

**LED BLINDLY: ONE CIRCUIT’S STRUGGLE TO FAITHFULLY  
APPLY THE U.S. SUPREME COURT’S RELIGIOUS SYMBOLS  
CONSTITUTIONAL ANALYSIS**

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I. INTRODUCTION

The Supreme Court of the United States is a teaching court. Its role as a tribunal tasked to resolve random errors committed by the Nation’s inferior judiciary has long since lapsed into the pages of history.<sup>1</sup> Today, the Supreme

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<sup>1</sup> See William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) (“The function of the Supreme Court is conceived to be, not the remedying of a particular litigant’s wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.”). This shift in role was due, in part, to the creation in 1891 of the national courts of appeals that assumed the principal error-correction labor. See Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (the “Evarts Act” or “Circuit Courts of Appeals Act”). See generally *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 448 (1959) (“Establishment of intermediate appellate courts in 1891 was designed by Congress to relieve the overburdened docket of the Court. The Circuit Courts of Appeals were to be equal in

Court's task is simply to teach. It culls through the blizzard of certiorari petitions it receives each year and then carefully picks out only a very few on which it elects to teach.<sup>2</sup> It does so very selectively, for its "special concerns" are no longer error-correction, but "constitutional interpretation" and tackling "significant questions of federal law."<sup>3</sup> In the end, the modern Court's greatest and nondelegable charge is to "provid[e] a uniform rule of federal law in areas that require one."<sup>4</sup>

Because so tiny a number of cases each year are chosen to be these "teaching vehicles," and because the Court itself is doing nearly all the choosing, one might presume that the Court teaches marvelously well, albeit infrequently. In the Establishment Clause context, this is far from true. Here, the Court teaches not only infrequently, but often with the bumbled fluster of one who just earned a K-to-12 certificate by redeeming box-tops.<sup>5</sup> The Court acknowledges its struggle frankly. In a not especially audacious opinion in 1986 that ruled that a legally blind collegian could—constitutionally—qualify for state vocational rehabilitation services, even if he would use those state monies to help him study to become a pastor, the Court reflected on its success in discerning the boundary between what the Establishment Clause permits and what it forbids. The Court wrote there with remarkable candor: "[W]e can only

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dignity to the Supreme Courts of the several States. The essential purpose of the Evarts Act was to enable the Supreme Court to discharge its indispensable functions in our federal system by relieving it of the duty of adjudication in cases that are important only to the litigants." (footnotes omitted)).

<sup>2</sup> See SUP. CT. R. 10 (noting that grants of certiorari are committed to "judicial discretion" and are reserved "only for compelling reasons"); see also WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 269 (1987) ("The Supreme Court, quite correctly in my opinion, . . . seeks to pick from the several thousand cases it is annually asked to review, those cases involving unsettled questions of federal constitutional or statutory law of general interest."); see generally ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE U.S. COURTS* at TABLE A-1 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/A01Sep12.pdf> (noting that during five-year period from 2007 to 2011, the U.S. Supreme Court docketed about 46,000 cases (or about 9,200 cases per year), but resolved by full opinion only 388 (or less than 78 per Term)).

<sup>3</sup> William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 11 (1993).

<sup>4</sup> Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006).

<sup>5</sup> Case in point: on one morning in June 2005, the Supreme Court released two Ten Commandments decisions, the first (by a 5-4 vote) declaring the contested display unconstitutional, accompanied by a four-Justice dissent, *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); the second (also 5-4) declaring the contested display constitutional, accompanied by a four-Justice dissent, *Van Orden v. Perry*, 545 U.S. 677 (2005). The majority in the first case applied the *Lemon* / endorsement test to decide a Kentucky monument, while the plurality in the second case found that same test "not useful" in deciding a Texas monument. See *infra* notes 80-107 and accompanying text.

dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”<sup>6</sup> Few are likely to quarrel with that observation.

Religious symbols in the public square—Ten Commandment monuments, crèches, menorahs, crosses, mottos, carved inscriptions, and the like—have been an especially unsettled area of Religion Clause jurisprudence. Over the years, the issue has sharply polarized the Justices.<sup>7</sup> On the accommodative side, for example, Chief Justice Warren Burger had once blithely rebuffed a challenge to a Rhode Island town’s display of an illuminated plastic nativity scene integrated into an annual Christmas celebration as a “stilted over-reaction.”<sup>8</sup> He concluded his opinion in that case quite dismissively: “Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.”<sup>9</sup> On the separationist side, in contrast, Associate Justice John Paul Stevens had insisted that a stone monument on the grounds of the Texas State Capitol depicting a version of the Ten Commandments ought to be removed because, “at the very least,” the Constitution “has created a strong presumption against the displays of religious symbols on public property.”<sup>10</sup> He offered a far less dispassionate view of the Constitution’s “wall of separation” between church and state: “[I]t is the difference between the shelter of a for-

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<sup>6</sup> *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 485 (1986) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). To be precise, the Court’s opinion in *Witters* did not craft this language; it first appeared back in 1971 in the Court’s *Lemon v. Kurtzman* decision and was merely re-quoted by the Court in *Witters*. But the tale of the college scholarships for religious study tends to validate the Court’s point. In 1986, the Supreme Court ruled in *Witters* that the State of Washington would not offend the U.S. Constitution’s Establishment Clause if it favored Larry Witters, a vision-impaired student, with a vision-enabling, vocational rehabilitation benefit to aid in his studies at a private Christian college as he prepared for a career as a pastor, missionary, or youth director. Less than 20 years later, when that very same State of Washington *denied* Joshua Davey access to a public scholarship because he would have used it to pursue a degree in devotional theology, the Supreme Court turned Mr. Davey’s challenge away, ruling that Washington had the constitutional right to refuse to fund his religious studies. *Locke v. Davey*, 540 U.S. 712, 720 (2004) (“In the present case, the State’s disfavor of religion (if it can be called that) is of a far milder kind.”); *cf.* *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring) (“The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion.”). The “lines of demarcation” are dim indeed.

<sup>7</sup> The Court’s polarity emits very directly a sense of confusion and disorientation because that polarity is so very public. *See* SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW 2* (2003) (“Most of our daily work does, in fact, occur in our chambers. But the fruits of that work—our decisions—are in writing and full available to the public and the media to read, discuss, and critique. Indeed, in that sense the Court is perhaps the most open of the three branches of government. We explain the reasons for our decisions in detail.”).

<sup>8</sup> *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (plurality opinion).

<sup>9</sup> *Id.*

<sup>10</sup> *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).

gress and exposure to ‘the winds that would blow’ if the wall were allowed to crumble.”<sup>11</sup>

This Article endeavors to neither commend nor criticize the merits of the substantive analytical lenses the U.S. Supreme Court has chosen to resolve religious symbols cases. Instead, this Article embarks upon a far more threshold exploration—whether the Court’s constitutional messages are susceptible to reliable application by the lower judiciary. This Article’s vantage point is a single region, bounded within the United States’ Fourth Judicial Circuit. The Fourth Judicial Circuit offers a good lens for this exploration because the State and federal courts it encompasses, both appellate and trial level, have considered a wide array of religious symbol cases: Ten Commandments monuments, crèches, crosses, religious license plates, carved inscriptions, and even, for good measure, a Good Friday public school holiday. This region’s travails with making applied sense of the U.S. Supreme Court’s religious symbol decisions offer valuable insights into what is working and what is not.

Part II orients the reader to the Religion Clauses and then, specifically, to the guiding principles and formulas the Supreme Court has devised for testing Establishment Clause comportment. Part III summarizes the leading opinions decided by the Supreme Court on the issue of religious symbols in the public square; it is those cases that now form the core controlling precedent that the Nation’s courts (and, for this study, the courts encompassed within the region of the U.S. Fourth Judicial Circuit) must weigh and attempt to apply. Part IV examines that application by this region’s appellate and trial courts, and offers some insights to answer this Article’s central question: how well is the Supreme Court teaching? Part V closes with some final observations.

## II. ORIGINS

Religious liberty was not explicitly protected in the original Constitution.<sup>12</sup> The express religious guarantees came a few years later, when the Bill of Rights was ratified in December 1791.<sup>13</sup> As written and ratified, the opening

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<sup>11</sup> *Id.* at 735 (citation omitted).

<sup>12</sup> With two highly specific exceptions. Article VI of the original Constitution forbade the requirement of any “religious Test . . . as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3. Article I, Section 7, Clause 2 excused the President from having to work on Sundays while deliberating whether to sign or veto a congressionally approved bill. U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

<sup>13</sup> The reason for this omission from the original Constitution is itself a fascinating tale. As originally framed, the Constitution contained no enumerated protections of individual liberties. The drafters, working throughout an oppressive Philadelphia summer in 1787, considered such

sixteen words of the First Amendment read: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>14</sup> The first ten of these words comprise what is today known as the “Establishment” Clause; the last six of these words comprise the “Free Exercise” Clause.<sup>15</sup> Together, they are the “Religion Clauses” and form the headwaters of constitutional religious liberty in the United States.<sup>16</sup>

Each of these two Clauses might well bear on the propriety of publicly displayed religious symbols.<sup>17</sup> Yet, far more often, the contests over such symbols have been fought under the first guarantee—the Establishment Clause. That first Clause has come to be seen as the more structural, institutional limitation on the machinery of government—barring the nation from officially ordaining (or tending towards an official ordination of) religious beliefs.<sup>18</sup> In contrast, the second guarantee, the Free Exercise Clause, is seen as more of an

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explicit constitutional guarantees unnecessary, since the federal government they had designed—of limited, constrained authority—ought not to be capable of engaging in conduct that could trample individual liberties. Yet, persistent concern over the soundness of this view later prompted assurances by the advocates of the freshly drafted Constitution that, upon ratification, a bill of individual rights would be amended to the document to quell such worries. *See* U.S. CONST. amend. I–X, pmbl., para. 1 (“The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added . . . .”). For a wonderfully readable and breathtakingly exhaustive history of the politics and polemics of ratification, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2011).

<sup>14</sup> U.S. CONST. amend. I.

<sup>15</sup> *See* *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

<sup>16</sup> *See* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702–04 (2012); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000); *Walz v. Tax Comm’n*, 397 U.S. 664, 668–70 (1970).

<sup>17</sup> *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8–9 (2004) (challenging the phrase “under God” in the Pledge of Allegiance as a violation of both the Establishment Clause and the Free Exercise Clause); *Stone v. Graham*, 449 U.S. 39, 39–40 (1980) (same, in Ten Commandments case); *see also* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995) (musing, in a Latin cross display case, that “[i]f the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (opining, in a crèche case, that “hostility” or “callous indifference” to religion “was never intended by the Establishment Clause” and, indeed, “would bring us into ‘war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion’” (citations omitted)).

<sup>18</sup> *See* *Cutter*, 544 U.S. at 719 (“The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state.”); *see also* *Lynch*, 465 U.S. at 673 (“[T]he Establishment Clause forbids an established church or anything approaching it.”).

individualized assurance of personal religious liberty.<sup>19</sup> Because government display of a religious symbol could tend to telegraph official government embrace of the beliefs associated with that symbol, the structural constitutional limitation—the Establishment Clause—has often been the core constitutional value invoked in such challenges.<sup>20</sup> So it is to the meaning of the Establishment Clause that this Article now turns.

Although appended to the Constitution in the waning years of the 18<sup>th</sup> Century, the Religion Clauses remained largely dormant in constitutional jurisprudence for most of the next 150 years.<sup>21</sup> Few cases invoking their protection percolated up to the United States Supreme Court, and those that did generated very little abiding precedent.<sup>22</sup> With one notable exception. In 1879, the Supreme Court decided *Reynolds v. United States*,<sup>23</sup> a criminal appeal that rejected a Mormon's defense that his conviction in the Territory of Utah for bigamy should be overturned since his plural marriages were, after all, a matter of religious conscience dictated by the tenets of his faith. Chief Justice Waite agreed that "[r]eligious freedom is guaranteed everywhere through the United States, so far as congressional interference is concerned," but then paused to note that the meaning of those guarantees was left undefined by the Framers.<sup>24</sup> "The precise point of the inquiry" in the *Reynolds* appeal, as he saw it, devolved then to

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<sup>19</sup> See *Cutter*, 544 U.S. at 719 ("The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people."); see also *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views." (citations omitted)).

<sup>20</sup> See, e.g., *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

<sup>21</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008) (noting how provisions in the Bill of Rights "remained unilluminated for lengthy periods," and that "it was not until after World War II that we held a law invalid under the Establishment Clause" (citation omitted)). See generally Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 338 (1986) ("Aside from a few polygamy cases, the religion clauses have been the subject of Supreme Court attention for only about forty years, or approximately one-fifth of the total time that the Court has been deciding cases and controversies." (footnotes omitted)).

<sup>22</sup> Indeed, as recently as 1961, the Court observed that Establishment Clause disputes reaching all the way up to the high court "are few in number." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

<sup>23</sup> 98 U.S. 145 (1879).

<sup>24</sup> *Id.* at 162.

this question: “what is the religious freedom which has been guaranteed[?]”<sup>25</sup> Although the Chief Justice’s answer is interesting,<sup>26</sup> it was his choice of metaphor that proved to be constitutionally enduring. The Court quoted from a very brief note of reply from President Thomas Jefferson to an association of Baptists in Danbury, Connecticut, who had written to him to express their fears of their home State’s lack of express protection for beliefs of religious minorities. In his note, President Jefferson had responded: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”<sup>27</sup> Chief Justice Waite closed his quotation with a sweeping commendation of Jefferson’s imagery: “Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.”<sup>28</sup> Thus was introduced the “wall of separation” metaphor which has since frequently been used to express the core value ascribed to the Establishment Clause.

But the battle for true constitutional meaning and interpretive precision joins here. A year before his elevation to Chief Justice, Associate Justice William Rehnquist penned a withering dissent to the Court’s 1985 moment-of-silence decision in *Wallace v. Jaffree*, excoriating the continued use of Jefferson’s “wall of separation” quotation as the standard-bearer for Establishment Clause principles. He chided:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted

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<sup>25</sup> *Id.*

<sup>26</sup> The Court in *Reynolds* rejected the defendant’s contention that the mandate of his religious beliefs could provide a defense to conduct made criminally forbidden. Chief Justice Waite reasoned:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

*Id.* at 166–67. Sensing such religiously individualized exemptions to otherwise neutral laws as a threat to the very existence of governed society, Chief Justice Waite and his colleagues rejected Mr. Reynolds’ bigamy defense.

<sup>27</sup> *Id.* at 164.

<sup>28</sup> *Id.*

with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.<sup>29</sup>

In 1998, the United States Library of Congress added a new artifact to this "wall" debate when, through the use of FBI restorative technology, it was able to reveal what lay beneath inked-out markings on Jefferson's original, hand-penned draft of the Danbury Baptist Letter.<sup>30</sup> Chief of the Library's Man-

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<sup>29</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). A fascinating historical note to *Wallace*: the Court in that case struck down an Alabama statute that attempted to add the phrase "or voluntary prayer" to a then-existing state statute dictating a one-minute moment of silence "for meditation" in all Alabama public schools. The decision was 6-3. The majority opinion was written by Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun. Justices Powell and O'Connor wrote separate concurrences. Chief Justice Burger and Justices Rehnquist and White dissented. The day the opinion was released, Mr. John G. Roberts, then associate counsel to President Reagan (but, four years earlier, law clerk to Associate Justice Rehnquist), wrote a memorandum summarizing the opinion and offering his assessment. Mr. Roberts wrote:

For what it's worth, a reading of the opinions strongly suggests that the outcome of the case shifted in the writing. As I see it, Rehnquist was writing for the Court—he would not write 24 pages of dissent (longer even than Stevens' majority), and the structure and tone of the dissent is that of a majority opinion. He had five votes to uphold the statute, and tried to use the occasion to go after the bigger game of the *Lemon* test itself. O'Connor probably was in Rehnquist's original majority but was not convinced that the broad opinion applied to the facts, penning a dissent to the would-be majority—her 19-page concurrence is directed solely to that [Rehnquist] opinion, critiquing it step-by-step and analyzing none of the others. It is very unusual for a concurrence to take on a dissent in such a fashion, and at such length. O'Connor's dissent apparently persuaded Powell to drop by the wayside as well, with a lame concurring opinion focusing on *stare decisis*, as if to explain why he was changing a vote. Thus, as I see it, Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority.

Twenty years and six weeks later, Mr. Roberts was nominated to fill retiring Justice O'Connor's seat on the Supreme Court, a nomination President George W. Bush withdrew upon Chief Justice Rehnquist's sudden death, and replaced with a nomination of Mr. Roberts to the post of Chief Justice. During the nomination process, this memorandum (among others) was made public in the course of the Senate's hearings on the nomination. See Memorandum from John G. Roberts to Fred F. Fielding (June 4, 1985), available at <http://www.washingtonpost.com/wp-srv/nation/documents/roberts/Box48-JGR-SchoolPrayer1.pdf> (last visited Sept. 8, 2013).

<sup>30</sup> James H. Hutson, "A Wall of Separation:" *FBI Helps Restore Jefferson's Obliterated Draft*, 57 LIBRARY OF CONGRESS INFORMATION BULLETIN NO. 6 (June 1998), available at <http://www.loc.gov/loc/lcib/9806/danbury.html> (last visited Sept. 8, 2013).

uscript Division, Mr. James H. Hutson, explained that the document, “far from being dashed off as a ‘short note of courtesy,’” was in fact a composition over which “Jefferson [had] labored,” with a tangle of insertions, deletions, and deleted-insertions.<sup>31</sup> When Jefferson’s long-obscured insertions-turned-deletions are studied, opined Mr. Hutson, Jefferson’s true purpose in writing is made plain: “[T]he Danbury Baptist letter was never conceived by Jefferson to be a statement of fundamental principles; it was meant to be a political manifesto, nothing more.”<sup>32</sup> Ergo, though now for somewhat different reasons, the letter’s famous “wall” metaphor as an accurate shorthand for sound constitutional principles may have been cast in new doubt.<sup>33</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Mr. Hutson explained:

The unedited draft of the Danbury Baptist letter makes it clear why Jefferson drafted it: He wanted his political partisans to know that he opposed proclaiming fasts and thanksgivings, not because he was irreligious, but because he refused to continue a British practice that was an offense to republicanism. To emphasize his resolve in this matter, Jefferson inserted two phrases with a clenched-teeth, defiant ring: “wall of eternal separation between church and state” and “the duties of my station, which are merely temporal.” These last words—“merely temporal”—revealed Jefferson’s preoccupation with British practice. Temporal, a strong word meaning secular, was a British appellation for the lay members of the House of Lords, the Lords Temporal, as opposed to the ecclesiastical members, the Lords Spiritual. “Eternal separation” and “merely temporal” – here was language as plain as Jefferson could make it to assure the Republican faithful that their “religious rights shall never be infringed by any act of mine.”

