

New Judicial Federalism and the Establishment Clause: Classroom Ten Commandments as a Case Study in State Constitutional Protection

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Louisiana recently enacted a law requiring a Ten Commandments display in every public school classroom from kindergarten to college. Forty-five years ago, the U.S. Supreme Court ruled that a nearly identical attempt to introduce Christianity into the public schools violated the Establishment Clause—the clause in the U.S. Constitution’s First Amendment that requires some degree of separation between church and state.

Unfortunately, the U.S. Supreme Court has since reduced the Establishment Clause to a shadow of its former self. It replaced doctrinal tests that protected religious minorities with a history and tradition test that is easily manipulated and that presumes the constitutionality of any longstanding religious practice. It has also developed multiple strategies for dodging establishment claims such as “secular-washing”—recharacterizing an inherently religious symbol as secular.

However, the U.S. Constitution and the U.S. Supreme Court do not have a monopoly on protecting rights, including the right against establishment. As “New Judicial Federalism” highlights, our dual system of government means state constitutions and their establishment clauses provide another layer of constitutional protection. Moreover, state courts are not obliged to interpret their establishment provisions in lockstep with the Supreme Court, even in the rare cases where the text is the same.

Accordingly, state courts can and should interpret their establishment provisions independently of federal jurisprudence to provide more robust protection when confronted with laws like Louisiana’s. Although the U.S. Supreme Court has all but abandoned religious minorities, state courts need not follow in its footsteps.

Even if state courts feel bound to rely on the history and tradition approach, they do not need to ground their analysis in blind acceptance of past practices as the Supreme Court regularly does. Unquestioning reliance on historical practices overlooks that the Establishment Clause sought to break with past

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practices and that past practices (such as anti-Catholic Protestantism in public schools) do not always live up to constitutional ideals. Instead, state courts can invoke foundational principles such as prohibiting religious favoritism and requiring secular justifications. State-mandated Ten Commandments posters on every public schoolroom wall undermine both principles. Foisting the sacred text of one or two religions onto students of various (or no) faiths epitomizes religious favoritism, and no persuasive secular reason justifies such an imposition.

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Introduction

The race is on to reintroduce Christianity into public schools. A new Louisiana law mandates that the Ten Commandments be posted in every public grade school, high school, and college classroom.¹ Oklahoma’s Superintendent of Public Schools decreed that all public schools must incorporate the Bible into social studies and English classes starting in fifth grade.² Texas’s Board of Education approved Biblical materials in kindergarten through fifth-grade lessons.³ Meanwhile, in a sign of things to come, parallel Ten Commandment laws have recently been proposed in at least fifteen states, with Arkansas and Texas already succeeding.⁴

Families with children in Louisiana’s public schools immediately challenged its Ten Commandments law, contending that it violates the First Amendment’s Establishment Clause.⁵ The Establishment Clause guarantees that “Congress shall make no law respecting an establishment of religion”⁶ and has long been interpreted to require some degree of separation between church and state. This lawsuit is in full swing and likely on track for Supreme Court review.

1. *Roake v. Brumley*, 756 F. Supp. 3d 93, 113 (M.D. La. 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025).

2. Bernd Debusmann Jr., *Oklahoma Orders Schools to Teach Bible ‘Immediately,’* BBC NEWS (June 27, 2024), <https://www.bbc.com/news/articles/cjk35vv2ryjo> [<https://perma.cc/K73M-GVWX>].

3. Nadia Lathan & Kendria LaFleur, *Texas Education Board Approves Optional Bible-Infused Curriculum for Elementary Schools*, ASSOCIATED PRESS (Nov. 22, 2024), <https://apnews.com/article/texas-bible-religion-schools-52b74577982b34ce2607b693bd51cae7> [<https://perma.cc/22DW-E66C>].

4. Matt Vasilogambros, *Eyeing a Friendly Supreme Court, Republicans Push for the Ten Commandments in Schools*, STATELINE (Feb. 27, 2025), <https://stateline.org/2025/02/27/eyeing-a-friendly-supreme-court-republicans-push-for-the-ten-commandments-in-schools/> [<https://perma.cc/VXJ7-EWTH>]; Thao Nguyen, *Arkansas Families Suing to Block Ten Commandments in Public Classrooms, Libraries*, USA TODAY (June 12, 2025), <https://www.usatoday.com/story/news/education/2025/06/12/arkansas-lawsuit-ten-commandments-public-schools/84159193007/> [<https://perma.cc/HAX2-94XW>].

5. *Roake*, 756 F. Supp. 3d at 112 n.1.

6. U.S. CONST. amend. I.

Under Supreme Court precedent, Louisiana's Ten Commandments law is unconstitutional.⁷ Forty-five years ago, *Stone v. Graham*⁸ addressed a Kentucky law strikingly similar to Louisiana's.⁹ Kentucky's law required that the Ten Commandments be displayed in every public school classroom, alongside a declaration stating, "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."¹⁰ The Supreme Court struck down the law, holding that the Establishment Clause requires that all laws have a secular purpose and that, despite its declaration, Kentucky's had none.¹¹ Consequently, it should be fairly straightforward to conclude that, under the directly on-point *Stone*, Louisiana's law violates the Establishment Clause. Indeed, a district court did just that, with a Fifth Circuit panel affirming its decision.¹²

Yet, the Justices who decided *Stone* in 1980 are long gone, and the newest Justices have reduced the Establishment Clause to a shadow of its former self.¹³ The Roberts Court has eliminated doctrine that had controlled for decades,¹⁴ along with the protection for religious minorities that the doctrine offered. Instead, as the Court has pronounced for other areas of law,¹⁵ constitutionality under the Establishment Clause will be guided by history and tradition.¹⁶

Louisiana is betting that the current Supreme Court will construct a history and uncover traditions to conclude that prominent displays of the Ten Commandments in public schools are constitutional, just as the Court has mobilized history and tradition to uphold Christian prayers at state legislative sessions and town council meetings.¹⁷ Of course, this is not the Court's sole

7. See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (invalidating state law that required the Ten Commandments be displayed in public school classrooms).

8. 449 U.S. 39 (1980) (per curiam).

9. *Id.* at 39.

10. *Id.* at 40 n.1.

11. *Id.* at 41 ("We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms had no secular legislative purpose, and is therefore unconstitutional.").

12. Roake v. Brumley, 756 F. Supp. 3d 93, 116 (M.D. La. 2024).

13. See *infra* subpart I(B).

14. See *infra* section I(B)(1) (discussing the elimination of the *Lemon* and endorsement tests).

15. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (interpreting the Second Amendment by reference to history and tradition); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (limiting substantive due process rights to those "deeply rooted in this Nation's history and tradition" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

16. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2228, 2242 (2022) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))).

17. *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014).

tactic for upholding a range of religious displays, including a monumental Latin cross.¹⁸ More than once, the Court has held that religious speech was not the speech of the government but that of a private speaker and therefore not subject to Establishment Clause strictures.¹⁹ Another favorite stratagem is what I call “secular-washing”: Claiming that an inherently religious item actually communicates a secular message and therefore does not implicate the Establishment Clause.²⁰ Lastly, the Court often dodges establishment claims entirely by deciding that plaintiffs lack standing, a tactic that has become easier to employ as this Court has whittled down the harms of government religious displays to mere “offense.”²¹ In short, the Supreme Court has paved many roads for courts eager to let Christianity dominate public schools, regardless of the cost to non-Christians.

One goal of this Article, however, is to remind both litigators and judges that the U.S. Constitution and the U.S. Supreme Court do not have a monopoly on protecting rights, including the right against establishment.²² Every state has a state constitution, and state constitutions contain their own establishment clauses.²³ One of the innovations of the United States, after all, is its federalist system of government. Rather than concentrate power in a single centralized government, the U.S. Constitution divides power between the federal and state governments. This dual system of government allows people to benefit from the protections of both the U.S. Constitution and state constitutions. Moreover, state courts are not obliged to interpret their establishment clauses in lockstep with the U.S. Supreme Court, even when the text is identical.²⁴ Instead, they are free to interpret their state constitutions to provide greater protection as long as their interpretation does not violate the federal Constitution.²⁵ “State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”²⁶ Turning to state

18. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019); *see also* *Shurtleff v. City of Bos.*, 596 U.S. 243, 248, 621 (2022) (upholding the right to raise a religious flag depicting the Latin cross).

19. *See infra* subpart II(A).

20. *See infra* subpart II(B).

21. *See infra* subpart II(D).

22. In reality, most challenges do not reach the U.S. Supreme Court. Consequently, lower courts will ultimately decide the constitutionality of many laws like Louisiana’s.

23. *See infra* section III(A)(1).

24. *See infra* section III(A)(2).

25. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982) (“[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”).

26. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). In fact, “[u]nlike their federal counterpart, state constitutions unambiguously confer positive constitutional rights.” Jeffrey Omar Usman, *Good Enough for*

constitutions to protect individual rights, once termed “New Judicial Federalism” by Justice Brennan, who encouraged the trend, is not altogether new.²⁷ But given the recent evisceration of the Establishment Clause, it is time to revisit that option.

Even if a state court adopts the Supreme Court’s history and tradition approach to interpreting its establishment provisions, its conclusions may differ when evaluating government religiosity such as Louisiana’s law (the case study for this Article, although its analysis applies more broadly).²⁸ To start, the history and tradition of a state provision may diverge from the history and tradition of the federal provision. In addition, rather than ground the history and tradition analysis in blind acceptance of past practices, as the Supreme Court regularly does, courts can instead invoke first principles. Such an approach better recognizes that the Establishment Clause sought to break with early establishment practices.²⁹ It also acknowledges that past practices do not always live up to constitutional ideals,³⁰ such as the widespread Protestant practices in nineteenth-century common schools that stemmed from the era’s anti-Catholicism.³¹ Relying on principles rather than practices also recognizes the reality that the United States is much more religiously diverse than in the past.

Two relevant and foundational principles in our history and tradition are that the Establishment Clause seeks to bar the government from (1) favoring one religion over others, and (2) enacting laws that are not primarily secular.³² Ten Commandments posters on every public schoolroom wall undermine both principles. Imposing Christian sacred texts onto students of various (or no) faiths epitomizes favoring one religion over others, and no persuasive secular reason justifies such an imposition.

Part I describes Louisiana’s Ten Commandments statute. It also reviews Establishment Clause doctrine and how the Supreme Court has remade it in the past quarter century. Part II explores the many strategies the Court has deployed to enable governmental Christianity. It also suggests how to resist

Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions, 73 ALB. L. REV. 1459, 1461 (2010).

27. Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U.L. REV. 949, 951 (2020) (“This phenomenon [New Judicial Federalism], beginning in the 1970s, saw state supreme courts relying on their own constitutions to recognize rights that were *more protective* than those recognized by the United States Supreme Court under the Federal Constitution.”).

28. Although the Article uses the laws mandating Ten Commandments in public schools as a case study, its analysis is not limited to those laws.

29. See *infra* subpart IV(A).

30. See *infra* subpart IV(B).

31. See *infra* subpart IV(B). Note, too, that the Supreme Court has held that past practices rooted in anti-Catholicism should be disregarded when evaluating a religion clause case. See *infra* notes 379–82 and accompanying text.

32. See *infra* subpart IV(C).

them, especially as applied to laws like Louisiana’s. Part III explores the distinctive establishment provisions in state constitutions and spotlights the fact that state judges may interpret them more expansively than their federal peers. For courts who nevertheless feel bound by the history and tradition approach, Part IV provides principles consistent with existing Supreme Court jurisprudence that should guide courts going forward and then applies them to Louisiana’s Ten Commandments mandate.

I. Background

A. Louisiana’s Ten Commandments Law

States have never really ceased their efforts to bring Christianity back into schools.³³ Nonetheless, the Roberts Court’s receptiveness—underscored by its 2022 decision allowing a public high school coach to pray in the middle of the school’s football field immediately after games—has emboldened them.³⁴

Louisiana’s detailed law mandating a Decalogue (another term for “Ten Commandments”) on every public school classroom wall exemplifies this boldness.³⁵ First, the Ten Commandments must be posted in every classroom of primary, secondary, and postsecondary public schools in Louisiana.³⁶ Second, the Decalogue must be a poster or framed document, measuring at least eleven-by-fourteen inches, and “printed in a large, easily readable font.”³⁷ Third, Louisiana specifies the wording,³⁸ basing it on the Protestant King James Bible version (as opposed to a Jewish or Catholic version).³⁹

The Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

33. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 98, 109 (1968) (striking down a law forbidding the teaching of evolution); *Edwards v. Aguillard*, 482 U.S. 578, 581, 596–97 (1987) (striking down a law that prohibits teaching evolution unless creationism is also taught); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708, 765 (2005) (striking down a law requiring students learn about “intelligent design” in biology).

34. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415, 2433 (2022).

35. LA. REV. STAT. ANN. § 17:2124(B)(1) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025).

36. *Id.* at (B)(6), (C); *Roake*, 141 F.4th at 626 (citing H.B. 71, 2024 Gen. Assemb., Reg. Sess. § 2122(B)(1) (La. 2024)).

37. § 17:2124(B)(1).

38. *Id.* at (B)(2).

39. *Roake*, 141 F.4th at 626; H.B. 71, 2024 Gen. Assemb., Reg. Sess. § 2122(B)(2) (La. 2024). As discussed in section III(C)(1), each religious tradition uses slightly different wording, so that there is not a definitive version of the Ten Commandments.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.⁴⁰

Fourth, the Decalogue must be displayed with an accompanying “context statement” that recounts how “[t]he Ten Commandments were a prominent part of American public education for almost three centuries.”⁴¹ These paragraphs explain that the Ten Commandments could be found in American textbooks including the colonial *New England Primer*, the nineteenth-century *McGuffey Reader*, and various schoolbooks published by Noah Webster.⁴² Fifth, the law allows three other historic texts as part of its display: the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance.⁴³ If such texts are displayed, however, the Ten Commandments must remain “the central focus.”⁴⁴ Finally, the displays should be funded from private donations as opposed to the public purse.⁴⁵

The laws in Texas and Arkansas likewise require displays of the Ten Commandments that are large and easy to read in every public school classroom. In fact, Texas requires an even bigger Decalogue—at least sixteen-by-twenty inches.⁴⁶ Both states dictate the exact wording: A text based on the King James Bible.⁴⁷ Unlike Louisiana, neither Texas nor Arkansas require any “context statement” with their Ten Commandments; on the contrary, Texas bars any accompanying text.⁴⁸ Finally, both laws

40. § 17:2124(B)(2).

41. *Id.* at (B)(3).

42. *Id.*

43. *Id.* at (B)(4).

44. *Id.* at (C)(1); *Roake*, 141 F.4th at 626 (citing H.B. 71, 2024 Gen. Assemb., Reg. Sess. § 2122(B)(1) (La. 2024)).

45. § 17:2124(B)(5).

46. S.B. 10, 89th Leg., Reg. Sess. § 1.0041(b)(2) (Tex. 2025).

47. In fact, the prescribed language is exactly the same in each of the three states. *See* S.B. 433, 95th Gen. Assemb., Reg. Sess. § 1 (Ark. 2025) (including language based on the King James Bible Version of the Ten Commandments); S.B. 10, 89th Leg., Reg. Sess. § 1.0041(c) (Tex. 2025) (same).

48. S.B. 433, 95th Gen. Assemb., Reg. Sess. § 1 (Ark. 2025); S.B. 10, 89th Leg., Reg. Sess. § 1.0041(b)(1) (Tex. 2025) (“A poster or framed copy of the Ten Commandments . . . must (1) include only the text of the Ten Commandments.”).

encourage private financing of these displays, mandating that schools “must” accept privately donated Ten Commandments and “may” spend district funds to purchase them.⁴⁹

B. Federal Establishment Clause Law

The Roberts Court has either eliminated or decimated the doctrinal tests previously used to evaluate a religious display like the Ten Commandments. The *Stone v. Graham* decision striking down Kentucky’s Ten Commandments law relied on the *Lemon* test, which the current Court has rejected. The Court has also rejected *Lemon*’s offshoot, the endorsement test. And while religious coercion by the state still violates the Establishment Clause, the Court has redefined coercion so narrowly that a display is unlikely to be found coercive. Instead, the Court has held that history and tradition is now the touchstone for the Establishment Clause. If there is a history and tradition of a specific governmental religious practice, the Court will likely conclude it is a constitutional one.

1. Lemon and Endorsement.—The *Lemon* test served as the overarching rule for the Establishment Clause since *Lemon v. Kurtzman*,⁵⁰ a case decided over 50 years ago. It required that a law have a primarily secular purpose, a primarily secular effect, and must not result in excessive entanglement with religion.⁵¹ A law that failed any one of these three elements would violate the Establishment Clause.

The Supreme Court relied on the *Lemon* test in *Stone*, finding that Kentucky had no secular purpose in mandating Ten Commandments displays in every single school classroom.⁵² Although the Ten Commandments, Bible, or other sacred texts might be studied as part of an English or world religions

49. S.B. 10, 89th Leg., Reg. Sess. § 1.0041(d)–(e) (Tex. 2025). The Arkansas law provides that the Ten Commandments “shall either be donated or purchased solely with funds made available through voluntary contributions.” S.B. 433, 95th Gen. Assemb., Reg. Sess. § 1(b) (Ark. 2025). Otherwise, a school may use public funds. See S.B. 10, 89th Leg., Reg. Sess. § 1.0041(e) (2025) (noting that a school may use district funds to purchase a poster); S.B. 433, 95th Gen. Assemb., Reg. Sess. § 1 (Ark. 2025) (noting that a school may use public funds to purchase a poster when funds are otherwise unavailable).

50. 403 U.S. 602 (1971).

51. *Id.* at 612–13 (“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.’”) (internal citation omitted). The third prong was later folded into the second. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O’Connor, J., concurring) (noting that the Court “folded the entanglement inquiry into the primary effect inquiry”).

52. *Stone v. Graham*, 449 U.S. 39, 40 (1980) (invoking the *Lemon* test); see also *id.* at 41 (“We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public [schoolrooms] had no secular legislative purpose, and is therefore unconstitutional.”).

class or other secular course of study,⁵³ “[p]osting of religious texts on the wall serve[d] no such educational function.”⁵⁴ The *Stone* Court never reached the other two elements because lacking a primarily secular purpose sufficed to render the Decalogue display unconstitutional.

Conservative Justices have long been hostile to the *Lemon* test. Expressing his contempt, Justice Scalia wrote: “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”⁵⁵ In *Kennedy v. Bremerton School District*,⁵⁶ the majority not only insisted that *Lemon* was no longer good law but also dismissed the endorsement test,⁵⁷ which was Justice O’Connor’s modification of the *Lemon* test.⁵⁸ The endorsement analysis asked whether a reasonable person, aware of the context of the government’s action, would conclude that it had the purpose or effect of endorsing religion.⁵⁹ Such state endorsement of one or some religions “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.”⁶⁰ The Roberts Court was already distancing itself from both tests before *Kennedy*,⁶¹ but *Kennedy* can be seen as their death knell.

2. *Coercion*.—Although the current Court has eliminated the *Lemon* and endorsement tests from Establishment Clause jurisprudence, it still recognizes that the government cannot “consistent with a historically sensitive understanding of the Establishment Clause, ‘make a religious observance compulsory.’”⁶² Thus, even the Roberts Court understands that the government cannot force anyone into practicing religion. The Court’s understanding of what constitutes coercion, however, has been significantly scaled back.

53. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

54. *Stone*, 449 U.S. at 42.

55. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

56. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

57. *Id.* at 2427.

58. The test debuted in one of Justice O’Connor’s concurrences and was later adopted by the majority in *County of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 595, 597 (1989).

59. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1994).

60. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

61. See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080–84 (2019) (enumerating *Lemon*’s shortcomings).

62. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022).

At one time, the Supreme Court presumed that government-sponsored prayers or government-sponsored religious displays in public schools were unconstitutionally coercive. Even an opt-out provision did not save the daily prayers in *Engel v. Vitale*⁶³ because, as the Court explained, “[w]hen 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.”⁶⁴ *Lee v. Weisman*⁶⁵ held that unconstitutional coercion emanates not just from the threat of official state punishment (legal coercion), but also from social pressure (social coercion).⁶⁶ Social pressure may come from a teacher or coach or from peers—no student wants to be the odd one out.⁶⁷ That pressure is inescapable for public school students, whose attendance at school is mandatory.⁶⁸ In short, as Justice Kennedy observed, “[t]his pressure, though subtle and indirect, can be as real as any overt compulsion.”⁶⁹

Adults, however, have never benefited from this expansive understanding of unconstitutional coercion as including social coercion.⁷⁰ Furthermore, legal coercion now requires a high evidentiary threshold: Adults claiming coercion must establish that the government actually punished them for failing to participate, such as proving that a town council denied a zoning permit to a town resident who declined to join the council’s pre-meeting prayer.⁷¹ It is not even clear if the Court would find a constitutional violation if an adult begrudgingly joined a government prayer to avoid negative legal repercussions.⁷²

63. 370 U.S. 421 (1962).

64. *Id.* at 43; *see also* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205, 221 (1963) (quoting same while striking down law requiring students to read ten chapters from the Bible every morning).

65. 505 U.S. 577 (1992).

66. *Id.* at 593 (1992).

67. *Id.* (“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.”).

68. *Cf. id.* at 596 (noting “the risk of compulsion is especially high” in “the classroom setting”); *id.* at 598 (“The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation . . .”).

69. *Id.* at 593.

70. *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (“[M]ature adults . . . ‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure.’” (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983))).

71. *Cf. id.* at 589 (rejecting coercion claim because “[n]othing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined.”).

72. *Id.* (“Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support.”).

Despite the Supreme Court's previous mindfulness of minors' vulnerability to pressure in public schools,⁷³ this retrenchment as to what constitutes unconstitutional coercion may apply equally to public school students.⁷⁴ *Kennedy v. Bremerton School District*, which allowed a public school coach to pray midfield after football games,⁷⁵ drops any acknowledgment of the potential pressure from peers or the pressure a coach might indirectly exert by virtue of his position. Instead, it suggests that no coercion existed unless the coach essentially told the students they had to participate: "In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate."⁷⁶ Notably, displays generally do not issue such directives. Rather than show any special solicitude for the underage players, the Court chided that students should be mature enough to respect their coach's religious practices.⁷⁷ Its empathy was reserved for the coach: to compel him to pray on his own time or outside the view of his students is simply hostility to religion.⁷⁸ This analysis may, of course, play out differently for much younger students, but there is no guarantee that age will matter.

3. *History and Tradition.*—With the *Lemon* and endorsement tests eliminated and the coercion test enfeebled, courts must look to history and

73. *Lee*, 505 U.S. at 592 ("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.").

74. It is difficult to draw definite conclusions from *Kennedy* because the Court's analysis applied to a limited set of the public school coach's prayers rather than all of the coach's prayers. Justice Sotomayor noted in her dissent that:

To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history.

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting). The *Kennedy* Court characterized the few prayers it does evaluate as far from coercive regardless of how coercion is defined. *Id.* at 2429 ("Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line."). Still, the fact that the Court went out of its way to avoid addressing problematic facts is itself telling.

75. *Id.* at 2415.

76. *Id.* at 2429–30; *see also id.* at 2431 (noting there is no Establishment Clause issue "where there is no evidence anyone sought to persuade or force students to participate").

77. *Id.* at 2430 ("This Court has long recognized as well that 'secondary school students are mature enough . . . to understand that a school does not endorse,' let alone coerce them to participate in, 'speech that it merely permits on a nondiscriminatory basis.'" (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990))).

