The Establishment Clause During the 2004 Term: Big Cases, Little Movement

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This was the term when the Supreme Court might have made Establishment Clause history. It was asked in the Ten Commandments cases to definitively reject the longstanding, though often maligned, *Lemon v. Kurtzman*[1] test, where the Court laid out three factors to consider in Establishment Clause cases: whether the law has a secular purpose, an improper effect of benefiting or burdening religion, or excessive entanglement with religion. While individual members of the Court, like Justice Scalia, have been grumbling about *Lemon* for quite a while,[2] it has been *the* standard in such cases since 1971. The Court was further confronted with the request, in *Cutter v. Wilkinson*,[3] to approve of legislative accommodation that dramatically increased religious prisoners' free exercise rights and would have created the broadest permissible accommodation of religious exercise to date. But neither of these dramatic requests was granted.

Instead, five members of the Court refused to abandon the ''purpose'' prong of *Lemon*—which requires that the government have a secular purpose for enacting the law. They left that issue to another day and, perhaps, to a new justice in the wake of Justice Sandra Day O'Connor's retirement. And a unanimous Court read the language of accommodation in the Religious Land Use and Institutionalized

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[1]403 U.S. 602 (1971).

[2]See, e.g., Board of Education v. Grumet, 512 U.S. 687, 751 (1994) (Scalia, J. dissenting); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 397–98 (1993) (Scalia, J. concurring) (''As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.'').

[3]125 S. Ct. 2113 (2005).

Persons Act (RLUIPA) narrowly, transforming the Act's seemingly drastic accommodation measures into a modest legislative accommodation. Its survival, therefore, worked little change in current Establishment Clause jurisprudence.

If these cases share any notable characteristic, it is that that they confirm the status quo understanding of the First Amendment's religion clauses, and, thus, mark a starting point for the reconfigured Court once Justice O'Connor's successor is confirmed. She has been an important vote in these cases, because she believes in the importance of government neutrality; yet, as was characteristic of her jurisprudence in general, she has been unwilling to take the neutrality principle to what she believed were absurd conclusions. Accordingly, while she has found unconstitutional a solitary crèche erected in a courthouse, she found no violation in either a more general holiday display or in the use of ''under God'' in the Pledge of Allegiance.[4] The absence of her moderating influence may well tip the balance against the separation of church and state closer to a political intertwinement between government and religion.

Below, I examine this term's Establishment Clause cases in turn, focusing first on *Cutter* and then on the Ten Commandments cases.

I. *Cutter v. Wilkinson*: Normalizing Legislative Accommodation of Religion

For the first time since 1990, when the Supreme Court decided *Employment Division v. Smith*,[5] the Supreme Court addressed the question of the permissible scope of legislative accommodation of religious practices. In *Smith*, the Court held that religious motivation does not excuse illegal conduct. In other words, the Free Exercise Clause does not mandate judicial accommodation of religious conduct, even though it may permit legislative accommodation of that conduct. As the *Smith* Court put it: ''[T]o 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

[4]Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (holiday display); County of Allegheny v. ACLU, 492 U.S. 573, 632–33 (1989) (O'Connor, J., concurring in part) (crèche in courthouse); Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2326–27 (2004) (O'Connor, J., concurring) (Pledge of Allegiance).

[5]494 U.S. 872, 890 (1990).

the appropriate occasions for its creation can be discerned by the courts.''[6]

In dictum, the Court further stated that legislative accommodation could be permissible if it did not violate the Establishment Clause.[7] Thus, under *Smith*, judicial accommodation is not mandated, and legislative accommodation is potentially permissible, but only if it is squared with constitutional limitations.[8] Since *Smith,* many have had been awaiting further clarification of the Court's dictum regarding permissible legislative accommodation, and *Cutter* offered the Court an opportunity to further elaborate on the permissible scope of the legislative accommodation doctrine. The *Cutter* decision was carefully crafted, though, to the particular circumstances of the accommodation at issue, and, therefore, provided little new guidance regarding other accommodations.

Cutter dealt with section 3 of RLUIPA, which required state and local institutions to accommodate religious practices. The question presented asked whether section 3, in the prison context, was consistent with the Establishment Clause.[9] The Court answered in the affirmative.

A. Background: The Religious Freedom Restoration Act

Some background is necessary to understand the genesis of RLUIPA and its intention. After the *Smith* Court held that there is no free exercise defense to neutral, generally applicable laws, legal scholars and numerous religious and civil liberties organizations raised a hue and cry,[10] arguing vociferously that judicial accommodation was far preferable to legislative accommodation. These critics claimed (albeit incorrectly) that the Court had applied strict scrutiny to all free exercise cases up to that point and had therefore departed from prior precedent.[11] To ''correct'' free exercise doctrine, they

[6]*Id.*

[7]*Id.*

[8]*Id.*

[9]Cutter v. Wilkinson, 125 S. Ct. 2113, 2117 (2005).

[10]Marci A. Hamilton, God vs. the Gavel: Religion and the Rule of Law 223–27 (Cambridge 2005) (hereinafter God vs. the Gavel). See also Brief for Amicus Curiae The Tort Claimants' Committee at 25–26, Gonzales v. O Centro Espirita Beneficiente Uniao, No. 04-1084 (U.S. filed July 8, 2005).

[11]For a more detailed discussion of the actual free exercise doctrine preceding *Smith*, see God vs. the Gavel, *supra* note 10, at 214–23, 276–80.

urged Congress to enact the Religious Freedom Restoration Act (RFRA),[12] which purported to ''restore'' free exercise doctrine to where it was before *Smith*. And during the course of three years of hearings, Congress vehemently criticized the Court for its holding in *Smith*.[13]

RFRA's supporters—which included President Clinton—intended to overturn the rule announced in *Smith* through a simple legislative majority. During debate over the bill, the *Smith* decision was described as ''a dastardly and unprovoked attack on our first freedom.''[14] Then-Representative Schumer called it ''a devastating blow to religious freedom, [which] we are trying to undo.''[15] Congress was not reticent about making clear its intention to overrule *Smith*: ''This landmark legislation,'' explained Representative Nadler, ''will overturn the Supreme Court's disastrous decision, Employment Division versus Smith, which virtually eliminated the First Amendment's protection of the free exercise of religion.''[16] President Clinton also understood RFRA as a provision that would overrule *Smith*, as he explained when he signed the Act into law: ''[T]his act reverses the Supreme Court's decision Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.''[17]

[12]42 U.S.C. § 2000bb (2005).

