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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER IV - ESTABLISHMENT CLAUSE: RELIGION IN CIVIC LIFE

Introduction

Establishment Clause issues also arise outside the context of public and private schools. Religion enters civic life in a variety of ways. The government places religious displays on government property such as a Ten Commandments monument on the grounds of the state capitol, a cross in a city park or Christmas decorations in a court building. Prayers are recited to open sessions of state legislatures and town meetings. These cases, as was true of cases in the previous two chapters, frequently, but not always, make use of the *Lemon* test to resolve Establishment Clause disputes. In addition, Justice O'Connor's "endorsement test," described as a clarification of the *Lemon* test, is introduced in *Lynch v. Donnelly*, the first of several Christmas holiday display cases. The chapter also returns to several themes debated in Chapter III, including the importance of historical practices to the interpretation of the Establishment Clause and the government speech/private speech distinction.

1. McGOWAN v. MARYLAND
366 U.S. 420 (1961)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.

Appellants are seven employees of a large discount department store. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md. Ann. Code, Art. 27, § 521. This section prohibited the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs.

In order properly to consider several of the broad constitutional contentions, we must examine the whole body of Maryland Sunday laws. Several sections of the Maryland statutes are particularly relevant. Section 492 forbids all persons from doing any work or bodily labor

on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, § 509 exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md. Ann. Code, Art. 2B, makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State.

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme.

Appellants were convicted and each was fined five dollars and costs.

Appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment. The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance. There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes, still retains its religious character.

Sunday Closing Laws go far back into American history. The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary travelling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the Connecticut and New Haven Colonies enacted similar prohibitions. The religious orientation of the colonial statutes was apparent. For example, a 1629 Massachusetts Bay instruction began, "And to the end the Sabbath may be celebrated in a religious manner. . . ." These laws persevered after the Revolution and, at about the time of the First Amendment's adoption,

each of the colonies had laws of some sort restricting Sunday labor.

But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard and the statutes began to lose some of their totally religious flavor. The New York law of 1788 omitted the term "Lord's day" and substituted "the first day of the week commonly called Sunday." Similar changes marked the Maryland statutes, discussed below. With the advent of the First Amendment, the colonial provisions requiring church attendance were soon repealed.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations.

Before turning to the Maryland legislation now here under attack, we must consider the standards by which the Maryland statutes are to be measured. The "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States. Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing -- Art. 27, §§ 492-534C -- is "Sabbath

Breaking"; § 492 proscribes work or bodily labor on the "Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; § 522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin. The first Maryland statute dealing with Sunday activities, enacted in 1649, was entitled "An Act concerning Religion." It made it criminal to "profane the Sabbath or Lords day called Sunday by frequent swearing, drunkennes or by any uncivill or disorderly recreation, or by working on that day when absolute necessity doth not require it." A 1692 statute entitled "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province," after stating the importance of keeping the Lord's Day holy and sanctified, then enacted a Sunday labor prohibition which was the obvious precursor of the present § 492. There was a re-enactment in 1696 entitled "An Act for Sanctifying & keeping holy the Lord's Day Commonly called Sunday." By 1723, the Sabbath-breaking section of the statute assumed the present form of § 492, omitting the specific prohibition against Sunday swearing and the patently religiously motivated title.

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition against Sunday work or bodily labor. To the contrary, we find that § 521 of Art. 27, the section which appellants violated, permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that § 509 of Art. 27 permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that Art. 2B, § 28, permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation. Certainly, these are not works of charity or necessity. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only § 492 retains the appellation of "Lord's day" and even that section no longer makes recitation of religious purpose. It does talk in terms of "profan[ing] the Lord's day," but other sections permit activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions.

The Maryland court declared in its decision in the instant case: "The legislative plan is

plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational." After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

But this does not answer all of appellants' contentions. We are told that the State has other means at its disposal to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to religion. However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice. However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility -- a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.

MR. JUSTICE DOUGLAS, dissenting.

The Court balances the need for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. The religious regime of every group must be respected. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause.

The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the "day of rest" becomes a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community. There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. Hence I would declare each of those laws unconstitutional.

2. LARKIN v. GRENDEL'S DEN, INC.
459 U.S. 116 (1982)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school, violates the Establishment Clause.

I

Appellee operates a restaurant located in the Harvard Square area of Cambridge, Mass. The Holy Cross Armenian Catholic Parish is located adjacent to the restaurant; the back walls of the two buildings are 10 feet apart. In 1977, appellee applied to the Cambridge License Commission for approval of an alcoholic beverages license for the restaurant.

Section 16C of Chapter 138 of the Massachusetts General Laws provides: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto."[1]

Holy Cross Church objected to appellee's application, expressing concern over "having so many licenses *so* near."[2] The License Commission voted to deny the application, citing only the objection of Holy Cross Church. On appeal, the Massachusetts Alcoholic Beverages Control Commission upheld the License Commission's action.

Appellee then sued in United States District Court. The District Court held that § 16C violated the Establishment Clause. The First Circuit affirmed.

II

Appellants contend that the State may, without impinging on the Establishment Clause, enforce what it describes as a "zoning" law in order to shield schools and places of divine worship from the presence nearby of liquor-dispensing establishments. It is also contended that a zone of protection around churches and schools is essential to protect diverse centers of

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[1] Section 16C defines "church" as "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses." "School" is defined as "an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by [state law] to children of compulsory school age."

Section 16C originally was enacted in 1954 as an absolute ban on liquor licenses within 500 feet of a church or school. A 1968 amendment modified the absolute prohibition, permitting licenses within the 500-foot radius "if the governing body of such church assents in writing." In 1970, the statute was amended to its present form.

[2] In 1979, there were 26 liquor licensees within a 500-foot radius of Holy Cross Church; 25 of these were in existence at the time Holy Cross Church objected to appellee's application.

spiritual, educational, and cultural enrichment. It is to that end that the State has vested in the governing bodies of all schools, public or private, and all churches, the power to prevent the issuance of liquor licenses for any premises within 500 feet of their institutions.

Plainly schools and churches have a valid interest in being insulated from certain kinds of commercial es tablishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws.

The zoning function is traditionally a governmental task requiring the "balancing [of] numerous competing considerations," and courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality." Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation.

However, § 16C is not simply a legislative exercise of zoning power. As the Massachusetts Supreme Judicial Court concluded, § 16C delegates to private, nongovernmental entities power to veto certain liquor license applications. This is a power ordinarily vested in agencies of government. We need not decide whether, or upon what conditions, such power may ever be delegated to nongovernmental entities; here, of two classes of institutions to which the legislature has delegated this important decisionmaking power, one is secular, but one is religious. Under these circumstances, the deference normally due a legislative zoning judgment is not merited.

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall" was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies.

This Court has consistently held that a statute must satisfy three criteria to pass muster under the Establishment Clause: "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.'" The statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause.

The purpose of § 16C is to "[protect] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." This embraces valid secular legislative purposes.[3]

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[3] In this facial attack, the Court assumes that § 16C actually effectuates the secular goal of protecting churches and schools from the disruption associated with liquor-serving

However, these valid secular objectives can be readily accomplished by other means -- either through an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions, or by ensuring a hearing for the views of affected institutions at licensing proceedings where, without question, such views would be entitled to substantial weight.[4]

Section 16C, as originally enacted, consisted of an absolute ban on liquor licenses within 500 feet of a church or school, see n. 1, *supra*; and 27 States continue to prohibit liquor outlets within a prescribed distance of various categories of protected institutions, with certain exceptions and variations. The Court does not express an opinion as to the constitutionality of any statute other than that of Massachusetts.

Appellants argue that § 16C has only a remote and incidental effect on the advancement of religion. The highest court in Massachusetts, however, has construed the statute as conferring upon churches a veto power over governmental licensing authority. Section 16C gives churches the right to determine whether a particular applicant will be granted a liquor license, or even which one of several competing applicants will receive a license.

The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith. We can assume that churches would act in good faith in their exercise of the statutory power, yet § 16C does not by its terms require that churches' power be used in a religiously neutral way. "[The] potential for conflict inheres in the situation," and appellants have not suggested any "effective means of guaranteeing" that the delegated power "will be used exclusively for secular, neutral, and nonideological purposes."[5] In addition, the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a "primary" and "principal" effect of advancing religion.

Turning to the third phase of the inquiry called for by *Lemon*, we see that we have not

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establishments. The fact that Holy Cross Church is already surrounded by 26 liquor outlets casts some doubt on the effectiveness of the protection granted, however.

[4] Eleven States have statutes or regulations directing the licensing authority to consider the proximity of the proposed liquor outlet to schools or other institutions in deciding whether to grant a liquor license.

[5] Appellants argue that the Beverages Control Commission may reject or ignore any objection made for discriminatory or illegal reasons. This contention appears flatly contradicted by the Massachusetts Supreme Judicial Court's own interpretation of the statute. In any event, an assumption that the Beverages Control Commission might review the decisionmaking of the churches would present serious entanglement problems.

previously had occasion to consider the entanglement implications of a statute vesting significant governmental authority in churches. This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[the] objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Lemon* v. *Kurtzman*.

The core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions." The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions. Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[political] fragmentation and divisiveness on religious lines." Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

JUSTICE REHNQUIST, dissenting.

Dissenting opinions in previous cases have commented that "great" cases, like "hard" cases, make bad law. Today's opinion suggests that a third class of cases -- silly cases -- also make bad law. The Court wrenches from the decision of the Massachusetts Supreme Judicial Court the word "veto," and rests its conclusion on this single term. The aim of this effort is to prove that a quite sensible Massachusetts liquor zoning law is apparently some sort of sinister religious attack on secular government. Being unpersuaded, I dissent.

In its original form, § 16C imposed a flat ban on the grant of an alcoholic beverages license to any establishment located within 500 feet of a church or a school. The majority concedes, as I believe it must, that "an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions" would be valid. Over time, the legislature found that it could meet its goal of protecting people engaged in religious activities from liquor-related disruption with a less absolute prohibition. The legislature settled on the simple expedient of asking churches to object if a proposed liquor outlet would disturb them. Thus, under the present version of § 16C, a liquor outlet within 500 feet of a church or school can be licensed unless the affected institution objects. The flat ban, which the majority concedes is valid, is more protective of churches and more restrictive of liquor sales than the present § 16C.

The evolving treatment of the grant of liquor licenses seems to me to be the sort of legislative refinement that we should encourage. If a particular church or school chooses not to object, the State has quite sensibly concluded that there is no reason to prohibit the issuance of the license. Nothing in the Court's opinion persuades me why the more rigid prohibition would be constitutional, but the more flexible not.

The Court rings in the metaphor of the "wall between church and state," and the "three-part test" to justify its result. However, by its frequent reference to the statutory provision as a "veto," the Court indicates a belief that § 16C effectively constitutes churches as third houses of the Massachusetts Legislature. Surely we do not need a three-part test to decide whether

the grant of actual legislative power to churches is within the proscription of the Establishment Clause. The question in this case is not whether such a statute would be unconstitutional, but whether § 16C is such a statute. The Court in effect answers this question in the first sentence of its opinion without any discussion or statement of reasons. I do not think the question is so trivial that it may be answered by simply affixing a label to the statutory provision.

Section 16C does not sponsor or subsidize any religious group or activity. It does not encourage, much less compel, anyone to participate in religious activities or to support religious institutions. To say that it "advances" religion is to strain at the meaning of that word. The Court states that § 16C "advances" religion because there is no guarantee that objections will be made "in a religiously neutral way." It is difficult to understand what the Court means by this. The concededly legitimate purpose of the statute is to protect citizens engaging in religious and educational activities from the incompatible activities of liquor outlets and their patrons. The only way to decide whether these activities are incompatible with one another in the case of a church is to ask whether the activities of liquor outlets and their patrons may interfere with religious activity; this question cannot, in any meaningful sense, be "religiously neutral." In this sense, the flat ban of the original § 16C is no different from the present version. Whether the ban is unconditional or may be invoked only at the behest of a particular church, it is not "religiously neutral" so long as it enables a church to defeat the issuance of a liquor license when a similarly situated bank could not do the same. The State does not, in my opinion, "advance" religion by making provision for those who wish to engage in religious activities, as well as those who wish to engage in educational activities, to be unmolested by activities at a neighboring bar or tavern.

The Court is apparently concerned for fear that churches might object to the issuance of a license for "explicitly religious" reasons, such as "favoring liquor licenses for members of that congregation or adherents of that faith." If a church were to seek to advance the interests of its members in this way, there would be an occasion to determine whether it had violated any right of an unsuccessful applicant for a liquor license. But our ability to discern a risk of such abuse does not render § 16C violative of the Establishment Clause. The State can constitutionally protect churches from liquor for the same reasons it can protect them from fire, and other harm. The heavy First Amendment artillery that the Court fires at this sensible and unobjectionable Massachusetts statute is both unnecessary and unavailing.

3. MARSH v. CHAMBERS
463 U.S. 783 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

I

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain

who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $ 319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause, he brought this action seeking to enjoin enforcement of the practice. The District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers.

II

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. On April 25, 1789, the Senate elected its first chaplain, the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent. An Act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning."

In *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970), we considered the weight to be accorded to history: "No one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice is not something to be lightly cast aside." No

more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment, they intended the Establishment Clause to forbid what they had just declared acceptable. In applying the First Amendment to the states, it would be incongruous to interpret that Clause as imposing more stringent limits on the states than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.