78. To prohibit demonstrative religious activity would be "a sure sign that our Establishment Clause jurisprudence had gone off the rails" and evidence government hostility to religion. *Id.* at 2431.

tradition when deciding Establishment Clause challenges to government religious displays and practices. As *Kennedy* held, “[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”⁷⁹ While the Supreme Court has been turning to history and tradition with greater regularity in interpreting the U.S. Constitution, it has been neither consistent nor clear what this encompasses. With the Establishment Clause, history and tradition often means that if a religious practice dates to the founding generation (history), and especially if this practice has continued until today (tradition), then it is most likely perfectly constitutional.⁸⁰ Contemporaneous practices presumptively equate to contemporaneous understanding, and the understanding of the Establishment Clause at the Founding should be the understanding today.⁸¹

Kennedy was not the first time the Court had invoked history and tradition in an Establishment Clause challenge to religious displays and practices. The analysis first appeared in *Marsh v. Chambers*,⁸² a case where the Supreme Court let stand Nebraska’s practice of having a state-paid chaplain open state legislative sessions with prayers.⁸³ The Court reasoned that since the Congress that approved the Establishment Clause also welcomed legislative prayers,⁸⁴ and since this practice has continued from the Founding until the present,⁸⁵ then the legislative prayers could not violate the Establishment Clause.⁸⁶ They noted:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the

79. *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

80. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983) (“Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”).

81. In other words, if a practice represented a hallmark of establishment at the Founding (such as mandating attendance at church or restricting political participation), it would violate the establishment clause today, and if a practice was accepted at the Founding, it would not violate the establishment clause today. *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1609–10 (2022) (Gorsuch, J., concurring); see also *Marsh*, 463 U.S. at 790–91 (“[I]t would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.”).

82. 463 U.S. 783 (1983).

83. *Id.* at 786.

84. *Id.* at 788 (“On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights.”).

85. *Id.* at 790 (“[A]n unbroken practice . . . is not something to be lightly cast aside.” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970))).

86. *Id.*

Establishment Clause of the Amendment to forbid what they had just declared acceptable.⁸⁷

In sum, a history and tradition analysis is now the default. If the original generation allowed a particular practice, then they did not believe it violated the Establishment Clause, and we should follow their lead. Furthermore, not only do unbroken practices that date to the Founding enjoy a presumption of constitutionality, but so too do “monuments, symbols, and practices” that are merely “longstanding.”⁸⁸

II. A Topography of Artful Dodges and How to Avoid Them

The Supreme Court has used various tactics to evade Establishment Clause strictures. They include: (1) classifying the contested religious exercise as private rather than governmental; (2) insisting that the inherently religious practice or display is secular (secular-washing); (3) denying evidence of coercion; and (4) declining to find standing. Moreover, its new history and tradition approach is easily manipulated. Yet, none of these moves are inevitable. Certainly, none need to be deployed in interpreting a state’s own constitution or to uphold a law like Louisiana’s Ten Commandments mandate.

A. *Not Government Speech*

One classic way to pirouette out of an Establishment Clause challenge is to argue that the contested speech or display is not governmental but private. Currently, speech is categorized as either private speech or government speech, and the rules governing each differ significantly. If speech is governmental, then the Establishment Clause applies but not the Free Speech Clause.⁸⁹ If speech is private, however, then it is protected by the Free Speech Clause but not subject to Establishment Clause limits.⁹⁰ The Establishment Clause regulates only what the *government* may or may not do vis-à-vis religion.

I. Previous Cases.—The Supreme Court deployed this maneuver twice recently. The first case, *Shurtleff v. City of Boston*,⁹¹ involved the third flagpole

87. *Id.*

88. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2081–82 (2019) (applying “a presumption of constitutionality for longstanding monuments, symbols, and practices”).

89. The Free Speech Clause protects private speech (but not government speech) from the government. *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467 (2009).

90. Private religious speech may also be protected by the Free Exercise Clause, as seen in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022).

91. 142 S. Ct. 1583 (2022).

in front of Boston City Hall.⁹² Although Boston granted access to this flagpole to private groups,⁹³ it refused to fly Camp Constitution's Christian flag.⁹⁴ According to Boston, flags on the government flagpoles in front of City Hall represented government speech, and flying a Christian flag would lead people to believe it was favoring Christianity in violation of the Establishment Clause.⁹⁵ According to Camp Constitution, Boston had turned the third flagpole into a forum for private speech by allowing other private groups to hoist their flags.⁹⁶ The Court sided with Camp Constitution and held that Boston had discriminated against the private Christian flag in violation of the Free Speech Clause.⁹⁷ By categorizing the flags on the third flagpole as private speech rather than government speech, the court sidestepped the Establishment Clause completely.

The Court made a similar move in 2022's *Kennedy v. Bremerton School District*.⁹⁸ Kennedy was a public high school football coach who insisted on praying in the middle of the football field immediately after games.⁹⁹ Under Free Speech Clause doctrine, the speech of a government employee (like Kennedy) that is made pursuant to official duties is considered government speech.¹⁰⁰ Yet, despite the fact that Coach Kennedy prayed while on duty supervising his players at a school event,¹⁰¹ the majority concluded that the coach was actually on a personal break when he prayed in front of everyone,¹⁰² and that, therefore, his prayers were private speech protected by both the Free Speech Clause and the Free Exercise Clause.¹⁰³ Characterizing

92. The first flagpole flies the American flag, the second the Massachusetts flag, and the third, usually the Boston flag. *Id.* at 1588.

93. Of the 50 guest flags flown between 2005 and 2017, most have been the flags of other nations, "marking the national holidays of Bostonians' many countries of origin." *Id.* at 1588.

94. *Id.* at 1587.

95. *Id.* at 1593.

96. Brief for the Petitioners at 21, *Shurtleff v. City of Bos.*, 142 S. Ct. 1583 (2022) (No. 20-1800); *Shurtleff*, 142 S. Ct. at 1593.

97. *Shurtleff*, 142 S. Ct. at 1593.

98. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

99. *Id.* at 2434 (Sotomayor, J., dissenting); *id.* at 2415.

100. *Id.* at 2423 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)) (explaining that speech pursuant to official duties is "for constitutional purposes at least—the government's own speech").

101. *Id.* at 2443 (Sotomayor, J., dissenting) ("Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game.").

102. *Id.* at 2425 (explaining that "[d]uring the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters" like checking their phones or chatting with family and friends).

103. *Id.* at 2433 ("Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment."). Although the majority suggests the school was attempting to bar his prayers, it was just trying to move them to a different time or place. *Id.* at 2439

the coach's postgame prayers as private rather than governmental reshaped the analysis and doomed any Establishment Clause claim. It also shifted the focus from the rights of the students to those of their coach.

2. *Applied to Louisiana's Ten Commandments.*—It would seem pointless to argue that state-mandated Ten Commandments hung in public school classrooms do not represent the government's own message. But a state may try anyway. Louisiana's law specifies that the Ten Commandments should be privately funded,¹⁰⁴ perhaps in anticipation of an argument that it is not the government speaking but the private individuals who paid for the displays.¹⁰⁵ But given that state law has ordered the display and specified in minute detail exactly how it is to be worded and presented, this argument should be categorically rejected.¹⁰⁶ Moreover, nothing indicates that the state has made public school walls a forum open to any viewpoints besides the ones it has prescribed.¹⁰⁷ Of all the various tactics used to defend laws like Louisiana's (or Arkansas's or Texas's), this one is least likely to gain traction.

B. *Not Religious: Secular-Washing*

Since the government does not run afoul of the Establishment Clause for promoting non-religious messages, recharacterizing inherently religious displays as not really religious provides another classic Establishment Clause dodge. One might call this secular-washing. Although *Stone v. Graham* was unequivocal about the religious nature of classroom Ten Commandments, later Supreme Court cases muddy the waters by insisting that religiosity (or secularity) depends on the specific context. Nonetheless, the context of Louisiana's Ten Commandments should negate claims of their secularity.

1. *Previous Cases.*—The *Lemon* and endorsement tests prohibited displays with a predominantly religious purpose or effect. Even when these tests were in full force, the Supreme Court occasionally held that government-sponsored displays of inherently religious symbols such as a nativity scene or the Ten

(Sotomayor, J., dissenting) (“Again, the District emphasized that it was happy to accommodate Kennedy’s desire to pray on the job . . .”).

104. LA. REV. STAT. ANN. § 17:2124(B)(5) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025); *see also* TEX. EDUC. CODE ANN. § 1.0041.

105. Such funding also prevents the government from directly funding religious proselytization, which would violate the Establishment Clause. *Town of Greece v. Galloway*, 572 U.S. 565, 585 (2014) (noting that government-sponsored proselytization would violate the Establishment Clause).

106. If an eclectic collection of donated monuments in public parks can be seen as government speech, *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009), then surely a carefully curated selection of donated displays in public schools can.

107. *See Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1593 (2022) (finding that Boston created a forum for private speech on its third flagpole by flying flags for various private organizations).

Commandments were actually secular and therefore complied with the Establishment Clause.

The nativity scene (also known as a crèche) depicts the birth and adoration of Jesus Christ and is sacred in Christianity.¹⁰⁸ “The crèche . . . is clearly a symbol of the Christian faith. It depicts one of the most fundamental beliefs of Christianity—the birth of Jesus as the birth of the Messiah.”¹⁰⁹ Pope Francis has written that “[t]he nativity scene is like a living Gospel rising up from the pages of sacred Scripture.”¹¹⁰ It portrays the infant Jesus in a manger, surrounded by his parents Mary and Joseph as well as those who have come to worship him, including local shepherds, angels who harkened his arrival, and Magi bearing gifts from the East.¹¹¹ It illustrates how God sent his son to Earth to “forgive[] us and to free[] us from our sins.”¹¹²

Nonetheless, the Court has held that, under the right circumstances, a nativity scene is not primarily religious. Granted, a government crèche in the grand staircase of a county courthouse complete with an angel bearing a banner proclaiming “Gloria in Excelsis Deo” is unconstitutional.¹¹³ But if surrounded by non-religious symbols of the Christmas holiday like Santa Claus, reindeer, and colored lights,¹¹⁴ then the nativity scene merely represents an attempt to celebrate a secular national holiday¹¹⁵ by showing its

108. Though strictly speaking the birth of Christ and the adoration of the Magi are separate, they are closely related and regularly depicted together. Kathleen Brady, *What Nativity Scenes Tell Us About the Evolution of Christianity*, SMITHSONIAN MAG. (Dec. 20, 2022), <https://www.smithsonianmag.com/history/what-nativity-scenes-tell-us-about-the-evolution-of-christianity-180981332/> [<https://perma.cc/6WJN-LYW6>].

109. Case Comment, *Government-Sponsored Nativity Scenes: Lynch v. Donnelly*, 98 HARV. L. REV. 174, 181 (1984); see also *Lynch v. Donnelly*, 465 U.S. 668, 708 (1984) (Brennan, J., dissenting) (“It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption.”).

110. CN Admin, *The Christmas Creche—A Tradition that Brings Joy*, CATHOLIC NEWS (Dec. 4, 2019), <https://catholicct.org/2019/12/04/the-christmas-creche-a-tradition-that-brings-joy/> [<https://perma.cc/KH9X-RNCF>] (quoting Pope Francis, *Apostolic Letter Admirable Signum of the Holy Father Francis on the Meaning and Importance of the Nativity Scene*, THE HOLY SEE (Dec. 1, 2019), https://www.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco-lettera-ap_20191201_admirabile-signum.html [<https://perma.cc/GJR5-L6QA>]).

111. Jennifer Burke, *Christmas Creches Help Catholics Enter into Nativity Story*, CATHOLIC COURIER (Nov. 30, 2021), <https://catholiccourier.com/articles/christmas-creches-help-catholics-enter-into-nativity-story/> [<https://perma.cc/XGG6-F3W8>].

112. CN Admin, *supra* note 110 [110](#).

113. *Cnty. of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 601–02 (1989) (holding the display of crèche unconstitutional because “[the county] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ”).

114. The crèche at issue in *Lynch* was surrounded by “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, [and] a large banner that reads ‘SEASONS GREETINGS.’” *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

115. *Cf. Cnty. of Allegheny*, 492 U.S. at 579 (“As observed in this Nation, Christmas has a secular, as well as a religious, dimension.”).

historical origins.¹¹⁶ According to the Court, based on nothing but its *ipse dixit*, the display-with-crèche “engenders a friendly community spirit of good will in keeping with the season.”¹¹⁷

Even the Latin cross—the preeminent symbol of Christianity that memorializes the ultimate sacrifice of Jesus Christ¹¹⁸—was transformed into something secular by the Supreme Court. The centrality of the cross to Christianity cannot be gainsaid. It is the symbol Christians wear to demonstrate their faith.¹¹⁹ It is the symbol that adorns Christian churches and marks Christian graves.¹²⁰ In short, “[t]he Latin cross is the foremost symbol of the Christian faith, embodying the ‘central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life.’”¹²¹

Still, in *American Legion v. American Humanist Association*,¹²² the Supreme Court rejected an Establishment Clause challenge to the government’s 40-foot-high Latin cross in the middle of a busy intersection.¹²³ The Court insisted that “there are many contexts in which the [Latin cross] has also taken on a secular meaning.”¹²⁴ According to the Court, despite no secular objects in its immediate vicinity, this particular monumental cross nevertheless served as a memorial for those who sacrificed their lives in World War I.¹²⁵ Indeed, a Latin cross is “widely associated with that wrenching event.”¹²⁶ In short, it was simply a World War I memorial, not a religious memorial. The Court adds yet another layer of secularity by

116. Lynch, 465 U.S. at 680 (“The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”). The suggestion that the nativity scene is an actual historic occurrence is already problematic, as Christianity’s mythology does not comprise history. Also, the assumption that Christmas is a secular holiday is not a belief universally shared.

117. Lynch, 465 U.S. at 685.

118. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2107–08 (2019) (Ginsburg, J., dissenting).

119. *Id.* at 2107 (Ginsburg, J., dissenting) (“Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity.”).

120. *Id.* at 2108 (Ginsburg, J., dissenting) (“Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. . . . As a commemorative symbol, the Latin cross simply ‘makes no sense apart from the crucifixion, the resurrection, and Christianity’s promise of eternal life.’”).

121. *Id.* at 2104 (Ginsburg, J., dissenting) (internal citation omitted).

122. 139 S. Ct. 2067 (2019).

123. *Id.* at 2077–78. Although the Supreme Court majority describes it as 32-feet, that measurement excludes its base. Most reports acknowledge it is 40-feet tall, including the American Legion. *Peace Cross*, AMERICAN LEGION, <https://www.legion.org/memorials/united-states/maryland/united-states-maryland-peace-cross> [<https://perma.cc/P9TN-9UFN>].

124. *Id.* at 2074.

125. *Id.* at 2086 (“[A] World War I cross remains a memorial to the fallen.”); *id.* at 2089 (“As we have explained, the Bladensburg Cross carries special significance in commemorating World War I.”).

126. *Id.* at 2076; *see also id.* at 2085 (“[T]he cross had become a symbol closely linked to the war.”).

proclaiming the monument has become part of the (presumably secular) cultural heritage of the town¹²⁷—a veritable historical landmark.¹²⁸

Finally, the Court has already worked this legerdemain—recharacterizing something inherently religious as promoting secular messages—with the Ten Commandments.¹²⁹ In *Van Orden v. Perry*,¹³⁰ the Court rejected an Establishment Clause challenge to a granite monolith inscribed with the Ten Commandments at the Texas State Capitol.¹³¹ The Court’s secular-washing described the Ten Commandments as commemorating the importance of religion to American history and the American people: “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.”¹³² More specifically, the Ten Commandments are important to American heritage due to their influence on our legal system. The *Van Orden* Court highlighted the depiction of Moses holding the Decalogue in Hebrew in the Supreme Court’s own courtroom.¹³³ The Court does not deny that the Ten Commandments are religious, “[b]ut Moses was a lawgiver as well as a religious leader.”¹³⁴

2. *Applied to Louisiana’s Ten Commandments.*—A lower court hoping to skip a historical analysis could make this secular-washing move. Louisiana’s legislative history tees up this claim by citing Supreme Court precedent that secularizes the Ten Commandments.¹³⁵ The problem, however, is that the mandated display lacks the necessary context that might foreground potential secular aspects of the Ten Commandments as opposed to its inherent religiosity.

The Louisiana law emphasizes that its mandated text is identical to the Ten Commandments upheld in *Van Orden*¹³⁶ and repeats *Van Orden*’s claim

127. *See id.* at 2089 (“[W]ith the passage of time, [the cross] has acquired historical importance.”); *id.* at 2083 (“[A] community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.”).

128. *Id.* at 2090 (“For others still, it is a historical landmark.”).

129. Not always. Context very much informed the Supreme Court decisions about Ten Commandment displays. *See Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam) (holding that nothing in the context detracted from the undeniably sacred text); *McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 868–69 (2005) (same).

130. 545 U.S. 677 (2005).

131. *Id.* at 681, 700.

132. *Id.* at 686 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)); *see also id.* at 692 (Thomas, J., concurring) (explaining that the Court “properly recognizes the role of religion in this Nation’s history and the permissibility of government displays acknowledging that history”).

133. *Id.* at 688 (“[W]ithin our own Courtroom . . . Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze.”).

134. *Id.* at 690.

135. *See* LA. REV. STAT. ANN. § 17:2124(A)(6) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025).

136. *Id.* at (A)(6).

that the Ten Commandments played an important historical role in the United States.¹³⁷ The legislative findings also cite dicta from *American Legion* that “the Ten Commandments ‘have historical significance as one of the foundations of our legal system.’”¹³⁸ As a result, courts keen to uphold the Decalogue law without delving deeply into historical practices have ample precedent to convert sacred into secular.

Of course, Louisiana’s legislative findings omit the Supreme Court cases holding that the inherent religiosity of the Ten Commandments had not been overcome by the context of their display.¹³⁹ Context is key. While the Ten Commandments may in theory embody secular aspects of our heritage, presenting the Ten Commandments on school walls in the manner mandated by Louisiana (and Arkansas and Texas) does not. Accordingly, lower courts may easily reject this secular-washing if it comes before them.

The starting point for any analysis is the indisputable fact that, as stressed in *Stone*, the Ten Commandments are holy religious text:¹⁴⁰ “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”¹⁴¹ The first five lines are explicit religious declarations and obligations: “I am your God; Have no other gods; make no graven images, shun blasphemy, keep the Sabbath holy.”¹⁴² The rest are divinely mandated.¹⁴³ For example, respecting your mother and father may be a secular virtue, but the Ten Commandments require it so that “thy days may be long upon the land which the Lord thy God giveth thee.”¹⁴⁴ These Commandments from God, therefore, are primarily religious, not secular, unless the context suggests otherwise.¹⁴⁵

None of the special contexts that the Court has recognized as foregrounding secular associations are present in Louisiana. The Commandments are not depicted in symbolic form as the Decalogue on the Supreme Court walls, where Moses is shown holding the tablets with no

137. *Id.* at (A)(3)–(4).

138. *Id.* at (A)(3) (quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2083 (2019)).

139. *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (striking down Kentucky’s law mandating display of the Ten Commandments in every classroom).

140. The Bible is literally a holy text. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 (1963) (“Surely the place of the Bible as an instrument of religion cannot be gainsaid . . .”).

141. *Stone*, 449 U.S. at 41.

142. § 17:2124(B)(2).

143. *Id.*

144. *Id.*

145. *McCreary Cnty. v. Am. C. L. Union of Kentucky*, 545 U.S. 844, 857 (2005) (“[U]nder *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry ‘a secular message.’”).

visible text in English.¹⁴⁶ On the contrary, the Ten Commandments on Louisiana classroom walls are just the opposite, with text but no tablet.¹⁴⁷

The Ten Commandments posters are not part of a larger collection of historical figures or artifacts either. The Supreme Court’s Moses lives among seventeen other lawgivers, most of whom are secular.¹⁴⁸ *Van Orden*’s Ten Commandments monument at the Texas State Capitol is among thirty-eight other monuments and historical markers that commemorate the “people, ideals, and events that compose Texan identity.”¹⁴⁹ In contrast, like the public school Ten Commandments struck down in *Stone*, Louisiana’s Ten Commandments stand alone.¹⁵⁰

Louisiana might respond—and has argued—that the secular context is provided by the other foundational historical texts accompanying the Ten Commandments.¹⁵¹ The statute explicitly approves the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance.¹⁵² The first problem is that these documents are merely optional.¹⁵³ The only mandated text is the Ten Commandments. Even if posted alongside others, the Decalogue must remain “the central focus.”¹⁵⁴ The second problem is that the three approved documents are not especially secular. In fact, the legislative findings showcase their connection to religion: the Mayflower Compact “affirmed the link between civil society and God”¹⁵⁵ and the Northwest Ordinance emphasized that religion was “necessary to good government and

146. In fact, the writing is in Hebrew, and only Commandments six through ten are visible, and then only partially. Nathaniel Segal, Religious Symbols Inside and Outside U.S. Supreme Court Building (2014), <http://nathanielsegal.mysite.com/TenCommandments/10SupremeCourtBuilding.html> [https://perma.cc/DYQ6-NB4K].

147. See *McCreary Cnty.*, 545 U.S. at 868 (noting that unconstitutional Ten Commandments “set out a text of the Commandments as distinct from any traditionally symbolic representation”).

148. Among the other lawgivers are Hammurabi, Draco, Confucius, Charlemagne, Louis IX, Sir William Blackstone, John Marshall, and Napoleon. Segal, *supra* note 146, 146.

149. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (internal citation omitted).

150. *McCreary Cnty.*, 545 U.S. at 868 (“*Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message.”); LA. REV. STAT. ANN. § 17:2124(B)(1) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (2025).

151. *Roake v. Brumley*, 756 F. Supp. 3d 93, 162 (M.D. La. 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025). Despite the proposed mockups submitted in litigation, it is not clear whether the law allows other documents besides those listed in § 17:2124(B)(4).

152. § 17:2124(B)(4). This argument is not even available in Texas, which prohibits any accompanying text. TEX. EDUC. CODE ANN. § 1.0041(b)(1) (2025).

153. § 17:2124(B)(4) (“A public school may also display the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance . . . along with the Ten Commandments.”).

154. *Id.* at (B)(1); *Roake*, 141 F.4th at 626 (citing H.B. 71, 2024 Gen. Assemb., Reg. Sess. § 2122(B)(1) (La. 2024)).

155. § 17:2124(A)(7).

the happiness of mankind.”¹⁵⁶ The third problem is that the greenlit documents oddly exclude (more secular) documents truly foundational to the United States (such as the U.S. Constitution)¹⁵⁷ or to Louisiana (such as the Napoleonic code).¹⁵⁸

Nor are the Ten Commandments integrated into the school’s secular curriculum. From its earliest Establishment Clause school decisions, the Supreme Court has made clear that the Bible and its Ten Commandments may be part of a secular course of study, such as a literature or comparative religion class.¹⁵⁹ Notwithstanding its secular-washing “context statement,”¹⁶⁰ a Ten Commandments poster on the wall of every public school classroom is not that.

C. *No Coercion*

The Supreme Court has consistently affirmed that the government cannot, consistent with the Establishment Clause, force a person into observing the state’s favored religion.¹⁶¹ However, the Roberts Court’s view of coercion has become so narrow that it is likely to find that displays cannot be coercive. At the same time, the Court has not explicitly overruled its decisions that exhibited greater sensitivity to potential coercion of children in public schools, permitting courts to apply a more realistic understanding of coercion in that context.¹⁶²

156. *Id.* at (A)(8). And, of course, the Declaration of Independence famously starts: “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.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

157. *Cf. McCreary Cnty. v. Am. C.L. Union of Ky*, 545 U.S. 844, 872 (2005) (“In a collection of documents said to be ‘foundational’ to American government, it is at least odd . . . to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787.”).

158. Chelsea Brasted, *Does Louisiana Use the Napoleonic Code*, TIMES-PICAYUNE (Feb. 4, 2019), https://www.nola.com/news/does-louisiana-use-the-napoleonic-code-louisianswers/article_efcb7e79-99e1-53df-8e74-6b432ed29b28.html [<https://perma.cc/VEK8-FJQW>] (explaining that while Louisiana public law is the same as the rest of the states, its private law is based on civil law and that roughly 70–75% of the Louisiana Civil Code borrows to some degree from the Napoleonic Code).

159. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“It certainly may be said that the Bible is worthy of study for its literary and historic qualities.”); *see also Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (“This is not a case in which the Ten Commandments are 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.”).

160. The mandated “context statement” asserts that the Ten Commandments “were a prominent part of American public education for almost three centuries.” LA. REV. STAT. ANN. § 17:2124(B)(3). For a deconstruction of these claims, see *infra* notes 246–57 and accompanying text.