*Id.* Jefferson asked two advisors to critique his draft. Postmaster General Gideon Granger of Connecticut “cheered Jefferson on, apparently welcoming the ‘temporary spasms’ that he predicted the letter would produce ‘among the Established Religionists’” in Connecticut. *Id.* But Attorney General Levi Lincoln counseled Jefferson caution, lest he be faulted for impliedly censoring respected local custom. *Id.* In the end,

Jefferson heeded Lincoln’s advice, with the result that he deleted the entire section about thanksgivings and fasts in the Danbury draft, noting in the left margin that the “paragraph was omitted on the suggestion that it might give uneasiness to some of our republican friends in the eastern states where the proclamation of thanksgivings etc. by their Executives is an ancient habit & is respected.” Removed in the process of revision was the designation of the president’s duties as “merely temporal”; “eternal” was dropped as a modifier of “wall.” Jefferson apparently made these changes because he thought the original phrases would sound too antireligious to pious New England ears.

*Id.*

<sup>33</sup> *Id.* (“[I]t will be of considerable interest in assessing the credibility of the Danbury Baptist letter as a tool of constitutional interpretation to know, as we now do, that it was written as a partisan counterpunch, aimed by Jefferson below the belt at enemies who were tormenting him more than a decade after the First Amendment was composed.”). For more on the 1998 restoration, and the competing views on giving the newly discovered text a proper interpretation, see Johann N. Neem, *Beyond the Wall: Reinterpreting Jefferson’s Danbury Address*, 27 J. EARLY REPUBLIC 139 (2007).

In any event, for Justice Rehnquist, a far more reliable selection for the contemporary understanding of the Establishment Clause might be James Madison who, unlike Jefferson, was actually in the United States when the Religion Clauses were drafted, and who, unlike Jefferson, was a principal member of the First Congress that voted on the Religion Clause text, and who, unlike Jefferson, was a personal participant in the crafting and debating of the syntax that the First Congress would ultimately come to prefer.<sup>34</sup> Examining the sparse historical record of the Religion Clauses' drafting, as Justice Rehnquist recounted in his same *Wallace* dissent, "we see a far different picture of its purpose than the highly simplified 'wall of separation between church and State.'"<sup>35</sup>

Representative Madison had taken the first crack at drafting the constitutional protection for religious liberty in the United States, and what he wrote read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>36</sup> The draft was subsequently referred to a select committee for review and revision, and then debated in mid-August 1789.<sup>37</sup> That debate, thought Justice Rehnquist, was not "particularly illuminating" in many respects, but it evidently did entice Representative Madison back to the floor to make two comments recorded in the *Annals of Congress*.<sup>38</sup> In the first, Madison is attributed to having "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."<sup>39</sup> In the second, Madison is noted as having proposed to insert the word "national" before the word "religion" in the working draft of the Amendment, a change he evidently explained to the gathered body this way: "He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought

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<sup>34</sup> *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

<sup>35</sup> *Id.* at 95.

<sup>36</sup> *Id.* at 94 (citation omitted).

<sup>37</sup> *Id.* at 95.

<sup>38</sup> *Id.* Obviously, the Framers' age predated electronic stenography, and the *Annals* suffer from that absence, and indeed often appear more episodic and thematic, than exacting, in capturing verbatim debate. Whether the *Annals* precisely record the back-and-forth of the discussion, or all of the speakers, or each of their comments and exchanges, is a truth forever lost to us. But some vignettes appear. For example, Representative Benjamin Huntington seems to have expressed the worry that the drafters' working syntax could "be taken in such latitude as to be extremely hurtful to the cause of religion," and that he hoped "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.* at 96. It was to this and other concerns that Representative Madison evidently addressed his attention when he spoke.

<sup>39</sup> *Id.*

that, if the word ‘national’ was introduced, it would point the amendment directly to the object it was intended to prevent.”<sup>40</sup> Surveying these recorded comments by Madison, and the surrounding context of the debate to which they contributed, Justice Rehnquist offered this summary of the historical record of the birth of the Religion Clauses: “It seems indisputable from these glimpses of Madison’s thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.”<sup>41</sup>

Whether “wall of separation” is actually a fitting metaphor or a misplaced one is probably consigned to unknowable history. What artifacts from the debate, and later ratification, of the Religion Clauses that may once have existed are likely either already well known (and the subject of longstanding, exhaustive, and contentious study) or forever lost.<sup>42</sup> More likely than not, we possess what survives of the contemporary record of that debate and ratification, and it points squarely towards the accommodationist perspective, or unerringly towards the opposing separationist view, or perhaps definitively toward

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 98. Not all would concur in then-Justice Rehnquist’s view of Madison’s constitutional thinking. Justice Brennan, for instance, might tend to see Madison as a political animal, engaged in 1789 in political expediency, and his floor statements amounting to something less than a matured, thoughtful exposition of well-reflected views on constitutional principle. See *Marsh v. Chambers*, 463 U.S. 783, 814–15 (1983) (Brennan, J., dissenting) (“Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other. Indeed, the fact that James Madison, who voted for the bill authorizing the payment of the first congressional chaplains, later expressed the view that the practice was unconstitutional, is instructive on precisely this point. Madison’s later views may not have represented so much a change of *mind* as a change of *role*, from a member of Congress engaged in the hurley-burley of legislative activity to a detached observer engaged in unpressured reflection. Since the latter role is precisely the one with which this Court is charged, I am not at all sure that Madison’s later writings should be any less influential in our deliberations than his earlier vote.” (footnote omitted) (citations omitted)).

<sup>42</sup> Justice Souter found himself, in 2005, less sanguine about what the historical record revealed of the Framers’ true intentions than was Justice Rehnquist. See *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 879 (2005) (“The fair inference is that there was no common understanding [among the Framers] about the limits of the establishment prohibition . . . . What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined.”).

neither—it all really depends on which passages from the meager record one chooses to credit and which one chooses to set off to the side.<sup>43</sup>

There is one attribute of the Religion Clauses that is incontestable—the handiwork of Representative Madison and his colleagues in the First Congress was meant only to constrain the federal government, not the states.<sup>44</sup> This changed, however, in the 1940s when the Supreme Court confirmed that the Fourteenth Amendment’s Due Process Clause had “incorporated” the Religion Clauses as constraints applicable equally against state behavior.<sup>45</sup> With that declaration, all manner of state-level government conduct fell under Religion Clause scrutiny, ushering in the modern battles over the scope, reach, and tolerance of constitutional religious liberty.

Which, then, brings the discussion back full-circle to the question Chief Justice Waite had posed long ago in the 1879 Mormon bigamy case: “[W]hat is the religious freedom which has been guaranteed[?]”<sup>46</sup> His answer (a “wall of separation” between religion and government) is clearly not universally accepted as authoritative on the Establishment Clause’s meaning; in fact, the *Reynolds* bigamy case—where the metaphor was first injected jurisprudentially by Chief Justice Waite—was not even an Establishment Clause dispute, but rather a Free Exercise Clause challenge.<sup>47</sup>

Sixty-eight years later, Associate Justice Hugo Black took a try at describing the Establishment Clause’s meaning in *Everson v. Board of Education*,<sup>48</sup> decided two years after the close of World War II. What resulted was a sweeping list of “thou-shalt-not” prohibitions, written with flair and a solemnly

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<sup>43</sup> Validating, once again, the wisdom of the late Judge Harold Leventhal, who famously pronounced that citing legislative history is a bit like “looking over a crowd and picking out your friends.” Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 n.143 (1983).

<sup>44</sup> The concerns prompting the drafting in 1789 of a bill of individual liberties were federalism ones, a fear that the central federal government would encroach upon the internal sovereignty of the states and their inhabitants. The very first five words of the Amendment (and Religion Clauses) dispel any rational doubt on that question. See U.S. CONST. amend. I (“Congress shall make no law . . .” (emphasis added)).

<sup>45</sup> See *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“The First Amendment, which the Fourteenth makes applicable to the states, declares that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .’”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.” (footnote omitted)).

<sup>46</sup> See *Reynolds v. United States*, 98 U.S. 145, 162 (1879).

<sup>47</sup> See *id.* at 164.

<sup>48</sup> 330 U.S. 1, 15–16 (1947).

memorable cadence (closing with a deferential tilt back to Chief Justice Waite's affection for Jefferson):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."<sup>49</sup>

Though a fine piece of prose to be sure, Justice Black's list is also not especially ideal as a test for Establishment Clause comportment. First, dramatic though it may be, it contains no footnotes to any constitutional authority for the boundaries it sets (beyond a single citation to the Mormon bigamy case for the Jefferson quote at the end).<sup>50</sup> Perhaps the omission was not so much neglect as absence. Until *Everson*, the particular contents of this list had never been expressed by the Court as Establishment Clause principles. So, in fairness, there was not all that much to which Justice Black could cite. In the absence of any weighty *Annals* support, the paragraph bears more the feeling of invention than the gravitas of constitutional lineage. Second, the language is broad and sweeping, not tailored or cautious. Perhaps this is because Justice Black knew the structural constitutional guarantee of religious liberty to be broad, not tailored, and sweeping, not cautious. Or perhaps this was just how Justice Black liked to write.<sup>51</sup> Third, after installing his foreboding "thou-shalt-not" list of constitu-

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<sup>49</sup> *Id.* at 15–16.

<sup>50</sup> It is true that what precedes this paragraph—a recounting of earlier religious strife here and abroad, and the crafting of Virginia's Bill for Religious Liberty—is supported by authority. *Id.* at 8–15. But this critical thou-shalt-not paragraph quoted above, an early exposition by the Court of what the Establishment Clause commands, has none, other than the citation to a source for the Jefferson "wall of separation" quote in *Reynolds*. *Id.* at 16.

<sup>51</sup> It really is hard to decipher which. Justice Black was, after all, a disciple of the "no-law-means-no-law" absolutist view of First Amendment meaning. See *Smith v. California*, 361 U.S. 147, 157–58 (1959) (Black, J., concurring) ("That Amendment provides, in simple words, that

tional prohibitions, which included the admonition that neither a state or federal government “can pass laws which aid one religion, aid all religions, or prefer one religion over another,” nor levy a tax “in any amount, large or small, . . . to support any religious activities or institutions,” Justice Black concluded that diverting state tax revenues to reimburse New Jersey parents for the costs of transporting their children to Catholic schools was constitutionally sound.<sup>52</sup> Thus, even in *Everson*, “no law” really didn’t seem to mean “no law” (at least not absolutely so).<sup>53</sup> In any event, whatever insights one might draw from Justice Black’s *Everson* list, this much is true: the paragraph’s categorical generalities make it difficult to apply as a “test” in any reliable or predictable way, especially to cases at the margins.

If neither Chief Justice Waite’s “wall of separation” metaphor nor Justice Black’s “thou-shalt-not” list answers the question of what the Establishment Clause means, the search for meaning must look elsewhere. One of the most highly regarded and impressively published scholars of the Religion Clauses, the late Professor Steven G. Gey, tackled this imposing task by cataloging varying analytical approaches used over the years by Justices of the Supreme Court to test for Establishment Clause constitutionality.<sup>54</sup> His exercise produced a remarkable ten (10) different tests (not counting Chief Justice Waite’s “wall of separation” metaphor and Justice Black’s “thou-shalt-not” list,

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‘Congress shall make no law . . . abridging the freedom of speech, or of the press.’ I read ‘no law . . . abridging’ to mean *no law abridging*.”) (alteration in original). That view, if truly given literal meaning, would result in an unqualified, categorically unyielding approach to constitutional interpretation, something the Court has, of course, never embraced. *Cf.* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” (citations omitted)). Justice Black showed his inclination towards sweeping craftsmanship elsewhere, as well. He penned the “no-set-of-facts” conception of the proper approach for testing the adequacy of federal pleadings, see *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), a view of almost unbounded pleading tolerance that the recent Court has since renounced. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (“[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.”).

<sup>52</sup> See *Everson*, 330 U.S. at 18 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”).

<sup>53</sup> And, in his dissent, Justice Rutledge made certain Justice Black wouldn’t forget it. See *id.* at 29 (Rutledge, J., dissenting) (“Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia’s great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. New Jersey’s statute sustained is the first, if indeed it is not the second breach to be made by this Court’s action. That a third, and a fourth, and still others will be attempted, we may be sure.” (footnote omitted)).

<sup>54</sup> See STEVEN G. GEY, *RELIGION AND THE STATE* 219–94 (2d ed. 2006).

if tests they be) used, on one or more occasions, and by one or more Justices, to assess whether a particular government action failed or passed the Establishment Clause:

The *Lemon* Tripartite Test: Which makes three inquiries—(i) whether the challenged government action had a secular purpose, (ii) whether its principal or primary effect neither advanced nor inhibited religion, and (iii) whether it avoided fostering an excessive governmental entanglement with religion.<sup>55</sup>

The Endorsement Test: Which retained but modified the *Lemon* tripartite test, by affixing an “endorsement or disapproval” focus to the first and second inquiries, thus asking whether the government’s actual purpose in its challenged action was to endorse or disapprove of religion, and then, regardless of actual purpose, whether the challenged action conveyed a message of religious endorsement or disapproval.<sup>56</sup>

The Broad Coercion Test: Which inquires whether the challenged government action coerced someone, even subtly or indirectly, into supporting or participating in religion or its exercise.<sup>57</sup>

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<sup>55</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (Burger, C.J.). Because it has become a sport of sorts among students of the Religion Clauses, discussing the *Lemon* test almost reflexively obliges an author to recount Justice Scalia’s blistering attack on the test from his 1993 concurrence in *Lamb’s Chapel v. Center Moriches Union Free School District*:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so . . . . The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs ‘no more than helpful signposts.’ Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (citations omitted).

<sup>56</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>57</sup> See *Lee v. Weisman*, 505 U.S. 577, 587, 593 (1992) (Kennedy, J.).

The Narrow Coercion Test: Which asks whether the challenged government action coerced, by either force of law or threat of penalty, religious orthodoxy or financial support of religion.<sup>58</sup>

The Substantive Neutrality Test: Which inquires whether the challenged government action was neutral, or whether it was instead undertaken with the ostensible, predominant objective to advance religion.<sup>59</sup>

The Formal Neutrality Test: Which inquires whether the challenged government action provided benefits or advantages to religion as merely a component of broader, neutrally-applicable programs offered to a wide array of beneficiaries, none of whom were selected or identified on the basis of religion.<sup>60</sup>

The Non-Preferentialist Test: Which asks whether the challenged government action provided benefits or advantages to religion on a sect- or denominationally-preferential basis.<sup>61</sup>

The Non-Incorporation Approach: Which asks only whether the challenged government action was federal (but not state) conduct that either established a national church or interfered with state-level religious establishments.<sup>62</sup>

The Divisiveness Test: Which inquires whether the challenged government action incited religious strife.<sup>63</sup>

The Ad Hoc / Legal Judgment Approach: Which asks whether the challenged government action, assessed through the exercise of the Court's legal judgment, remained faithful to the Religion Clauses' underlying purposes, taking into account the

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<sup>58</sup> See *id.* at 640–41 (Scalia, J., dissenting).

<sup>59</sup> See *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 860 (2005) (Souter, J.).

<sup>60</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002) (Rehnquist, C.J.).

<sup>61</sup> See *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989) (Marshall, J.); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (Brennan, J.).

<sup>62</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–52 (2004) (Thomas, J., concurring).

<sup>63</sup> See *Zelman*, 536 U.S. at 725–26 (Breyer, J., dissenting).

context and consequences measured in light of those purposes.<sup>64</sup>

As extraordinary a job as Professor Gey performed in cataloging the Justices and their many Establishment Clause constructions, one might find that Professor Gey's list—lengthy as it is—is *still* not complete. Additional categories of Establishment Clause tests might be added to Professor Gey's catalogue (even beyond the “wall of separation” metaphor and “thou-shalt-not” listing which his catalogue actually omits). These might include:

The Framers' Behavior Historical Test: Which examines whether the challenged government action was, as a matter of historical fact, actually performed by the First Congress which had drafted and approved the Religion Clauses.<sup>65</sup>

The Historical Contextualizing Test: Which inquires whether a long passage of time has shown that the challenged government action has lost its religious character and is no real favoritism of religion, but rather merely an artifact or acknowledgement reflecting cultural heritage.<sup>66</sup>

Ceremonial Deism Test: Which asks whether a facially religious challenged government action has, by virtue of its history and ubiquity, its absence of worship or prayer, its lack of reference to any particular faith, and its minimal religious content, so lost its religious intensity that it has been transformed into a simple ceremonial acknowledgement or reference to the divine.<sup>67</sup>

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<sup>64</sup> See *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

<sup>65</sup> See *Marsh v. Chambers*, 463 U.S. 783, 790–92 (1983) (Burger, C.J.).

<sup>66</sup> See *Van Orden*, 545 U.S. at 702–03 (Breyer, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 431–53 (1961) (Warren, C.J.); see also *Freethought Soc'y of Greater Philadelphia v. Chester Cnty.*, 334 F.3d 247, 265 (3d Cir. 2003) (rejecting an Establishment Clause challenge to Ten Commandments plaque that had been mounted on a county courthouse for more than 80 years, reasoning that “while the reasonable observer may perceive the Ten Commandments (in the abstract) as portraying a religious message, he or she would view the *plaque* as a reminder of past events in Chester County. Thus, history provides a context which changes how the reasonable observer would regard the plaque”).

