This collection is the first of three planned volumes of Supreme Court cases in the Ashbrook Center's extended series of document collections covering major periods, themes, and institutions in American history and government. A volume of cases on free speech will follow, as will a volume covering a variety of landmark cases. It is appropriate to begin with the volume on the religion clauses of the First Amendment. This is the first freedom guaranteed in the Bill of Rights, as the United States was the first nation founded on this right.

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Religious Liberty

CORE DOCUMENTS
Religious Liberty: Core Documents
Selected and Introduced by Ken Masugi

Includes Index
ISBN 978-1-878802-50-7 (pbk.)

Cover images, above the title, left to right:
Vashti Cromwell McCollum Reads Verdict, Mar. 8, 1948, Courtesy the Champaign-Urbana News Gazette and University of Illinois.
Antonin Scalia, Associate Justice of the Supreme Court of the United States, March 21, 2013. Collection of the Supreme Court of the United States.
Sister Loraine Marie Maguire, mother provincial of the Little Sisters of the Poor, speaks to the media after Zubik v. Burwell was heard by the U.S. Supreme Court in Washington, March 23, 2016. The Becket Fund.

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General Editor’s Introduction

This collection is the first of three planned volumes of Supreme Court cases in the Ashbrook Center’s extended series of document collections covering major periods, themes, and institutions in American history and government. A volume of cases on free speech will follow, as will a volume covering a variety of landmark cases. It is appropriate to begin with the volume on the religion clauses of the First Amendment. This is the first freedom guaranteed in the Bill of Rights, as the United States was the first nation founded on this right.

When the series of Ashbrook document collections is complete, it will be comprehensive, as well as authoritative, because it will present America’s story in the words of those who wrote it—America’s presidents, labor leaders, farmers, philosophers, industrialists, politicians, workers, explorers, religious leaders, judges, soldiers; its slaveholders and abolitionists; its expansionists and isolationists; its reformers and stand-patters; its strict and broad constructionists; its hard-eyed realists and visionary utopians—all united in their commitment to equality and liberty, yet all also divided often by their different understandings of these most fundamental American ideas. The documents are about all this—the still unfinished American experiment with self-government.

As this volume does, each of the volumes in the series will contain key documents on its period, theme, or institution, selected by an expert and reviewed by an editorial board. Each volume will have an introduction highlighting key documents and themes. In an appendix to each volume, there will also be a thematic table of contents, showing the connections between various documents. Another appendix will provide study questions for each document, as well questions that refer to other documents in the collection, tying them together as the thematic table of contents does. Each document will be checked against an authoritative original source and have an introduction outlining its significance. Notes to each document will identify people, events, movements, or ideas that may be unfamiliar to non-specialist readers and will improve understanding of the document’s historical context.

In sum, our intent is that the documents and their supporting material provide reliable and unique access to the richness of the American story.
Ken Masugi, Lecturer, Center for Advanced Governmental Studies, Johns Hopkins University, selected the documents and wrote the introductions, notes, and study questions. David Tucker served as general editor; the collection was copyedited by Joan Livingston. Ali Brosky and Ellen Tucker provided editorial support. Sarah Morgan Smith oversaw production. This publication was made possible through the support of a grant by the John Templeton Foundation. The opinions expressed in this publication are those of the editors and do not necessarily reflect the views of the John Templeton Foundation.

David Tucker
Senior Fellow
Ashbrook Center

A Note on Usage

Ellipses (…) at the end of a paragraph indicate that we have omitted text either from the remainder of the paragraph or that we have omitted the following paragraph. Ellipses at the beginning of a paragraph indicate that we have omitted text from the beginning of the paragraph. Ellipses between paragraphs indicates that we have omitted numbered or lettered sections of an opinion.
Introduction

The Supreme Court Debates Religious Freedom: The Major Cases

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment I. Ratified December 15, 1791

As the text of the First Amendment makes clear, originally it applied only to Congress, and not the states, which could make laws establishing churches and prohibiting the free exercise of religion. As a practical matter, the latter was not an issue by the time the Bill of Rights was adopted. States did still have established churches, however. In 1833, Massachusetts became the last state to stop funding and disestablish its church. In the last 150 years, the Supreme Court has ruled that the Due Process Clause of the Fourteenth Amendment (1868) (“nor shall any State deprive any person of life, liberty, or property, without due process of law”) expanded the application of the First Amendment and most of the Bill of Rights to state and local laws. Thus, the Court has required a uniform standard for both federal and state governments on major issues arising from violations of the Bill of Rights. The Court did not apply the Religion Clauses of the First Amendment to state and local laws until the mid-twentieth century (West Virginia v. Barnette [Document 2] and Everson v. Board of Education [Document 3]).

The First Amendment includes freedoms of religion, speech, press, assembly, and petition. Freedom of religion is first, the key element of republican citizenship. This freedom is expressed in two clauses. First, the government may not establish a religion—that is, make one religion the official, government-supported religion. But may the government promote or prefer religion generally, or even at all? Second, the government may not prohibit the free exercise of religion. But does protecting free exercise mean that all religious practices as well as beliefs must be allowed (Reynolds v. U.S, Document 1)? If not, how are we to distinguish between those practices which should and those which should not be protected?
This collection of cases introduces teachers and students to the legal debate over the First Amendment’s Religion Clauses through excerpted opinions of Supreme Court justices. While the cases are presented chronologically, they are also categorized by the focus each has on the two Religion Clauses, as well as by which cases involve schools or universities (Appendix A). These cases present the most clear, contentious, and instructive opinions on freedom of religion. The goal is to permit the reader to decide how each opinion attempts to protect religious freedom.

This goal means that, in the earlier cases that developed the Court’s understanding of the establishment and free exercise of religion, we emphasize the Court opinions, the opinion that declares which party in the case won or lost and, more important, why they deserved to do so. In explaining the Court’s opinion or in concurring with or dissenting from it, justices present reasoned arguments on the meaning of the Constitution or the law; on precedents or previous, similarly decided cases; or on the implications of this case for deciding later ones. Therefore, in these later cases (from the 1980s to the present), where the opinions of the justices are more divided, we often represent cases through dissenting or concurring opinions rather than the Court opinions. In addition to reflecting on the consequences of earlier decisions, concurring or dissenting opinions sometimes show the direction in which the Court is moving.

Collections such as these are not intended to be read straight through from beginning to end—as ambitious and useful as this might be. Locating a particular case in the stream of precedents—similarly decided cases—is crucial for understanding it. Justices bolster their arguments by reference to earlier Court opinions and write theirs with an eye to shaping future ones. At which cases, however, should a reader enter the often contentious conversation of the justices? One place to start is with the last three cases in the collection, Documents 21–23.

The first of these three introductory cases is *Town of Greece v. Susan Galloway, et al.* (Document 21). This case decided whether a New York State city council’s practice of opening its meetings with sectarian prayers, those of a particular religion, violated the Constitution. In her dissent, Justice Elena Kagan presents a moving series of objections that the practice actually does “tend to establish” a religion by making it appear official to citizens attending the meetings. Writing in support of the Court majority, concurring Justice Samuel A. Alito argued, against Justice Kagan, that she exaggerated the seriousness of the town’s actions or inactions. With the arguments of the justices in mind, the reader might review why the Court ruled school
prayer unconstitutional in *Engel v. Vitale* (Document 5) and *Lee v. Weisman* (Document 14).

The issue of establishment concerns not only prayer but the place of religious symbols (as in Christmas displays on public property, *Lynch v. Donnelly*, Document 10), including representations of the Ten Commandments (*Van Orden v. Perry* and *McCreary County v. ACLU of Kentucky*, Documents 18 and 19). These cases show how the Court has expanded what it means to establish religion, that is, for government to endorse, support, or prefer, one particular religion to the disadvantage of others. Is the government endorsing a religion when a public school permits a football pep rally with a student-led prayer? What of a town’s war memorial, a 40-foot high cross at a major highway, to the region’s fallen veterans? The principles involved in the town of Greece case go far beyond the city council chambers.

Next, the reader might turn to *Trinity Lutheran Church of Columbia, Inc. v. Comer* (Document 22), a case involving state aid for a religious school’s playground. This Missouri case illustrates the potential conflict between the ways the Court has understood the Establishment Clause and how it has understood the Free Exercise Clause. May a state prohibit a religious school from competing for a state grant to pave a playground? Is the state denying the school’s free exercise of religion or is it preventing establishment of religion? To see how the Court has decided this conflict, the reader might turn to the first school cases, including *Everson v. Board of Education* and *McCollum v. Board of Education* (Documents 3 and 4). These early cases set forth the doctrine that government may not directly aid religious schools or promote religious doctrines in the public schools. These should not be read without Justice William H. Rehnquist’s dissent in *Wallace v. Jaffree* (Document 11), which provides a different historical account of the meaning of religious establishment. According to Justice Rehnquist, “establishment” meant not aiding religion but setting up an official state church. (In *Lee v. Weisman* [Document 14], Justice David H. Souter offered a different history, leading to a different conclusion.) The later school funding cases of *Lemon v. Kurzman* (Document 7) and *Zelman v. Simmons-Harris* (Document 16), show the complexities of the funding issue and how the Court has expanded the type of aid that a school could receive from government. Arguments over free exercise rights are foreshadowed in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (Document 15) and *Locke v. Davey* (Document 17), among other cases. In *Trinity Lutheran Church of Columbia, Inc. v. Comer* (Document 22) the clashing opinions of Justices Neil Gorsuch and Sonia Sotomayor offer a series of arguments for and against the constitutionality of state aid to
a church-run school based on their respective understandings of religious freedom and establishment of religion.


From *Reynolds* one might review the older free exercise cases, including the flag salute case of *West Virginia v. Barnette* (Document 2) and *Wisconsin v. Yoder* (Document 8), which exempted Amish children from state school attendance laws. Perhaps the most controversial free exercise case is *Oregon v. Smith* (Document 13), which ruled that a person’s free exercise of religion is not violated by an otherwise valid law. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (Document 15) and *Burwell v. Hobby Lobby* (Document 20) further expanded free religious exercise, the latter through its interpretation of a law, rather than the First Amendment.

These elaborations on three cases are just examples of how the cases can be linked to illustrate continuities and breaks in the interpretation of the law. Another way to approach the cases is by asking basic questions, such as what is free exercise, what is establishment, what might the elected branches do to protect First Amendment rights?

Did the Court get off on the wrong step by defining establishment as not only government favoring one religion over another but more broadly by favoring religion over non-religion? Consider the very first Establishment Clause cases involving schools, *Everson v. Board of Education*, *McCollum v. Board of Education*, and *Engel v. Vitale* (Documents 3, 4, and 5). Does aiding a religious school advance, that is, tend to establish, that religion? Apparently, funds for school construction pass muster but, at least at one point, funds for teachers’ salaries do not. (See *Lemon v. Kurtzman*, Document 7.) Perhaps the strongest expression of this viewpoint occurs in Justice John Paul Stevens’ and Justice Souter’s opinions. In *Wallace v. Jaffree* (Document 11), Justice Stevens wrote that “[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.” Likewise, Justice Souter in the school prayer case of *Lee v. Weisman* (Document
14) wrote of “the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.” See as well Justice Sotomayor’s dissent in *Trinity Lutheran* (Document 22).

Contrast these views on how governments should treat religion with Justice Rehnquist’s dissent in *Wallace v. Jaffree* (Document 11), Justice Clarence Thomas’s concurrence in *Van Orden v. Perry* (Document 18), and Justice Antonin Scalia’s dissents in *Lee v. Weisman* (Document 14) and *McCreary County* (Document 19), all of which emphasize a government interest in promoting religion in general. This view seeks support in the traditional use of religious language and ideas in public proclamations by presidents and Congress, as in Lincoln’s Gettysburg Address. In fact, in this view, the elimination of a national established religion on the one hand and the public embrace of religion on the other are both necessary for the promotion of free religious exercise, a central purpose of the first amendment.

Justice Souter replied to this objection, contending, in *Lee*, that “religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families.” Do school principals then need to be monitored more closely than presidents for constitutional violations? In his *Van Orden* concurrence Justice Thomas made the test of constitutionality whether beliefs were being coerced—that is punished by legal penalties. Does his likening of religious expression to free speech—whose constitutionally protected robustness can be acrimonious, vulgar, and even dishonest—fail to protect religious minorities?

Must we choose between religious free exercise and religious establishment? Have the Court’s interpretations over the past 70 years actually made these opposed principles? Is accommodating a minority religion the same as privileging it? Is a state law allowing moments of silence in public schools a subtle way of legalizing prayer and therefore establishing a religion? Are there not ways to see free exercise and establishment as parts of a larger comprehensive view of religious freedom?

All of this discussion leads to other questions, such as the proper constitutional role for the Court to play. Early on, Justices Felix Frankfurter and Robert H. Jackson (*West Virginia v. Barnette* [Documents 2] and *McCollum v. Board of Education* [Document 4]) worried that the Court was substituting its own opinions for the practical wisdom of elected legislatures and school boards. Justices Rehnquist and Scalia would also see practical wisdom expressed in the religious language in presidential speeches and
proclamations, congressional resolutions, and the traditions of the American people (Wallace v. Jaffree [Documents 11] and Lee v. Weisman [Document 14]). Contrast these views with the confidence of Justices Souter and Stevens on the Court’s judgments versus their skepticism of the views from the past, which they regard as antiquated. Justice Stevens once declared in dissent, “Fortunately, we are not bound by the Framers’ expectations—we are bound by the legal principles they enshrined in our Constitution,” which the Court interprets (Van Orden v. Perry [Document 18]). But how much confidence should we citizens have in the wisdom of the Court? Or the justice of our traditions?

These are a few of the many questions readers of these opinions ought to be raising as they exercise their capacities as human beings and citizens. Ultimately, it is not the Courts but informed citizens who will determine the vitality of the First Amendment and of republican self-government.

Ken Masugi
Religious Liberty

CORE DOCUMENTS
The Morrill Anti-Bigamy Act (1862) intended to end the practice of polygamy in the Utah territory by members of the Church of Jesus Christ of the Latter-Day Saints (the Mormons). It also limited church property ownership in any U.S. territory. George Reynolds, a prominent Mormon, allowed his second marriage to become a court case to test the authority of the U.S. Congress to ban a religious practice in the territories. Reynolds argued that his membership in the Mormon Church gave him the constitutional right of free religious exercise to marry a second wife. The Supreme Court disagreed, unanimously affirming a district court ruling that Reynolds had violated a federal anti-bigamy law governing the Territory of Utah. (Utah did not become a state until 1896.) In rejecting Reynolds’ claim, the Court followed the traditional common law doctrines of state courts as well as federal practices in the territories and Washington, D.C. These doctrines, some of which continue today, include the confidentiality of confessions and the exemption of churches from taxation. In addition, the common law recognized traditional moral and legal practices, such as monogamy. State and federal laws and court decisions have rejected or modified common law, as the cases in this volume will illustrate. The court’s decision in the Reynolds case was unanimous. The case illustrates the doctrine that a claim to religious freedom may not be used to overturn otherwise legitimate laws: There is a limit to individual free exercise as there is to any asserted right.

Source: 98 U.S. 145 (1879), https://www.law.cornell.edu/supremecourt/text/98/145. We have omitted the concurring opinion by Justice Stephen J. Field. All footnotes added by the editors.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

...As to the defense of religious belief or duty.

On the trial, [Reynolds] proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church
of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church “that it was the duty of male members of said church, circumstances permitting, to practice polygamy…”

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he “was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be ‘not guilty’”…

…[T]he question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word “religion” is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that state having under consideration “a bill establishing provision for teachers of the Christian religion,” postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested “to signify their opinion respecting the adoption of such a bill at the next session of assembly.”

This brought out a determined opposition. Amongst others, Mr. Madison
prepared a “Memorial and Remonstrance,”\(^1\) which was widely circulated and signed, and in which he demonstrated “that religion, or the duty we owe the Creator,” was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, “for establishing religious freedom,” drafted by Mr. Jefferson, was passed.\(^2\) In the preamble of this act religious freedom is defined; and after a recital “that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,” it is declared “that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.” In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

... [A]t the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison.\(^3\) It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: “Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.”\(^4\) Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.

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\(^1\) https://teachingamericanhistory.org/library/document/memorial-and-remonstrance/?sf_s=Memorial+and+remonstrance

\(^2\) https://teachingamericanhistory.org/library/document/statute-of-religious-liberty/?sf_s=Statute+for+Religious+Liberty

\(^3\) First Amendment. See the Introduction.

of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that “all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,” the legislature of that state substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, “it hath been doubted whether bigamy or polygamy be punishable by the laws of this commonwealth.” From that day to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to
a greater or less extent, rests. Professor, Lieber5 says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. … [T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances . . .

5 Franz Lieber (1800–1872), an American jurist and educator
West Virginia State Board of Education v. Barnette

June 14, 1943

Just three years after the first “flag salute” case, Minersville School District v. Gobitis, in which the Court ruled 7 to 1 that states could require participation by public school students in flag salutes even in the face of their religious objections, the Supreme Court reversed that decision in West Virginia State Board of Education v. Barnette. Writing for the Court in Gobitis, Justice Felix Frankfurter argued that the “ultimate foundation of a free society is the binding tie of cohesive sentiment…. The flag is the symbol of our national unity, transcending all internal differences, however large…. ” New Justices Robert H. Jackson and James F. Byrnes helped form the majority in Barnette, along with Justices Hugo L. Black and William O. Douglas, who switched their votes. Justice Jackson wrote here for a 6–3 majority against the compulsory flag salute. Setting aside the reasoning in Gobitis, the Court concluded that the Fourteenth Amendment’s Due Process Clause guarantees residents of states the First Amendment’s protections of freedom of speech and free exercise of religion. Of particular significance in this decision is its application of the “discrete and insular minority” doctrine, described in footnote 1, below. The Court asserted its authority to protect minorities whose rights might otherwise be violated by the power of majorities.

We include the dissent of Justice Frankfurter. We omit the concurring opinion of Justices Black and Douglas, in which they explain why their opinion changed. We omit as well the concurring opinion of Justice Frank Murphy and the dissenting opinion of Justice Owen Roberts.


MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in Minersville School District v. Gobitis, the West Virginia Legislature amended its statutes to require
all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the state

“for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.”

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court’s *Gobitis* opinion and ordering that the salute to the flag become “a regular part of the program of activities in the public schools”. What is now required is the “stiff-arm” salute, the saluter to keep the right hand raised with palm turned up while the following is repeated:

I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.

Failure to conform is “insubordination,” dealt with by expulsion. Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah’s Witnesses. [The] religious beliefs [of the Witnesses] include a literal version of Exodus, Chapter 20, verses 4 and 5, which says:

Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.

They consider that the flag is an “image” within this command. For this reason, they refuse to salute it. . . .

. . . The sole conflict [here] is between authority and rights of the individual. The state asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.
As the present chief justice said in dissent in the *Gobitis* case,\(^1\) the state may “require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.” Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The state announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the cross, the crucifix, the altar and shrine, and clerical raiment. Symbols of state often convey political ideas, just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a

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\(^1\) The chief justice had established this rationale for Court protection of religious and other “discrete and insular” minorities, which has persisted ever since:

We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See *United States v. Carolene Products Co.*, 304 U. S. 144 [1938], 304 U. S. 152, note 4. And, until now, we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances, careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools. . . .
salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.

... Here, it is the state that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication, when coerced, is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony, or whether it will be acceptable if they simulate assent by words without belief, and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here, the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence, validity of the asserted power to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one, presents

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2 This standard was first asserted by Justice Oliver Wendell Holmes in *Schenck v. the United States* (1919).
questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue, as we see it, turn on one’s possession of particular religious views or the sincerity with which they are held. While religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, assumed, as did the argument in that case and in this, that power exists in the state to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine, rather than assume existence of, this power, and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision. [In portions of the opinion that we omit, Jackson disputed Frankfurter’s main claims in *Gobitis* about governmental authority, the Court’s power, and the meaning of the Fourteenth Amendment’s Due Process Clause.]

... 4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that “National unity is the basis of national security,” that the authorities have “the right to select appropriate means for its attainment,” and hence reaches the conclusion that such compulsory measures toward “national unity” are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity, as an end which officials may foster by persuasion and example, is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men. Nationalism is a relatively recent phenomenon, but, at other times and places, the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its
accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort, from the Roman drive to stamp out Christianity as a disturber of its pagan unity; the Inquisition as a means to religious and dynastic unity; the Siberian exiles as a means to Russian unity; down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the state or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us...
MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing, as they do, the thought and action of a lifetime. But, as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution, and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. . . . It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could, in reason, have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the “liberty” secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of “liberty” than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in Hamilton v. Regents 293 U.S. 245. In neither situation is our function comparable to that of a legislature, nor are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court’s authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the
press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked.

