Syllabus

VAN ORDEN *v.* PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

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 its 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. 683–692.

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 fact-intensive cases such as this.

Syllabus

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. 698–705.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., *post*, p. 692, and THOMAS, J., *post*, p. 692, filed concurring opinions. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 698. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 707. O'CONNOR, J., filed a dissenting opinion, *post*, p. 737. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 737.

Erwin Chemerinsky argued the cause for petitioner. With him on the briefs were *Mark Rosenbaum* and *Paul Hoffman*.

Greg Abbott, Attorney General of Texas, argued the cause for respondents. With him on the brief were *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach* and *Don R. Willett*, Deputy Attorneys General, *R. Ted Cruz*, Solicitor General, *Joel L. Thollander* and *Amy Warr*, Assistant Solicitors General, and *Paul Michael Winget-Hernandez*, Assistant Attorney General.

Counsel

Acting Solicitor General Clement argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Assistant Attorney General Keisler*, *Deputy Assistant Attorney General Katsas*, *Patricia A. Millett*, *Robert M. Loeb*, and *Lowell V. Sturgill, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for American Atheists by *Robert J. Bruno;* for the American Humanist Association et al. by *Elizabeth L. Hileman;* for the American Jewish Congress et al. by *Marc D. Stern* and *Jeffrey Sinensky;* for Americans United for Separation of Church and State et al. by *Ian Heath Gershengorn*, *William M. Hohengarten*, *Ayesha Khan*, *Richard B. Katskee*, *Elliot M. Mincberg*, and *Judith E. Schaeffer;* for the Anti-Defamation League et al. by *Jeffrey R. Babbin*, *Aaron S. Bayer*, *Kenneth D. Heath*, *Frederick M. Lawrence*, *Daniel S. Alter*, and *Steven M. Freeman;* for the Baptist Joint Committee et al. by *Douglas Laycock* and *K. Hollyn Hollman;* for the Council for Secular Humanism by *Edward Tabash;* for the Freedom from Religion Foundation by *James A. Friedman* and *James D. Peterson;* and for the Hindu American Foundation et al. by *Henry C. Dinger*, *Jeffrey A. Simes*, *Keith A. Zullow*, *Aseem V. Mehta*, and *Jessica Jamieson.*

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Steve Carter*, Attorney General of Indiana, *Thomas M. Fisher*, and *Rebecca Walker*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Charles J. Crist, Jr.*, of Florida, *Lawrence G. Wasden* of Idaho, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *Jim Hood* of Mississippi, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Gerald J. Pappert* of Pennsylvania, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Francis J. Manion*, and *Walter M. Weber;* for the American Family Association Center for Law & Policy by *Stephen M. Crampton*, *Brian Fahling*, and *Michael J. DePrimo;* for the Becket Fund for Religious Liberty by *Anthony R. Picarello, Jr.;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for the Eagle Forum Education & Legal Defense Fund by *Douglas G. Smith* and *Phyllis Schlafly;* for the Ethics and Public Policy Center by *Mark A. Perry;* for the Foundation for Moral Law, Inc., by *Benjamin D. DuPré* and *Gregory M. Jones;* for the Fraternal Order of Eagles by *Kelly Shackelford* and

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., Reg. Sess. (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 "PRE-

George A. Miller; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin*, *Alyza D. Lewin*, *Dennis Rapps*, *David Zwiebel*, and *Nathan J. Diament;* for the Pacific Justice Institute by *Peter D. Lepiscopo;* for the Rutherford Institute by *John W. Whitehead;* and for Janet Napolitano et al. by *Len L. Munsil.*

Briefs of *amici curiae* were filed for the Atheist Law Center et al. by *Pamela L. Sumners* and *Larry Darby;* for the Chester County Historic Preservation Network by *Alfred W. Putnam, Jr.;* for Faith and Action et al. by *Bernard P. Reese, Jr.;* for Focus on the Family et al. by *Benjamin W. Bull* and *Jordan W. Lorence;* for the Thomas More Law Center by *Edward L. White III;* and for Wallbuilders, Inc., by *Barry C. Hodge.*

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

SENTED 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. 923 (2004), and now affirm.

Our cases, Janus-like, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. 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

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[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").

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]

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[3] Despite JUSTICE STEVENS' recitation of occasional language to the contrary, *post*, at 710–711, 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. 709 (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 711 (opinion of STEVENS, J.) (recognizing that the Establishment Clause permits some "recognition" or "acknowledgment" of religion); *post*, at 740–741, and n. 4 (opinion of SOUTER, J.) (discussing a number of permissible displays with religious content).

These two faces are evident in representative cases both upholding[4] and invalidating[5] laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed

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

to *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), as providing the governing test in Establishment Clause challenges.[6] 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 (internal quotation marks omitted). President Washington's procla-

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[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).

mation 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).[7] This recognition

[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 judg-

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.[8] 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.

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ment) ("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.

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.[9]

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 opin-

[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."

ion 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

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[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).

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 its 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

[11] Nor does anything suggest that *Stone* would extend to displays of 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 Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization"). Indeed, we need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case.

group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time. I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments. See *McCreary County* v. *American Civil Liberties Union of Ky.*, *post*, at 885–894 (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 690. He properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history. *Ante*, at 686–688. 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 "resis[t] incorporation" against the States. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 45–46 (2004) (opinion concurring in judgment); see also *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 677–680, and n. 3 (2002) (concurring opinion). If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.

Even if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, see *Cutter* v. *Wilkinson*, 544 U. S. 709, 728, n. 3 (2005) (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 729 (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

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*See, *e. g.*, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989) (employing endorsement test); *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (setting forth three-pronged test); *Marsh* v. *Chambers*, 463 U. S. 783, 790–792 (1983) (upholding legislative prayer due to its "unique history"); see also *Lynch* v. *Donnelly*, 465 U. S. 668, 679–681 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area").

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 (ED 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 (CD 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]assersby . . . 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 judgment 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 in part and concurring in judgment); *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*, 542 U. S., 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 display. See, *e. g.*, *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) (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. 844, 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*, 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 700 (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 cor-

rectly 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 "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil." A. de Tocqueville, Democracy in America 282–283 (1835) (H. Mansfield & D. Winthrop transls. 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 881.

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 compel 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 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 Tex. S. Con. Res. 16, 57th Leg., Reg. Sess. (1961). 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., Reg. Sess. (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 869–873 (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, preexisting 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 partic-

ular 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 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

> "[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 exercises 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. Nor can I agree with JUSTICE SCALIA's dissent in *McCreary County*, *post*, at 885. I do agree with JUSTICE O'CONNOR's statement of principles in *McCreary County*, *post*, at 881–883, 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.

[Appendixes A and B to opinion of BREYER, J., follow this page.]