pluris*, non semplici diritti di realizzazione della libertà del soggetto ma diritti di realizzazione dell'uomo nella sua complessità, della sua natura ideale. Intesi in tal senso non possono, e non devono, comportare un semplice atteggiamento negativo da parte dello Stato – la rivendica della libertà *da* qualcuno – quanto piuttosto sembrano dover implicare l'intervento *attivo*. L'identificazione corretta della *res quae agitur* – la libertà religiosa quale diritto umano autonomo – è quindi pregiudiziale a qualsiasi intervento in materia.

Nella classica ripartizione delle diverse categorie dei diritti si sottolinea che i diritti civili obbligano lo Stato a un atteggiamento di non impedimento – libertà *da* – quelli politici implicano una libertà attiva – libertà *di* – ed infine quelli sociali obbligano ad un comportamento *attivo*. I diritti del primo tipo, quelli civili, impongono al potere politico un'astensione in grado di consentire l'espandersi dell'*agere* del cittadino. Nell'ultima tipologia è, invece, primaria l'esigenza dell'individuo di un intervento da parte dei pubblici poteri tale da garantire l'effettivo esercizio e tutela dei diritti stessi.

Emerge, dunque, un profilo concernente il particolare *trait d'union* tra i tre diritti, intrinsecamente collegati, paradigmatici delle libertà intellettuali: libertà di religione, coscienza e pensiero. Essi investono anche il settore delle limitazioni che possono, o debbono essere imposte, ma si configurano *in primis* come libertà negative, libertà dall'esercizio di autoritativi interventi da parte dello Stato. Questa sottoline-

³³ Come sottolinea il giudice dissenziente, Tulken, Leyla Sahin «est une jeune femme majeure et universitaire dont on peut supposer une capacité de résistance plus forte aux pressions dont l'arrêt ne fournit, au demeurant, aucun exemple concret. Son intérêt individuel à exercer le droit à la liberté de religion et à la manifester par un signe extérieur ne peut être entièrement absorbé par l'intérêt public à lutter contre les extrémistes».

atura del momento negativo è importante, anche se non esaustiva, perché consente di evidenziare il carattere difensivo dei diritti e delle libertà intellettuali ed indica chiaramente nello Stato il destinatario dell'obbligo di astensione. Applicando questa riflessione alla libertà di religione, ne deriva che essa non può esaurirsi nella libertà di praticare una religione o un credo ma richiede, anche, ad esempio, la sottrazione ad offese che potrebbero turbarla ma, soprattutto, a comportamenti che potrebbero limitarla nella sua piena estrinsecazione.

Nella dottrina internazionalistica dei diritti umani, ed in atti e documenti delle più importanti organizzazioni internazionali, si tende a porre sullo stesso piano religione, coscienza e pensiero, sia con riferimento all'esercizio dei rispettivi diritti da parte di singoli soggetti o di pluralità di individui – la dimensione comunitaria – sia con riferimento all'obbligo che ne deriva. Se storicamente il problema si era così strutturato a causa della contrapposizione ideologica dei blocchi Est-Ovest nella fase della guerra fredda, il totale superamento di queste contrapposizioni non consente di mantenere inalterato tale impianto strutturale, che tende ad assimilare e ridurre la libertà di religione a quella di pensiero e/o di opinione.

La difficile integrazione con i tendenziali valori della laicità e del multiculturalismo non possono, infatti, giustificare, la riduzione del fattore religioso in un mero ambito privatistico, svuotandone qualsiasi dimensione sociale in nome di un presunto pluralismo delle moderne società occidentali. Interpretando *a contrario* si dovrebbe temere che l'invasione del religioso nella sfera pubblica possa solo sfociare in pericolosi fenomeni di intolleranza, se non di aperta conflittualità del tessuto sociale. Alla luce delle più recenti impostazioni dottrinarie i concetti di religione e convinzione dovrebbero essere interpretati attraverso l'intermediazione dell'ideale della tolleranza, inteso nel senso più ampio possibile, evitando, tuttavia, di confondere tali libertà *sic et simpliciter* con il principio di non discriminazione.