When Mr. Justice Holmes, speaking for this Court, wrote that “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,” he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court’s only and very narrow function is to determine whether, within the broad grant of authority vested in legislatures, they have exercised a judgment for which reasonable justification can be offered.

... [T]he Framers of the Constitution denied legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are, in fact, passing judgment on “the power of the state as a whole.” Practically, we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an act of Congress for the District of Columbia. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

... But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one’s conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say “This or that law is void.” It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and, more
particularly, with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice “so rooted in the traditions and conscience of our people as to be ranked as fundamental”—something without which “a fair and enlightened system of justice would be impossible.” *Palko v. Connecticut*, 302 U.S. 319; *Hurtado v. California*, 110 U.S. 516. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure, and they should be made directly responsible to the electorate. . . .

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not, in fact, disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. . . . Religious minorities, as well as religious majorities, were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which, except by leave of religious loyalties, is within the domain of temporal power. Otherwise, each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws. . . .

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state’s support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a nondiscriminatory law that it
may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority, and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not, of itself, establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise, the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church, but the establishment of all churches, and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment, these are but illustrations of conduct that has often been—compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior, and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the
action is not asserted in a discriminatory way, either openly or by stealth. One may have the right to practice one’s religion and at the same time owe the duty of formal obedience to laws that run counter to one’s belief. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue, and with ample opportunity for seeking its change or abrogation. . . .

. . . [I]f religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized, and what should be rejected as satisfying the “religion” which the Constitution protects. That would, indeed, resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. . . .

Consider the controversial issue of compulsory Bible reading in public schools. . . .

These questions assume increasing importance in view of the steady growth of parochial schools, both in number and in population. I am not borrowing trouble by adumbrating these issues, nor am I parading horrible examples of the consequences of today’s decision. . . .

These questions are not lightly stirred. They touch the most delicate issues, and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality. . . .

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the conscience of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority. . . .

. . . [S]urely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state’s educational
system may not stimulate the imagination because this may lead to unwise stimulation. . . .

. . . Saluting the flag suppresses no belief, nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow, as publicly as they choose to do so, the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. . . .

Of course, patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation, rather than with its wisdom, tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech, much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and action of a community is the ultimate reliance against unabated temptations to fetter the human spirit.
Writing for a narrow 5–4 majority, Justice Hugo L. Black enunciated a principle, the separation of church and state, which would henceforth dominate discussion of the First Amendment: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.” While using the familiar expression, separation of church and state, Black reinterpreted it and applied it in controversial ways to public schools, among other state and local government activities. The Court found in this case that the First Amendment Establishment Clause, which restricts only Congress, is applicable to states by the Fourteenth Amendment’s Due Process Clause. (West Virginia State Board of Education v. Barnette (Document 2) found that the Free Exercise Clause applied to the states.)

Justice Black concluded that “New Jersey has not breached [the wall of separation]” and affirmed a New Jersey court opinion finding no federal constitutional violation in the state’s support of transportation subsidies for both public and private school students. In Illinois ex rel. McCollum v. Board of Education of School District (Document 4), he and the Court would come to a different conclusion regarding the Illinois practice of releasing students from class to attend voluntarily religious services in a public school building.

Black summarized the facts of the case in his opinion for the Court. We omit the concurring opinion of Justices Frank Murphy and William O. Douglas and the dissenting opinions of Justices Robert H. Jackson and Wiley B. Rutledge. This case should be read together with McCollum (Document 4). A comprehensive dissenting opinion on these initial Establishment Clause cases (Documents 5 and 7) is that of Justice William H. Rehnquist in Wallace v. Jaffree (1985, Document 11).

Source: 330 U.S. 1 (1947), https://www.law.cornell.edu/supremecourt/text/330/1. We have included some footnotes from the opinion. Footnotes added by the editors are preceded by “Ed. note.”
Mr. Justice BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee,\(^1\) a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant\(^2\) [Everson], in his capacity as a district taxpayer, filed suit in a state court challenging the right of the board to reimburse parents of parochial school students. . . . The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the state constitution or the provisions of the federal Constitution in issue.

. . .

Second. The New Jersey statute is challenged as a “law respecting an establishment of religion.” The First Amendment, as made applicable to the states by the Fourteenth, \(Murdock v. Pennsylvania\), 319 U.S. 105,\(^3\) commands that a state “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the nation moved toward it that the expression “law respecting an establishment of religion” probably does not so vividly remind present-day Americans of the evils, fears, and political

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\(^1\) Ed. note: appellee is the party against whom an appeal is filed.

\(^2\) Ed. note: an appellant is a person who applies to a higher court to reverse the decision of a lower court.

\(^3\) Ed. note: Murdock applied the First Amendment to the states by the Fourteenth. Everson applied the establishment clause of the First Amendment to the states by the Fourteenth.
problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an “establishment of religion” requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of nonbelief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to, and began to thrive in, the soil of the new America. The very charters granted by the English crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or nonbelievers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshiping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to
strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.\(^4\) The imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights’ provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia’s tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.\(^5\) In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or nonbeliever, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free, and that cruel persecutions were the inevitable result of government-established religions. Madison’s Remonstrance received strong support throughout Virginia, and the assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at

\(^4\) Madison wrote to a friend in 1774: “That diabolical, hell-conceived principle of persecution rages among some…. This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all.” (\textit{Writings of James Madison}, Vol. I [1900] 18, 21).

\(^5\) Ed. note: For the text of the \textit{Memorial and Remonstrance}, see https://teachingamericanhistory.org/library/document/memorial-and-remonstrance/?_sf_s=Memorial+and+remonstrance.
that session, it not only died in committee, but the assembly enacted the famous “Virginia Bill for Religious Liberty” originally written by Thomas Jefferson. The preamble to that Bill stated, among other things, that

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern . . .

And the statute itself enacted

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . .

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective, and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups . . .

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its

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6 Ed. note: Thomas Jefferson had no direct role in the drafting or adoption of the First Amendment, although he was in favor of a Bill of Rights as an amendment to the Constitution.
history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual’s religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the “Establishment of Religion” Clause. . . .

The “Establishment of Religion” Clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and state.”

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state’s constitutional power, even though it approaches the verge of that power. . . . New Jersey cannot, consistently with the “Establishment of Religion” Clause of the First Amendment, contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we

do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their bus fares out of their own pockets when transportation to a public school would have been paid for by the state. The same possibility exists where the state requires a local transit company to provide reduced fares to school children, including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children’s welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious, rather than a public, school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U.S. 510. It appears that these parochial schools meet New Jersey’s requirements.
The state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.
In this case, Justice Hugo L. Black applied his “separation of church and state” logic to rule against what he took to be state aid to religious institutions, in the form of voluntary “released time” of public school students to attend voluntary religious instruction in their own beliefs at public schools. He argued that the Illinois practice was an unconstitutional establishment of religion. Black’s opinion, supported by the Court 8 to 1, reversed the Illinois Supreme Court’s approval of the state’s released time program. This case should be read together with the earlier Everson v. Board of Education (Document 3). The reasoning of this case is the starting point for all subsequent Court reasoning on the meaning of the establishment of religion. Recent cases have questioned its argument. A comprehensive dissenting opinion on these initial Establishment Clause cases (Documents 3, 5, and 7) is that of Justice William H. Rehnquist in Wallace v. Jaffree (Document 11).

Source: 333 U.S. 203 (1948), https://www.law.cornell.edu/supremecourt/text/333/203. We have included excerpts of Justice Black’s majority opinion, and Justice Robert H. Jackson’s concurrence, which predicted dire consequences if the Court opinion were applied without respect for diverse local community practices. We have omitted both Justice Felix Frankfurter’s opinion and Justice Stanley F. Reed’s dissent. All footnotes added by the editors.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the federal Constitution.

The appellant,¹ Vashti McCollum, . . . was . . . a resident and taxpayer of Champaign and . . . a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools, where the children are to remain in attendance.

¹ a person who applies to a higher court to reverse the decision of a lower court
during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the state. District boards of education are given general supervisory powers over the use of the public school buildings within the school districts.

Appellant’s petition for mandamus\(^2\) alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there, for a period of thirty minutes, substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public school religious group program violated the First and Fourteenth Amendments to the United States Constitution.

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute. In 1940, interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine, inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although, for the past several years, there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

\(^2\) a court order, in this case to stop the practice of voluntary religious instruction in the schools
The foregoing facts, without reference to others that appear in the record, show the use of tax supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state’s compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the states by the Fourteenth) as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1.3 There we said

Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will, or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and state.”

The majority in the *Everson* case, and the minority . . . agreed that the First Amendment’s language, properly interpreted, had erected a wall of separation between church and state. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment’s language to those facts. . . .

To hold that a state cannot, consistently with the First and Fourteenth Amendments, utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel

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3 Document 3
urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between church and state which must be kept high and impregnable.

Here not only are the state’s tax-supported public school buildings used for the dissemination of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery. This is not separation of church and state....

The cause is reversed and remanded⁴ to the State Supreme Court for proceedings not inconsistent with this opinion.

Justice Robert H. Jackson, concurring.

I join the opinion of Mr. Justice Frankfurter, and concur in the result reached by the Court, but with these reservations: I think it is doubtful whether the facts of this case establish jurisdiction in this Court, but, in any event, that we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. I make these reservations a matter of record in view of the number of litigations likely to be started as a result of this decision....

A federal court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the federal Constitution. Ordinarily this will come about in either of two ways:

First. When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. Typical of such cases was West Virginia State Board of Education v. Barnette (Document 2) .... Second. Where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. We can protect a taxpayer against such a levy. This was the Everson Case (Document 3) .... In this case, however, any cost of this plan to the taxpayers is incalculable and

⁴ returned to the lower court for reconsideration
negligible. It can be argued, perhaps, that religious classes add some wear and
tear on public buildings, and that they should be charged with some expense
for heat and light, even though the sessions devoted to religious instruction
do not add to the length of the school day. But the cost is neither substantial
nor measurable, and no one seriously can say that the complainant’s tax bill
has been proved to be increased because of this plan. I think it is doubtful
whether the taxpayer in this case has shown any substantial property injury.

If, however, jurisdiction is found to exist, it is important that we circum-
scribe our decision with some care. What is asked is not a defensive use of
judicial power to set aside a tax levy or reverse a conviction, or to enjoin
threats of prosecution or taxation. The relief demanded in this case is the
extraordinary writ of mandamus to tell the local Board of Education what
it must do. The prayer for relief is that a writ issue against the Board of Edu-
cation ordering it to immediately adopt and enforce rules and regulations
prohibiting all instruction in and teaching of religious education in all public
schools . . . and in all public school houses and buildings in said district when
occupied by public schools . . .

While we may and should end such formal and explicit instruction as the
Champaign plan, and can at all times prohibit teaching of creed and cate-
chism and ceremonial, and can forbid forthright proselytizing in the schools,
I think it remains to be demonstrated whether it is possible, even if desirable,
to comply with such demands as plaintiff’s completely to isolate and cast out
of secular education all that some people may reasonably regard as religious
instruction. Perhaps subjects such as mathematics, physics or chemistry are,
or can be, completely secularized. But it would not seem practical to teach
either practice or appreciation of the arts if we are to forbid exposure of youth
to any religious influences. Music without sacred music, architecture minus
the cathedral, or painting without the scriptural themes would be eccentric
and incomplete, even from a secular point of view . . . . The fact is that, for good
or for ill, nearly everything in our culture worth transmitting, everything
which gives meaning to life, is saturated with religious influences, derived
from paganism, Judaism, Christianity—both Catholic and Protestant—and
other faiths accepted by a large part of the world’s peoples. One can hardly
respect a system of education that would leave the student wholly ignorant
of the currents of religious thought that move the world society for a part in
which he is being prepared . . .

“[T]o immediately adopt and enforce rules and regulations prohibiting
all instruction in and teaching of religious education in all public schools” is
to decree a uniform, rigid and, if we are consistent, an unchanging standard
for countless school boards representing and serving highly localized groups which not only differ from each other, but which themselves, from time to time, change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If, with no surer legal guidance, we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And, more importantly, we are likely to make the legal “wall of separation between church and state” as winding as the famous serpentine wall designed by Mr. Jefferson for the university he founded.
The school prayer case of Engel v. Vitale pitted the Court against the long-standing American tradition of praying in public school. Expanding the principle he set forth in Everson v. Board of Education (Document 3) and following incorporation of the First Amendment into the Fourteenth Amendment’s Due Process Clause, Justice Hugo L. Black contended that a school prayer was a state-sponsored prayer and thus established a state religion. For this reason, he did not need to address the issues in West Virginia Board of Education v. Barnette (Document 2) about compulsory or even voluntary prayer or, more broadly, speech or expression that might violate one’s conscience.

Not surprisingly, the Court’s opinion met with fierce opposition, which included calls for a constitutional amendment reversing the decision, a denunciation of secularism, and rejection of federal aid to education. For a comprehensive dissent to this and other early Establishment Clause cases, see Justice William H. Rehnquist in Wallace v. Jaffree (Document 11), which voided an Alabama statute requiring moments of silence in public schools. Justice David H. Souter criticized this dissent in various opinions, including his concurrence in the public school commencement prayer case Lee v. Weisman (Document 14). The Court eventually expanded its Establishment Clause argument to cover prayers at high school pep assemblies before football games (Santa Fe Independent School District v. Doe, 2000).

The facts of the case are presented in Justice Black’s Court opinion. The Court decided the case 6–1, Justice Potter Stewart dissenting. Justices Felix Frankfurter and Byron R. White did not participate in the decision.

SOURCE: 370 U.S. 421, https://www.law.cornell.edu/supremecourt/text/370/421. We include excerpts of Justice Black’s opinion for the Court. We omit Justice William O. Douglas’s concurring opinion and Justice Stewart’s dissent. Footnotes added by the editors are preceded by “Ed. note.”
MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent\(^1\) Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the school district’s principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.” This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the state Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the state’s public school system. These state officials composed the prayer which they recommended and published as a part of their “Statement on Moral and Spiritual Training in the Schools,” saying: “We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.”

Shortly after the practice of reciting the regents’ prayer was adopted by the school district, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. . . . The New York Court of Appeals . . . sustained an order of the lower state courts which had upheld the power of New York to use the regents’ prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents’ objection. We granted certiorari\(^2\) to review this important decision involving rights protected by the First and Fourteenth Amendments.

We think that, by using its public school system to encourage recitation of the regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the regents’ prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The

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\(^{1}\) Ed. note: the defendant in a law suit  
\(^{2}\) Ed. note: a Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.
nature of such a prayer has always been religious, none of the respondents has denied this, and the trial court expressly so found....

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax supported Church of England....

It is an unfortunate fact of history that, when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia, where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785–1786, those opposed to the established church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous “Virginia Bill for Religious Liberty” by which all religious groups were placed on an equal footing so far as the state was concerned. Similar though less far-reaching legislation was being considered and passed in other states.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of church and state. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another
to obtain the government’s stamp of approval from each king, queen, or protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people, rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the federal government would be used to control, support or influence the kinds of prayer the American people can say—that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment’s prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York’s state prayer program officially establishes the religious beliefs embodied in the regents’ prayer. The respondents’ argument to the contrary, which is largely based upon the contention that the regents’ prayer is “nondenominational” and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program’s constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the states by virtue of the Fourteenth Amendment. Although these two clauses may, in certain instances, overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power,
prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its “unhallowed perversion” by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand... And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our nation, our Constitution, and our Bill of Rights, with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the regents’ prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that, since the beginning of that history, many people have devoutly believed that “More things are wrought by prayer than this world dreams of.” It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith
in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew, rather, that it was written to quiet well justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men’s tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.3

It is true that New York’s establishment of its regents’ prayer as an officially approved religious doctrine of that state does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that, because the regents’ official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

[I]t is proper to take alarm at the first experiment on our liberties…. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three

3 There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer’s professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.
pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever?

The judgment of the Court of Appeals of New York is reversed, and the cause remanded\(^4\) for further proceedings not inconsistent with this opinion.

\(^4\)Ed. note: returned to a lower court for reconsideration
Sherbert v. Verner

June 17, 1963

Sherbert v. Verner is a free exercise case involving employment rights. The decision ordered accommodation of the religious practices of Seventh-day Adventist workers, so that they may collect state unemployment insurance. By insisting that Adell Sherbert be given state unemployment benefits, despite her refusal to work on her Saturday Sabbath and subsequent firing, the Court expanded what it did earlier in West Virginia v. Barnette (Document 4), recognizing free exercise rights against government. The claim of religious free exercise may also be asserted by a for-profit corporation, as in the contraceptive mandate at issue in Burwell v. Hobby Lobby, (Document 20) and in Masterpiece Cakeshop v. Colorado Civil Rights Commission (Document 23).


MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because, from conscientious scruples, she would not take Saturday

1 Ed. note: person who applies to a higher court to reverse the decision of a lower court

2 Appellant became a member of the Seventh-day Adventist Church in 1957, at a time when her employer, a textile mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday, for all three shifts in the employer’s mill. No question has been raised in this case concerning the sincerity of appellant’s religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion’s interpretation of the only Bible.
work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be “able to work and . . . available for work;” and, further, that a claimant is ineligible for benefits “[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer. . . .” The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant’s restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept “suitable work when offered . . . by the employment office or the employer. . . .” The State Supreme Court held specifically that appellant’s ineligibility infringed no constitutional liberties because such a construction of the statute places no restriction upon the appellant’s freedom of religion, nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience. . . . We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

I

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, Cantwell v. Connecticut, 310 U.S. 296. Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.” Braunfeld v. Brown. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U.S. 145. . . .

Plainly enough, appellant’s conscientious objection to Saturday work

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3 Ed. note: the party against whom an appeal is filed
4 Ed. note: return a case to a lower court for reconsideration
5 Ed. note: Document 1
constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant’s constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant’s religion may be justified by a “compelling state interest in the regulation of a subject within the state’s constitutional power to regulate. . . .”

II

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant’s religion. We think it is clear that it does. In a sense, the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the state’s general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” Here, not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s “right,” but merely a “privilege.” It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . .

Significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the

Sabbatarian’s religious liberty. When, in times of “national emergency,” the textile plants are authorized by the state commissioner of labor to operate on Sunday, “no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.” No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.

III

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right. It is basic that no showing merely of a rational relationship to some colorable\(^8\) state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”\(^9\) No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here, because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs,—a question as to which we intimate no view, since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of

\(^8\) Ed. note: an apparently correct or justified claim or interest

religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served “to make the practice of [the Orthodox Jewish merchants’] … religious beliefs more expensive.” But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case, no such justifications underlie the determination of the state court that appellant’s religion makes her ineligible to receive benefits.

**IV**

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant’s right to unemployment benefits under the state statute serve to abridge any other person’s religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee’s religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the states to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to
abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” *Everson v. Board of Education*, 330 U.S. 1, 16.10

In view of the result we have reached under the First and Fourteenth Amendments’ guarantee of free exercise of religion, we have no occasion to consider appellant’s claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment. . . .

**MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.**

Today’s decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

South Carolina’s Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. As stated in the statute itself:

Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this state; *involuntary unemployment* is therefore a subject of general interest and concern . . . ; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers to *provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment*, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.” (Emphasis added.)

Thus, the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when work was unavailable. But, at the same time, there was clearly no intent to provide relief for those who, for purely personal reasons, were or became unavailable for work. In accordance with this design, the legislature provided, in § 68–113, that “[a]n

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10 Ed. note: Document 3
unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that . . . [h]e is able to work and is available for work. . . . “ (Emphasis added.)

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not “available for work” if his unemployment has resulted not from the inability of industry to provide a job, but rather from personal circumstances, no matter how compelling. The reference to “involuntary unemployment” in the legislative statement of policy, whatever a sociologist, philosopher, or theologian might say, has been interpreted not to embrace such personal circumstances. . . . In the present case, all that the state court has done is to apply these accepted principles. Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was “unavailable for work,” and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court’s application of the law. Thus, in no proper sense can it be said that the state discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits because she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not “available for work” for personal reasons.

With this background, this Court’s decision comes into clearer focus. What the Court is holding is that, if the state chooses to condition unemployment compensation on the applicant’s availability for work, it is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.

First, despite the Court’s protestations to the contrary, the decision necessarily overrules Braunfeld v. Brown, which held that it did not offend the “Free Exercise” Clause of the Constitution for a state to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in Braunfeld. And just as in Braunfeld—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during
periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today’s holding, as already noted, is that the state must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The state, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated. It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. My own view, however, is that, at least under the circumstances of this case, it would be a permissible accommodation of religion for the state, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of “neutrality” is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the state justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The state violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant’s.

