

In *Reynolds v. United States*, 98 U.S. 145, 164 (1878), the first case to construe the Free Exercise Clause, Chief Justice Waite wrote that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions." Likewise, in *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961), Chief Justice Warren declared that "[t]he freedom to hold religious beliefs and opinions is absolute."

The Free Exercise Clause, however, obviously does not provide absolute protection for religiously motivated conduct. The Court has thus said that the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."¹⁸ Similarly, the Court spoke of the "distinction between the absolute constitutional protection against governmental regulation of religious beliefs on the one hand, and the qualified protection against the regulation of religiously motivated conduct."¹⁹

Governments, though, do not adopt laws prohibiting or requiring thoughts; statutes invariably regulate conduct. Thus, the Free Exercise Clause is invoked in several situations. One is when the government prohibits behavior that a person's religion requires. For example, in *Reynolds v. United States*, the Supreme Court upheld the constitutionality of a law forbidding polygamy even though Mormons said that it was required by their religion.

The Free Exercise Clause also is invoked when the government requires conduct that a person's religion prohibits. For instance, the Court rejected a challenge by Amish individuals who said that the requirement that they obtain Social Security numbers and pay Social Security taxes violated their religious beliefs.²⁰

Additionally, the Free Exercise Clause is invoked when individuals claim that laws burden or make more difficult religious observances. An illustration of this is the many cases where the Court held that the government impermissibly burdens religion if it denies benefits to individuals who quit their jobs for religious reasons.²¹

2. The Current Test

In *Employment Division v. Smith*, in 1990, the Court substantially changed the law regarding the Free Exercise Clause and articulated the test that is used today. Following *Smith*, earlier case law is reviewed and the application of the *Smith* test is discussed.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. SMITH

494 U.S. 875 (1990)

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote

18. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

19. *Employment Division v. Smith*, 494 U.S. 872, 670 n.13 (1990).

20. *United States v. Lee*, 455 U.S. 252 (1982).

21. See, e.g., *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." As compiled by the State Board of Pharmacy under its statutory authority, Schedule I contains the drug peyote, a hallucinogen.

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Supreme Court held that respondents' religiously inspired use of peyote [was protected by the] Free Exercise Clause.

II

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable

law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning.

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. [D]ecisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States v. Lee*. There an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut* [1940] (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania* (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); or the right of parents, acknowledged in *Pierce v. Society of Sisters* (1925), to direct the education of their children, see *Wisconsin v. Yoder* (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated

actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner* (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.

In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy* (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest.

In *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices." In *Goldman v. Weinberger* (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" — permitting him, by virtue of his beliefs, "to become a law unto himself" — contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields — equality of treatment and an unrestricted flow of contending

speech — are constitutional norms; what it would produce here — a private right to ignore generally applicable laws — is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims."

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

B. The Free Exercise Clause

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.

Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972).' In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."

Applying this test, the Court concluded, "Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances are exceptionally dangerous. Nevertheless, there is no indication that Congress considered the harms posed by the particular use at issue here — the circumscribed, sacramental use of hoasca by [this religion]."

The case indicates that RFRA is applicable to the federal government and that the Court approves a rigorous application of strict scrutiny under the statute.

After RFRA was declared unconstitutional as applied to state and local governments, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2001cc-1, which says the government land use decisions and treatment of prisoners that significantly burden religion must meet strict scrutiny.

In *Cutter v. Wilkinson*, the Court considered whether this law violates the Establishment Clause.

CUTTER v. WILKINSON

544 U.S. 709 (2005)

Justice GINSBURG delivered the opinion of the Court.

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Plaintiffs below, petitioners here, are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of "nonmainstream" religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian. They complain that Ohio prison officials (respondents here), in violation of RLUIPA, have failed to accommodate their religious exercise "in a variety of different ways, including retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith."

In response to petitioners' complaints, respondent prison officials have mounted a facial challenge to the institutionalized-persons provision of RLUIPA; respondents contend that the Act improperly advances religion in violation of the First Amendment's Establishment Clause.

"This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." Just last Term, in *Locke v. Davey* (2004), the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. "At some point, accommodation may devolve into an unlawful fostering of religion." But §3 of RLUIPA, we hold, does not, on its face, exceed the limits of permissible government accommodation of religious practices.

Our decisions recognize that "there is room for play in the joints" between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. In accord with the majority of Courts of Appeals that have ruled on the question, we hold that §3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths.

"[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine. . . ." Section 3 covers state-run institutions—mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.

We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "[c]ontext matters" in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."

Finally, RLUIPA does not differentiate among bona fide faiths. RLUIPA presents no such defect. It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.

The Sixth Circuit misread our precedents to require invalidation of RLUIPA as “impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.” Were the Court of Appeals’ view the correct reading of our decisions, all manner of religious accommodations would fall. Congressional permission for members of the military to wear religious apparel while in uniform would fail, as would accommodations Ohio itself makes. Ohio could not, as it now does, accommodate “traditionally recognized” religions. The State provides inmates with chaplains “but not with publicists or political consultants,” and allows “prisoners to assemble for worship, but not for political rallies.”