<sup>67</sup> See *Elk Grove Unified Sch. Dist.*, 542 U.S. at 37–44 (O'Connor, J., concurring). Some have indicted the prudence of using the phrase “ceremonial deism” (or, perhaps more fundamentally, the very notion it connotes) as “disconcerting”; see also *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 405 n.11 (4th Cir. 2005) (Williams, J.) (“The phrase ‘ceremonial deism’ is somewhat disconcerting because it suggests that, when ‘initially used’ phrases like ‘in God we trust’ and ‘under God’ ‘violated the Establishment Clause because they had not yet been rendered

The Pre-Lemon Three-Part Brennan Test: Which inquires whether the challenged government action served an essentially religious activity of a religious institution, or employed the organs of government for an essentially religious purpose, or used essentially religious means to serve a governmental end that could be obtained through only secular means.<sup>68</sup>

The School-Funding Modification to Lemon: Which folds the *Lemon* tripartite test into two inquiries—purpose and effect—but then adjusts the effect inquiry to ask whether the challenged government action resulted in government indoctrination, defined recipients on the basis of religion, or created an excessive entanglement with religion.<sup>69</sup>

The Proselytizing Test: Which, in a bit of an amalgam of several other approaches, asks whether the challenged government action coerced the involuntary funding of a faith, directly compelled its observance, or exhorted to religiosity to such a degree that it constitutes proselytizing.<sup>70</sup>

The Context-Specific Approach: Which concedes that the search for a “grand unified theory” to govern all Establishment Clause disputes is an illusory one, and ought to be replaced by a less unitary approach employing different tests to address narrowed, more homogeneously grouped categories of disputes.<sup>71</sup>

No doubt, other students of the Religion Clauses might dispute this catalogue of Establishment Clause tests, or might add to it or subtract from it. But in whatever final form the resulting catalogue of tests might take, the very fact that this cataloguing variety exists at all illustrates the Supreme Court’s schizophrenia in trying to frame the appropriate lens for testing constitutionality un-

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meaningless by repetitive use.”) (quoting *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring)).

<sup>68</sup> See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294–95 (1963) (Brennan, J., concurring).

<sup>69</sup> See *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (O’Connor, J.).

<sup>70</sup> See *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 659–60 (1989) (Kennedy, J., concurring and dissenting).

<sup>71</sup> See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 718–21 (1994) (O’Connor, J., concurring); see also *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (“While the Court’s prior tests provide useful guideposts . . . , no exact formula can dictate a resolution to such fact-intensive cases.”).

der the Establishment Clause. It is small wonder that the Supreme Court's religious symbol cases mirror that confusion, and reveal the line that is, in the Court's own words, "blurred, indistinct, and variable."<sup>72</sup>

The goal of this Article is to explore whether the Supreme Court's Establishment Clause jurisprudence has yielded reliable, predictable outcomes from the lower judiciary. To be sure, the tangled nature of the Supreme Court's analytical tools gives that search a decidedly tepid start. But perhaps all is not lost. Even if the Court is unable to settle on a fixed analytical framework for Establishment Clause adjudications, perhaps the Court's applied example is sufficiently instructive—if only as a factual model—to produce a predictable progeny in the lower courts. What now follows, then, is an introduction to those Supreme Court models.

### III. THE SUPREME COURT'S RELIGIOUS SYMBOL RULINGS

Although the Establishment Clause and the United States Supreme Court have both existed now for nearly two and a quarter centuries, the collection of religious symbol decisions is quite small. In just eleven cases, the Supreme Court has passed on (or avoided passing on) the constitutionality of Ten Commandments and similar monuments, crèche (or nativity) holiday displays, a menorah holiday display, Latin crosses, and the "under God" phrase in the Pledge of Allegiance. In dicta elsewhere, the Court has also intimated views on the national motto "In God We Trust" and the courtroom summons "God Save This Honorable Court." Those opinions are introduced, and their reasonings briefly sketched, below.

#### The Ten Commandments Early: *Stone v. Graham* (1980)

The Supreme Court's religious symbol jurisprudence begins only fairly recently, in 1980, with *Stone v. Graham*.<sup>73</sup> That year, the Court received a petition for a writ of certiorari to the Kentucky Supreme Court, requesting review of that court's decision upholding the constitutionality of a statute that required the posting of a copy of the Ten Commandments in every public school classroom in the state. In an arresting move, the U.S. Supreme Court granted the writ of certiorari and, by per curiam opinion, without briefing or oral argument, summarily reversed the Kentucky ruling.<sup>74</sup> The Court used the *Lemon* tripartite test to decide the dispute, rejecting the state's claimed secular purpose of educating students on the origins of Western Civilization's "fundamental legal

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<sup>72</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>73</sup> 449 U.S. 39 (1980) (per curiam).

<sup>74</sup> *Id.*

code” and the United States’ common law.<sup>75</sup> The Court explained that the Ten Commandments are “undeniably a sacred text” whose display on a schoolroom wall would (if it has any effect at all) be “to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”<sup>76</sup> The Court was unpersuaded by the presence of a small-print written disclaimer to appear at the bottom of each display, or that the displays were funded privately and not with public monies, or that nothing was read aloud or recited by the students.<sup>77</sup> Ruling that the Kentucky mandatory posting law violated the first of *Lemon*’s three required inquiries (the requirement of a secular purpose),<sup>78</sup> the Court declared the schoolhouse posting statute to be unconstitutional.<sup>79</sup>

The Ten Commandments Late, Part I:

*McCreary County v. American Civil Liberties Union (2005)*

A quarter-century after *Stone*, and on the same day in June 2005, the Court announced two Ten Commandments display rulings; in the first (*McCreary County v. American Civil Liberties Union*),<sup>80</sup> a 5-4 majority struck down a display by two counties in Kentucky, and in the second (*Van Orden v. Perry*),<sup>81</sup> a 5-4 majority upheld a display in Texas. The voting Justices were grouped identically in each case, except for Justice Breyer whose fifth vote created the different majorities.

The counties of McCreary and Pulaski are small communities in south central Kentucky, near the Tennessee border.<sup>82</sup> In 1999, gold-framed copies of

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<sup>75</sup> *Id.* at 40–41.

<sup>76</sup> *Id.* at 41–42.

<sup>77</sup> *Id.* at 41–43.

<sup>78</sup> Challenged government conduct is unconstitutional under *Lemon* if it violates any of the three prongs (purpose, effect, entanglement). *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

<sup>79</sup> The Supreme Court has found an unconstitutional governmental purpose—a violation of the first *Lemon* prong—only four times in the Court’s history. *See McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844, 859 (2005). The *Stone* decision was one of those four cases. Since then, the Court has clarified that a governmental purpose is unconstitutional under *Lemon* “only if it is motivated wholly by an impermissible purpose,” *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); but that lawful purpose must be genuine and neither a sham nor “merely secondary to a religious objective,” *McCreary Cty.*, 545 U.S. at 864.

<sup>80</sup> 545 U.S. 844.

<sup>81</sup> 545 U.S. 677 (2005).

<sup>82</sup> McCreary County actually borders Tennessee, with a population estimated in 2012 to be just under 20,000. *See State & County QuickFacts—McCreary County, Ky.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21147.html> (last visited Sept. 8, 2012); *see*

the Ten Commandments were installed in the courthouses of both counties in visible, high-traffic areas.<sup>83</sup> The ACLU brought suit, prompting each county to expand its display with eight, smaller-framed copies of other documents, including the “endowed by our creator” passage from the Declaration of Independence, the national motto “In God We Trust,” the Congressional Record’s memorialization of the 1983 “Year of the Bible,” and President Lincoln’s Proclamation of a National Day of Prayer (among other materials).<sup>84</sup> Following an injunction that ordered the displays to be removed, each county substituted in new displays, this time with nine equally-sized framed documents, depicting the “Foundations of American Law,” including the Magna Carta, the Declaration of Independence, the Bill of Rights, the Mayflower Compact, and, once again, the Ten Commandments, although this time with a statement of legislative and historical significance.<sup>85</sup>

The majority in *McCreary County* seemed to rely on the tripartite test from *Lemon* in conducting its analysis, although hints of Justice O’Connor’s endorsement test and substantive neutrality theory peek through the prose.<sup>86</sup> Ultimately, the Court held that the displays’ sequence of erection/modification-and-supplementation/removal-and-replacement unveiled an unconstitutional purpose to advance religion, violating, again, the first prong (secular purpose) of the *Lemon* test.<sup>87</sup> After noting the intrinsic religious intensity of the full text of the Ten Commandments, the Court wrote that any reasonable observer (the

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also MCCREARY COUNTY, <http://www.mccrearycounty.com> (last visited Oct. 20, 2013). Pulaski County, adjacent and to the north, had a population estimated to be just under 65,000 in 2012. See *State & County QuickFacts—Pulaski County, Ky.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21199.html> (last visited Sept. 8, 2012); see also PULASKI COUNTY GOVERNMENT, <http://www.pcgovt.com> (last visited Oct. 20, 2013). As a point of reference, Kentucky’s estimated population in 2012 was 4,380,415, with its largest county, Jefferson County, at just over 750,000. See *State & County QuickFacts—Jefferson County, Ky.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21/21111.html> (last visited Sept. 8, 2012).

<sup>83</sup> *McCreary Cnty.*, 545 U.S. at 852.

<sup>84</sup> *Id.* at 853–54.

<sup>85</sup> *Id.* at 854–57. The statement noted how the Ten Commandments “have profoundly influenced the formation of Western legal thought and the formation of our county.” *Id.* at 856.

<sup>86</sup> *Id.* at 860 (“By showing a purpose to favor religion, the government ‘sends the . . . message to . . . nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .’” (alteration in original) (citations omitted)); *id.* (“The touchstone for our analysis is the principle that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.’ When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” (citations omitted)).

<sup>87</sup> *Id.* at 867–74.

endorsement test's lens), mindful of the histories of the various displays, "would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses that were constitutionally required to maintain religious neutrality."<sup>88</sup> Thus, with a little *Lemon*, a smidgen of endorsement, and a goodly portion of neutrality for balance, the majority reached its conclusion.

The majority emphasized, though, that its ruling was not categorical; it was not purporting to pass on the constitutionality of every possible display or use of the Ten Commandments.<sup>89</sup> After all, noted the majority:

We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze [in the U.S. Supreme Court Building] was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.<sup>90</sup>

Because, however, the two Kentucky displays lacked such neutrality-contextualizing features, originally omitted including a disclaimer, and were the product of a purpose found to be religious, not secular, they were unconstitutional under the Establishment Clause.

The four-Justice dissent, written by Justice Scalia, took special note of this qualification by the majority, which had been offered (Justice Scalia ventured) "to dispel that impression that [the majority's] decision will require governments across the country to sandblast the Ten Commandments from the public square."<sup>91</sup> To the dissent, the Kentucky counties' displays were nothing more than an "[a]cknowledgement of the contribution that religion has made to our Nation's legal and governmental heritage."<sup>92</sup> Reasoned the dissent:

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<sup>88</sup> *Id.* at 873.

<sup>89</sup> *Id.* at 874.

<sup>90</sup> *Id.* One familiar with the Old Testament (or, for that matter, Cecil B. DeMille's 1956 vivid cinematic vision of *The Ten Commandments*) might protest that this notion of Moses as "lawgiver" with the Ten Commandments involves more than a little bit of poetic license. See *Suhre v. Haywood Cnty.*, 55 F. Supp. 2d 384, 389–90 (W.D.N.C. 1999) (recounting, from North Carolina Ten Commandments' litigation, the testimony of Reverend R. Eugene Owens, a retired Baptist minister, who explained: "'These Commandments were written by the finger of God on tablets of stone,' and, in Rev. Owens' mind, it is impossible to be more religious than that").

<sup>91</sup> *McCreary Cnty.*, 545 U.S. at 907 (Scalia, J., dissenting).

<sup>92</sup> *Id.* at 906.

[I]n the context of public acknowledgements of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling ‘excluded’; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors.<sup>93</sup>

The Ten Commandments Late, Part II:  
*Van Orden v. Perry* (2005)

The same morning that *McCreary County* was decided, the Justices (by a 5-4 vote) went the other way in *Van Orden v. Perry*, the Texas monument case.<sup>94</sup> In 1961, the Fraternal Order of Eagles presented the people of Texas with a large stone monolith inscribed with the Ten Commandments, which the State of Texas displayed—along with 16 other monuments and 21 other historical markers—on the 22-acre green space that surrounded its Capitol building.<sup>95</sup> A Texas lawyer sued to have it removed, complaining of his affront each time he walked past it. The four-Justice plurality explained how, “Januslike,” the Court’s Establishment Clause cases point in two directions—towards the role played by religion and religious tradition in American history and towards the principle that government intervention into religion can threaten religious liberty.<sup>96</sup> Finding the *Lemon* tripartite test “not useful in dealing with [this] sort of passive monument,” the plurality announced a focus “driven both by the nature of the monument and by our Nation’s history.”<sup>97</sup> The plurality toured the reader through the pervasive presences of Moses and Ten Commandments imagery adorning the U.S. Supreme Court building, the City of Washington, D.C., and elsewhere throughout the United States, concluding that “[t]hese displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgements.”<sup>98</sup> Because the Ten Commandments have “an undeniable historical meaning,” because they have “dual significance, partaking of both religion and government,” and because “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause,” the plurality found the display constitutional.<sup>99</sup>

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<sup>93</sup> *Id.* at 900.

<sup>94</sup> 545 U.S. 677 (2005).

<sup>95</sup> *Id.* at 681–82 (plurality opinion).

<sup>96</sup> *Id.* at 683.

<sup>97</sup> *Id.* at 686.

<sup>98</sup> *Id.* at 688–90.

<sup>99</sup> *Id.* at 690–92.

The decisive fifth vote came from Justice Breyer, who had voted with the majority to strike down the Kentucky display earlier that morning. For him, the forced removal of this 40-year-old monument, particularly in the absence of any indication that Texas was making any religious use of it, “would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”<sup>100</sup> That tradition, he reasoned, “does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>101</sup> When, therefore, the courts come upon “difficult borderline cases,” Justice Breyer had become resigned that there is “no test-related substitute for the exercise of legal judgment.”<sup>102</sup> Such judgment, he explained, is not a personal one, but “must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and circumstances measured in light of those purposes.”<sup>103</sup> And so, “rely[ing] less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment’s Religion Clauses themselves,” Justice Breyer voted that “as a practical matter of *degree* this display is unlikely to prove divisive,”<sup>104</sup> and, therefore, did not offend the Establishment Clause.

Of the four dissenting Justices, three wrote separately (although Justice O’Connor, it seems, only to note which of the two leading dissents she preferred). Justice Stevens would have heavily credited his “strong presumption” against governmental religious displays, and insisted upon the Texas monument’s removal.<sup>105</sup> His lengthy dissent focused on the powerfully religious language of obligation carved into the Ten Commandments, and argued that permitting government to display sacred religious texts “makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion.”<sup>106</sup> Separately, Justice Souter emphasized how a display of the full text of the Ten Commandments, unlike a merely symbolic illustration of tablets, allowed passersby to sense that the monolith, “quoting God himself, pro-

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<sup>100</sup> *Id.* at 704 (Breyer, J., concurring).

<sup>101</sup> *Id.* at 699.

<sup>102</sup> *Id.* at 700.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 703–04 (Breyer, J., concurring). How peculiarly distinctive Justice Breyer saw his views when plotted on the continuum of the far ends of the *Van Orden* debate was made clear by his final paragraph:

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

*Id.* at 704–05 (citations omitted).

<sup>105</sup> *Id.* at 708 (Stevens, J., dissenting).

<sup>106</sup> *Id.* at 735.

claims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.”<sup>107</sup>

Ten Commandments-Like Monuments:  
*Pleasant Grove City v. Summum* (2009)

A Ten Commandments monument, along with 14 others, stood in a public park in Pleasant Grove City, Utah. The religious organization Summum believes that Moses was originally given the “Seven Aphorisms” by God but, because the people were not ready to receive them, Moses destroyed them, returned back to Mount Sinai, and received the Ten Commandments in their stead.<sup>108</sup> Summum petitioned the mayor of Pleasant Grove City to accept a donated monument of the Seven Aphorisms for permanent display in the public park, but the mayor refused, citing a policy that required donated monuments either to relate to the history of the town or to have longstanding ties with the town community.<sup>109</sup> In *Pleasant Grove City v. Summum*,<sup>110</sup> all nine Justices rejected the religious group’s contention that the town was obligated on free speech grounds to give Summum “equal time” at monumenting. The Court concluded that the town’s decision of which monuments to select for permanent installation, and which to reject, did not trigger the Constitution’s free speech guarantee because the speech was the government’s own, and not private speech.<sup>111</sup> The Court noted, however, that government speech was not unbounded; “[f]or example, government speech must comport with the Establishment Clause.”<sup>112</sup> Since, however, only a Free Speech Clause claim had been asserted in the *Summum* litigation, the Establishment Clause question was not squarely implicated by the appeal (though the obvious shadow it cast over the litigation prompted four of the Justices to comment on it collaterally).<sup>113</sup>

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<sup>107</sup> *Id.* at 738 (Souter, J., dissenting).

<sup>108</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 465, n.1 (2009). In its opinion, the Court referred only obliquely to these seven principles. *See generally Seven Summum Principles*, SUMMUM: SEALED EXCEPT TO THE OPEN MIND, <http://www.summum.us/philosophy/principles.shtml> (last visited Sept. 8, 2013).

<sup>109</sup> *Pleasant Grove City*, 555 U.S. at 465.

<sup>110</sup> 555 U.S. 460.

<sup>111</sup> *Id.* at 481.

<sup>112</sup> *Id.* at 468.