For very much the same reasons, however, I cannot subscribe to the conclusion that the state is constitutionally compelled to carve out an exception

11 Ed. note: Justice John Marshall Harlan cited *School District of Abington Township v. Schempp* https://www.law.cornell.edu/supremecourt/text/374/203, in which the Court found that a requirement to read Bible passages or the Lord’s prayer was an establishment of religion and thus prohibited by the First Amendment.
to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant’s religion and in light of the direct financial assistance to religion that today’s decision requires.

For these reasons I respectfully dissent from the opinion and judgment of the Court.
In this case, the Court by a vote of 7 to 1 (Justice Thurgood Marshall did not participate) invalidated laws of Pennsylvania and Rhode Island that allowed public money to be spent to supplement the salaries of private school teachers who were being paid less than their public school peers.

In Lemon v. Kurtzman Chief Justice Warren E. Burger tried to retain Justice Hugo L. Black’s “wall of separation between church and state.” But aware of the practical and principled difficulties that concurring Justice Robert H. Jackson had predicted in McCullom v. Board of Education (Document 4), Burger summarized major, often clashing cases involving government assistance to public schools and developed what became known as “the Lemon test” for constitutionality. This test has three “prongs”: “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.’” Whether these tests and their variants add clarity or simply paper over incoherence here or in future cases has been vigorously disputed over the years.

For the sake of brevity, we present only the Rhode Island portion of the case in excerpts of Chief Justice Burger’s opinion for the Court. We omit Justice William J. Brennan Jr.’s dissent, which completely foreclosed federal aid to a religious school “in which the propagation and advancement of a particular religion are a function or purpose of the institution,” and Justice Byron R. White’s opinion, in which he concurred in part with and dissented in part from the Court’s decision. It should be noted that a companion case, Tilton v. Richardson, 403 U.S. 672 (1971) upheld a federal aid to higher education law that funded building construction at religious universities.

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

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

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

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher’s salary cannot exceed the maximum paid to teachers in the state’s public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the state’s public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.
The act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the state’s public schools. They must use “only teaching materials which are used in the public schools.” Finally, any teacher applying for a salary supplement must first agree in writing “not to teach a course in religion for so long as or during such time as he or she receives any salary supplements” under the act . . . .

A three-judge federal court . . . found that Rhode Island’s nonpublic elementary schools accommodated approximately 25% of the state’s pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date, some 250 teachers have applied for benefits under the act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was “an integral part of the religious mission of the Catholic Church.”

The district court concluded that the act violated the Establishment Clause, holding that it fostered “excessive entanglement” between government and religion. In addition, two judges thought that the act had the impermissible effect of giving “significant aid to a religious enterprise.” We affirm . . . .

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster “an excessive government entanglement with religion.” Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. . . .

In Allen, the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the state were, in fact, instrumental in the teaching of religion. The
legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract, we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission, and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions, and to ensure that state financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion.

III

In *Walz v. Tax Commission* the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine, rather than enlarge, the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Sherbert v. Verner* (1963). Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the state had a continuing burden to ascertain that the exempt property was, in fact, being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a “wall,” is a blurred,

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1 For *Sherbert v. Verner*, see Document 8.
indistinct, and variable barrier depending on all the circumstances of a particular relationship. . . .

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority. . . . Here we find that both statutes foster an impermissible degree of entanglement.

(a) Rhode Island program
The district court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises, since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the district court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools, rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings, the district court concluded that the parochial schools constituted “an integral part of the religious mission of the Catholic Church.” The various characteristics of the schools make them “a powerful vehicle for transmitting the Catholic faith to the next generation.” This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. . . .
The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the states to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen*, the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the state would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

In our view, the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the diocesan superintendent of schools . . . . Religious authority necessarily pervades the school system . . . .

Several teachers testified, however, that they did not inject religion into their secular classes. And the district court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential, if not actual, hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably, some of a teacher’s responsibilities hover on the border between secular and religious orientation . . . .

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious belief from their secular educational responsibilities. But the potential for impermissible fostering of religion is present . . . . The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The state must be certain, given
the Religion Clauses, that subsidized teachers do not inculcate religion—indeed, the state here has undertaken to do so. To ensure that no trespass occurs, the state has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition, the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school’s records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity.

Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have states or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national,
domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution’s authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion’s intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.

V

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

\[2\] returned to a lower court for reconsideration
The distinctive religious culture of the Amish clashed with a Wisconsin State compulsory school attendance law requiring attendance through age 16. The Amish—for details about them, see the Court opinion—raised a combination of cultural and religious reasons for their separation from mainstream society but made their legal argument only on the basis of first amendment free exercise rights. The Court agreed with them by a vote of 6 to 1. (Justices Lewis F. Powell Jr. and William H. Rehnquist did not participate in the case.) In his opinion for the Court, Chief Justice Warren E. Burger summarized the facts of the case. Thus the Court expanded what it did in *Sherbert v. Verner* (Document 6) and ordered a religious exemption from a general law for the youths of an entire religion.

Source: 406 U.S. 205 (1972); https://www.law.cornell.edu/supremecourt/text/406/205. We have excerpted the Court’s opinion and the dissent of Justice William O. Douglas. We have omitted the concurring opinion of Justice Byron R. White. All footnotes added by the editors.

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

... Respondents¹ Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church.... Wisconsin’s compulsory school attendance law required them to cause their children to attend public or private school until reaching age 16, but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade. The children were not enrolled in any private school, or within any

¹ defendants in a suit, in this case the parents who kept their children out of school before they were 16.
recognized exception to the compulsory attendance law, and they are con-
ceded to be subject to the Wisconsin statute.

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory attendance law in Green County Court, and were fined the sum of $5 each. Respondents defended on the ground that the application of the compulsory attendance law violated their rights under the First and Fourteenth Amendments. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that, by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The state stipulated that respondents’ religious beliefs were sincere.

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century, who rejected institutionalized churches and sought to return to the early, simple, Christian life deemphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the Ordnung, or rules, of the church community. Adult baptism, which occurs in late adolescence,
Wisconsin v. Yoder is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a “worldly” influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal “learning through doing;” a life of “goodness,” rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and “doing,” rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. . . .

I

There is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a state. Yet even this paramount responsibility was, in Pierce, made to yield to
the right of parents to provide an equivalent education in a privately operated system. There, the Court held that Oregon’s statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a state’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, “prepare [them] for additional obligations.”

It follows that, in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the state does not deny the free exercise of religious belief by its requirement or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by states and by Congress.\(^2\)

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the state’s interest in universal compulsory education, it is by no means absolute to the exclusion

\(^2\) See Documents 3 and 7.
or subordination of all other interests. E.g., Sherbert v. Verner, 374 U.S. 398 (1963); ...³

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin’s compulsory school attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims, we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau⁴ rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau’s choice was philosophical and personal, rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, “be not conformed to this world....”⁵ This command is fundamental to the Amish faith....

³ Document 6
⁴ Henry David Thoreau (1817–1862) was an American poet and philosopher.
⁵ Romans 12:2
The impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. Nor is the impact of the compulsory attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large or be forced to migrate to some other and more tolerant region.

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the state's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the state's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the state undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that, under the Religion Clauses, religious beliefs are absolutely free from the state's control, but it argues that “actions,” even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject
to regulation by the states in the exercise of their undoubted power to promote the health, safety, and general welfare, or the federal government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the state is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the state to control, even under regulations of general applicability. This case, therefore, does not become easier because respondents were convicted for their “actions” in refusing to send their children to the public high school; in this context, belief and action cannot be neatly confined in logic-tight compartments.

Nor can this case be disposed of on the grounds that Wisconsin’s requirement for school attendance to age 16 applies uniformly to all citizens of the state and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. Sherbert v. Verner. The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception, no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses, “we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope,’ and one we have successfully traversed.” Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

We turn, then, to the state’s broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the state seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

The state advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in

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6 Document 6
our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests . . . .

The state attacks respondents’ position as one fostering “ignorance” from which the child must be protected by the state. No one can question the state’s duty to protect children from ignorance, but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.” Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child’s crucial adolescent period of religious development . . . .

We must not forget that, in the Middle Ages, important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today’s majority is “right,” and the Amish and others like them are “wrong.” A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The state, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that, if this occurs, they will be ill-equipped for life. The state argues that, if Amish children leave their church, they should not be in the position of making their way in the world without the education available in
the one or two additional years the state requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that, upon leaving the Amish community, Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society. Absent some contrary evidence supporting the state’s position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the state’s claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself, this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson’s ideal of the “sturdy yeoman” who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

IV

Finally, the state, on authority of *Prince v. Massachusetts*, argues that a decision exempting Amish children from the state’s requirement fails to recognize the substantive right of the Amish child to a secondary education, and
fails to give due regard to the power of the state as parens patriae\(^7\) to extend the benefit of secondary education to children regardless of the wishes of their parents.

... [I]n this case, the Amish have introduced persuasive evidence undermining the arguments the state has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the state.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the state from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the “necessity” of discrete aspects of a state’s program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a state’s legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some “progressive” or more enlightened process for rearing children for modern life.

... In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the state would require and what the Amish already accept, it

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\(^7\) A Latin phrase meaning “parents of the nation,” this is a legal doctrine that the state has the power to act in place of parents or guardians to protect children or other individuals unable to protect themselves.
was incumbent on the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

MR. JUSTICE DOUGLAS dissenting in part.

I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court’s conclusion that the matter is within the dispensation of parents alone. The Court’s analysis assumes that the only interests at stake in the case are those of the Amish parents, on the one hand, and those of the state, on the other. The difficulty with this approach is that, despite the Court’s claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

... If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.

II

... In *Tinker v. Des Moines School District*, 393 U.S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

“Students, in school as well as out of school, are “persons” under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state.”

It is the future of the student, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have
said about the Bill of Rights and of the right of students to be masters of their own destiny.

III

... What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed, and it even promises that in time Reynolds\(^8\) will be overruled.

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\(^8\) Document 1
This seminal case, decided 8 to 1, affirmed the unity between the First Amendment freedoms of religious exercise and of speech. Given this unity of fundamental rights, the Court ruled, a public university must respect both rights in the way it allows its facilities to be used after hours by private groups. The Court has divided in 5–4 cases over applications of Widmar to specific groups, extending its open forum principle to university funding of student groups in Rosenberger v. Rector and Visitors of the University of Virginia (515 U.S. 819, 1995). More recently, in Christian Legal Society Chapter of the University of California, Hastings School of Law v. Martinez (561 U.S. 661, 2010) the Court decided that the student Christian group could not require its members to be Christians and thus it might not receive funding. But Widmar’s fundamental principle that private religious discourse is constitutionally protected speech remains in effect. Moreover, this nondiscrimination principle also expanded government financial aid to religious schools when applying the Lemon test (Document 7).

Justice Lewis F. Powell Jr.’s opinion provides the facts of the case, which takes its name from one of the students involved, Clark Vincent, and the name of the Dean of Students, Gary Widmar, of the school Vincent attended.

SOURCE: 454 U.S. 263, https://www.law.cornell.edu/supremecourt/text/454/263. We include excerpts of Justice Powell’s opinion for the Court. We omit Justice John Paul Stevens’ concurrence and Justice Byron R. White’s dissent. Footnotes added by the editors are preceded by “Ed. note.”

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.
I

It is the stated policy of the University of Missouri at Kansas City [UMKC] to encourage the activities of student organizations. The university officially recognizes over 100 student groups. It routinely provides university facilities for the meetings of registered organizations. Students pay an activity fee of $41 per semester (1978–1979) to help defray the costs to the university.

From 1973 until 1977, a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in university facilities.¹ In 1977, however, the university informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds “for purposes of religious worship or religious teaching.”

Eleven university students, all members of Cornerstone, brought suit to challenge the regulation in the Federal District Court for the Western District of Missouri. They alleged that the University’s discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

II

Through its policy of accommodating their meetings, the university has created a forum generally open for use by student groups. Having done so, the university has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

Here, UMKC has discriminated against student groups and speakers

¹ Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, “perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization.” Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public, and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.
based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the university must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end.

III

In this case, the university claims a compelling interest in maintaining strict separation of church and state. It derives this interest from the “Establishment Clauses” of both the federal and Missouri Constitutions.

A

The university first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States. We agree that the interest of the university in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an “equal access” policy would be incompatible with this Court’s Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test:

First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster “an excessive government entanglement with religion.” Lemon v. Kurtzman.2

In this case, two prongs of the test are clearly met. Both the district court and the court of appeals held that an open forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. But the district court concluded, and the university argues here, that allowing religious groups to share the limited public forum would have the “primary effect” of advancing religion.

The university’s argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student

2 Ed. note: Document 7
groups, and the question is whether it can now exclude groups because of the content of their speech. In this context, we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum’s likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to university facilities. But this Court has explained that a religious organization’s enjoyment of merely “incidental” benefits does not violate the prohibition against the “primary advancement” of religion.

We are satisfied that any religious benefits of an open forum at UMKC would be “incidental” within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the court of appeals quite aptly stated, such a policy “would no more commit the University . . . to religious goals” than it is “now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,” or any other group eligible to use its facilities.

Second, the forum is available to a broad class of nonreligious, as well as religious, speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. If the Establishment Clause barred the extension of general benefits to religious groups, “a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.” At least in the absence of empirical evidence that religious groups will dominate UMKC’s open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum’s “primary effect.” . . .

B

Arguing that the State of Missouri has gone further than the federal Constitution in proscribing indirect state support for religion, the university claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.

On one hand, respondents’ First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here—in achieving greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free
Exercise Clause, and, in this case, by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the state’s interest as sufficiently “compelling” to justify content-based discrimination against respondents’ religious speech.

IV

Our holding in this case in no way undermines the capacity of the university to establish reasonable time, place, and manner regulations. Nor do we question the right of the university to make academic judgments as to how best to allocate scarce resources or “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

Finally, we affirm the continuing validity of cases that recognize a university’s right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the university seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the university is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is Affirmed.

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In this case, the Court considered expanding its Establishment Clause doctrine involving school prayer (Engel, Document 5) and government aid to schools (Lemon, Document 7) to Christmas displays on public property. In Lynch, the Court ruled 5 to 4 that such displays do not necessarily violate the First Amendment, but the displays must observe certain conditions that make it clear the government is not endorsing any religion, presumably by including seasonal decoration, which indicate that no religious doctrine is being promulgated and the display has a secular purpose of, for example, encouraging commercial activity. The Court subsequently applied Lynch to distinguish between displays of a menorah and Christmas symbols on public grounds (County of Allegheny v. American Civil Liberties Union 492 US. 573). Any religious symbols, the Court argued, must not stigmatize nonadherents or encourage them to think they are not equal citizens. Therefore, a menorah served a secular purpose of religious toleration, while a crèche and angels were a divisive state endorsement of a religion.

Chief Justice Warren E. Burger sets forth the facts of the case.


CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari¹ to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a crèche, or Nativity scene, in its annual Christmas display.

¹ Ed. note: A Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.
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 across the nation—often on public grounds—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 crèche at issue here. All components of this display are owned by the city.

The crèche, 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 inches to 5 feet. In 1973, when the present crèche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the crèche costs the city about $20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years.

II

A

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is “to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.” Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). At the same time, however, the Court has recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”

In every Establishment Clause case, we must reconcile the inescapable

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2 Ed. note: Document 9
3 Ed. note: also Document 9
tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.

The Court has sometimes described the Religion Clauses as erecting a “wall” between church and state, see, e.g., Everson v. Board of Education, 330 U.S. 1, 18 (Document 4). The concept of a “wall” of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the “callous indifference” we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into “war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.” McCollum, supra, at 211–212.

C

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. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas’ opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

“We are a religious people whose institutions presuppose a Supreme Being.” Zorach v. Clauson.

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of nature as gifts from God. . . .
III

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused “to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.” *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970) . . . .

In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause “was to state an objective, not to write a statute.” *Walz*, supra, at 668 . . . .

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 crèche in the context of the Christmas season. See, e. g., *Stone v. Graham*, 449 U.S. 39 (1980) . . . . In *Stone*, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not “integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” Similarly, in *Abington*, although the Court struck down the practices in two states requiring daily Bible readings in public schools, it specifically noted that nothing in the Court’s holding was intended to “indicat[e] that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected with the First Amendment.” Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded

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4 Ed. note: intrinsic
5 Ed. note: This is the so-called Lemon test. See Document 9.
there was no question that the statute or activity was motivated wholly by religious considerations. . . .

The narrow question is whether there is a secular purpose for Pawtucket’s display of the crèche. The display is sponsored by the city to celebrate the holiday and to depict the origins of that holiday. These are legitimate secular purposes.\(^6\) . . .

We are unable to discern a greater aid to religion deriving from inclusion of the crèche 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 crèche: its “reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions.” See McGowan, supra, at 442.

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. . . . Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as “Christ’s Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The district court found that there had been no administrative entanglement between religion and state resulting from the city’s ownership and use of the crèche. But it went on to hold that some political divisiveness was engendered by this litigation. . . .

Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the district court’s finding on the absence of administrative entanglement. . . . There is nothing here, of course, like the “comprehensive, discriminating, and continuing state surveillance” or the “enduring entanglement” present in Lemon, 403 U.S., at 619—622.

. . . [A]part from this litigation there is no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket’s Christmas celebration. . . .

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\(^6\) The city contends that the purposes of the display are “exclusively secular.” We hold only that Pawtucket has a secular purpose for its display, which is all that Lemon v. Kurtzman, 403 U.S. 602 (1971), requires. Were the test that the government must have “exclusively secular” objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.
We are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.

IV

Justice Brennan describes the crèche as a “re-creation of an event that lies at the heart of Christian faith.” The crèche, 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 crèche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season. The crèche 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. That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation.

Taken together [our] cases abundantly demonstrate the Court’s concern to protect the genuine objectives of the Establishment Clause. It is far too late in the day to impose a crabbed reading of the clause on the country.

JUSTICE O’CONNOR, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine.

I

The Establishment Clause prohibits government from making adherence to a religion relevant in any way 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* 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, as even the district court found, there is no institutional entanglement. Nevertheless, the respondents contend that the political divisiveness caused by Pawtucket’s display of its crèche violates the excessive-entanglement prong of the *Lemon* test....

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, in part because the existence of the litigation, as this case illustrates, itself may affect the political response to the government practice. 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 crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche 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 purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

A

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes....

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 crèche in the larger display was not promotion of the religious content of the crèche but 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. The laws upheld in *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan v. Maryland*, 366 U.S. 420 (1961) (mandatory Sunday closing law), and in *Zorach v. Clauson*, 343 U.S. 306 (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. 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, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket’s display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, 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, and no one contends that declaration of that holiday is understood to be an endorsement of religion. 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 crèche 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 crèche in this particular physical setting no more an endorsement of religion than such governmental “acknowledgements” of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 463 U.S. 783 (1983), 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, in the only ways reasonably possible in our culture, 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 crèche 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. It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket’s display of the crèche does not have the effect of communicating endorsement of Christianity.

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

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us proved difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon v. Kurtzman*, for assessing whether a challenged
governmental practice involves an impermissible step toward the establishment of religion. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the city of Pawtucket’s nativity scene appeared. The Court’s decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone, or the public display of other distinctively religious symbols such as a cross. Despite the narrow contours of the Court’s 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 crèche is presented obscures or 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 not because the principles of decision are obscure, but 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 crèche simply 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 in some fashion the crèche’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 and precious religious diversity as a nation, which the Establishment Clause seeks to protect, runs directly counter to today’s decision. . . .
A

Applying the three-part [*Lemon*] test to Pawtucket’s crèche, I am persuaded that the city’s inclusion of the crèche in its Christmas display simply does not reflect a “clearly secular . . . purpose.” Nyquist, supra, at 773. Unlike the typical case in which the record reveals some contemporaneous expression of a clear purpose to advance religion or, conversely, a clear secular purpose, here we have no explicit statement of purpose by Pawtucket’s municipal government accompanying its decision to purchase, display, and maintain the crèche. Governmental purpose may nevertheless be inferred. . . . 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 generally prudent “reluctance to attribute unconstitutional motives” to a governmental body, *Mueller v. Allen*, 463 U.S. 388, 394 (1983), should be overcome. First, as was true in *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123–124 (1982), 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 that are already a part of Pawtucket’s annual Christmas display. More importantly, the nativity scene, unlike every other element of the Hodgson Park 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 distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene. . . . Plainly, the city and its leaders understood that the inclusion of the crèche in its display would serve the wholly religious purpose of “keep[ing] ‘Christ in Christmas.’” 525 F. Supp. 1150, 1173 (RI 1981). From this record, therefore, it is impossible to say . . . that a wholly secular goal predominates.