161. *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (“It is an elemental First Amendment principle that government may not coerce its citizens ‘to support or participate in any religion or its exercise.’”).

162. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

1. *Previous Cases.*—Recall that with regard to adults, the Court in *Town of Greece*¹⁶³ demanded evidence that someone was punished by the state for failing to participate in a religious exercise before it would find unconstitutional coercion.¹⁶⁴ Although the Court did not set the bar quite so high in *Kennedy*, it declined to consider social pressure, either from a popular and influential coach or from a player’s peers.¹⁶⁵ Then again, the *Kennedy* Court based its ruling on just a few of Kennedy’s prayers rather than all of them, choosing those least likely to raise questions of indirect pressure.¹⁶⁶ Still, *Kennedy* suggested that unless the coach instructed a student to pray, presumably with consequences lurking in the background, then there was no unconstitutional coercion. Because “Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate,”¹⁶⁷ the Establishment Clause remained unbreached.

2. *Applied to Louisiana’s Ten Commandments.*—Because a “passive display” will never direct a student into any activity, it may be impossible to claim unconstitutional coercion when challenging religious displays, no matter their context or location. That the Supreme Court regularly describes religious displays as “passive” suggests they do so precisely to evade charges of coercion.¹⁶⁸ Louisiana has picked up this baton in defending against coercion: “Plaintiffs’ children are not required to do anything, nor does H.B. 71 require displays to be read, discussed, or even placed in an especially visible part of the classroom; they are simply passive displays.”¹⁶⁹

Again, a lower court does not need to accept *Kennedy*’s invitation to reject out-of-hand that a religious display might be coercive. Although no one has specifically ordered students to read and follow the Ten Commandments, the law creates the conditions that compel them to do so nonetheless.¹⁷⁰ Indeed, the district court and Fifth Circuit agreed with plaintiffs that “[p]ermanently posting the Ten Commandments in every Louisiana public-school classroom—rendering them unavoidable—unconstitutionally pressures students into religious observance, veneration,

163. *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

164. *See supra* notes 70–72 and accompanying text.

165. *See supra* notes 73–76 and accompanying text. Although recall, the Supreme Court ensured it only considered a very narrow set of prayers where indirect coercion was less likely.

166. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (noting that the majority ignored the history of Kennedy’s prayers).

167. *Id.* at 2429–30.

168. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (describing Ten Commandments monolith as a “passive monument”); *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (describing the crèche as a “passive symbol”).

169. *Roake v. Brumley*, 756 F. Supp. 3d 93, 171–72 (M.D. La. Nov. 12, 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025).

170. *Cf. Roake*, 141 F.4th at 637 (noting that government religious messages in the public school context “carr[y] a particular risk of indirect coercion”) (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992)).

and adoption of the state's favored religious scripture."¹⁷¹ The state mandates that young, impressionable students attend school, and then forces these students to read the Ten Commandments all day long, every school day, by making them inescapable.¹⁷² In effect, the state is coercing religious observance.

D. No Standing

One of the easiest ways for the Court to reject an Establishment Clause challenge is to avoid the substantive issues altogether by denying the challenger standing to sue.¹⁷³ Establishment Clause suits are uniquely vulnerable to this age-old tactic for a couple of reasons. One, the structural component of the Establishment Clause has necessitated more forgiving standing requirements and that leniency is ending. Two, the Court's increasingly parsimonious view of what harms are caused by government religion, especially government religious displays, spills over from the merits into standing.

1. Previous Cases.—Standing is a constitutional requirement for claims filed in federal court. Article III of the U.S. Constitution empowers federal courts to hear cases and controversies.¹⁷⁴ Without standing, a court would be exceeding its constitutional authority by issuing an advisory opinion instead of deciding a case or controversy. Among the basic requirements for standing is that the plaintiff must have suffered an injury-in-fact.¹⁷⁵ This requires a particularized injury (as opposed to a generalized grievance) that harms plaintiffs in a way it does not harm everyone else.¹⁷⁶ The harm must also be sufficiently concrete to be a legally cognizable injury-in-fact.¹⁷⁷

171. *Roake*, 756 F. Supp. 3d at 117, *aff'd*, 141 F.4th at 637.

172. Remember, students do not simply walk past the Decalogue once a day. It is featured in every single one of their classrooms. *Roake*, 141 F.4th at 614, 635 (“[I]mpressionable students will confront a display of the Ten Commandments for nearly an hour of every school day of their public school education . . .”).

173. See, e.g., Note, *Article III—Standing—Comstock Act*, 138 HARV. L. REV. 295, 299 (2024) (“Considering how the Supreme Court manipulates standing doctrine to reach or avoid the merits in certain cases, the denial of standing in *Alliance for Hippocratic Medicine* was likely a strategic move on the part of the Court.”) (citing *Food & Drug Admin. v. All. for Hippocratic Med.*, 144 S. Ct. 1540 (2024)).

174. U.S. CONST. art. III, § 2, cl. 1.

175. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). An injury-in-fact must also be actual (already occurring) or imminent (about to occur). In addition to an injury-in-fact, standing requires that the injury must be traceable to the defendant and that the court must be able to remedy the harm. *Id.* at 560–61.

176. *Id.*

177. *Id.*

In *Elk Grove Unified School District v. Newdow*,¹⁷⁸ a father mounted an Establishment Clause challenge to a school's daily recitation of the Pledge of Allegiance that had children declare that the United States was one nation "under God."¹⁷⁹ The Supreme Court held that the father lacked prudential standing since the mother, who did not oppose the Pledge, had sole legal custody.¹⁸⁰ The Court thereby avoided the merits question.

Nowadays, the Court is more likely to conclude that plaintiffs lack constitutional standing because they have not suffered an injury-in-fact, especially if it revokes the prior leniency necessitated by the structural component of the Establishment Clause: "Establishment Clause standing doctrines are looser than most, for the prudential reason that the Clause would not be judicially enforced if traditional Article III rules applied."¹⁸¹ The structural component is that aspect of the Establishment Clause that serves more as a limit on what the government is allowed to do rather than as a direct protection of individual rights.¹⁸² This leniency has appeared in two types of cases.¹⁸³ In funding cases, taxpayers were granted standing.¹⁸⁴ In religious practice and display cases like those involving a Ten Commandments display, the Court allowed people who had been personally exposed to sue.¹⁸⁵

178. 542 U.S. 1 (2004).

179. *Id.* at 7–8.

180. *Id.* at 17–18 ("We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court."); see also *id.* at 12 ("[W]e have explained that prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . .'" (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))).

181. Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 119 (2008); see also Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607, 609 (2013) ("Because the Court employs the no-establishment principle much like a structural clause separating church and state, that boundary can be transgressed without anyone having suffered individualized injury-in-fact. That in turn has led the Supreme Court to respond by adopting these specialized rules of reduced-rigor standing.").

182. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2 (1998); see also *id.* at 3 ("[F]or government to avoid exceeding a structural restraint is a matter of limiting its activities and laws to the scope of its powers."). Of course, a particular limit can work in both ways.

183. Esbeck, *supra* note 181, at 608.

184. Specifically, the Supreme Court held that it sufficed for taxpayers to challenge the use of their taxpayer money for government expenditures that raised Establishment Clause issues. *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968).

185. Esbeck, *supra* note 181, at 619 (noting that out of sixteen unwanted exposure cases the Supreme Court had so far decided, plaintiffs' standing was not challenged in twelve of them).

In addition to chipping away at taxpayer standing,¹⁸⁶ the Roberts Court has become much stingier in recognizing what counts as an injury-in-fact. Previous Courts regularly reached the merits of challenges to government-sponsored religion, whether it be religious invocations or religious displays, without fretting about standing.¹⁸⁷ They did not doubt that such actions could violate the Establishment Clause.¹⁸⁸ The current Court believes otherwise. As far as a majority of today's Justices are concerned, the harm to those protesting Christian prayers and especially Christian displays is nothing more than "offense" and "hurt feelings,"¹⁸⁹ and as Justice Gorsuch asserts, "this Court has never endorsed the notion that an 'offended observer' may bring an Establishment Clause claim."¹⁹⁰

Earlier decisions, however, had not reduced the injury of the government's Christian prayers or Christian displays to "offense" and "hurt feelings." Instead, they had recognized the potential harm to both religious liberty and religious equality. When the state puts its imprimatur on a favored religion, religious minorities experience social pressure to conform, putting their religious liberty in jeopardy.¹⁹¹ And as the endorsement test used to

186. *Flast v. Cohen* originally applied whenever the plaintiff taxpayer had contributed to a religious endeavor. 392 U.S. 83, 102–03. In *Hein v. Freedom from Religion Foundation, Inc.*, the Supreme Court limited taxpayer standing to cases where the legislature, as opposed to the executive, had approved the government funding for a program and the program expected the money to go to religious recipients. *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 608–09 (2007) (plurality opinion); Esbeck, *supra* note 181, at 612 ("[T]he *Hein* plurality insisted that taxpayer standing be allowed only when the legislative program in question expressly contemplated that the appropriated monies would go to religion."). The Court further limited taxpayer standing in Establishment Clause cases by holding it did not apply to tax credits as opposed to expenditures. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011).

187. See *supra* note 185 and accompanying text.

188. Among the religious exercise/religious display cases were several that involved public schools. See *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (striking down daily prayers in New York public schools); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (striking down Kentucky's requirement to post Ten Commandments in public school classrooms); *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987) (striking down Louisiana law requiring public schools to teach creationism in science class whenever evolution was taught); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (striking down clergy-led invocations at public school graduation ceremony). The government's challenge to standing was rejected in *Abington School District v. Schempp*, 374 U.S. 203 (1963), which struck down a law requiring daily recitation of Ten Bible verses. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205, 224 n.9 (1963).

189. See, e.g., *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 58 (2019) (describing plaintiffs as offended by government Christian cross); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 589 (2014) (reducing harm of government Christian prayers to offense: "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum.").

190. *City of Ocala v. Rojas*, 143 S. Ct. 764, 764 (2023) (Gorsuch, J., statement respecting the denial of certiorari) (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2101 (2019)).

191. For example, a Jewish student who feels pressured into joining Coach Kennedy's Christian prayers has compromised his own faith, which does not espouse the divinity of Jesus.

recognize, the state favoring one dominant religion like Christianity inevitably sends a message that religious minorities are second-class citizens, thereby compromising their equality and equal standing in the community: “[G]overnment cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”¹⁹²

By diminishing the harm of religious displays to “hurt feelings,” the Roberts Court aims to eliminate standing to challenge them. Certainly Justice Gorsuch announces this goal in his *American Legion* concurrence, which is devoted to explaining why plaintiffs should not have had standing to challenge the government’s monumental Latin cross.¹⁹³ Gorsuch attributes expansive standing to *Lemon*’s logic (rather than a structural Establishment Clause),¹⁹⁴ declares *Lemon* is gone,¹⁹⁵ and concludes that therefore standing based on the observer’s offense should also vanish.¹⁹⁶ It is probably only a matter of time before the majority wholeheartedly adopts this position.

2. *Applied to Louisiana’s Ten Commandments.*—A lower court motivated to rid itself of an Establishment Clause claim without having to reach the merits may latch onto Justice Gorsuch’s reasoning when faced with a religious display. For religious exercises, there is at least a theoretical concrete and individualized injury: plaintiffs might be able to prove they were coerced into participating.¹⁹⁷ No such injury exists vis-à-vis religious displays if the only potential harm is “offense.” According to this logic, urged by Louisiana, classroom Decalogue

192. *Cnty. of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 627 (1989); see also Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 317 (2015) (“[T]here is a world of difference between offending someone’s sensibilities and excluding them from equal citizenship.”); *id.* (“The *Town of Greece* plaintiffs did not sue because they were ‘affronted’ by hearing the name of Jesus. . . . The plaintiffs sued because the government, at the seat of government, at the moment of citizen self-governance, was sending the message that they were second-class citizens.”).

193. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring) (“[S]uits like this one should be dismissed for lack of standing.”). Justice Gorsuch repeats his claims in a case where the police department organized a prayer vigil, complete with police chaplains and Christian prayers. *Rojas*, 143 S. Ct. at 764.

194. *Am. Legion*, 139 S. Ct. at 2101 (“Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court’s decision in *Lemon v. Kurtzman*.”).

195. *Id.* at 2101 (“*Lemon* was a misadventure.”).

196. *Id.* at 2102 (“With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing. . . .”); see also *Rojas*, 143 S. Ct. at 765 (“[W]ith the demise of *Lemon*’s reasonable observer test, little excuse now remains for the anomaly of offended observer standing.” (internal quotations omitted)).

197. *Cf. Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring) (noting that even if offended observer standing is eliminated, “a public school student compelled to recite a prayer will still have standing to sue”). Note the potential narrowness of this conception of standing: The student actually coerced into joining the school-sponsored religious exercise has standing but the one subjected to the pressure the school practice engenders yet resists may not.

posters, as “offensive” as they may be, do not force students to do anything nor deprive them of anything.¹⁹⁸ Under Justice Gorsuch’s theory, if there is no legally cognizable harm, then there is no standing.¹⁹⁹

This conclusion is not inevitable.²⁰⁰ Justice Gorsuch’s views on standing have not yet been officially adopted by the entire Court;²⁰¹ the Fifth Circuit actually describes them as “nonbinding, minority-view” opinions.²⁰² In short, the Supreme Court as a whole has not yet held that standing is out of reach to those raising Establishment Clause challenges to laws mandating religion in public schools. Moreover, because the weight of Supreme Court precedent supports standing, a lower court may decline Justice Gorsuch’s invitation and instead cite to those many prior cases to find standing and continue to the merits.

E. *History and Tradition*

To the extent it reaches the merits of an Establishment Clause challenge, the Supreme Court will perform a history and tradition analysis.²⁰³ Consequently, a court may, as the Supreme Court has in the past, construct the history and uncover the tradition it needs to reach its desired outcome. This Article cannot cover all the ways the Supreme Court manipulates history and tradition, but it will highlight a few.²⁰⁴ One is to cherry-pick history and tradition. Another is to opportunistically invoke the test, relying on it when it bolsters the Court’s conclusion and ignoring it when it does not. Yet

198. *Roake v. Brumley*, 756 F. Supp. 3d 93, 172 (M.D. La. 2024) (“Children may be offended, but AG Defendants maintain that, under Kennedy, ‘offense does not equate to coercion.’” (internal citation omitted)), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025).

199. Note that Louisiana avoids taxpayer standing by having the Ten Commandments privately funded. *Roake*, 756 F. Supp.3d at 113 (noting that H.B. 71 permits schools to accept donated Ten Commandments displays and does not require use of public funds); *id.* at 215 (reiterating that plaintiffs must show a concrete and particularized injury-in-fact to establish Article III standing).

200. Notably, Article III standing requirements do not apply to state courts deciding state constitutional issues. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 26, at 501 (“[S]tate courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts.”).

201. Justice Thomas did join Justice Gorsuch’s concurrence in *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch & Thomas, JJ., concurring).

202. *Roake*, 141 F.4th at 636.

203. Coercion is still a factor, but one the Roberts Court will probably conclude is inapposite when evaluating religious displays. See subpart II(C) (describing how the Supreme Court is likely to find that passive monuments cannot coerce).

204. There are plenty of law reviews critiquing the Court’s use and misuse of history and tradition in its Establishment Clause decisions. *E.g.*, Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 728–29 (2009); Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 620 (2019); Steven K. Green, *The Supreme Court’s Ahistorical Religion Clause*, 73 BAYLOR L. REV. 505, 507 (2021).

another is to play with the level of generality: Is the Court meant to examine the history and tradition of government Ten Commandments? Ten Commandments in schools? Or Ten Commandments posters in public schools? The bottom line is that these three moves alone allow a court to reach its desired result.

I. Manipulations

a. Cherry-Picking History and Tradition.—The first Supreme Court establishment case to explicitly rely primarily on history and tradition also provides a fine example of cherry-picking historical facts.²⁰⁵ In *Marsh v. Chambers*, a taxpayer-funded chaplain gave nonsectarian prayers at the opening of Nebraska’s legislative sessions.²⁰⁶ A legislator argued that these government prayers violated the Establishment Clause.²⁰⁷ The majority held that the Founding generation thought such prayers did not violate the Establishment Clause, and therefore neither should we.²⁰⁸ The Court pointed to the Founders’ practices as proof of the Founders’ beliefs: the same Congress that approved the Establishment Clause also hired a congressional chaplain, so naturally those Founders did not think there was any constitutional infirmity.²⁰⁹ Moreover, the Court emphasized, the tradition of legislative prayers has continued to this day.²¹⁰

Other historical evidence was left out or glossed over. For example, if practices reveal constitutional meaning,²¹¹ perhaps the more telling historical practice was the omission of prayers during the Constitutional Convention, when the Constitution was in sharp focus.²¹² The majority also downplays the fact that many in the Founding generation expressed their belief that government prayers did violate the Establishment Clause; among them is

205. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (“The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”).

206. *Id.* at 784–85.

207. *Id.* at 785.

208. *Id.* at 790–91 (“[I]t would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.”).

209. *Id.* at 788 (“Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”).

210. *Id.* at 792 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society [and is constitutional].”).

211. *But see supra* Part IV (arguing otherwise).

212. *Marsh* 463 U.S. at 787; *but see Marsh* 463 U.S. at 787 n.6.

James Madison, the Founder who drafted the Establishment Clause.²¹³ In truth, history (and tradition) is sufficiently rich and contradictory that either side could find support for their claims.

b. Ignoring History and Tradition.—Another common tactic is to avoid a dive into history and tradition when inconvenient. *American Legion v. American Humanist Association* showcases this approach. While the case served as a harbinger of *Lemon*'s demise and its replacement with a history and tradition test,²¹⁴ the Court never actually applied the latter test to government Latin crosses. That is, the Court did not ask whether there was an unbroken history and tradition, dating to the Founding (or at least Reconstruction, when the Establishment Clause was made applicable to the states), of government Latin crosses generally or those commemorating war dead specifically.²¹⁵ If it had, the answer would be a resounding no. Instead, the Court looked only to the history surrounding the monumental cross in question to secular-wash the inherently religious symbol of Jesus's sacrifice into a secular memorial to Americans who died fighting in World War I.²¹⁶

Town of Greece v. Galloway also avoids a full history and tradition analysis, but by looking to precedent. The town of Greece had not always opened its town council meetings with prayers.²¹⁷ That practice only began with a new town supervisor.²¹⁸ But once started, the prayers by volunteer chaplains were explicitly and almost exclusively Christian.²¹⁹ Under a history and tradition approach, which *Town of Greece* endorsed,²²⁰ one might expect the Court to examine the history of Greece or small towns like Greece for evidence of government-sponsored Christian prayers at the beginning of

213. *Id.* at 815 (Brennan, J., dissenting).

214. The Court criticized *Lemon* at length, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080–85, and asserted that the “Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” *Id.* at 2087 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

215. There is debate over whether the relevant historical era is the Founding, when the Bill of Rights (including the Establishment Clause) were ratified, or Reconstruction, when the Fourteenth Amendment (whose Due Process Clause made the Establishment Clause applicable to the states) was. This uncertainty also lets courts choose the more favorable era. *See, e.g.*, Corbin, *supra* note 204, at 654–55 (2019) (noting that “[s]ome scholars have argued that the Founding era is the wrong time period to examine, especially for challenges to state laws” because “the Establishment Clause, like all of the protections listed in the Bill of Rights, originally constrained only the federal government. It is the Fourteenth Amendment, ratified in 1868, that applies establishment limits to state governments.”).

216. *See supra* section II(B)(1); *see also Am. Legion*, 139 S. Ct. at 2089 (“As we have explained, the Bladensburg Cross War carries special significance in commemorating World War I.”).

217. *Town of Greece*, 572 U.S. at 570.

218. *Id.* at 570.

219. *Id.* at 571–72.

220. *Id.* at 576 (“[*Marsh*] teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”).

town meetings. This the Supreme Court did not do,²²¹ perhaps because such an analysis would not have supported its conclusion.²²² Instead, it held that Christian prayers at small town meetings were similar enough to the legislative prayers described in *Marsh* for *Marsh* to be dispositive.²²³

c. Manipulating Level of Generality.—Another way to understand *Town of Greece* is as an example of manipulating the level of generality to reach a desired outcome. Before any court can decide if a practice is a traditional one with a long history, it must first define the practice. How the practice is articulated may well determine its history.

Substantive due process cases provide a masterclass in this technique. One component—and now the sole component—of determining whether a right is protected by substantive due process is asking whether the right is deeply rooted in the nation’s history and traditions.²²⁴ The right to homosexual sodomy is not;²²⁵ the right to select your intimate partner is.²²⁶ The right of two people of the same sex to marry is not;²²⁷ the right of two people to marry is.²²⁸ The right to abortion is not;²²⁹ the right to determine your medical treatment is.²³⁰ In substantive due process cases, conservative justices advocate for defining the question as precisely and narrowly as possible.²³¹ They argue that this is needed to prevent judges from smuggling

221. *Id.* at 577 (“The Court’s inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”).

222. *Id.* at 576 (“Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer . . .”).

223. According to the Court, *Marsh* still applied despite the fact that the prayers were overwhelmingly Christian. *Id.* at 580–81. *Marsh* also still applied despite the fact that, in addition to council members, citizens seeking favors from those members also attended these town council meetings. *Id.* at 586–91.

224. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022) (“The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions.”). Before *Dobbs*, the Court would also make this inquiry, but it was a starting point of its analysis, not the entirety of it. *See Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”).

225. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by Lawrence*, 539 U.S. at 578. Conservatives controlled the framing question in *Bowers* but not in *Lawrence*.

226. *Lawrence*, 539 U.S. at 578.

227. *Obergefell v. Hodges*, 576 U.S. 644, 704 (2015) (Roberts, C. J., dissenting).

228. *Id.* at 671.

229. *Dobbs*, 142 S. Ct. at 2253. Of course, as many have detailed, the Court also cherry-picked history to reach its conclusion. *See, e.g.*, Melissa Murray, *Making History*, 133 YALE L.J. FORUM 990, 996 (2024), <https://www.yalelawjournal.org/forum/making-history> [<https://perma.cc/7RCV-2FNJ>] (“[T]he history on which a majority of the Court has relied in some of its most consequential decisions does not tell the whole story—it is selective and instrumental.”).

230. *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990).

231. *Washington v. Glucksberg*, 521 U.S. 702, 722–23 (1997) (noting that the Court is “careful[]” and “precise” when defining potential substantive due process rights, and holding that

in their personal biases.²³² Whether by design or not, the end result is that conservative Christian values usually win the day.²³³

In the Establishment Clause cases, in contrast, the Court has defined the practice under review more broadly to allow government Christian symbols. In *Town of Greece v. Galloway*, the Court assumed the relevant practice was the broader “prayers before government meetings” rather than the more precise “Christian prayers before small town government meetings attended by citizens seeking favors from that government body,” thereby permitting the Court to claim that history and tradition validate the practice.²³⁴

2. Applied to Louisiana’s Ten Commandments.—Louisiana has mobilized more than one of these tactics in defending its Ten Commandments law on history and tradition grounds. The statute assumes that the level of generality is “Ten Commandments in public schools;” it assembles a questionable history and tradition in support; and it selectively cites helpful Supreme Court precedent.²³⁵ In reality, it is easier to argue that history and tradition do not support Ten Commandments posters in every public school classroom regardless of the grade level.

Louisiana’s statute first defines the relevant inquiry as investigating the history and tradition of “the Ten Commandments in public schools” as opposed to “Ten Commandments posters in every single public-school classroom.”²³⁶ The state repeats this framing in their litigation.²³⁷

Next, the statute’s “context statement” offers a ready-made history and tradition in support of educational Ten Commandments. The context statement, which must be posted next to every Decalogue poster, asserts that “[t]he Ten Commandments were a prominent part of American public education for almost three centuries.”²³⁸ This “History of the Ten Commandments in American Public Education” describes three readers from

the question before them is not whether people have a right to choose how to die but a right to commit assisted suicide).