<sup>113</sup> That, however, did not constrain the Justices from addressing it in dicta. The lead opinion, by Justice Alito, offered the “must-comport-with-the-Establishment-Clause” admonition noted above, and Justice Stevens (joined by Justice Ginsburg) echoed the same sentiment. *Id.* at 482 (Stevens, J., concurring) (“For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”). Justice Souter urged the Court to “go slow” in this area, since “[t]he interaction between the ‘government

The Crèche Early:  
*Lynch v. Donnelly* (1984)

For some 40 years, the City of Pawtucket, Rhode Island included a crèche (or nativity) scene—depicting the Infant Jesus, Mary, Joseph, angels, kings, shepherds, and animals—in its annual Christmas display, along with other seasonal decorations—a Santa Claus house, reindeers, a sleigh, a Christmas tree, carolers, candy-striped poles, cut-out figures, colored lights, and a “Season’s Greetings” banner.<sup>114</sup> A divided 5-4 Court in *Lynch v. Donnelly* ruled that the display had not transgressed the Establishment Clause.<sup>115</sup> The four-Justice plurality opinion relied principally on the three-prong *Lemon* test, finding that the City’s purpose in including the crèche was to celebrate the Christmas holiday and to depict the holiday’s historical origins, that the effect of including the crèche was indirect, remote, and incidental (and no greater than the effect of other practices the Court’s precedents had earlier approved), and that the display had caused no administrative entanglement between the City and religion.<sup>116</sup> The plurality explained that, in assessing the Pawtucket crèche’s constitutionality, its context mattered greatly—since “[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause,”<sup>117</sup> and because the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>118</sup>

Justice O’Connor’s concurrence supplied the decisive fifth vote, though she would have preferred her newly-minted “endorsement” inquiry as a modification to the first and second inquiries of the *Lemon* test.<sup>119</sup> So adjusted, she found the City’s purpose was not to endorse Christianity, but only the public holiday of Christmas through the use of “traditional” symbols, and the effect

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speech doctrine’ and Establishment Clause principles has not . . . begun to be worked out.” *Id.* at 485–86 (Souter, J., concurring). Justice Scalia (joined by Justice Thomas) was far less moderated in his assessment, assuring the town that it “can safely exhale” because its Ten Commandments monument and the one upheld in *Van Orden* were functionally indistinguishable, and thus the town “ought not fear that today’s victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire.” *Id.* at 482–83 (Scalia, J., concurring).

<sup>114</sup> *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

<sup>115</sup> *Id.* at 687.

<sup>116</sup> *Id.* at 679–85 (plurality opinion).

<sup>117</sup> *Id.* at 680.

<sup>118</sup> *Id.* at 673.

<sup>119</sup> *Id.* at 687–94 (O’Connor, J., concurring).

of the City's display did not communicate any endorsement of Christianity but only a secular celebration.<sup>120</sup>

The four dissenting Justices would have found that the City's purpose could not be confidently found to be predominantly secular, that the effect of the City's display was to place a governmental imprimatur on a particular religious belief, and that the display posed a significant threat of entangling the City with religion.<sup>121</sup> For the dissenters, the Pawtucket crèche challenge "appear[ed] hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable."<sup>122</sup> Finding the crèche constitutional, they felt, resulted in "a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the crèche conveys."<sup>123</sup>

The Crèche Late:

*County of Allegheny v. American Civil Liberties Union (1989)*

In the early 1980s, Pittsburgh decorated its courthouse with a crèche (nativity scene) and its government offices building with a menorah. The crèche was displayed on the "Grand Staircase" of the courthouse, bounded by a small wooden fence, poinsettia plants, evergreen trees, and two large wreaths with red bows, and headed with a sign noting that the display had been donated by the Holy Name Society.<sup>124</sup> Next door, the neighboring city-county building hosted a 45-foot Christmas tree beside an 18-foot Chanukah menorah and above a "Salute to Liberty" sign which read: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."<sup>125</sup>

The challenge to these two displays in *County of Allegheny v. American Civil Liberties Union*<sup>126</sup> produced perhaps the most disheartening Establishment Clause decision ever released by the U.S. Supreme Court. Justice Blackmun wrote the lead opinion in seven parts. Parts I and II of his opinion were joined by Justices Stevens and O'Connor only. Part III-A of his opinion was joined by Justices Brennan, Marshall, Stevens, and O'Connor. Part III-B of his opinion was joined by only Justice Stevens. Parts IV and V of his opinion

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<sup>120</sup> *Id.* at 690–93.

<sup>121</sup> *Id.* at 698–704 (Brennan, J., dissenting).

<sup>122</sup> *Id.* at 696.

<sup>123</sup> *Id.* at 725–26.

<sup>124</sup> *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 579–81 (1989).

<sup>125</sup> *Id.* at 581–87.

<sup>126</sup> 492 U.S. 573.

were joined by Justices Brennan, Marshall, Stevens, and O'Connor. Part VI of his opinion no one joined. And Part VII of his opinion was joined by Justice O'Connor only. Justice O'Connor wrote separately to concur in part and to concur in the judgment (to which Justices Brennan and Stevens joined, but only in part). Justice Brennan wrote separately to concur in part and to dissent in part (to which Justices Marshall and Stevens joined). Justice Stevens wrote separately to concur in part and to dissent in part (to which Justices Brennan and Marshall joined). Justice Kennedy wrote separately to concur, in part, in the judgment and to dissent in part (to which Chief Justice Rehnquist and Justices White and Scalia joined). When bound in the *United States Reports*, the full opinion spans a demoralizing 106 pages.

In the end, by separate 5-4 tallies, the crèche display failed and the menorah display survived.<sup>127</sup> The five Justices forming the crèche majority seemed to approve the *Lemon* tripartite test, the endorsement test, and neutrality theory in tandem as proper analytical lenses for testing religious symbol constitutionality.<sup>128</sup> In fact, in one of the most perplexing moments in the case, Justice Blackmun devoted a sub-part of his opinion to proving that, by cobbling together from *Lynch v. Donnelly* both Justice O'Connor's concurrence and reasoning from the four dissenting Justices, a majority of the Court had actually settled upon the endorsement test as *the* (or, at least, as one of *the*) constitutional principles guiding religious symbols adjudication.<sup>129</sup> Seven of the Court's Justices, however, refused expressly to join in this sub-part of the Blackmun opinion, notwithstanding that it purported merely to summarize their settled agreement on principle.<sup>130</sup>

Unlike the crèche approved five Terms earlier in *Lynch*, five Justices agreed that the Pittsburgh display lacked a context that "detract[ed] from the

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<sup>127</sup> These brutal divisions were mirrored in the Court of Appeals below. The original Third Circuit opinion had been 2-1, and a subsequent rehearing en banc petition had been refused 6-5. *Id.* at 589.

<sup>128</sup> *Id.* at 592 (observing that *Lemon's* "trilogy of tests has been applied regularly in the Court's later Establishment Clause cases"); *id.* ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has a purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."); *id.* at 593-94 ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . .").

<sup>129</sup> *Id.* at 597 ("[D]espite divergence at the bottom line, the five Justices in concurrence and dissent in *Lynch* agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context . . . . Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs.").

<sup>130</sup> *Id.* at 577 (listing joins, concurrences, and dissents).

crèche’s religious message” because it “stands alone,” without Santas or reindeer or candy-canes.<sup>131</sup> That majority found that the evergreens and poinsettia plants were not contextualizing features but instead acted as a “floral frame” that “contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the crèche.”<sup>132</sup> The majority also ruled that the display’s positioning—on the “Grand Staircase” of the county courthouse—sent “an unmistakable message” of Christian endorsement, since “[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.”<sup>133</sup> Finding an endorsing effect, the majority concluded their analysis, since “nothing more is required to demonstrate a violation of the Establishment Clause.”<sup>134</sup>

As for the menorah, Justice Blackmun wrote alone. He reasoned that the positioning of the menorah next to a much taller Christmas tree, and accompanied by the “Salute to Liberty” official governmental message, created an “overall holiday setting,” particularly because the City had no “less religious” symbol choices other than the menorah with which to celebrate Chanukah.<sup>135</sup> Consequently, the menorah display lacked the unconstitutionally endorsing effect that had doomed the crèche.<sup>136</sup> In a separate opinion, Justice O’Connor agreed that the menorah display was constitutional, but not (like Justice Blackmun) because it was celebrating a secular holiday; instead, she reasoned that Pittsburgh’s message was a celebration of religious pluralism, which would not constitute a constitutionally impermissible religious endorsement.<sup>137</sup>

Four other Justices (Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice Kennedy) concurred with Justice Blackmun’s judgment that the menorah display was constitutional, but for wholly different reasons, and those same four Justices would have applied their own reasoning to approve, not invalidate, the Pittsburgh crèche display. Lead by Justice Kennedy, these Justices would find no unconstitutional effect with either display (though neither “advocating, let alone adopting” the *Lemon* test along the way).<sup>138</sup> Nor would these four Justices accept the endorsement test as a proper analytical tool, since any “test for implementing the protections of the Establishment

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<sup>131</sup> *Id.* at 598.

<sup>132</sup> *Id.* at 599.

<sup>133</sup> *Id.* at 599–600.

<sup>134</sup> *Id.* at 601–02.

<sup>135</sup> *Id.* at 613–21.

<sup>136</sup> *Id.* at 620. Justice Blackmun ended his discussion there, without considering either the display’s purpose or its potential entanglement with religion. He explained that the lower court had not addressed either issue, but would have license to do so on remand. *Id.* at 620–21.

<sup>137</sup> *Id.* at 632–37 (O’Connor, J., concurring).

<sup>138</sup> *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”<sup>139</sup> Instead, Justice Kennedy would have preferred a more categorical approach to governmental displays of religious symbols: “Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”<sup>140</sup> Since both the crèche and menorah were “purely passive symbols” which passersby “are free to ignore,”<sup>141</sup> and since, “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal,”<sup>142</sup> Justice Kennedy would have concluded that there was “no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.”<sup>143</sup>

Conversely, three Justices (Justice Brennan, Justice Marshall, and Justice Stevens) would have insisted on the removal of the menorah as well as the crèche. For those Justices, the Christmas tree and menorah both were religious symbols (the menorah “indisputably” so), and the governmental commemoration of both could not be defended as secular “pluralism.”<sup>144</sup> These Justices would install a “strong presumption” against public use of religious symbols, under which neither display would survive.<sup>145</sup>

Crosses, Unattended:

*Capitol Square Review & Advisory Board v. Pinette (1995)*

The plaza surrounding the statehouse in Columbus, Ohio, is called Capitol Square, and for over a hundred years it has been a public forum for speeches, gatherings, and festivals.<sup>146</sup> After a rabbi sought (and received) approval to erect a menorah next to the state’s annual Christmas tree, the Ku Klux Klan sought approval to install a cross on the square as well. The board charged with considering such applications denied the Klan’s request, reasoning that the Establishment Clause forbade it from approving such an unattended display.<sup>147</sup> Resolving the Klan’s subsequent court challenge in *Capitol Square Review and*

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<sup>139</sup> *Id.* at 670.

<sup>140</sup> *Id.* at 662–63.

<sup>141</sup> *Id.* at 664.

<sup>142</sup> *Id.* at 662.

<sup>143</sup> *Id.* at 664.

<sup>144</sup> *Id.* at 637–46 (Brennan, J., concurring in part and dissenting in part).

<sup>145</sup> *Id.* at 650–52 (Stevens, J., concurring in part and dissenting in part).

<sup>146</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995).

<sup>147</sup> *Id.* at 758–59.

*Advisory Board v. Pinette*,<sup>148</sup> seven Justices ruled that the Establishment Clause would not bar approval by the state of the Klan's request. Justice Scalia and three of his colleagues agreed that refusing to violate the Establishment Clause would be a sufficiently compelling state interest to have warranted restricting the Klan's private speech,<sup>149</sup> though they found no such spectre of an Establishment Clause violation on the *Capitol Square* facts. In their view, unanchored to any specific Establishment Clause test, a broad, categorical approach would be proper—namely, that the Establishment Clause cannot be violated by purely private religious expression occurring, with the state's consent, in a public forum that is equally accessible to all.<sup>150</sup> Three other Justices, led by Justice O'Connor, rejected such an approach, preferring instead that the endorsement test be applied; upon doing so, they opined that no "reasonable observer" would, on the basis of the facts presented, conclude that the state was endorsing religion or any particular religious creed.<sup>151</sup> The two dissenting Justices, noting the unattended nature of the Klan's proposed display, the religiousness of their proposed symbol, the "strong presumption" against state-hosted religious symbols, and the potential for a passerby to misattribute the displayed cross as a message by the government, would have upheld the board's refusal to grant the Klan a permit.<sup>152</sup>

Crosses, As Memorials:  
*Salazar v. Buono* (2010)

A retired national park service employee sought to obtain the removal of a cross which had stood for more than 70 years atop Sunrise Rock in the federal Mojave National Preserve in southeastern California.<sup>153</sup> After a federal trial court found the cross to violate the Establishment Clause and ordered its dismantling, Congress enacted a statute ordering the transfer of the cross and its adjoining land to the Veterans of Foreign Wars to be preserved as a permanent memorial. The district court then enjoined the land transfer, holding that the new statute constituted an attempt to preserve the cross in violation of its earlier

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<sup>148</sup> 515 U.S. 753.

<sup>149</sup> *Id.* at 761–62 (plurality opinion).

<sup>150</sup> *Id.* at 770.

<sup>151</sup> *Id.* at 772–83 (O'Connor, J., concurring).

<sup>152</sup> *Id.* at 797–815 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting). It is perhaps fair to say that Justice Stevens, in dissent, would embrace Justice Scalia's invitation to a broad, categorical approach for such private speech, though his reasoning would tilt categorically in the opposite direction. *See id.* at 806–07 (Stevens, J., dissenting) ("I would hold that the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government.").

<sup>153</sup> *Salazar v. Buono*, 559 U.S. 700, 707 (2010).

ruling.<sup>154</sup> On appeal, the Supreme Court reversed in *Salazar v. Buono*.<sup>155</sup> Three Justices, led by Justice Kennedy, favored a reversal for the trial judge's neglect to examine the congressional statute as an intervening change in the law which may have merited a dissolving of the underlying injunction.<sup>156</sup> Although the litigants had agreed that the tripartite *Lemon* test ought to be applied to resolve the dispute,<sup>157</sup> and the trial court had applied an endorsement inquiry,<sup>158</sup> Justice Kennedy carefully avoided crediting either approach, reasoning instead, simply, that the trial judge had erred in not independently assessing Congress' new law against any Establishment Clause analysis.<sup>159</sup> But, while doing so, Justice Kennedy previewed his thoughts on Establishment Clause misapprehensions he thought the trial judge had already made. First, Justice Kennedy offered: "The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."<sup>160</sup> Next, he faulted the judge's sole concentration of the religiousness of the symbol, and not its secular character of memorializing the heroism and contributions of those who had fallen in battle defending the Nation.<sup>161</sup> After more than seven decades, Justice Kennedy reasoned, "[t]ime . . . has played its role" and "the cross and the cause it commemorated had become entwined in the public consciousness."<sup>162</sup>

Concurring only in the judgment, Justices Scalia and Thomas agreed with the reversal, but for lack of Article III standing, finding that the plaintiff's claimed injury—offense by the display of a cross on government property—had been abated by Congress' transfer action.<sup>163</sup> Conversely, three dissenting Justices would have affirmed, deferring to the lower court's baseline finding of an Establishment Clause violation which had become final and unreviewable before Congress acted to transfer the land.<sup>164</sup> Justice Breyer would have dismissed the grant of certiorari.<sup>165</sup>

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<sup>154</sup> *Id.* at 708–11.

<sup>155</sup> 559 U.S. 700.

<sup>156</sup> *Id.* at 715–22 (Kennedy, J.).

<sup>157</sup> *Id.* at 708.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 719–21.

<sup>160</sup> *Id.* at 718.

<sup>161</sup> *Id.* at 721.

<sup>162</sup> *Id.* at 716.

<sup>163</sup> *Id.* at 729–35 (Scalia, J., concurring).

<sup>164</sup> *Id.* at 735–60 (Stevens, J., dissenting).

<sup>165</sup> *Id.* at 760–65 (Breyer, J., dissenting).

## Crosses, Unresolved:

*Utah Highway Patrol Association v. American Atheists, Inc.* (2011) and *Mount Soledad Memorial Association v. Trunk* (2012)

Twice recently, the Supreme Court refused certiorari to lower court opinions that had found other government uses of crosses to offend the Establishment Clause. In October, 2011, the Court in *Utah Highway Patrol Association v. American Atheists, Inc.* denied review of a Tenth Circuit's decision to hold unconstitutional the placement of white roadside crosses in memory of fallen highway patrol officers.<sup>166</sup> In an unusual move, Justice Thomas published a dissent to the certiorari denial. "[O]ur Establishment Clause precedents," he wrote, "remain impenetrable, and the lower courts' decisions . . . remain incapable of coherent explanation."<sup>167</sup> Citing liberally to lower court religious symbol cases, Justice Thomas noted how "we have learned that a crèche displayed on government grounds violates the Establishment Clause, except when it doesn't,"<sup>168</sup> that "a menorah displayed on government property violates the Establishment Clause, except when it doesn't,"<sup>169</sup> that a "Ten Commandments [monument] on government property also violates the Establishment Clause, except when it doesn't,"<sup>170</sup> and that "a cross displayed on government property violates the Establishment Clause, . . . except when it doesn't."<sup>171</sup> Mindful of this lower court quagmire, Justice Thomas urged that the Court "should not now abdicate our responsibility to clean up our mess."<sup>172</sup>

In June, 2012, the Court in *Mount Soledad Memorial Association v. Trunk* denied review of a Ninth Circuit opinion finding Congress in violation of the Establishment Clause when it used its eminent domain authority to acquire the Mount Soledad war memorial, atop which stands a large white cross.<sup>173</sup> In yet an even more unusual move, Justice Alito published a "statement" on the denial of certiorari to which he had joined: "The Court's Establishment Clause jurisprudence is undoubtedly in need of clarity, and the constitutionality of the Mount Soledad Veterans Memorial is a question of substantial importance."<sup>174</sup> Although Justice Alito agreed that certiorari was properly denied because the

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<sup>166</sup> *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

<sup>167</sup> *Id.* at 21–22 (Thomas, J., dissenting from denial of certiorari).

<sup>168</sup> *Id.* at 17–18.