The “primary effect” of including a nativity scene in the city’s display is, as the District Court found, to place the government’s imprimatur of approval on the particular religious beliefs exemplified by the crèche. Those who believe in the message of the nativity receive the unique and exclusive
benefit of public recognition and approval of their views. For many, the city’s decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing “a significant symbolic benefit to religion…. “ Larkin v. Grendel’s Den, Inc., supra, at 125–126. The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit…. Our decision in Widmar v. Vincent\(^7\) rests upon the same principle. There the Court noted that a state university policy of “equal access” for both secular and religious groups would “not confer any imprimatur of state approval” on the religious groups permitted to use the facilities because “a broad spectrum of groups” would be served and there was no evidence that religious groups would dominate the forum. Here, by contrast, Pawtucket itself owns the crèche and instead of extending similar attention to a “broad spectrum” of religious and secular groups, it has singled out Christianity for special treatment.

Finally, it is evident that Pawtucket’s inclusion of a crèche as part of its annual Christmas display does pose a significant threat of fostering “excessive entanglement.” As the Court notes, the district court found no administrative entanglement in this case, primarily because the city had been able to administer the annual display without extensive consultation with religious officials. Of course, there is no reason to disturb that finding, but it is worth noting that after today’s decision, administrative entanglements may well develop. Jews and other non-Christian groups, prompted perhaps by the mayor’s remark that he will include a Menorah in future displays, can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands. More importantly, although no political divisiveness was apparent in Pawtucket prior to the filing of respondents’ lawsuit, that act, as the district court found, unleashed powerful emotional reactions which divided the city along religious lines. The fact that calm had prevailed prior to this suit does not immediately suggest the absence of any division on the point for, as the district court observed, the quiescence of those opposed to the crèche may have reflected nothing more than their sense of futility in opposing the majority. Of course, the Court is correct to

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\(^7\) Ed. note: Document 11
note that we have never held that the potential for divisiveness alone is sufficient to invalidate a challenged governmental practice; we have, nevertheless, repeatedly emphasized that “too close a proximity” between religious and civil authorities, _Schempp_, 374 U.S., at 259 (Brennan, J., concurring), may represent a “warning signal” that the values embodied in the Establishment Clause are at risk. Furthermore, the Court should not blind itself to the fact that because communities differ in religious composition, the controversy over whether local governments may adopt religious symbols will continue to fester. In many communities, non-Christian groups can be expected to combat practices similar to Pawtucket’s; this will be so especially in areas where there are substantial non-Christian minorities.

In sum, considering the District Court’s careful findings of fact under the three-part analysis called for by our prior cases, I have no difficulty concluding that Pawtucket’s display of the crèche is unconstitutional.

B
The Court advances two principal arguments to support its conclusion that the Pawtucket crèche 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 clear religious import of the crèche and the findings of the district court that most observers understood the crèche as both a symbol of Christian beliefs and a symbol of the city’s support for those beliefs. Thus, although the Court concedes that the city’s inclusion of the nativity scene plainly serves “to depict the origins” of Christmas as a “significant historical religious event,” and that the crèche “is identified with one religious faith,” we are nevertheless expected to believe that Pawtucket’s use of the crèche does not signal the city’s support for the sectarian symbolism that the nativity scene evokes. The effect of the crèche, of course, must be gauged not only by its inherent religious significance but also by the overall setting in which it appears. But it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the crèche in its Christmas display, Pawtucket has done no more than make use of a “traditional” symbol of the holiday, and has thereby purged the crèche 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 crèche seems to me misguided for several reasons. In the first place, the city has positioned the crèche 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 crèche, to suggest that the crèche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalog of ethnic and religious celebrations, or to disassociate itself from the religious content of the crèche....

Third, we have consistently acknowledged that 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 crèche retains a specifically Christian religious meaning. ...To be so excluded on religious grounds by one’s elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause.

Second. The Court also attempts to justify the crèche by entertaining a beguilingly simple, yet faulty syllogism. The Court begins by noting that government may recognize Christmas Day as a public holiday; the Court then asserts that the crèche is nothing more than a traditional element of Christmas celebrations; and it concludes that the inclusion of a crèche as part of a government’s annual Christmas celebration is constitutionally permissible.... 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.... As is demonstrated below, 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, as exemplified by the crèche.

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. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step. Because it is clear that the celebration of Christmas has both secular and sectarian elements, it may well be that by taking note of the holiday, the government is simply seeking to serve the same kinds of wholly secular goals—for instance, promoting goodwill and a common day of rest—that were found to justify
Sunday Closing Laws. 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 crèche in Pawtucket’s otherwise secular celebration of Christmas clearly violates these principles.

II

Although the Court’s relaxed application of the Lemon test to Pawtucket’s crèche is regrettable, it is at least understandable and properly limited to the particular facts of this case. The Court’s opinion, however, also sounds a broader and more troubling theme. Invoking the celebration of Thanksgiving as a public holiday, the legend “In God We Trust” on our coins, and the proclamation “God save the United States and this Honorable Court” at the opening of judicial sessions, the Court asserts, without explanation, that Pawtucket’s inclusion of a crèche in its annual Christmas display poses no more of a threat to Establishment Clause values than these other official “acknowledgments” of religion.

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 acknowledgements of religious practices that may imply governmental favoritism toward one set of religious beliefs. This does not mean, of course, 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 be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion.

Despite this body of case law, the Court has never comprehensively
addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations, and I do not presume to offer a comprehensive approach. Nevertheless, it appears from our prior decisions that at least three principles—tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause—may be identified.

First, although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion. . . . And for me that principle would justify government’s decision to declare December 25 a public holiday.

Second, our cases recognize that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons. . . . [T]he mere fact that a governmental practice coincides to some extent with certain religious beliefs does not render it unconstitutional. Thanksgiving Day, in my view, fits easily within this principle, for despite its religious antecedents, the current practice of celebrating Thanksgiving is unquestionably secular and patriotic. We all may gather with our families on that day to give thanks both for personal and national good fortune, but we are free, given the secular character of the holiday, to address that gratitude either to a divine beneficence or to such mundane sources as good luck or the country’s abundant natural wealth.

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions 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 the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, 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 in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. 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 crèche fits none of these categories. Inclusion of the crèche is not necessary to accommodate individual religious expression. This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a crèche as part of a wholly private display on public land. Nor is the inclusion of the crèche necessary to serve wholly secular goals; it is clear that the city’s secular purposes of celebrating the Christmas holiday and promoting retail commerce can be fully served without the crèche. And the crèche, 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 religious works on display at the National Gallery, presidential references to God during an Inaugural Address, or the national motto present no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the crèche 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 [David J.] Brewer could arrogantly declare for the Court that “this is a Christian nation.” Church of Holy Trinity v. United States (1892). Those days, I had thought, were forever put behind us by the Court’s decision in Engel v. Vitale, in which we rejected a similar argument advanced by the state of New York that its regent’s prayer was simply an acceptable part of our “spiritual heritage.”

III

The American historical experience concerning the public celebration of Christmas, if carefully examined, provides no support for the Court’s decision. . . .

Indeed, the Court’s approach suggests a fundamental misapprehension of the proper uses of history in constitutional interpretation. Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment

8 Ed. note: Document 7
Clause. But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, “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.” *Walz*, supra, at 678. Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit our central inquiry in these cases—whether the challenged practices “threaten those consequences which the Framers deeply feared.” *Abington School Dist. v. Schempp*, 374 U.S., at 236 (Brennan, J., concurring). In recognition of this fact, the Court has, until today, consistently limited its historical inquiry to the particular practice under review.

... [T]he Court wholly fails to discuss the history of the public celebration of Christmas or the use of publicly displayed nativity scenes. The Court, instead, simply asserts, without any historical analysis or support whatsoever, that the now familiar celebration of Christmas springs from an unbroken history of acknowledgment “by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries . . . .” The Court’s complete failure to offer any explanation of its assertion is perhaps understandable, however, because the historical record points in precisely the opposite direction. Two features of this history are worth noting. First, at the time of the adoption of the Constitution and the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious holiday or as a public event. Second, the historical evidence, such as it is, offers no uniform pattern of widespread acceptance of the holiday and indeed suggests that the development of Christmas as a public holiday is a comparatively recent phenomenon.

The intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread celebration of Christmas did not emerge in its present form until well into the 19th century. Carrying a well-defined Puritan hostility to the celebration of Christ’s birth with them to the New World, the founders of the Massachusetts Bay Colony pursued a vigilant policy of opposition to any public celebration of the holiday. To the Puritans, the celebration of Christmas represented a “Popish” practice lacking any foundation in scripture.

Furthermore, unlike the religious tax exemptions upheld in *Walz*, the public display of nativity scenes as part of governmental celebrations of Christmas does not come to us supported by an unbroken history of widespread acceptance. It was not until 1836 that a state first granted legal recognition to Christmas as a public holiday. This was followed in the period between 1845 and 1865, by 28 jurisdictions which included Christmas Day
as a legal holiday. Congress did not follow the states’ lead until 1870 when it established December 25, along with the Fourth of July, New Year’s Day, and Thanksgiving, as a legal holiday in the District of Columbia. This pattern of legal recognition tells us only that public acceptance of the holiday was gradual and that the practice—in stark contrast to the record presented in either *Walz* or *Marsh*—did not take on the character of a widely recognized holiday until the middle of the 19th century.

In sum, there is no evidence whatsoever that the Framers would have expressly approved a federal celebration of the Christmas holiday including public displays of a nativity scene; accordingly, the Court’s repeated invocation of the decision in *Marsh* is not only baffling, it is utterly irrelevant. Nor is there any suggestion that publicly financed and supported displays of Christmas crèches are supported by a record of widespread, undeviating acceptance that extends 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. Contrary to today’s careless decision, those prior cases have all recognized that the “illumination” provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America’s varied history solely to suit the views of five members of this Court.

IV

Under our constitutional scheme, the role of safeguarding our “religious heritage” and of promoting religious beliefs is reserved as the exclusive prerogative of our nation’s churches, religious institutions, and spiritual leaders. Because the Framers of the Establishment Clause understood that “religion is too personal, too sacred, too holy to permit its ‘unhallowed perversion’ by civil [authorities],” *Engel v. Vitale*, 370 U.S., at 432, the clause demands that government play no role in this effort.

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9 Ed. note: In *Marsh v. Chambers*, 463 U.S. 783 (1983), https://www.law.cornell.edu/supremecourt/text/463/783, the Court held 6 to 3 that publicly funded chaplains were constitutional because of the unique historical background of the practice.
Ishmael Jaffree, a resident of Mobile County, Alabama, asserted “that two of [his] children had been subjected to various acts of religious indoctrination” because of an Alabama law authorizing moments of silence in schools. For the Court, Justice John Paul Stevens declared the Alabama law a violation of the Establishment Clause of the First Amendment, applied to the states through the Fourteenth Amendment due process clause. Justice Stevens wrote that “[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.” He maintained that the law concealed its unconstitutional motive of promoting prayer. In his ruling, Justice Stevens relied on the precedents established by the opinions of Justice Hugo L. Black in previous Establishment Clause cases (for example, Documents 3 and 4), expanding it in this case from prohibiting prayer in school to prohibiting moments of silence.

In his dissent, Justice William H. Rehnquist presented an alternate constitutional history to the one that Justice Black had relied on. He challenged the Court’s previous rulings that a wall of separation should exist between church and state, arguing instead that the Establishment Clause was meant originally to prohibit only a national Church or preferential treatment of one sect among others. He also argued that the Lemon test (Document 7) led to inconsistencies in determining what government practices constituted establishment of a religion. Justice David H. Souter’s dissent in Lee v. Weisman (Document 14) disputes both Rehnquist’s history and his original understanding approach. See as well Justice Stevens’ dissent in Van Orden v. Perry (Document 18). This dispute is at the heart of the approach known as “originalism.” Those who argue for a “living Constitution” might argue that as long as the spirit or intention of the document remains, past historical meaning is of secondary concern.

From the opinions in Wallace v. Jaffree, we include only Justice Rehnquist’s dissent. Concurring Justice Sandra Day O’Connor maintained that most moments of silence would remain protected.

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in Everson v. Board of Education,\(^1\) summarized its exegesis of Establishment Clause doctrine thus: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state. Reynolds v. United States, 98 U.S. 145, 98 U. S. 164 (1879)].’ This language from Reynolds, a case involving the Free Exercise Clause of the First Amendment, rather than the Establishment Clause, quoted from Thomas Jefferson’s letter to the Danbury Baptist Association the phrase “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.”

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years. Thomas Jefferson was, of course, in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson’s fellow Virginian, James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison’s significant contributions thereto, we see a far different picture of its purpose than the highly simplified “wall of separation between church and state.”

During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that, without a Bill of Rights guaranteeing individual liberty, the

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\(^1\) Ed. note: Document 3
new general government carried with it a potential for tyranny. The typical response to this argument on the part of those who favored ratification was that the general government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the 11 Colonies which ratified the Constitution by early 1789, 5 proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—including in one form or another a declaration of religious freedom. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. Virginia and North Carolina proposed identical guarantees of religious freedom: “[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and . . . no particular religious sect or society ought to be favored or established, by law, in preference to others.”

On June 8, 1789, James Madison rose in the House of Representatives and “reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution.” Madison’s subsequent remarks in urging the House to adopt his drafts of the proposed Amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm, and might do a great deal of good. . . .

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”

[Justice Rehnquist summarized the debate over Madison’s proposal in the House.] . . .

The following week, without any apparent debate, the House voted to alter the language of the Religion Clauses to read “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” The floor debates in the Senate were secret, and therefore not reported in the annals. The Senate, on September 3, 1789, considered several different forms of the Religion Amendment, and reported this language back to the House: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”
The House refused to accept the Senate’s changes in the Bill of Rights, and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The House and the Senate both accepted this language on successive days, and the amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the members of the House of the amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights. His original language “nor shall any national religion be established” obviously does not conform to the “wall of separation” between church and state idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language—“that Congress should not establish a religion, and enforce the legal observation of it by law”—is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language “no religion shall be established by law” should be amended by inserting the word “national” in front of the word “religion.”

It seems indisputable from these glimpses of Madison’s thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court’s opinion in Everson—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.
The repetition of this error in the Court’s opinion in *Illinois ex rel. McCollum v. Board of Education,*\(^2\) and *Engel v. Vitale*\(^3\) does not make it any sounder historically. Finally, in *Abington School District v. Schempp*, 374 U. S. 203, 374 U. S. 214 (1963), the Court made the truly remarkable statement that “the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the federal Constitution but likewise in those of most of our states.” On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; stare decisis\(^4\) may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other members of Congress who spoke during the August 15 debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the government might aid all religions evenhandedly. If one were to follow the advice of Justice Brennan . . . and construe the amendment in the light of what particular “practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent,”\(^5\) one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the federal government was, of course, not bound by draft amendments to the

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\(^2\) Ed. note: Document 4

\(^3\) Ed. note: Document 5

\(^4\) Ed. note: the legal principle that courts should follow precedent

\(^5\) *Abington School District v. Schempp*, supra, at 374 U. S. 236,
Constitution which had not yet been proposed by Congress, say nothing of ratified by the states, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new states and territories to nonsectarian schools.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he “could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them.” Representative Aedanas Burke objected to the resolution because he did not like “this mimicking of European customs”; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the States knew better than the Congress, and, in any event, “it is a religious matter, and, as such, is proscribed to us.” Representative Sherman supported the resolution “not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion…."

Boudinot’s resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving Proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clauses; Tucker, who opposed the Thanksgiving Proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President “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, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness."6...

George Washington, John Adams, and James Madison all issued Thanksgiving Proclamations; Thomas Jefferson did not. . . .

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson’s treaty with the Kaskaskia Indians, which provided annual cash support for the tribe’s Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in Everson that “no tax in any amount” may be levied for religious activities in any form.

Joseph Story, a member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story’s “Commentaries on the Constitution of the United States” discussed the meaning of the Establishment Clause of the First Amendment this way:

Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the

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national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word “establishment” as “the act of establishing, founding, ratifying or ordaining,” such as in “[t]he episcopal form of religion, so called, in England.” The Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the federal government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the “wall of separation” that was constitutionalized in *Everson*.

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful, albeit misguided, analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson*, our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the “wall of separation” is merely a “blurred, indistinct, and variable barrier,” which “is not wholly accurate” and can only be “dimly perceived.”

Whether due to its lack of historical support or its practical unworkability, the *Everson* “wall” has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo’s observation that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”

But the greatest injury of the “wall” notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The “crucible of litigation” is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The “wall of separation between church and state” is a metaphor based on bad history, a

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7 Ed. note: Legal scholar and Associate Justice, U.S. Supreme Court (1932-1938)
8 Ed. note: Justice Rehnquist quotes from the Court’s opinion.
metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to Everson’s wall through the three-part test of Lemon v. Kurtzman which served at first to offer a more useful test for purposes of the Establishment Clause than did the “wall” metaphor. Generally stated, the Lemon test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion.

Lemon cited Board of Education v. Allen as the source of the “purpose” and “effect” prongs of the three-part test. The Allen opinion explains, however, how it inherited the purpose and effect elements from Schempp and Everson, both of which contain the historical errors described above. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proved mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus, the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so.

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of any intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test,
and we would be required to void some state aids to religion which we have already upheld. . . .

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.\(^{11}\)

For example, a state may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class. A state may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A state may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A state may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A state may pay for diagnostic services conducted in the parochial school, but therapeutic services must be given in a different building; speech and hearing “services” conducted by the state inside the sectarian school are forbidden, but the state may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A state may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.

These results violate the historically sound principle “that the Establishment Clause does not forbid governments . . . to [provide] general welfare

\(^{11}\) Ed. note: For an example, see Document 16.
under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that ‘aid’ religious instruction or worship.” It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the Lemon test.

Although the test initially provided helpful assistance, we soon began describing the test as only a “guideline,” and lately we have described it as “no more than [a] useful signpost.”12 We have noted that the Lemon test is “not easily applied,” and as Justice White noted in Committee for Public Education & Religious Liberty v. Regan under the Lemon test we have “sacrifice[d] clarity and predictability for flexibility.”13 In Lynch,14 we reiterated that the Lemon test has never been binding on the Court, and we cited two cases where we had declined to apply it.

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results, I see little use in it. The “crucible of litigation” has produced only consistent unpredictability, and today’s effort is just a continuation of “the sisyphean task of trying to patch together the blurred, indistinct and variable barrier’ described in Lemon v. Kurtzman.”15 We have done much straining since 1947, but still we admit that we can only “dimly perceive” the Everson wall. Our perception has been clouded not by the Constitution, but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that charter and will only lead to the type of unprincipled decision-making that has plagued our Establishment Clause cases since Everson.

The Framers intended the Establishment Clause to prohibit the designation of any church as a “national” one. The clause was also designed to stop the federal government from asserting a preference for one religious denomination or sect over others. Given the “incorporation” of the Establishment Clause as against the states via the Fourteenth Amendment in Everson, states

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14 Ed. note: Document 10
15 Regan, 444 US 646 (1980).
are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that clause prohibit Congress or the states from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute because the state wished to “characterize prayer as a favored practice.” It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from “endorsing” prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The state surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized “endorsement” of prayer. I would therefore reverse the judgment of the Court of Appeals.
In this case, by a vote of 7 to 2, the Court prohibited as unconstitutional the state-required content of classroom speech by teachers. Specifically, the Court ruled unconstitutional a Louisiana law requiring that, if evolution were taught in a school, creationism must be also. In previous cases, such as those involving government aid to religious schools (Documents 3, 9), a prayer or posting of scripture (Document 5), a moment of silence (Document 11), or requirement of a flag salute (Document 2), the Court found restrictions on free speech and religious exercise or an establishment of religion. In this case, the Court extended its earlier doctrines about religious establishment to the content of a state school’s curriculum. As in Wallace v. Jaffree (Document 11), the Court singled out statements of a legislator supporting the law as key evidence for the law’s religious purpose.

The facts of the case are stated in the Court’s opinion. It takes its name from the high school teacher, Don Aguillard, who opposed the law, and Governor of Louisiana, Edwin Edwards, who decided to appeal a lower court ruling in favor of Aguillard.

source: 482 U.S. 578 (1987), https://www.law.cornell.edu/supremecourt/text/482/578. We include excerpts of Justice William J. Brennan Jr.’s opinion for the Court and omit Justice Scalia’s lengthy dissent. Footnotes added by the editors are preceded by “Ed. note.”

Justice Brennan delivered the opinion of the Court.

The question for decision is whether Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act (Creationism Act) is facially¹ invalid as violative of the Establishment Clause of the First Amendment.

¹ Ed. note: on its face, as it appears; as a law appears, not as it is applied
I

The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in “creation science.” No school is required to teach evolution or creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as “the scientific evidences for [creation or evolution] and inferences from those scientific evidences.”

II

The Establishment Clause forbids the enactment of any law “respecting an establishment of religion.” The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute’s principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971). State action violates the Establishment Clause if it fails to satisfy any of these prongs.

In this case, the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system. States and local school boards are generally afforded considerable discretion in operating public schools.

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary. The state exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.