[13]RFRA's legislative history contains over 400 pages explicitly criticizing *Smith*. See, e.g., The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. 2, 8, 9, 11, 22, 28–29, 31–32, 35, 38, 41, 48, 49, 51, 61 (1990); The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess. 7, 8, 19, 23, 32, 39, 45, 63, 99, 136, 160, 175, 193, 201, 214, 249, 251, 271 (1992).

[14]137 Cong. Rec. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz).

[15]139 Cong. Rec. H2360 (daily ed. May 11, 1993) (statement of Rep. Schumer).

[16]139 Cong. Rec. H2359 (daily ed. May 11, 1993) (statement of Rep. Nadler). See also 139 Cong. Rec. H2361 (daily ed. May 11, 1993) (statement of Rep. Hoyer) (''This ruling did great mischief to the rights of all Americans. Religious liberty [is] no longer a fundamental constitutional right.''); 139 Cong. Rec. S14464 (daily ed. October 27, 1993) (statement of Sen. Coats) (''The Court has effectively turned religious Americans into second class citizens.'').

[17]Remarks on Signing the Religious Freedom Restoration Act of 1993, President William J. Clinton, Nov. 16, 1993, 29 Weekly Comp. Pres. Doc. 2377.

RFRA did not create specific exemptions from the Establishment Clause's neutrality principle for specific religious practices burdened by law, as Congress had with respect to anti-discrimination law in Title VII of the Civil Rights Act of 1964.[18] Rather, RFRA created a judicial standard of review that would be applicable to laws that burden religious exercise. Its scope, therefore, was constitutional: that is, RFRA mandated that every category of law in the country (local, state, and federal; legislative, executive, and judicial),[19] when applied to burden religious conduct in a significant way, must satisfy strict scrutiny as that standard has been characterized in the Court's First Amendment cases. Specifically, RFRA barred government from applying its laws in any way that ''substantially burdened'' religious conduct unless the government could prove the law existed to further a ''compelling interest'' and was the ''least restrictive means'' of accomplishing that interest.[20]

In *City of Boerne v. Flores*,[21] the Court held that RFRA was unconstitutional, reasoning that Congress cannot supplant the Supreme Court's interpretation of the Constitution through legislative action. The Court held that, in attempting to do so, Congress had violated separation-of-powers principles,[22] had exceeded Congress' power under Section 5 of the Fourteenth Amendment (which was the only congressional power that Congress considered as a source of its enacting authority),[23] and had violated Article V's mandated procedures to amend the Constitution.[24]

B. Round II: Religious Land Use and Institutionalized Persons Act

In the wake of *Boerne*, RFRA's proponents immediately returned to Congress to request further legislation to protect religious accommodation, preferably with RFRA's scope. First, Congress considered

[18]42 U.S.C. § 2000e-1

[19]''(1) [T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity; (2) the term 'covered entity' means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States . . .'' 42 U.S.C. § 2000bb-2(1)-(2) (2005).

[20]42 U.S.C. § 2000bb-1 (2005).

[21]521 U.S. 507 (1997).

[22]God vs. the Gavel, *supra* note 10, at 236.

[23]*Id.* at 236–37.

[24]*Id.*

the Religious Liberty Protection Act (RLPA)—a proposal that met this demand—but members proved unwilling to pass another law that approached the sweep of RFRA.[25] Instead, Congress responded by attempting to protect religious accommodation in two relatively discrete arenas of law—land use law and the law governing state institutions. Thus, three years after the Court held RFRA unconstitutional in *City of Boerne v. Flores*,[26] and ten years after the Court's decision in *Smith*, Congress enacted, and President Bill Clinton signed, the Religious Land Use and Institutionalized Persons Act (RLUIPA),[27] a bill that imposes heightened scrutiny on regulation of religious exercise by programs that receive federal financial assistance when those programs regulate individuals' exercise of religion in a burdensome way.[28]

RLUIPA is in fact two distinct laws brought under one lengthy heading—one of these laws imposes strict scrutiny on federally assisted local and state land use programs that substantially burden religious conduct while the other imposes scrutiny on regulations in federally assisted state institutions, including prisons.[29] Only the provision imposing strict scrutiny in the prison context was at stake in the Supreme Court's unanimous decision in *Cutter v. Wilkinson*.

Applied to prisons, RLUIPA's language, taken by itself, is at a significant distance from the Court's pre-existing free exercise jurisprudence in the prison context. Before *Smith*, RFRA, and RLUIPA, the Court had applied low-level scrutiny to prison regulations and mandated deference to prison interests.[30] Justice O'Connor encapsulated the approach in her *Turner* opinion: ''[A] [prison] regulation

[25]For further details, see Marci A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 Ind. L.J. 311, 332–54 (2003).

[26]521 U.S. 507 (1997).

[27]42 U.S.C. § 2000cc (2005).

[28]*Id*.

[29]42 U.S.C. 2000cc-3(i) (2005) provides: ''Severability.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.''

[30]See O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Safley, 482 U.S. 78 (1987).

cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression.''[31] However, RLUIPA, on its face, appeared to demand far more exacting scrutiny.