<sup>169</sup> *Id.* at 18.

<sup>170</sup> *Id.* at 18–19.

<sup>171</sup> *Id.* at 19.

<sup>172</sup> *Id.* at 22.

<sup>173</sup> *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535 (2012).

<sup>174</sup> *Id.* at 2535 (Alito, J., issuing statement).

lower court's ruling remained interlocutory and not final, he encouraged the government that it "is free to raise the same issue in a later petition."<sup>175</sup>

Symbol-Like — The Pledge of Allegiance:  
*Elk Grove Unified School District v. Newdow* (2004)

A divorced parent without legal custody for his daughter brought suit under the Establishment Clause to challenge the statutorily-mandated practice in California of beginning each school day by inviting his child and her classmates to recite the Pledge of Allegiance—including its "under God" phrase that Congress had inserted in 1954.<sup>176</sup> Although California's policy permitted unwilling students to simply remain quiet during such Pledge recitations, the Ninth Circuit found that both the Pledge itself and the California statute requiring school days to begin with its recitation were unconstitutional.<sup>177</sup> That opinion unleashed a tsunami of potent opposition. The President declared the opinion "ridiculous"; both the U.S. Senate (by vote of 99-0) and the U.S. House of Representatives (by vote of 416-3) denounced the opinion and sought its reversal.<sup>178</sup> The Supreme Court granted certiorari in the case, *Elk Grove Unified School District v. Newdow*, and reversed.<sup>179</sup> A five-Justice majority ruled that the non-custodial parent lacked the right to press the claim on his daughter's behalf, especially in view of the custodial mother's objections, and dismissed for lack of standing.<sup>180</sup> Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, would have found standing and reversed on the merits, believing that the Pledge was "in no sense a prayer, nor an endorsement of any religion," and that reciting it was "a patriotic exercise, not a religious one."<sup>181</sup> Justice O'Connor wrote separately to explain how, under an endorsement analysis, the Pledge was mere "ceremonial deism" and, thus, non-endorsing: "It would be

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<sup>175</sup> *Id.* at 2536.

<sup>176</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4–9 (2004).

<sup>177</sup> *Id.* at 9–10. The Ninth Circuit later amended its opinion, this time omitting its earlier holding that the Pledge itself was unconstitutional, ruling that issue need not be reached in view of its invalidation of the California statute requiring the Pledge to be recited. *Newdow v. U.S. Congress*, 328 F.3d 466, 468, 490 (9th Cir. 2003). Six years later, Mr. Newdow returned to the Ninth Circuit to challenge the Pledge on behalf of another claimant; this time, a divided court (in a 109-page series of opinions) denied relief. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010).

<sup>178</sup> See H.R. REP. NO. 107-659, at 4–5 (2002); Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West, Cite Words 'Under God.'* *NEWSDAY*, June 27, 2002, at A03, available at 2002 WLNR 533024.

<sup>179</sup> 542 U.S. 1.

<sup>180</sup> *Id.* at 17–18.

<sup>181</sup> *Id.* at 31 (Rehnquist, C.J., concurring).

ironic indeed if the Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the tradition developed to honor it.”<sup>182</sup> And Justice Thomas wrote separately to advocate his view that the Establishment Clause should not be viewed as a protection of individual liberties, and should therefore be “dis-incorporated” from the Fourteenth Amendment.<sup>183</sup>

Symbol-Like — “In God We Trust” Motto:  
*Various References in Dicta*

Mr. Newdow returned to the Ninth Circuit years later to press his view that the national motto, “In God We Trust,” also violated the Establishment Clause. The Ninth Circuit denied his requested injunction to ban the motto’s use on American currency, relying on earlier Circuit precedent that had ruled the motto constitutional.<sup>184</sup> The U.S. Supreme Court has not had occasion to pass squarely on the motto’s constitutionality, although the Court and its Justices have, in dicta, and on several occasions, seemed to assume its validity.<sup>185</sup>

Symbol-Like — “God Save This Honorable Court” Invocation:  
*Various References in Dicta*

Mr. Newdow also filed an Establishment Clause challenge in the D.C. Circuit to enjoin the Chief Justice from administering the Presidential Oath of

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<sup>182</sup> *Id.* at 44–45 (O’Connor, J., concurring).

<sup>183</sup> *Id.* at 45–52 (Thomas, J., concurring).

<sup>184</sup> *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) (relying on *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970)). The Ninth Circuit in *Lefevre* noted that “every circuit to address the question has held the national motto does not violate the Establishment Clause.” *Id.* at 644 n.11.

<sup>185</sup> *See, e.g., Elk Grove Unified Sch. Dist.*, 542 U.S. at 29–30 (Rehnquist, C.J., concurring) (commenting that the motto, like other similar references, “strongly suggest[s] that our national culture allows public recognition of our Nation’s religious history and character”); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 602–03 (1989) (Blackmun, J.) (“Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.”); *id.* at 625 (O’Connor, J., concurring) (“the printing of ‘In God We Trust’ on our coins serve[s] the secular purposes of ‘solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society’”); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (Burger, C.J.) (“Other examples of reference to our religious heritage are found in the statutorily prescribed national motto ‘In God We Trust. . . .’”); *id.* at 716 (Brennan, J., dissenting) (“While I remain uncertain about these questions, I would suggest that such practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow’s apt phrase, as a form a ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”).

Office with the closing solemnity, “So help me God” (which was, by then, moot, given that the Inaugural Address had been delivered), and also that, in hearing his appeal, the D.C. Circuit should order the marshal to dispense with the traditional invocation of “God save the United States and this honorable court.”<sup>186</sup> The court rejected both requests.<sup>187</sup> Like the national motto, the Supreme Court had not had occasion to assess the court-opening invocation’s constitutionality, but has similarly implied in dicta that it is not improper.<sup>188</sup>

Through these eleven cases and various passages of dicta, the Supreme Court has endeavored to teach the lower judiciary the boundary set by the Establishment Clause to demark permitted from proscribed uses of religious symbolism in the public square.<sup>189</sup> Relying heavily on this body of decisional law, the federal and state courts encompassed within the region of the United States’ Fourth Judicial Circuit have resolved Establishment Clause challenges to Ten

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<sup>186</sup> *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010).

<sup>187</sup> *Id.* at 1021–22 (Kavanaugh, J., concurring) (recounting denial, and elaborating that the court-opening invocation does not offend the Establishment Clause because it does not “proselytize” or “otherwise exploit” the moment to “advance any one, or to disparage any other, faith or belief,” because it is “deeply rooted in American history and tradition,” and because the Supreme Court in *Marsh* had cited the practice as “a quintessential example of a permissible religious reference”).

<sup>188</sup> *See* *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (citing Chief Justice Marshall’s early court-opening invocation as evidence that a purging of religion from the public forum “is not, and never was, the model adopted by America”); *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting) (contrasting the Texas Ten Commandments display with “an incidental part of a familiar recital (‘God save the United States and this honorable Court’)”); *Elk Grove Unified Sch. Dist.*, 542 U.S. at 29–30 (Rehnquist, C.J., concurring) (noting that the court-opening invocation “strongly suggest[s] that our national culture allows public recognition of our Nation’s religious history and character”); *Cnty. of Allegheny*, 492 U.S. at 630–31 (O’Connor, J., concurring) (“It is the combination of the longstanding existence of practices such as . . . opening Court sessions with ‘God save the United States and this honorable Court,’ as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.”); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (Burger, C.J.) (citing the court-opening invocation as an example of a practice that “has coexisted with the principles of disestablishment and religious freedom” since colonial times); *id.* at 818 (Brennan, J., dissenting) (“I frankly do not know what should be the proper disposition of features of our public life such as ‘God save the United States and this Honorable Court,’” . . . though “I might well adhere to the view . . . that such mottos are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance.”).

<sup>189</sup> Though dicta may be unbinding, it is undeniably an instance of teaching. The lower judiciary ascribes highly persuasive, nearly controlling value to such statements, especially when repeated. *See* *Lambeth v. Bd. of Cmm’rs*, 407 F.3d 266, 271 (4th Cir. 2005) (“Such observations by the Court, interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive value in the inferior courts.”).

Commandments monuments, crèches, crosses, carved inscriptions, religious license plates, and a Good Friday public school holiday. What now remains to be done is to assess, through an examination of those opinions, how reliable the Supreme Court's teaching work has proven to be.

#### IV. SYMBOL RULINGS FROM THE FEDERAL AND STATE COURTS OF THE FOURTH CIRCUIT

Whether it be ten different tests, or seventeen or nineteen,<sup>190</sup> the Supreme Court has certainly labored hard on test-building for analyzing comportment with the Establishment Clause. For anyone tasked with making applied sense of this constitutional provision, however, the sheer size of that testing variety is daunting. Perhaps to explain its interpretative fits and starts, the Court has reminded us that the term “establishment” is not self-defining: “No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, a state) church, but nothing in the text says just how much more it covers. There is no simple answer . . . .”<sup>191</sup>

But while that answer may not be simple, supplying answers remains the charge of the judiciary. And perched atop the judicial hierarchy is the one forum specially tasked to teach the path to those answers. How well has the Supreme Court met that responsibility?

The discussion now endeavors to make that assessment by examining the work of one particular lower judiciary—the state and federal courts within the U.S. Fourth Judicial Circuit. This body of law offers a valuable exemplar for this assessment because it has resolved a wide-ranging series of religious symbol controversies (including Ten Commandments monuments, crèche displays, cross displays, a themed license plate, the national motto, the Pledge of Allegiance, and an Easter holiday). Moreover, this body of law all looked to two common sources of controlling precedent: the case law of the Fourth Circuit Court of Appeals and the U.S. Supreme Court. How this region's courts understood the Supreme Court's teachings and how ably they applied that understanding to deciding this broad array of disputes offers a platform for insights into how well the Supreme Court is doing in building the tools for sound Establishment Clause adjudication.

The exploration of the case law from this region is divided topically (by religious symbol type), and then again into two parts: a summary of the relevant local opinions, followed by an assessment of the Supreme Court's pertinent case law as an able guide to this lower judiciary.

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<sup>190</sup> See *supra* notes 49–71 and accompanying text.

<sup>191</sup> *McCreary Cnty.*, 545 U.S. at 874–75 (citation omitted).

### A. *Ten Commandment Monuments*

Five times the state and federal courts within the Fourth Circuit have assessed Ten Commandments displays. This list begins in 1997, when the Fourth Circuit in *Suhre v. Haywood County*<sup>192</sup> examined whether Richard Suhre, a self-identified atheist, had standing to challenge a Ten Commandments display in the courthouse in Haywood County, North Carolina. The display at issue was installed in 1932, and appeared in the courthouse's main courtroom, behind the judge's bench, and included a marble and plaster bas-relief 6' 6" Lady Justice holding scales and a sword; flanking her on either side were marble tablets containing an abridged Ten Commandments and the United States and North Carolina flags.<sup>193</sup> The County had argued that Mr. Suhre lacked standing because, although a resident and taxpayer, he never altered his personal conduct as a consequence of the presence of the Ten Commandments tablets.<sup>194</sup> The Fourth Circuit rejected the argument, noting that Mr. Suhre came into unwelcome contact with the tablets as both a litigant appearing for court proceedings in the courtroom and as an active participant in local politics when meetings are scheduled for the courtroom.<sup>195</sup> The court's opinion, temporally, fell in the middle of the Supreme Court's Ten Commandments precedent: it was decided seventeen years after the Supreme Court's *Stone* opinion, but eight years before the *McCreary County* and *Van Orden* cases. Although the court resolved only a standing question, it previewed two broader understandings about the Establishment Clause boundary line. First, the court described "unwelcome direct contact with a religious display that appears to be endorsed by the state" as a type of injury that can confer Establishment Clause standing.<sup>196</sup> Second, the court surmised that the nature of this injury could be "compounded" if "the display that causes this distress is located within a public facility" because, in such a setting, it "may seem more in the nature of endorsements and may potentially impair the use of the affected facilities by individuals who harbor strong objections to a religious message."<sup>197</sup>

On remand back to the district court, a bench trial was convened in 1999 to resolve Mr. Suhre's dispute on its merits.<sup>198</sup> There, the trial judge found for the county and against Mr. Suhre. The court began by identifying the *Lem-*

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<sup>192</sup> *Suhre v. Haywood Cnty. (Suhre I)*, 131 F.3d 1083 (4th Cir. 1997).

<sup>193</sup> *Id.* at 1084; *Suhre v. Haywood Cnty. (Suhre II)*, 55 F. Supp. 2d 384, 385–87 (W.D.N.C. 1999).

<sup>194</sup> *Suhre I*, 131 F.3d at 1087.

<sup>195</sup> *Id.* at 1090.

<sup>196</sup> *Id.* at 1086.

<sup>197</sup> *Id.* at 1087.

<sup>198</sup> *Suhre II*, 55 F. Supp. 2d at 384.

on tripartite test as the proper judicial standard for its inquiry, modified (as Justice O'Connor had advocated) by the endorsement test.<sup>199</sup> The judge explained that he understood the Supreme Court as not requiring “that all government displays be sanitized to erase any reference or allusion to religion.”<sup>200</sup> Instead, he read the Supreme Court’s precedent as influenced importantly by not only the content of the challenged symbol, but by “the context or setting as well.”<sup>201</sup> Examining the historically recorded remarks from the display’s 1932 dedication ceremony, the court discerned a secular purpose in the county’s combined blind Goddess of Justice/Decalogue depiction, namely “to honor and respect the development of the judicial system.”<sup>202</sup> To assess the display’s effect, the judge turned to Justice Stevens’ concurrence/dissent in *County of Allegheny* for guidance, making special mention of Justice Stevens’ discussion of the contextualization of the Ten Commandments imagery in the U.S. Supreme Court building and how the Decalogue imagery’s placement there among great, secular lawgivers rendered the display non-endorsing.<sup>203</sup> The judge noted that had the Ten Commandments plaques appeared in Haywood County alone, “this would be equivocal at the least.”<sup>204</sup> But, like the relative size disparity between the taller (secular) Christmas tree and the smaller (religious) menorah in *County of Allegheny*, the plaques in Haywood County were “the smallest part of the display which is overwhelmingly dominated by Lady Justice and which contains other secular objects such as the sword of justice and the scales of justice flanked by the American and North Carolina flags.”<sup>205</sup> Informed by this context, and Justice Stevens’ *County of Allegheny* summaries, the judge concluded that the effect on the reasonable observer in Haywood County would be one that “‘signals respect’ not for religion but for the law”;<sup>206</sup> as such, “[i]t would be absurd to exclude such a fitting message from a courtroom.”<sup>207</sup> The judge determined that, viewed in its context, the display in Haywood County is “more secular in nature” than much of the challenged conduct that had appeared before the Supreme Court.<sup>208</sup> Finally, in finding no excessive entanglement, the judge wrote that the county’s display required “no expenditure of state or local

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<sup>199</sup> *Id.* at 393.

<sup>200</sup> *Id.* at 395.

<sup>201</sup> *Id.* at 393.

<sup>202</sup> *Id.* at 394.

<sup>203</sup> *Id.* at 395.

<sup>204</sup> *Id.* at 395.

<sup>205</sup> *Id.* at 395–96.

<sup>206</sup> *Id.* at 396 (quoting *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 652–53 (1989) (Stevens, J., concurring and dissenting)).

<sup>207</sup> *Id.* at 653.

<sup>208</sup> *Suhre II*, 55 F. Supp. 2d 384, 397.

funds to support” a religious activity, “no governmental involvement with a religious program,” and no “overt action by a governmental authority . . . to call attention to the presence of the plaques in the courtroom, much less to promote the Ten Commandments.”<sup>209</sup> There was no evidence, further explained the judge, of “a single act or effort by the County” during its 67 years on display to “coerce anyone” or “exhort ‘religiosity [which] amounts in fact to proselytizing.’”<sup>210</sup> Consequently, the court dismissed the Establishment Clause challenge.

Also in 1999, the Charleston County Court of Common Pleas in *Young v. County of Charleston*<sup>211</sup> enjoined the Charleston County Council from acquiring and displaying a Ten Commandments plaque in the council’s anteroom.<sup>212</sup> The court began by noting that it found the Establishment Clause precedent “somewhat muddled,” yet one principle to be clear: that government “may not affiliate itself with religious symbols or doctrines in a manner that suggests an endorsement of a particular religious faith,” and that the state may “acknowledge[]” and “accommodate[]” religion, but not “promote[]” it.<sup>213</sup> To vindicate this principle, the court, much like as in *Suhre*, applied the tripartite *Lemon* test, modified by the endorsement approach.<sup>214</sup> The court added that, in combination, the *Stone*, *Lynch*, and *County of Allegheny* decisions “provide guidance on when religious items can be included in government-sponsored displays.”<sup>215</sup> In surveying that precedent, the court noted how *Stone* had concluded that the Kentucky Ten Commandments posting involved an “undeniably sacred text” that “urge[s]” viewers “‘to read, meditate upon, perhaps to venerate and obey’” the Commandments’ prescriptions.<sup>216</sup> The court also highlighted how *County of Allegheny* had distinguished the ruling in *Lynch* since “nothing in the context of the [*County of Allegheny*] display detract[ed] from the crèche’s religious message.”<sup>217</sup> From this study, the court reasoned that it had “little choice” but to find the Charleston County plaque offensive to the Establishment Clause because, like in *Stone*, it contained “undeniably a sacred text in the Jewish and Christian faiths,” and because, like in *County of Allegheny*, it

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<sup>209</sup> *Id.* at 398.

<sup>210</sup> *Id.* (quoting *Cnty. of Allegheny*, 492 U.S. at 659–660).

<sup>211</sup> *Young v. Cnty. of Charleston*, No. 97-CP-3491, 1999 WL 33530383 (S.C. Com. Pl. Jan. 21, 1999).

<sup>212</sup> The court found the display violative not only of the Federal Establishment Clause, but the South Carolina clause as well, noting that the State guarantee looks to the federal provision for its substantive meaning. *Id.* at \*3 (construing S.C. CONST. art. 1, § 2 (“The General Assembly shall make no law respecting an establishment of religion . . . ”)).