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2 Ed. note: Document 9
III

Lemon’s first prong focuses on the purpose that animated adoption of the act. “The purpose prong of the Lemon test asks whether government’s actual purpose is to endorse or disapprove of religion.” Lynch v. Donnelly. A governmental intention to promote religion is clear when the state enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, see Wallace v. Jaffre, or by advancement of a particular religious belief, e.g., Stone v. Graham; Epperson v. Arkansas, (holding that banning the teaching of evolution in public schools violates the First Amendment, since “teaching and learning” must not “be tailored to the principles or prohibitions of any religious sect or dogma”). If the law was enacted for the purpose of endorsing religion, “no consideration of the second or third criteria [of Lemon] is necessary.” Wallace v. Jaffree. In this case, appellants have identified no clear secular purpose for the Louisiana Act.

True, the act’s stated purpose is to protect academic freedom. This phrase might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will. The Court of Appeals, however, correctly concluded that the act was not designed to further that goal. We find no merit in the state’s argument that the “legislature may not [have] use[d] the terms ‘academic freedom’ in the correct legal sense. They might have [had] in mind, instead, a basic concept of fairness; teaching all of the evidence.” Even if “academic freedom” is read to mean “teaching all of the evidence” with respect to the origin of human beings, the act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

A

While the Court is normally deferential to a state’s articulation of a secular purpose, it is required that the statement of such purpose be sincere, and not a sham...

It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: “My preference would be that

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3 Ed. note: Document 12
4 Ed. note: those who apply to a higher court to reverse the decision of a lower court. In this case, Edwin Edwards.
neither [creationism nor evolution] be taught." Such a ban on teaching does not promote—indeed, it undermines—the provision of a comprehensive scientific education.

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory. As the president of the Louisiana Science Teachers Association testified, “[a]ny scientific concept that’s based on established fact can be included in our curriculum already, and no legislation allowing this is necessary.” The act provides Louisiana schoolteachers with no new authority. Thus, the stated purpose is not furthered by it.

Furthermore, the goal of basic “fairness” is hardly furthered by the act’s discriminatory preference for the teaching of creation science and against the teaching of evolution.... The act forbids school boards to discriminate against anyone who “chooses to be a creation scientist” or to teach “creationism,” but fails to protect those who choose to teach evolution or any other non-creation-science theory, or who refuse to teach creation science.

If the Louisiana Legislature’s purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the act’s requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals’ conclusion that the act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting “evolution by counterbalancing its teaching at every turn with the teaching of creationism....”

B

...The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term “creation science” was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act. Senator Keith’s leading expert on creation science, Edward Boudreaux, testified at the legislative hearings that the theory of creation science included
belief in the existence of a supernatural creator. Senator Keith also cited testimony from other experts to support the creation science view that “a creator [was] responsible for the universe and everything in it.” The legislative history therefore reveals that the term “creation science,” as contemplated by the legislature that adopted this act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind.

Furthermore, it is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the act’s primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. The sponsor of the Creationism Act, Senator Keith, explained during the legislative hearings that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs. According to Senator Keith, the theory of evolution was consonant with the “cardinal principle[s] of religious humanism, secular humanism, theological liberalism, atheism [sic].” The state senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own. The legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. 

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. Indeed, the Court acknowledged in Stone⁵ that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization. In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the

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effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the act furthers religion in violation of the Establishment Clause. . . .

V

The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose. The judgment of the Court of Appeals therefore is

Affirmed.
The State of Oregon denied unemployment benefits to former employees Alfred Leo Smith (and Galen Black) because they were fired for using an illegal drug, peyote. Smith and Black argued that Oregon was denying them their First Amendment free exercise of religion right because their use of peyote was part of a traditional Native American Church rite. The rest of the facts of the case are found in the Court opinion.

The Oregon Supreme Court ruled that the state’s prohibition of peyote violated Smith and Black’s First Amendment’s Free Exercise Clause rights and thus the state could not deny them unemployment benefits. The U.S. Supreme Court reversed the Oregon Court’s decision 6 to 3. In its ruling, the Court sought to impose some limits to the scope of free religious exercise without compromising the fundamental principle. The justices sought a judicial doctrine that would avoid approving illegal conduct (in this case illegal drug use) but still allow some free exercise exceptions to some laws (e.g., conscientious objection to military service). Compare Justice Antonin Scalia’s opinion with Justice Felix Frankfurter’s dissent in Document 2 and with the Court’s opinion in Document 1.

In response to Oregon v. Smith, Congress overwhelmingly passed “The Religious Freedom Restoration Act” (RFRA). https://www.law.cornell.edu/uscode/text/42/chapter-21B In summary, the Religious Freedom Restoration Act of 1993 prohibits any agency, department, or official of the United States or any state (the government) from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. https://www.congress.gov/bill/103rd-congress/house-bill/1308
RFRA and its successors (one version was overturned by the Court as interference with its authority to interpret the first amendment, City of Boerne v. Flores 521 U.S. 507 [1997]) have played a role in its interpretations of religious freedom (e.g., Burwell v. Hobby Lobby, Document 20).

SOURCE: 494 U.S. 872 (1990), https://www.law.cornell.edu/supremecourt/text/494/872. We have included excerpts of Justice Scalia’s opinion for the Court, Justice Sandra Day O’Connor’s concurring opinion, and Justice Harry A. Blackmun’s dissent. Footnotes added by the editors are preceded by “Ed. note.”

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the state to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. . . .

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the states by incorporation into the Fourteenth Amendment, see Cantwell v. Connecticut,¹ provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious beliefs as such.” Sherbert v. Verner.² The government may not compel affirmation of religious belief, punish the expression of religious doctrines it

¹ Ed. note: Document 2
² Ed. note: Document 8
believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

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

Respondents in the present case, however, seek to carry the meaning of “prohibiting the free exercise [of religion]” one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise

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3 Ed. note: defendants in a law suit, in this case, Smith and Black
jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Educ. v. Gobitis:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.4

We first had occasion to assert that principle in Reynolds v. United States, where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said,

are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribe (or prescribes) conduct that his religion prescribes (or proscribes).”5 In Prince v. Massachusetts, 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in “excluding [these children] from doing there what no other children may do.” In Braunfeld v. Brown, we upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v. United States we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

4 Ed. note: Document 3
Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual’s religion was *United States v. Lee*, 455 U.S. at 258–261. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. . . .

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . . .

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

B

Respondents argue that, even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*. Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test, we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial

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6 Ed. note: Document 8
of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied....

Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The Sherbert test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct....

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” Lyng, supra, 485 U.S. at 451. To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the state’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,” Reynolds v. United States—contradicts both constitutional tradition and common sense.

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Nor is it possible to limit the impact of respondents’ proposal by requiring a “compelling state interest” only when the conduct prohibited is “central” to the individual’s religion. It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his
personal faith? Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” United States v. Lee, 455 U.S. at 263 n. 2. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” Braunfeld v. Brown, 366 U.S. at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment’s protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of states have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation
to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

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

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

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

... II

The Court today extracts from our long history of free exercise precedents the single categorical rule that “if prohibiting the exercise of religion ... is ... merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” Indeed, the Court holds that, where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

A The Free Exercise Clause of the First Amendment commands that “Congress shall make no law ... prohibiting the free exercise [of religion].”... Because
the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are “one large step” removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a state directly targets a religious practice. . . .

To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment’s command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless
required by clear and compelling governmental interests “of the highest order,” *Wisconsin v. Yoder.*

The Court attempts to support its narrow reading of the clause by claiming that

“[W]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.” But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder,* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts…. 

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them “hybrid” decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

**B**

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court’s rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the state to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that “the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to” challenges to general criminal prohibitions.

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7 Ed. note: Document 10
In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.... I would have thought it beyond argument that such laws implicate free exercise concerns....

... Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector “is essential to accomplish an overriding governmental interest,” Lee, 455 U.S. at 257–258, or represents “the least restrictive means of achieving some compelling state interest,” Thomas, 450 U.S. at 718. To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant, and whether the particular criminal interest asserted by the state before us is compelling. Even if, as an empirical matter, a government’s criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Given the range of conduct that a state might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the state to grant a limited exemption for religiously motivated conduct....

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a “constitutional anomaly,” the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a “constitutional nor[m],” not an “anomaly.” As the language of the clause itself makes clear, an individual’s free exercise of religion is a preferred constitutional activity.... The Court’s parade of horribles not only fails as a reason for discarding the compelling

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interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an “unavoidable consequence” under our system of government, and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish. . . . The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a “luxury” is to denigrate “[t]he very purpose of a Bill of Rights.”

III

The Court’s holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon’s criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church, and is regarded as vital to respondents’ ability to practice their religion. . . .

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. . . . In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive social security system, and military conscription are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the state’s general criminal prohibition “will unduly interfere with fulfillment of the governmental interest” Lee, supra, 455 U.S. at 259. . . . Because
the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote.

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon’s compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the state to accommodate respondents’ religiously motivated conduct. . . .

I would therefore adhere to our established free exercise jurisprudence and hold that the state in this case has a compelling interest in regulating peyote use by its citizens, and that accommodating respondents’ religiously motivated conduct “will unduly interfere with fulfillment of the governmental interest.” Lee, 455 U.S. at 259. Accordingly, I concur in the judgment of the Court.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the state’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court’s First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a “constitutional anomaly.” As carefully detailed in Justice O’Connor’s concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court’s precedents. The Court discards leading free exercise cases such as Cantwell v. Connecticut, and Wisconsin v. Yoder,10 as “hybrid.” The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). The Court

10 Ed. note: Document 10
cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country’s drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a “luxury” that a well-ordered society cannot afford, and that the repression of minority religions is an “unavoidable consequence of democratic government.” I do not believe the Founders thought their dearly bought freedom from religious persecution a “luxury,” but an essential element of liberty—and they could not have thought religious intolerance “unavoidable,” for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with Justice O’Connor’s analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion. As she points out, “the critical question in this case is whether exempting respondents from the state’s general criminal prohibition ‘will unduly interfere with fulfillment of the governmental interest.’” I do disagree, however, with her specific answer to that question.

I

In weighing respondents’ clear interest in the free exercise of their religion against Oregon’s asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the state’s broad interest in fighting the critical “war on drugs” that must be weighed against respondents’ claim, but the state’s narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. . . .

The state’s interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The state cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest if it does not, in fact, attempt to enforce that prohibition. In this case, the state actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. . . .

Similarly, this Court’s prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. . . .
The state proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the state’s assumption that religious use of peyote is harmful.

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous.

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.

III

Finally, although I agree with Justice O’Connor that courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is “central” to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a state’s restrictions on the adherents of a minority religion.

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be “forced to migrate to some other and more tolerant region.” Yoder, 406 U.S. This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans.

IV

For these reasons, I conclude that Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion. Since the state could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the state’s drug laws cannot justify its denial of unemployment benefits.

I dissent.

SOURCE: 505 U.S. 577, https://www.law.cornell.edu/supremecourt/text/505/577. We include excerpts from Justice Kennedy’s opinion for the court, the concurring opinion of Justice Souter, and the dissent of Justice Scalia. Omitted is Justice Harry A. Blackmun’s dissent. Footnotes added by the editors are preceded by “Ed. note.”

Justice Kennedy delivered the opinion of the Court.

I.

A.

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, [Rhode Island] at a formal ceremony in June 1989. She was about 14 years old.… The school principal, petitioner1 Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah’s class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.…

Rabbi Gutterman’s prayers were as follows:

1 Ed. note: a person who makes a formal application to a court for a writ, judicial action in a suit, etc.
INVOCATION

God of the Free, Hope of the Brave:

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

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

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

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

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

AMEN

BENEDICTION

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

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

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

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

AMEN….

… The parties stipulate that attendance at graduation ceremonies is
voluntary…. 

B.

… The district court held that petitioners’ practice of including invocations
and benedictions in public school graduations violated the Establishment
Clause of the First Amendment, and it enjoined petitioners from continuing
the practice.... On appeal, the United States Court of Appeals for the First Circuit affirmed.... We granted certiorari\(^2\) and now affirm.

II.

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma....

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.” *Lynch.*\(^3\) The state’s involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undeniable. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the state, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the state. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent....

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint....

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the

\(^2\) Ed. note: A Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.

\(^3\) ???
school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the state to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi’s prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent Peer Cross Pressures, 28 Am. Sociological Rev. 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 J. of Youth and Adolescence 451 (Dec. 1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self Reported Behavior Among Adolescents, 22 Developmental Psychology 521 (July 1986). To recognize that the choice imposed by the state constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means. . . .

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4 Ed. note: We include these references to show the Court’s use of social science research.
Justice Souter, with whom Justice Stevens and Justice O’Connor join, concurring.

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the state has crossed the line from permissible accommodation to unconstitutional establishment.

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from presidential religious proclamations and similar official “acknowledgments” of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. Madison himself respected the difference between the trivial and the serious in constitutional practice. Realizing that his contemporaries were unlikely to take the Establishment Clause seriously enough to forgo a legislative chaplainship, he suggested that “[r]ather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex . . . .” But that logic permits no winking at the practice in question here. When public school officials, armed with the state’s authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However “ceremonial” their messages may be, they are flatly unconstitutional.

Justice Scalia, with whom the Chief Justice, Justice White, and Justice Thomas join, dissenting.

Three terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the “[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted

5 Ed. note: A Latin phrase meaning “the law does not concern itself with unimportant things.”
part of our political and cultural heritage.” That opinion affirmed that “the meaning of the clause is to be determined by reference to historical practices and understandings.” It said that “[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the clause.” County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter. These views of course prevent me from joining today’s opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense.6 Today’s opinion shows more forcefully than volumes of argumentation why our nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the justices of this Court, but must have deep foundations in the historic practices of our people.

I

Justice Holmes’ aphorism that “a page of history is worth a volume of logic,” New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921), applies with particular force to our Establishment Clause jurisprudence. . . .

The history and tradition of our nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, but since the Court is so oblivious to our history as to suggest that the Constitution restricts “preservation and

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6 Ed. note: Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). Recognizing criminal intent as necessary or a crime, the Durham rule held that a defendant could not be found guilty if he or she suffered from mental illness. Over time, the ruling in the Durham case was narrowed, in part because it made cases depend on expert witness judgments about mental states.
transmission of religious beliefs . . . to the private sphere,” it appears necessary to provide another brief account.

From our nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations. [There follows a 600 word history of such prayers.] . . .

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises . . .

II

The Court presumably would separate graduation invocations and benedictions from other instances of public “preservation and transmission of religious beliefs” on the ground that they involve “psychological coercion.” I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to “requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.” American Jewish Congress v. Chicago, 827 F.2d 120, 129 (Easterbrook, J., dissenting). But interior decorating is a rock hard science compared to psychology practiced by amateurs. A few citations of “[r]esearch in psychology” that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court’s argument that state officials have “coerced” students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identifies two “dominant facts” that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause. Neither of them is in any relevant sense true.

A

The Court declares that students’ “attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory.” But what exactly is this “fair and real sense”? According to the Court, students at graduation who want “to avoid the fact or appearance of participation” in the invocation and benediction are psychologically obligated by “public pressure,

as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence” during those prayers. This assertion—the very linchpin of the Court’s opinion—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer\(^8\) like prayer position, pay attention to the prayers, utter “Amen,” or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced “to stand . . . or, at least, maintain respectful silence” (emphasis added). Both halves of this disjunctive (both of which must amount to the fact or appearance of participation in prayer if the Court’s analysis is to survive on its own terms) merit particular attention.

To begin with the latter: The Court’s notion that a student who simply sits in “respectful silence” during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely “our social conventions” have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite “subtle coercive pressures,”) the free will to sit, there is absolutely no basis for the Court’s decision. It is fanciful enough to say that “a reasonable dissenter,” standing head erect in a class of bowed heads, “could believe that the group exercise signified her own participation or approval of it.” It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is “subtly coerced” . . . to stand! Even that half of the disjunctive does not remotely establish a “participation” (or an “appearance of participation”) in a religious exercise. The Court acknowledges that “in our culture standing . . . can signify adherence to a view or simple respect for the views of others.” (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a “reasonable dissenter . . . could believe that the group exercise signified her own participation or approval”? Quite obviously, it cannot. I may add,

\(^8\) Ed. note: Albrecht Dürer (1471-1528) was a German artist, among whose famous works is a drawing of praying hands.
moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter’s interest in avoiding even the false appearance of participation constitutionally trumps the government’s interest in fostering respect for religion generally.

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman’s invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy West Virginia Board of Education v. Barnette. Moreover, since the Pledge of Allegiance has been revised since Barnette to include the phrase “under God,” recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court’s view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In Barnette we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to stand in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court’s bulldozer.

I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether “mature adults” may. I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults? . . .

These distortions of the record are, of course, not harmless error: without them the Court’s solemn assertion that the school officials could reasonably be perceived to be “enforc[ing] a religious orthodoxy,” would ring as hollow as it ought.

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9 Ed. note: Document 4
III

The deeper flaw in the Court’s opinion does not lie in its wrong answer to the question whether there was state induced “peer pressure” coercion; it lies, rather, in the Court’s making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term “establishment” had acquired an additional meaning—financial support of religion generally, by public taxation”—that reflected the development of “general or multiple” establishments, not limited to a single church. But that would still be an establishment coerced by force of law. And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations ruled out of order government sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, “peer pressure” psycho coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the officially sponsored non-denominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.
Thus, while I have no quarrel with the Court’s general proposition that the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise.” I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the national government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that “[s]peech is not coercive; the listener may do as he likes.” American Jewish Congress v. Chicago, 827 F.2d at 132 (Easterbrook, J., dissenting).

This historical discussion places in revealing perspective the Court’s extravagant claim that the state has “for all practical purposes” and “in every practical sense,” compelled students to participate in prayers at graduation. Beyond the fact, stipulated to by the parties, that attendance at graduation is voluntary, there is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline. Contrast this with, for example, the facts of Barnette: Schoolchildren were required by law to recite the Pledge of Allegiance; failure to do so resulted in expulsion, threatened the expelled child with the prospect of being sent to a reformatory for criminally inclined juveniles, and subjected his parents to prosecution (and incarceration) for causing delinquency. To characterize the “subtle coercive pressures,” allegedly present here as the “practical” equivalent of the legal sanctions in Barnette is . . . well, let me just say it is not a “delicate and fact sensitive” analysis.

The Court relies on our “school prayer” cases. But whatever the merit of those cases, they do not support, much less compel, the Court’s psycho journey. In the first place, Engel and Schempp10 do not constitute an exception to the rule, distilled from historical practice, that public ceremonies may include prayer; rather, they simply do not fall within the scope of the rule (for the obvious reason that school instruction is not a public ceremony). Second, we have made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (i.e., coercion under threat of penalty) provides the ultimate backdrop. . . .

IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so called Lemon test. The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court’s otherwise lamentable decision. Unfortunately, however, the Court has replaced Lemon with its psycho coercion test, which suffers the double disability of having no roots whatever in our people’s historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court’s decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

... The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington’s first Thanksgiving Proclamation put it, the “Great Lord and Ruler

11 Ed. note: Document 7
of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon non-believers. Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution. As the age old practices of our people show, the answer to that question is not at all in doubt.

I must add one final observation: The founders of our republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

For the foregoing reasons, I dissent.
In this case, with no justice dissenting but with various views expressed among several concurring opinions, the Court clarified its free exercise reasoning: laws that violate free exercise of religion are put under the “strict scrutiny” test in order to justify their constitutionality. (The Court applies this same test, for example, to government practices that discriminate on the basis of race: they are presumptively unconstitutional.) The Florida city of Hialeah attempted to ban a Santeria church by enacting public health laws banning the animal slaughter essential to its practice. Justice Anthony Kennedy relates the main facts in this unanimous opinion.

SOURCE: 508 U.S. 520 (1993), https://www.law.cornell.edu/supct/html/91-948.ZO.html. We include only excerpts of Justice Kennedy’s opinion for the court, omitting the clashing concurrences of Justices Harry A. Blackmun, Antonin Scalia, and David H. Souter. Justices Scalia and Souter continued their disputes from earlier cases, such as Lee v. Weisman (document 14). All notes added by the editors.

Justice Anthony Kennedy delivered the opinion of the Court.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.¹

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the nation’s essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends

¹A Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.
asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

This case involves practices of the Santeria religion, which originated in the nineteenth century. When hundreds of thousands of members of the Yoruba people were brought as slaves from eastern Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, “the way of the saints.” The Cuban Yoruba express their devotion to spirits, called orishas, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orishas. The basis of the Santeria religion is the nurture of a personal relation with the orishas, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots…

According to Santeria teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent…. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

Petitioner Church of the Lukumi Babalu Aye, Inc. (church), is a not for profit corporation organized under Florida law in 1973. The church and its congregants practice the Santeria religion. The president of the church is petitioner Ernesto Pichardo, who is also the church’s priest and holds the religious title of Italero, the second highest in the Santeria faith. In April 1987, the church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the church’s goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the church’s
efforts at obtaining the necessary licenses and permits were far from smooth, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987.