C. Cutter v. Wilkinson*: A Victory for the Status Quo*

In *Cutter*, the Court was finally presented with an opportunity to address the scope of RLUIPA's language. Five Ohio state prisoners alleged that certain prison regulations impeded their religious freedom and therefore violated section 3. They included members of the Church of Jesus Christ Christian, which is a subdemonination of the Christian Identity Church (a white supremacist organization), as well as members of Wicca, Satanist, and Astaru religions. The Ohio prison regulations forbade certain reading materials and ceremonial items, and required adherence to religious dress and appearance mandates. The regulations also did not mandate a chaplain trained in their particular religions. The prisoners argued that RLUIPA required prisons to give prisoners access to white supremacist literature, conduct religious services, dress as their religion commands, and have a prison chaplain specifically trained in their religion.[32] The State of Ohio, in turn, challenged the constitutionality of RLUIPA under the Establishment Clause, arguing that the law did not have a secular purpose and that its effect was to give religious prisoners superior constitutional rights.[33]

The trial court held that RLUIPA's strict scrutiny test is constitutional, because it allows some safety and security claims to outweigh

[31]Safley, 482 U.S. at 89–90.

[32]Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 832–33 (S.D. Ohio 2001). Among the readings requested in *Gerhardt* were publications used as gang identifiers written in foreign languages prisoners were known to have utilized for codes. See Brief for Respondents, Cutter v. Wilkinson, 125 S. Ct. 2113 (No. 03-9877) (U.S. filed Feb. 11, 2005).

[33]For a summary of the facts of the case, see Gerhardt, 221 F. Supp. 2d at 833–34.

claims for religious accommodation and therefore does not impermissibly advance religion, as the Court's Establishment Clause forbids.[34] The court also held that RLUIPA was a proper exercise of Congress' power under the Spending Clause, because, according to the trial court, RLUIPA furthered the general welfare of the United States and gave the states a meaningful choice to accept federal funds knowing the attached conditions.[35]

The U.S. Court of Appeals for the Sixth Circuit reversed and held that RLUIPA violates the Establishment Clause ''because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation.''[36] The court relied on Justice Stevens's reasoning in his concurrence to *Boerne*:

> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.[37]

Justice Stevens's analysis in *Boerne* suggests that granting a special privilege for the conduct of religious groups, and not for groups engaged in other First Amendment–protected activities, violates the Establishment Clause. As the Sixth Circuit recognized, that same argument can be made with respect to RLUIPA, which operates

[34]*Id*. at 846–49.

[35]*Id*. at 839–44.

[36]Cutter v. Wilkinson, 349 F.3d 257, 262 (6th Cir. 2003).

[37]*Id*. at 261 (quoting City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997)). The State of Ohio also had challenged Congress' power to enact RLUIPA, but the Sixth Circuit did not reach the issue: ''For all the reasons set forth above, we hold that [RLUIPA] violates the Establishment Clause. Because of this determination, we have no need to consider the alternative grounds raised by defendants in their constitutional challenge to RLUIPA.'' *Id*. at 268–69.

identically to RFRA, though it does not, as RFRA would, apply to every law in the land.

The decision was appealed to the Supreme Court, where Justice Ginsburg issued a unanimous opinion, reversing the Sixth Circuit. On its face, the opinion may appear to be a win for the prisoners and RLUIPA's supporters. Closer reading of the opinion brings that conclusion into rather serious doubt. The Court characterized the question before it as one of permissible accommodation, and reaffirmed the principle that legislatures may accommodate religious conduct within certain parameters, a principle previously approved in dictum in *Smith*[38] and expressly in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[39] The *Amos* Court upheld Congress' exemption of religious employers from Title VII, which otherwise forbids employers from discriminating on the basis of religious belief (and which provides no exemption for discrimination on the basis of racial or gender-based classifications).[40] Aside from the peyote exemptions approved in dictum in *Boerne*, *Amos* is the Court's sole case upholding a legislative accommodation. In *Texas Monthly, Inc. v. Bullock*,[41] the Court had invalidated special tax treatment for religious publications, because the government directed a subsidy exclusively to religious writings that promulgate the teachings of religious faith.[42] *Cutter* essentially left the doctrine as it was.

Justice Ginsburg's unanimous decision found no Establishment Clause defect with RLUIPA, as applied, for two primary reasons. First, said Ginsburg, section 3 deals with whether a prisoner is able to worship *at all* and therefore ''alleviates *exceptional* government-created burdens on private religious exercise.''[43] For the framing generation, free ''exercise'' of religion referred primarily to worship. There is good reason to doubt that the Free Exercise Clause was intended to extend beyond worship. Thus, a situation that deprives

[38]Employment Division v. Smith, 494 U.S. 872, 890 (1990).

[39]483 U.S. 327, 338 (1987).

[40]Title VII of the Civil Rights Act of 1964, § 702, 42 U.S.C. §§ 2000e–2000e-17 (2005).

[41]489 U.S. 1 (1989).

[42]*Id*. at 5 (invalidating state tax that had an exclusive exemption for religious periodicals).

[43]Cutter v. Wilkinson, 125 S. Ct. 2113, 2121 (2005).

a believer of any possibility of worship is worse, as a constitutional matter, than burdens on conduct other than worship.[44] RLUIPA does not, by its terms, limit itself to worship, but the institutionalized person is not in a position to engage in other religious conduct beyond worship, such as proselytizing on street corners, by the very nature of his or her institutionalization. There are degrees of burdens on religious practice, from those that preclude worship altogether in the institutional setting to those, like land use laws, that affect only where—not whether—worship will occur. Institutional regulations encompassed by RLUIPA generated ''exceptional'' burdens on the right of worship, because section 3 operates in an arena where ''the government exerts a degree of control unparalleled in civilian society'' and ''that is severely disabling to private religious exercise.''[45]

Second, unlike the courts below, Justice Ginsburg reads RLUIPA to require *deferential* review of prison regulations, not strict scrutiny as it is understood in the realm of constitutional law. It is an understatement to say that the Court did not take RLUIPA's language of strict scrutiny at face value. Instead, the Court relied on legislative history that instructed courts to apply RLUIPA with ''due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.''[46]

Lest the lower courts applying *Cutter* misunderstand the Court's message, a footnote reiterated the directive to defer to prison officials' judgments: ''It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this arena.''[47] Moreover, at the end of the opinion, the Court urged prison administrators to refuse to accommodate religious exercise in circumstances where ''inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective

[44]See Arlin M. Adams & Charles J. Emmerich, A Heritage of Religious History, 137 U. Pa. L. Rev. 1559, 1582–94 (1989)

[45]125 S. Ct. at 2121.