232. *Dobbs*, 142 S. Ct. at 2247 (“[W]e must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy.”).

233. The more narrow and precise definition of the potential right would deny LGBTQ members the right to sexual intimacy and the right to marry and led to denying women the right against compulsory pregnancy. *See supra* notes 225–29 and accompanying text.

234. *See supra* note 223 and accompanying text.

235. LA. REV. STAT. ANN. § 17:2124(B)(3) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025).

236. *Id.*

237. *Roake v. Brumley*, 756 F. Supp. 3d 93, 113 (M.D. La. 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025) (presenting the state’s argument that the Decalogue is constitutional because of its historical role in American education).

238. § 17:2124(B)(3).

different eras that included the Ten Commandments.²³⁹ The first, the New England Primer, was written around 1688, during the colonial era; the second, the McGuffey Reader, dates to “the early 1800s;” and the third, textbooks written by Noah Webster, are presumably from early American history, though dates are not provided.²⁴⁰ The final touch is a quotation from James Madison, who allegedly stated “[w]e have staked the whole future of our new nation . . . upon the capacity of each of ourselves to govern ourselves according to the moral principles of the Ten Commandments.”²⁴¹

Third, by citing to Supreme Court cases that support government Ten Commandments,²⁴² Louisiana’s statute also paves the way for a court to deploy the same shortcut used in *Town of Greece v. Galloway*. Rather than undertake a full-fledged history and tradition analysis, a court could point to precedent upholding the Ten Commandments—the law highlights *Van Orden v. Perry*’s Ten Commandments monument on the Texas Capitol grounds—and argue that the Decalogue posters in Louisiana public schools do not differ in any constitutionally significant ways.²⁴³

Louisiana’s arguments do not withstand scrutiny. On the contrary, there is little evidence of an unbroken practice of Ten Commandments displays in public schools, whether the clock starts at the Founding or Reconstruction. In addition, Supreme Court decisions are also part of our history and tradition, and they indicate the unconstitutionality of school Decalogue displays.

The starting point for a history and tradition analysis is to define the contested practice carefully and precisely. At least, so the Supreme Court has insisted for substantive due process claims, and a lower court could (and perhaps should) do the same for establishment ones.²⁴⁴ After all, the risk of inadvertent bias is as present with the one right as with the other. Following the Court’s own admonitions would mean that the practice in question is posting Ten Commandment posters in every single classroom, from kindergarten to college, regardless of the room’s use, so that they would appear equally in homerooms, music rooms, and science labs.²⁴⁵

239. § 17:2124(B)(3).

240. *Id.* Apparently, Webster was moved to write an American textbook because Americans were still using English ones that pledged loyalty to King George. *Noah Webster History*, NOAH WEBSTER HOUSE & SOCIETY, <https://noahwebsterhouse.org/noahwebsterhistory/> [<https://perma.cc/3S7B-W4WE>].

241. § 17:2124(A)(4).

242. *Id.* at (A)(1), (3).

243. *Id.* at (A)(1), (6).

244. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”).

245. *See, e.g., Roake v. Brumley*, 141 F.4th 614, 630 (5th Cir. 2025) (noting that Ten Commandment displays must be “[i]n every Louisiana public school classroom, regardless of class subject matter, student age, or student grade”).

If the relevant practice is Ten Commandments posted in public school classrooms, then the appearance of the Ten Commandments in school textbooks is beside the point. In any event, the Supreme Court has never banned the Bible or Decalogue in public schools, only required that they be part of a secular course of study.²⁴⁶ That textbooks would include excerpts from the King James Bible is hardly surprising given its reputation as an exemplary model of English literature.²⁴⁷

Meanwhile, contrary to Louisiana's pronouncement, "the Ten Commandments were [NOT] a prominent part of public education for almost three centuries."²⁴⁸ As proof of its claim, Louisiana points to three educational textbooks that include them. The first, *The New England Primer*, predates the country and the Constitution. This schoolbook was the American Puritan version of the English Protestant Tutor,²⁴⁹ and its nickname was "the little Bible of New England."²⁵⁰ Its avowed goal was to inculcate Puritan beliefs²⁵¹ and it was gleefully anti-Catholic.²⁵² Consequently, Louisiana's

246. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (mentioning that "[i]t certainly may be said that the Bible is worthy of study for its literary and historic qualities," and, as such, "[n]othing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment"); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("This is not a case in which the Ten Commandments are 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.").

247. *King James Bible*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/King-James-Version> [<https://perma.cc/K9R5-9S4H>] ("[The King James Bible] is widely regarded as one of the major literary accomplishments of early modern England.").

248. *Roake v. Brumley*, 756 F. Supp. 3d 93, 207 (M.D. La. 2024) ("Green systematically dismantled this purported historical evidence and its conclusions"), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff'd*, 141 F.4th 614 (5th Cir. 2025).

249. Puritan Benjamin Harris first wrote *The Protestant Tutor* while in England. Its original title was *The Protestant Tutor, Instructing Children to Spel and read English and Grounding them in the True Protestant Religion, and Discovering the Errors and Deceits of the Papists*. Andrea Immel, *Benjamin Harris's Protestant Tutor (1679): Teaching Religion, Reading, and Writing in a Time of Crisis*, PRINCETON UNIV. COTSEN CHILDREN'S LIBRARY (Sep. 27, 2022), <https://blogs.princeton.edu/cotsen/2022/09/benjamin-harriss-protestant-tutor-1679-teaching-religion-reading-and-writing-in-a-time-of-crisis/> [<https://perma.cc/RM3H-GQU4>]. Its anti-Catholic rhetoric got him thrown into jail by Catholic King James II. Harris moved to New England and released an abridged version as the *New England Primer*. Laura Leibman, *The New-England Primer*, REED COLLEGE INDIAN CONVERTS COLLECTION, https://www.reed.edu/indianconverts/studyguides/children_education/new_england_primer.html [<https://perma.cc/M6B5-T5RY>].

250. Samuel James Smith, *The New-England Primer*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/The-New-England-Primer> [<https://perma.cc/9X5F-R4WN>].

251. Leibman, *supra* note 249 ("Education and salvation were inextricably linked in the minds of New England Puritans Educational materials such as the *New England Primer* did more than teach children to read and write: they taught children how to save their souls.").

252. Patrick McKinley Brennan, *Are Catholics Unreliable from a Democratic Point of View?*, 56 VILL. L. REV. 199, 201–02 (2011) ("'Abhor that arrant Whore of Rome, And all her blasphemies, And drink not of her cursed cup, Obey not her decrees.' Thus [taught] the *New England Primer*").

recitation that this colonial-era Puritan schoolbook included 40 questions about the Ten Commandments (i.e., a catechism) simply underscores the need for the Establishment Clause.²⁵³ Moreover, as pointed out by Steven K. Green, the New England Primer's use faded before common schools developed.²⁵⁴ The McGuffey Reader did not become popular until the 1830s,²⁵⁵ and therefore was too late to serve as evidence of founding understandings. Even if focusing on the Reconstruction era, the McGuffey Readers—as well as Noah Webster's American Spelling Book—did not consistently include the Ten Commandments.²⁵⁶ And as time passed, references to the Ten Commandments in the Reader and Spelling textbooks became scarcer until they eventually disappeared.²⁵⁷

A particularly notable misrepresentation is the quotation ascribed to James Madison.²⁵⁸ According to the University of Virginia professors who edited Madison's papers, “[w]e did not find anything in our files remotely like the sentiment expressed in the extract In addition, the idea is inconsistent with everything we know about Madison's views on religion and

253. Cf. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 253 (1983) (“It is well known that the Puritans in Massachusetts, who had fled religious intolerance in England, themselves showed little tolerance for dissent.”); LA. STAT. ANN. § 17:2124 (B)(3) (2025), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025).

254. *Roake v. Brumley*, 756 F. Supp. 3d 93, 207–08 (M.D. La. 2024) (quoting Green's testimony that “the *Primer* was used chiefly, if not exclusively, in *religiously* run schools, and, importantly, it fell into disuse during the early decades of the nineteenth century, before the rise of public education”), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff'd*, 141 F.4th 614 (5th Cir. 2025).

255. Samuel James Smith, *McGuffey Readers*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/McGuffey-Readers> [<https://perma.cc/4RNS-3QV8>] (recounting that the first and second readers were published in 1836 and the third and fourth readers were published in 1837).

256. *Roake*, 756 F. Supp. 3d at 173 (“[W]hile some versions of the McGuffey *Readers* contained lessons with the Ten Commandments in their entirety or that reference particular commandments, others did not. Even when used, they were not a significant part of the texts.” (internal citation omitted)); *see also id.* at 208 (“Significantly, the words ‘commandment’ or ‘commandments’ do not appear in the [American Spelling] book’s 1795, 1808, 1822, 1843, 1848, 1857, 1866, 1880, and 1908 editions.”).

257. *Id.* at 208 (“[R]eferences to the commandments were largely eliminated in later versions of the *Readers*”).

258. *See* § 17:2124(A)(4) (quoting James Madison).

government.”²⁵⁹ Indeed, Madison wrote the *Memorial & Remonstrance*,²⁶⁰ the most famous broadside on the need for separation of church and state.²⁶¹

Even if the “Madison” quotation was not pure fantasy, to cite that single line while ignoring the *Memorial & Remonstrance* is the perfect example of distorting history—here, Madison’s beliefs on the Establishment Clause. The same misleading omissions appear in the legislation’s recounting of Supreme Court decisions. It cites *Van Orden v. Perry*, which upholds a Ten Commandments monument, and quotes from *American Legion v. American Humanist Association*, which claims the Ten Commandments have historical significance, but ignores *Stone v. Graham*, the only case directly on point that struck down mandatory Ten Commandments posters in public school classrooms.²⁶²

One looks in vain for a tradition of Ten Commandments posters in American public schools when the public school system finally did develop.²⁶³ Louisiana offers no such evidence. The district court decision striking down Louisiana’s law explains how its expert concluded no such tradition exists after examining state law, surveys from the 1880s and 1890s by the U.S. Commissioner of Education, and Thomas Cooley’s very popular nineteenth-century treatise, *Constitutional Limitations*.²⁶⁴

If there is a tradition, it is to bar such displays. It has been unconstitutional for American public schools to lead nondenominational prayers since 1962;²⁶⁵ it has been unconstitutional for public schools to have students recite Bible verses every morning (presumably including passages

259. Robert McCoy, *Louisiana’s Ten Commandments Law Is an Assault on History*, PROGRESSIVE MAG. (June 25, 2024), <https://progressive.org/public-schools-advocate/louisianas-ten-commandments-law-is-an-assault-on-history-mccoy-20240625/> [https://perma.cc/8YJR-GGCK].

260. James Madison, *Memorial and Remonstrance Against Religious Assessments* (c. June 20, 1785), reprinted by NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [https://perma.cc/Z36H-EGTF].

261. See, e.g., Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. UNIV. L. REV. 145, 164 (2008) (citing MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 62 (2002) (referring to *Memorial & Remonstrance* as the most thoughtful exposition of disestablishmentarianism of its time)).

262. LA. STAT. ANN. § 17:2124(A)(1) & (3) (2025), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025) (citing *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) and quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2083 (2019)); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (“We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public [schoolrooms] had no secular legislative purpose, and is therefore unconstitutional.”).

263. See *infra* notes 359–60 and accompanying text. In fact, there is little history of government Ten Commandments at all. Green, *supra* note 204, at 521 (“In contrast to *Marsh*, with its direct evidence of early legislative chaplains, there was no evidence from the Founding regarding the use or acknowledgement of the Ten Commandments.”).

264. *Roake v. Brumley*, 756 F. Supp. 3d 93, 205–06 (M.D. La. 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025).

265. *Engel v. Vitale*, 370 U.S. 421 (1962).

with the Ten Commandments) since 1963;²⁶⁶ and it has been explicitly unconstitutional for public schools to post Ten Commandments in classrooms since 1980.²⁶⁷ This amounts to a long stretch of American history where our traditional understanding and practices were that public schools in the United States do not promote, proselytize, or post the religious tenets of any religion. Rather than an unbroken history of Ten Commandments in public schools from the Founding or Reconstruction,²⁶⁸ there is a tradition of barring Ten Commandments posters in public schools—a legal tradition that is longer than any welcoming them.

In sum, the Supreme Court has made available many stratagems that lower courts may deploy to reject an Establishment Clause challenge to laws like Louisiana’s Ten Commandments statute. At the same time, a court could rely on the same constitutional doctrine and arrive at the opposite conclusion. Even applying the conservative and malleable history and tradition test, the constitutionality of Ten Commandments statutes is not a foregone conclusion. On the contrary, the stronger argument points to the unconstitutionality of such attempts to force religion onto America’s public-school students. Besides parrying arguments based on federal doctrine, plaintiffs may assert arguments under state-created doctrine, with state courts responding in kind, described in the next Part.

III. Plan A: New Judicial Federalism and State Constitutional Protections

The Establishment Clause is not the only constitutional bulwark against the union of church and state. State constitutions contain their own establishment provisions. Before the religion clauses were made applicable to the states in the 1940s, state constitutions alone guarded against establishment.²⁶⁹ “[T]hroughout much of American history, state constitutional interpretation was the most important game in town.”²⁷⁰ State constitutions as an independent source of constitutional rights became mostly quiescent during the Warren Court era—a time when the Supreme Court expanded individual rights under the U.S. Constitution.²⁷¹ During the post-

266. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

267. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

268. *Cf. Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (supporting legislative prayers because tradition dates to founding and has continued unbroken since then).

269. The Bill of Rights originally applied to the federal government alone. *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 754 (2010). The Fourteenth Amendment, with its explicit limits on state power, made it possible to apply certain rights to the states as well. This process is known as incorporation. *Id.* at 759–66; see also Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 332 (2011) (“That doctrine has bound the states to almost all of the guarantees in the federal Bill of Rights . . .”).

270. Blocher, *supra* note 269, at 335.

271. Earl Warren was Chief Justice between 1953–1969. *Earl Warren, 1953–1969*, SUPREME COURT HISTORICAL SOCIETY, <https://supremecourthistory.org/chief-justices/earl-warren-1953->

Warren retrenchment, Justice Brennan launched “New Judicial Federalism” with his landmark article, *State Constitutions and the Protection of Individual Rights*.²⁷² He urged state courts to interpret their state constitutions to provide greater protection for individual rights than the federal Constitution.²⁷³ The Roberts Court’s evisceration of the Establishment Clause may likewise inspire litigators and state courts to turn to state constitutions to guard against establishment in their states.

State courts have, of course, always held the power to interpret their state constitutions as they see fit. When state supreme courts follow U.S. Supreme Court precedent in construing their own establishment provisions, they do so voluntarily.²⁷⁴ Even if the language of the state constitution is identical to the federal Constitution (and it usually differs with establishment provisions), a state court need not interpret it in the same way.²⁷⁵ Consequently, in applying their state’s establishment provisions, a state court may reject the Supreme Court’s recent history and tradition test in favor of *Lemon* or endorsement, or it may fashion its own test. Granted, a state court’s interpretation of its state constitution cannot violate the U.S. Constitution, including the newly expanded Free Exercise Clause, but even the Roberts Court’s religion jurisprudence should not present a roadblock in invalidating laws like Louisiana’s Ten Commandments mandate.²⁷⁶

1969/ [https://perma.cc/4LGC-2FCS]. In addition to decisions like *Brown v. Board of Education*, 347 U.S. 483 (1954) (ending racial segregation in public schools) and *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating Miranda rights including that a person in custody must be informed of certain rights before interrogation), the Warren Court was responsible for landmark Establishment Clause decisions such as *Engel v. Vitale*, 370 U.S. 421 (1962) (barring recital of prayers in public school), *Abington School District v. Schempp*, 374 U.S. 203 (1963) (barring Bible readings in public schools), and *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking religion-based ban against teaching evolution in public schools).

272. Blocher, *supra* note 269, at 337 (“But if state constitutional interpretation was submerged when the Warren Court’s tide rolled in, it was uncovered again when that tide rolled back out.”).

273. See Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 26, at 491 (arguing that individual liberties can only be fully realized by state courts employing state constitutions, which often contain greater protections than the Supreme Court’s interpretations of federal law).

274. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) (“As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.”).

275. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 26, at 495 (noting that “more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased”).

276. Furthermore, the Supreme Court does not review state court rulings based on state constitutional law unless it violates federal law. The Supremacy Clause guarantees that duly enacted federal law and the federal Constitution preempt any contrary state law. But otherwise “when a state ruling rests on an ‘independent and adequate state ground,’ it is immune from review by the Supreme Court.” G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 79 (1989) (citing *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)).

A. Availability of State Constitutional Protection

Every state constitution but one contains its own version of the Establishment Clause.²⁷⁷ A few mirror the language of the federal Establishment Clause; most, however, contain additional provisions,²⁷⁸ providing textual support for additional protection. Regardless, even the same language might result in more establishment protection depending on how state courts choose to interpret it.²⁷⁹

1. Language.—While some state constitutions copy the Establishment Clause verbatim, most state provisions do not. Instead, they forbid the government from favoring a religion or forcing anyone to attend religious services. They also ban the government from directing taxpayer dollars to religious institutions, especially religious schools. They bar the teaching of religious tenets in public schools as well.

The constitutions of roughly ten states model their Establishment Clause on the federal Establishment Clause, including Louisiana’s.²⁸⁰ Thus, the Louisiana Constitution’s Declaration of Rights states “[n]o law shall be enacted respecting an establishment of religion,”²⁸¹ paralleling the U.S. Constitution’s “Congress shall make no law respecting an establishment of religion.”²⁸² However, the Louisiana Constitution, like that of other states whose language parallels the U.S. Constitution, contains additional provisions.²⁸³

Approximately half of state constitutions explicitly forbid the government from favoring one religion over others. Virginia’s constitution, for example, declares that “the General Assembly shall not . . . confer any

277. North Carolina seems to be an exception. When the state readopted its constitution during Reconstruction, the Disestablishment provision was dropped. Nonetheless, courts have interpreted its constitution to provide the same protection as the U.S. Constitution. Rachel E. Grossman, *North Carolina’s Establishment Clause: History and Interpretation*, 3 N.C.C.R. L. REV. 69, 74 (2023).

278. Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, 7 U. ST. THOMAS J.L. & PUB. POL’Y 192, 197 (2013) (“The texts of state constitutional religion provisions . . . are substantially different from the more familiar First Amendment.”).

279. See Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 26, at 489, 495 (discussing the recent trend of state courts construing state constitutional provisions as affording greater protection than the federal provisions).

280. LA. CONST. art. 1, § 8. Others include Alaska, California, Florida, Hawaii, Iowa, Montana, South Carolina, and Utah. ALASKA CONST. art. 1, § 4; CAL. CONST. art. 1, § 4; FLA. CONST. art. 1, § 3; HAW. CONST. art. 1, § 4; IOWA CONST. art. 1, § 3; MONT. CONST. art. 2, pt. 2, § 5; S.C. CONST. art. 1, § 2; UTAH CONST. art. 1, § 4.

281. LA. CONST. art. 1, § 8.

282. U.S. CONST. AMEND. I.

283. See, e.g., LA. CONST. art. 1, § 8 (“No law shall be enacted respecting an establishment of religion.”); U.S. CONST. AMEND. I. (“Congress shall make no law respecting an establishment of religion.”); LA. CONST. art. 4, § 8 (banning public funding of sectarian schools).

peculiar privileges or advantages on any sect or denomination.”²⁸⁴ Several others guarantee freedom of religion “without discrimination or preference.”²⁸⁵ A popular provision, appearing in roughly twenty state constitutions including those of Arkansas²⁸⁶ and Texas,²⁸⁷ ensures that “no preference shall be given by law to any religious sect, society, denomination, or mode of worship.”²⁸⁸

At least a dozen states forbid the state from favoring one religion over another by requiring a religious test for office.²⁸⁹ In fact, this guarantee often follows a “no preference” clause.²⁹⁰ Thus, found in New Jersey’s constitution is “[t]here shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.”²⁹¹ Tennessee, meanwhile, provides that “no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office

284. VA. CONST. art. 1, § 16.

285. Nevada, Wyoming, New York, North Dakota, and California Constitutions have similar language. *See, e.g.*, WYO. CONST. art. I, § 18 (“The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state.”).

286. ARK. CONST. art. 2, § 24 (“[N]o preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.”).

287. TEX. CONST. art. 1, § 6 (“[N]o preference shall ever be given by law to any religious society or mode of worship.”).

288. ALA. CONST. art. 1, § 3. While this language was taken from Alabama’s constitution, many others, including the constitutions of Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, New Mexico, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, and Wisconsin have similar provisions. *See, e.g.*, MINN. CONST. art. I, § 16 (“[N]or shall . . . any preference be given by law to any religious establishment or mode of worship”).

289. States include New Jersey, Maine, Ohio, Mississippi, Alabama, Utah, Arizona, Kansas, Virginia, Oklahoma, and Nebraska. *See, e.g.*, Utah Const. art. X, § 8 (“No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state’s education systems.”). While this provision also protects freedom of belief and therefore seems more aligned with free exercise, the two types of clauses—those preventing the state from favoring religion and those preventing the state from creating barriers to free exercise—work together to protect people’s religious liberty from state compulsion and control. Caroline Mala Corbin, *Is There Any Silver Lining to Trinity Lutheran Church, Inc. v. Comer?*, 116 MICH. L. REV. ONLINE 137, 144 (2018) (“[T]ogether the Free Exercise and Establishment Clause guarantee that no one is punished because of what they do or do not believe.”).

290. This is the case in New Jersey, Maine, Ohio, Kansas, and Nebraska. *See, e.g.*, ME. CONST. art. I, § 3 (“[N]o subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State.”). In Mississippi, the no preference clause immediately follows the no religious test clause. MISS. CONST. art. III, § 18. Several states like Utah, Arizona, and Oklahoma also guarantee that no one shall be denied the right to serve as a witness or juror because of their religious beliefs. *See, e.g.*, UTAH CONST. art. I, § 4.

291. N.J. CONST. art. 1, § 4.

or public trust under this state.”²⁹² Kansas’s constitution contains similar language.²⁹³

The majority of states prohibit the government from mandating attendance at religious services. Fairly typical is Alabama’s provision assuring “that no one shall be compelled by law to attend any place of worship.”²⁹⁴ Similarly, Idaho guarantees that “[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination.”²⁹⁵

These provisions are almost always accompanied by language stating that no one can be compelled to financially support any place of worship either. Several guarantee that no one shall ever have to “attend or support”²⁹⁶ or “attend, erect, or support”²⁹⁷ any place of worship. Many go further. Kentucky’s constitution, for example, declares that no one shall be compelled “to contribute to the erection or maintenance of any [place of worship], or to the salary or support of any minister of religion.”²⁹⁸ In addition to language barring state funding for places of worship and clergy, three quarters of states amended their constitutions in the nineteenth century to include no-aid provisions, sometimes called “Blaine Amendments.”²⁹⁹ These clauses

292. TENN. CONST. art. 1, § 4.

293. KAN. CONST. BILL OF RIGHTS, § 7 (“No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.”).

294. ALA. CONST. art. 1, § 3.

295. IDAHO CONST. art. 1, § 4; *see also, e.g.*, W. VA. CONST. art. 3, § 15 (“No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever”).

296. South Dakota, Kansas, Colorado, Illinois, and Idaho are among them. *See, e.g.*, KAN. CONST. BILL OF RIGHTS, § 7 (“nor shall any person be compelled to attend or support any form of worship”).

297. Pennsylvania, Tennessee, Arkansas, Minnesota, Texas, and Nebraska are among them. *See, e.g.*, TEX. CONST. art. 1, § 6 (“No man shall be compelled to attend, erect, or support any place of worship”).

298. KY. CONST. BILL OF RIGHTS, § 5; *see, e.g.*, IOWA CONST. art. 1, § 3 (“[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”).

299. *See Blaine Amendments in State Constitutions*, BALLOTPEdia, https://ballotpedia.org/Blaine_amendments_in_state_constitutions#Status_of_Blaine_Amendments_by_state [<https://perma.cc/WEA4-KDF2>] (listing states). James G. Blaine proposed adding the following language to the U.S. Constitution:

“No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.” Blaine Amendment, H.R.J. Res. 1, 44th Cong. (1875).