<sup>213</sup> *Id.* at \*3.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*4.

<sup>216</sup> *Id.* (quoting *Stone v. Graham*, 449 U.S. 39, 42 (1980)).

<sup>217</sup> *Id.*

was to appear alone on the anteroom wall, without any additional, contextualizing materials.<sup>218</sup> The court added that, unlike in *County of Allegheny*, the plaque at issue in Charleston was not owned privately but by the government, was not displayed only seasonally but year-round, and was located in government buildings “that are closely associated with political and civil authority.”<sup>219</sup> Consequently, the court forbade the council’s installation, reasoning that “the display resembled the Ten Commandments in *Stone* and the crèche in *Allegheny*; and did not resemble the crèche in *Lynch* or the menorah in *Allegheny*.”<sup>220</sup>

In 2003, a federal trial court in *Chambers v. City of Frederick*<sup>221</sup> ruled that a local citizen had standing to challenge the display of a Ten Commandments monolith once owned by the City of Frederick, Maryland. The monument at issue had been donated to the city in 1955, was evidently uncontroversial until the ACLU sought its removal in 2002, and the city elected to avoid a litigated resolution by proposing to sell the monument and its adjoining land.<sup>222</sup> The city had the land appraised, accepted bids, considered each bidder’s ability to pay and willingness to abide by land covenants which required the parcel’s upkeep and maintenance, and ultimately awarded the title to the Fraternal Order of Eagles.<sup>223</sup> In his lawsuit, the citizen accused the city of a sham transfer, and alternatively, of an arrangement that would deceive reasonable observers into misunderstanding the parcel to be public.<sup>224</sup> The court issued two rulings, two years apart.

In its first ruling, the court held that the citizen’s allegations survived a motion to dismiss.<sup>225</sup> The court preliminarily acknowledged that the *Lemon* tripartite test, as modified by the endorsement approach, provided the controlling analysis.<sup>226</sup> Then, the court ruled that the citizen’s allegation of a sham governmental purpose was sufficient to avoid dismissal, and that the citizen should be permitted to show that a reasonable observer would believe the display to be endorsing.<sup>227</sup>

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<sup>218</sup> *Id.* at \*5 & n.2. Obviously, the trial judge in 1999 was unable to consider the reasoning offered by the Supreme Court’s 2005 opinions in *McCreary County* and *Van Orden*, as it would be six more years before those decisions were released.

<sup>219</sup> *Id.* at \*5.

<sup>220</sup> *Id.*

<sup>221</sup> (*Chambers I*), 292 F. Supp. 2d 766 (D. Md. 2003).

<sup>222</sup> *Id.* at 768–69; *see also* *Chambers v. City of Frederick (Chambers II)*, 373 F. Supp. 2d 567, 569–71 (D. Md. 2005).

<sup>223</sup> *Chambers II*, 373 F. Supp. 2d at 570–71.

<sup>224</sup> *Id.* at 571.

<sup>225</sup> *Chambers I*, 292 F. Supp. 2d at 770–73.

<sup>226</sup> *Id.* at 771.

<sup>227</sup> *Id.* The court did not reach the third *Lemon* criterion, excessive entanglement, noting that “none of the parties ha[d] addressed” it. *Id.*

Two years later, the citizen received his evidentiary opportunity; the court convened its bench trial, heard testimony, and then issued its findings and conclusions.<sup>228</sup> As it had earlier at the pleadings stage, the court relied on the *Lemon* tripartite test with the endorsement modification.<sup>229</sup> The court found that the city successfully asserted a secular purpose (namely, to not “bear false witness, to deal fairly and not to covet other’s property”), and that the plaintiff had offered no contrary religious purpose or any reason to find the stated purpose insincere or a sham.<sup>230</sup> The validity of the secular purpose was “bolstered,” ruled the court, by the city’s “decision to disassociate itself from the monument in response to accusations that it was endorsing a religious message.”<sup>231</sup> In addressing the question of endorsing effect, the court cited the Supreme Court’s *Capitol Square* decision for the notion that the “reasonable observer” lens used to test for such effect is one “deemed aware of the history and context of the community and forum in which the religious display appears.”<sup>232</sup> Such an observer, explained the court, would know that the city had transferred title to the land on which the monument appears so as “to disassociate itself from whatever message the monument conveys,” and therefore was not intending to “advance religion.”<sup>233</sup>

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Impressions. In several notable respects, these five Ten Commandments opinions fairly well reflect certain baseline principles that seem to emanate from the U.S. Supreme Court’s religious symbols precedents. Those opinions that discussed the question of analytical lens reasoned that the controlling constitutional symbols inquiry was the *Lemon* tripartite test, enhanced by the endorsement lens.<sup>234</sup> That aligns with the approach taken in the Supreme Court’s early symbol cases.<sup>235</sup> All five of these lower court Ten Commandments cases predated *McCreary County* and *Van Orden*, however. Consequent-

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<sup>228</sup> *Chambers II*, 373 F. Supp. 2d at 571.

<sup>229</sup> *Id.* at 571–72.

<sup>230</sup> *Id.* at 572–73.

<sup>231</sup> *Id.* at 573.

<sup>232</sup> *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995)).

<sup>233</sup> *Id.*

<sup>234</sup> *See id.* at 571–72; *Chambers I*, 292 F. Supp. 2d 766, 771 (D. Md. 2003); *Suhre II*, 55 F. Supp. 2d 384, 393 (W.D.N.C. 1999); *Young v. Cnty. of Charleston*, No. 97-CP-10-3491, 1999 WL 33530383, at \*1, \*3 (S.C. Com. Pl. Jan. 21, 1999); *see also Suhre I*, 131 F.3d 1083, 1086–87 (4th Cir. 1997) (holding that “unwelcome direct contact with a religious display that appears to be endorsed by the state” can confer Establishment Clause standing).

<sup>235</sup> *See Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592–94 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 680–85 (1984); *id.* at 687–94 (O’Connor, J., concurring); *Stone v. Graham*, 449 U.S. 39, 40–41 (1980).

ly, the lower court opinions neither considered nor could have been influenced by the *Van Orden* plurality's monument nature/history assessment,<sup>236</sup> Justice Breyer's concurring heavy reliance on the uncontroversial 40-year tenure of the *Van Orden* monument,<sup>237</sup> or the *McCreary County* majority's emphasis on the importance of a detailed contextual assessment.<sup>238</sup>

But the five opinions remain instructive, nonetheless. None of the five opinions embraced an absolutist, categorical application of the Establishment Clause (namely, public religious symbol displays are neither reflexively unconstitutional nor reflexively proper). Although some Justices might prefer a more strident approach to symbol constitutionality,<sup>239</sup> that view—from either pole—has not attracted a reliable majority of the Court. Instead, in both the Supreme Court majorities and the lower Fourth Judicial Circuit opinions, the decisions reflect the now-settled conclusion that context matters greatly in religious symbol dispositions.<sup>240</sup> Consequently, though every dispute is necessarily decided on its facts, the special contextualization focus in the religious symbols environment is understood to be a grant of a broad license for lower courts.<sup>241</sup>

This is not to suggest that the lower courts view their discretion in these case-by-case determinations to be unbridled. Their cases tend to accept the suggestion that symbol displays in a government building or facility will

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<sup>236</sup> See *supra* notes 96–99 and accompanying text.

<sup>237</sup> See *Van Orden v. Perry*, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring) (“[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to ‘engage in’ any ‘religious practic[e],’ to ‘compel’ any ‘religious practic[e],’ or to ‘work deterrence’ of any ‘religious belief.’ Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.” (citations omitted)).

<sup>238</sup> See *supra* notes 86–90 and accompanying text.

<sup>239</sup> Compare, e.g., *supra* note 9 and accompanying text (Chief Justice Burger’s sentiment that “[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed”), with *supra* note 10 and accompanying text (Justice Stevens’ view that the Clause “created a strong presumption against the displays of religious symbols on public property”).

<sup>240</sup> See, e.g., *Suhre II*, 55 F. Supp. 2d 384, 393 (W.D.N.C. 1999) (“Where the practice in question involves a display, the context or setting as well as the content is important.”) (citing *Cnty. of Allegheny*, 492 U.S. at 597); *Young v. Cnty. of Charleston*, No. 97-CP-3491, 1999 WL 33530383, at \*1, \*4–5 (S.C. Com. Pl. Jan. 21, 1999) (discussing context of prior precedent, and its guidance in current dispute).

<sup>241</sup> See *Young*, 1999 WL 33530383, at \*5 n.1 (“each display must be addressed on a case-by-case basis”).

ratchet up the constitutional inquiry.<sup>242</sup> But, true to the conclusion that context matters, this fact alone never blindly, reflexively drove the lower courts' respective outcomes.<sup>243</sup> Beyond that vague notion, though, the lower courts were largely unguided. The Supreme Court has never offered much by way of instruction on how a religious symbol's placement in a powerfully governmental space ought to be weighed. In *County of Allegheny*, for instance, the Court emphasized that placement in a courthouse was significant because "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government."<sup>244</sup> But just how useful is that observation as a guide for the lower judiciary? What analytical value does it add? Won't every official display on government-owned or government-controlled space impart that very same impression? After all, every display placed by the government (or by the government's leave) in government space will necessarily enjoy official assent,<sup>245</sup> while displays placed by others in government space will likely either be ascribed to the government (if officially tolerated)<sup>246</sup> or implicate no Establishment Clause concerns at all (if displayed in a government space set aside as a public forum).<sup>247</sup> It is difficult to see how the "no-viewer-could-reasonably-think" principle offers much analytical help to the lower judiciary.

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<sup>242</sup> See, e.g., *Suhre I*, 131 F.3d 1083, 1087 (1997) ("Religious displays in public buildings may seem more in the nature of endorsement and may potentially impair the use of the affect facilities by individuals who harbor strong objections to a religious message."); *Young*, 1999 WL 33530383, at \*3 (noting placement of "a quintessentially religious text in a space intimately associated with the State").

<sup>243</sup> Compare *Suhre II*, 55 F. Supp. 2d at 397–99 (Ten Commandments displayed prominently in courtroom not violative of Establishment Clause), with *Young*, 1999 WL 33530383, at \*5–6 (Ten Commandments displayed prominently on wall of local legislative body violative of Establishment Clause).

<sup>244</sup> See *Cnty. of Allegheny*, 492 U.S. at 599–600 ("[T]he crèche sits on the Grand Staircase [of the Allegheny County Courthouse], the 'main' and 'most beautiful part' of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the 'display of the crèche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." (citations omitted)).

<sup>245</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (analyzing constitutionality of government-owned and government-placed crèche within government-sponsored holiday display, though erected in a non-governmental park); see also *Cnty. of Allegheny*, 492 U.S. at 587 (analyzing constitutionality of privately-owned but governmental-displayed menorah on city-county building front).

<sup>246</sup> See *Cnty. of Allegheny*, 492 U.S. at 579 (analyzing constitutionality of government-tolerated display erected privately by Holy Name Society of a crèche in courthouse); see also *id.* at 601 (holding that government may not "lend[] its support to the communication of a religious organization's religious message").

<sup>247</sup> See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (plurality opinion) (rejecting Establishment Clause challenge to privately displayed cross in public forum area); *id.* at 772–83 (O'Connor, J., concurring) (same).

Uncertainty as to how to consider, or weigh, the government space criterion in religious symbol challenges is present in these lower court opinions. The court in *Haywood County*, for example, did not explain how the government courtroom presence there was weighed in finding the Ten Commandments constitutional, nor did the court in *County of Charleston* explain the weighing of the council chambers presence in finding the Ten Commandments unconstitutional there. The lower courts know this location criterion is meaningful to the Supreme Court, but how the criterion fits into the overall analysis is left largely unexplored.

Similarly unilluminating has been the Supreme Court's guidance in assessing when surrounding secular ornamentation mitigates a potentially religiously endorsing message into constitutional tolerance<sup>248</sup> and when it intensifies a potentially religiously endorsing message into unconstitutional prohibition.<sup>249</sup> More simply stated, when are contextualizing secular symbols more akin to candy canes, talking wishing wells, and Christmas trees that positively adjust the reasonable observer's gaze, and when are they more akin to poinsettia plants, evergreens, and tiny white fences that negatively frame the reasonable observer's gaze? The Supreme Court has offered scant guidance on how to make that assessment. Thus, and also unsurprisingly, the lower court decisions encompassed within the Fourth Judicial Circuit mirror this imprecision. For example, in *Haywood County*, why were the Goddess of Justice, her sword, her scales, and the American and North Carolina flags ruled to be non-endorsing elements rather than intensifiers? Couldn't the centrality and prominence of the Ten Commandments display, and its "framing" placement *between* the flags, just as easily support an invalidation? Wouldn't the far less prominent, far less imposing Ten Commandments display in the Charleston council chambers be thought to diffuse its message? The lower court opinions offer little insight on *how* they performed that mitigator/intensifier assessment, and the Supreme Court's own thin discussions are the likely culprit for explaining why. What makes surrounding secular context a mitigator or an intensifier has been left by the Court so sweepingly to the case-by-case legal judgment of the deciding court that the missing discussion and analysis from the Fourth Judicial Circuit courts is hard to indict. Interestingly, though, and true to the Supreme

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<sup>248</sup> See *Cnty. of Allegheny*, 492 U.S. at 617–18 ([T]he combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.”).

<sup>249</sup> See *id.* at 598–99 (“The floral decoration surrounding the crèche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. The floral frame, like all good frames, serves only to draw one’s attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche.”).

Court's own model, the lower court explanations, though conclusory and brief, are nonetheless certain.<sup>250</sup>

Although each of the five opinions is thoughtful and considered, each suffers from the lack of guidance from the Supreme Court on the nuances. The lower courts discern broad principles from the available Supreme Court precedent, which they dutifully recite. They agree on what they deem to be the appropriate testing tools, but their choice (*Lemon* plus endorsement) is justified only summarily. And they rely heavily on Supreme Court factual modeling for comparative analysis, which is, of course, an especially limiting analytical device in so fact-intensive an inquiry as this. What emerges from the lower courts of the Fourth Judicial Circuit are conclusions in Ten Commandments cases that are explained only cursorily, but never wholly defended. What is missing is depth and principled analysis, and it is missing, perhaps, because it was never fully delivered by the Supreme Court.<sup>251</sup>

### B. *The Crèche Displays*

Three times, the courts within the Fourth Judicial Circuit have encountered crèche display litigations. In the first, *Smith v. Lindstrom*,<sup>252</sup> a federal trial court in Virginia examined the County of Albemarle's decision to permit the local Jaycees to install a crèche on the lawn of the county office building, with large illuminated figures and an 18" by 6" sign identifying the Jaycees as spon-

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<sup>250</sup> See, e.g., *Suhre II*, 55 F. Supp. 2d 384, 399 (W.D.N.C. 1999) ("The display is clearly set in a historical, ethical and legal context . . . . When considered in the totality, only a narrow and shrewish interpretation of the display could lead one to conclude that it is an endorsement of Christian or Jewish faith."); *Young v. Cnty. of Charleston*, No. 97-CP-10-3491, 1999 WL 33530383, at \*1, \*5 (S.C. Com. Pl. Jan. 21, 1999) ("[T]his Court has little choice but to find that the resolution at issue, and the subsequent display of the Ten Commandments, were in violation of the Establishment Clause because they endorsed religion in general and Judeo-Christianity in particular."). This illusion of deliberative certainty has rich foundations. One might expect to find Justice Blackmun, the author of *County of Allegheny*'s lead opinion, smiling in admiration. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 60 (2005) (recounting how "[e]arly in Blackmun's tenure [on the Supreme Court.] [Justice Hugo] Black visited his chambers to offer some [opinion-writing] advice: 'Always go for the jugular. Never agonize in an opinion. Make it sound as though it's just as clear as crystal.'").

<sup>251</sup> To be fair, the Supreme Court's omission may be the unavoidable consequence of an analytical testing approach that hinges so critically on imagined impressions of a fictional "objective" and "reasonable" observer's make-believe encounter with a factually particular, unique symbols display. Under this testing paradigm, the *Lynch* outcome might well have been otherwise had the plastic reindeers been found to be looking (reverentially?) at the crèche display, just as the *Suhre* outcome could well have been otherwise had Lady Justice been perceived as bowing before the Ten Commandments. Such a testing approach may indeed make factual modeling from settled precedent a highly unreliable adventure.

<sup>252</sup> (*Smith I*), 699 F. Supp. 549 (W.D. Va. 1988).

sors.<sup>253</sup> The sight-lines across the lawn were such that the government building rose visually behind and above the crèche, with the official name of the government building clearly seen over the crèche.<sup>254</sup> Episodically, the county office building's lawn had been used for various other activities, including pageants, fundraising billboards, sunrise services on Easter, weddings, concerts, and a demonstration.<sup>255</sup> The district court ruled that *Lynch* was “the controlling law,” and that the *Lemon* tripartite test governed (as clarified by the endorsement test),<sup>256</sup> though acknowledging the Supreme Court's stated “unwillingness to be confined to any single test or criterion in this sensitive area.”<sup>257</sup> For this reason, the court assessed its pending dispute largely with a modeling analysis. “[O]f crucial importance,” wrote the court, would be “the extent to which the nativity display in this action differs from or is similar to the display in *Lynch*.”<sup>258</sup>

In that regard, the court concluded, the Albemarle display differed markedly from the Pawtucket crèche in *Lynch*: “In the instant case, the display consists only of the religious nativity scene and it was located on public land at the very front of the County Office Building with the trappings of government providing the unavoidable and obvious backdrop to the display.”<sup>259</sup> So viewed, the district court found the display readily passed the first (purpose)<sup>260</sup> and third (entanglement)<sup>261</sup> inquiries under *Lemon*, but failed the second (effect) inquiry. In reaching this latter conclusion, the court described Justice O'Connor's endorsement test as “an extraordinarily useful, adaptable, and even illuminating analytical device” because “endorsement provides a very real threat of the

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<sup>253</sup> *Id.* at 550.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 551–52, 554–55, 559–61.

<sup>257</sup> *Id.* at 552 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)).