A summary [of the ordinances passed at that and later meetings] suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87-66, which noted the “concern” expressed by residents of the city “that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and declared that “[t]he city reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.” Next, the council approved an emergency ordinance, Ordinance 87-40, that incorporated in full, except as to penalty, Florida’s animal cruelty laws. Among other things, the incorporated state law subjected to criminal punishment “[w]henever . . . unnecessarily or cruelly . . . kills any animal.”

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with state law. To obtain clarification, Hialeah’s city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited “a religious group from sacrificing an animal in a religious ritual or practice” and whether the city could enact ordinances “making religious animal sacrifice unlawful.” The attorney general . . . advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict.

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption,” and prohibited owning or possessing an animal “intending to use such animal for food purposes.” It restricted application of this prohibition, however, to any individual or group that “kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.” The ordinance contained an exemption for slaughtering by “licensed establishment[s]” of animals “specifically raised for food purposes.” Declaring, moreover, that the city council “has determined that the sacrificing of animals within the city limits is contrary
to the public health, safety, welfare and morals of the community,” the city council adopted Ordinance 87-71. That ordinance defined sacrifice as had Ordinance 87-52, and then provided that “[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the city of Hialeah, Florida.” The final Ordinance, 87-72, defined “slaughter” as “the killing of animals for food” and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of “small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both....

... The city does not argue that Santeria is not a “religion” within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981). Given the historical association between animal sacrifice and religious worship, petitioners’ assertion that animal sacrifice is an integral part of their religion “cannot be deemed bizarre or incredible.” Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 834, n. 2 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners’ professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners’ First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Employment Div., Dept. of Human Resources of Oregon v. Smith. Neutral and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the Smith requirements. We begin by discussing neutrality.

2 Document 13.
In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C. J.). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some...

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words “sacrifice” and “ritual,” words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words “sacrifice” and “ritual” have a religious origin, but current use admits also of secular meanings. The ordinances, furthermore, define “sacrifice” in secular terms, without referring to religious practices.

We reject the contention advanced by the city, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The clause “forbids subtle departures from neutrality” *Gillette v. United States*, 401 U.S. 437, 452 (1971), and “covert suppression of particular religious beliefs,” *Bowen v. Roy*, supra, (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot
be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. “The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” Walz v. Tax Commission of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words “sacrifice” and “ritual” does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council’s enactments discloses the improper attempt to target Santeria. Resolution 87-66, adopted June 9, 1987, recited that “residents and citizens of the city of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and “reiterate[d]” the city’s commitment to prohibit “any and all [such] acts of any and all religious groups.” No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances’ operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals, and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a “religious gerrymander,” an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. . . . The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas, not food consumption. Indeed, careful
drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished. . . .

... As we noted in Smith, in circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Respondent’s application of the ordinance’s test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

We also find significant evidence of the ordinances’ improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits “gratuitous restrictions” on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. . . . The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city’s interest in preventing cruelty to animals. . . .

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. . . .

The principle that government, in pursuit of legitimate interests, cannot
in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

We conclude, in sum, that each of Hialeah’s ordinances pursues the city’s governmental interests only against conduct motivated by religious belief. The ordinances “ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.” The Florida Star v. B. J. F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment). This precise evil is what the requirement of general applicability is designed to prevent.

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S., at 628, quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The compelling interest standard that we apply once a law fails to meet the Smith requirements is not “water[ed] . . . down” but “really means what it says.” A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.
The Court, in a 5–4 vote, upheld a Cleveland program providing financial assistance in the form of vouchers to parents of children in low-performing schools districts, enabling them to attend other schools, including private, religious ones. The Court opinion and the dissenters disagreed over whether this case marks an overthrow of the first school aid cases (Everson v. Board of Education, Document 3, and McCollum v. Board of Education, Document 4), which had proclaimed a “wall of separation between church and state,” whose slightest breach constituted a violation of the Establishment Clause.

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.

The Court’s majority holds that the Establishment Clause is no bar to Ohio’s payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools’ religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these…. I therefore respectfully dissent.
The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing*, which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent:

“No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

Today, however, the majority holds that the Establishment Clause is not offended by Ohio’s Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the republic.

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today’s decision on those criteria.

I

The majority’s statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court’s announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition

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1 Ed. note: Document 5
of the cases, which I tried to classify in some detail in an earlier opinion, see Mitchell v. Helms, 530 U.S. 793, 873–899 (2000) (dissenting opinion), but to set out the broad doctrinal stages covered in the modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient’s religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

II

Although it has taken half a century since Everson to reach the majority’s twin standards of neutrality and free choice, the facts show that, in the majority’s hands, even these criteria cannot convincingly legitimate the Ohio scheme.

...  

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school.

There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools
can afford to accept more than a handful of voucher students. And contrary to the majority’s assertion, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has. For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the state did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson’s choice is not a choice, whatever the reason for being Hobsonian.2

III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed arguendo3 that the majority’s formal criteria were satisfied on the facts, today’s conclusion would be profoundly at odds with the Constitution. Proof of this is clear on two levels. The first is circumstantial, in the now discarded symptom of violation, the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. . . .

The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996 ($28 million in voucher payments, $5 million in administrative costs), and its cost was expected to exceed $8 million in the 2001-2002 school year. These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly $600 per child.

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers’ money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands

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2 Ed. note: A Hobson’s choice is one in which the choice is between something and nothing. The phrase is thought to have originated from the practice of a stable owner named Hobson, who would offer customers the horse near the stable door or none at all.

3 Ed. note: for the sake of argument
of qualifying students, the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences of “substantial” aid hypothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

**B**

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. I anticipated these objectives earlier in discussing *Everson*, which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one “shall be compelled to . . . support any religious worship, place, or ministry whatsoever,” *A Bill for Establishing Religious Freedom*, even a “teacher of his own religious persuasion” and Madison thought it violated by any “authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.” *Memorial and Remonstrance*. “Any tax to establish religion is antithetical to the command that the minds of men always be wholly free.” *Mitchell*, 530 U.S., at 871 (Souter, J., dissenting). Madison’s objection to three pence has simply been lost in the majority’s formalism.

As for the second objective, to save religion from its own corruption, Madison wrote of the “experience . . . that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.” *Memorial and Remonstrance*. In Madison’s time, the manifestations were “pride and indolence in the clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution;” in the 21st century, the risk is one of “corrosive secularism” to religious schools and the specific threat is to the primacy of the schools’ mission to educate the children of the faithful according to the unaltered precepts of their faith. Even “[t]he favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.” *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring).

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not “discriminate on the basis of . . . religion,” which means

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the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers. This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for “[c]hildren . . . whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school.” Nor is the state’s religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. Indeed, a separate condition that “[t]he school . . . not . . . teach hatred of any person or group on the basis of . . . religion” could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.

For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. . . . When government aid goes up, so does reliance on it; the only thing likely to go down is independence. . . . A day will come when religious schools will learn what political leverage can do, just as Ohio’s politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion’s capacity for discord. . . .

Justice Breyer has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America’s Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines
“a nationalistic sentiment” in support of Israel with a “deeply religious” element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife’s obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

* * *

If the divisiveness permitted by today’s majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland’s will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority’s decision. Everson’s statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle.
May a state deny its college scholarship funds to students who wish to major in devotional theology, that is, study in preparation to be a minister? Would this denial violate one’s free exercise of religion or would it amount to simply a rational decision about funding state programs, such as including some majors (e.g., engineering) and excluding others (e.g., physical education)? Chief Justice William H. Rehnquist relates the facts in his opinion for the Court, which decided 7–2 that the Washington State law did not violate the First Amendment’s Free Exercise Clause by denying the funding. Justice Antonin Scalia objected that excluding devotional theology from a state program violated the Court’s earlier free exercise decisions, such as Church of the Lukumi Babalu Aye, Inc. v. Hialeah (Document 15).

SOURCE: 540 U.S. 712 (2004), https://www.law.cornell.edu/supct/html/02-1315.ZS.html. We include the Chief Justice Rehnquist’s opinion for the court and omit the dissents of Justices Scalia and Clarence Thomas. Footnotes added by the editors are preceded by “Ed. note.”

Chief Justice Rehnquist delivered the opinion of the Court.

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

The Washington State Legislature…created the Promise Scholarship Program, which provides a scholarship, renewable for one year, to eligible students for postsecondary education expenses. Students may spend their funds on any education-related expense, including room and board. . . . The scholarship was worth $1,125 for academic year 1999–2000 and $1,542 for 2000–2001.
To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. A student must graduate from a Washington public or private high school and either graduate in the top 15% of his graduating class, or attain on the first attempt a cumulative score of 1,200 or better on the Scholastic Assessment Test I or a score of 27 or better on the American College Test. The student’s family income must be less than 135% of the state’s median. Finally, the student must enroll “at least half time in an eligible postsecondary institution in the State of Washington,” and may not pursue a degree in theology at that institution while receiving the scholarship. (“No aid shall be awarded to any student who is pursuing a degree in theology.”) Private institutions, including those religiously affiliated, qualify as “eligible postsecondary institution[s]” if they are accredited by a nationally recognized accrediting body. A “degree in theology” is not defined in the statute, but, as both parties concede, the statute simply codifies the state’s constitutional prohibition on providing funds to students to pursue degrees that are “devotional in nature or designed to induce religious faith.”

Respondent,1 Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had “planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor.” To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.

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

Davey then brought an action under 42 U.S.C. § 1983 against various state officials (hereinafter state) in the district court for the Western District of Washington to enjoin the state from refusing to award the scholarship solely because a student is pursuing a devotional theology degree, and for damages.

1 Ed. note: a defendant in a law suit
The district court rejected Davey’s constitutional claims and granted summary judgment in favor of the state.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. The court concluded that the state had singled out religion for unfavorable treatment and thus under our decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), the state’s exclusion of theology majors must be narrowly tailored to achieve a compelling state interest. Finding that the state’s own antiestablishment concerns were not compelling, the court declared Washington’s Promise Scholarship Program unconstitutional. We granted certiorari, and now reverse.

The Religion Clauses of the First Amendment provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that “there is room for play in the joints” between them. *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). In other words, there are some state actions permitted by the Establishment Clause, but not required by the Free Exercise Clause.

This case involves that “play in the joints” described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). As such, there is no doubt that the state could, consistent with the federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the state does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been

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2 Ed. note: Document 15
3 Ed. note: A Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.
4 Ed. note: Document 16
5 The relevant provision of the Washington Constitution, Art. I, §11, states: “Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”
authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the state’s disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The state has merely chosen not to fund a distinct category of instruction.

Justice Scalia argues, however, that generally available benefits are part of the “baseline against which burdens on religion are measured.” Because the Promise Scholarship Program funds training for all secular professions, Justice Scalia contends the state must also fund training for religious professions. But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a state would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

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*Ed. note: on the face of it*

*Davey, relying on *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech...*

*Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.*
Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a state’s antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an “established” religion.

Most states that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. The plain text of these constitutional provisions prohibited any tax dollars from supporting the clergy. We have found nothing to indicate, as Justice Scalia contends, that these provisions would not have applied so long as the state equally supported other professions or if the amount at stake was de minimis. That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

Far from evincing the hostility toward religion which was manifest in _Lukumi_, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. As Northwest advertises, its “concept of education is distinctly Christian in the evangelical sense.” It prepares all of its students, “through instruction, through modeling, [and] through [its] classes, to use . . . the Bible as their guide, as the truth,” no matter their chosen profession. And under the Promise Scholarship Program’s current guidelines, students are still eligible to take devotional theology courses. Davey notes all students at Northwest are required to take at least four devotional courses, “Exploring the Bible,” “Principles of Spiritual Development,” “Evangelism in the Christian Life,” and “Christian Doctrine,” and some students may have additional religious requirements as part of their majors.

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

Without a presumption of unconstitutionality, Davey’s claim must fail.

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9 Ed. note: too unimportant to merit consideration
The state’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.

The judgment of the Court of Appeals is therefore Reversed.
Van Orden v. Perry
June 27, 2005

This case and the next, McCreary County v. American Civil Liberties Union of Kentucky (Document 19) are companion cases, announced the same day. Justice Stephen G. Breyer was the swing vote of the two 5–4 majorities, the first upholding a Ten Commandments monument on the Texas Capitol grounds, the second barring a Ten Commandments display within a Kentucky courthouse. The decisions reflect two different results of the government endorsement of religion test that arose in the wake of Lemon v. Kurzman (Document 7).

SOURCE: 543 U.S. 677 (2005), https://www.law.cornell.edu/supct/html/03-1500.ZO.html. We omit the opinion of the Court by Chief Justice William H. Rehnquist and provide instead the concurring opinions of Justices Clarence Thomas and Breyer and the dissent of Justice John Paul Stevens, whose argument is also reflected in Justice David H. Souter’s Court opinion in McCreary. Justice Thomas’s opinion exemplifies his originalist jurisprudence, which bases interpretation on the original public meaning of the Constitution’s text. Justice Stevens’ dissent criticizes the originalism of Justices Thomas and Antonin Scalia. We also omit the concurrence of Justice Scalia and the dissent of Justice Sandra Day O’Connor. Justice Breyer concurred in the opinion of the court but did not accept its argument. His opinion presents the facts of the case. Footnotes added by the editors are preceded by “Ed. note.”

Justice Breyer, concurring in the judgment.

... While the Court’s prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.

The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing, the deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.
In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message, but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the nation, including the Supreme Court of the United States.

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 physical setting of the monument, moreover, suggests little or nothing of the sacred.¹ 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 meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display’s inscription about its origin) communicates to visitors that the state sought to reflect moral principles, illustrating a relation between ethics and law that the state’s citizens, historically speaking, have endorsed. That is to say, the context suggests that the state intended the display’s moral message—an illustrative message reflecting the historical “ideals” of Texans—to predominate.

If these factors provide a strong, but not conclusive, indication that the Commandments’ text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court

¹Ed. note: Justice Breyer attached a photo of the park. See [https://www.law.cornell.edu/supct/pdf/03-1500P.ZC2](https://www.law.cornell.edu/supct/pdf/03-1500P.ZC2) at end.
Van Orden v. Perry

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has found Ten Commandments displays impermissible. The display is not
on the grounds of a public school, where, given the impressionability of the
young, government must exercise particular care in separating church and
state. . . .

For these reasons, I believe that the Texas display—serving a mixed but
primarily nonreligious purpose, not primarily “advanc[ing]” or “inhibit[ing]
religion,” and not creating an “excessive government entanglement with reli-
gion,”2—might satisfy this Court’s more formal Establishment Clause tests.
But, as I have said, in reaching the conclusion that the Texas display falls on
the permissible side of the constitutional line, I rely less upon a literal appli-
cation of any particular test than upon consideration of the basic purposes of
the First Amendment’s Religion Clauses themselves. This display has stood
apparently uncontested for nearly two generations. That experience helps
us understand that as a practical matter of degree this display is unlikely to
prove divisive. And this matter of degree is, I believe, critical in a borderline
case such as this one.

At the same time, to reach a contrary conclusion here, based primarily 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 reli-
giously based divisiveness that the Establishment Clause seeks to avoid. . . .

In light of these considerations, I cannot agree with today’s plurality’s
analysis. Nor can I agree with Justice Scalia’s dissent in McCreary County. I
do agree with Justice O’Connor’s statement of principles in McCreary County,
though I disagree with her evaluation of the evidence as it bears on the appli-
cation of those principles to this case.

I concur in the judgment of the Court.

Justice Thomas, concurring.

The Court holds that the Ten Commandments monument found on the Texas
State Capitol grounds does not violate the Establishment Clause. Rather
than trying to suggest meaninglessness where there is meaning, the chief
justice rightly recognizes that the monument has “religious significance.”

2 Lemon, 403 U.S., at 612–613 (Document 7)
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 in full.

This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the clause. I have previously suggested that the clause’s text and history “resist[s] 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” than it is under the various approaches this Court now uses. The Framers understood an establishment “necessarily [to] involve actual legal coercion.” … “In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.” 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 present in the Court’s current approach to such challenges. This Court’s precedent elevates the trivial to the proverbial “federal case,” by making benign signs and postings subject to challenge. Yet even as it does so, the Court’s precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by

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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 adher-
ent’s or the nonadherent’s beliefs, and provides no principled way to choose
between them. Even worse, the incoherence of the Court’s decisions in this
area renders the Establishment Clause impenetrable and incapable of con-
sistent application. All told, this Court’s jurisprudence leaves courts, gov-
ernments, and believers and nonbelievers alike confused—an observation
that is hardly new.

First, this Court’s precedent permits even the slightest public recognition
of religion to constitute an establishment of religion. For example, individ-
uals frequenting a county courthouse have successfully challenged as an
Establishment Clause violation a sign at the courthouse alerting the public
that the building was closed for Good Friday and containing a 4-inch high
crucifix. Similarly, a park ranger has claimed that a cross erected to honor
World War I veterans on a rock in the Mojave Desert Preserve violated the
Establishment Clause, and won. If a cross in the middle of a desert establishes
a religion, then no religious observance is safe from challenge. Still other suits
have charged that city seals containing religious symbols violate the Estab-
lishment Clause. In every instance, the litigants are mere “[p]assersby . . . free
to ignore [such symbols or signs], or even to turn their backs, just as they are
free to do when they disagree with any other form of government speech.”

Second, in a seeming attempt to balance out its willingness to consider
almost any acknowledgment of religion an establishment, in other cases
members of this Court have concluded that the term or symbol at issue has
no religious meaning by virtue of its ubiquity or rote ceremonial invocation.
But words such as “God” have religious significance. For example, just last
term this Court had before it a challenge to the recitation of the Pledge of
Allegiance, which includes the phrase “one Nation under God.” The decla-
ration that our country is “one Nation under God” necessarily “entail[s] an affirmation that God exists.” This phrase is thus anathema to those who
reject God’s existence and a validation of His existence to those who accept
it. Telling either nonbelievers or believers that the words “under God” have
no meaning contradicts what they know to be true. Moreover, repetition
does not deprive religious words or symbols of their traditional meaning.

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5 County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989)
6 Ed. note: Justice Thomas quotes from his opinion in Newdow.
Words like “God” are not vulgarities for which the shock value diminishes with each successive utterance.

Even when this Court’s precedents recognize the religious meaning of symbols or words, that recognition fails to respect fully religious belief or disbelief. This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display. In looking to the view of this unusually informed observer, this Court inquires whether the sign or display “sends the ancillary message to . . . nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” 7

This analysis is not fully satisfying to either nonadherents or adherents. For the nonadherent, who may well be more sensitive than the hypothetical “reasonable observer,” or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court’s foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views. In sum, this Court’s effort to assess religious meaning is fraught with futility.

Finally, the very “flexibility” of this Court’s Establishment Clause precedent leaves it incapable of consistent application. The inconsistency between the decisions the Court reaches today in this case and in McCreary County v. American Civil Liberties Union of Ky., 8 only compounds the confusion.

The unintelligibility of this Court’s precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.

Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application. While the Court correctly rejects the challenge to the Ten Commandments monument

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8 Ed. note: Document 19
on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.

**Justice Stevens, with whom Justice Ginsburg joins, dissenting.**

. . . . 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 and often recited in this Court’s cases. The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another. 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.”

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*. Powerful as his argument was, we squarely rejected it and thereby reaffirmed the principle that the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. As we wrote, “the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embodies the right to select any religious faith or none at all.”

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

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10 Ed. note: Document 11
and John Adams, the Chief Justice and Justice Scalia, fail to account for the acts and publicly espoused views of other influential leaders of that time. Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause. The chief justice and Justice Scalia disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite.

The original understanding of the type of “religion” that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred “monotheistic” religions Justice Scalia has embraced in his McCreary County opinion. The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, Justice Scalia is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to “God” hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. Justice Scalia’s inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is one that is unmoored from the Constitution’s history and text, and moreover one that is patently arbitrary in its inclusion of some, but exclusion of other (e.g., Buddhism), widely practiced non-Christian religions. Given the original understanding of the men who championed our “Christian nation”—men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern—one must ask whether Justice Scalia “has not had the courage (or the foolhardiness) to apply [his originalism] principle consistently.”

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

11 Ed. note: Justice Stevens quotes from Justice Scalia’s opinion in McCreary.
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.

It is our duty, therefore, to interpret the First Amendment’s command that “Congress shall make no law respecting an establishment of religion” not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the clause’s text and history the broad principles that remain valid today.

To reason from the broad principles contained in the Constitution does not, as Justice Scalia suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one’s selection between two (or more) sides in a heated historical debate. We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye towards our nation’s history and the other fixed on its democratic aspirations.