While the Blaine Amendment failed at the federal level (it passed the House but not the Senate), many states enacted comparable provisions. *Blaine Amendments in State Constitutions*, BALLOTPEdia, https://ballotpedia.org/Blaine_amendments_in_state_constitutions#Status_of_Bla

prohibit state funding for religious institutions more generally,³⁰⁰ with many specifically barring taxpayer funding of religious schools.³⁰¹

Finally, close to a third of states forbid religious education in public schools.³⁰² The Colorado constitution, for example, insists that “[n]o sectarian tenets or doctrines shall ever be taught in the public school[s],”³⁰³ while Nebraska’s declares that “[a]ll public schools shall be free of sectarian instruction.”³⁰⁴ Due to requirements imposed by the enabling act that facilitated statehood, the state constitutions of North Dakota, South Dakota, Montana, and Washington guarantee public education “free from sectarian control.”³⁰⁵ West Virginia’s constitution, after ensuring a moment of silence at the beginning of the public school day, provides that no public school student shall “be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.”³⁰⁶

2. *Interpretation.*—Although states often follow the Supreme Court’s interpretation of the U.S. Constitution, they are free to construe their state constitutions differently,³⁰⁷ especially given the diverging language. In fact, “state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*.”³⁰⁸ To insist otherwise seems contrary to our federalist structure of government.³⁰⁹

ine Amendments by state [https://perma.cc/WEA4-KDF2]. Although Louisiana added one to its Constitution in 1879, it was removed when Louisiana approved a new constitution in 1974. *Id.*

300. *See, e.g.*, GA. CONST. art. I, § 2, para. VII (“No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”).

301. *See, e.g.*, MISS. CONST. art. 8, § 208 (“nor shall any funds be appropriated toward the support of any sectarian school”).

302. Sixteen states forbid sectarian instruction in or sectarian control over public schools: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wisconsin, Wyoming. *See infra* Appendix.

303. COLO. CONST. art. 9, § 8. California has an even stronger version: “[N]or shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.” Cal. Const. art. IX, § 8.

304. NEB. CONST. art. VII, § 11; *see also* WIS. CONST. art. X, §§ 3, 6 (“[N]o sectarian instruction shall be allowed.”).

305. Enabling Act of 1889, Ch. 180, 50th Cong. § 4 (2d Sess. 1889) (“That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.”).

306. W. VA. CONST. art. 3, § 15a.

307. *See supra* notes 274–75 and accompanying text.

308. The Honorable Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1315 (2017); *see also, e.g.*, Planned Parenthood of the Heartland, Inc. v. Reynolds, No. 22-2036, 2023 WL 4635932, at *8 (Iowa June 16, 2023) (“Our duty to independently interpret the Iowa Constitution holds even ‘though the two provisions may contain nearly identical language and have the same general scope, import, and purpose.’”).

309. State court constitutionalism “serve[s] as an antidote for misguided decisions of the U.S. Supreme Court.” Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304,

States take different approaches to federal doctrine when interpreting their own state constitutions. Many interpret theirs in lockstep with federal doctrine, regardless of language.³¹⁰ Others rely primarily if not exclusively on their own interpretations.³¹¹ Some consider both, with various degrees of deference to federal doctrine.³¹² For example, state courts might follow federal courts in interpreting identical provisions but interpret the state's unique provisions independently of federal precedent,³¹³ or they might start by following federal interpretation but turn to state-specific provisions to fill gaps in the protection of individual rights.³¹⁴

There is no shortage of reasons for states to interpret their state constitutions independently. At the very least, the text of state establishment provisions usually differs from the federal Constitution. The time periods they were adopted and their histories usually differ as well. For example, the U.S. Constitution was adopted in the late eighteenth century while “[t]he majority of current state constitutions,” in contrast, “were adopted in the late nineteenth century, and nine were adopted . . . after 1960.”³¹⁵ More specifically, Arkansas adopted its current constitution in 1874, Texas in

1314 (2019). Dual protection of rights afforded by federalism also allows for experimentation, as states try out different levels of protection. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting the value of states serving as laboratories willing to “try novel social and economic experiments without risk to the rest of the country”).

310. Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 48–49 (2006) (“Under ‘lockstep’ analysis state courts bind the meaning of state constitutional provisions to their parallel federal counterparts, either case by case or as a broad rule.”); Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 880 (2007) (“When taking the lockstep approach, the state court does not look to its state constitution if the individual right is one that the Federal Constitution also protects.”).

311. Anderson & Oseid, *supra* note 310, at 885 (noting that under this approach, states look first to their own constitutions and “only consider[] federal precedent if . . . [their] state constitution does not protect the particular individual right at issue”).

312. *Cf.* Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 643 (1985) (“[T]hese courts are willing to learn from the experience of federal courts, but feel free to develop the test that best serves state constitutional objectives.”).

313. This is known as either the interstitial approach or the supplementary approach. Anderson & Oseid, *supra* note 310, at 879, 881; *id.* at 882 (“A court taking the interstitial approach ‘view[s] federal interpretation of analogous provisions as presumptively correct[,] . . . [but does] not automatically follow the federal interpretation in construing state provisions.’” (quoting Robert F. Utter & Sanford E. Pittler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 648–49 (1987))).

314. Long, *supra* note 310, at 48. There are more permutations. *See id.* at 48 (“Under a jurisprudence of ‘dualism,’ a court will examine both the state and Federal Constitutions, regardless of whether one or the other disposes of the case.”).

315. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 9 (2011); *see also* Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, *supra* note 278, at 200 (“This tendency towards lockstepping fails to understand the significant textual and historical differences between federal and state constitutional religion clauses.”).

1876, and Louisiana in 1975.³¹⁶ Accordingly, to the extent history informs the meaning of these clauses, each state constitution may have its own unique history, or at least a history that is not exactly the same as the Establishment Clause.

Moreover, a key reason for a dual system of government is to ensure two layers of protection for individual rights:³¹⁷ “[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.”³¹⁸ After the Supreme Court revamped substantive due process to eliminate constitutional protection for abortion, most state supreme courts declined to reinterpret their constitutions in the same way.³¹⁹ Closer afield, when the Supreme Court cut back free exercise protection in 1990 under *Employment Division v. Smith*,³²⁰ states did not automatically follow suit.³²¹ States have also long deviated from Supreme Court precedent in cases involving government funding of religion, especially in states with constitutions that specifically forbid it in a way the U.S. Constitution does not.³²² Thus, as they have in the past—especially when faced with Supreme Court erosion of individual rights—states may choose to part ways with their federal peers.

In sum, “the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart

316. *State Constitution*, BALLOTPEDIA, https://ballotpedia.org/State_constitution [https://perma.cc/ZVU8-266B].

317. Cf. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, *supra* note 274, at 548 (praising state courts for “tak[ing] seriously their obligation as coequal guardians of civil rights and liberties”).

318. *Id.* at 503.

319. See, e.g., *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. 22-2036, 2023 WL 4635932, at *7 (Iowa June 16, 2023) (citing state supreme court cases from Montana, North Dakota, Oklahoma, and South Carolina and concluding “[t]o date, not a single state supreme court that previously recognized protection for abortion under its state’s constitution has overruled its precedent”). Florida broke the streak in *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 89 (Fla. 2024).

320. 494 U.S. 872 (1990).

321. *Employment Division v. Smith*, 494 U.S. 872 (1990), changed the more generous Free Exercise Clause doctrine established by *Sherbert v. Verner*, 374 U.S. 398 (1963). An empirical study of state court decisions between 1970 and 1994 that had extended state protections beyond federal ones found that states expanded free exercise rights in more than half their decisions with state and federal claims, with the vast majority (7 out of 8) refusing to abandon *Sherbert* after *Smith*. James N.G. Caughen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1197–98 (2000).

322. See, e.g., Wendtland, *supra* note 312, at 636 (noting that contrary to Supreme Court interpretation of Establishment Clause, “[c]ourts [interpreting state constitutions] in nine states have disallowed public transportation of children to parochial schools, and seven have disapproved direct textbook loans”). Most recently, the Oklahoma Supreme Court held it would violate Oklahoma Constitution’s no-aid provision for the state to fund a religious charter school, *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1 (Okla. 2024), a ruling not necessarily mandated by the Roberts Court’s interpretation of the Establishment Clause.

provisions of state law.”³²³ Consequently, states may, and should, break with the Court’s recent diminishment of Establishment Clause protection and retain earlier tests and precedents—like *Stone v. Graham*. Although the Court has abdicated its Establishment Clause responsibility to protect religious minorities, states are not obliged to interpret their establishment provisions to likewise abandon its religiously vulnerable citizens. The only limit to a state’s interpretation is that its state constitution cannot clash with the U.S. Constitution.³²⁴

B. No Clash with Free Exercise Clause

As the supreme law of the United States, the U.S. Constitution preempts any inconsistent state law, whether originating from the common law, statute, or state constitution. At the same time, the federal Constitution creates a floor rather than a ceiling for individual rights, meaning that a state constitutional provision may provide greater protection than that guaranteed by its federal counterpart—as long as that extra protection does not clash with another clause of the U.S. Constitution.³²⁵ Under the Roberts Court’s reimagined religion clause jurisprudence, any attempt to limit financing of religion beyond restrictions required by the Establishment Clause (which are rapidly vanishing) will now likely violate the Free Exercise Clause. While these decisions preclude a more generous state establishment clause insofar as religious funding is concerned, the Court has not yet precluded a more generous one with regard to religious practices and displays. Accordingly, even if the Supreme Court were to uphold a Decalogue-in-every-classroom mandate, states have leeway when applying their own establishment provisions.

The Supreme Court used to recognize “play in the joints” between the U.S. Constitution’s two religion clauses, which may be in tension with each other given that the Free Exercise Clause requires government accommodation of religion and the Establishment Clause reigns in government support for religion.³²⁶ The Supreme Court previously found that not every voluntary accommodation of religious exercise would violate the

323. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, *supra* note 26, at 502.

324. Realistically, state judges are no doubt also aware that unpopular decisions may lead to a state constitutional amendment (because state constitutions are easier to amend) or to being voted out of office (because state judges are usually not lifetime appointments). Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, *supra* note 27, at 972–73.

325. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, *supra* note 274, at 550 (“[S]tate courts may not provide a level of protection less than that offered by the federal Constitution.”).

326. *See, e.g., Locke v. Davey*, 540 U.S. 712, 718–19 (2004) (“[T]he Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet [the Court has] long said that ‘there is room for play in the joints’ between them.”).

Establishment Clause,³²⁷ and not every attempt to encourage separation of church and state would violate the Free Exercise Clause.³²⁸ When they did clash, often a risk with government funding of religious organizations, the Court's primary worry was that this financial assistance might violate the Establishment Clause.³²⁹

Now, the Court's overriding concern with government funding is that denying government monies to religious entities might violate the Free Exercise Clause.³³⁰ The Roberts Court's expansionist views of the Free Exercise Clause (and concomitant restrictive views of the Establishment Clause) have led it to repeatedly conclude that attempts to implement establishment values with state level funding violate the Free Exercise Clause.³³¹ The result is that common restrictions on government funding of religion are now deemed to impugn the Free Exercise Clause. If the government awards playground grants or vouchers to private secular schools, private religious schools must also be eligible.³³² To do otherwise, according to the Roberts Court, is to discriminate against religion,³³³ which in turn

327. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (upholding RLUIPA religious exemptions even when not required by the Free Exercise Clause); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 329–30 (1987) (upholding religious exemptions from Title VII even though not required by Free Exercise Clause).

328. See, e.g., *Locke*, 540 U.S. at 719, 725 (upholding restrictions on government funding of religious scholarships even if not required by the Establishment Clause).

329. Until the Roberts Court, government funds going to religious schools generally raised Establishment Clause questions. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (“The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses.”); *Aguilar v. Felton*, 473 U.S. 402, 412–14 (1985) (weighing whether the public funding of teachers in a “pervasively sectarian environment” infringes “Establishment Clause values”); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (holding that providing a sign-language interpreter under IDEA to a handicapped child does not violate the Establishment Clause even if a child chooses to attend a religious school); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (determining that a scholarship program with vouchers that can be used at sectarian schools “does not offend the Establishment Clause” as it is neutral with respect to religion).

330. Faraz Sanei, *Funding Free Exercise*, 70 WAYNE L. REV. 183, 192 (2024) (“During [a] short period of time, the Court has moved from asking whether the public aid in question was *permitted* under the Establishment Clause to inquiring whether it is now *required* by the Free Exercise Clause.”).

331. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017) (“The State has pursued its preferred policy [of honoring establishment values] to the point of expressly denying a qualified religious entity a public benefit . . . violat[ing] the Free Exercise Clause.”); *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2262–63 (2020) (determining that Montana denying aid to religious schools violates the Free Exercise Clause); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause.”).

332. *Trinity Lutheran Church*, 582 U.S. at 453, 466; *Espinoza*, 140 S. Ct. at 2261–62. The government must even directly fund private religious schools if it funds private secular schools. *Carson*, S. Ct. 1987, 2000.

333. See *Trinity Lutheran Church*, 582 U.S. at 463 (describing refusal to award grant to church school as “express discrimination”); *Espinoza*, 140 S. Ct. at 2262 (“[T]he Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis

violates the Free Exercise Clause.³³⁴ That these rulings run contrary to longstanding Establishment Clause limits on directing taxpayer dollars to religion is not acknowledged. The bottom line is that honoring state constitutional prohibitions against public funding of religious institutions and religious schools may be stymied by the Supreme Court's aggressive interpretation of the Free Exercise Clause.

The Supreme Court has not yet ruled that refusing to post religious scripture in the classroom while posting the alphabet or periodic table of elements amounts to discrimination against religion. Such an extreme interpretation is not out of the question under the Roberts Court's religion jurisprudence. So far, however, declining to post excerpts from the Bible on public school walls despite the presence of secular educational materials does not violate the Free Exercise Clause. Nor should it.

To start, the educational posters (including the Ten Commandments) represent the school's own speech, making their display government speech rather than private speech. It is black letter free speech law that the government may discriminate on the basis of viewpoint in conveying its own messages.³³⁵ For example, a public school's decision to hang American history posters does not obligate it to add Canadian history posters. Along these lines, a school should be able to decide what pedagogical lessons it wishes to highlight.

Furthermore, religious discrimination in violation of the Free Exercise Clause arose when private religious entities were denied government funds that they would have received had they been secular. They were excluded from a government benefit due to their religious status. There is no parallel claim here. No religious student or parent has been denied a government benefit because of their religious status that has been granted to secular students or parents.³³⁶ Consequently, the Court's overweening Free Exercise

of religious status."); *Carson*, 142 S. Ct. at 2001 ("In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why.").

334. *Trinity Lutheran*, 582 U.S. at 466; *Espinoza*, 140 S. Ct. 2246, 2262–63; *Carson v. Makin*, 142 S. Ct. at 2002.

335. *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1587 (2022) ("[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views."); *id.* at 1589 ("When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. That must be true for government to work." (internal citation omitted)).

336. Indeed, it is not even clear who would have standing. A Christian parent might argue that their children are exposed to lessons on the alphabet but not lessons on the Ten Commandments. To start, the Decalogue is not a secular counterpart to the alphabet. In addition, parents are generally not entitled to dictate the content of school curriculum. The claim the most comparable to the ones raised in the funding cases is that the public school discriminates by teaching secular morality but not religious morality. But not only is there no obligation for public schools to teach religious morality, they are forbidden to do so under the Establishment Clause. In any event, a Christian

Clause jurisprudence is not yet an impediment to lower courts ruling that a Ten Commandments mandate violates their state establishment provisions.

IV. Plan B: A Principled History and Tradition Analysis

While not obliged to do so, some state courts might nevertheless continue to follow Supreme Court doctrinal developments. But even if a court feels compelled to use history and tradition to determine the scope of its own establishment provisions, it should avoid the Supreme Court's tendency to overvalue contemporaneous practices,³³⁷ an approach that makes at least three logical errors.³³⁸ First, the Court's assumption that practices from the time a constitutional provision was ratified conclusively prove the provision's meaning overlooks the fact that the Establishment Clause—and the Fourteenth Amendment that incorporated it—were meant to break with existing practices, and the same may hold true for early state provisions. In other words, historical practices might represent exactly the opposite of what an establishment clause was understood to do. Second, relying exclusively or primarily on past practices blithely ignores the fact that practices often fall far short of constitutional ideals. The anti-Catholicism behind the ubiquity of Protestant Christian practices in nineteenth-century common schools exemplifies this failure. The third mistake is that transplanting the practices of the past to the present may fail to reflect the historical principles that animate the establishment provisions because of changes in society, such as today's vastly more diverse religious landscape.³³⁹ Understanding the longstanding principles behind establishment provisions allows a court to better achieve those provisions' goals while also remaining consistent with the Supreme Court's history and tradition approach.

A. *Break with Past Practices*

Under the Supreme Court's history and tradition analysis, practices that existed at ratification (history) and have continued until this day (tradition) generally do not violate the Establishment Clause.³⁴⁰ This framework relies on at least two assumptions. One is that the interpretation existing at the time of adoption forever controls. This originalist approach to the U.S.

parent demanding that a school teach every child morality tailored to their own personal religious belief is demanding a special favor.

337. *Cf. Roake v. Brumley*, 141 F.4th 614, 646 (5th Cir. 2025) (describing the Supreme Court's history and tradition approach as “depend[ing] on ‘original meaning and history’ with particular attention paid to ‘historical practices’” (internal citation omitted)).

338. *See, e.g., McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) (“What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it.”).

339. *See infra* Part IV(C)(1).

340. *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014).

Constitution is a source of endless criticism, but not the focus of this Article.³⁴¹ A second assumption is that the practices of the Founding or Reconstruction era accurately reflect the original understanding of the Constitution. But, as Andy Koppelman has pointed out, some constitutional provisions are meant to break with tradition: “They are specifically designed to reject longstanding evils.”³⁴² Because the Establishment Clause was one of those provisions, practices at the Founding should not necessarily serve as a guide to interpreting the Establishment Clause. The Fourteenth Amendment, which incorporated the Establishment Clause, explicitly sought to remedy the past,³⁴³ so the same argument applies with at least equal force to practices at Reconstruction.

While some constitutional provisions serve to preserve traditional practices (like jury trials),³⁴⁴ others seek to end them. The Establishment Clause is among the remedial clauses.³⁴⁵ During the colonial era, state establishments were common,³⁴⁶ as was *de jure* religious discrimination.³⁴⁷ Colonies maintained religious restrictions on who could hold office,³⁴⁸ vote,³⁴⁹ or even reside within the colony.³⁵⁰ Although the trend was towards disestablishment, state establishments continued even during the early days of the Republic. At the time the Bill of Rights was ratified, half of the states still maintained some degree of establishment.³⁵¹ In addition, religious

341. See generally, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (arguing that the most prevalent form of originalism “is not merely false but pernicious as well”); see also *id.* at 94 (“The arguments for Originalism . . . are fallacious”). One criticism is that it is not even clear whether the Founding or Reconstruction is the more important era for clauses that have been incorporated. See *supra* note 215.

342. Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami’s Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 187, 188 (2023).

343. *Id.* (“Some of those provisions, notably the Establishment Clause and the Reconstruction amendments, directly attack tradition.”); U.S. Const. amend. XIV, § 1.

344. *Id.*

345. *Id.* at 196 (“Sometimes a provision exists to break with a tradition that is deemed evil, such as slavery, or racial discrimination, or religious establishment.”).

346. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2152 (2003) (“[A]ll nine of the American colonies with established churches imposed compulsory taxes for the support of churches and ministers.”).

347. Honorable Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VALPARAISO U. L. REV. 353, 356 (2004) (“[T]he colonial establishments also freely discriminated against Catholics, Jews, and even other Protestants. In both Massachusetts and Virginia, for example, simply being a practicing Baptist could land one in jail.”).

348. McConnell, *supra* note 346, at 2177 (“Similar [religious] restrictions on officeholding were also common in America.”).

349. *Id.* (“Religious restrictions on the right to vote were imposed in almost every colony.”).

350. *Id.* at 2123 (“The New England colonies, like the South, attempted to maintain religious homogeneity by banishing or punishing dissenters . . .”).

351. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 292 (2001) (“At the time the First Amendment was adopted, seven of the

requirements for office persisted in most states,³⁵² and even mandatory church attendance remained on the books in a few.³⁵³

The point of the Establishment Clause (and its state analogues) was to eliminate such religious establishments, not to constitutionalize them.³⁵⁴ Despite continuing controversies over the Clause's original scope, it is not disputed that the historical trend was towards disestablishment.³⁵⁵ Moreover, that these problematic practices persisted in various states even after enactment is hardly surprising: "Any provision that aims to break with deeply entrenched wrongs of the past, particularly wrongs with powerful beneficiaries, predictably will not be instantly effective."³⁵⁶ To use the practices that the Establishment Clause was meant to end as proof it protected them subverts the Establishment Clause entirely.³⁵⁷

B. *Practices Falling Short of Ideals*

Overreliance on past practices also overlooks the ways that we as a nation regularly fall short of our constitutional ideals and risks reintroducing

fourteen States maintained government-sponsored churches, and several others used various means to advance the Christian religion.").

352. McConnell, *supra* note 346, at 2179 (explaining that even after Independence, "[a]t the state level, religious tests for office were ubiquitous, outside of Virginia They survived decades longer than any other aspect of religious establishment."). Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 461 (2006) ("[M]ost of these disestablished states retained other practices far removed from a modern regime of separation, such as religious requirements for public officeholding and participating in legal proceedings (i.e., oath requirements), official acknowledgments of religion and a host of religiously based sumptuary laws (e.g., blasphemy and Sabbath laws).").

353. McConnell, *supra* note 346, at 2145 (noting that Connecticut repealed mandatory church attendance law in 1816 and Virginia repealed it in 1833).

354. Some argue that the goal was merely to ensure the federal government would not meddle with state establishments. Others disagree. Two points neutralize the former argument. First, "this federalism limit was superseded by the Fourteenth Amendment, which fundamentally changed the relationship between the federal government and the states." Corbin, *Opportunistic Originalism*, *supra* note 204, at 650. Second, even at the Founding, the Establishment Clause had a substantive component that limited the federal government. By the time of Reconstruction, that substantive component also applied to the states. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416 (1986) ("Protecting state establishments would be wholly inconsistent with the premise of the fourteenth amendment—to protect individual rights against state violations.").

355. Green, *supra* note 352, at 456. For example, by the 1840s states shifted their justification for Sunday closing laws from the need for religious observance (as argued in an 1817 conviction for violating sanctity of Sabbath) to the need for a day of rest. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1105–06 (1995). Or, "[n]ew constitutions in Georgia in 1789 and 1798, respectively, removed the religious test for officeholding and abolished all authority for assessments." Green, *supra* note 352, at 462.

356. Koppelman, *supra* note 342, at 197.

357. *Id.* at 196 ("The most perverse misuse of tradition . . . [is] to invoke tradition to defend the very practices that a constitutional provision means to invalidate.").

past shortcomings. Racist practices like segregation are an obvious example; religious practices in nineteenth-century public schools that were animated by animosity towards Catholics are less well-known. These failures provide yet another reason why practices on their own do not necessarily illuminate the meaning of a constitutional provision. The Supreme Court itself has refused to be guided by practices that reflected anti-Catholicism.³⁵⁸ It turns out those practices include the continuing dominance of Protestantism in public schools despite a massive influx of Catholic immigrants.

Public schools funded by taxpayer money and open to all did not exist at the Founding.³⁵⁹ The precursors of today's public schools were the common schools pioneered by Horace Mann in the mid-nineteenth century.³⁶⁰ These common schools were infused with Protestant religion and embraced practices common to all Protestants,³⁶¹ such as reading from the King James Bible.³⁶² Horace Mann vehemently opposed sectarian public education, but by sectarian he meant favoring one particular Protestant sect over others.³⁶³ “[D]uring the nineteenth century, when public schools took over the main burden of American education, they taught from a nondenominationalist Protestant perspective and engaged in devotional Bible reading.”³⁶⁴

These religious practices in school may have been ecumenical to the many different Protestant sects, but they were sectarian to Catholics. Barely one percent of the population at the Founding, the United States became home to millions of Catholics after waves of European immigration in the nineteenth century.³⁶⁵ “[Catholics] found the public schools unfriendly and inhospitable.”³⁶⁶ Unlike Protestants, Catholics did not read directly from the

358. See *infra* notes 369–81 and accompanying text.

359. Before common schools, “many charity schools for the poor run by religious groups had received government funds.” Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 175 (1996).