Il problema è reso ancora più complesso dalla tendenza ad associare a queste tre libertà anche il concetto di convinzioni filosofiche ma anche dal particolare rapporto della libertà di religione con i diritti delle minoranze, poiché spesso l'identità del gruppo minoritario è legata ad una data appartenenza religiosa. Gli organismi internazionali ed interni prevedono in tale settore norme specifiche per la tutela delle minoranze con la funzione di riaffermare il divieto di usare trattamenti differenziati in ragione delle diversità di adesione religiosa, ma soprattutto di garantire l'esigenza di eguaglianza *sostanziale*, assicurando alle diverse compagini religiose condizioni idonee alla conservazione del proprio patrimonio, conferendo non soltanto determinati diritti e facoltà ma soprattutto il diritto al mantenimento dei caratteri propri al gruppo, all'interno dei quali un tratto fondamentale è indubbiamente rappresentato dal patrimonio religioso. L'esistenza di tali interessi, operanti quali fattore di aggregazione del gruppo conferisce allo stesso il carattere di formazione a base socio-religiosa e la tutela specifica accordata è l'unico strumento in grado di parificare situazioni di partenza diseguali, poiché la vera libertà non consiste nel dare a tutti gli stessi diritti – che si tradurrebbe in un'eguaglianza *formale* – ma a ciascuno il suo³⁴. In tali ipotesi l'interrogativo che si pone è se tali forme di intervento rientrino nel rispetto del valore della tolleranza o siano configurabili come tutela della libertà di religione, come diritto giuridico autonomo. Tale ultima accezione imporrebbe, infatti, di considerare tale diritto come valevole

³⁴ F. Ruffini, *Libertà religiosa...* cit., p. 11.

erga omnes e, quindi, anche in possibile confronto dialettico con l'ordinamento. Se, invece, si partisse da un'interpretazione della libertà religiosa in termini di tolleranza si potrebbero giustificare situazioni in cui il fattore religioso, pur costituendo uno degli elementi fondamentali che costituiscono l'identità del gruppo minoritario, dovrebbe essere posto in confronto dialettico con il concetto di identità culturale.

Notevoli problematiche si evidenziano nel tentativo di una definizione *positiva* della libertà di religione. Intesa, infatti, in un'accezione puramente negativa essa può essere spiegata come il diritto appartenente all'individuo di escludere dalla propria sfera di libertà qualsiasi interferenza – dello Stato o di altri soggetti – con il pretesto di ragioni religiose. Nella sua formulazione positiva il concetto si colora di differenti qualificazioni a seconda dei diritti che si accompagnano allo stesso – libertà di fede o di professione religiosa, libertà di culto, libertà di manifestazione e di propaganda religiosa. Storicamente la stessa era associata alla libertà di coscienza, intesa come libertà di agire nel comportamento esteriore, singolarmente e socialmente, in base alle proprie convinzioni religiose. L'attuale codificazione autonoma del diritto all'obiezione di coscienza, sia a livello nazionale che internazionale, non consente più tale imprecisa associazione. Da un lato la libertà di coscienza ha carattere più ampio, in quanto include la libertà di religione come una facoltà; dall'altro la libertà religiosa supera i limiti di quella di coscienza in quanto aggiunge alla dimensione individuale, propria della libertà di coscienza, un ambito comunitario ed istituzionale.

Nelle formulazioni della teoria generale del diritto, la libertà si configura come uno dei diritti pubblici soggettivi, con carattere autonomo, dal momento che lo *status libertatis* – al quale intrinsecamente appartengono tutte le diverse libertà giuridiche, in quanto manifestazioni dello stesso deve, sia storicamente che sistematicamente, considerarsi costruito da tanti diritti autonomi quante sono le sue specifiche manifestazioni. Il diritto di libertà religiosa è autonomo in forma eminente perché, da un lato si potrebbero mascherare dietro lo stesso forme di intolleranza di diversa natura – politica, sociale, economica – e, dall'altro si potrebbe obbligare il credente a violare i precetti del proprio credo.

In un'analisi ad ampio respiro il diritto alla libertà religiosa viene ulteriormente delineato sulla base di quattro caratteristiche inscindibili, come diritto *pubblico* – in quanto riguarda l'individuo non come *singulus* ma i *uti civis*, in quanto comunità – *negativo/positivo* – come libertà *da* e libertà *di* – *assoluto* – esigibile *erga omnes* – e costituzionale – in quanto rientra nei pilastri fondamentali di uno Stato, tale da non poter subire limitazioni arbitrarie da parte dei singoli poteri.

Nella sua unitarietà essa comprende, come contenuto, una serie di facoltà/diritti che, a causa della loro manifestazione storica hanno costituito diritti/libertà autonomi dal punto di vista giuridico. Questi diritti sono enunciati nella descrizione, più che nella definizione, della libertà religiosa per cui le uniche limitazioni ammesse sono quelle comuni con le altre libertà, ed in particolare, la tutela dell'ordine pubblico.

Se l'accettazione teorica dei diritti dell'uomo è un dato incontrovertibile nella prassi e nella documentazione internazionale, più complessa appare, tuttavia, la loro pratica sistematica giuridica per motivazioni intrinseche – legate all'indeterminatezza degli stessi – ed estrinseche – causa la difficoltà nell'identificazione degli organismi che ne debbano garantire l'osservanza. L'attuale diritto internazionale, pur attraversando una fase di trasformazione, non è riuscito ad infrangere con norme – positive, cogenti – la *domestic jurisdiction* degli Stati e, di conseguenza, accorda protezione ai diritti individuali di libertà con i vincoli posti dalle particolari coordinate giuridiche e politiche “interne”.