In upholding RLUIPA’s institutionalized-persons provision, we emphasize that respondents “have raised a facial challenge to [the Act’s] constitutionality, and have not contended that under the facts of any of [petitioners’] specific cases . . . [that] applying RLUIPA would produce unconstitutional results.” Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.

3. *Is Denial of Funding for Religious Education a Violation of Free Exercise of Religion?*

The discussion below concerning the Establishment Clause shows that in recent years the Supreme Court has been more permissive in allowing government aid to religious education. *Locke v. Davey*, below, presents the question of whether the denial of funding for religious education violates free exercise of religion. The case involved a scholarship program for college students in Washington state. Students could not use the scholarships if they were pursuing “devotional” studies to be ordained a minister. The Supreme Court, in a seven-to-two decision, rejected the argument that the state’s refusal to fund such religious education violated the Free Exercise Clause of the First Amendment.

LOCKE v. DAVEY

540 U.S. 714 (2004)

Chief Justice REHNQUIST delivered the opinion of the Court.

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. The student must enroll “at least half time in an eligible postsecondary institution in the state of Washington,” and may not pursue a degree in theology at that institution while receiving the scholarship.

Private institutions, including those religiously affiliated, qualify as "eligible postsecondary institution[s]" if they are accredited by a nationally recognized accrediting body. A "degree in theology" is not defined in the statute, but, as both parties concede, the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are "devotional in nature or designed to induce religious faith."

Respondent, Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.

At the beginning of the 1999-2000 academic year, Davey met with Northwest's director of financial aid. He learned for the first time at this meeting that he could not use his scholarship to pursue a devotional theology degree. He was informed that to receive the funds appropriated for his use, he must certify in writing that he was not pursuing such a degree at Northwest. He refused to sign the form and did not receive any scholarship funds.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. *Walz v. Tax Comm'n of City of New York* (1970). In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See *Zelman v. Simmons-Harris* (2002). As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitutions,²⁴ which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a

24. The relevant provision of the Washington Constitution, Art. I, §11, states: "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." [Footnote by the Court.]

State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion. Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.²⁵

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. Davey notes all students at Northwest are required to take at least four devotional courses, and some students may have additional religious requirements as part of their majors.

In short, we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.

Kiryas Joel is remarkably similar to the analysis under the first two prongs of the *Lemon* test: If the government is favoring one religion, it is acting with the purpose, and there is the effect of fostering that religion.

3. The Lemon Test for the Establishment Clause

If a law is not discriminatory, the Supreme Court says that a court should apply the three-part test articulated in *Lemon v. Kurtzman*.

LEMON v. KURTZMAN

403 U.S. 602 (1971)

Chief Justice BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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."

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are

intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. [However,] we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion. In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan echoed the classic warning as to "programs whose very nature is apt to entangle the state in details of administration." Here we find that both statutes foster an impermissible degree of entanglement.

Although there have been many cases where the Court decided Establishment Clause cases without applying the *Lemon* test,⁴² it has been frequently used. While several justices have criticized the test and called for it to be overruled, this has not occurred.⁴³ Indeed, Justice Scalia, the primary advocate for overruling the *Lemon* test, colorfully lamented its survival and analogized it to "a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. [It] is there to scare us [when] we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely."⁴⁴

The *Lemon* test is favored and used by justices taking the strict separationist approach to the Establishment Clause. It also is used by justices taking the neutrality approach, although they emphasize whether the purpose or effect is to symbolically endorse religion.⁴⁵ Justices favoring the accommodationist approach urge the overruling of the *Lemon* test.

The current and future role of the *Lemon* test is uncertain. The test has not been expressly overruled or discarded, and it has been invoked in recent years. For example, in one of the most recent Establishment Clause cases, *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), below, the Court used the *Lemon* test in invalidating a court's requirement for posting the Ten Commandments. Yet a majority of the justices on the current Court have expressed dissatisfaction with the test and have advocated

42. See, e.g., *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994) (finding favoritism for one religion by creating a school district contiguous with a religious community violates the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (allowing nativity scene on government property); *Marsh v. Chambers*, 463 U.S. 783 (1983) (allowing government payment of a legislative chaplain because of history of the practice).

43. See *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (applying the *Lemon* test and concluding that the Establishment Clause was not violated by allowing religious groups to use school facilities during evenings and weekends).

44. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. at 398-399 (Scalia, J., dissenting).

45. See, e.g., *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.").

applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman* (1971). Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face.

[W]ith respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." Under the Court's logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice.

d. Religious Symbols on Government Property

In *Allegheny County*, above, the Court considered the constitutionality of a nativity scene and a menorah on government property. More recently, in two cases, the Court considered the constitutionality of Ten Commandments displays on government property.

The court declared the display in *McCreary County* unconstitutional, but upheld the display in *Van Orden*. In reading the decisions, consider whether there is a meaningful distinction between these cases. Also, it is important to consider what lower courts should do, in light of these decisions, if they are confronted with cases involving Ten Commandments monuments or other religious symbols.