360. Jeffries & Ryan, *supra* note 351, at 298; Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 NYU J.L. & LIBERTY 267, 281 (2008) (describing Horace Mann as “the generally acknowledged father of the common school”).

361. Jeffries & Ryan, *supra* note 351, at 299 (“A generalized Protestantism became the common religion of the common school.”).

362. Laycock, *supra* note 354, at 418 (“When the states began to create public schools in the nineteenth century, many of those schools openly taught Protestant Christianity and read from the King James version of the Bible.”).

363. Lash, *supra* note 355, at 1122 (“Horace Mann . . . was adamant about the prohibition of sectarian doctrine in the new common schools. By sectarian, however, Mann was referring to doctrines peculiar to one or more Protestant sects.”).

364. Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 501–02 (2006).

365. Lash, *supra* note 355, at 1123 (noting that in 1800 approximately 50,000 Catholics lived in the U.S. but by mid-nineteenth century, about one and a half million mostly Catholic Irish had immigrated to the United States due to the potato famine).

366. Jeffries & Ryan, *supra* note 351, at 300.

Bible as “a direct and unmediated approach to God contradicted Catholic doctrine.”³⁶⁷ In any event, their official Bible was the Douay Bible, not the King James Bible.³⁶⁸

The fact that Protestant religious practices persisted in public schools despite the growing Catholic population reflected animosity toward the newly arrived Catholics.³⁶⁹ It was part and parcel of the pervasive anti-Catholicism in the mid-nineteenth century United States,³⁷⁰ a time when the Know-Nothing Party—“the political expression of the Protestant nativist movement”—was ascendant.³⁷¹ Catholic public school students who refused to participate in Protestant rituals were beaten or expelled.³⁷² The question of Catholics and Bible reading in public schools even sparked nativist anti-Catholic riots.³⁷³ Catholics responded by creating their own private

367. *Id.* at 300; *see also id.* (“Unaccompanied Bible reading, which was the cornerstone of the Protestant consensus, was to Catholics an affront.”).

368. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 68 (2002) (“Catholics objected to the schools’ embrace of the King James Bible with its anti-Catholic introduction.”); Linda Przybyszewski, *Religious Liberty Sacralized: The Persistence of Christian Dissenting Tradition and the Cincinnati Bible War*, 39 LAW & HIST. REV. 707, 714 (2021) (“The Catholic Church held that untutored readers needed the expert commentary provided in the Douai-Rheims Bible.”).

369. Lash, *supra* note 355, at 1124 (“Catholic protests that Bible reading violated their rights of conscience fell on deaf ears.”). The origins, though, are not necessarily anti-Catholic. Feldman, *supra* note 368, at 85–86 (“It is doubtful whether the early nineteenth-century Protestants who had come up with non-sectarianism as a response to religious heterogeneity had even thought of the possibility that anyone would object to the reading of the King James version of the Bible in an unmediated form.”).

370. Lash, *supra* note 355, at 1119 (“In the 1840s, anti-Catholic riots in Philadelphia left Catholic homes burned, churches destroyed, and several people dead. In the 1850s, on what came to be known as ‘Bloody Monday,’ anti-Catholic rioting in Louisville left twenty people dead, three quarters of them ‘foreigners,’ and hundreds wounded.”).

371. Laycock, *supra* note 354, at 417 (noting the Know-Nothing Party “swept elections in eight states in the 1850s”); *see also* Lash, *supra* note 355, at 1119 (describing the Know-Nothing Party as “notoriously anti-Catholic”).

372. Jeffries & Ryan, *supra* note 351, at 300 n.105 (citing first *Donahoe v. Richards*, 38 Me. 379, 391–92, 398–400 (1854) (permitting school officials to expel students who refused to read the Protestant Bible); then citing *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859) (holding that teachers may beat students who refused to read the Protestant Bible)); *see also* Lash, *supra* note 355, at 1124 (recounting that “eleven year old Thomas Wall of Boston followed the advice of his priest and refused to recite a prayer or read from the Protestant King James Bible during morning exercises in the public school” and thus “[a]fter Wall’s teacher beat his hands with a rattan stick for thirty minutes, Wall submitted. The Boston Police Court upheld the beating”).

373. Barbara O’Brien, *The Philadelphia Bible Riots of 1844*, PATHEOS (Sep. 19, 2024), <https://www.patheos.com/blogs/thereligioushistorynerd/2024/09/the-philadelphia-bible-riots-of-1844/> [<https://perma.cc/L2QZ-L96S>] (describing how a false rumor that Catholics were plotting to remove King James Bible readings from public schools became a flashpoint for attacks on Catholic churches and Catholic homes).

schools,³⁷⁴ but these schools failed to secure public funding.³⁷⁵ Protestants in power were determined to keep public schools favorably disposed to their religion rather than accommodate the religion of immigrants they disdained.³⁷⁶ In short, a fervent streak of anti-Catholicism lies behind some Protestant religious practices in public schools around the time of Reconstruction.³⁷⁷

Even this highly abbreviated history should make clear that past practices are often not consistent with constitutional ideals. In interpreting the religion clauses, the Supreme Court has rejected as irrelevant deeply rooted practices it deemed based on religious hostility—an obvious failure to live up to constitutional expectations. In particular, the Court disregarded the longstanding history and tradition of denying government funds to sectarian schools.³⁷⁸ It declared that this practice, which it attributed to anti-Catholic hostility,³⁷⁹ “has a shameful pedigree that we do not hesitate to disavow”³⁸⁰ and that “[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”³⁸¹ Because nineteenth-century Protestant religious practices in public schools can likewise be attributed to the anti-Catholic sentiment of the era, under the Court’s own reasoning, they too should not inform our understanding of state religion clauses.

In sum, using the history and tradition of Protestant religious practices in public schools is highly suspect, and therefore should not serve as the basis for understanding establishment clauses. Consequently, rather than rely on past practices, courts should seek to uncover the longstanding principles behind a constitutional clause and use them as a guide.

374. Laycock, *supra* note 354, at 418 (“Catholics viewed the public schools and the ‘Protestant Bible’ as a threat to their children’s faith and responded by creating their own schools . . .”).

375. Salomone, *supra* note 359, at 177 (“But Catholic efforts in New York . . . to obtain public funding for an alternative system of Catholic schools failed in the face of strident opposition mounted not only by the anti-Catholic Know-Nothing Party but also by the mainstream Protestant press.”).

376. Lash, *supra* note 355, at 1125 (“By the 1860s, it was clear that anti-Catholicism would thwart any attempt at equal time or equal funds.”).

377. I am painting with broad strokes; each state history may have its own nuances.

378. See *supra* notes 331–34 and accompanying text.

379. The history is actually more complicated than that. See, e.g., Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn’t Provide*, 2004 BYU L. REV. 1617, 1618 (2004) (noting that blaming anti-Catholicism for disapproval of government funding of religion ignores “abundant evidence of nondiscriminatory opposition to such financing”).

380. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

381. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020).

C. *Principles Behind History and Tradition*

At least two broad principles undergird the Establishment Clause, and these principles are consistent with both early and recent decisions.³⁸² The first, the anti-favoritism principle, requires that the government not favor one or some religions over others. Anti-favoritism is still embraced by the Supreme Court, at least in theory.³⁸³ A hallmark of establishment as originally understood, after all, is that the government has aligned itself with one religious tradition.³⁸⁴ The second principle, a deeply rooted one that *Lemon* incorporated,³⁸⁵ is that government laws must advance primarily secular goals, not religious ones. This principle requires that there must be a strong secular justification for any law the government forces everyone to obey. Posting Ten Commandments displays in every single public school classroom from kindergarten through college is contrary to both foundational principles.³⁸⁶ Consequently, even state courts that follow federal interpretation may still rule against laws like Louisiana's.

1. *Anti-Favoritism Principle*.—The first principle—that the government must not favor one or some religions over others—is not controversial. Textually, this principle can be traced to the bar on the establishment of religion as well as to specific language in dozens of state constitutions. Cases regularly recognize the anti-favoritism principle too.³⁸⁷ Mandating a particular version of the Ten Commandments in public school classrooms is the poster child for favoring some religions over others. Although applying this historic and deeply rooted principle has taken a backseat to relying on religious practices in recent Supreme Court decisions,³⁸⁸ this practices-based approach to history and tradition is not inevitable.

Multiple state constitutions explicitly forbid their state government from preferring one religion over others.³⁸⁹ As examined in section III(A)(1),

382. While not necessarily the only principles, they are foundational and particularly relevant for religious displays.

383. The Supreme Court would not have upheld the Christian prayers in *Town of Greece* had the Town intentionally excluded non-Christian prayers. *Town of Greece v. Galloway*, 572 U.S. 565, 585–86 (2014); see also *id.* at 597 (Alito, J., concurring) (“I would view this case very differently if the omission of these synagogues were intentional.”).

384. *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring) (noting that a hallmark of establishment was government supporting and demanding adherence to established church).

385. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

386. Cf. *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam).

387. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“[T]he central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored.”).

388. See, e.g., *Town of Greece*, 572 U.S. at 575–76 (upholding legislative prayers as a practice that dates to the Founding).

389. Tarr, *supra* note 276, at 95 (“Almost all state constitutions contain emphatic prohibitions on favoritism toward a particular religion . . .”).

many state constitutions guarantee religious liberty “without preference”³⁹⁰ or ensure that “no preference” should be given to any religious sect.³⁹¹ This includes the Texas Constitution, which reads “no preference shall ever be given by law to any religious society or mode of worship,”³⁹² and the Arkansas Constitution, which reads “no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.”³⁹³ Moreover, the principle is readily derived even from state constitutions that do not explicitly ban favoritism since an established church is essentially the government favoring one church. And of course, the text of the U.S. Constitution and the state constitutions that track it do not simply bar establishments but something a bit broader: any government action “*respecting* an establishment of religion.”³⁹⁴

Even the current Supreme Court recognizes that governments cannot intentionally favor some religions over others. For example, when the majority stayed the execution of a Buddhist death row inmate, Justice Kavanaugh’s concurrence emphasized that “[w]hat the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.”³⁹⁵

The question, then, is whether Decalogue mandates like Louisiana’s violate the anti-favoritism principle. They may not have in founding-era public schools (had they existed), given that essentially all competing religious sects worshipped God and read the King James Bible.³⁹⁶ Indeed, that is why Horace Mann could believe that Bible readings in the newly formed common schools were nonsectarian.³⁹⁷

However nonsectarian the King James Bible’s Ten Commandments may have been in our early history, they no longer are for reasons both obvious and subtle. The obvious reason is that the Ten Commandments are Christian, or at best Judeo-Christian, while the United States is significantly more religiously diverse. The Pew Religious Research Institute reports that as of 2023, only 66% of adult Americans identify as Christian of any sect, while approximately 6% identify as members of non-Christian faiths (including Jewish, Muslim, Buddhist, and Hindu), and 27% identify with no religion—with a breakdown of 5% identifying as atheist, 5% as agnostic, and

390. See *supra* note 285 and accompanying text.

391. MISS. CONST. art. 3, § 18; see also *supra* notes 286–88 and accompanying text.

392. TEX. CONST. art. 1, § 6.

393. ARK. CONST. art. 2, § 24.

394. Greenawalt, *supra* note 364, at 484 (“[R]especting an establishment of religion’ definitely appears to forbid something more than the creation of an outright establishment.”).

395. *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019).

396. Feldman, *supra* note 368, at 69 (“[T]he religious heterogeneity in America [in] 1830 was pretty much unprecedented.”). Noah Feldman also notes that diversity in the colonies before the Great Awakening was across states rather than within them. *Id.* at 69–70.

397. See *supra* notes 360–64 and accompanying text.

17% with nothing in particular.³⁹⁸ The percentage of Christians falls even lower for Generation Z, the cohort most recently in school: among Gen Z adults between 18–25, only 56% identify as Christian.³⁹⁹

Given the rainbow of religious beliefs that Americans now hold, the state’s Ten Commandments law undeniably prefers some religions over others.⁴⁰⁰ The Louisiana Governor claimed otherwise at a news conference, insisting that “[t]he Ten Commandments is not symbolic of any one particular religion Many religions share and recognize the Ten Commandments as a whole. So really and truly, I don’t see what the big fuss is about.”⁴⁰¹ Setting aside the question of whether “many” religions venerate the Ten Commandments,⁴⁰² many religions absolutely do not.⁴⁰³ Courts recast the Ten Commandments as secular rather than religious precisely to avoid the inevitable conclusion that the Decalogue favors some religions over others⁴⁰⁴—a conclusion that violates the anti-favoritism principle.

In addition, even among the religions that do honor the Ten Commandments, the text varies.⁴⁰⁵ That is, different faith traditions have different Ten Commandments. If the violent Bible Wars of the nineteenth century taught anything, it was that Catholics and Protestants use different Bibles and use them differently.⁴⁰⁶ Louisiana’s law draws from Exodus 20:1–17 of the Protestant King James Bible.⁴⁰⁷ The Catholic Decalogue, in contrast, omits the prohibition against graven images, as Catholics regularly

398. *The American Religious Landscape in 2023*, 2023 PRRI CENSUS OF AM. RELIGION (Aug. 29, 2024), <https://www.prii.org/research/census-2023-american-religion/> [https://perma.cc/TD6E-8KU4].

399. *Generation Z Fact Sheet*, PRRI’S AMERICAN VALUES ATLAS, 8 (2024), <https://www.prii.org/wp-content/uploads/2024/04/PRRI-Apr-2024-GenZ-Fact-Sheet-Final.pdf> [https://perma.cc/2VLZ-J7ZU].

400. Cf. Jeffries & Ryan, *supra* note 351, at 283–84 (“[T]he growing religious diversity of public school students makes it more and more difficult to envision any religious exercise that would not favor some faiths and offend others.”).

401. Eric Levenson, *Louisiana Unveils Ten Commandments Posters for Public Schools Featuring Hamilton, Ruth Bader Ginsburg, and Mike Johnson*, CNN (Aug. 5, 2024), <https://www.cnn.com/2024/08/05/us/louisiana-ten-commandments-schools/index.html> [https://perma.cc/2C6B-4CA4].

402. The main other religion that might venerate the Ten Commandments is Judaism.

403. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1479 (2005) (“[T]he Ten Commandments have no place at all in Hinduism, Buddhism, Taoism, and other non-western faiths.”).

404. See *supra* subpart II(B) (explaining the tactic of recharacterizing an inherently religious symbol as secular).

405. See generally Finkelman, *supra* note 403 (detailing differences among Protestant, Lutheran, Catholic, and Jewish Decalogues).

406. See *supra* notes 367–68, 372–73 and accompanying text.

407. Exodus 20:1–17 (King James); LA. REV. STAT. ANN. § 17:2124 (Supp. 2024), *invalidated by*, Roake v. Brumley, 141 F.4th 614 (5th Cir. 2025).

venerate icons of Christ, the Virgin Mary, and the saints.⁴⁰⁸ Naturally, Catholics distinguish this veneration from the worshipping of idols.⁴⁰⁹

The Jewish version differs from both of these. Its First Commandment makes the vital point that God led the Jews out of slavery into freedom: “I the LORD am your God who brought you out of the land of Egypt, the house of bondage.”⁴¹⁰ The Jewish Exodus from Egypt is so important, its retelling is the focus of Passover, a major Jewish holiday.⁴¹¹ The Jewish Decalogue also declares “[y]ou shall not murder” rather than “[t]hou shalt not kill.”⁴¹² Additionally, many Orthodox Jews do not spell out “God,” as is done in the King James version, writing “G-d” instead.⁴¹³ Some Jews would condemn any Ten Commandments posters as proselytizing, which is contrary to core Jewish tenets.⁴¹⁴ As for Islam, the Ten Commandments are influential but not adhered to as holy laws.⁴¹⁵ The Qur’an does not even contain a full Decalogue.⁴¹⁶ After detailing the various versions, Paul Finkelman concludes, “[i]t is quite impossible to have a theologically neutral version of

408. CATECHISM OF THE CATHOLIC CHURCH 516–17 (Libreria Editrice Vaticana, 2d ed. 2000).

409. MICHAEL COOGAN, *THE TEN COMMANDMENTS: A SHORT HISTORY OF AN ANCIENT TEXT* 118 (Yale Univ. Press, 2014) (“[Icons have] been rationalized by the argument that they are not false gods who are worshipped, but images of the one true God, or of angels and saints who are not actually worshipped, but only ‘venerated.’”).

410. *THE TORAH: A MODERN COMMENTARY* 539 (W. Gunther Plaut ed., 1981).

411. Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 *FIRST AMEND. L. REV.* 185, 207 (2017) (“Indeed, the retelling of Exodus is at the heart of Passover, one of the most important Jewish holidays.”); *cf. id.* at 207 n.119 (“[T]hese first ten commandments are only a few of the 613 Jewish commandments, all of which are equally important. And this summary itself likely glosses over theological disputes within the Jewish community.”).

412. Finkelman, *supra* note 403, at 1495 (“Jewish Bibles, following well accepted Jewish theological traditions and careful scholarly attention to the original Hebrew, translate this line as ‘You shall not murder.’”).

413. Marvin Fox, Louis F. Hartman, Moshe Idel, Louis Isaac Rabinowitz & David Sperling, *God, Names of* *ENCYC. JUDAICA* 676–77 (Fred Skolnik ed., Macmillan Reference USA 2d ed. 2007) (1971) (explaining that “it is forbidden to erase the name of God from a written document, and since any paper upon which that name appears might be discarded and thus ‘erased,’ it is forbidden to write the name explicitly,” therefore, “the custom has become widespread among extremely particular Jews not to write the word God or any other name of God”).

414. *Roake v. Brumley*, 756 F. Supp. 3d 93, 200 (M.D. La. 2024), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025).

415. Finkelman, *supra* note 403, at 1481 (“Muslims accept the Jewish Bible as a holy scripture, but it is not central to their faith and they do not embrace the Ten Commandments as part of their doctrine.”).

416. Sebastian Günther, *O People of the Scripture! Come to a Word Common to You and Us (Q. 3:64): The Ten Commandments and the Qur’an*, 9 *J. QU’RANIC STUD.* 28, 29–30 (2007) (noting that the Qur’an twice refers to the Commandments revealed to Moses on Mount Sinai but does not list them).

the Ten Commandments.”⁴¹⁷ Consequently, to post one version is to favor one or some religious traditions over others.

In sum, if the Establishment Clause means anything, it is that the government cannot prefer one religion over others. Posting a Protestant version of the Ten Commandments does not just favor Christianity, it favors particular sects of Christianity over others. Even among religions for whom the Decalogue is a holy text, any state-sponsored Ten Commandments display will inevitably play favorites and therefore should not be countenanced by any Establishment Clause, federal or state.

2. Secular Justification Principle.—A second principle informing the Establishment Clause is that the government should always have a primarily secular justification for its laws.⁴¹⁸ That is, the state’s justification ought to be based on public reasons that might persuade citizens regardless of their religious beliefs.⁴¹⁹ The *Lemon* test reflected this requirement, but it stands as a fundamental principle that pre-dates and post-dates *Lemon*.⁴²⁰ Mandating the Ten Commandments in every school classroom whether relevant or not to the subject taught fails this secularity requirement and therefore should violate federal and state establishment provisions.

This commitment to secular justification can be traced back to the works of Enlightenment thinkers, such as John Locke,⁴²¹ and may also represent a

417. Finkelman, *supra* note 403, at 1492; *see also id.* at 1479 (“[A]ny display of the Commandments is inherently sectarian, because it must choose a translation, ordering, and numbering system that will favor, or endorse one or more religions, and therefore disfavor other religions.”).

418. Robert Audi terms this “a principle of secular rationale.” Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 *IND. L.J.* 273, 276 (2000); *see also* Robert Audi, *Religious Reasons and the Liberty of Citizens*, 25 *CONST. COMMENT.* 249, 252 (2008) (“My ‘principle of secular rationale’ . . . is that ‘citizens in a free democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate secular reason for this advocacy or support.’”).

419. This is akin to Rawls’s public reason, where “[o]nly public reasons drawing on political values that others could reasonably be expected to endorse may be introduced.” James P. Madigan, *The Idea of Public Reason Resuscitated*, 10 *WM. & MARY BILL RTS. J.* 719, 725 (2002). In other words, the reason cannot “rest on a comprehensive doctrine that others do not share,” i.e., religion. *Id.* at 723; *see also* John Rawls, *The Idea of Public Reason Revisited*, 64 *U. CHI. L. REV.* 765, 786 (1997) (“Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.”).

420. Audi, *Religious Values, Political Action, and Civic Discourse*, *supra* note 418, at 289 (describing as a “basic liberal-democratic idea” the belief “that governmental coercion should be justifiable on the basis of secular reason”).

421. Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 *MINN. L. REV.* 1341, 1351–52 (2020) (noting that “[t]hese basic commitments to the separation of church and state are mainly a product of the Enlightenment,” as such, “[t]he intellectual roots . . . can be traced to foundational texts like John Locke’s A Letter Concerning Toleration (1689), James Madison’s Memorial and Remonstrance Against Religious Assessments (1785), and Thomas Jefferson’s A Bill for Establishing Religious Freedom (1779), written for

response to the widespread religious wars that plagued Europe.⁴²² “The requirements of ‘public reason’ mean that a state cannot enforce a law if the only justification for the law is based on a specific comprehensive doctrine . . . [such as] a particular religious tradition.”⁴²³ A law without a mainly secular justification equates to state power used to force religious tenets onto everyone, including those with contrary religious beliefs and obligations.⁴²⁴ Such government imposition is a hallmark of establishment.⁴²⁵

Indeed, the prohibition on laws without adequate secular justification flows from more than one historical aspect of establishment. One paradigmatic example of government establishment is the government choosing sides on theological controversies by declaring religious truth, such as insisting that the Baptist understanding of the Bible is the infallible and correct one.⁴²⁶ A related one is the government declaring that everyone must be Baptist (or some other faith tradition) and must abide by its beliefs.⁴²⁷ Laws whose *raison d’être* is to codify Baptist theology or foist Baptist tenets onto the public is therefore a type of establishment.⁴²⁸ The one way to ensure that laws do not enact religious truth or mandate adherence to religious tenets

Virginia.”); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 483 (1996) (“Most scholars consider the Constitution itself to be a product of the Enlightenment.”); see also Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 467–68 (describing the Constitution’s debt to the Enlightenment).

422. Schragger & Schwartzman, *supra* note 421, at 1351 (“The effort to separate the state and religion was in part a reaction to the European wars of religion between Protestants and Catholics.”).

423. *Id.* at 1353; see also Madigan, *supra* note 419, at 733–34 (“Public [secular] reasons draw on shared political values and common-sense methods of inquiry. They are not based upon comprehensive [religious] doctrines that listeners will not share.”); see also Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 S.D. L. REV. 729, 731 (1993) (describing Rawls’s position) (“Public reasons, however, are limited to premises and modes of reasoning that can appeal to the public at large.”).

424. Madigan, *supra* note 419, at 726 (referencing John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997)) (describing Rawls’s argument in *The Idea of Public Reason Revisited* as “[p]eople of faith . . . must not attempt to use law to establish the hegemony of their own comprehensive views.”).

425. It also, as Andy Koppelman points out, “effectively read[s] the Establishment Clause out of the Constitution altogether.” Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002). If the government does not need a secular justification, then it can ban same-sex marriage because of religious hostility to it, or ban pork altogether as forbidden by religion. In addition, “[i]f there were no secular purpose requirement, the state could invoke divine will as a compelling justification for any discrimination that it chose to practice.” *Id.* at 93–94.