Parlare oggi delle possibilità di manifestazione del credo religioso impone di con-

siderare che “l’idea laica racchiude in sé una concezione filosofica sull’indipendenza e la capacità della ragione umana ed una concezione politica sui diritti dello Stato e dei cittadini di fronte alle chiese”³⁵ e che la moderna dimensione pluralista, multi-culturale dovrebbe “spostare l’indagine sul carattere di laicità dello Stato ben al di là del solo campo relativo all’integrazione del fenomeno religioso, ma ad un momento di sintesi di un determinato assetto dei rapporti tra Stato e cittadini, tra autorità e libertà, alla luce di un modello etico non cognitivista”³⁶.

La laicità non è una convinzione, un semplice ideale ma si configura più correttamente come metodo, strumento, paradigma assiologico di uno Stato moderno, democratico e pluralista. La difesa dell’esibizione identitaria non può costituire *tout court* minaccia o involuzione dell’ideale laico. È necessario comprendere anche l’impossibilità, per il credente, di ridimensionare la religione ad un fenomeno privatistico dal momento che la fede – e non la religione – investe necessariamente la sfera pubblica, la morale comune e contribuisce alla strutturazione del tessuto sociale e dei suoi codici etici. Il superamento della dicotomia laicismo-fondamentalismo è la sfida delle comunità moderne, democratiche e pluraliste che, in nome di un ampio concetto di tolleranza siano in grado di accogliere le diverse identità, di gestire armonicamente le inevitabili conflittualità, interne al sistema, di favorire la ricerca del delicato equilibrio tra libertà ed eguaglianza³⁷.

Occorre, dunque, potenziare una *politica dell’identità* nel rispetto delle *diversità*. Ed è interessante sottolineare che nel Protocollo n. 12, firmato a Roma il 4 novembre 2003, si afferma il nuovo fondamentale principio del rispetto della «diversità culturale, religiosa e linguistica» (art. II-23)³⁸.

Il problema della tolleranza è allora quello di una ridefinizione di uno spazio pubblico che sia totalmente e realmente comune. La preservazione/tutela dei legami di coesione sociale e la lotta contro le discriminazioni devono costituire le linee guida di questa fase costruttiva delle società aperte, globalizzate, multiculturali, che non possono consentire alle religioni un’invasiva penetrazione all’interno delle res publicae né dare spazio a qualsiasi forma o modalità di particolarismi, ma consentire a ciascuno una libera espressione religiosa, purché non invasiva della sfera comune, riformulando il progetto democratico, così come delineatosi nelle culture moderne, e degli ideali ad esso sottesi.

³⁵ G. Weill, Prefazione a *Storia dell’idea laica in Francia nel secolo XI*, Bari, 1937.

³⁶ F. Rimoli, *Laicità*, in *Enc. Giur.*, vol. XVIII, Roma, 1990, pp. 1-2.

³⁷ «Pluralisme, tolérance et esprit d’ouverture caractérisent une ‘société démocratique’. Bien qu’il faille parfois subordonner les intérêt d’individus à ceux d’un groupe, la démocratie ne se ramène pas à la suprématie constante de l’opinion d’une majorité mais commande un équilibre qui assure aux individus minoritaires un traitement juste et évitant tout abus d’une position dominante... le pluralisme et la démocratie doivent également se fonder sur le dialogue et un esprit de compromis, qui impliquent nécessairement de la part des individus des concessions diverses qui se justifient aux fins de la sauvegarde et de la promotion des idéaux et valeurs d’une société démocratique... c’est précisément cette constante recherche d’un équilibre entre les droits fondamentaux de chacun qui constitue le fondement d’une ‘société démocratique’»: par. 108 sent. Leyla Sahin...cit.

³⁸ Oltre a quello della parità tra i sessi: art. II-23 TCUE. Cfr. J. Luther, *Le frontiere dei diritti culturali in Europa*, in AA.VV., *Diritti e Costituzione nell’Unione Europea*, a cura di G. Zagrebelsky, Roma, 2003, p. 221 ss.

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. “[After 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. Clauson*, 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 3Ω-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 Com-mandments, 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., *Capeitol 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 “checkered 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 pre-served 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. Ruegger, 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 forebears’ faith in God played in their decisions to select America as a refuge from religious persecution, to declare their independence from the British Crown, and to conceive a new Nation. 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); *Summum 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 "ultraterritorialità" 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'attuavano 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.

Argomento 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 laicità – 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 clausola 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 risolubile 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 del 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 corpose 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 ordinarie 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.