[46]*Id.* at 2123 (quoting 139 Cong. Rec. 26190 (1993) (remarks of Senator Hatch) and Joint Statement S7775 (quoting S. Rep. No. 103–111, at 10 (1993)).

[47]*Id.* at 2124 n.13.

functioning of an institution . . . .''[48] Thus, far from establishing strict scrutiny with teeth, the *Cutter* Court read RLUIPA to require deference to prison interests and to prison authorities' expertise regarding those interests. It is not too much to say that the Court used RLUIPA's legislative history to gut its plain language. The Court's holding, therefore, did not so much reverse the Sixth Circuit, or affirm the trial court, as it re-interpreted the statute. Had the courts below read RLUIPA's language identically, they may well have reached the same legal conclusions as the Supreme Court.

In sum, the Court upheld RLUIPA because the statute merely requires accommodation when prison regulations create exceptional burdens, but did so with the proviso that courts must apply its ruling with deference to governing authorities. One is left to wonder precisely how far the import of section 3 now is from the low-level scrutiny constitutional precedents that pre-dated RLUIPA. The distance does not appear to be great at all. Far from being an opinion that opens the door to expansive accommodation, as some had feared, *Cutter* leaves the range of permissible accommodation rather narrow. Moreover, it reaffirms the principle that legislative accommodation must be examined to ensure it does not encroach on the establishment of religion. Thus, as interpreted, RLUIPA is significantly less onerous than Title VII's creation of a mandatory exemption from anti-discrimination principles for religious employers who discriminate in hiring on the basis of religious belief. In short, by emphasizing its legislative history, the Court's reading makes the statute less controversial than it might have been.

D. Ramifications

However, upholding RLUIPA, even on these terms, does introduce a new factor into legislative accommodation doctrine. While RLUIPA's imposition is not as onerous as Title VII's anti-discrimination exemption, it covers a significantly larger field of law. Whereas Title VII's exemption applies only to hiring practices, and not all of employment law (e.g., issues involving pensions or union seniority, for example), section 3 of RLUIPA imposes its terms on an entire category of law—prison regulation. Its terms potentially modify every aspect of prison regulation, to the extent that such regulation

[48] *Id.* at 2125.

burdens religious conduct. Thus, although the scope of permissible accommodation recognized in *Cutter* is narrow, the reach of the opinion is potentially quite wide. *Cutter*, however, does not answer whether applying strict scrutiny to burdens on religious conduct well beyond worship and within an entire arena of law is consistent with the Establishment Clause. That very question is working its way through the federal courts in litigation addressing section 2 of RLUIPA, which imposes strict scrutiny on another arena of law: neutral, generally applicable land use laws. Unlike the provisions at issue in *Cutter*, section 2 offers no legislative history requiring deference to local land use authorities, and, therefore, presents a harder disestablishment question than does section 3.[49] The *Cutter* Court explicitly declined to rule on any aspect of section 2.[50]

One of the more fascinating elements of *Cutter* is the Court's clear-headed treatment of RLUIPA's terms as ''legislative'' and not equivalent to ''constitutional'' language. Remember, Congress, when it enacted RLUIPA, borrowed constitutional language—that is, language from the Court's constitutional precedents construing the First Amendment; it incorporated that language into the statutory ''strict scrutiny'' test that RLUIPA applies to burdens on religious exercise. Thus, it lifted the Court's language and placed it within a statutory context. It would have been easy for the Court to interpret RLUIPA's terminology in the same way that that terminology is used in constitutional cases. That is certainly what the lower courts did. Yet, the Court deals with the language with due deference to the legislature and interprets RLUIPA's language of strict scrutiny according to the intent of Congress. It therefore treats RLUIPA's language like any other legislative enactment, to be interpreted according to the usual tools of statutory interpretation and congressional intent, rather than according to the Court's own understanding of the terms. This is driven by a praiseworthy sensitivity to the separation of powers.

[49]The legislative history does, to be sure, require religious landowners to complete the land use process at the local level, but it does not water down the strict scrutiny language.

[50]*Id.* at 2119 n.3 (''Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.''). The other issue deferred is Congress' power to enact RLUIPA, *id*. at 2120, which Justice Thomas, in concurrence, doubts: ''[T]hough RLUIPA is entirely consonant with the Establishment Clause, it may well exceed Congress' authority under either the Spending Clause or the Commerce Clause.'' *Id.* at 2125 n.2 (Thomas, J., concurring).

One can see this interpretive move most clearly by focusing on the Court's reliance on legislative history regarding legislative intent—a distinctive method of *statutory* interpretation. The Court, to Justice Scalia's chagrin, often looks to legislative history to pinpoint the meaning of particular legislative terms[51]—and in the case of RLUIPA, that history plainly suggested that Congress intended the terms of the statute to be applied with deference to prison regulators. Thus, the *Cutter* Court (rightly) recognizes a dual interpretive track for the language of strict scrutiny: a constitutional meaning, when the language of strict scrutiny is used by the Court in the context of judicial interpretation of the Constitution, and a separate legislative meaning, which applies when the same language is employed by Congress with congressional gloss.[52]

Of course, it remains to be seen whether the application of the weaker legislative strict scrutiny language used in RLUIPA will undercut the strength of strict scrutiny in the constitutional context; in this common law system, one can expect some cross-pollination between the two doctrines. That would be unfortunate for those arenas where strict scrutiny is justified, e.g., cases of racial discrimination or government suppression of speech based on its message. It is also further evidence of the folly that results when a legislature adopts language drawn from a judicial standard of review as part of its own substantive legislation. In the constitutional context, a judicial standard of review is supposed to be a policy-free way of analyzing whether the legislature acted contrary to the Constitution.