426. *Id.* at 89 (“The secular purpose requirement follows directly from a principle at the core of the Establishment Clause: that government may not declare religious truth.”); see also *id.* at 108–09 (“The Establishment Clause forbids the state from declaring religious truth. This proposition has been well settled for decades.”).

427. Cf. Sherry, *Enlightening the Religion Clauses*, *supra* note 421, at 481 (“The crucial epistemological difference between reason and faith is aspirational: religion’s goal is to identify and follow the word of God while secularists attempt to appeal only to shared *human* knowledge.”).

428. The prohibitions in state constitutions that protect against government enforced religiosity partially capture this requirement. These include one of the most common provisions—the guarantee that no one would have to support or attend any particular religious ministry or worship.

is to guarantee that there is an adequate secular, rather than religious, justification for them.⁴²⁹

Requiring a sufficient secular justification for laws does not mean a lawmaker's religious convictions can never play a role.⁴³⁰ To start, lawmakers can be motivated by religious and secular reasons.⁴³¹ In addition, motivation differs from justification.⁴³² A legislator might vote for a law that would guarantee housing for the homeless because they believe that Christ's admonition to "give to the poor, and thou shalt have treasure in heaven"⁴³³ creates a duty to take care of those in need. But the humanitarian idea that everyone should have a roof over their head is not an exclusively religious one, and plenty of non-Christian and non-religious people may well support such a law. Likewise, because there are plenty of secular reasons to bar theft (no society, regardless of religion, generally allows it),⁴³⁴ it does not preclude a legislator from criminalizing online scams simply because one of the Ten Commandments declares that "[t]hou shalt not steal." As long as the main justification is available to everyone, regardless of their faith tradition, it should be constitutional.⁴³⁵

The question then becomes whether there is an adequate secular justification for posting the Decalogue in every public school classroom. Because the Ten Commandments are inherently religious, a court should presume that laws like Louisiana's mandating their display lack such a justification.⁴³⁶ The presumption could be rebutted, of course, but the fact that the supporters of the Louisiana law freely admit to their religious ends

429. What makes a secular justification adequate? At the very least, the secular reason cannot simply be a pretext for religious goals. It also must be the case that the law would have passed due to the secular reason alone, which is more likely if it is the primary rather than secondary reason.

430. Note that Madigan and Rawls focus more on political discourse, while I am focusing more on the ultimate justification. See, e.g., Madigan, *supra* note 419, at 733 ("[I]n my exclusive view . . . reasons failing the reciprocity test (e.g., other free and equal citizens will not reasonably be expected to endorse them) [should] be left out of public political discourse."). One can be motivated by religion to vote for a law yet advance only public reasons for it. So, I am not taking a position on the question of what reasons should be offered in favor of a law.

431. Audi, *Religious Values, Political Action, and Civic Discourse*, *supra* note 418, at 280.

432. *Id.* at 280–81.

433. *Matthew* 19:21 (Douay-Rheims).

434. For example, the Code of Hammurabi, one of the oldest known legal codes, prohibits theft. See *The Code of Hammurabi* (L.W. Wong trans.), AVALON PROJECT, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, <https://avalon.law.yale.edu/ancient/hamframe.asp> [<https://perma.cc/TT5D-JZQF>] (containing several provisions prohibiting theft); see also Finkelman, *supra* note 403, at 1505 ("Laws punishing theft and perjury are found in virtually every known culture").

435. Sherry, *Enlightening the Religion Clauses*, *supra* note 421, at 492 ("[T]hese principles suggest that government may not make decisions that are themselves based on contested religious beliefs that cannot be rationally supported.").

436. See *supra* section II(B)(2), especially notes 140–45 and accompanying text.

tends to diminish the credibility of any proffered secular justification.⁴³⁷ The lead author and sponsor, for example, announced that “I have been wanting to get God back in the classroom since it was removed many moons ago”⁴³⁸ and described her aim as ensuring children “be able to see . . . that there is a God.”⁴³⁹ Her co-sponsor complained that children were not attending church anymore and that “we need to do something in the schools to bring people back to where they need to be.”⁴⁴⁰ Moreover, the statute itself stresses the religious connections more than the historical significance of the other documents expressly approved for display with the Decalogue, further undermining any secular justification.⁴⁴¹

Louisiana focused its context statement—the justification students will read for why the Ten Commandments adorn their school walls—on its manufactured history and tradition of the Ten Commandments in public schools,⁴⁴² perhaps assuming this narrative alone would satisfy the Supreme Court’s history and tradition test. Nonetheless, if pressed for secular justifications, Louisiana and states with similar laws might propose two

437. *Roake v. Brumley*, 756 F. Supp. 3d 93, 170 (M.D. La. 2024) (“[I]n light of the requirements of H.B. 71 itself and the undisputed statements of its proponents as to its purpose, the Act’s alleged secular purposes are ‘so implausible [and] inadequate that they ought not be credited.’”), *hearing en banc denied*, 132 F.4th 748 (5th Cir. 2024), *aff’d*, 141 F.4th 614 (5th Cir. 2025); *Roake*, 1141 F.4th at 644 (concluding that sponsor statements “indeed ‘support a commonsense conclusion that a religious objective permeated the government’s action’” (internal citation omitted)).

438. TONY PERKINS, *State Rep. Dodie Horton on her legislation to display the Ten Commandments in public schools*, at 5:20–5:26 (YouTube, May 30, 2024), <https://www.youtube.com/watch?v=bFhsOD0Es3Q> [<https://perma.cc/C5X8-NYST>]; *see also* Johanna Alonso, *Louisiana Wants the Ten Commandments in College Classrooms, Too*, INSIDE HIGHER ED (July 11, 2024), <https://www.insidehighered.com/news/diversity/religion/2024/07/11/will-louisianas-ten-commandments-law-apply-colleges-too> [<https://perma.cc/J522-FQ9S>] (quoting state Rep. Dodie Horton as saying her goal was to “have a display of God’s law in the classroom for children to see what He says is right and what He says is wrong”).

439. PERKINS, *supra* note 438, at 1:50–1:54. In Texas, the similarly transparent House sponsor of the Texas Commandments mandate argued during debate: “It is incumbent on all of us to follow God’s law and I think we would all be better off if we did.” Sameea Kamal, *Texas Will Require Public School Classrooms to Display Ten Commandments Under Bill Signed by Governor*, TEXAS TRIBUNE (May 24, 2025), <https://www.texastribune.org/2025/05/24/ten-commandments-texas-schools-senate-bill-10/> [<https://perma.cc/Y6L8-FYLM>].

440. *Roake*, 756 F. Supp. 3d at 169. The Fifth Circuit noted that in response to a query about what a Muslim or Buddhist student would make of the Ten Commandments, the bill’s author replied that the Ten Commandments are “a model for what’s God’s—it’s God’s law, and its universal law.” *Roake*, 141 F.4th at 644. Another co-sponsor’s equating opposition to the law with an “attack on Christianity” is also very telling. *Roake*, 756 F. Supp. 3d at 169.

441. *See supra* notes 155–56 and accompanying text (discussing religiosity of the Mayflower Compact, the Northwest Ordinance, and the Declaration of Independence).

442. *See supra* notes 234–48 and accompanying text. In other words, rather than articulate an actual justification, Louisiana argues that it is enough that there have always been Ten Commandments in public schools.

secular educational reasons for mandating Ten Commandment displays.⁴⁴³ First, students should learn that the Ten Commandments form the basis of American government and law; Louisiana asserts that the Decalogue was “foundational” for both.⁴⁴⁴ Second, a primary purpose of public schools is to teach fundamental values, and the Ten Commandments does just that.⁴⁴⁵

Neither is persuasive. As many scholars have exhaustively detailed, the main inspiration for the government of the United States and its Constitution lies not with the Bible but with the Enlightenment.⁴⁴⁶ Far from being grounded in the Ten Commandments, the Constitution of the United States does not once mention God.⁴⁴⁷ Nor does American law owe its existence to the Decalogue.⁴⁴⁸ Other than a few universal prohibitions that exist in every culture,⁴⁴⁹ most Commandments cannot be enacted into law. What would a law against coveting your neighbor’s spouse and goods even look like?⁴⁵⁰

443. In *Stone*, Kentucky claimed in its accompanying disclaimer that the Ten Commandments were adopted “as the fundamental legal code of Western Civilization and the Common Law of the United States.” *Stone*, 449 U.S. at 41 (quoting 1978 Ky. Acts, ch. 436 § 1); *see also* *McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 856 (2005) (evaluating Ten Commandments included in “The Foundations of American Law and Government Display”).

444. LA. REV. STAT. ANN. § 17:2124(A)(3) (Supp. 2024), *invalidated by*, *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025) (quoting Supreme Court dicta that Ten Commandments “have historical significance as one of one of the foundations of our legal system,” *Am. Legion v. Am. Humanists Ass’n*, 588 U.S. 29, 53 (2019)); LA. REV. STAT. § 17:2124(A)(9) (describing Ten Commandments as a “foundational document of our state and national government”).

445. In *Schempp*, the district argued that Bible readings advanced the secular purpose of “the promotion of moral values.” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

446. Suzanna Sherry, *The Sleep of Reason*, *supra* note 421, at 467–68 (“It seems virtually undisputed among historians that ‘the dominant, fresh, and creative intellectual energy behind the Constitution and the Bill of Rights was that of the eighteenth-century Enlightenment.’”); Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1697 (1988) (“The Constitution is a product of the Enlightenment.”).

447. Sherry, *Enlightening the Religion Clauses*, *supra* note 421, at 483–84 (“Unlike founding documents of the previous century, the Constitution does not refer to God The underlying epistemology of the Constitution, then, is reason rather than faith.”). Moreover, the religious references in the Declaration of Independence are non-biblical. Finkelman, *supra* note 403, at 1509 (“The Declaration of Independence includes references in the beginning to the ‘Laws of Nature and of Nature’s God,’ a ‘Creator,’ and a reference in the end to ‘divine Providence,’ but these are non-biblical references.”).

448. *See, e.g.*, Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & RELIGION 525, 545 (2000) (explaining that “[t]he influence of Locke and other Enlightenment thinkers on late colonial attitudes toward the law cannot be over-stated.” And adding that, “[r]egardless of whether the common law was viewed as embodying custom or natural rights, it took on a very non-sacred quality. As a result, the legal and political documents of the founding era reveal practically no reliance on the Decalogue, Mosaic law, or the bible generally.”); *see also id.* at 548 (“[T]he historical record is devoid of *any* statements by the Founders about the legal significance of the Ten Commandments.”) (emphasis in original).

449. *See, e.g.*, Finkelman, *supra* note 403, at 1505 (noting that anti-theft laws are pervasive across cultures).

450. Or a law requiring children to honor their parents? *Id.* at 1518 (“Indeed, it is hard to imagine how most of the Commandments could be understood to be foundational for American

Even if the Decalogue served as *an* influence on American government or law, Louisiana’s decision to emphasize its role and no other’s in this unique, ubiquitous fashion is suspect.⁴⁵¹ As the Fifth Circuit observed, it is unclear how the Ten Commandments will elucidate the Constitution or other foundational political or legal documents when only the Decalogue is posted.⁴⁵² They certainly have not been integrated into a social studies or history course.⁴⁵³ In sum, “[w]hen the Ten Commandments must be posted prominently and legibly, while the other ‘contextual’ materials need not be visible at all, the disparity lays bare the pretext.”⁴⁵⁴ In any event, as a lesson on the intellectual antecedents of our government and law, Decalogue posters are too simplistic for college students and age-inappropriate for children just learning to read.

If the secular goal is to teach children essential secular values—something children are never too young to learn—the Ten Commandments again fail to deliver. To start, the first four Commandments are religious exhortations.⁴⁵⁵ They order the reader to have no other God; to make no graven images; to shun blasphemy; and to remember the Sabbath. These are neither shared nor secular values. They are Christian values that not even all Christians agree upon. Even the purportedly secular Fifth Commandment “[h]onour thy father and thy mother” is ultimately religious, as it finishes with “that thy days may be long upon the land which the Lord thy God giveth thee.”⁴⁵⁶ Only the Commandments on theft, murder, perjury and coveting arguably further common nonreligious values.

The paucity of actual shared secular values captured by the Ten Commandments is only the start of the mismatch between the state’s means and its asserted secular goal. One problem is that the moral teachings of the Ten Commandments are often age inappropriate. Warning against adultery is hardly a lesson for grade schoolers, or frankly even high schoolers.⁴⁵⁷ A second problem is that values are not usually taught by plastering moral precepts on the wall of every classroom regardless of that room’s intended

law. Most of the Commandments could not be enacted into law and withstand a constitutional challenge.”).

451. *Cf.* *Adland v. Russ*, 307 F.3d 471, 482 (6th Cir. 2002) (“[W]e cannot ignore the Commonwealth’s adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences.”).

452. *Roake v. Brumley*, 141 F.4th 614, 645 (5th Cir. 2025).

453. *Id.* at 643.

454. *Id.* at 645.

455. *Cf.* *Indiana C. L. Union v. O’Bannon*, 259 F.3d 766, 770–71 (7th Cir. 2001) (“These particular commandments are wholly religious in nature, and serve no conceivable secular function.”).

456. *Exodus* 20:12 (King James).

457. The merit of admonishing children that they should not covet thy neighbor’s wife nor thy neighbor’s cattle is also dubious; not only does the state’s message seem addressed only to the husbands, but it suggests that husbands possess wives in the same way they possess cattle.

purpose. The periodic table of elements or posters of famous scientists hang in science labs, not “I [am] the Lord thy God.” Likewise, “reading is fun” posters or quotations from famous books decorate libraries, not “[t]hou shalt not covet thy neighbor’s house . . . [and] wife.”

Yet another problem is that the Ten Commandments do not reflect the values that public schools are generally charged with teaching children. Although schools may certainly reaffirm criminal prohibitions against perjury, theft, and murder, laying down the criminal law is not a main purpose of public education. Rather, its mission includes instilling civic values like citizenship, democratic participation, and social responsibility; or character traits such as kindness, integrity, and empathy; or academic virtues like developing intellectual curiosity, managing one’s time, and learning to persevere. There are dozens of more relevant values that public schools undertake to teach children than those enumerated in the Ten Commandments. To the extent that the secular goal is teaching students of all ages important secular values, the Ten Commandments is an unusually ineffective means to do so.

The mismatch indicates a lack of adequate secular justification. As the Supreme Court has observed in many different contexts, a bad fit between the means and end raises the strong suspicion that the state’s asserted justification is really a pretext for something else, whether it be animus, suppressing unpopular viewpoints, or, as here, foisting a set of religious views onto school-age and college students.⁴⁵⁸

In short, as the Supreme Court stressed the first time it addressed a law mandating the Ten Commandments in the classroom, “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”⁴⁵⁹ It was not a genuine secular justification that led Louisiana to demand that schools post the Ten Commandments in every public school classroom, and such a mandate should violate the establishment provisions of the U.S. Constitution as well as state constitutions across the country. Otherwise, the government risks becoming akin to a theocracy, dictating religious rules that all must follow.

458. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 359 (1819) (“[C]omparing the means with the proposed end, will decide whether the connection is real, or assumed as the pretext [for illegitimate government action.]”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985) (finding that fit between means and end was so poor that law appears based on animus); Brenda Swierenga, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1473 (1986) (“[I]f a statute’s means plainly do not fit permissible ends, the Court will conclude the asserted permissible ends are a pretext for impermissible ones.”).

459. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

Conclusion

It has become more difficult than ever to win an Establishment Clause challenge such as one to Louisiana's Ten Commandments mandate. To start, the Roberts Court's revamped doctrine, with its jettisoned *Lemon* and endorsement tests, diminished coercion test, and ever-growing Free Exercise Clause, cuts into establishment protection. In addition, the Roberts Court has embraced several tactics for rejecting Establishment Clause claims ranging from secular-washing religious symbols into something secular to manipulating the now de rigueur "history and tradition" test.

State courts interpreting their state constitution's establishment provisions, however, provide an alternative. As *New Judicial Federalism* emphasizes, states are meant to provide another layer of protection for individual rights, and therefore state courts may read their constitutions to provide greater coverage than the U.S. Constitution. Accordingly, a state court may choose to rely on precedent that the Supreme Court has discarded or fashion its own establishment rules. Even if a state court prefers to follow the Supreme Court's turn to history and tradition, it may opt to be guided by underlying establishment principles—like the anti-favoritism principle and secular justification principle—rather than historical practices that may conflict with those principles.

Appendix

Alabama

Alabama Religion Provisions:

“That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.”⁴⁶⁰

Alabama No-Aid Provisions:⁴⁶¹

“No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”⁴⁶²

Alaska

Alaska Religion Provisions:

“No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.”⁴⁶³

“The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control.”⁴⁶⁴

Alaska No-Aid Provisions:⁴⁶⁵

No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”⁴⁶⁶

460. ALA. CONST. art. I, § 3.

461. Adopted in 1875 and most recently approved in 1901. ALA. CONST. of 1875, art. XIII, § 8; ALA. CONST. art. XIV, § 263 (as enacted in 1901).

462. ALA. CONST. art. XIV, § 263.

463. ALASKA CONST. art. I, § 4.

464. *Id.* art. VII, § 1.

465. Adopted in 1956, and most recently approved in 1956. ALASKA CONST. art. VII, § 1 (as enacted in 1956).

466. ALASKA CONST. art. VII, § 1.

Arizona

Arizona Religion Provisions:

“The liberty of conscience secured by the provisions of this constitution 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 to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.”⁴⁶⁷

“Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same.”⁴⁶⁸

“Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from sectarian control”⁴⁶⁹

Arizona No-Aid Provisions:⁴⁷⁰

“No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school”⁴⁷¹

Arkansas

Arkansas Religion Provisions:

“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.”⁴⁷²

467. ARIZ. CONST. art. II, § 12.

468. *Id.* art. XX, pt. 1.

469. *Id.* art. XX, pt. 7.

470. Adopted in 1910 and most recently approved in 1910. ARIZ. CONST. art. IX § 10; *id.* at art. XX, pt. 7 (as enacted in 1910).

471. ARIZ. CONST. art. IX, § 10.

472. ARK. CONST. art. 2, § 24.

“Religion, morality and knowledge being essential to good government, the General Assembly shall enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.”⁴⁷³

“No religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations.”⁴⁷⁴

“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”⁴⁷⁵ (Unenforceable under *Torcaso v. Watkins*.)⁴⁷⁶

Arkansas No-Aid Provisions: No additional provisions

California

California Religion Provisions:

“Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.”⁴⁷⁷

“A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.”⁴⁷⁸

“The university [of California] shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex.”⁴⁷⁹

473. *Id.* art. 2, § 25.

474. *Id.* art. 2, § 26.

475. *Id.* art. 19, § 1.

476. 376 U.S. 488 (1960).

477. CAL. CONST. art. I, § 4.

478. *Id.* art. I, § 4.

479. *Id.* art. IX, § 9(f).

California No-Aid Provisions:⁴⁸⁰

“No public money shall ever be appropriated for the support of any sectarian or denominational school . . .”⁴⁸¹

ColoradoColorado Religion Provisions:

“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.”⁴⁸²

“No sectarian tenets or doctrines shall ever be taught in the public school . . .”⁴⁸³

Colorado No-Aid Provisions:⁴⁸⁴

“Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose . . . nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.”⁴⁸⁵

ConnecticutConnecticut Religion Provisions:

“The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state; provided, that the right hereby declared and established, shall not be so construed as to

480. Adopted in 1879 and most recently approved in 1879. CAL. CONST. art. IX, § 8 (as enacted in 1879).

481. CAL. CONST. art. IX, § 8.

482. COLO. CONST. art. II, § 4.

483. *Id.* art. IX, § 8.

484. Adopted in 1876 and most recently approved in 1876. COLO. CONST. art. IX (as enacted in 1876).

485. COLO. CONST. art. IX, § 7.

excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.”⁴⁸⁶

“It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship.”⁴⁸⁷

Connecticut No-Aid Provisions: No additional provisions

Delaware

Delaware Religion Provisions:

“Although it is the duty of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; yet no person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against the person’s own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.”⁴⁸⁸

“No religious test shall be required as a qualification to any office, or public trust, under this State.”⁴⁸⁹

486. CONN. CONST. art. 1, § 3.

487. *Id.* art. 7.

488. DEL. CONST. art. I, § 1.

489. *Id.* art. I, § 2.

Delaware No-Aid Provisions:⁴⁹⁰

“No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school”⁴⁹¹

FloridaFlorida Religion Provisions:

“There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety.”⁴⁹²

Florida No-Aid Provisions:⁴⁹³

“No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”⁴⁹⁴

GeorgiaGeorgia Religion Provisions:

“No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.”⁴⁹⁵

Georgia No-Aid Provisions:⁴⁹⁶

“No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”⁴⁹⁷

490. Adopted in 1897 and most recently approved in 1897. DEL. CONST. art. X, § 3 (as enacted in 1897).

491. DEL. CONST. art. X, § 3.

492. FLA. CONST. art. I, § 3.

493. Adopted in 1885. FLA. CONST. art. I, § 6 (as enacted in 1885; originally “. . . and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination, or in aid of any sectarian institution.”). Most recently approved in 1968. FLA. CONST. art. I, § 3 (as enacted in 1968).

494. FLA. CONST. art. I, § 3.

495. GA. CONST. art. I, § I, ¶ IV.

496. Adopted in 1877. GA. CONST. of 1877, art. I, § I, ¶ XIV (differing only in ending the list with “denomination of religionists” rather than “religious denomination.”). Most recently approved in 1983. GA. CONST. art. I, § II, ¶ VII (as enacted in 1983).

497. GA. CONST. art. I, § II, ¶ VII.

Hawaii

Hawaii Religion Provisions:

“No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof”⁴⁹⁸

“The state shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control”⁴⁹⁹

Hawaii No-Aid Provisions: No explicit provisions

Idaho

Idaho Religion Provisions:

“The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.”⁵⁰⁰

“No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the

498. HAW. CONST. art. I, § 4.

499. *Id.* art. X, § 1. Enacted in 1978 and most recently approved in 1978. HAW. CONST. art. X, § 1 (as amended in 1978).

500. IDAHO CONST. art. I, § 4.

schools have not been taught in accordance with the provisions of this article.”⁵⁰¹

Idaho No-Aid Provisions.⁵⁰²

“Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose . . . nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose”⁵⁰³

Illinois

Illinois Religion Provisions:

“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.”⁵⁰⁴

Illinois No-Aid Provisions.⁵⁰⁵

“Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.”⁵⁰⁶

501. *Id.* art. IX, § 6.

502. Adopted in 1890 and last approved in 1890. IDAHO CONST. art. IX, § 5 (as enacted in 1890).

503. IDAHO CONST. art. IX, § 5.

504. ILL. CONST. art. I, § 3.

505. Adopted in 1870. ILL. CONST. of 1870, art. VIII, § 3. Most recently approved in 1970. ILL. CONST. art. X, § 3 (as enacted in 1970).

506. ILL. CONST. art. X, § 3.

Indiana

Indiana Religion Provisions:

“All men shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.”⁵⁰⁷

“No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.”⁵⁰⁸

“No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”⁵⁰⁹

“No religious test shall be required, as a qualification for any office of trust or profit.”⁵¹⁰

“No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.”⁵¹¹

Indiana No-Aid Provisions:⁵¹²

“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”⁵¹³

Iowa

Iowa Religion Provisions:

“The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”⁵¹⁴

507. IND. CONST. art. 1, § 2.

508. *Id.* art. 1, § 3.

509. *Id.* art. 1, § 4.

510. *Id.* art. 1, § 5.

511. *Id.* art. 1, § 7.

512. Adopted in 1851 and most recently approved in 1851. IND. CONST. art. 1, § 6 (as enacted in 1851).

513. IND. CONST. art. 1, § 6.

514. IOWA CONST. art. I, § 3.

“No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.”⁵¹⁵

Iowa No-Aid Provisions: No additional provisions

Kansas

Kansas Religion Provisions:

“The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.”⁵¹⁶

“The militia shall be composed of all able-bodied male citizens between the ages of twenty-one and forty-five years, except such as are exempted by the laws of the United States or of this state; but all citizens of any religious denomination whatever who from scruples of conscience may be adverse to bearing arms shall be exempted therefrom, upon such conditions as may be prescribed by law.”⁵¹⁷

Kansas No-Aid Provisions.⁵¹⁸

“No religious sect or sects shall control any part of the public education funds.”⁵¹⁹

515. *Id.* art. I, § 4.