Respondent argues that we should not rely too heavily on "the advice of the Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers. Respondent also points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer.

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates to the Congress "were so divided in religious sentiments . . . that [they] could not join in the same act of worship." Their objection was met by Samuel Adams, who stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view." Rather, the Founding Fathers looked at invocations as "conduct whose effect [harmonized] with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." The individual claiming injury is an adult, presumably not readily susceptible to "religious indoctrination" or peer pressure.

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held.

III

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination -- Presbyterian -- has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in

the Judeo-Christian tradition.[1] Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.[2] Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated by the same Congress that drafted the Establishment Clause. Currently, many state legislatures and the United States Congress provide compensation for their chaplains.[3] Nebraska has paid its chaplain for well over a century. The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to parse the content of a particular prayer.

We do not doubt the sincerity of those who believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded. The practice for two centuries in Congress and for more than a century in Nebraska and in many other states gives assurance that there is no real threat "while this Court sits."

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. The Court's limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that 20 years ago, I came very close to endorsing essentially the result reached by the Court today.[1] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as

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[1] Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." Although his earlier prayers were often explicitly Christian, Palmer removed references to Christ after a 1980 complaint from a Jewish legislator.

[2] We note that Dr. Edward L. R. Elson served as Chaplain of the Senate of the United States from January 1969 to February 1981, a period of 12 years; Dr. Frederick Brown Harris served from February 1949 to January 1969, a period of 20 years.

[3] The states' practices differ widely. Like Nebraska, several states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day. Under either system, some states pay their chaplains and others do not.

[1] *Abington School Dist*. v. *Schempp*, 374 U.S. 203, 299-300 (1963) (BRENNAN, J., concurring).

well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

I

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws" is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play -- formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose -- could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. Invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[The] mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."

Finally, the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring religious affairs. In the case of legislative prayer, the process of choosing a "suitable" chaplain, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that government should if at all possible avoid.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. The record also reports instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer led to controversy along religious lines. And in general, the history of legislative prayer has been far more divisive than a hasty reading of the Court's opinion might indicate.[2]

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[2] As the Court points out, the practice of legislative prayers in Congress gave rise to controversy at points in the 19th century. In recent years, particular prayers and chaplains in state legislatures have periodically led to political divisiveness along religious lines. See, *e. g.*, The Oregonian, Apr. 1, 1983, p. C8 ("Despite protests from at least one representative, a follower of an Indian guru was allowed to give the prayer at the start of Thursday's House session. Shortly

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to legislative prayer, they would find the practice to be unconstitutional.

II

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause.

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here. The first is to guarantee the individual right to conscience. The right to conscience, in the religious sphere, is implicated when the government requires individuals to support the practices of a faith with which they do not agree. The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life. The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to government. Finally, the principles of separation and neutrality help assure that essentially religious issues not become the occasion for battle in the political arena.

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp*. It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.

III

The Court says almost nothing contrary to the above analysis. Instead, it holds that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," and chooses not to interfere. I sympathize with the Court's reluctance to strike down a practice so prevalent and so ingrained. I am, however, unconvinced by the Court's arguments, and cannot shake my conviction that legislative prayer violates both the letter and the spirit of the Establishment Clause.

The Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of

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before Ma Anand Sheela began the invocation, about a half-dozen representatives walked off the House floor in protest").

the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century."

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[Our] religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." Members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.

Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." Simply put, the Court seems to regard legislative prayer as at most a *de minimis* violation. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in *Schempp* that such mottos have lost any true religious significance. Legislative invocations, however, are very different.

First of all, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly sectarian. I agree that the judiciary should not sit as a board of censors on individual prayers, but the better way of avoiding that task is by striking down all official legislative invocations.

More fundamentally, however, *any* practice of legislative prayer, even if it might look "nonsectarian," will inevitably involve the State in one or another religious debate. In this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.

JUSTICE STEVENS, dissenting.

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. I would not expect to find a Jehovah's Witness or a disciple of the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause.

The Court declines to "parse the content of a particular prayer." Perhaps it does so because it would be unable to explain away the sectarian content of some prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the majority.

4. LYNCH v. DONNELLY
465 U.S. 668 (1985)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R. I. erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.

II

In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that total separation of the two is not possible. The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state. The metaphor is not a wholly accurate description of the relationship that in fact exists between church and state. "It has never been thought either possible or desirable to enforce a regime of total separation." Nor does the Constitution require complete separation; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. 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. Our history is replete with official references to the value of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance. Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both

Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from public revenues. Thus, it is clear that Government has long recognized -- indeed it has subsidized -- holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," and in the language "One nation under God," as part of the Pledge of Allegiance. Art galleries supported by public revenues display religious paintings. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of manifestations of that heritage. One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs. Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression. Through this accommodation, as Justice Douglas observed, governmental action has "[followed] the best of our traditions" and "[respected] the religious nature of our people."

III

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism, an absolutist approach in applying the Establishment Clause has been uniformly rejected by the Court. Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith -- as an absolutist approach would dictate -- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause is not a precise, detailed provision in a legal code capable of ready application. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*. In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.

In this case, the focus of our inquiry must be on the creche in the context of the Christmas season. The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that the statute or activity was motivated wholly by religious considerations. Even where the benefits to religion were substantial, as in *Everson*, *Allen*, *Walz*, and *Tilton*, we saw a secular purpose.

The District Court inferred from the religious nature of the creche that the city has no

secular purpose. The District Court plainly erred by focusing exclusively on the creche. When viewed in the context of the Christmas Holiday season, it is apparent that there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. The city has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

The District Court found that the primary effect of including the creche is to confer a substantial benefit on religion in general and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are difficult to make. But to conclude that the primary effect of including the creche is to advance religion would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, and tax exemptions for church properties. It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws in *McGowan*, the release time program in *Zorach*, and the legislative prayers in *Marsh*.

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh*, and implied about the Sunday Closing Laws in *McGowan* is true of the city's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions."

The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental.

In this case, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. There is nothing here like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon*.

The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for. In any event, apart from this litigation there is no evidence of political friction over the creche in the 40-year history of Pawtucket's Christmas celebration.

We are satisfied that the city has a secular purpose for including the creche, that the city has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government.

IV

JUSTICE BRENNAN describes the creche as a "re-creation of an event that lies at the heart of Christian faith." The creche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications. That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not, as the dissent points out, determine the character of the display.

Of course the creche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause. See, *e. g., McGowan*; *Marsh*. It would be ironic if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, the Executive Branch, the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of one passive symbol -- the creche -- would be a stilted overreaction contrary to our history and to our holdings. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

JUSTICE O'CONNOR, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis.

I

The Establishment Clause prohibits government from making adherence to a religion relevant to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a 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. Disapproval sends the opposite message.

Our prior cases have used the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), as a guide to detecting these two forms of unconstitutional government

action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

II

In this case, there is no institutional entanglement. Nevertheless, the respondents contend that the political divisiveness caused by Pawtucket's display violates the excessive-entanglement prong of the *Lemon* test. The Court's opinion concludes that "no inquiry into potential political divisiveness is even called for" in this case. In my view, political divisiveness along religious lines should not be an independent test of constitutionality.

Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon*, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional. Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise. Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.

III

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Examination of both the subjective and the objective components of the message communicated by a government action is necessary to determine whether the action carries a forbidden meaning.

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 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.

A

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied by the mere existence of some secular purpose, however dominated by religious purposes. The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to

convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

B

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect that make religion relevant to status in the political community.

Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche. The overall holiday setting changes what viewers may fairly understand to be the purpose of the display -- as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

These features combine to make the government's display of the creche in this physical setting no more an endorsement of religion than such "acknowledgments" of religion as government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the creche likewise serves a secular purpose -- celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. I conclude that Pawtucket's display of the creche does not have the effect of communicating endorsement of Christianity.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross.[1] Despite the narrow contours of the Court's

[1] Given the Court's focus upon the otherwise secular setting of the creche, it remains uncertain whether absent such secular symbols as Santa Claus' house, a talking wishing well, and

opinion, our precedents in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the city's creche is presented diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.

I

Last Term, I expressed the hope that the Court's decision in *Marsh* v. *Chambers* would prove to be only a single, aberrant departure from our settled method of analyzing Establishment Clause cases. That the Court today returns to the settled analysis of our prior cases gratifies that hope. At the same time, the Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial. After reviewing the Court's opinion, I am convinced that this case appears hard because the Christmas holiday seems so familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a creche cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes the creche's singular religiosity, or that the city's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. Indeed, our remarkable religious diversity as a Nation which the Establishment Clause seeks to protect, runs directly counter to today's decision.

A

Applying the three-part test to Pawtucket's creche, I am persuaded that the city's inclusion of the creche in its Christmas display simply does not reflect a "clearly secular purpose." In the present case, the city claims that its purposes were exclusively secular. Pawtucket sought, according to this view, only to participate in the celebration of a national holiday and to attract people to the downtown area in order to promote pre-Christmas retail sales and to help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season. Despite these assertions, two compelling aspects of this case indicate that our "reluctance to attribute unconstitutional motives" to a governmental body should be overcome. First, all of Pawtucket's "valid secular objectives can be readily accomplished by other means." Plainly, the city's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells. More importantly, the nativity scene, unlike every other element of the display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce simply do not encompass. To be found constitutional, Pawtucket's seasonal celebration must at least be nondenominational and not serve to promote religion. The inclusion of a religious element like the creche, however, demonstrates that a

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cutout clowns and bears, a similar nativity scene would pass muster under the Court's standard.

narrower sectarian purpose lay behind the decision to include a nativity scene.

The "primary effect" of including a nativity scene in the city's display is to place the government's imprimatur of approval on the religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique benefit of public recognition and approval of their views. The effect on minority religious groups, as well as on those who reject all religion, is to convey the message that their views are not similarly worthy of public recognition. It was precisely this sort of religious chauvinism that the Establishment Clause was intended to prohibit.

Finally, it is evident that Pawtucket's inclusion of a creche as part of its Christmas display does pose a significant threat of fostering "excessive entanglement." Although no political divisiveness was apparent in Pawtucket prior to the filing of respondents' lawsuit, that act, as the District Court found, unleashed powerful reactions which divided the city along religious lines. Of course, the Court is correct to note that we have never held that the potential for divisiveness alone is sufficient to invalidate a governmental practice; we have, nevertheless, emphasized that "too close a proximity" between religious and civil authorities may represent a "warning signal" that the values embodied in the Establishment Clause are at risk.

I have no difficulty concluding that Pawtucket's display of the creche is unconstitutional.

B

The Court advances two principal arguments to support its conclusion that the Pawtucket creche satisfies the *Lemon* test. Neither is persuasive.

First. The Court, by focusing on the holiday "context" in which the nativity scene appeared, seeks to explain away the religious import of the creche. The effect of the creche, of course, must be gauged not only by its inherent religious significance but also by the setting in which it appears. But it blinks reality to claim, as the Court does, that by including such a distinctively religious object in its Christmas display, Pawtucket has done no more than make use of a "traditional" symbol of the holiday, and has thereby purged the creche of its religious content and conferred only an "incidental and indirect" benefit on religion.

The Court's struggle to ignore the clear religious effect of the creche seems to me misguided for several reasons. In the first place, the city has positioned the creche in a central and highly visible location within the Hodgson Park display. Moreover, the city has done nothing to disclaim government approval of the religious significance of the creche. Third, an otherwise secular setting alone does not suffice to justify a governmental practice that has the effect of aiding religion. Finally, and most importantly, even in the context of Pawtucket's seasonal celebration, the creche retains a specifically Christian religious meaning. I refuse to accept the notion that non-Christians would find that the religious content of the creche is eliminated by the fact that it appears as part of the city's otherwise secular celebration of the Christmas holiday. The nativity scene is distinct in its purpose and effect from the rest of the display for the simple reason that it is the only one rooted in a biblical account of Christ's birth. It is the chief symbol of the Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious, and holy. But for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has

been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith. When government appears to sponsor such religiously inspired views, we cannot say that the practice is "'so separate and so marked off from the religious function,' . . . that [it] may fairly be viewed as [reflecting] a neutral posture toward religious institutions."

Second. The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements. To say that government may recognize the holiday's traditional, secular elements of gift-giving, public festivities, and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday. Indeed, in its eagerness to approve the creche, the Court has advanced a rationale so simplistic that it would appear to allow the Mayor of Pawtucket to participate in the celebration of a Christmas Mass, since this would be just another unobjectionable way for the city to "celebrate the holiday." The Court's logic is fundamentally flawed both because it obscures the reason why public designation of Christmas Day as a holiday is constitutionally acceptable, and blurs the distinction between the secular aspects of Christmas and its distinctively religious character.

When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities. If public officials go further and participate in the *secular* celebration of Christmas -- by, for example, decorating public places with such secular images as wreaths, garlands, or Santa Claus figures -- they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause. But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday, and places the prestige, power, and financial support of a civil authority in the service of a particular faith.

The inclusion of a creche in Pawtucket's otherwise secular celebration of Christmas clearly violates these principles. Unlike such secular figures as Santa Claus, reindeer, and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma -- that God sent His Son into the world to be a Messiah. Contrary to the Court's suggestion, the creche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist that the story of Christ is in no sense a part of "history" nor an element of our national "heritage."