[51]See Henry M. Hart Jr. et al., The Legal Process: Basic Problems in the Making and Application of Law (1994); Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992); see also, e.g., Small v. United States, 125 S. Ct. 1752, 1757 (2005) (using legislative history to determine the meaning of ''any''); Koons Buick Pontiac GMC v. Nigh, 125 S. Ct. 460, 467–68 (2005) (using legislative history to determine the meaning of ''subparagraph''); Doe v. Chao, 540 U.S. 614, 622–23 (2004) (looking to drafting history to interpret terms).

[52]It is possible that Congress might borrow judicial language wholesale and intend it to be applied just as the court has applied it, but that is not what happened with section 3, and, as a practical matter, is highly unlikely as it requires Congress to add no additional gloss in the legislative history. It also invites separation of powers challenges as in *Boerne*, because the only reason Congress would enact a pure judicial standard of review is to displace the Court's existing standard. In any event, legislative meaning is likely to diverge from constitutional meaning; and the degree of divergence requires investigation into the intent of Congress.

Yet, legislation is policy by its very nature, and when incorporated into legislation, the language of the judicial standard of review can no longer function as it is supposed to function in the judicial context. Rather, it becomes an indicator of policy preferences—and the Supreme Court properly treated it as such in *Cutter*.

II. The Ten Commandments Decisions: Context Is Everything

RLUIPA, like RFRA, was a product of religious and civil rights interests pressuring Congress to obtain special treatment for religious actors. Also like RFRA, RLUIPA was not the subject of public debate, but rather was a creature of legal specialists in Congress and religious pressure groups. RLUIPA is a classic example of the type of legislative exemption I document in *God vs. the Gavel*, which occurs mostly sub rosa and is neither known nor understood by the general citizen.[53] As such, the *Cutter* ruling is a rather esoteric exercise in Establishment Clause interpretation and therefore is dramatically different from the rulings in the two Ten Commandments cases, *McCreary County v. ACLU*[54] and *Van Orden v. Perry*,[55] which were litigated and debated in the context of a vehement and large political debate over the role of government and religious messages. It is quite ironic that *Cutter*, which featured five fringe religions, brought to the forefront the deep pluralism of the United States, while, in the same term, the justices were asked to address whether this is a ''Christian country'' in the context of the Ten Commandments cases.[56]

A. Introductory Overview of the Ten Commandments Cases

The Ten Commandments cases, which involved Establishment Clause challenges to displays of the Ten Commandments on government property, came to opposite results and were expressed through a plethora of concurring opinions. For this reason, some critics have charged the Court with muddying the constitutional waters, but it is my view that the Court's decisions turn on one axis: whether the government's purpose in posting religious messages on its property

[53]God vs. the Gavel, *supra* note 10, at 273–305

[54]125 S. Ct. 2722 (2005).

[55]125 S. Ct. 2854 (2005).

[56]Van Orden, 125 S. Ct. at 2861–62; McCreary County, 125 S. Ct. at 2740–41.

is to further religion. In light of existing Establishment Clause precedent, that is neither a new nor inchoate concept.

Both cases were decided five to four, with Justice O'Connor voting to hold the displays unconstitutional in both cases and Justice Breyer serving as the swing vote. That means that replacing Justice O'Connor with someone who is opposed to a vigorous Establishment Clause will likely open the door to the continued melding of power between church and state already initiated by the Rehnquist Court,[57] which in turn threatens real religious liberty.

Although the Court's opinions fail to make the distinction sufficiently clear, it is important to point out that the Ten Commandments cases ask whether the government may post on its own property displays with religious content. They do not begin to deal with a separate question—whether religious messages may circulate in the ''public square,'' which is composed of the many means of information exchange in our society, including all forms of media, including the Web, and of course the public exchange of private views. The concept of the ''public square'' comes from the Court's free speech cases, in which the First Amendment restrains government from regulating private speech in a location where, as a matter of tradition, there has been a robust exchange of private views. When the government creates an open ''forum,'' it cannot then regulate the content of speech, regardless of the government's distaste for the ideas contained within it. ''[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it,'' the Court has held. ''Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.''[58] In an era with a diminishing number of used public squares, but a highly active Web and media, the public square concept logically extends well beyond

[57]See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school voucher system is without constitutional defect); Mitchell v. Helms, 530 U.S. 793 (2000) (computers for parochial schools are not per se unconstitutional). See also Elk Grove Unified School District v. Newdow, 542 U.S. 1, 28 (2004) (Rehnquist, C.J., concurring) (''Under God'' in the Pledge of Allegiance is constitutionally permissible).

[58]FCC v. Pacifica Foundation, 438 U.S. 726, 745–46 (1978).

government property to capture all those locations where exchanges of views take place in the presence of the public.[59]

The constitutional question in the public square cases, and as a matter of principle, is whether the government is suppressing viewpoints with which it disagrees. ''As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.''[60] Thus, the government is kept from suppressing private viewpoints engaged in public debate, including religious speech.[61]

Unfortunately, those interested in having the government support their religious viewpoint have hijacked ''public square'' and its related imagery and emotional force to argue that the Court is shoving religious speech out of the public square, i.e., out of public discourse altogether. For example, forbidding government from posting the Ten Commandments on its property has been characterized as a move that ''exile[s] faith from the public square.''[62] James Dobson characterized such decisions as proof ''there is a religious witch hunt underway'' in America, with the court ''allow[ing] liberal special interests to banish God from the public square.''[63] But this is a perversion of what ''public square'' actually means in constitutional lore.

The Ten Commandments cases are about government speech, not private speech, which means the public square cases simply are not on point. Moreover, the Ten Commandments cases involve government property dedicated to government purposes, for example,

[59]The Court has wrestled with whether a private space made available to the public is the equivalent of the traditional public square for First Amendment purposes. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[60]Reno v. ACLU, 521 U.S. 844, 885 (1997).