516. KAN. CONST. Bill of Rights § 7.

517. *Id.* art. 8, § 1.

518. Adopted in 1859. KAN. CONST. art. 6, § 8 (moved pursuant to the 1966 amendment; textual change from “common school or university funds” to “public education funds”). Most recently approved in 1966. KAN. CONST. art. 6, § 6(c) (as amended in 1966).

519. KAN. CONST. art. 6, § 6(c).

Kentucky

Kentucky Religion Provisions:

“No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.”⁵²⁰

Kentucky No-Aid Provisions:⁵²¹

“No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”⁵²²

Louisiana

Louisiana Religion Provisions:

“No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of . . . religious ideas, beliefs, or affiliations. . . .”⁵²³

“No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.”⁵²⁴

“In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on . . . religion”⁵²⁵

“(A) The freedom to worship in a church or other place of worship is a fundamental right that is worthy of the highest order of protection.

(B) This Section shall not alter or limit Article 1, Section 8 of this Constitution in any way. The free exercise of religion guaranteed by

520. KY. CONST. § 5.

521. Adopted in 1891 and most recently approved in 1891. KY. CONST. § 189 (as enacted in 1891).

522. KY. CONST. § 189.

523. LA. CONST. art. I, § 3.

524. *Id.* art. I, § 8.

525. *Id.* art. I, § 12.

Article 1, Section 8 of this Constitution shall not be limited to the fundamental right to worship in a church or other place of worship.

(C) If a state or local governmental body or official acts in a manner that is contrary to the provisions of this Section and a challenge is brought related to that governmental action, the court shall apply strict scrutiny in order to protect the fundamental right to worship in a church or other place of worship, unless there is a higher level of protection or scrutiny recognized and applied by the court.”⁵²⁶

Louisiana No-Aid Provisions: No explicit provisions

Maine

Maine Religion Provisions:

“All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person’s liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person’s own conscience, nor for that person’s religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship; -- and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.”⁵²⁷

Maine No-Aid Provisions: No explicit provisions

Maryland

Maryland Religion Provisions:

“That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe

526. *Id.* art. XII, § 17.

527. ME. CONST. art. I, § 3.

the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come. Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place. Nothing in this article shall constitute an establishment of religion.”⁵²⁸

“That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.”⁵²⁹ (Declaration of belief requirement unenforceable under *Torcaso v. Watkins*.)⁵³⁰

“That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.”⁵³¹

Maryland No-Aid Provisions: No additional provisions

Massachusetts

Massachusetts Religion Provisions:

“It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.”⁵³²

528. MD. CONST. Declaration of Rights, art. 36.

529. *Id.* art. 37.

530. 376 U.S. 488 (1960).

531. MD. CONST. Declaration of Rights, art. 39.

532. MASS. CONST. pt 1, art. II; *id.* amend. art. XVIII, § 1; *id.* amend. art. XVIII editor’s and revisor’s notes.

“No law shall be passed prohibiting the free exercise of religion.”⁵³³

Massachusetts No-Aid Provisions:⁵³⁴

“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding . . . any church, religious denomination or society.”⁵³⁵

Michigan

Michigan Religion Provisions:

“Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”⁵³⁶

“No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.”⁵³⁷

Michigan No-Aid Provisions:⁵³⁸

“No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.”⁵³⁹

Minnesota

Minnesota Religion Provisions:

“The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to

533. *Id.* amend. art. XVIII, § 1; *id.* amend. art. XVIII editor’s and revisor’s notes.

534. Adopted in 1917 replacing earlier provision. MASS. CONST. art. XVIII, § 2 (as amended in 1917). Most recently approved in 1974. MASS. CONST. art. XLVI, § 2 (as amended in 1974).

535. MASS. CONST., art. XLVI, § 2.

536. MICH. CONST. art. I, § 4.

537. *Id.* art. I, § 18.

538. Adopted in 1835. MICH. CONST. of 1835, art. I, § 5 (originally “No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.”). Most recently approved in 1963. MICH. CONST. art. I, § 4 (as enacted in 1963).

539. MICH. CONST. art. I, § 4.

attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; 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 or safety of the state . . .”⁵⁴⁰

“No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.”⁵⁴¹

Minnesota No-Aid Provisions:

“In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.”⁵⁴²

“[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.”⁵⁴³

Mississippi

Mississippi Religion Provisions:

“No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of this state.”⁵⁴⁴

540. MINN. CONST. art. I, § 16.

541. *Id.* art. I, § 17.

542. *Id.* art. XIII, § 2. Adopted in 1877. *Id.* art. VIII, § 3 (as amended in 1877; originally begins “But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated . . .”). Most recently approved in 1974. *Id.* art. XIII, § 2 (as revised in 1974).

543. *Id.* art. I, § 16. Adopted and most recently approved in 1857. *Id.* (as enacted in 1857).

544. MISS. CONST. art. 3, § 18.

“No person who denies the existence of a Supreme Being shall hold any office in this State.”⁵⁴⁵ (Unenforceable in light of *Torcaso v. Watkins*.)⁵⁴⁶

Mississippi No-Aid Provisions.⁵⁴⁷

“No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.”⁵⁴⁸

Missouri

Missouri Religion Provisions:

“That all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his or her religious persuasion or belief, be rendered ineligible to any public office . . . ; be disqualified from testifying or serving as a juror, or be molested in his or her person or estate; that to secure a citizen’s right to acknowledge Almighty God according to the dictates of his or her own conscience, neither the state nor any of its political subdivisions shall establish any official religion, nor shall a citizen’s right to pray or express his or her religious beliefs be infringed; that the state shall not coerce any person to participate in any prayer or other religious activity, but shall ensure that any person shall have the right to pray individually or corporately in a private or public setting so long as such prayer does not result in disturbance of the peace or disruption of a public meeting or assembly; that citizens as well as elected officials and employees of the state of Missouri and its political subdivisions shall have the right to pray on government premises and public property so long as such prayers abide within the same parameters placed upon any other free speech under similar circumstances; . . . that students may express their beliefs about religion in written and oral assignments free from discrimination based on the religious content of their work; that no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs; that the state shall ensure public school students their right to free exercise of religious expression without interference, as long as such prayer or other expression is private and voluntary, whether individually or corporately, and in a manner that is not disruptive and as long as such prayers

545. *Id.* art. 14, § 265.

546. 376 U.S. 488 (1960).

547. Adopted in 1890 and most recently approved in 1890. MISS. CONST. art. 8, § 208 (as enacted in 1890).

548. MISS. CONST. art. 8, § 208.

or expressions abide within the same parameters placed upon any other free speech under similar circumstances; and, to emphasize the right to free exercise of religious expression, that all free public schools receiving state appropriations shall display, in a conspicuous and legible manner, the text of the Bill of Rights of the Constitution of the United States”⁵⁴⁹

“That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.”⁵⁵⁰

Missouri No-Aid Provisions:⁵⁵¹

“Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.”⁵⁵²

“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.”⁵⁵³

Montana

Montana Religion Provisions:

“The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁵⁵⁴

549. MO. CONST. art. I, § 5.

550. *Id.* art. I, § 6.

551. The first was adopted in 1884, MO. CONST. of 1875, art. XI, § 11 (as amended in 1884), and the second in 1875, MO. CONST. of 1875, art. I, § 7. Both were most recently approved in 1945. MO. CONST. art. IX, § 8 (as enacted in 1945); MO. CONST. art. I, § 7 (as enacted in 1945).

552. MO. CONST. art. IX, § 8.

553. *Id.* art. I, § 7.

554. MONT. CONST. art. II, § 5.

“No religious or partisan test or qualification shall be required of any teacher or student as a condition of admission into any public educational institution. Attendance shall not be required at any religious service. No sectarian tenets shall be advocated in any public educational institution of the state. No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin.”⁵⁵⁵

Montana No-Aid Provisions:⁵⁵⁶

“The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”⁵⁵⁷

Nebraska

Nebraska Religion Provisions:

“All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. . . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”⁵⁵⁸

“All public schools shall be free of sectarian instruction.”⁵⁵⁹

555. *Id.* art. X, § 7.

556. Adopted in 1889. MONT. CONST. of 1889, art. XI, § 8 (originally “Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations, shall ever make, directly or indirectly, any appropriations, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect, or denomination whatever.”). Most recently approved in 1972. MONT. CONST. art. X, § 6(1) (as enacted in 1972).

557. MONT. CONST. art. X, § 6(1).

558. NEB. CONST. art. I, § 4.

559. NEB. CONST. art. VII, § 11. Adopted in 1875. NEB. CONST. art. VIII, § 11 (as enacted in 1875; originally “No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes; nor shall the state accept any grant, conveyance, or bequest of money, lands, or other property, to be used for sectarian purposes.”). Most recently approved in 1972. NEB. CONST. art. VII, § 11 (as amended in 1972).

“A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.”⁵⁶⁰

Nebraska No-Aid Provisions: No additional provisions

Nevada

Nevada Religion Provisions:

“That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested, in person or property, on account of his or her mode of religious worship.”⁵⁶¹

“The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of conscience [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.”⁵⁶²

“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.”⁵⁶³

“No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.”⁵⁶⁴

560. NEB. CONST. art. VII, § 11. Adopted in 1920. NEB. CONST. art. VII, § 11 (as amended in 1920; originally “No religious test or qualification shall be required of teacher or student, for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.”). Most recently approved in 1972. NEB. CONST. art. VII, § 11 (as amended in 1972).

561. NEV. CONST. Ordinance.

562. *Id.* art. 1, § 4.

563. NEV. CONST. art. 11, § 2. Adopted in 1864. NEV. CONST. art. XI, § 2 (as enacted in 1864; originally included “. . . in every year, and any school district neglecting to establish and maintain such a school, or which shall allow . . .”). Most recently approved in 1938. NEV. CONST. art. XI, § 2 (as amended in 1938).

564. NEV. CONST. art. XI, § 9.

Nevada No-Aid Provisions:⁵⁶⁵

“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.”⁵⁶⁶

New HampshireNew Hampshire Religion Provisions:

“Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.”⁵⁶⁷

“As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.”⁵⁶⁸

New Hampshire No-Aid Provisions:⁵⁶⁹

“Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”⁵⁷⁰

565. Adopted in 1880 and most recently approved in 1880. NEV. CONST. art. XI, § 10 (as amended in 1880).

566. NEV. CONST. art. XI, § 10.

567. N.H. CONST. pt. 1, art. 5.

568. *Id.* pt. 1, art. 6.

569. Adopted in 1877 and most recently approved in 1877. N.H. CONST. pt. II, art. 83 (as amended in 1877).

570. N.H. CONST. pt. 2, art. 83.

New Jersey

New Jersey Religion Provisions:

“No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.”⁵⁷¹

“There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.”⁵⁷²

“No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.”⁵⁷³

New Jersey No-Aid Provisions: No additional provisions

New Mexico

New Mexico Religion Provisions:

“Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.”⁵⁷⁴

“Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.”⁵⁷⁵

“No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher

571. N.J. CONST. art. 1, ¶ 3.

572. *Id.* ¶ 4.

573. *Id.* ¶ 5.

574. N.M. CONST. art. II, § 11.

575. *Id.* art. XXI, § 1.

or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.”⁵⁷⁶

New Mexico No-Aid Provisions:

“The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.”⁵⁷⁷

New York

New York Religion Provisions:

“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; 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 or safety of this state.”⁵⁷⁸

“No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of . . . religion . . . be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.

New York No-Aid Provisions:⁵⁷⁹

“Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . ”⁵⁸⁰

576. *Id.* art. XII, § 9. Adopted in 1911, most recently approved in 1911. N.M. CONST. art. XII, §§ 3, 9 (as enacted in 1911).

577. N.M. CONST. art. XII, § 3.

578. N.Y. CONST. art. I, § 3.

579. Adopted in 1894. N.Y. CONST. art. IX, § 4 (as enacted in 1894). Most recently approved in 1962. N.Y. CONST. art. XI, § 3 (as enacted in 1938).

580. N.Y. CONST. art. XI, § 3.

North Carolina

North Carolina Religion Provisions:

“All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”⁵⁸¹

“No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of . . . religion.”⁵⁸²

“The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God.”⁵⁸³ (Disqualification of atheists unenforceable in light of *Torcaso v. Watkins*.)⁵⁸⁴

North Carolina No-Aid Provisions: No explicit provisions

North Dakota

North Dakota Religion Provisions:

“The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; 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 or safety of this state.”⁵⁸⁵

“Perfect toleration of religious sentiment must be secured, and no inhabitant of this state may ever be molested in person or property on account of that person’s mode of religious worship.”⁵⁸⁶

“[T]he legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.”⁵⁸⁷

581. N.C. CONST. art. I, § 13.

582. *Id.* art. I, § 19.

583. *Id.* art. VI, § 8.

584. 376 U.S. 488 (1960).

585. N.D. CONST. art. I, § 3.

586. *Id.* art. I, § 1.

587. *Id.* art. I, § 1.

North Dakota No-Aid Provisions:⁵⁸⁸

“No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”⁵⁸⁹

Ohio

Ohio Religion Provisions:

“All men have a natural and infeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”⁵⁹⁰

Ohio No-Aid Provisions:⁵⁹¹

“[N]o religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”⁵⁹²

Oklahoma

Oklahoma Religion Provisions:

“Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights.”⁵⁹³

588. Adopted in 1889. N.D. CONST. art. VIII, §§ 147, 152 (as enacted in 1889). Most recently approved in 1981. N.D. CONST. art. VIII, §§ 1, 5 (as amended in 1981).

589. N.D. CONST. art. VIII, § 5.

590. OHIO CONST. art. I, § 7.

591. Adopted in 1851 and most recently approved in 1851. OHIO CONST. art. VI, § 2 (as enacted in 1851).

592. OHIO CONST. art. VI § 2.

593. OKLA. CONST. art. I, § 2.

“Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control.”⁵⁹⁴

Oklahoma No-Aid Provisions:⁵⁹⁵

“Such educational institutions shall remain under the exclusive control of the State and no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university . . .”⁵⁹⁶

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”⁵⁹⁷

Oregon

Oregon Religion Provisions:

“All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.”⁵⁹⁸

“No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.”⁵⁹⁹

“No religious test shall be required as a qualification for any office of trust or profit.”⁶⁰⁰

“No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion [sic]; nor be questioned in any Court of Justice touching his religious [sic] belief to affect the weight of his testimony.”⁶⁰¹

594. *Id.* art. I, § 5.

595. Adopted in 1907 and most recently approved in 1907. OKLA. CONST. art. I, § 5 (as enacted in 1907); *id.* art. II, § 5; *id.* art. XI, § 5.

596. OKLA. CONST. art. XI, § 5.

597. *Id.* art. II, § 5.

598. OR. CONST. art. I, § 2.

599. *Id.* art. I, § 3.

600. *Id.* art. I, § 4.

601. *Id.* art. I, § 6.

Oregon No-Aid Provisions:⁶⁰²

“No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religious [sic] services in either house of the Legislative Assembly.”⁶⁰³

PennsylvaniaPennsylvania Religion Provisions:

“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.”⁶⁰⁴

“No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.”⁶⁰⁵ (Implied requirement to acknowledge existence of a God unenforceable in light of *Torcaso v. Watkins*.)⁶⁰⁶

Pennsylvania No-Aid Provisions:

“No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”⁶⁰⁷

“No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association”⁶⁰⁸

602. Adopted in 1857 and most recently approved in 1857. OR. CONST. art. I, § 5 (as enacted in 1857).

603. OR. CONST. art. I, § 5.

604. PA. CONST. art. I, § 3.

605. *Id.* art. I, § 4.

606. 376 U.S. 488 (1960).

607. PA. CONST. art. III, § 15. Adopted in 1874. PA. CONST. art. X, § 2 (as enacted in 1874). Most recently approved in 1967. PA. CONST. art. III, § 15 (as amended in 1967).

608. PA. CONST. art. III, § 29. Adopted in 1933. PA. CONST. art. III, § 18 (as amended in 1933). Most recently approved in 1967. PA. CONST. art. III, § 29 (as amended in 1967).

Rhode Island

Rhode Island Religion Provisions:

“Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concernments; we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person’s voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person’s religious belief; and that every person shall be free to worship God according to the dictates of such person’s conscience, and to profess and by argument to maintain such person’s opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.”⁶⁰⁹

Rhode Island No-Aid Provisions: No additional provisions

South Carolina

South Carolina Religion Provisions:

“The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .”⁶¹⁰

“No person who denies the existence of the Supreme Being shall hold any office under this Constitution.”⁶¹¹ (Held unconstitutional in *Silverman v. Campbell*.)⁶¹²

609. R.I. CONST. art. I, § 3.

610. S.C. CONST. art. I, § 2.

611. *Id.* art. VI, § 2.

612. 486 S.E.2d 1, 2 (S.C. 1997).

South Carolina No-Aid Provisions:⁶¹³

“No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.”⁶¹⁴

South Dakota

South Dakota Religion Provisions:

“The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state. No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.”⁶¹⁵

“That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. . . . That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.”⁶¹⁶

South Dakota No-Aid Provisions:⁶¹⁷

“No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state . . . and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.”⁶¹⁸

613. Adopted in 1971, replacing 1895 version: “The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.” S.C. CONST. art. XI, § 9 (as enacted in 1895). Most recently approved in 1971. S.C. CONST. art. XI, § 4 (as amended in 1971).

614. S.C. CONST. art. XI, § 4.

615. S.D. CONST. art. VI, § 3.

616. *Id.* art. XXVI, § 18.

617. Adopted in 1889 and most recently approved in 1889. S.D. CONST. art. VIII, § 16 (as enacted in 1889); *id.* art. XXVI, § 18.

618. S.D. CONST. art. VIII, § 16.

Tennessee

Tennessee Religion Provisions:

“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.”⁶¹⁹

“That no political or religious test, other than an oath to support the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this State.”⁶²⁰

“That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.”⁶²¹

“No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State.”⁶²² (Unenforceable in light of *Torcaso v. Watkins*.)⁶²³

Tennessee No-Aid Provisions: No additional provisions

Texas

Texas Religion Provisions:

“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.”⁶²⁴ (Requirement to acknowledge existence of a Supreme Being unenforceable in light of *Torcaso v. Watkins*.)⁶²⁵

“No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most

619. TENN. CONST. art. I, § 3.

620. *Id.* art. I, § 4.

621. *Id.* art. I, § 6.

622. *Id.* art. IX, § 2.

623. 376 U.S. 488 (1960).

624. TEX. CONST. art. I, § 4.

625. 376 U.S. 488.

binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.”⁶²⁶

“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.”⁶²⁷

“This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief.”⁶²⁸

Texas No-Aid Provisions:

“No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.”⁶²⁹

“The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.”⁶³⁰

Utah

Utah Religion Provisions:

“The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of

626. TEX. CONST. art. I, § 5.

627. *Id.* art. I, § 6.

628. *Id.* art. I, § 6-a. Added November 2, 2021. *Id.* credits.

629. TEX. CONST. art. I, § 7. Adopted in 1876, and most recently approved in 1876. TEX. CONST. art. I, § 7 (as enacted in 1876).

630. TEX. CONST. art. VII, § 5(c). Adopted in 1876. TEX. CONST. art. VII, § 5 (as enacted in 1876; originally “And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school . . .”). Most recently approved in 2003. TEX. CONST. art. VII, § 5(c) (as amended in 2003).

public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.”⁶³¹

“No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state’s education systems.”⁶³²

“The Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”⁶³³

Utah No-Aid Provisions:⁶³⁴

“Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.”⁶³⁵

Vermont

Vermont Religion Provisions:

“That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with,

631. UTAH CONST. art. I, § 4.

632. *Id.* art. X, § 8.

633. UTAH CONST. art. X, § 1.

634. Adopted in 1895. UTAH CONST. art. X, §§ 1, 13 (as enacted in 1895; § 1 originally “The Legislatures shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State, and be free from sectarian control.”; § 13 originally “Neither the Legislature nor any county, city, town, school district or other public corporation shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever.”). Most recently approved in 1987. UTAH CONST. art. X, §§ 1, 9 (as amended in 1987).

635. *Id.* art. X, § 9.

or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."⁶³⁶

Vermont No-Aid Provisions: No additional provisions

Virginia

Virginia Religion Provisions:

"[T]he right to be free from any governmental discrimination upon the basis of religious conviction . . . shall not be abridged"⁶³⁷

"That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. 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; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please."⁶³⁸

Virginia No-Aid Provisions:

"The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the

636. VT. CONST. ch. I, art. 3.

637. VA. CONST. art. I, § 11.

638. *Id.* art. I, § 16.

Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.”⁶³⁹

“The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society.”⁶⁴⁰

Washington

Washington Religion Provisions:

“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 No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.”⁶⁴¹

Washington No-Aid Provisions:⁶⁴²

“All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”⁶⁴³

West Virginia

West Virginia Religion Provisions:

“No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment.”⁶⁴⁴

639. VA. CONST. art. VIII, § 11. Adopted in 1971. VA. CONST. art. VIII, § 11 (as enacted in 1971; originally did not include “. . . and grants to or on behalf of . . .”). Most recently approved in 1975. VA. CONST. art. VIII, § 11 (as amended in 1975).

640. VA. CONST. art. IV, § 16. Adopted in 1902. VA. CONST. of 1902, art. IV, § 67 (originally “. . . of public funds, of personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever . . .”). Most recently approved in 1971. VA. CONST. art. IV, § 16 (as enacted in 1971).

641. WASH. CONST. art. 1, § 11.

642. Adopted in 1889 and most recently approved in 1889. *Id.* art. IX, § 4 (as enacted in 1889).

643. *Id.* art. 9, § 4.

644. W. VA. CONST. art. III, § 11.

“No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess and by argument, to maintain their opinions in matters of religion; and the same shall, in nowise, affect, diminish or enlarge their civil capacities; and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contracts as he shall please.”⁶⁴⁵

“Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.”⁶⁴⁶ (Held unconstitutional in *Walter v. West Virginia Board of Education.*)⁶⁴⁷

“No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination.”⁶⁴⁸

West Virginia No-Aid Provisions: No additional provisions

Wisconsin

Wisconsin Religion Provisions:

“The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of

645. *Id.* art. III, § 15.

646. *Id.* art. III, § 15(a).

647. 610 F. Supp. 1169, 1178 (S.D. W. Va. 1985).

648. W. VA. CONST. art. VI, § 47.

conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”⁶⁴⁹

“No religious tests shall ever be required as a qualification for any office of public trust under the state, and no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion.”⁶⁵⁰

“The legislature shall provide by law for the establishment of district schools . . . and no sectarian instruction shall be allowed therein . . . ”⁶⁵¹

“Provision shall be made by law for the establishment of a state university . . . and no sectarian instruction shall be allowed in such university.”⁶⁵²

Wisconsin No-Aid Provisions: No additional provisions

Wyoming

Wyoming Religion Provisions:

“The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; 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 or safety of the state.”⁶⁵³

“Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.”⁶⁵⁴

“No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored

649. WIS. CONST. art. I, § 18.

650. *Id.* art. I, § 19.

651. *Id.* art. X, § 3.

652. *Id.* art. X, § 6.

653. WYO. CONST. art. 1, § 18.

654. *Id.* art. 21, § 25.

in any public school or institution that may be established under this constitution.”⁶⁵⁵

Wyoming No-Aid Provisions.⁶⁵⁶

“No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.”⁶⁵⁷

“No appropriation shall be made for charitable, . . . educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.”⁶⁵⁸

655. *Id.* art. 7, § 12.

656. Adopted in 1889, most recently approved in 1889. WYO. CONST. art. 1, § 19 (as enacted in 1889); *id.* art. 3, § 36; *id.* art. 7, § 12.

657. WYO. CONST. art. 1, § 19.

658. *Id.* art. 3, § 36.