<sup>258</sup> *Id.* at 554.

<sup>259</sup> *Id.* at 555.

<sup>260</sup> The court found no violation of *Lemon*'s purpose prong for two reasons: first, the standard it understood to be applicable was a very forgiving one—“that no secular purpose at all could be advanced for the display,” and, second, that the record confirmed the presence of qualifying secular purposes in the Jaycees' location request (namely, engendering “more Christmas spirit,” “raising the hopes” of the community, and practical considerations such as display visibility, prominence, and electrical outlet availability). *Id.* at 558–59.

<sup>261</sup> Entanglement was treated in an exceptionally cursory manner. The court pronounced that the entanglement risk before it was “even less of a danger” than that presented in *Lynch*: “Whatever possible threat of entanglement might exist in this case, it surely falls far short of the ‘comprehensive, discriminating, and continuing state surveillance’ or ‘enduring entanglement’ described in *Lemon*.” *Id.* at 558 (citation omitted). But why that was so, or how the court reasoned to that conclusion, the opinion did not explain.

symbolic disenfranchisement of a portion of the community.”<sup>262</sup> The court determined that the effect of the crèche’s positioning on the public lawn, visibly beneath the government’s office building, and unaccompanied by contextualizing secular holiday symbols, communicated “a message of government endorsement.”<sup>263</sup> The presence of the display’s written disclaimer (namely, that the local Jaycees, and not the County of Albemarle, was the source of the crèche display) could not provide a rescue: “Drivers cannot easily read the disclaimer while passing the scene, the intersection is busy, and it is hardly possible to park or to stop and read the disclaimer with the care that would be necessary.”<sup>264</sup> Nor was the crèche rescued by the fact of its private ownership and maintenance by the Jaycees, reasoned the court, because “the ‘aura’ of endorsement is permeating.”<sup>265</sup>

The court closed its opinion with a seven-page anticipatory reassurance and rejoinder to those who would disagree.<sup>266</sup> “The sky will indeed not fall,” promised the court, and “the effects of the decision” are “circumscribed” and “do not bar religion from the public square.”<sup>267</sup> Sometimes, displaying religious symbols may result only in “truly *de minimis*” entanglements, or the symbols may have become “less potent” or “declawed.”<sup>268</sup> Some constitutional symbol challenges will be just “silly suits,” and, in any event, litigants should always be on the lookout for “compromise” rather than “confrontation or adjudication” on Establishment Clause issues.<sup>269</sup> It is only lawsuits of “import” that merit resolution under the Clause, announced the court.<sup>270</sup> But in those cases, notwithstanding the “benign or even . . . beneficent” motives of the actors, justice must

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<sup>262</sup> *Id.* at 560; *see also id.* at 560–61 (“The upshot of endorsement is that those citizens whose preferences are not endorsed may perceive themselves to be recipients of something akin to a ‘badge of inferiority.’”) (analogizing endorsement to racial discrimination).

<sup>263</sup> *Id.* at 561–62 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984)).

<sup>264</sup> *Id.* at 562. Even a more prominent disclaimer would have prompted the same invalidation, predicted the court. *See id.* (“[E]ven a readily discernible disclaimer would hardly have been sufficient alone. A larger sign, by itself, would not necessarily begin to undercut the strong aura of government endorsement.”). After completing its Establishment Clause analysis, the court also considered, and rejected, the alternative contention that the crèche’s placement could be defended under the Speech Clause because the government lawn had become something of a public forum. *See id.* at 565 (“This court finds that, given the message of endorsement which is communicated by the relationship between the trappings of government and the crèche with its religious connotations, no less restrictive alternative than removal of the crèche would curtail the impermissible message of government endorsement.”).

<sup>265</sup> *Id.* at 562.

<sup>266</sup> *Id.* at 565–72.

<sup>267</sup> *Id.* at 568.

<sup>268</sup> *Id.* at 571.

<sup>269</sup> *Id.* at 572.

<sup>270</sup> *Id.*

be done, since “our interests protected by the Establishment Clause are appreciably damaged by the investiture of a potent religious symbol with the secular, civic sanctification of government trappings.”<sup>271</sup>

On appeal from this ruling, a divided panel of the Fourth Circuit in *Smith v. County of Albemarle*<sup>272</sup> affirmed, also relying on the *Lemon* tripartite test, modified by the endorsement analysis.<sup>273</sup> Notably, in the period between the trial judge’s decision and the Fourth Circuit’s panel opinion, the Supreme Court had handed down its ruling in *County of Allegheny*. The appeals court lauded the trial judge’s prescience for very nearly anticipating that opinion: “Judge Michael employed the same analysis and evaluated the same factors endorsed by the Supreme Court in *Allegheny County* to reach a result fully comports with the Supreme Court’s recent pronouncement.”<sup>274</sup> As had the trial judge, the Fourth Circuit emphasized that “‘a particular physical setting’ is critical — [e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion.”<sup>275</sup> When the opinion completed its recounting of the Supreme Court’s *County of Allegheny* decision and turned to application of that precedent to the Albemarle County circumstances, the Fourth Circuit devoted a Spartan eleven sentences to its analysis. The Albemarle physical setting, determined the court, compelled an affirmance:

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<sup>271</sup> *Id.* at 566.

<sup>272</sup> (*Smith II*), 895 F.2d 953 (4th Cir. 1990).

<sup>273</sup> *Id.* at 956.

<sup>274</sup> *Id.* While Judge Michael might well be praised for a thoughtful, scholarly opinion, the Fourth Circuit’s commendation of *County of Allegheny*’s clarity hints at their steeply falling expectations of the Supreme Court. *See id.* at 956 (“From the collection of opinions in *Allegheny County*, central adjudicative principles must be distilled.”). *See generally supra* notes 127–145 and accompanying text (noting *County of Allegheny*’s five separate opinions spanning 106 pages, and the case’s roll-call in its Syllabus which belies any credible claim to clarity):

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III–A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O’CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O’CONNOR, JJ., joined, an opinion with respect to Part III–B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O’CONNOR, J., joined, and an opinion with respect to Part VI. O’CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C.J., and WHITE and SCALIA, JJ., joined . . . .

*Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 577 (1989) (internal pagination references omitted).

<sup>275</sup> *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)).

Here, too, the crèche was not associated with any secular symbols or artifacts. The crèche was situated on the front lawn of the County Office Building — a prominent part, not only of the town, but of the county office structure itself. Prominent in the background is the sign identifying the building as a government office structure. As in *Allegheny County*, “[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.”<sup>276</sup>

The Fourth Circuit agreed that the disclaimer failed to diminish the “aura of government endorsement of religion.”<sup>277</sup>

Nine years later, the Fourth Circuit revisited the Establishment Clause/Speech Clause intersection in *Warren v. Fairfax County*,<sup>278</sup> where a non-resident proposed during the holiday season to display a crèche and other objects of “love, hope, and peace” in a large, grassy mall located in front of the Fairfax County, Virginia government center complex.<sup>279</sup> The county had administratively denied her request, noting that only county residents or employees were eligible to use this public forum.<sup>280</sup> The Establishment Clause consequences of such a display were never directly reached by the divided, en banc court, which reversed the county’s denial of public forum access in the absence of a compelling interest narrowly achieved.<sup>281</sup>

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Impressions. These Fourth Judicial Circuit region crèche decisions align in several important respects with the Ten Commandments precedent. First, the courts again seem to accept the *Lemon* tripartite test, as modified by the endorsement test, as the appropriate analytical tool for conducting Establishment Clause evaluations of symbol displays (and, like the Ten Command-

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<sup>276</sup> *Id.* at 958. The “unmistakable message” of religious endorsement, the court concluded, “proceeds as much from the religious display itself as from the identification of a religious sponsor.” *Id.*

<sup>277</sup> *Id.* As had the trial court, the Fourth Circuit also ruled that the Speech Clause had not become decisively implicated by the lawn’s status as a public forum, since the “associational” Establishment Clause risk of state with religion was sufficiently great to warrant a constraint on free speech to avoid it. *Id.* at 958–60. In dissent, Judge Blatt would have given much greater consideration of the Free Speech implications of the majority’s decision. *Id.* at 961 (noting “the absence of a mandate from the Supreme Court on the ‘head-to-head’ clash of these two competing First Amendment rights”).

<sup>278</sup> 196 F.3d 186 (4th Cir. 1999).

<sup>279</sup> *Id.* at 188–89; *id.* at 199 (Niemeyer, J., dissenting).

<sup>280</sup> *Id.* at 189.

<sup>281</sup> *Id.* at 190.

ments opinions, do so reflexively and without much substantive explanation).<sup>282</sup> Second, they also declare their rejection of an absolutist approach to resolving Clause disputes.<sup>283</sup> Third, they acknowledge that religious symbol adjudications will hinge on peculiarly fact-dependent assessments driven largely by unique, contextualizing details.<sup>284</sup> Fourth, they confirm that a symbol's placement in a governmentally prominent location will influence (and, as here, sometimes decisively so) the constitutional assessment.<sup>285</sup> But the crèche opinions, much like the Ten Commandments cases, merely verify that placement can prove constitutionally meaningful without teasing out what features or circumstances will render a governmentally significant placement constitutional and what will not.<sup>286</sup>

Some attributes of the crèche cases are unique contributions to this body of Fourth Judicial Circuit regional precedent. The trial court in the Albemarle County crèche case explored how the notion of “nonpreferentialism” (one of the various Establishment Clause tests championed by some Justices)<sup>287</sup> is ill-suited for religious symbol adjudications. The court noted that such a goal, nonpreferentialism, would be “difficult, if not impossible” to achieve in the context of governmentally displayed religious symbols:

Government assistance to religion which would involve the erection of displays celebrating a specific sect or group of sects may be nonpreferential in that any sect could make use of this platform, but it is surely not nonpreferential in that it celebrates, or assists in the celebration of, a particular sect rather

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<sup>282</sup> See *Smith II*, 895 F.2d at 956; *Smith I*, 699 F. Supp. 549, 552, 554–55, 559–61 (W.D. Va. 1988).

<sup>283</sup> See *Smith I*, 699 F. Supp. at 551 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (“[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.”)); see also *Smith II*, 895 F.2d at 956 (noting analysis where some religious symbol displays are upheld and others are not).

<sup>284</sup> See *Smith II*, 895 F.2d at 956 (noting “fact specific analysis” where the “‘particular physical setting’ is critical”); *Smith I*, 699 F. Supp. at 554 (advising that “*Lynch* commands us to examine, in a particularistic manner, the effect of this crèche in the context before us”).

<sup>285</sup> See *Smith II*, 895 F.2d at 958; *Smith I*, 699 F. Supp. at 561–62.

<sup>286</sup> Compare *Smith II*, 895 F.3d at 958 (crèche display on front lawn of county office building unconstitutionally conveys “unmistakable message” of government endorsement), and *Smith I*, 699 F. Supp. at 561–62 (crèche display on front lawn of county office building unconstitutionally conveys “symbolic embrace” of religion), and *Young v. Cnty. of Charleston*, No. 97-CP-10-3491, 1999 WL 33530383, at \*4–5 (S.C. Com. Pl. Jan. 21, 1999) (Ten Commandments display in county council chambers unconstitutionally conveyed a religious message), with *Suhre II*, 55 F. Supp. 2d 384, 395–96 (W.D.N.C. 1999) (Ten Commandments display in county courtroom constitutionally “‘signal[ed] respect’ not for religion but for the law”).

<sup>287</sup> See *supra* note 61 and accompanying text.

than in the celebration of some generic concept of “religion” without its particular sectarian manifestations.<sup>288</sup>

The trial court did not dwell further on these musings, but their logical ramifications continue to highlight how lower courts struggle to make applied sense of the Supreme Court’s Establishment Clause principles. Perhaps the trial court’s nonpreferentialism thinking would lead it to conclude categorically that the government should never be in the business of displaying, or tolerating, the display of religious symbolism. But that conclusion would contradict the very non-absolutist interpretation of the Establishment Clause the trial court declares to be the controlling, threshold constitutional canon in the opinion’s opening pages.<sup>289</sup> Alternatively, perhaps the trial court’s nonpreferentialism thinking would lead it to decide that the concept of nonpreferentialism is simply an unfit test to use in religious symbol cases. But, broadly considered, nonpreferentialism is a core ingredient in Justice O’Connor’s endorsement test (an analytical tool the trial court finds praiseworthy), as both tests condemn the governmental elevation of religion to the degree that it creates “insiders” and “outsiders” on religious grounds by preferring some over others.<sup>290</sup> Significantly, Justice O’Connor applied her endorsement test (with its “insiders”/“outsiders” analysis) to the Pawtucket crèche in *Lynch* to find that the governmentally-displayed religious symbol there was constitutionally sound.<sup>291</sup> The trial court’s struggle to understand how these vague concepts of “effect,” “endorsement,” “nonpreferential,” and “non-absolute” all thread together into the fabric of the Establishment Clause is a consequence of the Supreme Court’s lack of instructional clarity.

Also largely under-developed by the Supreme Court is the correct constitutional evaluation of disclaimers, and the two County of Albemarle cases suffer from that lack of effective instruction. The Supreme Court in *Stone* quite summarily dismissed the Kentucky public school disclaimer posted under its Ten Commandments displays as “not sufficient to avoid conflict with the First Amendment,” because 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.”<sup>292</sup> That being so, a constitutionally relevant role for disclaimers would seem difficult to conjure. Oddly, though not

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<sup>288</sup> *Smith I*, 699 F. Supp. at 552 n.1.

<sup>289</sup> *See id.* at 551 (“[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.”). It would also contradict the intimation in the trial court’s seven-page post-script that the Constitution does not proscribe all governmentally-displayed religious symbols. *See supra* notes 267–269 and accompanying text.

<sup>290</sup> *See Smith I*, 699 F. Supp. at 554.

<sup>291</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 690–93 (1984) (O’Connor, J., concurring).

<sup>292</sup> *Stone v. Graham*, 449 U.S. 39, 41 (1980).

entirely inconsistently, the Supreme Court in *McCreary County* wrote that the first version of the challenged display there “lacked even the *Stone* display’s implausible disclaimer that the Commandments were set out to show their effect on the civil law.”<sup>293</sup> Odd, because why note the absence of “even the *Stone* display’s implausible disclaimer” if disclaimers, categorically, cannot save a constitutionally infirm religious symbol display? Later, the Court in *McCreary County* brushed aside the explanatory disclaimer accompanying the third version of the challenged display as simply “a litigating position” and, in any event, “[n]o reasonable observer could swallow the claim that the Counties had cast off the [impermissible] objective so unmistakable in the earlier displays.”<sup>294</sup> Here again, why take the time to explain the ineffectiveness of this third disclaimer if no disclaimer could ever be effective? Then, in *County of Allegheny*, the situation becomes murkier still. The disclaimer accompanying the Pittsburgh courthouse’s crèche is rejected as compounding the unconstitutionally endorsing effect, not curing it,<sup>295</sup> but the disclaimer seated below the Christmas tree and menorah is credited with “confirm[ing]” the lack of unconstitutional endorsement.<sup>296</sup>

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<sup>293</sup> *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 869 (2005). The Court reasoned, as in *Stone*, that such a declaration would be of no consequence because “the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.” *Id.*

<sup>294</sup> *Id.* at 870–72; *see also id.* at 873 (“If the [reasonable] observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.”).

<sup>295</sup> *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 600 (1989) (“The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government’s own communications. It also prohibits the government’s support and promotion of religious communications by religious organizations.”).

<sup>296</sup> *Id.* at 619 (“The mayor’s sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation’s legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, an ‘explanatory plaque’ may confirm that in particular contexts the government’s association with a religious symbol does not represent the government’s sponsorship of religious beliefs. Here, the mayor’s sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.” (citations omitted)).

The County of Albemarle courts rejected the Jaycee disclaimer because it was too small, or too improperly placed, or too inconspicuous.<sup>297</sup> Both courts expressly doubted whether disclaimers of any variety could have validated the Albemarle display, and though both courts come to the precipice, they still both avoid pronouncing disclaimers to be a constitutional dead-letter for Establishment Clause purposes.<sup>298</sup> How, then, do disclaimers fit within the Supreme Court's Establishment Clause analysis? Can they, either alone or in tandem with other contextual attributes, ever transform the constitutional assessment of symbol displays? This, indeed, is what the dissenting judge in the Fourth Circuit opinion—equally unguided by Supreme Court direction—would have embraced in place of the majority's invalidation:

I feel that a remand to the district court to direct the county to erect a sign of sufficient size to make it clearly apparent to every viewer that the crèche was not endorsed by the county would be one method that would legally meet the “least restrictive means” test [under Speech Clause principles], and thus avoid allowing Establishment Clause rights to unnecessarily trammel the right of free speech.<sup>299</sup>

At least in principle, doesn't this logic square with the analytical testing tool the Supreme Court is understood as having chosen? If, in fact, the correct legal test is *Lemon* and endorsement, and the proper inquiry under that approach's effect analysis asks “whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval,”<sup>300</sup> someone who actually encounters and is able to read an effective disclaimer would seem to be disabused instantly of the conclusion that the government was endorsing.<sup>301</sup> Whether the dissenting judge accurately understands the proper constitutional function of disclaimers or not remains unresolved. It is another nuance in need of Supreme Court direction.

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<sup>297</sup> *Smith II*, 895 F.2d 953, 958 (4th Cir. 1990); *Smith I*, 699 F. Supp. 549, 562 (W.D. Va. 1988).

<sup>298</sup> *Smith II*, 895 F.2d at 958 (“It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion.”); *Smith I*, 699 F. Supp. at 562 (“[E]ven a readily discernible disclaimer would hardly have been sufficient alone.”).

<sup>299</sup> *Smith II*, 895 F.2d at 962 (Blatt, J., dissenting).

<sup>300</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

<sup>301</sup> *Smith II*, 895 F.2d at 962 (Blatt, J., dissenting) (“Anyone who read the Albemarle sign knew that the county did not ‘endorse’ the crèche scene.”).