The principle that guides my analysis is neutrality. The basis for that principle is firmly rooted in our Nation’s history and our Constitution’s text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. But cf. Letter from George Washington to the Hebrew Congregation in Newport, R. I. (Aug. 18, 1790.) Fortunately, we are not bound by the Framers’ expectations—we are bound by the legal principles they enshrined in our Constitution.

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Justice David H. Souter presents the facts of the case, decided 5–4, along with Van Orden v. Perry (Document 18), on the same day. Here the Court struck down a Kentucky courthouse display of the Ten Commandments as a violation of the Establishment Clause. Justice Stephen G. Breyer explained his change of vote from supporting the Ten Commandments monument near the Texas Capitol in companion case of Van Orden v. Perry (Document 18): The Capitol display was more like a museum display, while the courthouse display was intended to make a statement about a particular religion. The Court opinion and the dissents likewise change places. Justice Souter dissented in Van Orden v. Perry, but wrote the Court’s opinion in this case. Justice Antonin Scalia concurred in the Court’s opinion in Van Orden, but dissented in this case. The arguments in these cases about monuments have implications for future cases about religious symbols on public land, such as crosses as memorials to fallen soldiers.

SOURCE: 545 U.S. 844, https://www.law.cornell.edu/supct/html/03-1693.ZS.html. We include the abridged opinions of Justices Souter and Scalia but omit the concurrence of Justice Sandra Day O’Connor. Footnotes added by the editors are preceded by “Ed. note.”

Justice Souter delivered the opinion of the Court.

Executives of two [Kentucky] counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky’s “precedent legal code.” The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.
The issues are whether a determination of the counties’ purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties’ claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties’ manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.

I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring “the display [to] be posted in ‘a very high traffic area’ of the courthouse.” In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county judge-executive, who called them “good rules to live by” and who recounted the story of an astronaut who became convinced “there must be a divine God” after viewing the Earth from the moon. The judge-executive was accompanied by the pastor of his church, who called the Commandments “a creed of ethics” and told the press after the ceremony that displaying the Commandments was “one of the greatest things the judge could have done to close out the millennium.” . . .

In each county, the hallway display was “readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver’s licenses and permits, to register cars, to pay local taxes, and to register to vote.” 96 F. Supp. 2d., at 684; American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky, 96 F. Supp. 2d 691, 695 (ED Ky. 2000) . . .

As directed by the resolutions [of county authorities], the counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted. In addition to the first display’s large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted

1 Ed. note: persons who make a formal application to a court for a writ, judicial action in a suit, etc.
to highlight a religious element. The documents were the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

After argument, the district court entered a preliminary injunction on May 5, 2000, ordering that the “display . . . be removed from [each] County Courthouse IMMEDIATELY” and that no county official “erect or cause to be erected similar displays.” . . . The court found that the second version [the expanded display] also “clearly lack[ed] a secular purpose” because the “count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity.”

The counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the “King James Version” at Exodus 20:3 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.”

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 First Amendment’s bar against establishment of religion. Stone. The counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the counties would avoid

\[^{2}\text{Ed. note: A Latin word meaning “to be informed” or “we wish to be informed,” certiorari is an order of a higher court to review a lower court decision. “Certiorari” was the first word of such orders when they were written in Latin.}\]

the district court’s conclusion by having us limit the scope of the purpose enquiry
so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

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

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

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

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4 Ed. note: inquiry into the purpose of posting the commandments
5 Ed. note: Document 7
6 Wallace v. Jaffree, 472 U.S. 38, 75 (1985) [doc. 11]
7 Epperson v. Arkansas, 393 U.S. 97, 104 (1968);
8 Zelman v. Simmons-Harris (Document 16).
Americans to honor Christ, the divisive thrust of the official action would be inescapable.

B

...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\textsuperscript{10} deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts... 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...

...That said, one consequence of the corollary that Establishment Clause analysis does not look to the veiled psyche of government officers could be that in some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the “‘objective observer, acquainted with the text, legislative history, and implementation of the statute’”\textsuperscript{11} cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.

C

After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the counties’ alternative tack of trivializing the enquiry into it. The counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and they would

\textsuperscript{10} Ed. note: Something purporting to be a discovery but really only a hoax; a particularly messy problem
\textsuperscript{11} Santa Fe Independent School Dist. v. Doe.
cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the counties’ arguments, or reason supporting them.

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

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, 12 and a word needs to be said about the different view taken in today’s dissent . . .

The First Amendment has not one but two clauses tied to “religion,” the second forbidding any prohibition on the “the free exercise thereof,” and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices. The dissent, then, is wrong to read cases like Walz v. Tax Commission of City of New York, 13 as a rejection of neutrality on its own terms, for trade-offs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had.

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience

12 Ed. note: Document 3
13 Ed. note: https://www.law.cornell.edu/supremecourt/text/397/664
in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate . . . .

But the dissent’s argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first president as stating that “national morality [cannot] prevail in exclusion of religious principle,” for example, and it cites his first Thanksgiving proclamation giving thanks to God. Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers’ understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle.) . . .

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

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent’s conclusion that its narrower view was the original understanding, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet “exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.” 14

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does

manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, but at least religion has previously been treated inclusively. Today’s dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses. Even on originalist critiques of existing precedent there is, it seems, no escape from interpretative consequences that would surprise the Framers. Thus, it appears to be common ground in the interpretation of a Constitution “intended to endure for ages to come,” that applications unanticipated by the Framers are inevitable. . . .

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

A

On September 11, 2001 I was attending in Rome, Italy an international conference of judges and lawyers, principally from Europe and the United States.

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16 McCulloch v. Maryland
That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as presidential addresses often do, with the prayer “God bless America.” The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country’s loss, sadly observed “How I wish that the head of state of my country, at a similar time of national tragedy and distress, could conclude his address ‘God bless _______’ It is of course absolutely forbidden.”

That is one model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins “France is [a] . . . secular . . . Republic.” Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. .

. . Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality. .

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words “so help me God.” Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer “God save the United States and this Honorable Court.” Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto “IN GOD WE TRUST.” And our Pledge of Allegiance contains the acknowledgment that we are a Nation “under God.” As one of our Supreme Court opinions rightly observed, “We are a religious people whose institutions presuppose a Supreme Being.”

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that “the First Amendment mandates governmental neutrality between . . . religion and nonreligion” and that “[m]anifesting 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 constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only 5 nays

in the House of Representatives criticizing a Court of Appeals opinion that had held “under God” in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century. And it is, moreover, a thoroughly discredited say-so.\textsuperscript{18} 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 “\textit{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. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate. Today’s opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, the Court acknowledges that the “Establishment Clause doctrine” it purports to be applying “lacks the comfort of categorical absolutes.” What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that “[i]n special instances we have found good reason” to dispense with the principle, but “[n]o such reasons present themselves here.” It does not identify all of those “special instances,” much less identify the “good reason” for their existence.

I have cataloged elsewhere the variety of circumstances in which this Court—even after its embrace of \textit{Lemon}’s stated prohibition of such behavior—has approved government action “undertaken with the specific 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

\textsuperscript{18} Ed. note: Justice Scalia is referring to \textit{Elk Grove United School District v. Newdow} 42 U.S. 1 (2004), when the Court denied standing to a parent who objected to “under God” in the Pledge of Allegiance rather than rule on the merits of his case. Justice Stevens wrote the Court opinion. Justice Scalia recused himself from the case.
religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice—but we have approved it. . . .

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 would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. . . . And almost monthly, it seems, the Court has not shrunk from invalidating aspects of criminal procedure and penology of similar vintage. What, then, could be the genuine “good reason” for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which “has no influence over either the sword or the purse,” The Federalist No. 78, cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today’s opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, see Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002),19 or where the free exercise of religion is at issue, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993),20 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 at the instance of the First

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19 Ed. note: Document 16
20 Ed. note: Document 15
Congress was scrupulously nondenominational—but it was monotheistic. In *Marsh v. Chambers*, 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, as *Marsh v. Chambers* put it, “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, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

II

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today’s opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court’s hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an “objective observer.” Because in the Court’s view the true danger to be guarded against is that the objective observer would feel like an “outside[r]” or “not [a] full membe[r] of the political community,” its inquiry focuses not on the actual purpose of government action, but the “purpose apparent from government action.” Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court’s objective observer would think otherwise.

I have remarked before that it is an odd jurisprudence that bases the

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unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so. But that oddity pales in comparison to the one invited by today’s analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion.

Second, the Court replaces *Lemon*’s requirement that the government have “a secular . . . purpose,” 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.

I have urged that *Lemon*’s purpose prong be abandoned, because (as I have discussed in Part I) even an exclusive purpose to foster or assist religious practice is not necessarily invalidating. But today’s extension makes things even worse. By shifting the focus of *Lemon*’s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

### III

Even accepting the Court’s *Lemon*-based premises, the displays at issue here were constitutional.

#### A

to any person who happened to walk down the hallway of the McCreary or Pulaski County Courthouse during the roughly nine months when the Foundations Displays were exhibited, the displays must have seemed
unremarkable—if indeed they were noticed at all. The walls of both courthouses were already lined with historical documents and other assorted portraits; each Foundations Display was exhibited in the same format as these other displays and nothing in the record suggests that either County took steps to give it greater prominence.

Entitled “The Foundations of American Law and Government Display,” each display consisted of nine equally sized documents. . . . The frame holding the Ten Commandments was of the same size and had the same appearance as that which held each of the other documents. . . .

B

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the district court: “to display documents that played a significant role in the foundation of our system of law and government.” That the displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs. Even an isolated display of the Decalogue conveys, at worst, “an equivocal message, perhaps of respect for Judaism, for religion in general, or for law.” But when the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system. This is doubly true when the display is introduced by a document that informs passersby that it “contains documents that played a significant role in the foundation of our system of law and government.” . . .

The same result follows if the Ten Commandments display is viewed in light of the government practices that this Court has countenanced in the past. The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our nation’s legal and governmental heritage is surely no more of a step towards establishment of religion than was the practice of legislative prayer we approved in Marsh v. Chambers, and it seems to be on par with the inclusion of a creche or a menorah in a “holiday” display that incorporates other secular symbols. . . .

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. The Court adds in a footnote: “One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.”

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. By virtue of details familiar only to the parties to litigation and their lawyers, McCreary and Pulaski Counties, Kentucky, and Rutherford County, Tennessee, have been ordered to remove the same display that appears in courthouses from Mercer County, Kentucky to Elkhart County, Indiana. Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the clause’s protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

C

In any event, the Court’s conclusion that the counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful. In the Court’s view, the impermissible motive was apparent from the initial displays of the Ten Commandments all by themselves: When that occurs, the Court says, “a religious object is unmistakable.” Surely that cannot be. If, as discussed above, the Commandments have a proper place in our civic history, even placing them by themselves can be civically motivated—especially when they are placed, not in a school (as they were in the Stone case upon which the Court places such reliance), but in a courthouse. And the fact that at the posting of the exhibit a clergyman was present is unremarkable (clergymen taking particular pride in the role of the Ten Commandments in our civic history); and even more unremarkable the fact that the clergyman “testified to the certainty of the existence of God.”...

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, the Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying
the third displays as the fruit of a desire to display the Ten Commandments, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous.\footnote{Even if the intent was to display the Ten Commandments, it does not mean that the fact of doing so is unconstitutional.}

For the foregoing reasons, I would reverse the judgment of the court of appeals.
The Hobby Lobby case excited political passions over the contraception mandate issued under the auspices of the Affordable Care Act (ACA) (2010). Hobby Lobby and another family-owned corporation alleged that their right to free exercise of religion was denied by the ACA because it required them, in opposition to their religious principles, to provide for their employees certain contraceptives that aborted fertilized eggs. In a 5–4 decision, Justice Samuel A. Alito wrote for the Court that family-owned, for-profit corporations are legal persons, who may exercise religious freedom rights. In this case, the Hobby Lobby corporation may exercise religious free exercise rights under the amended Religious Freedom Restoration Act (RFRA). In dissent, Justice Ruth Bader Ginsburg’s point-by-point criticisms of the Court opinion argued that the Court radically diverged from previous understandings of RFRA, the rights of for-profit corporations, and recent laws acknowledging equal rights for women. We present excerpts from Justice Alito’s Court opinion and the dissent of Justice Ginsberg, while omitting Justice Anthony Kennedy’s concurrence and Justice Elena Kagan’s dissent.

In a related case involving contraception coverage and religious liberty, Zubik v. Burwell (May 16, 2016), known as the Little Sisters of the Poor case, the Court by per curiam (no signed opinion) order vacated the judgments in four federal courts of appeal and ordered that the parties “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’” https://www.law.cornell.edu/supremecourt/text/14-1418

Justice Alito delivered the opinion of the Court.

...As we have seen, RFRA [the Religious Freedoms Restoration Act] was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.... As we will show, Congress provided protection for people like the Hahns and Greens¹ by employing a familiar legal fiction: It included corporations within RFRA's definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings....

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the government—that dropping insurance coverage eliminates the substantial burden that the HHS [the Department of Health and Human Services] mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA [the Affordable Care Act]—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an

¹ Ed. note: The owners of the corporations who sued to protect their rights of free exercise.
embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, e.g., *Oregon v. Smith*, 494 U. S., at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim”)

Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent....

Here... the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of *Hobby Lobby*—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs....

Under HHS’s view, RFRA would permit the government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the nation. RFRA was enacted to prevent such an outcome.... In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” The wisdom of Congress’s judgment on this matter...
is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.

The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

I

“The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.” Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs....
II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court’s decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)3. The First Amendment is not offended, Smith held, when “prohibiting the exercise of religion . . . is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision.” The ACA’s contraceptive coverage requirement applies generally, it is “otherwise valid,” it trains on women’s well-being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if Smith did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. It would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. . . .

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith.” Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U. S. 418, 424 (2006).

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2 As the Court explains, see ante, at 11–16, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

3 Ed. note: Document 13
RFRA’s purpose is specific and written into the statute itself. The act was crafted to “restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U. S. 398 (1963) and *Wisconsin v. Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.”

...Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. . . .

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. . . .

The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. . . .

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4 Ed. note: Document 6
5 Ed. note: Document 8
The Court decided 5–4 that denominational prayers opening a town council meeting did not violate the Establishment Clause. The majority applied as precedent *Marsh v. Chambers* (1989), which held that denominational prayers at the opening of a state legislature’s day are constitutional. Justice Elena Kagan’s dissent protested that the sectarian prayers violated the First Amendment’s Establishment Clause and risked intimidating those who did not share the clergies’ religion. Her discussion of a founding-era document, George Washington’s letter to the Touro Synagogue, exemplifies the enduring significance of the founding to current cases. Justice Samuel A. Alito’s concurring opinion challenged her rendition of the facts, arguing the allegedly discriminatory policies in choosing clergy had been altered and that the town’s practices were consistent with historical tradition. We omit Justice Anthony M. Kennedy’s Court opinion, Justice Clarence Thomas’s concurrence, and Justice Stephen G. Breyer’s dissent.

We have reversed the order of the dissent and concurrence, since Justice Alito’s concurrence is a response to Justice Kagan’s dissent. Justices exchange drafts of their opinions prior to submitting final versions and revise theirs accordingly.

*Source:* 681 F. 3d 20, reversed, https://www.law.cornell.edu/supremecourt/text/12-696. Footnotes added by the editors are preceded by “Ed. note.”

### 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*, upholding the Nebraska Legislature’s tradition of beginning
each session with a chaplain’s prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum 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, accommodate, 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 her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight 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 designated 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 10 or so 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 . . . .”1 The judge then asks your lawyer to begin the trial . . . .

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion’s beliefs

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1 Ed. note: Justice Kagan quotes one of the prayers that opened the town board meeting.
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 (he was not asked about the others) would violate the First Amendment. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. . . .

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. . . .

By authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) 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 interact with, and participate in, the institutions and processes of their government. . . . And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) 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. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785). (“[O]pinion[s] in matters of religion . . . shall in no wise diminish, enlarge, or affect [our] civil capacities”). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. . . .

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2 That principle meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century “political correctness,” but of the 18th century view—rendered no less wise by time—that, in George Washington’s words, “[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause” . . .
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*. And before I dispute the town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. … 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, as Congress and state assemblies do—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—that they respect each and every member of the community as an equal citizen. 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, and less inclusive, 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. …

C

Those three differences [differences in purpose, audience and character between the prayers considered in *Marsh* and the prayers in this case] taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. … And so, contra the majority, Greece’s prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. 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. …

None of this means that Greece’s town hall must be religion- or 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 each other and their elected representatives in a legislative session, the government must take especial 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, of whatever religion, 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, common to diverse religious groups, then no one would have valid grounds for complaint. Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the board to run afoul of the idea that “[t]he First Amendment is not a majority rule,” as the Court (headspinningly) suggests; what does that is the board’s refusal to reach out to members of minority religious groups.) Or if the board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, 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. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide.

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community’s majority religious belief. 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 so 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
answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing 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.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation’s lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas’s phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. “It is now no more,” Washington said, “that toleration is spoken of, as if it was by the indulgence of one class of people to another, lesser one. For “[a]ll possess alike . . . immunities of citizenship.” That is America’s promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone “who live[s] under [the government’s] protection[,] should demean themselves as good citizens.”

For me, that remarkable guarantee means at least this much: 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.

Justice Alito, with whom Justice Scalia joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case. I recount facts that I find particularly salient.

The Town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief prayer before sessions of the town board. The task of lining up clergy members willing to provide such a prayer was given to the town’s office of constituent services. For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece “Community Guide,” a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. . . .

Apparently, all the houses of worship listed in the local Community Guide were Christian churches. That is unsurprising given the small number of non-Christians in the area. . . .

For some time, the town’s practice does not appear to have elicited any criticism, but when complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths.

Meetings of the Greece Town Board appear to have been similar to most other town council meetings across the country. The prayer took place at the beginning of the meetings. The board then conducted what might be termed the “legislative” portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances.

No prayer occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding. . . .
II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent’s objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

A
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.” “Priests and ministers, rabbis and imams,” the principal dissent continues, “give such invocations all the time” without any great difficulty.

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. . . .

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. . . .

. . . Must a town screen and, if necessary, edit prayers before they are given? . . .

B
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.” . . .

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. For that is really the only difference between what the town did and what the principal dissent is willing to accept. The Greece clerical employee drew up her list using the town directory instead of a directory covering the entire greater Rochester area…. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of… synagogues [in nearby Rochester] 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 like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in Marsh v. Chambers, 463 U. S. 783 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone…. But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment 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

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 v. Chambers*, which upheld the constitutionality of the Nebraska Legislature’s practice of prayer at the beginning of legislative sessions, but the principal dissent’s acceptance of Marsh appears to be predicated on the view that the prayer at issue in that case was little more than a formality to which the legislators paid scant attention. . . .

. . . [W]hat 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. By that time, prayer before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice.

The principal dissent paints a picture of “morning in Nebraska” circa 1983, but it is more instructive to consider “morning in Philadelphia,” September 1774. . . .

. . . [There follows, up to Part V of the opinion, a 700-word account of ceremonial prayer at the time of the founding.] Th[e] 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. . . .

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.
May the State of Missouri forbid religious schools from competing for state grants for purchase of playground paving materials? A 7–2 Court majority found no violation of the Establishment Clause by opening competition for state funds to religious schools. Justice Neil Gorsuch urged a broader scope for religious free exercise than Chief Justice John G. Roberts Jr.’s Court opinion might imply. Dissenting Justice Sonia Sotomayor’s view of the Religion Clauses, seemed to come close to restricting religious free exercise to freedom of worship, when state aid is involved. Justice Gorsuch’s concurrence and Justice Sotomayor’s dissent summarized two leading views of the Free Exercise and Establishment Clauses and thus present the principles underlying future clashes. Both opinions presented the facts of the case.


Justice Gorsuch, with whom Justice Thomas joins, concurring in part.

Missouri’s law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment and I am pleased to join nearly all of the Court’s opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts
and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.

Neither do I see why the First Amendment’s Free Exercise Clause should care. After all, that clause guarantees the free exercise of religion, not just the right to inward belief (or status). And this Court has long explained that government may not “devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”¹ Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. I don’t see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey.*² In that case, this Court upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion’s claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.

Second and for similar reasons, I am unable to join [Chief Justice Roberts’] footnoted observation that “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing.” Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only “playground resurfacing” cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court’s opinion. Such a reading would be unreasonable for our cases are “governed by general principles, rather than ad hoc improvisations.”³ And the general principles here do not

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¹ Ed. note: *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, Document 15
² Ed. note: Document 17
permit discrimination against religious exercise—whether on the playground or anywhere else.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both. . . .

