

Video in the Classroom

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There are many teaching aids available in the modern classroom. My institution provides a DVD player and projection screen in almost every classroom. Making the best use of such teaching aids presents several challenges. The issues include: how to select material, how to blend any unusual presentations (video in this case) with other materials, and how to evaluate what students have learned from such material as opposed to using more conventional methods.

This presentation will focus on the use of short video clips that are designed to provide background material for teaching about specific issues. Thus I am not discussing a film course. At most, I would use half a class session to illustrate a point or to solidify a concept that had emerged in a course where most of the material could be found in a text book or on-line.

My major teaching areas are statistics (not on the docket for today) and the legal field. For the latter, I use a law school level text book – Chase’s Constitutional Interpretation – and spend much of the class encouraging students to parse actual judicial opinions. I seldom “lecture” as such but rather lead students through cases with a series of questions. It is not quite the Socratic method in that I do point out what I think are critical passages and have definite answers that are better than others.

I also make use of role playing, having the students assume the character of one specific Justice of the Supreme Court of the United States and both writing and arguing for that Justice. As with any technique, there are tradeoffs in terms of time spent and lessons learned. I have found that the students value these mock court sessions, which I hold three times a year.

Since I teach Constitutional Law and Civil Liberties, I always have my eye out for material which might enhance these courses. Recently I came across a short series that the Duke University law school had produced. Each video covers one recent Supreme Court case, interviewing actual plaintiffs and attorneys, and providing local color and a great deal of context to the fact situation.

My dilemma is which ones to use, how to blend them with the other reading and discussion, and how to evaluate what students have learned. What I am going to do at the conference is show a part of one of the videos and then discuss methods of evaluation that I used. Part of the issue is whether “liking” on the part of the students amounts to the same thing as “learning.”

It would help if conference participants could familiarize themselves with the basics of the case involved in the video I will show. It is *Van Orden v. Perry* 545 U.S. 677

(2005) . I will attach a summary of the case and excerpts from the Supreme Court opinions. One of the many challenges in presenting cases today is that multiple sources of material are available on the web, including lower court opinions, briefs filed, and recording of oral arguments. Just what blend is appropriate in each case becomes difficult to discern. I wanted to emphasize this particular case because it was recent and had been widely reported. It was one of two cases (with differing outcomes) that illustrate the latest attempt of the Court to settle issues of the meaning of establishment of religion.

My list for Civil Liberties includes over 100 cases to be covered in a total of 28 class days, including any time for tests or mock trial sessions. Typically I try to cover between 4 to 8 cases a day. Thus I certainly cannot do a detailed examination of every case and the more time spent on one means that others get short shrift if they are not excluded entirely.

I will show the part of the video, discuss why I think it is worthwhile, and then open the floor for discussion on how to evaluate such material in the context of the larger course.

THE OPINION:

VAN ORDEN v. PERRY, in his official capacity as GOVERNOR OF TEXAS and CHAIRMAN, STATE PRESERVATION BOARD, et al.

No. 03—1500. Argued March 2, 2005—Decided June 27, 2005

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 3-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."

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.

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. As we observed in *School Dist. of Abington Township v. Schempp*, [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 Lawgiver 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).

These two faces are evident in representative cases both upholding⁴ and invalidating⁵ 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 challenges.⁵ 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 grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

As we explained in *Lynch v. Donnelly*, [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 resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God." 1 Annals of Cong. 90, 914. President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation:

"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 useful 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).² 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 792.³ 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 of Frankfurter, J.).

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the

north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.²

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 Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. See *Lynch v. Donnelly*, 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 improper 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 example 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 grounds.¹¹

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.

Justice Breyer, concurring in the judgment.

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 guideposts—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).

Justice Stevens, with whom Justice Ginsburg joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. *** 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"² is to be preserved-if there remains any meaning to the "wholesome '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.

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 heritage.³ *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.

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 Presidents.¹⁰

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 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 courthouse 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 Commandments.¹¹

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."¹² 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."¹³ 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 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, the 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 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 text.¹⁴ 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 text,¹⁵ 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 significance.¹⁶ 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 selection.¹⁷

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, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.¹⁸ 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 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*, 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).¹⁹

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.

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 1787²³ 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 Clause.²⁴ 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”),²⁵ and paper over the fact that Madison more than once repudiated the views attributed to him by many, stating unequivocally that with respect to government's involvement with religion, the “ ‘tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.’ ”²⁶

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 Clause.²⁷

Ardent separationists aside, there is another critical nuance lost 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 Christ.²⁸ 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. 36.²⁹

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).³⁰

The original understanding of the type of “religion” that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred “monotheistic” religions Justice Scalia has embraced in his *McCreary County* opinion. See *post*, at 10–11 (dissenting opinion).³¹ 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 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 hollow.³² 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 Star.³³

It is our duty, therefore, to interpret the [First Amendment](#)'s command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. 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 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 unequal.³⁴ 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 neutrality.³⁵ The basis for that principle is firmly rooted in our Nation's history and our Constitution's text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. But cf. Letter from George Washington to the Hebrew Congregation in Newport, 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[,] and believers in unconcerned deities," *McCreary County, post*, at 10 (Scalia, J., dissenting), is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, forbids Texas from displaying the Ten Commandments monument the plurality so casually affirms.