[61]See, e.g., Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).

[62]Bishop Thomas Wenski, Editorial: Founding Fathers, Founding Faith, Orlando Sentinel, July 3, 2005, at G3.

[63]John Aloysius, Divided on Display of Commandments, Denver Post, June 28, 2005, at A1 (quoting Focus on the Family Action chairman James Dobson).

courthouses and not public squares dedicated to free expression by private citizens. By melding apples and oranges—i.e., by treating precedent regarding private speech in the ''public square'' as precedent for cases involving scrutiny of religious messages embedded in government speech—critics have managed to create the impression that the Court's Establishment Clause decisions are actually suppressing private religious speech in toto by secularizing the public square. In fact, however, the Court's decisions are *promoting* public exchange of a wide variety of views. After the Ten Commandments cases, the public square remains every bit as full of competing religious and nonreligous viewpoints as before. The only difference is that one viewpoint does not have the government's thumb on its side of the scale. Thus, these cases are about particular viewpoints co-opting government authority, not about government suppression of the free exchange of religious views.

It is a simple fact that religious speech is robust in the United States and that the country in the twenty-first century is a deeply religious country, far more so than most other post-industrial nations, with many professing religious belief and a rate of church attendance that well outstrips our allies in Europe.[64] It is also a country of mind-boggling diversity, with beliefs ranging from atheism and secular humanism to mainstream religions to schisms and cults.[65] By keeping the government and religion meaningfully separate and by enforcing the absolute right to believe whatever one

[64]''Religion is much more important to Americans than to people living in other wealthy nations. Six-in-ten (59%) of people in the U.S. say religion plays a very important role in their lives.'' The Pew Research Center, Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion (Dec. 19, 2002), available at http://people-press.org/reports/display.php3?ReportID=167 (last visited July 29, 2005). Over 80% of Americans say they believe in God. See Therapy of the Masses, The Economist, Nov. 6, 2003, available at http://www.economist.com/surveys/PrinterFriendly.cfm?StoryID=2172112 (last visited July 29, 2005). According to the Harris Poll of February 26, 2003, 90% of all American adults believe in the existence of God, with 84% believing in both miracles and the survival of the soul after death. See Humphrey Taylor, The Religious and Other Beliefs of Americans (2003), available at http://www.harrisinteractive.com/harrispoll/index.asp?PID=359 (last visited July 29, 2005).

[65]Diana L. Eck, A New Religious America 3–4 (2001). See also Mission Statement, The Pluralism Project, available at http://www.pluralism.org/about/mission.php (last visited July 29, 2005).

chooses, the United States has crafted vibrant religious liberty like no other before it.

Before turning to the Court's opinions, it is worthwhile to sketch the phenomenon of religious diversity during the founding and framing eras, in order to better understand each justice's views on the meaning of the Establishment Clause. First, at the time of the founding, there was no monolithic set of religious beliefs that all citizens shared. It was a single-faith, ''Christian'' country only in the sense that the vast majority of believers were part of some faith that owed its origins either to the Roman Catholic Church or to the Reformation. Jews first settled the United States 350 years ago, so there can be no honest claim this was exclusively a Christian country. And, of course, the American polity has always included nonbelievers, or, as with Thomas Jefferson, Deists, who may feel some fealty to a God, but who do not believe in Christian theology.[66] Thus, America has exhibited significant religious diversity and a strong feeling among members of different faiths about the marked differences between competing beliefs.[67]

Religious diversity at the time did not necessarily entail religious tolerance, which is why disestablishment became a theme for oppressed religious groups. For example, the Puritans settled the United States to avoid oppression in England and landed here—only to practice their own form of oppression. If one wanted to live in the Massachusetts Puritan communities, one had to believe what they believed, or one could exercise one's right to leave.[68] The Baptists

[66]Nathan Schachner, Thomas Jefferson: A Biography 155–56 (1951).

[67]Edmund Sears Morgan, Roger Williams: The Church and the State 86–99 (1967); John Witte, Jr., Religion and the American Constitutional Experiment 46–48 (2005); James Madison, Memorial and Remonstrance, in 8 The Papers of James Madison 301–02 (William T. Hutchinson et al. eds., 1962) (''What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries.''). Moreover, there are distinctive biblical traditions, so that there are competing versions of the Ten Commandments among the monotheistic faiths.

[68]See generally Morgan, *supra* note 67; Timothy L. Hall, Separating Church and State: Roger Williams and Religious Liberty (1998); Amy S. Lang, Prophetic Woman: Anne Hutchinson and the Problem of Dissent in the Literature of New England 4–7 (1987).

dissented from Puritan practice and bore the brunt of the Puritans' established religion. They became the most fervent backers of the ''separation of church and state,'' because they experienced firsthand the oppression of a union of power between the church and the state.[69] Two of the most important contributors were the Rev. Isaac Backus and John Leland. The Rev. Backus' incessant prodding of the Congregationalist establishment in Massachusetts set the stage for the end of establishment there in 1833.[70] Along with Leland, he believed that Baptist theology mandated the freedom to believe. Leland took it one step further and declared that ''[t]he notion of a Christian commonwealth should be exploded forever.''[71] On Leland's terms, religious establishments were ''all of them, anti-Christocracies.''[72]

Thus, early on, there was a division not simply between religious persons and non-religious persons, but also a division between those religious groups that held and exercised state power (which enjoyed the privileges of religious establishments) and those that were oppressed by them (which did not). At the federal level, the former camp lost: The Establishment Clause formally foreclosed transferring this unequal power relationship into the federal arena. At the same time, the diversity of religious beliefs in the United States ensured that any permanent and formal establishment of religion was politically impracticable and, therefore, the state establishments fell by the wayside early in the nineteenth century.[73] A century later, the Supreme Court interpreted the Establishment Clause to apply to the states, because it was incorporated into the Fourteenth Amendment.