I

. . . The [Trinity Lutheran] Learning Center serves as “a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program.”4 In this way, “[t]hrough the Learning Center, the church teaches a Christian world view to children of members of the church, as well as children of non-member residents” of the area. These activities represent the church’s “sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.” . . .

. . . Missouri denied the church funding based on Article I, §7, of its state constitution, which prohibits the use of public funds “in aid of any church, sect, or denomination of religion.”

II

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. . . .

A

The government may not directly fund religious exercise. . . . Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly “advanc[es] . . . religion.”

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. . . . Within its walls, worshippers gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group’s beliefs. When a government funds a house of worship, it underwrites this religious exercise. . . .

. . . The church seeks state funds to improve the Learning Center’s facilities, which, by the church’s own avowed description, are used to assist the spiritual growth of the children of its members and to spread the church’s faith to the children of nonmembers. The church’s playground surface—like a Sunday School room’s walls or the sanctuary’s pews—are integrated with and integral to its religious mission. The conclusion that the funding the church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. The church has not and cannot provide such assurances here. The church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the church’s walls, glass stained and used to form its windows, or nails used to build its altar.

B

The Court may simply disagree with this account of the facts and think that the church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the state’s funding would further religious activity and sees no Establishment Clause problem, then it must be implicitly applying a rule other than the one agreed to in our precedents. . . .

Today’s opinion suggests the Court has made the leap the Mitchell plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The problems of the “secular and neutral” approach have been aired before. It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the
Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.

Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, “not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state—at least where the heartland of religious belief, such as primary religious [worship], is at issue.”

III

Even assuming the absence of an Establishment Clause violation and proceeding on the Court’s preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity’s religious “status.” But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question here is thus whether those interests support the line drawn in Missouri’s Article I, §7, separating the state’s treasury from those of houses of worship. They unquestionably do.

A

The Establishment Clause prohibits laws “respecting an establishment of religion” and the Free Exercise Clause prohibits laws “prohibiting the free exercise thereof.” Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. And the government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause, without violating the Free Exercise Clause. “[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without

[5 Ed. note: Zelman v. Simmons-Harris, Document 16]
sponsorship and without interference.”6 This space between the two clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A state need not, for example, require nonprofit houses of worship to pay property taxes. It may instead “spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions” and spare the government “the direct confrontations and conflicts that follow in the train of those legal processes” associated with taxation.7 Nor must a state require nonprofit religious entities to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a “[f]ear of potential liability [that] might affect the way” it “carried out what it understood to be its religious mission” and on the government the sensitive task of policing compliance.8 But the government may not invoke the space between the Religion Clauses in a manner that “devolve[s] into an unlawful fostering of religion.”9

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The state need not, for example, fund the training of a religious group’s leaders, those “who will preach their beliefs, teach their faith, and carry out their mission.”10 It may instead avoid the historic “antiestablishment interests” raised by the use of “taxpayer funds to support church leaders.”11

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so.

B

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice and provides:

7 Walz, 397 U. S., at 673–674.
8 Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U. S. 327, 336 (1987)
10 Hosanna-Tabor, 597 F. 3d 769 (2012)
That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.” Art. I, §7.

Missouri’s decision, which has deep roots in our nation’s history, reflects a reasonable and constitutional judgment.

This Court has consistently looked to history for guidance when applying the Constitution’s Religion Clauses. Those clauses guard against a return to the past, and so that past properly informs their meaning. This case is no different.

This nation’s early experience with, and eventual rejection of, established religion—shorthand for “sponsorship, financial support, and active involvement of the sovereign in religious activity,”—defies easy summary. [There follows a summary of the Founders’ views and of recent Court decisions that the justice claims support this rejection.] . . . At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the clauses protect not religion but “the individual’s freedom of conscience,”—that which allows him to choose religion, reject it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities. . . .

On top of all of this, the Court’s application of its new rule here is mistaken. In concluding that Missouri’s Article I, §7, cannot withstand strict scrutiny, the Court describes Missouri’s interest as a mere “policy preference for skating as far as possible from religious establishment concerns.” The constitutional provisions of thirty-nine states—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.

12 Walz, 397 U. S., at 668
13 Wallace v. Jaffree, 472 U.S., at 50 (Document 11)
Today’s decision discounts centuries of history and jeopardizes the government’s ability to remain secular. Just three years ago, this Court claimed to understand that, in this area of law, to “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.”14 It makes clear today that this principle applies only when preference suits.

IV

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to “the free exercise” of religion, to choose for ourselves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a “law respecting an establishment of religion,” start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

Masterpiece Cakeshop, Ltd., et al., Petitioners
June 4, 2018

With a 7–2 vote, this controversial case recognized the Cakeshop owner’s religious free exercise right in his refusal to produce a custom-wedding cake for a same-sex wedding. Specifically, the Court found flagrant anti-religious bias displayed by two members of the Colorado Civil Rights Commission, which initiated proceedings against the Cakeshop. Given the focus on facts, whether the ruling will have any effect on other religious free exercise claims may be doubted. We reprint only an excerpt of Justice Clarence Thomas’s concurring opinion, which anchored the Cakeshop owner’s refusal on his free expression rights, possibly giving him a stronger defense than his religious free exercise claim, which the Court here allowed only because of the Colorado agency’s bias. Ommitted are Justice Anthony Kennedy’s Court opinion, Justice Elena Kagan’s concurrence, Justice Neil Gorsuch’s concurrence, and Justice Ruth Bader Ginsberg’s dissent.


Justice Thomas, with whom Justice Gorsuch joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips’ right to freely exercise his religion.…

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim..…

I

…When [the Massachusetts public-accommodations law] required the sponsor of a St. Patrick’s Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor’s right to free speech. Parades are “a form of expression,”
this Court explained, and the application of the public-accommodations law “alter[ed] the expressive content” of the parade by forcing the sponsor to add a new unit. The addition of that unit compelled the organizer to “bear witness to the fact that some Irish are gay, lesbian, or bisexual”; “suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals”; and imply that their participation “merits celebration.” While this Court acknowledged that the unit’s exclusion might have been “misguided, or even hurtful,” it rejected the notion that governments can mandate “thoughts and statements acceptable to some groups or, indeed, all people” as the “antithesis” of free speech.

The parade in Hurley was an example of what this Court has termed “expressive conduct.”

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist’s paint palate with a paintbrush and baker’s whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece’s website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. . . . He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.”

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## APPENDIX A

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Appendix B

Study Questions

The “A” questions are for the listed case, while the “B” questions relate this case to others in the volume.

1. Reynolds v. United States

A. What is the basis for the Court opinion? How do the Free Exercise and Establishment Clauses of the First Amendment shape it? Is there another legal source that guides the opinion?

B. If the 20th century Court had strictly adopted Reynolds’ logic, how might later Courts have decided free exercise cases such as Sherbert v. Verner (Document 6) or Wisconsin v. Yoder (Document 8)? Was Justice Antonin Scalia in Oregon v. Smith (Document 13) simply reinstating Reynolds?

2. West Virginia v. Barnette

A. Questions for both the Court opinion and the dissent: If a compelled oath is at best invalid, according to Justice Jackson, what about an oath of office or oath of American citizenship? Is Justice Frankfurter right that “Law is concerned with external behavior, and not with the inner life of man”? Can there be a shared political life unless the laws concern themselves, at some level, with “the inner life of man”?

B. How should the justices in all our cases weigh a concern for patriotism or any common good against a concern for “small and helpless” religious minorities? How would you (or could you) square Justice Scalia’s dissent in the commencement prayer case of Lee v. Weisman (document 15), as well as his Court opinion in Oregon v. Smith (Document 13), with Justice Jackson’s Court opinion here?
3. Everson v. Board of Education

A. Does Justice Black have in mind a particular religion that he thinks government should be separated from? Is his “wall” metaphor justified by American history or even a closer reading of Jefferson's letter to the Danbury Baptists, which he quotes?

B. Are public schools a part of political authority in the same way legislatures and agencies, such as the Department of the Treasury, are? Should that make a difference for the Court in the way it treats schools? Does the Court’s affirmation of Ohio’s voucher program for private schools in distressed areas (Zelman v. Simmons-Harris, Document 16) extend Everson or change or even reverse it?

4. McCollum v. Board of Education

A. How does Justice Black develop his notion of establishment of religion? How does establishment come to mean something other than establishing an official church? Would he think the Court would one day be considering the constitutionality of prayers said at a public high school’s pep rally before a football game?

B. Justice Jackson’s concurrence worries about whether “it is possible, even if desirable . . . to isolate and cast out of secular education all that some people may reasonably regard as religious instruction.” Compare Justice Sotomayor’s dissent in Trinity Lutheran v. Comer (Document 28) as an example of denying any secular content to a religious education and therefore denying government support for religious schools. Whose understanding of religion is right? Is everything a religious school undertakes (for example, playground sports) religious? May, for example, the Puritans be studied seriously in public schools—that is, by considering the truth of their beliefs?

5. Engel v. Vitale

A. In his footnote included in the excerpt, Justice Black writes “There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity.” Is the Declaration merely an “historical document”? Are its religious references (e.g., “all men
are created equal”) merely historical or are they intended to have enduring political and legal relevance?

B. After comparing the respective first amendment histories of Justice Black and Justice Rehnquist in Wallace v. Jaffree (Document 11), which historical account seems more accurate? Should justices even try to be their own legal historians?

6. Sherbert v. Verner

A. Is Justice Harlan’s dissent correct that the Court’s Establishment and Free Exercise Clauses jurisprudence collide in this case? What sort of test would the Court opinion propose for the state to accommodate an individual’s religion?

B. How far does the right of free exercise go and when do laws based on the common good begin (see both Reynolds [Document 1] and Oregon v. Smith [Document 13])? For example, the Court recently ruled unanimously that many employee protections do not apply to employees of religious institutions, if the employees are regarded as fulfilling a religious role, as types of ministers. How far can religious exemptions go in protecting religious institutions from law suits by its employees? Compare what the Court did here with what it did in Burwell v. Hobby Lobby (Document 20). In Hosanna-Tabor Evangelical Lutheran Church and School v. U.S. Equal Employment Opportunity Commission 565 US 171 (2012) a unanimous Court (the opinion written by Justice Ginsburg) found that a discharged employee, who argued her job as a teacher was not religious, had in fact been designated a “minister” of her church and therefore could not sue for being fired for violating church doctrine.

7. Lemon v. Kurzman

A. How coherent is the three-pronged Lemon test? Is each part of the test consistent with the other parts? How does one distinguish between religious and secular purposes? How does one determine that a law has as its “principal or primary effect” either advancing or inhibiting religion? When does a law foster “excessive government entanglement with religion”?

B. In light of the controversy the Court’s Establishment Clause cases stirred up, one might ask whether the Lemon test applies to Supreme Court decisions
themselves? That is, isn’t the Supreme Court itself a governmental entity having effects on religion and secularism and entangling itself with the practice of religion? Or is the Supreme Court above the law and politics? Based on the arguments you have read so far, do you think the Court is approaching these issues appropriately as one branch of the separated powers of our government?

8. Wisconsin v. Yoder
A. How would the Court have ruled if a religious sect insisted on separate education for girls and women? Or if it denied membership to blacks? Should the Court always accept the “unchallenged testimony of acknowledged experts in education and religious history” (or any other field) in deciding this or any other case? Does Yoder signify the privileging of minority sects over larger ones? How or how not?

B. How does Yoder grow out of Sherbert v. Verner (Document 6)? How does Yoder help explain Justice Scalia’s opinion in the free exercise case of Oregon v. Smith (Document 13), which both concurring and dissenting justices claimed overturned precedents that protected religious freedoms?

9. Widmar v. Vincent
A. What are the advantages of using a free speech argument here in addition to a religious free exercise one?

B. If the Court had protected religious free exercise in the same vigorous way it protected free speech and expression, how might the Court have approached the free exercise cases following Widmar (Documents 15, 17, 20, and 23)?

10. Lynch v. Donnelly
A. Does dissenting Justice Brennan’s “ceremonial deism” argument let him have his cake and eat it too, in the face of Chief Justice Burger’s court opinion? Is not deism itself a religion, just as Unitarianism is?

B. Would non-Christian seasonal symbols (such as a menorah) be treated with as much scrutiny as Christian symbols? Would the secular good of religious toleration protect the minority non-Christian symbols but not the
majority Christian ones? Has “discrete and insular minority” protection—see footnote 1 in the flag salute case (Document 2)—been interpreted to undermine majority or plurality religious freedom against secular objections?

11. Wallace v. Jaffree

A. How important should the original meaning of the text of the Constitution be for interpreting it today?

B. Who is more persuasive in his history of the First Amendment, Justices Black, Stevens, and Souter or Rehnquist and Thomas (documents 3–5, 16, 18, and 19)? What are the strengths and weaknesses of their respective arguments?

12. Edwards v. Aguillard

A. As in the court opinion in Wallace v. Jaffree (Document 11), the motives of one legislator supporting the law played a crucial role in its reasoning. How does one assess the motives behind a law? Would the Court similarly overturn or sustain a state law banning the teaching of quantum theory or requiring or prohibiting a course promoting man-made climate change?

B. Is there more in this case about free speech than about religion? If so, would free speech (see Widmar v. Vincent, Document 9) be a more appropriate argument?

13. Oregon v. Smith

A. Does Justice Scalia’s opinion unreasonably restrict religious free exercise, as both the concurrence and dissent charge? Does this opinion overturn the Amish exception to school attendance laws in Wisconsin v. Yoder (Document 8)? Why do three of the dissenting justices join part of Justice O’Connor’s concurrence in the judgment?

14. Lee v. Weisman

A. Why did Justice Kennedy cite social psychology studies to make a kind of coercion argument concerning teenage behavior? “We do not address whether that choice [of protesting or standing in respect for a benediction] is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the Establishment Clause, place primary and secondary school children in this position.” Does the first amendment apply differently to children? Should it apply at all?

B. How does Justice Souter’s concurring argument against “non-preferentialism” support his objection to preferring any religion over non-religion? “When public school officials, armed with the state’s authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However “ceremonial” their messages may be, they are flatly unconstitutional.” Why does Justice Scalia regard this decision as “only a jurisprudential disaster and not a practical one”? How does his judgment reflect on the limits of the Court’s powers not only in religion cases? He predicted: “Logically, that [elimination of the Pledge of Allegiance to the flag] ought to be the next project for the Court’s bulldozer.” The Court declined to be logical and ducked the issue in what promised to be a case about the “under God” phrase in the Pledge of Allegiance (Elk Grove United School District v. Newdow, 2004). One might raise a question applicable to other cases as well: If a citizen has a right, must he or she push it to its outer limits for it to be secure?

15. Church of the Lukumi Babalu Aye, Inc. v. Hialeah

A. Could the city council have drafted any health or animal treatment ordinance that could have survived challenge in the courts?

B. How zealous has the Court been subsequently in adopting the Court opinion’s reiteration of the “strict scrutiny” test of constitutionality for any law that impinges on religious freedom? How does this decision square with Justice Scalia’s Court opinion in Oregon v. Smith (Document 13)? Does it compel the result of Masterpiece Bakeshop v. Colorado Commission on Civil Rights (Document 23)?
16. Zelman v. Simmons-Harris

A. Based on what you can infer from Justice Souter’s dissent, suggest a defense of the constitutionality of the Cleveland plan. Why should his arguments that state aid would corrupt the independence of religious schools and incite religious conflict be a part of first amendment jurisprudence?

B. Answer Justice Souter’s rhetorical question, “How can a Court consistently leave Everson on the books and approve the Ohio vouchers?” How does his defense of a high wall of separation of church and state differ from the earliest arguments, such as those in Documents 3, 4, and 5?

17. Locke v. Davey

A. Is Washington State’s sole exclusion of “devotional theology” as justifiable as the exclusion for funding of any other major? What if Washington State had also excluded physical education, social work, and business as majors it would not fund?

B. Given other opinions of his you have read, such as his dissent in Wallace (Document 11), are you surprised by Chief Justice Rehnquist’s argument in this case? Is such a prohibition on funding, as in the Washington State Constitution (cited in footnote 5), a neutral stance or does it reflect a bias against religious study? Was Trinity Lutheran v. Comer (Document 22), more forthright in confronting the anti-Catholic Blaine Amendments to state constitutions, which, beginning in the 1870s, prohibited government funding of religious schools?

18. Van Orden v. Perry

A. How might Justice Thomas respond to Justice Stevens’ criticism of his originalist approach to constitutional interpretation?

B. From Justice Stevens’ dissent: “It is our duty, therefore, to interpret the First Amendment’s command that “Congress shall make no law respecting an establishment of religion” not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the clause’s text and history the broad principles that remain valid today.” How does his “living Constitution” theory inform the decisions and arguments of
recent justices, such as Justice Souter in his dissent in *Lee v. Weisman* (Document 14) and *McCreary County* (Document 19)?

19. **McCreary County v. ACLU of Kentucky**

A. Is Justice Souter correct that favoring “religion over irreligion” is the same as favoring “one religion over another”? Or is dissenting Justice Scalia correct? “If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all.” Or is he begging the question?

B. Justice Scalia contends, “Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.” How has the Court since the earliest cases confirmed or disputed his conclusion?

20. **Hobby Lobby v. Burwell**

A. Is Hobby Lobby’s argument for an exemption from the contraception mandate made best by the legal analysis or by its First Amendment free exercise claim?

B. Which free exercise cases seem most applicable to the arguments here? Is Justice Scalia consistent as author of the opinion in *Oregon v. Smith* (1990, Document 14) and as voting with the majority here?

21. **Town of Greece v. Galloway**

A. Dissenting Justice Kagan cites George Washington’s letter to the Newport synagogue, but how might Justice Alito have used it in support of his concurring position?

B. How do the arguments here affirm or dispute the various arguments in the school prayer decisions, beginning with *Engel v. Vitale* (1963, Document 5) and ending with *Lee v. Weisman* (1993, Document 15) and the Ten Commandments opinions (Documents 18 and 19)? How might they influence arguments about religious symbols, such as a cross, on public memorials?
22. *Trinity Lutheran v. Comer*

A. With the clashing opinions here about “play in the joints” of the First Amendment Religion Clauses, are we back to the original issue of whether religion is fundamentally about individual conscience and worship or as that plus a religious institution’s activity within society?

B. Does Trinity Lutheran’s logic overthrow the rationale in the earlier Establishment Clause cases of *Everson v. Board of Education* (1947, Document 3) and *McCollum v. Board of Education* (1948, Document 4)? (See as well *Wallace v. Jaffree*, Document 11.) Does religious free exercise now constrict the earlier meaning of establishment of religion in the school funding cases? Is this the consequence of the “play in the joints” between free exercise and establishment both Justice Gorsuch and Justice Sotomayor note?

23. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

A. Why does Justice Thomas base his decision more on free speech or free expression than religious free exercise?

APPENDIX C

Suggested Reading

This list contains recommendations ranging from sources on basic orientation to the Supreme Court to sophisticated analyses of the cases.

Basic Orientation to the Supreme Court

The Supreme Court’s website provides an introduction to its procedures. www.supremecourt.gov

Black’s online legal dictionary explains legal terms, https://thelawdictionary.org/.

Audio recordings of arguments and opinion announcements, as well as other useful materials, can be found at https://www.oyez.org/. A source for cases currently being decided in the Supreme Court is SCOTUS blog, https://www.scotusblog.com/, which provides links to the oral arguments, past federal courts’ actions on current cases, and a variety of commentary on the justices’ opinions.

Casebooks, Books, and Other Sources


Donald L. Drakeman, *Church, State, and Original Intent* (New York: Cambridge University Press, 2010).


**Websites**

Besides this sample of websites devoted to religion and law, one may also check websites of particular religions, political and social groups, and think-tanks.
American Civil Liberties Union: https://www.aclu.org/aclu-defense-religious-practice-and-expression
Becket Legal Institute: https://www.becketlaw.org/
The Department of Justice website https://www.justice.gov/
This collection is the first of three planned volumes of Supreme Court cases in the Ashbrook Center’s extended series of document collections covering major periods, themes, and institutions in American history and government. A volume of cases on free speech will follow, as will a volume covering a variety of landmark cases. It is appropriate to begin with the volume on the religion clauses of the First Amendment. This is the first freedom guaranteed in the Bill of Rights, as the United States was the first nation founded on this right.

The Ashbrook Center restores and strengthens the capacities of the American people for constitutional self-government. Ashbrook teaches students and teachers across our country what America is and what she represents in the long history of the world. Offering a variety of programs and resources, Ashbrook is the nation’s largest university-based educator in the enduring principles and practice of free government.

Ken Masugi is a senior fellow of the Claremont Institute. He has taught in graduate programs for the Ashbrook Center and Johns Hopkins University, as well as at the U. S. Air Force Academy and James Madison College. Dr. Masugi spent ten years in the federal government serving Cabinet and agency heads. He has contributed a dozen books and monographs to the scholarship on American politics and political thought. He is currently writing a book on equality and citizenship in America.