McCREARY COUNTY v. AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY

545 U.S. 844 (2005)

Justice SOUTER delivered the opinion of the Court.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their

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

I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon.

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

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted. In addition to the first display's large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a

Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone v. Graham* (1980). *Stone* found a predominantly religious purpose in the government's posting of the Commandments, given their prominence as "an instrument of religion." The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain.

A

Ever since *Lemon v. Kurtzman* (1971) summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and "the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function."

The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . ." By showing a purpose to favor religion, the government "sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . .'"

B

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

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine, e.g., Wash-

ington v. Davis (1976) (discriminatory purpose required for Equal Protection violation); Hunt v. Washington State Apple Advertising Comm'n (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act. There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.

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

C

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

Lemon said that government action must have "a secular . . . purpose," and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every

morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."

III

We take *Stone* as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments. *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion: although state law specifically required their posting in public school classrooms, their isolated exhibition did not leave room even for an argument that secular education explained their being there. But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. Hence, we look to the record of evidence showing the progression leading up to the third display of the Commandments.

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

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious

statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. This new one was the product of forthright and nearly identical Pulaski and McCreary County resolutions listing a series of American historical documents with theistic and Christian references, which were to be posted in order to furnish a setting for displaying the Ten Commandments and any "other Kentucky and American historical document[t]" without raising concern about "any Christian or religious references" in them. As mentioned, the resolutions expressed support for an Alabama judge who posted the Commandments in his courtroom, and cited the fact the Kentucky Legislature once adjourned a session in honor of "Jesus Christ, Prince of Ethics."

In this second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties' purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

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

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Government" exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done. No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the

Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.

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

IV

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments. On the dissent's view, it apparently follows that even rigorous espousal of a common element of this common monotheism is consistent with the establishment ban.

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban.

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead "extended [the] prohibition to state support for 'religion' in general."

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. And Madison, whom the dissent claims as supporting its thesis, criticized Virginia's general assessment tax not just because it required people to donate "three pence" to religion, but because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its

narrower view was the original understanding stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

unremarkable—if indeed they were noticed at all. The walls of both courthouses were already lined with historical documents and other assorted portraits; each Foundations Display was exhibited in the same format as these other displays and nothing in the record suggests that either County took steps to give it greater prominence. On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court: “to display documents that played a significant role in the foundation of our system of law and government.” That the Displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs.

Acknowledgment of the contribution that religion has made to our Nation’s legal and governmental heritage partakes of a centuries-old tradition. Display of the Ten Commandments is well within the mainstream of this practice of acknowledgment. Federal, State, and local governments across the Nation have engaged in such display. The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols of the Ten Commandments “adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom.” Similar depictions of the Decalogue appear on public buildings and monuments throughout our Nation’s Capital. The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.

VAN ORDEN v. PERRY

545 U.S. 677 (2005)

Chief Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which Justice SCALIA, Justice KENNEDY, and Justice THOMAS join.

The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does.

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the “people, ideals, and events that compose Texan identity.” The monolith challenged here stands 6-feet high and 3½ 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. 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 seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal.

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

These two faces are evident in representative cases both upholding and invalidating laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* (1971) as providing the governing test in Establishment Clause challenges. Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

As we explained in *Lynch v. Donnelly* (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 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." President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation.

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," and that "[t]he history of man is inseparable from the history of religion." 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* (1982). 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* (1961).

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.

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.

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham* (1980) (per curiam). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose.

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. 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.

history of the law was clear that its purpose was to reintroduce prayer into the public schools. The Court said that the record was "unambiguous" that the law "was not motivated by any clearly secular purpose — indeed, the statute had *no* secular purpose."

The Court did not resolve the question of whether a moment of "silent reflection" would be permissible absent legislative history that indicated that its purpose was to reintroduce prayer into public schools. For some people, there seems little objectionable about teachers asking students to be silent for a moment at the beginning of the school day to collect their thoughts and mentally prepare for learning. But for others, government-mandated moments of silent reflection and prayer seem unnecessary; students surely have been saying silent prayers as long as teachers have been giving tests.

In *Lee v. Weisman*, which is discussed in the *Doe* case above, the Court declared unconstitutional clergy-delivered prayers at public school graduations. The competing theories of the Establishment Clause, discussed earlier in this chapter, are very much in evidence in the opinions in *Lee*.

LEE v. WEISMAN

505 U.S. 577 (1992)

Justice KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

I

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercise for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The guidelines recommend that

public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations, referred to by the school district as "promotional exercise." We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life we can with confidence describe their customary features.

II

These dominant facts mark and control the confines of our decision. State officials direct the performance of a formal religious exercise at promotional

and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

[T]he controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*.

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercise for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undeniable. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasion," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale* (1962), and that is what the school officials attempted to do.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.

We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not. As we have observed before, there

are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State of enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as amicus, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the

objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.

The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.