As the diversity of religious belief in the United States has become more pronounced over the centuries, the role of the Establishment Clause as a protector of those believers who lack political power has come to the fore. Justice O'Connor's endorsement test reinforces

[69]See Bernard Bailyn, The Ideological Origins of the American Revolution 261–67 (1967).

[70]See *id.*; Witte, *supra* note 67, at 28 n.11.

[71]Witte, *supra* note 67, at 29.

[72]Leonard Levy, The Establishment Clause 136 n.12 (2d ed. 1994).

[73]*Id.* at 25–26, 110–19.

this tradition.[74] ''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.''[75] In effect, she asks whether the outsider (translation: smaller religion or nonbeliever) is led to feel disenfranchised, in other words, less of a citizen, by the government's religious speech. It is a test that forces government to take into account the beliefs and nonbeliefs of all of its citizens, and not just those religious believers who happen to have contemporary access to power.

B. The Court's Clash of Establishment Clause Interpretations

I recount this history, because the debate at the heart of the Ten Commandments cases is whether the government may further mainstream religious beliefs. On this point, there is much disagreement on the current Court. Four members of the Court—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—have found no constitutional fault when government explicitly embraces a pervasive religious viewpoint.[76] Indeed, they have treated such endorsement as the government's right.[77] By contrast, four members of the Court—Justices Stevens, O'Connor, Souter, and Ginsburg—have found constitutional error in the identical circumstance.[78] Thus, eight members embrace a bright-line rule with respect to the Ten Commandments. For the four conservatives, the Ten Commandments,

[74]See Lynch v. Donnelly, 465 U.S. 668, 687–90 (1984) (O' Connor, J., concurring) (coercive power in violation of the Establishment Clause measured by the purpose and effect of the conveyed message); County of Allegheny v. ACLU, 492 U.S. 573, 623–26 (1989) (O' Connor, J., concurring in part) (crèche displayed inside a courthouse conveys a message of non-inclusion to non-believers from the seat of state power). See also Lee v. Weisman, 505 U.S. 577, 609–11 (1992) (Souter, J., concurring) (Establishment Clause protections extend to the non-religious as part of the panoply of religious identity rights).

[75]Lynch, 465 U.S. at 688.

[76]Van Orden v. Perry, 125 S. Ct. 2854, 2861–64 (2005); McCreary County v. ACLU, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

[77]Van Orden, 125 S. Ct. at 2861–62; McCreary County, 125 S. Ct. at 2750 (Scalia, J., dissenting).

[78]Van Orden, 125 S. Ct. at 2872 (Stevens, J., dissenting); McCreary County, 125 S. Ct. at 2747.

despite their patent religious content, can be endorsed by government. For the other four, the patent religious content of the Commandments means that government cannot not display them, except perhaps in extraordinary circumstances where the content makes it clear that the government is posting them for secular purposes.

Justice Breyer, who was the swing vote in the cases, rested his conclusions on whether the government was in fact endorsing a mainstream religious viewpoint in each case.[79] He certainly does not embrace the four conservative justices' suggested doctrine, which would give the government the right to engage in religious speech. But Justice Breyer also was not willing to go so far as to say that the Ten Commandments were so inherently religious that government posting on government property normally would be unconstitutional.

C. The Decisions

One case came out of Kentucky and the other out of Texas. The former involved government going out of its way to send a distinctly religious message to its citizens; while the latter involved a more passive, or innocuous, posting.

1. McCreary County v. ACLU

The Kentucky case, *McCreary County v. ACLU*,[80] involved the actions of two Kentucky counties that directed their courthouses to post the Ten Commandments in prominent locations. After being sued by the ACLU, the counties issued resolutions stating the Ten Commandments were the primary source of Kentucky law.[81] The resolutions expressed support for Alabama Judge Roy Moore's purchase and installation of a large Ten Commandments monument in the Alabama Supreme Court's foyer;[82] reiterated a 1993 statement

[79]In *Van Orden*, Justice Breyer stated that monument had a mixed purpose, but one that was primarily secular and therefore permissible. He goes on to agree with the evaluative principles laid out by Justice O'Connor in *McCreary*, but faults her application of those principles to the evidence in the Texas case. 125 S. Ct. at 2869–71 (Breyer, J., concurring).

[80]125 S. Ct. 2722 (2005).

[81]*Id.* at 2727.

[82]*Id.* at 2729.

by a unanimous Kentucky House of Representatives ''in remembrance and honor of Jesus Christ, the Prince of Ethics'';[83] and included a declaration that the ''founding Fathers [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction.''[84] These resolutions, of course, did not dissuade the ACLU from pursuing its challenge, and the counties responded by hiring new lawyers.[85] Instead of removing the postings, they then added other documents, also chosen for their religious content, including 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.[86] Both the district court and the Court of Appeals for the Sixth Circuit enjoined the displays, because the obvious purpose of the displays was sectarian, not secular.[87] Even so, the counties never renounced their earlier resolutions.

Justice Souter, writing for five members of the Court, found that the Kentucky display violated the Establishment Clause, because the counties so obviously intended to send a religious message. ''[T]he Commandments are an 'instrument of religion' and . . . at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion . . . .''[88] As Souter explained:

> Displaying that text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.[89]

[83] *Id.*

[84] *Id.*

[85] *Id.* at 2730.

[86] *Id.* at 2731.

[87] *Id.* at 2731–32.

[88] *Id.* at 2738 (quoting Stone v. Graham, 449 U.S. 39, 41 (1980)).