The Court seems to assume that prohibiting Pawtucket from displaying a creche would be

tantamount to prohibiting a state college from including the Bible or Milton's Paradise Lost in a course on English literature. But in those cases the religiously inspired materials are being considered solely as literature. In this case, by contrast, the creche plays no comparable secular role. Unlike the poetry of Paradise Lost which students in a literature course will seek to appreciate primarily for esthetic or historical reasons, the angels, shepherds, Magi, and infant of Pawtucket's nativity scene can only be viewed as symbols of a particular set of religious beliefs. It would be another matter if the creche were displayed in a museum, in the company of other religiously inspired artifacts, as an example, among many, of the symbolic representation of religious myths. In that setting, we would have objective guarantees that the creche could not suggest that a particular faith had been singled out for public favor and recognition. The effect of Pawtucket's creche, however, is not confined by any of these limiting attributes. The fact that Pawtucket has gone to the trouble of making an elaborate public celebration and including a creche in that otherwise secular setting inevitably serves to reinforce the sense that the city means to express solidarity with the Christian message of the creche and to dismiss other faiths as unworthy of similar attention and support.

II

Intuition tells us that some official "acknowledgment" is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people. It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs. This does not mean that public officials may not take account, when necessary, of the separate existence and significance of the religious institutions and practices in the society they govern. Should government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgment must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion. Thus, in a series of decisions concerned with such acknowledgments, we have repeatedly held that any active form of public acknowledgment of religion indicating endorsement is forbidden. *E. g., Stone*; *Epperson*; *Schempp*; *Engel*; *McCollum*.

Despite this body of case law, the Court has never comprehensively addressed the extent to which government may acknowledge religion, and I do not presume to offer a comprehensive approach. Nevertheless, it appears that at least three principles may be identified. First, although the government may not be compelled to do so by the Free Exercise Clause, it may act to accommodate to some extent the opportunities of individuals to practice their religion. For me that principle would justify government's decision to declare December 25th a public holiday.

Second, our cases recognize that while a governmental practice may have derived from religious motivations and retain religious connotations, it is permissible for the government to pursue the practice today for secular reasons. Thanksgiving Day fits within this principle.

Finally, we have noted that government cannot be completely prohibited from recognizing the religious beliefs and practices of the American people as an aspect of our national history and culture. While I remain uncertain about these questions, I would suggest that such

practices as "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood as a form a "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

The creche fits none of these categories. Inclusion of the creche is not necessary to accommodate individual religious expression. Nor is the inclusion of the creche necessary to serve wholly secular goals. And the creche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we accept in ceremonial phrases or in other contexts that assure neutrality. The message of the creche begins and ends with reverence for a particular image of the divine.

By insisting that such a distinctively sectarian message is merely an unobjectionable part of our "religious heritage," the Court takes a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that "this is a Christian nation." Those days, I had thought, were forever put behind us by the Court's decision in *Engel* v. *Vitale*.

III

The American historical experience concerning the public celebration of Christmas provides no support for the Court's decision. There is no evidence that the Framers would have approved a federal celebration of the Christmas holiday including displays of a nativity scene. Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case.

IV

The Establishment Clause "[withdraws] from the sphere of legitimate legislative concern a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression of that belief or disbelief." That the Constitution sets this realm apart from the pressures and antagonisms of government is one of its supreme achievements. Regrettably, the Court today tarnishes that achievement.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. The creche has been relegated to the role of a neutral harbinger of the holiday season, but incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory -- but it is a Pyrrhic one indeed. The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated. Surely, this is a misuse of a sacred symbol.

5. COUNTY OF ALLEGHENY v. ACLU, GREATER PITTSBURGH CHAPTER
492 U.S. 573 (1989)

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV , and V, an opinion with respect to Parts I and II, in which JUSTICE STEVENS and JUSTICE O'CONNOR join, an opinion with respect to Part III-B, in which JUSTICE STEVENS joins, an opinion with respect to Part VII, in which JUSTICE O'CONNOR joins, and an opinion with respect to Part VI.

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a creche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty. The Court of Appeals ruled that each display violates the Establishment Clause because each has the impermissible effect of endorsing religion. We agree that the creche display has that unconstitutional effect but reverse the judgment regarding the menorah display.

I

A

The county courthouse is owned by Allegheny County and is its seat of government. It houses the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court. Civil and criminal trials are held there. The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase.

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a creche in the county courthouse during the Christmas holiday season. The creche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!" During the 1986-1987 holiday season, the creche was on display on the Grand Staircase from November 26 to January 9. It had a wooden fence on three sides and a plaque stating: "This Display Donated by the Holy Name Society." During the week of December 2, the county placed poinsettia plants around the fence. The county also placed a small evergreen tree behind each of the two endposts of the fence. The angel was at the apex of the creche display. Altogether, the creche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase.

B

The City-County Building is a block from the county courthouse and is jointly owned by the city of Pittsburgh and Allegheny County. The city's portion of the building houses the city's principal offices, including the mayor's. The city is responsible for the building's Grant Street entrance which has three rounded arches supported by columns. For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees on November 17, 1986, erected a 45-foot tree and decorated it with lights and ornaments. A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive

lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday. Chanukah is the Jewish holiday that falls closest to Christmas Day each year. Lighting the menorah is the primary tradition associated with Chanukah, but the holiday is marked by other traditions as well.

Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event." Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country. Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance would indicate; in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance.

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah. The menorah was placed next to the city's 45-foot Christmas tree. The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. The tree, the sign, and the menorah were all removed on January 13.

II

This litigation began when respondents, the Greater Pittsburgh Chapter of the ACLU and seven local residents, filed suit seeking to enjoin the county from displaying the creche in the county courthouse and the city from displaying the menorah in front of the City-County Building. Respondents claim that the displays each violate the Establishment Clause.

III

A

This Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

In *Lemon v. Kurtzman*, the Court sought to refine these principles by focusing on three "tests" for determining whether a government practice violates the Establishment Clause. Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion.

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or preferred." Moreover, the term "endorsement" is closely linked to the term "promotion," and this Court long since has

held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite." Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch* v. *Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

B

We have had occasion in the past to apply Establishment Clause principles to the government's display of objects with religious significance. In *Lynch* v. *Donnelly*, we considered whether the city of Pawtucket, R. I., had violated the Establishment Clause by including a creche in its annual Christmas display. By a 5-to-4 decision, the Court upheld inclusion of the creche in the display.

The rationale of the majority opinion in *Lynch* is none too clear: the opinion contains two strands, neither of which provides guidance for decision in subsequent cases. First, the opinion states that the inclusion of the creche was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past -- but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the display of the creche gave to religion was no more than "indirect, remote, and incidental" -- without saying how or why.

Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.

First and foremost, the concurrence recognizes any endorsement of religion as "invalid" because it "sends a 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." Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry turns upon the context in which the contested object appears. The concurrence thus emphasizes that the constitutionality of the creche depended upon its "particular physical setting," and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion."

The concurrence applied this mode of analysis to the Pawtucket creche. In addition to the creche, the city's display contained: a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear. The concurrence concluded that both because the creche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the creche was

"displayed along with purely secular symbols," the creche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the creche."

The four *Lynch* dissenters agreed with the concurrence that the controlling question was "whether Pawtucket ha[d] run afoul of the Establishment Clause by endorsing religion through its display of the creche." The dissenters also agreed that the context in which the government uses a religious symbol is relevant for determining the answer to that question. They simply reached a different answer: the dissenters concluded that the other elements of the Pawtucket display did not negate the endorsement of Christian faith caused by the presence of the creche. They viewed the inclusion of the creche as placing "the government's imprimatur of approval on the particular religious beliefs exemplified by the creche."

Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in *Lynch* agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. Accordingly, our task is to determine whether the display of the creche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.

IV

We turn first to the county's creche display. There is no doubt, of course, that the creche itself is capable of communicating a religious message. Indeed, the creche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the creche -- Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious -- indeed sectarian -- just as it is when said in the Gospel or in a church service.

Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display comprised a series of figures and objects. Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

The floral decoration surrounding the creche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. The floral frame serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the creche contributes to, rather than detracts from, the endorsement of religion conveyed by the creche.

Furthermore, the creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the creche's religious message.

The fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the

religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message.

Finally, the county argues that it is sufficient to validate the display of the creche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

In sum, *Lynch* teaches that government may celebrate Christmas, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a Christian message. Under *Lynch*, nothing more is required to demonstrate a violation of the Establishment Clause.

V

Justice Kennedy and the three Justices who join him would find the display of the creche consistent with the Establishment Clause. He argues that this conclusion follows from the Court's decision in *Marsh* v. *Chambers*. He also asserts that the creche poses "no realistic risk" of "represent[ing] an effort to proselytize," having repudiated the Court's endorsement inquiry. Justice Kennedy's reasons for permitting the creche and his condemnation of the Court's reasons for deciding otherwise are so far reaching that they require a response.

In *Marsh*, the Court relied on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Justice Kennedy, however, argues that *Marsh* legitimates all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." Otherwise, the Justice asserts, such practices as our national motto and our Pledge of Allegiance are in danger of invalidity. There is an obvious distinction between creche displays and the motto and pledge. History cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.

Justice Kennedy's reading of *Marsh* would gut the core of the Establishment Clause. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity. But this heritage of discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean, it certainly means that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

Justice Kennedy would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae" because it examines the particular contexts in which the government employs religious symbols. The Justice would substitute the term "proselytization" for "endorsement," but his "proselytization" test suffers from the same "defect" of requiring close factual analysis. In order to define what government could and could not do under Justice Kennedy's "proselytization" test, the Court would have to decide a series of cases with fact patterns that fall along the spectrum of government references to religion (from the permanent display of a

cross atop city hall to a passing reference to divine Providence in an official address).[1]

Indeed, perhaps the only real distinction between Justice Kennedy's "proselytization" test and the Court's "endorsement" inquiry is a burden of "unmistakable" clarity that Justice Kennedy would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause. Our cases impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have required "strict scrutiny" of practices suggesting "a denominational preference. Thus, Justice Kennedy's effort to abandon "endorsement" in favor of "proselytization" seems an attempt to lower considerably the level of scrutiny in Establishment Clause cases.

Although Justice Kennedy repeatedly accuses the Court of harboring a "latent hostility" toward religion, nothing could be further from the truth. Justice Kennedy's accusations are shot from a weapon triggered by the following proposition: if government may celebrate the secular aspects of Christmas, then it must be allowed to celebrate the religious aspects as well because, otherwise, the government would be discriminating against citizens who celebrate Christmas as a religious, and not just a secular, holiday. This proposition, however, is flawed at its foundation. The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations.

A secular state is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed. Confining the government's celebration to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians. Rather, it permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs.[2]

VI

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions. Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. Their presence is obviously relevant in determining the effect of the menorah's display.

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[1] In describing what would violate his "proselytization" test, Justice Kennedy uses the adjectives "year-round," and "continual," as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause. Presumably, however, Justice Kennedy does not really intend these adjectives to define the limits of his principle.

[2] To legitimate the creche on the Grand Staircase, Justice Kennedy characterizes it as an "accommodation" of religion. But an accommodation of religion, to be permitted under the Establishment Clause, must lift "an identifiable burden *on the exercise of religion*." Prohibiting the display of a creche at this location does not impose a burden on the practice of Christianity, and therefore permitting the display is not an "accommodation" of religion.

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.[3] Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause.

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible.

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is the predominant element in the display. The 45-foot tree occupies the central position in front of the Grant Street entrance; the 18-foot menorah is positioned to one side. In the shadow of the tree, the menorah is readily understood as a recognition that Christmas is not the only way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious. It is difficult to imagine a secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah. The absence of a more secular alternative is itself part of the context in which the city's actions must be judged. The mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation's legacy of freedom. While no sign can disclaim an overwhelming message of endorsement, an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. Here, the mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but a recognition of cultural diversity.

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[3] A menorah next to a creche on government property might prove to be invalid.

Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval of their individual religious choices." For purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.[4] The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the *Lemon* analysis. These issues were not addressed by the Court of Appeals and may be considered by that court on remand.

VII

Lynch v. Donnelly confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the creche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its "particular physical setting."

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE STEVENS join as to Part II, concurring in part and concurring in the judgment.

I

The constitutionality of the two displays at issue in these cases turns on how we interpret and apply the holding in *Lynch* v. *Donnelly*. I joined the majority opinion in *Lynch* because, as I read that opinion, it was consistent with the analysis set forth in my separate concurrence. Moreover, I joined the Court's discussion in Part II of *Lynch* concerning government acknowledgments of religion in American life because, in my view, acknowledgments such as legislative prayers and the printing of "In God We Trust" on our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. Thus, in my view, the central issue in *Lynch* was whether the city of Pawtucket had endorsed Christianity by displaying a creche as part of a larger exhibit of traditional secular symbols of the Christmas holiday season.

For the reasons stated in Part IV of the Court's opinion, I agree that the creche displayed on the Grand Staircase conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they

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[4] This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations.

are favored members. In contrast to *Lynch*, this creche stands alone in the courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant to status in the political community."

II

Justice Kennedy asserts that the endorsement test "is flawed in its fundamentals and unworkable in practice." In my view, neither criticism is persuasive. I continue to believe that the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds. I also remain convinced that the endorsement test is capable of consistent application. To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But even the modified coercion test offered by Justice Kennedy involves judgment and hard choices at the margin. He admits as much by acknowledging that the permanent display of a Latin cross at city hall would violate the Establishment Clause, as would the display of symbols of Christian holidays alone. We cannot avoid the obligation to draw lines in deciding Establishment Clause cases, and that is not a problem unique to the endorsement test.

Justice Kennedy submits that the endorsement test is inconsistent with our precedents and traditions because, if it were "applied without artificial exceptions for historical practice," it would invalidate many traditional practices recognizing the role of religion in our society. This criticism shortchanges both the endorsement test and my explanation of the reason why certain longstanding government acknowledgments of religion do not convey a message of endorsement. Under the test, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the longstanding existence of practices such as opening legislative sessions with legislative prayers, as well as their nonsectarian nature, that leads me to the conclusion that those particular practices do not convey a message of endorsement of particular religious beliefs. The question under endorsement analysis is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose and have largely lost their religious significance over time. Although the endorsement test requires careful and often difficult linedrawing and is highly context specific, no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does.

III

For reasons which differ somewhat from those in Part VI of Justice Blackmun's opinion, I also conclude that the city of Pittsburgh's combined display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of an endorsement of religion. Under Justice Blackmun's view, the menorah "has been relegated to the role of a neutral harbinger of the holiday season," almost devoid of any religious significance. In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of

Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

A menorah standing alone at city hall may well send a message of governmental endorsement. Thus, the question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display and when the tree cannot reasonably be understood to convey an endorsement of Christianity. One need not characterize Chanukah as a "secular" holiday or argue that the menorah has a "secular" dimension, in order to conclude that the combined display does not convey a message of endorsement of Judaism or of religion in general.

In setting up its holiday display, which included the lighted tree and the menorah, the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "'During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.'" This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom. By accompanying its display of a Christmas tree -- a secular symbol of the Christmas holiday season -- with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.

The message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion. Just as government may not favor particular religious beliefs over others, "government may not favor religious belief over disbelief." A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of "mak[ing] religion relevant, in reality or public perception, to status in the political community."

My conclusion does not depend on whether or not the city had "a more secular alternative symbol" of Chanukah. In my view, Justice Blackmun's new rule, that an inference of endorsement arises every time government uses a symbol with religious meaning if a "more secular alternative" is available is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case. Indeed, the opinion appears to recognize the importance of this contextual sensitivity by creating an exception to its new rule in the very case announcing it: the opinion acknowledges that "a purely secular symbol" of Chanukah is available, namely, a dreidel or foursided top, but rejects the use of such a symbol because it "might be interpreted by some as mocking the celebration of Chanukah." This recognition that the more *religious* alternative may, depending on the circumstances, convey a message that is least likely to implicate Establishment Clause concerns is an excellent example of the need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed a message that religion or a particular religious belief is favored.

In sum, I conclude that the city of Pittsburgh's combined holiday display had neither the purpose nor the effect of endorsing religion, but that Allegheny County's creche display had such an effect. Accordingly, I join Parts I, II, III-A, IV, V, and VII of the Court's opinion and concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I have previously explained at some length my views on the relationship between the Establishment Clause and government-sponsored celebrations of the Christmas holiday. See *Lynch* v. *Donnelly* (dissenting opinion). I continue to believe that the display of an object that "retains a specifically Christian [or other] religious meaning," is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a creche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause, and join Parts III-A, IV, and V of the Court's opinion. I cannot agree, however, that the city's display of a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the mayor's office shows no favoritism towards Christianity, Judaism, or both.

The decision as to the menorah rests on three premises: the Christmas tree is a secular symbol; Chanukah is a holiday with secular dimensions, symbolized by the menorah; and the government may promote pluralism by sponsoring or condoning displays having strong religious associations on its property. None of these is sound.

I

While acknowledging the religious origins of the Christmas tree, Justices Blackmun and O'Connor dismiss their significance. That the tree may be deemed a secular symbol if found alone does not mean that it will be so seen when combined with other objects. In asserting that the Christmas tree, regardless of its surroundings, is a purely secular symbol, Justices Blackmun and O'Connor ignore the precept they otherwise embrace: that context is all important in determining the message conveyed. In analyzing the Christmas tree, Justices Blackmun and O'Connor abandon this contextual inquiry. In doing so, they go badly astray.

Situated next to the menorah -- "the central religious symbol and ritual object of" Chanukah, -- the Christmas tree's religious dimension could not be overlooked by observers of the display. Even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol. Consider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol.

Justice Blackmun believes that it is the tree that changes the message of the menorah, rather than the menorah that alters our view of the tree. The distinguishing characteristic, it appears, is the size of the tree. As a factual matter, it seems to me that the sight of an 18-foot menorah would be far more eye catching than that of a rather conventionally sized Christmas tree. It also seems to me likely that the symbol with the more singular message will predominate over one lacking such a clear meaning. Given the homogenized message that

Justice Blackmun associates with the Christmas tree, I would expect that the menorah, with its concededly religious character, would tend to dominate the tree.

II

The second premise on which today's decision rests is the notion that Chanukah is a partly secular holiday, for which the menorah can serve as a secular symbol. I would venture that most, if not all, major religious holidays have beginnings and enjoy histories studded with figures, events, and practices that are not strictly religious. It does not seem to me that the mere fact that Chanukah shares this kind of background makes it a secular holiday in any meaningful sense. The menorah is indisputably a religious symbol, used ritually in a celebration that has deep religious significance. That, in my view, is all that need be said.

III

Justice Blackmun and Justice O'Connor appear to believe that, where seasonal displays are concerned, more is better. I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion.

The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar. It is the proximity of Christmas that undoubtedly accounts for the city's decision to participate in the celebration of Chanukah, rather than more significant Jewish holidays. Thus, the city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying "the city's secular recognition of different traditions for celebrating the winter-holiday season," or "a message of pluralism and freedom of belief," has the effect of promoting a Christianized version of Judaism. The holiday calendar they appear willing to accept revolves around a Christian holiday. And those religions that have no holiday between Thanksgiving and New Year's Day will not benefit from the city's tribute. This is not "pluralism" as I understand it.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. Application of a strong presumption against the public use of religious symbols will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular.

Thus I find wholly unpersuasive Justice Kennedy's attempts to belittle the importance of the differences between the display of the creche in this case and that in *Lynch*. Even if I had not dissented in *Lynch*, I would conclude that Allegheny County's unambiguous exposition of a sacred symbol inside its courthouse promoted Christianity to a degree that violated the Establishment Clause. Accordingly, I concur in the Court's judgment regarding the creche.

I cannot agree with the Court's conclusion that the display at Pittsburgh's City-County Building was constitutional. Standing alone in front of a governmental headquarters, a lighted, 45-foot evergreen tree might convey holiday greetings linked too tenuously to

Christianity to have constitutional moment. Juxtaposition of this tree with an 18-foot menorah does not make the latter secular, as Justice Blackmun contends. Rather, the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions. Although it conceivably might be interpreted as sending "a message of pluralism and freedom to choose one's own beliefs," the message is not sufficiently clear to overcome the strong presumption that the display, respecting two religions to the exclusion of all others, is the very kind of double establishment that the First Amendment was designed to outlaw.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join, concurring in the judgment in part and dissenting in part.

In permitting the displays of the menorah and the creche, the city and county sought to "celebrate the season," and to acknowledge the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning. It cannot be disputed that government, if it chooses, may participate in sharing with its citizens the joy of the holiday season, by declaring public holidays, installing or permitting festive displays, sponsoring celebrations and parades, and providing holiday vacations for its employees. All levels of our government do precisely that.

If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge that many of its citizens celebrate its religious aspects. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.

There is no suggestion here that the government's power to coerce has been used in any way. The creche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them.

There is no risk that the creche and the menorah represent an effort to proselytize.[1] *Lynch* is dispositive of this claim with respect to the creche, and I find no reason for reaching a different result with respect to the menorah. Both are traditional symbols of religious holidays that have acquired a secular component. Religious displays that serve "to celebrate and depict the origins of that Holiday" give rise to no Establishment Clause concern.

Respondents say that the religious displays are distinguishable from the creche in *Lynch* because they are located on government property and are not surrounded by other holiday

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[1] One can imagine a case in which the use of passive symbols to acknowledge religious holidays could present this danger. For example, if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths.

paraphernalia. Nothing in Chief Justice Burger's opinion in *Lynch* provides support for these distinctions. Crucial to the Court's conclusion was not the number, prominence, or type of secular items in the holiday display but the simple fact that, when displayed by government during the Christmas season, a creche presents no realistic danger of moving government down the road toward an establishment of religion. Whether the creche be surrounded by poinsettias, talking wishing wells, or carolers, the conclusion remains the same, for the relevant context is not the items in the display but the season as a whole.

The fact that the creche and menorah are both located on government property is likewise inconsequential. The *Lynch* Court did not rely on the fact that the setting was a privately owned park. Nor can I comprehend why it should be that placement of a government-owned creche on private land is lawful while placement of a privately owned creche on public land is not.[2] If anything, I should have thought government ownership of a religious symbol presented the more difficult question, but as *Lynch* resolved that question, the sponsorship here ought to be all the easier to sustain. Nothing about the displays here distinguishes them in any meaningful way from the creche permitted in *Lynch*.

I accept and indeed approve both the holding and the reasoning of Chief Justice Burger's opinion in *Lynch*, and so I must dissent from the judgment that the creche display is unconstitutional. On the same reasoning, I agree that the menorah display is constitutional.

Even if *Lynch* did not control, I would not commit this Court to the test applied by the majority today. For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice.

If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.

Either the endorsement test must invalidate scores of traditional practices, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as "a center of attention separate from the creche." The court must then measure their proximity to the creche. Another important factor will be the prominence of the setting. In this case, the Grand Staircase of the county courthouse proved too resplendent.

My description of the majority's test, though perhaps uncharitable, is intended to illustrate

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[2] The creche in *Lynch* was owned by Pawtucket. Neither the creche nor the menorah at issue in this case is owned by a governmental entity.

the inevitable difficulties with its application. This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.

The result the Court reaches in these cases is perhaps the clearest illustration of the unwisdom of the endorsement test. I would be the first to admit that many questions arising under the Establishment Clause do not admit of easy answers, but whatever the Clause requires, it is not the result reached by the Court today.

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.

A further contradiction arises from the majority's approach, for the Court also assumes the task of saying what every religious symbol means. This Court is ill equipped to sit as a national theology board, and I question the wisdom and the constitutionality of its doing so.

In my view, the principles of the Establishment Clause allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

6. CAPITOL SQUARE REVIEW AND ADVISORY BOARD V. PINETTE
515 U.S. 753 (1995)

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Part IV, in which THE CHIEF JUSTICE, Justice KENNEDY and Justice THOMAS join.

The question in this case is whether a State violates the Establishment Clause when, pursuant to a religiously neutral policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government.

I

Capitol Square is a 10-acre, state-owned plaza surrounding the Statehouse in Columbus, Ohio. For a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. §128-4- 02 makes the square available "for use by the public for discussion of public questions, or activities of a broad public purpose," and Ohio Rev. Code Ann. §105.41 gives the Capitol Square Review and Advisory Board responsibility for regulating public access.

It has been the Board’s policy " to allow a broad range of speakers and other gatherings of

people to conduct events on the Capitol Square." Such diverse groups as homosexual rights organizations, the Ku Klux Klan and the United Way have held rallies. The Board has also permitted unattended displays on Capitol Square: a State-sponsored lighted tree during the Christmas season, a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths during an arts festival.

In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from respondent Donnie Carr, an officer of the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993. The Board denied that application.

II

Respondents' display in Capitol Square was private expression. Private religious speech is as fully protected under the Free Speech Clause as secular private expression. Indeed, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship. Petitioners do not dispute that respondents, in displaying their cross, were engaging in constitutionally protected expression. They do contend that the constitutional protection does not extend to permitting that expression on Capitol Square.

The right to use government property for private expression depends upon whether the property has been given the status of a public forum, or rather has been reserved for official uses. If the former, a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions (a ban on all unattended displays might be one such), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. These strict standards apply here, since the District Court and the Court of Appeals found that Capitol Square was a traditional public forum. Petitioners concede that the Board rejected the display because its content was religious. Petitioners advance a single justification: avoiding endorsement of Christianity, as required by the Establishment Clause.

III

There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content. *Lamb's Chapel*; *Widmar*.

The factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested on the same terms required of other private groups.

IV

Petitioners argue that one feature of the present case distinguishes it from *Lamb's Chapel* and *Widmar*: the forum's proximity to the seat of government, which, they contend, may produce the perception that the cross bears the State's approval. They urge us to apply the "endorsement test," and to find that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional.

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. Where we have tested for endorsement of religion, the subject of the test was either expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity. The test petitioners propose, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.

Petitioners rely heavily on *Allegheny County* and *Lynch*, but each is easily distinguished. In *Allegheny County* we held that the display of a privately-sponsored creche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the County was favoring sectarian religious expression. We expressly distinguished that site from the kind of public forum at issue here. In *Lynch* we held that a city's display of a creche did not violate the Establishment Clause because, in context, the display did not endorse religion. The case neither holds nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional.