[89] *Id.*

Even though a number of amici in both cases invited the Court to reject *Lemon v. Kurtzman* as the governing standard in Establishment Clause decisions,[90] Justice Souter's opinion embraced the requirement first set forth in *Lemon* that government must have a ''secular'' purpose, saying ''[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine . . . [S]crutinizing purpose does make practical sense . . . in Establishment Clause analysis . . .''[91]

Four justices dissented. Justice Scalia, writing for Chief Justice Rehnquist and Justices Kennedy and Thomas, rejected the notion that government is forbidden from backing a particular religious viewpoint, stating that ''the Court's oft repeated assertion that the government cannot favor religious practice is false . . . .''[92] He further caricatured and belittled the majority's reasoning, saying,

> 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.[93]

[90]For examples, see Brief of Amicus Curiae Pacific Justice Institute in Support of Petitioners at 2–30, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693); Brief for the States of Alabama, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Wyoming as Amici Curiae in Support of Petitioners at 8–12, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693); Brief of Amicus Curiae of Conservative Legal Defense and Education Fund, Joyce Meyer Ministries, Committee to Protect the Family Foundation, Lincoln Institute for Research and Education, American Heritage Party, Public Advocate of the United States, Radio Liberty, and Spiritual Counterfeits Project, Inc. in Support of Petitioners at 30, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693); Brief of Amicus Curiae Judicial Watch, Inc. in Support of Petitioners at 9–14, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693); Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Petitioners at 3–8, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693); Brief of Amicus Curiae The Rutherford Institute in Support of Petitioners at 13–19, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693).

[91]McCreary County, 125 S. Ct. at 2734 (citations omitted).

[92]*Id.* at 2748 (Scalia, J., dissenting).

[93]*Id.* (citations omitted).

2. Van Orden v. Perry

In contrast to *McCreary*, the record in the Texas case, *Van Orden v. Perry*, did not contain evidence of overt government support for the religious content of the Ten Commandments.[94] The Texas government engraved the Commandments on a six-foot monument located on the Texas state capitol grounds, which was given to the state by the Fraternal Order of the Eagles (FOE) in order to deter juvenile delinquency.[95] The grounds surrounding the Texas State Capitol hold twenty-one historical markers and seventeen monuments, including the six-foot rendition of the Ten Commandments, which featured an inscription stating that it was donated by the FOE ''to the people and youth of Texas.''[96] A plurality of the Court characterized the posting as ''passive.''[97]

While the Court upheld the Texas display, no majority of the Court agreed on the reasoning. For the four *McCreary* dissenters, who now formed a plurality, government posting of the Ten Commandments was neither a violation of existing Supreme Court precedent nor in tension with the history behind the Establishment Clause. ''Of course, the Ten Commandments are religious . . . [s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.''[98]

Justice Breyer supplied the fifth vote to uphold the Texas display and reasoned that the government's purpose was secular enough:

> I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily ''advancing'' or ''inhibiting religion,'' and not creating an ''excessive government entanglement with religion''—might satisfy this Court's more formal Establishment Clause tests. But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon

[94]Van Orden v. Perry, 125 S. Ct. 2722, 2871 (2005) (Breyer, J. concurring).

[95]*Id.* at 2870.

[96]*Id.* at 2858.

[97]*Id.* at 2861.

[98]*Id.* at 2863.

> consideration of the basic purposes of the First Amendment's Religion Clauses themselves.[99]

In dissent, Justice Souter, writing for Justices Stevens, Ginsburg, and O'Connor, would have held that the display was frankly religious, because the Ten Commandments are, by their content, religious.

> [A] pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.
>
> . . . .
>
> To drive the religious point home, and identify the message as religious to any viewer who failed to read the text, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ.[100]

D. Ramifications

These cases highlight the deep divide at the Court regarding government's power to set forth a particular religious message. On the one hand, it is quite clear that the chief justice and Justices Scalia, Thomas, and Kennedy would not only uphold, but applaud, any government display of a religious message that would have been relevant to the religious traditions of the founding era. It remains to be seen where their votes would fall if the religious message endorsed by government is not Christian and therefore not identifiable with the founding in some way. These justices have aligned themselves with a vocal segment of the political sphere, which argues vigorously that this is a ''Christian country.''[101]

[99]*Id.* at 2871 (Breyer, J., concurring) (citations omitted).

[100]*Id.* at 2893 (Souter, J., dissenting).

[101]Some, like Justice Scalia in dissent, have tried to make the Ten Commandments inherently neutral by identifying them with the great monotheistic religions, Christianity, Judaism, and Islam. But, as the *McCreary* case proves, each of these religions espouses a version of the Ten Commandments that reflects a separate religious tradition.

The justices in the majority of the *McCreary* case take a very different view of the American public. Their vision of this country encompasses every conceivable believer and nonbeliever. They hold government responsible to all of these citizens, with no special access for particular religious groups to government support of their messages. The majority further rejects the implicit, troubling argument of the conservatives: namely, that the government's posting of the Ten Commandments is justified because this is a ''Christian country.'' It is an argument that works only at the most abstract level. To be sure, there were lots of Christians—some established, some oppressed, some tolerant, some not—but early America was hardly a big, happy Christian country. It included some Christian sects, like the Puritans (and other established religions), who oppressed those who did not agree with them. And it was a country with Jews and Catholics, who would not post the Protestant version of the Ten Commandments that was posted in the *McCreary* case. The *McCreary* Court was unwilling to fall into the ''Christian country'' solipsism.

These are stark differences, and the next justice of the Supreme Court, who replaces Justice O'Connor, will have the power to shift the doctrine either way.

III. Conclusion

The 2004 term did not break much new ground, if any, for the Establishment Clause. In the Ten Commandments cases in particular, it remains, as it was before, a context-dependent doctrine, which is driven by the facts of each case. Thus, there is no ''Grand Unified Theory,'' to use Justice O'Connor's phraseology, but rather a pragmatic set of rules intended to keep the government neutral with respect to religion.[102] Of course, the conservative justices obviously have a different view of the matter, pressing first in *Mitchell v. Helms*,[103] and now in the Ten Commandments cases, for a bright-line rule that favors a stronger role for government endorsement. The question that remains to be answered is whether such a view can command a majority of the Court in the future. More to the

[102]Board of Education v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and in judgment).

[103]530 U.S. 793, 805 (2000) (plurality opinion).

point, the focus is now on how the next justice will mediate the play of power between state and the religious pluralism now entrenched in the United States.