What distinguishes *Allegheny County* and *Lynch* from *Widmar* and *Lamb's Chapel* is the difference between government speech and private speech. Petitioners assert, in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government. But that must be a subpart of a general principle: that the distinction disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). One can conceive of a case in which a governmental entity manipulates its administration of a forum close to the seat of government in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate. But those situations do not exist here.

The contrary view, most strongly espoused by Justice STEVENS, but endorsed by Justice SOUTER and Justice O'CONNOR as well, exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. It will be a sad day when this Court casts piety in with pornography. This would be

merely bizarre were religious speech simply as protected as other forms of private speech; but it is perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of government. It has never been read by this Court to serve as an impediment to private religious speech connected to the State only through its occurrence in a public forum.

If Ohio is concerned about misconceptions, nothing prevents it from requiring all private displays in the Square to be identified as such. That would be a content-neutral "manner" restriction which is assuredly constitutional. But the State may not, on the claim of misconception of official endorsement, ban all private religious speech, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.

Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square.

Justice THOMAS, concurring.

I join the Court's conclusion that petitioner's exclusion of the Ku Klux Klan's cross cannot be justified on Establishment Clause grounds. But the fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one.

Although the Klan might have sought to convey a message with some religious component, I think that the Klan had a primarily nonreligious purpose in erecting the cross. In my mind, this suggests that this case may not have truly involved the Establishment Clause, although I agree with the Court's disposition because of the manner in which the case has come before us. In the end, there may be much less here than meets the eye.

Justice O'CONNOR, with whom Justice SOUTER and Justice BREYER join, concurring in part and concurring in the judgment.

In my view, "the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols," *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 628 (1989) (O' CONNOR, J., concurring in part and concurring in judgment), even where a neutral state policy toward private religious speech in a public forum is at issue. Accordingly, I see no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context.

I conclude on the facts of this case that there is "no realistic danger that the community would think that the (State) was endorsing religion," *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2143 (1993), by granting respondents a permit to erect their temporary cross on Capitol Square. I write separately, however to emphasize that, because it seeks to identify those situations in which government makes "adherence to a

religion relevant to a person's standing in the political community," the endorsement test necessarily focuses upon the perception of a reasonable, informed observer.

I

Although "[e]xperience proves that the Establishment Clause cannot easily be reduced to a single test," the endorsement inquiry captures the fundamental requirement of the Establishment Clause when courts are called upon to evaluate the constitutionality of religious symbols on public property.

While the plurality would limit application of the endorsement test to "expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity," I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism. It is true that neither *Allegheny* nor *Lynch* involved the same combination of private religious speech and a public forum that we have before us. Nonetheless, as Justice SOUTER demonstrates, we have on several occasions employed an endorsement perspective in Establishment Clause cases where private religious conduct has intersected with a neutral governmental policy providing some benefit in a manner that parallels the instant case. Our cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue. Given this background, I see no necessity to draw new lines where "[r]eligious expression is private and occurs in a traditional or designated public forum."

None of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly. Indeed, many of the factors the plurality identifies are some of those I would consider important in deciding cases like this one where religious speakers seek access to public spaces: "The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested on the same terms required of other groups."

To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship on the Klan cross. This factor is important because certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message -- particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings. In context, a disclaimer helps remove doubt about State approval of respondents' religious message.

Our agreement as to the outcome of this case, however, cannot mask the fact that I part company with the plurality on a fundamental point: I disagree that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may -- even reasonably -- confuse an incidental benefit to religion with State endorsement." On the contrary, when the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid. The plurality today takes an exceedingly narrow view of the Establishment Clause. The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State to take

steps to avoid being perceived as endorsing a private religious message. That is, the Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible because they are neutral in form.

Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so because the State's own actions (operating the forum in a particular manner and permitting the religious expression therein), and their relationship to the private speech at issue, convey a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a policy of equal access is transformed into a demonstration of approval. Other circumstances may produce the same effect -- whether because of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise.

In the end, I would recognize that the Establishment Clause inquiry cannot be distilled into a fixed, per se rule. Thus, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'CONNOR, J., concurring). And this question cannot be answered in the abstract, but instead requires courts to examine the history and administration of a particular practice to determine whether it operates as such an endorsement. I continue to believe that government practices relating to speech on religious topics "must be subjected to careful judicial scrutiny," and that the endorsement test supplies an appropriate standard.

II

Justice STEVENS reaches a different conclusion regarding whether the Board's decision to allow respondents' display constituted an impermissible endorsement of the cross' religious message. Our fundamental point of departure concerns the knowledge that is attributed to the "reasonable observer (who) evaluates whether a challenged governmental practice conveys a message of endorsement of religion." In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by the dissent. I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. In my view, the endorsement test creates a more collective standard to gauge "the 'objective' meaning of the (government's) statement in the community."

The reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display. Our hypothetical observer also should know the general history of the place in which the cross is displayed. The fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Statehouse. An informed member of the community will know how public space has been used in the past -- and it is that fact, not that the space may meet the definition of a public forum, which is relevant to the endorsement inquiry.

The dissent's property-based argument fails to give sufficient weight to the fact that the cross at issue here was displayed in a forum traditionally open to the public. To the extent there is a presumption that "structures on government property -- and, in particular, in front of buildings plainly identified with the State -- imply state approval of their message," that presumption can be rebutted where the property at issue is a forum historically available for private expression. The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer.

In this case, I believe, the reasonable observer would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct. Moreover, this observer would certainly be able to understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as a condition of granting the Klan's application. On the facts of this case, therefore, I conclude that the reasonable observer would not interpret the State's tolerance of the Klan's private religious display in Capitol Square as an endorsement of religion.

Justice SOUTER, with whom Justice O'CONNOR and Justice BREYER join, concurring in part and concurring in the judgment.

I concur in Parts I, II, and III of the Court's opinion. Otherwise, I limit my concurrence to the judgment. I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.

The plurality's opinion declines to apply the endorsement test to the Board's action, in favor of a per se rule: religious expression cannot violate the Establishment Clause where it (1) is private and (2) occurs in a public forum, even if a reasonable observer would see the expression as indicating state endorsement. This per se rule would be an exception to the endorsement test, not previously recognized and out of square with our precedents.

Allegheny County's endorsement test cannot be dismissed, as Justice SCALIA suggests, as applying only to situations in which there is an allegation that the Establishment Clause has been violated through "expression by the government itself" or "government action discriminat[ing] in favor of private religious expression." Such a distinction would, in all but a handful of cases, make meaningless the "effect-of-endorsing" part of *Allegheny County's* test. Effects matter to the Establishment Clause, and one way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer. Unless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize a public perception of endorsement as a harm only in that subclass of cases in which the government owns the display.

The fact that the Court in *Allegheny County* did not intend to 1ay down a per se rule in the way suggested by the plurality has been confirmed by subsequent cases. In *Lamb's Chapel*, we held that an evangelical church, wanting to use public school property to show films about child-rearing with a religious perspective, could not be refused access to the premises under a policy that would open the school to other groups showing similar films from a non-religious

perspective. In reaching this conclusion, we looked to the specific circumstances: the film would not be shown during school hours or be sponsored by the school, it would be open to the public, and the forum had been used "repeatedly" by "a wide variety" of other private speakers. "Under these circumstances," we concluded, "there would have been no realistic danger that the community would think that the (school) was endorsing religion."

Even if there were an open question about applying the endorsement test to private speech in public forums, I would apply it. By allowing government to encourage what it can not do on its own, the proposed per se rule would tempt a public body to contract out its establishment of religion.

III

As for the specifics of this case, a number of facts known to the Board, or reasonably anticipated, weighed in favor of upholding its denial of the permit. For example, the Latin cross is the principal symbol of Christianity, and display of the cross alone could not be taken to have any secular point. It was displayed in front of the Statehouse, with the government's flags flying nearby, and the government's statues close at hand. For much of the time the cross was to stand on the square, it would have been the only private display (the menorah's permit expired several days before the cross went up). There was nothing else on the Statehouse lawn that would have suggested a forum open to all private, unattended religious displays.

Based on these and other factors, the Board was understandably concerned about a possible Establishment Clause violation if it had granted the permit. But a flat denial of the Klan's application was not the Board's only option, and the Board was required to find its most "narrowly drawn" alternative. Either of two possibilities would have been better suited to this situation. The Board could have granted the application subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross was there to "demonstrat[e] the government's allegiance to, or endorsement of, Christian faith." In the alternative, the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.

With such alternatives available, the Board cannot claim that its flat denial was a narrowly tailored response to the Klan's application. For these reasons, I concur in the judgment.

Justice STEVENS, dissenting.

The Establishment Clause should be construed to create a strong presumption against the installation of unattended religious symbols on public property. Although the State of Ohio has allowed Capitol Square to be used as a public forum, and has occasionally allowed private groups to erect sectarian displays there, neither fact provides a sufficient basis for rebutting that presumption. On the contrary, the sequence of sectarian displays disclosed by the record illustrates the importance of rebuilding the "wall of separation between church and State."

The Establishment Clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny County*, 492 U.S. 573, 593-594 (1989). When religious symbols are involved, the question of whether the state is

"appearing to take a position" is best judged from the standpoint of a "reasonable observer." It is important to take account of the perspective of a reasonable observer who may not share the religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith. If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display.

In determining whether the Klan's cross in front of the Statehouse conveyed a forbidden message of endorsement, we should be mindful of the power of a symbol standing alone and unexplained. The "reasonable observer" of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign -- which is not only the owner of that parcel but also the lawgiver for the territory -- has sponsored and facilitated its message.

That the State may have granted a variety of groups permission to engage in expressive activities in front of the capitol building does not contradict the normal inference of endorsement that the reasonable observer would draw from the symbol. When a freestanding, silent, unattended, immoveable structure appears on the lawn of the Capitol building, the reasonable observer must identify the State either as the messenger, or, at the very least, as one who has endorsed the message. When the message is religious in character, it is a message the state can neither send nor reinforce without violating the Establishment Clause. Accordingly, I would hold that the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government.

Justice GINSBURG, dissenting.

We confront here a large Latin cross alone and unattended in close proximity to Ohio's Statehouse. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.

Justice SOUTER suggests two arrangements that might have distanced the State from "the principal symbol of Christianity": a sufficiently large and clear disclaimer, or an area reserved for unattended displays carrying no endorsement from the State, a space plainly and permanently so marked. Neither arrangement is even arguably present in this case.

Whether a court order allowing display of a cross, but demanding a sturd[y] disclaimer, could withstand Establishment Clause analysis is a question more difficult than the one this case poses. I would reserve that question for another day and case.

7. 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."[1] The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

The legislative record surrounding the State's acceptance of the monument from the Eagles -- a national social, civic, and patriotic organization -- is limited to legislative journal entries. After the monument was accepted, the State selected a site for the monument. 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. 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, he sued state officials, seeking a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal.

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. 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. 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.[2]

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[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.

[2] Despite JUSTICE STEVENS' recitation of occasional language to the contrary, we have not, and do not, adhere to the principle that the Establishment Clause bars all governmental preference for religion over irreligion. Even the dissenters do not claim that the Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion.

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* as providing the governing test in Establishment Clause challenges. Many of our recent cases simply have not applied the *Lemon* test. See, *e.g.*, *Zelman* v. *Simmons-Harris*; *Good News Club* v. *Milford Central School*. 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*: "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."

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*. 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*.

In this case we are faced with a display of the Ten Commandments 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. 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. These displays of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.

Of course, the Ten Commandments are religious. 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. Simply having religious content 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,* 449 U.S. 39 (1980) *(per curiam)*. *Stone* 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."

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.

JUSTICE SCALIA, concurring.

I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence. 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, or, in a nonproselytizing manner, venerating the Ten Commandments.

JUSTICE THOMAS, concurring.

The Court holds that the Ten Commandments monument found on the Texas State Capitol grounds does not violate the Establishment Clause. THE CHIEF JUSTICE rightly recognizes that the monument has "religious significance." He properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history. For those reasons, I join THE CHIEF JUSTICE's opinion.

This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resist incorporation" against the States. 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, our task would be far simpler if we returned to the original meaning of the word "establishment." The Framers understood an establishment "necessarily [to] involve actual legal coercion." And "government practices that have nothing to do with creating or maintaining . . . coercive state establishments" simply do not "implicate the possible liberty interest of being free from coercive state establishments."

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 in the Court's current approach. 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 renders the Establishment Clause incapable of consistent application. This Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused -- an observation that is hardly new.

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. While the Court correctly rejects the challenge to the monument, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.

JUSTICE BREYER, concurring in the judgment.

The Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

The Court has found no single mechanical formula that can accurately draw the constitutional line in every case. 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 results which partake of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." Neither can this Court's tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, 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.

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. That judgment must 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, no exact formula can dictate a resolution to such fact-intensive cases.

The case before us is a borderline case. On the one hand, the Commandments' text undeniably has a religious message. 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*.

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 -- 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.

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 efforts to combat juvenile delinquency. The Eagles' consultation with members of several faiths in order to find a nonsectarian text underscores the group's ethics-based motives. 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. 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. The setting does not readily lend itself to 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. 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 indication that the 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. Those 40 years suggest that few individuals are likely to have understood the monument as amounting to a government effort to favor a particular religious sect, to promote religion over nonreligion, to "engage in" any "religious practice," or to "work deterrence" of any "religious belief." Those 40 years suggest that the public has considered the religious aspect of the tablets' message as part of a broader moral and historical message.

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. This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. 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 monument has not.

For these reasons, I believe that the Texas display -- serving a mixed but primarily nonreligious purpose, not primarily "advancing" or "inhibiting religion," and not creating an

"excessive government entanglement with religion," -- might satisfy this Court's more formal Establishment Clause tests. But I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the Religion Clauses themselves.

To reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:

"I AM the LORD thy God.
"Thou shalt have no other gods before me.
"Thou shalt not make to thyself any graven images.
"Thou shalt not take the Name of the Lord thy God in vain.
"Remember the Sabbath day, to keep it holy.
"Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
"Thou shalt not kill.
"Thou shalt not commit adultery.
"Thou shalt not steal.
"Thou shalt not bear false witness against thy neighbor.
"Thou shalt not covet thy neighbor's house.
"Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's."

On its face, Texas' display has no connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' display is plain: This State endorses the divine code of the "Judeo-Christian" God.

For those who learned to recite the King James version of the text, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause. If any fragment of Jefferson's metaphorical "wall of separation between church and State" is to be preserved -- if there remains any meaning to the "wholesome 'neutrality' of which this Court's [Establishment Clause] cases speak" -- a negative answer to that question is mandatory.

I

In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property. The adornment of

our public spaces with displays of religious symbols and messages undoubtedly provides comfort, even inspiration, to many individuals who subscribe to particular faiths. Unfortunately, the practice also runs the risk of "offending nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." See, *e.g., County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 651 (STEVENS, J., concurring in part and dissenting in part).

Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state. This metaphorical wall protects principles long recognized in this Court's cases. The most fundamental of these principles is that the Establishment Clause demands religious neutrality -- government may not exercise a preference for one religious faith over another. This essential command, however, is not merely a prohibition against the government's differentiation among religious sects. We have repeatedly reaffirmed that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961). This principle is based on the straightforward notion that governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State's banner.

Acknowledgments of this broad understanding of the neutrality principle are legion in our cases. Strong arguments to the contrary have been raised from time to time, perhaps the strongest in then-JUSTICE REHNQUIST's scholarly dissent in *Wallace* v. *Jaffree*, 472 U.S. 38, 91-114 (1985). Powerful as his argument was, we squarely rejected it and thereby reaffirmed the principle that the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith.

In restating this principle, I do not discount the importance of avoiding an overly strict interpretation of the metaphor so often used to define the reach of the Establishment Clause. The plurality is correct to note that "religion and religious traditions" have played a "strong role . . . throughout our nation's history." Given this history, it is unsurprising that a religious symbol may at times become an important feature of a familiar landscape or a reminder of an important event in the history of a community. The wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public view just because they also have religious significance.

This case, however, is not about historic preservation or the mere recognition of religion. The issue is obfuscated rather than clarified by recitation of the many extant governmental "acknowledgments" of the role the Ten Commandments played in our Nation's heritage.

The monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it upon objection be explained as a simple desire to preserve a historic relic. This Nation's resolute commitment to neutrality with respect to religion is inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God.

II

When the Ten Commandments monument was donated to the State of Texas in 1961, the donation was only one of over a hundred largely identical monoliths, and of over a thousand paper replicas, distributed to state and local governments throughout the Nation over the course of several decades. This ambitious project was the work of the Fraternal Order of Eagles, a well-respected benevolent organization whose good works have earned the praise of several Presidents.

As the story goes, the program was initiated by the late Judge E. J. Ruegemer, a Minnesota juvenile court judge and then-Chairman of the Eagles National Commission on Youth Guidance. Inspired by a juvenile offender who had never heard of the Ten Commandments, the judge approached the Minnesota Eagles with the idea of distributing paper copies of the Commandments to be posted in courthouses nationwide. The State's Aerie undertook this project and its popularity spread. When Cecil B. DeMille, who at that time was filming the movie The Ten Commandments, heard of the judge's endeavor, he teamed up with the Eagles to produce the type of granite monolith now displayed in front of the Texas Capitol and at courthouse squares, city halls, and public parks throughout the Nation.

The donors were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "code of conduct or standards by which to govern their actions." It is the Eagles' belief that disseminating the Ten Commandments will help to persuade young men and women to observe civilized standards of behavior, and will lead to more productive lives. Significantly, although the Eagles' organization is nonsectarian, membership is premised on a belief in the existence of a "Supreme Being."

The desire to combat juvenile delinquency by providing guidance to youths is both admirable and unquestionably secular. But achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor. By disseminating the "law of God" the Eagles hope that this divine guidance will help wayward youths improve their lives. In my judgment, the significant secular by-products that are intended consequences of religious instruction are not the type of "secular" purposes that justify government promulgation of sacred religious messages.

Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium. The State may admonish its citizens not to lie, cheat or steal, to honor their parents and to respect their neighbors' property; and it may do so by printed words, in television commercials, or on granite monuments in front of its public buildings. Moreover, the State may provide its schoolchildren and adult citizens with educational materials that explain the important role that our forebears' faith in God played in their decisions to select America as a refuge from religious persecution, to declare their independence from the British Crown, and to conceive a new Nation. The message at issue in this case, however, is fundamentally different from either a bland admonition to observe generally accepted rules of behavior or a general history lesson.

The reason this message stands apart is that the Decalogue is a venerable religious text. For many followers, the Commandments represent the literal word of God as spoken to

Moses and repeated to his followers after descending from Mount Sinai. The message conveyed by the Ten Commandments thus cannot be analogized to an appendage to a common article of commerce ("In God we Trust") or an incidental part of a familiar recital ("God save the United States and this honorable Court"). Thankfully, the plurality does not attempt to minimize the religious significance of the Ten Commandments. Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.

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

Moreover, despite the Eagles' best efforts to choose a benign nondenominational text, the Ten Commandments display projects not just a religious, but an inherently sectarian message. There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance. In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate. The reasonable observer, after all, has no way of knowing that this text was the product of a compromise, or that there is a rationale of any kind for the text's selection.

The Establishment Clause, if nothing else, forbids government from "specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ." *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (SCALIA, J., dissenting). Given that the chosen text inscribed on the Ten Commandments monument invariably places the State at the center of a serious sectarian dispute, the display is unquestionably unconstitutional under our case law. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

Even if the message of the monument fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism. And, at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion. Any of those bases, in my judgment, would be sufficient to conclude that the message should not be proclaimed by the State of Texas on a permanent monument at the seat of its government.

I do not doubt that some Texans may believe that the statues displayed on the Texas Capitol grounds, including the Ten Commandments monument, reflect the "ideals that compose Texan identity." But Texas, like our entire country, is now a much more diversified community than it was when it became a part of the United States or even when the monument was erected. Today there are many Texans who do not believe in the God whose Commandments are displayed at their seat of government. Many of them worship a different

god or no god at all. Some may believe that the account of the creation in the Book of Genesis is less reliable than the views of men like Darwin and Einstein.

Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, allowing the seat of government to serve as a stage for an unmistakably Judeo-Christian message of piety would make nonmonotheists and nonbelievers "feel like [outsiders] in matters of faith, and [strangers] in the political community." *Pinette*, 515 U.S. at 799 (STEVENS, J., dissenting). "Displays of this kind have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal." *Allegheny County*, 492 U.S. at 651 (STEVENS, J., concurring in part and dissenting in part).

Even more than the display of a religious symbol on government property, displaying this sectarian text at the state capitol should invoke a powerful presumption of invalidity. As JUSTICE SOUTER's opinion persuasively demonstrates, the physical setting in which the Texas monument is displayed enhances the religious content of its message. The monument's permanent fixture at the seat of Texas government is of immense significance.

Critical examination of the Decalogue's prominent display at the seat of Texas government, rather than generic citation to the role of religion in American life, unmistakably reveals on which side of the "slippery slope" this display must fall. God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose -- to encourage Texans to abide by the divine code of a "Judeo-Christian" God. If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow.

III

The plurality relies on the fact that our Republic was founded, and has been governed since its nascence, by leaders who speak in plainly religious rhetoric. Further, the plurality emphatically endorses the recognition that our "institutions presuppose a Supreme Being."

The speeches and rhetoric characteristic of the founding era, however, do not answer the question before us. I have already explained why Texas' display of the full text of the Ten Commandments, given the context in which it is situated, sets this case apart from the countless examples of benign government recognitions of religion. But there is another crucial difference. Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, when public officials deliver speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the personal views of the speaker as an individual member of the polity. The permanent placement of a textual religious display on state property is different in kind; it amalgamates otherwise discordant individual views into a collective statement of government approval. Moreover, the message never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze. In this sense, although Thanksgiving Day proclamations and inaugural speeches seem official, in most circumstances they will not constitute the sort of endorsement of religion at which separation of church and state is aimed.

The plurality's reliance on early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional

Convention in 1787 nor enshrined in the Constitution's text. Thus, the presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture. It does so here. In according deference to the statements of George Washington, THE CHIEF JUSTICE and JUSTICE SCALIA fail to account for the views of other leaders of that time.

There is another critical nuance lost in the plurality's portrayal of history. Many of the Founders understood the Establishment Clause to stand for a *narrower* proposition than the plurality is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.

The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their constitutions. Many of those provisions restricted "equal protection" and "free exercise" to Christians. That historical background informed the Framers' understanding of the First Amendment. For nearly a century after the Founding, many accepted the idea that America was not just a *religious* nation, but "a Christian nation."

The original understanding of the type of "religion" that qualified for constitutional protection under the Establishment Clause likely did not include followers of Judaism and Islam who are among the preferred "monotheistic" religions JUSTICE SCALIA has embraced in his *McCreary County* opinion. Indeed, JUSTICE SCALIA is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause's original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. JUSTICE SCALIA's inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is unmoored from the Constitution's history and text, and moreover arbitrary in its inclusion of some, but exclusion of other (*e.g.*, Buddhism), widely practiced non-Christian religions. Given the original understanding of the men who championed our "Christian nation" one must ask whether JUSTICE SCALIA "has not had the courage to apply [his originalism] principle consistently."

Indeed, to constrict narrowly the reach of the Establishment Clause to the views of the Founders would also leave us with an unincorporated constitutional provision -- one that limits only the *federal* establishment of "a national religion." Under this view, not only could a State constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament, it would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as *the* official state religion. Only the Federal Government would be prohibited from taking sides, (and only then as between Christian sects).

A reading of the First Amendment dependent on either of the purported original meanings expressed above would eviscerate the heart of the Establishment Clause. It would replace Jefferson's "wall of separation" with a perverse wall of exclusion -- Christians inside, non-Christians out. It would permit States to construct walls of their own choosing -- Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance.

Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross back over the incorporation bridge, appeals to the religiosity of the Framers ring hollow. But even if there were a coherent way to embrace incorporation with one hand while steadfastly abiding by the Founders' purported religious views on the other, the problem of the selective use of history remains. As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.

It is our duty, therefore, to interpret the First Amendment's command not by merely asking what those words meant at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations. Constitutions are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' In the application of a constitution our contemplation cannot be only of what has been but of what may be.

The principle that guides my analysis is neutrality. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers. Fortunately, we are not bound by the Framers' expectations -- we are bound by the legal principles they enshrined in our Constitution. Story's vision that States should not discriminate between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, "polytheists[,] and believers in unconcerned deities" is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, forbids Texas from displaying the Ten Commandments monument.

IV

The judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to "have no other gods before me," it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.

The disconnect between this Court's approval of Texas's monument and the constitutional prohibition against preferring religion to irreligion cannot be reduced to the exercise of plotting two adjacent locations on a slippery slope. Rather, it is the difference between the shelter of a fortress and exposure to "the winds that would blow" if the wall were allowed to crumble. That wall, however imperfect, remains worth preserving.

JUSTICE O'CONNOR, dissenting.

For essentially the reasons given by JUSTICE SOUTER, as well as the reasons given in my concurrence in *McCreary County v. ACLU of Ky.*, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Establishment Clause requires neutrality as a general rule. A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose either to adopt the religious message or to urge its acceptance by others.

Until today, only one of our cases addressed the constitutionality of posting the Ten Commandments, *Stone* v. *Graham*, 449 U.S. 39, 41-42 (1980) *(per curiam)*. A Kentucky statute required posting the Commandments on the walls of public school classrooms, and the Court described the State's purpose as being at odds with the obligation of religious neutrality.

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

What these observations underscore are the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.

In this case, moreover, the text is presented to give particular prominence to the Commandments' first sectarian reference, "I am the Lord thy God." That proclamation is centered on the stone and written in slightly larger letters than the subsequent recitation. To ensure that the religious nature of the monument is clear to even the most casual passerby, the word "Lord" appears in all capital letters (as does the word "am"), so that the most eye-catching segment of the quotation is the declaration "I AM the LORD thy God." What follows are the rules against other gods, graven images, vain swearing, and Sabbath breaking.

To drive the religious point home, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ. Nothing on the monument, in fact, detracts from its religious nature,[1] and the plurality does not suggest otherwise. It would therefore be difficult to miss the point that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it.

The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them, the

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[1] That the monument also surrounds the text of the Commandments with various American symbols (notably the U.S. flag and a bald eagle) only underscores the impermissibility of Texas's actions: by juxtaposing these patriotic symbols with the Commandments and other religious signs, the monument sends the message that being American means being religious (and also subscribing to the Commandments, *i.e.,* practicing a monotheistic religion).

frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers. Since Moses enjoys no especial prominence, viewers can readily take him to be there as a lawgiver in the company of other lawgivers; and the viewers may see the tablets of the Commandments (showing the later ones, forbidding things like killing and theft) as background from which the concept of law emerged, ultimately having a secular influence in the history of the Nation. Government may post displays or erect monuments recounting this aspect of our history, so long as there is a context and that context is historical. Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable.

Texas seeks to take advantage of the recognition that visual symbol and written text can manifest a secular purpose in secular company, when it argues that its monument is only 1 among 17 placed on the 22 acres surrounding the state capitol. Texas, indeed, says that the Capitol grounds are like a museum for a collection of exhibits. But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any sense that some purpose held the miscellany together more coherently than fortuity. If the State's museum argument does nothing to blunt the religious message and religious purpose, neither does the plurality's reliance on generalities culled from cases factually different from this one. It is not until the end of its opinion that the plurality turns to the precedent of *Stone*.

When the plurality finally does confront *Stone,* it tries to avoid the case's applicability by limiting its holding to the classroom setting. The plurality claims to find authority for limiting *Stone*'s reach in the opinion's citations of two school-prayer cases. But *Stone* relied on those cases for widely applicable notions, not for any concept specific to schools. Accordingly, our prior discussions of *Stone* have never treated its holding as restricted to the classroom.

Nor can the plurality deflect *Stone* by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in *Stone,* where the text confronted elementary school students every day." Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it.

To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment, this distinction should make no difference. The monument sits on the grounds of the Texas State Capitol. The "statehouse" is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or rejection of religion.

Finally, I do not see a persuasive argument in the plurality's observation that Van Orden's lawsuit comes "forty years after the monument's erection." Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse is much evidentiary help in applying the Establishment Clause.

8. McCREARY COUNTY, KENTUCKY v. ACLU
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 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 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. The Judge-Executive was accompanied by the pastor of his church. In both counties, this was the version of the Commandments posted:

> "Thou shalt have no other gods before me.
> "Thou shalt not make unto thee any graven images.
> "Thou shalt not take the name of the Lord thy God in vain.
> "Remember the sabbath day, to keep it holy.
> "Honor thy father and thy mother.
> "Thou shalt not kill.
> "Thou shalt not commit adultery.
> "Thou shalt not steal.
> "Thou shalt not bear false witness.
> "Thou shalt not covet.
> "Exodus 20:3-17."

In each county, the hallway display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, respondents ACLU of Kentucky sued the Counties in Federal District Court. Within a month, 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 Fathers [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, 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; a proclamation by 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 "the Bible is the best gift God has ever given to man; a proclamation marking 1983 the Year of the Bible; and the Mayflower Compact.

The District Court entered a preliminary injunction, ordering that the "display be removed from [each] County Courthouse IMMEDIATELY." The Counties filed a notice of appeal but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3-17, and quoted at greater length than before:

> "Thou shalt have no other gods before me.
> "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.
> "Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.
> "Remember the sabbath day, to keep it holy.
> "Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.
> "Thou shalt not kill.
> "Thou shalt not commit adultery.

"Thou shalt not steal.
"Thou shalt not bear false witness against thy neighbour.
"Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbour's."

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

> "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."

The ACLU moved to enjoin the third display, and the Counties responded with several explanations for the new version, including desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose," and found that the assertion that the Counties' broader educational goals are secular "crumbles upon an examination of the history of this litigation." The Court of Appeals for the Sixth Circuit affirmed. We granted certiorari and now affirm.

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 bar against establishment of religion. *Stone* v. *Graham,* 449 U.S. 39, 41 (1980) *(per curiam)*. *Stone* found a predominantly religious purpose in the government's posting of the Commandments.'" The Counties ask for a different approach here by arguing that official purpose is unknowable. In the alternative, the Counties would limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

A

Ever since *Lemon* v. *Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases.

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." *Epperson* v. *Arkansas*; *Everson* v. *Board of Ed. of Ewing*. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *Zelman* v. *Simmons-Harris,* 536 U.S. 639, 718 (2002) (BREYER, J., dissenting). By showing a purpose to favor religion, the government "sends the message to nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.'" *Santa Fe Independent School Dist.* v. *Doe,* 530 U.S. 290, 309-10 (2000) (quoting *Lynch* v. *Donnelly,* 465 U.S. 668, 688 (1984) (O'CONNOR, J., concurring)).

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable.

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. 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 where an understanding of official objective emerges from readily discoverable fact. 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.

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace v. Jaffree*, we inferred purpose from a change of wording from an earlier statute to a later one. And in *Edwards v. Aguillard*, we relied on a statute's text and the public comments of its sponsor. In other cases, the government action itself bespoke the

purpose, as in *School Dist. of Abington Township v. Schempp*, where the object of required Bible study in public schools was patently religious; in *Stone*, the Court held that the "posting of religious texts on the wall served no educational function," and found that if "the copies of the Ten Commandments [were] to have any effect, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." In each case, the government's action was held unconstitutional only because data supported a conclusion that a religious objective permeated the government's action.

Nor is there any indication that the enquiry is rigged to finding a religious purpose dominant. In the past, the test has not been fatal very often, presumably because government does not generally act with the predominant purpose of advancing religion. That said, [it] 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. 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 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 has to be genuine, not a sham, and not 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 be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions. 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. 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.

A

The display rejected in *Stone* had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments as distinct from any traditionally symbolic

representation, and each stood alone, not part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, 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. 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*. 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 law. The point is simply that the original text is an unmistakably religious statement. When the government place[s] this statement alone in public view, a religious object is unmistakable.

B

Once the Counties were sued, they modified the exhibits in a display that hung for about six months. This new one was the product of 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" without raising concern about "any Christian or religious references" in them.

In this second display, the Commandments were not hung in isolation. Instead, the second version was required to include the statement of the government's purpose 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 because of their sectarian content. That demonstration of the government's objective was enhanced by the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable showing of an impermissible purpose. Today, the Counties describe version two as "dead and buried." Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

C

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 significant in the foundation of American government**.** In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." The Counties' claims did not persuade the court, or the Court of Appeals, neither of which found a legitimizing secular purpose in this third version of the display. The conclusions of the two courts preceding us in this case are well warranted.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. 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.

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta. If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the "Ten Commandments' . . . influence is clearly seen in the Declaration;" in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration holds that the authority of government to enforce the law derives "from the consent of the governed." If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

In holding the preliminary injunction adequately supported by evidence that the purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort 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.

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 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 importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson* v. *Board of Ed. of Ewing*, and a word needs to be said about the different view taken in today's dissent. We all agree, of course, on the need for

some interpretative help. The First Amendment contains no textual definition of "establishment," and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, a state) church, but nothing in the text says just how much more it covers. There is no simple answer, for more than one reason.

The First Amendment has two clauses tied to "religion," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. The dissent, then, is wrong to read cases like *Walz* as a rejection of neutrality for trade-offs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not be had.

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The Framers intended not only to protect individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate. A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause. To be sure, given its generality as a principle, an appeal to neutrality alone cannot lay every issue to rest. But invoking neutrality is a prudent way of keeping sight of something the Framers thought important.

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

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first President and it cites his first Thanksgiving proclamation giving thanks to God. But there is also evidence 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 "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 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. What the evidence does show is a group of statesmen who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. 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, it does manage to deliver a surprise. 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 a remarkable view. Today's dissent 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 Christianity, a fact that no member of this Court takes as a premise for construing the Religion Clauses. Thus, it appears to be common ground in the interpretation of a Constitution "intended to endure for ages to come," that applications unanticipated by the Framers are inevitable.

Historical evidence thus supports no solid argument for changing course, whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. 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.

JUSTICE O'CONNOR, concurring.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "we are a religious people" has proved true. Americans attend their places of worship more often than do citizens of other developed nations and describe religion as playing an especially important role in their lives. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

Our guiding principle has been James Madison's -- that "Religion must be left to the conviction and conscience of every man." To that end, government may not coerce a person into worshiping against her will, nor prohibit her from worshiping according to it. It may not prefer one religion over another or promote religion over nonbelief. It may not entangle itself

with religion. And government may not, by "endorsing religion or a religious practice," "make adherence to religion relevant to a person's standing in the political community."

When we enforce these restrictions, we do so for the same reason that guided the Framers. Our Founders conceived of a Republic receptive to voluntary religious expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship.

Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. Nor can we accept the theory that Americans who do not accept the Commandments' validity are outside the First Amendment's protections. It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.

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

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE KENNEDY joins as to Parts II and III, dissenting.

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

I

George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God." The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the

same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer." President Washington offered the first Thanksgiving Proclamation shortly thereafter, thus beginning a tradition of offering gratitude to God that continues today. And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Nor have views significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with "God save the United States and this Honorable Court." Invocation of the Almighty by public figures, at all levels of government, remains commonplace. Our coinage bears the motto "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God."

With all of this reality staring it in the face, how can the Court *possibly* assert that "'the First Amendment mandates governmental neutrality between religion and nonreligion,'" and that "manifesting a purpose to favor adherence to religion generally" is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's understanding of those words. Surely not even the current sense of our society. Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so. And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle.

I have cataloged elsewhere the variety of circumstances in which this Court has approved government action "undertaken with the intention of improving the position of religion." Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice -- but we have approved it. We have even approved government-led prayer to God. *Marsh* v. *Chambers*.

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. That is hardly a good reason for letting an unconstitutional practice continue. What, then, could be the genuine "good reason" for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court cannot go too far down the road of an enforced neutrality

that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive.

Besides appealing to the false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington was scrupulously nondenominational -- but it was monotheistic. In *Marsh*, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition" posed no additional problem because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is "a tolerable acknowledgment of beliefs widely held among the people of this country." The three most popular religions in the United States, Christianity, Judaism, and Islam -- which combined account for 97.7% of all believers -- are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population -- from Christians to Muslims -- that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.[1]

A few remarks are necessary in response to the criticism of this dissent by JUSTICE STEVENS in the related case of *Van Orden* v. *Perry*. I must respond to JUSTICE STEVENS' assertion that I would "marginalize the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic. Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions

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[1]This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.

cease to be religions recognized by the religion clauses, but because governmental invocation of God is not an establishment. JUSTICE STEVENS fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people,* and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.

II

As bad as the *Lemon* test is, it is worse for the fact that its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose as a means to ascertain the appearance of the government action to an "'objective observer.'" Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the objective observer would think otherwise.

Second, the Court replaces *Lemon*'s requirement that the government have "*a* secular purpose," with the heightened requirement that the secular purpose "predominate" over any purpose to advance religion. The Court treats this extension as a natural outgrowth of the longstanding requirement that the government's secular purpose not be a sham, but simple logic shows the two to be unrelated. If the government's proffered secular purpose is not genuine, then the government has no secular purpose at all. The new demand that secular purpose predominate contradicts *Lemon*'s more limited requirement, and finds no support in our cases. In all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion. See *Santa Fe Independent School Dist.* v. *Doe,* 530 U.S. 290, 308-09 (2000) (dismissing proffered secular purposes as shams); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (finding "*no* secular purpose"); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) *(per curiam)* (finding *no secular legislative purpose*"); *Epperson* v. *Arkansas*, 393 U.S. 97, 107-09 (1968). In *Edwards* v. *Aguillard,* 482 U.S. 578 (1987), the Court did say that the state action was invalid because its "primary" or "preeminent" purpose was to advance a particular religious belief, but that statement was unnecessary to the result, since the Court rejected the State's only proffered secular purpose as a sham.

I have urged that *Lemon*'s purpose prong be abandoned, because even an *exclusive* purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has fairly limited inquiry into a rigorous review of the full record.

III

Even accepting the Court's *Lemon*-based premises, the displays at issue here were constitutional. On its face, the Foundations Displays manifested the purely secular purpose asserted before the District Court: "to display documents that played a significant role in the foundation of our system of law and government." When the Ten Commandments appear

alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included to show their unique contribution to the development of the legal system. This is doubly true when the display informs passersby that it "contains documents that played a significant role in the foundation of our system of law and government."

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.

Perhaps in recognition of the centrality of the Ten Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square. The constitutional problem, the Court says, is with the Counties' *purpose* in erecting the Foundations Displays, not the displays themselves.

This inconsistency may be explicable in theory, but I suspect that the "objective observer" with whom the Court is so concerned will recognize its absurdity in practice. Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment.

C

The Court's conclusion that the Counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful. In the Court's view, the impermissible motive was apparent from the initial displays of the Ten Commandments. Surely that cannot be. If the Commandments have a proper place in our civic history, placing them by themselves can be civically motivated -- especially when they are placed, not in a school, but in a courthouse.

The Court has in the past prohibited government actions that "proselytize or advance any one, or . . . disparage any other, faith or belief," or that apply some level of coercion (though I and others have disagreed about the form that coercion must take). The passive display of the Ten Commandments, even standing alone, does not begin to do either. What JUSTICE KENNEDY said of the creche in *Allegheny County* is equally true of the Counties' original Ten Commandments displays:

> "No one was compelled to observe or participate in any religious ceremony or activity. The counties [did not] contribute significant amounts of tax money to serve the cause of one religious faith. [The Ten Commandments] are purely passive symbols of [the religious foundation for many of our laws and governmental institutions]. Passersby who disagree with the message conveyed by the displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not closely associated with a single religious belief. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.

The Court also points to the Counties' second displays as evidence of an impermissible religious purpose. All it necessarily shows is that the exhibit was meant to focus upon the historic role of religious belief in our national life -- which is entirely permissible. And the same can be said of the resolution. To forbid any government focus upon this aspect of our history is to display "untutored devotion to the concept of neutrality."

Turning at last to the displays actually at issue in this case, the Court faults the Counties for not *repealing* the resolution expressing what the Court believes to be an impermissible intent. The Court implies that the Counties may have been able to remedy the "taint" from the old resolutions by enacting a new one. But that action would have been wholly unnecessary in light of the explanation included *with the displays themselves*: A plaque informed all who passed by that each display "contains documents that played a significant role in the foundation of our system of law and government." Additionally, there was no reason for the Counties to repeal or repudiate the resolutions adopted with the hanging of the second displays, since they related *only to the second displays*. After complying with the District Court's order to remove the second displays, and erecting new displays that reflected a *different* purpose, the Counties had no reason to believe that their previous resolutions would be deemed to be the basis for their actions. After the Counties discovered that the sentiments in the resolutions could be attributed to their most recent displays (in oral argument before this Court), they repudiated them immediately.

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.

9. PLEASANT GROVE CITY, UTAH v. SUMMUM
129 S. Ct. 1125 (2009)

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11

of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two occasions in 2003, Summum's president wrote to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"[1] and be similar in size and nature to the Ten Commandments monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics. In 2005, respondent's president again wrote to the mayor asking to erect a monument. The city council rejected this request.

Respondent filed this action asserting that petitioners violated the Free Speech Clause by accepting the Ten Commandments monument but rejecting the Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument. After the District Court denied Summum's request, respondent appealed.

A panel of the Tenth Circuit reversed. Noting that public parks have traditionally been regarded as public forums, the panel held that the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. The panel then concluded that the exclusion of respondent's monument was unlikely to survive this strict scrutiny, and the panel therefore held that the City was required to erect Summum's monument immediately.

The Tenth Circuit denied the City's petition for rehearing en banc. We granted certiorari and now reverse.

II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation

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[1]Respondent's brief describes the church and the Seven Aphorisms as follows:

"The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'

"Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai . . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.

in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct or were they providing a forum for private speech?

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate for its advocacy."

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks. In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny.

III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. Persons who observe donated monuments

routinely -- and reasonably -- interpret them as conveying some message on the property owner's behalf.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately donated monuments, they have exercised selectivity. Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."

Public parks are often closely identified in the public mind with the government unit that owns the land. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and the City has now expressly set forth the criteria it will use in making future selections.

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. In this case, for example, the City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form

of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. Respondent seems to think that a monument can convey only one "message." This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one. Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger. Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas?

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony." Does this statue commemorate a "revolutionary leader who advocated for agrarian reform and the poor" or "a violent bandit"?

Contrary to respondent's belief, it frequently is not possible to identify a single "message" that is conveyed by an object, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.[2] By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the significance of that conduct may not coincide with the thinking of the monument's donor or creator.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the vicinity. For example, following controversy over the design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial.

The "message" conveyed by a monument may change over time. A striking example of how the interpretation of a monument can evolve is provided by the Statue of Liberty. The

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[2] Museum collections illustrate this phenomenon. The significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. It does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the influence of American ideals. Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom.

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program.

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, "'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments."

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Respondent compares the present case to *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995), but that case involved a very different situation -- a request by the Ku Klux Klan to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. Although some public parks may be made generally available for temporary private displays, the same is rarely true for permanent monuments. As a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause. We therefore reverse.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message.

To date, our decisions relying on the recently minted government speech doctrine have been few and, in my view, of doubtful merit. The Court's opinion signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. Nor is it likely that the government will be able to avoid political accountability for the views that it endorses or expresses through this means. Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today's decision will be limited.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State;" respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise Establishment Clause issues."

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. There are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.

In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), this Court upheld against Establishment Clause challenge a virtually identical Ten Commandments monument. Nothing in that decision suggested that the outcome turned on a finding that the monument was only "private" speech. To the contrary, all the Justices agreed that government speech was at issue, but the Establishment Clause argument was nonetheless rejected. For the plurality, that was

because the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance." JUSTICE BREYER, concurring in the judgment, agreed that the monument conveyed a permissible secular message, as evidenced by its location in a park that contained multiple monuments and historical markers; by the fact that it had been donated by the Eagles "as part of that organization's efforts to combat juvenile delinquency;" and by the length of time (40 years) for which the monument had gone unchallenged.

Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*, there is little basis to distinguish the monument in this case: Pioneer Park includes "15 permanent displays;" it was donated by the Eagles as part of its national effort to combat juvenile delinquency; and it was erected in 1971, which means it is approaching its (momentous!) 40th anniversary.

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary -- and, yes, even its Ten Commandments monument -- without fear that they are complicit in an establishment of religion.

JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes -- lest we turn "free speech" doctrine into a jurisprudence of labels. Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.

Were we to do so here, we would find that the City's action does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. Cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to pick and choose among proposed monuments according to criteria reasonably related to these legitimate ends restricts Summum's expression, but the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that the Ten Commandments monument is government speech. I also agree that the city need not satisfy the formality urged by Summum as a condition of

recognizing that the expression here falls within the public category. I have qualms, however, about accepting the position that public monuments are government speech categorically.

Because the government speech doctrine is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, Establishment Clause issues have been neither raised nor briefed, there is no doubt that this case and its government speech claim has been litigated with one eye on the Establishment Clause. The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all, a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments.

Whether that view turns out to be sound is more than I can say at this point. It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech. This reasonable observer test is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. The adoption of it would thus serve coherence within Establishment Clause law, and it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views. Application of this observer test provides the reason I find the monument here to be government expression.

10. TOWN OF GREECE v. GALLOWAY
134 S. Ct. 1811 (2014)

Justice KENNEDY delivered the opinion of the Court, except as to Part II-B. THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II-B.

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

"Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen."

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

"Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... Praise and glory be yours, O Lord, now and forever more. Amen."

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." After respondents complained that Christian themes pervaded the prayers, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." The District Court upheld the prayer practice as consistent with the First Amendment. The Court of Appeals for the Second Circuit reversed. Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the

practice of opening legislative sessions with a prayer has become part of the fabric of our society."

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, no faith was excluded by law, nor any favored, and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers. *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first

chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.

The contention that legislative prayer must be generic or nonsectarian is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S. at 793, n.14. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale*, 370 U.S. 421 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define

permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."

From the earliest days of the Nation, invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders.

Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," while another lamented that other towns did not have "God-fearing" leaders. Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of

ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a `diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some amici contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. To be sure, many members of the

public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.

This case can be distinguished from the conclusions and holding of *Lee v. Weisman*. There the Court found that a religious invocation was coercive as to an objecting student. The circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to

mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I write separately to respond to the principal dissent. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways. First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint."

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply recommending that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what

must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed."

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. The Greece clerical employee drew up her list using the town directory. If the task of putting together the list had been handled in a more sophisticated way, the employee would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers* was largely based, that municipality should not be held to have violated the Constitution simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is never permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. The guest chaplains stand in front of the room facing the public. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." Before a session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual. It is common for residents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at

the beginning of such a meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, the fact that guest chaplains often began with the words "Let us pray" is also commonplace. In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh*, but the acceptance of *Marsh* appears to be predicated on the view that the prayer in that case was little more than a formality to which the legislators paid scant attention. It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*, but what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment.

The first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational. But one of its purposes, and presumably one of its effects, was not to divide, but to unite. The practice of beginning congressional sessions with a prayer was continued after the Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses.

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice. There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads — to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II-B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*. I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," and to state my understanding of the proper "coercion" analysis.

As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. The text of the Clause also suggests that Congress "could not interfere with state establishments." Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789.

The relationship between church and state in the fledgling Republic poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected."

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation.

II.

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform. Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion."

None of these founding-era state establishments remained at the time of Reconstruction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of what

constituted an establishment. There is no support for the proposition that the framers of the Fourteenth Amendment embraced modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," or perceives governmental "endors[ement]."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts — not the "subtle coercive pressures" allegedly felt by respondents in this case.

Justice BREYER, dissenting.

The Court of Appeals did not hold that "the town may not open its public meetings with a prayer," or that "any prayers offered in this context must be blandly `nonsectarian.'" In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced.

To be precise: During 2008, two prayers were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan prayer givers were invited only after they reached out to the town to inquire about giving an invocation. The town apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 meetings, which contrasts starkly with the single-denomination prayers every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite. Rather, the evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits.

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. Given that the town could easily have made efforts but chose

not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion.

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation. The town made no effort to promote a similarly inclusive prayer practice here.

As both the Court and Justice KAGAN point out, we are a Nation of many religions. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect."

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality — the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers*. And I believe that a town hall need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given — directly to those citizens — were predominantly sectarian in content.

Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer — taken from this case's record — infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the setting:

• You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, through his dying and in his rising, he has restored our life. Amen." The judge then asks your lawyer to begin the trial.

• It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. `Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....'" And after he concludes, he makes the sign of the cross, and appears to wait expectantly for prospective voters to do so too.

• You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit — it is with a due sense of reverence and awe that we come before you seeking your blessing. You are a wise God, oh Lord, ... as evidenced in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen."

I would hold that the government officials responsible for the above practices — that is, for prayer repeatedly invoking a single religion's beliefs in these settings — crossed a constitutional line. I have every confidence the Court would agree. And even Greece's attorney conceded that something like the first hypothetical would violate the First Amendment. Why?

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. But no one has disagreed with this much:

"[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address to the present day, has ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, specifying details upon which men and women who believe in a benevolent, omnipotent Creator are known to differ (for example, the divinity of Christ)." Lee v. Weisman, 505 U.S. 577, 641 (1992) (SCALIA, J., dissenting).

By authorizing prayers associated with a single religion — to the exclusion of all others — the government officials in my hypothetical cases have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to participate in the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony — and a government official or his hand-picked minister asks her, as the first order of business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along — to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function brings religious differences to the fore: That proceeding becomes an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or deed. And that government imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding — I could go on: to a zoning agency, a parole board hearing, or the DMV — government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans. Why not at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*. They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer. And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures."

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions — and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were more sectarian than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing — say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings allow citizens to actively participate in the Town's governance — both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. The same is true in the U.S. Congress and, I suspect, in every state legislature.

The very opposite is true in Greece: Contrary to the majority's characterization, the prayers there are directed squarely at the citizens. The chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing — the members of the public. He begins with some version of "Let us all pray together." Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. In essence, the chaplain leads a highly intimate (albeit brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers as "in the Judeo-Christian tradition," and stated that the chaplain had removed all explicitly Christian references at a senator's request. And as the majority acknowledges, *Marsh* hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one faith"; had it been otherwise, the Court would have reached a different decision.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian — constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit, the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. The monthly chaplains appear almost always to assume that everyone in the room is Christian. The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session.

Those three differences, taken together, remove this case from the protective ambit of *Marsh*. That legislative prayer practice is not Greece's. None of the history *Marsh* cited supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of *Marsh*. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. The government may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." She must think that Christian worship has become entwined with local governance. And now she faces a choice — to pray alongside the majority or somehow to register her deeply felt difference. She is a strong person, but that is no easy call — especially given that the room is small and her every action will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade.

And yet she does not want to acknowledge Christ's divinity. So assume she declines to participate in the first act of the meeting — or even, as the majority proposes, that she leaves the room altogether. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation infringes the First Amendment. And of course, it would do so no less if the Town's clergy always used the liturgy of some other religion. That the Town Board selects, month after month and year after year, prayergivers who will speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in worship that may be at odds with their beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's religious beliefs and another (far smaller) that does not. And that the practice alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be prayer-free. "[W]e are a religious people," *Marsh* observed, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to their elected representatives in a legislative session, the government must take care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required — but that much is crucial — to treat every citizen as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, then no one would have valid grounds for complaint. Priests and ministers, rabbis and imams give such invocations all the time. Or the Board might have invited clergy of many faiths to serve as chaplains, as Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah — as the majority counterfactually suggests happened here, the government does not identify itself with one religion and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings.

But Greece could not do what it did: infuse a participatory government body with one faith, so that citizens appearing before it become partly defined by their creed. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The error reflects two kinds of

blindness. First, the majority misapprehends the facts of this case, as distinct from traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority acknowledges that the inquiry — a "fact-sensitive" one — turns on "the setting in which the prayer arises and the audience to whom it is directed." But then the majority glides over those considerations as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than to the lawmakers. The chaplain faces the Town's residents and calls on them to pray together.

And of course — as the majority sidesteps as well — to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in other government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal." But that case is not this one because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion. So all the majority can point to is that the Board "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." But that representation has never been publicized; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, as most state legislatures and Congress do. The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is relentlessly noninclusive.

The not-so-implicit message of the majority's opinion — "What's the big deal, anyway?" — is mistaken. The content of Greece's prayers is a big deal, to Christians and non-Christians alike. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. They express beliefs that are fundamental to some, foreign to others — and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project — the distinctively American project — of creating one from the many, and governing all as united.

IV

When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.