### C. *The Cross Display*

Only once has a court within the Fourth Judicial Circuit tested the constitutionality of a governmental display of a Latin cross. In *Demmon v. Loudoun County Public Schools*,<sup>302</sup> a district court considered the propriety of a public school's directive that personalized engraved paving bricks be removed from the school's "walkway of fame" because they contained images of a Latin cross. This "walkway of fame" had been created by the school's parents association as a fundraiser, with students and their families eligible to purchase personalized engraved paving bricks commemorating the student's name, date of graduation, and a personalized phrase (such as "David Guinter: 2001 State Champs," "Cory Everett: Most Artistically Talented," and "Scott Dowdle: Keeping It Real").<sup>303</sup> For an additional fee, the brick could be inscribed with one of a finite number of available symbols depicting such extracurricular activities as soccer, volleyball, music, or drama.<sup>304</sup> The only religious symbol offered for selection was a Latin cross, which several donors ordered, and which then appeared on those students' bricks as installed in the "walkway of fame" near the front entrance to the school.<sup>305</sup> In response to a letter complaining of such imagery, the high school's principal ordered the bricks removed and the donors' money refunded.<sup>306</sup> In the resulting litigation, the affected donors challenged the constitutionality of the principal's decision. The high school defended the lawsuit, by insisting, among other things, that the brick removals were necessary to remedy what would otherwise have been an Establishment Clause violation.<sup>307</sup>

The district court began by noting that, although it had been criticized, the *Lemon* tripartite test remained the governing Establishment Clause inquiry, as modified by endorsement approach.<sup>308</sup> The result of that analysis, concluded the court, showed that the public school had mistakenly over-reacted, as there was no imminent constitutional violation from the inclusion of the Latin cross bricks. The court determined that the placement of Latin cross bricks in the "walkway of fame" had a secular purpose (namely, as a fundraiser for the school).<sup>309</sup> The court also found the bricks to have a permissible, non-endorsing effect, reasoning that "[t]he bricks must be considered in the context of the

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<sup>302</sup> 342 F. Supp. 2d 474 (E.D. Va. 2004).

<sup>303</sup> *Id.* at 483.

<sup>304</sup> *Id.* at 477.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 490.

<sup>308</sup> *Id.* at 490–91.

<sup>309</sup> *Id.* at 491.

walkway as a whole,” and since all the bricks bore the names of the donor student or faculty member, “[a]n observer would first connect the symbol with the name on the brick.”<sup>310</sup> Thus, just as no reasonable observer would discern a discriminatory preference for or endorsement of swimming from a swimmer symbol on a certain student’s brick, “[t]he Latin cross would be connected to the student and not to the school”;<sup>311</sup> The prominent public placement of the bricks did not alter this message, the court held, because, first, “the Latin cross bricks were part of a much larger secular display,” namely the entire walkway; second, that walkway “communicates a message of the diverse achievements of the graduates and faculty of the school,” and, third, the placement, though prominent, was “not the ‘main’ to ‘most beautiful’ part of the school like the grand staircase in the county seat in *Allegheny County*.”<sup>312</sup> Lastly, the court found no excessive government entanglement with religion because the school had not designed the Latin cross symbol (but only chose it from stock clip-art) and because the Latin cross symbol, though the only religious imagery offered for inclusion on the bricks, was not discriminatorily selected (since no one requested an additional religious symbol be made available).<sup>313</sup>

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Impressions. Many aspects of this Virginia decision, like the earlier Ten Commandments and crèche opinions, partake of standard, routinely recited Establishment Clause fare: *Lemon* is the controlling inquiry,<sup>314</sup> that test is to be adjusted with the endorsement approach,<sup>315</sup> and physical context is an important focus for examination.<sup>316</sup> The opinion also reaffirms that the Establishment Clause may be invoked not only to remedy government actions that unconstitutionally prefer or endorse religion, but also those that unconstitutionally inhibit or disapprove religion.<sup>317</sup> But this opinion also highlights two persisting

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<sup>310</sup> *Id.* at 493.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (quoting *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 599 (1989)).

<sup>313</sup> *Id.* at 494 (“The fact that the school originally only offered the Latin cross does not, by itself, constitute excessive entanglement. Had the school only permitted the Latin cross and refused requests for other symbols, the Court would have found a violation of the Establishment Clause. The remedy, however, would have been to offer additional symbols and not to remove those in place.”).

<sup>314</sup> *Id.* at 490.

<sup>315</sup> *Id.* at 491.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 490 (“While the Establishment Clause is often invoked to protect against the state’s endorsement of religion over non-religion, it is equally applicable to claims that the state action is ‘hostile’ to religion. . . . ([noting that] ‘the State may not establish a “religion of secularism” in

uncertainties in the Supreme Court's precedent, and how those two uncertainties are leaving the lower judiciary analytically adrift in this area.

First, as discussed earlier in the Ten Commandments and crèche impressions, the analytical role to be played by a symbol's placement on government property remains incompletely explained, and that imprecision continues to produce seemingly inconsistent outcomes. Recall how centrally (nearly dispositively) some of the Ten Commandments and crèche opinions treated a symbol's placement in a prominent governmental location.<sup>318</sup> In this Virginia brick case, not only was the display placed prominently in the front of an unquestionably governmental facility, but the case implicated what the Supreme Court has often highlighted as the special concerns of the young, vulnerable population of elementary and secondary school students.<sup>319</sup> Yet none of those factors proved dispositive for the Virginia court. In testing the Latin cross bricks, the district court acknowledged the relevance of their placement on official government property, noted also that the bricks' placement was "prominent," and then dismissed the analytical relevance of this characteristic because the brick "walkway of fame" was not the "main" or "most beautiful" portion of the school grounds.<sup>320</sup> It would seem unlikely that the district court understood from those descriptions of the *County of Allegheny* crèche that government property placement is only analytically important under the Establishment Clause when it occurs at the "main" or "most beautiful" part of a particular government site. Far more likely, these comparative references to a facility's "main" or "most beautiful" part reflects an abiding uncertainty of what precisely to do with that component of the Establishment Clause inquiry, and how to weigh or treat it. Again, that uncertainty is not at all surprising; although the Supreme Court waxed on for 106 pages in *County of Allegheny*, the Justices remained deeply divided and, in any event, neglected to ever really agree on how to teach on this issue. All that the lower judiciary can safely draw from the *County of Allegheny*'s "main" and "most beautiful" descriptions of the crèche placement in Pittsburgh is what the Court wrote in two sentences:

No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the crèche in this particular physical setting," the county sends an unmistakable message that it sup-

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the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe")" (citations omitted)).

<sup>318</sup> See *supra* note 286 and accompanying text.

<sup>319</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987).

<sup>320</sup> *Demmon*, 342 F. Supp. 2d at 493.

ports and promotes the Christian praise to God that is the crèche's religious message.<sup>321</sup>

As noted earlier, this is not especially valuable for guiding lower courts; absent the unusual circumstance of a religious symbol being installed by strangers or by stealth, every symbol display on government property should reasonably cause viewers to assume that it is there with the government's assent.<sup>322</sup> Nor is this to say that the Virginia court's cogently explained and well-defended result is unsound. But ultimate results aside, aligning the Fourth Judicial Circuit region's physical placement analysis into some semblance of parade-ground-like order is no easy chore.

Second, the Virginia court confronted in the bricks case the question of the constitutional significance, if any, of a government's use of a religious symbol of one faith that is not displayed alongside religious symbols of other faiths. The court found no excessive entanglement caused by the school's inclusion of only Latin crosses (and no other religion's symbols), because the school evidently had never been asked by a prospective donor to include another religion's symbols among the brick engraving options.<sup>323</sup> Although a majority of the Supreme Court has never directly spoken to this issue in a religious symbol decision,<sup>324</sup> the Virginia court's reasoning is not belied by the controlling precedent. Neither the *Lynch* nor the *County of Allegheny* holding, for example, seemed to hinge on the fact that symbols of other religions were not displayed alongside those of the Christian and Jewish faiths. Indeed, the Court in *Lynch* emphasized that the Establishment Clause is not presumed offended merely because the symbols displayed are powerfully sectarian ones, representative of central beliefs of one faith.<sup>325</sup> But otherwise, the lower courts have

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<sup>321</sup> *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 599–600 (1989).

<sup>322</sup> *See supra* notes 245–247 and accompanying text.

<sup>323</sup> *Demmon*, 342 F. Supp. 2d at 494. The court noted, however, that “[h]ad the school only permitted the Latin cross and refused requests for other symbols, the Court would have found a violation of the Establishment Clause.” *Id.* Interestingly, the court added that, even in that situation, the remedy “would have been to offer additional symbols and not to remove those in place.” *Id.*

<sup>324</sup> In *County of Allegheny*, Justice Blackmun had expressed some of his views on the point. *Cnty. of Allegheny*, 492 U.S. at 614–15 (Blackmun, J.) (“The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.”). No other Justice joined in this portion of Justice Blackmun's opinion, however.

<sup>325</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”); *id.* at 692 (O'Connor, J., concurring) (“Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday set-

been left unguided on the issue. And inconsistency has followed. The fact that a government was offering only a single-sect religious symbol option, entirely not worrisome to the district court in Virginia, would powerfully influence the analysis of the district court in South Carolina just a few years later.

*D. The “I BELIEVE” License Plates*

In 2008, the South Carolina state legislature enacted the “I Believe” law, passed unanimously by both the state House and Senate.<sup>326</sup> The act authorized the issuance of a certain specialty license plate for private motorists which “must contain the words ‘I Believe’ and a cross superimposed on a stained glass window.”<sup>327</sup> Unlike normal specialty plate procedures which originate by application from private groups, the legislatively-authorized “I Believe” plate was developed and designed by the state itself.<sup>328</sup> Four religious leaders and two religious-cultural organizations sued to permanently enjoin the issuance of these license plates as violating the Establishment Clause.<sup>329</sup> The federal district court in South Carolina issued two written opinions assessing the merits of the Establishment Clause challenge, one granting a preliminary injunction<sup>330</sup> and the second entering summary judgment.<sup>331</sup>

The court held that the *Lemon* tripartite test applies in Establishment Clause challenges,<sup>332</sup> and that the second *Lemon* prong “is often referred to as the endorsement test.”<sup>333</sup> The Court then found that, in expressly authorizing a faith-specific religious license plate which required the inclusion of only Chris-

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ting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.”).

<sup>326</sup> *Summers v. Adams (Summers II)*, 669 F. Supp. 2d 637, 645 (D.S.C. 2009).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 644.

<sup>329</sup> *Id.* at 640–41.

<sup>330</sup> *Summers v. Adams (Summers I)*, No. 3:08-22C5-CMC, 2008 WL 5401537 (D.S.C. Dec. 23, 2008).

<sup>331</sup> *Summers II*, 669 F. Supp. 2d at 637.

<sup>332</sup> *Id.* at 657.

<sup>333</sup> *Id.* at 663. The denseness of the Supreme Court’s broader Establishment Clause jurisprudence likely explains this repeated misstatement. See *Lambeth v. Bd. of Cmm’rs*, 407 F.3d 266, 269 (4th Cir. 2005) (“[W]e have treated . . . [the] ‘endorsement’ test as an ‘enhancement of *Lemon*’s second prong.”). From the very outset, Justice O’Connor had made plain that the endorsement inquiry refines both the first (purpose) and the second (effect) prongs of *Lemon*. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (“The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”).

tian imagery, “the Act demonstrates an obvious and singular purpose of legislative endorsement and promotion not only of religion in general, but of Christianity in particular.”<sup>334</sup> The court credited neither of the State’s two asserted secular goals (expanding motorists’ choices of possible plates and accommodating Christian plate wishes in a manner akin to how the specialty plate program accommodated fraternities, sororities, and other groups). The court explained that those claimed objectives could have been obtained by allowing a private specialty-plate application to be considered and evaluated by the Department of Motor Vehicles (just like any other specialty-plate request would be), but that South Carolina had instead acted legislatively to embrace singularly this Christian plate.<sup>335</sup> Any secular purpose was further belied, reasoned the court, by the text of the legislation, “which says nothing of making a choice available to all religious groups,”<sup>336</sup> and by the powerfully religious remarks of one of the legislation’s sponsors, South Carolina Lieutenant Governor Andre Bauer.<sup>337</sup>

The court next ruled that the act’s primary effect was to promote and endorse Christianity, finding that the license plates would have “the effect of any other form of ‘advertising’” and because governmental “authorization of this plate (and no other religious plate) signals that the referenced religion is uniquely worthy of legislative endorsement and promotion.”<sup>338</sup> Turning to the endorsement test’s “reasonable observer” lens, the court ruled that, even without knowing of the legislatively-mandated nature of the creation of the “I Believe” plate, “a reasonable, objective observer would likely consider that a state-issued license plate bearing Christian images carries the endorsement of the state.”<sup>339</sup> In taking sides in the Christian debate over which symbols to display and how, and having to confront the spectre of later deciding which other

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<sup>334</sup> *Summers II*, 669 F. Supp. 2d at 658. Expansively, the court added, “This intended purpose is so clear that the court would find it controlling *even if* there were evidence of some other stated legislative purpose.” *Id.*

<sup>335</sup> *Id.* at 658–59.

<sup>336</sup> *Id.* at 659.

<sup>337</sup> *See id.* at 660–63; *see also id.* at 650–51 (quoting from an email sent under the name of Lt. Governor Bauer, which read: “As you probably know by now, I am a strong advocate for the ‘I Believe’ license plate, and presented the idea to the Legislature after seeing a similar fight in Florida fail . . . . *It is time that we as Christians let society know that we are tired of backing down in fear of ridicule for exercising our beliefs simply because others say that they are offended.* Just because I hold public office, I do not stop being a Christian . . . . If . . . you agree . . . that all South Carolina citizens should have the ‘choice’ to display a license plate on their vehicle that reflects their beliefs at their own cost, then I urge you to join me by signing this online petition . . . .”).

<sup>338</sup> *Id.* at 663.

<sup>339</sup> *Id.* at 664.

religions to favor with license plates, the court ruled that the state had also excessively entangled itself in religious matters.<sup>340</sup>

In an interesting closing matter, the court considered whether South Carolina's director of the department of motor vehicles was entitled to qualified immunity from liability in damages, which in turn required the court to determine whether the director had violated "clearly established" constitutional rights. The existing Establishment Clause precedent, the court conceded, "remains in a degree of flux" and is "particularly difficult to interpret and apply due, in part, to the number and diversity of concurring and dissenting opinions."<sup>341</sup> Nonetheless, the court found that "a reasonable person with a basic understanding of Establishment Clause jurisprudence would easily have predicted that this proceeding would conclude with a determination that the Act was unconstitutional."<sup>342</sup> The court found it to be clearly established that "endors[ing] a particular religion through government speech" was constitutionally prohibited, and that "display of religious symbols by the state constitutes 'speech' or action in violation of the Establishment Clause absent a context which suggests that the intent is not religious."<sup>343</sup> The presence of other legislatively-approved specialty plates in South Carolina (such as the "In God We Trust" and "God Bless America" plates) did not provide that neutralizing context, reasoned the court, because the inclusion of the "I Believe" plate "suggests a movement towards theocracy—with the Legislature approving increasingly religious plates, progressing from the merely monotheistic (and arguably Judeo-Christian theme), to a singularly pro-Christian plate."<sup>344</sup> Nevertheless, because "no prior controlling precedent specifically address[ed] application of the Establishment Clause to a religious message on a legislatively-approved plate," the court extended the director qualified immunity from damages.<sup>345</sup>

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Impressions. There are several items to highlight in the "I Believe" opinions. At the outset, the factual record contained evidence which the court construed as the government purposefully aiming to uniquely promote the

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<sup>340</sup> *Id.* at 664–65. The court quoted from earlier newspaper interviews with legislators who had offered their initial views on similar plates for other religions: for Islam, one legislator said "[a]bsolutely and positively no"; for Wiccans, another legislator said Wicca is "not what [he] consider[s] to be a religion"; for Buddhists, another said he would need "to look at the individual situation"; for Judaism, another replied that "I guess I'd have to admit I could support [it]"; and for Scientologists, he "would be very uncomfortable." *Id.* at 661 n.42.

<sup>341</sup> *Id.* at 666.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 668.

<sup>344</sup> *Id.* at 669 n.55.

<sup>345</sup> *Id.* at 672.

Christian faith. Such sect-specific preferences have long been given an inhospitable welcome by the Supreme Court.<sup>346</sup> That factual record included the indisputably sect-specific religious statements of purpose from one of the legislation's key governmental advocates, the halting or downright hostile responses by voting members of the legislature to the possibility of expanding the officially-authorized plate program to encompass other religions' symbols, and the ready availability of a privately-initiated specialty plate option that could have pronounced the same message free of governmental involvement.<sup>347</sup> The result was a factual record that the court understood to be unequivocal on a matter where the Supreme Court had spoken with some special clarity over the years. Those features, however, combine infrequently in Establishment Clause disputes.

That is not to say that the "I Believe" court enjoyed reliable guidance from the Supreme Court in all respects. For example, the South Carolina court understood "endorsement" as certainly present when a government acts to display only a single religion's symbol. Indeed, that single-symbol feature meaningfully influenced good portions of the court's holdings in both the purpose and effect inquiries.<sup>348</sup> Here, again, the Supreme Court's uncertain direction triggers lower court inconsistencies. The Virginia court in the Latin cross brick case, for example, had given that single-symbol characteristic barely a glancing mention (absent proof that the government had actually been requested to dis-

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<sup>346</sup> See *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989); *Larson v. Valente*, 456 U.S. 228, 246 (1982). Even among members of the Court who advocate a substantial restructuring of the Supreme Court's Establishment Clause jurisprudence there seems to be agreement on this restriction. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, 'peer-pressure' psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).").

<sup>347</sup> See *supra* notes 337, 340 and accompanying text. Although contested vigorously by some members of the Court, see *Edwards v. Aguillard*, 482 U.S. 578, 610–40 (1987) (Scalia, J., dissenting), the lack of a secular purpose has alone been enough to justify invalidating a challenged government activity. See *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 860–61 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 55–60 (1985). Moreover, the Court has found that a claimed secular purpose is constitutionally insufficient if that purpose had already been achieved prior to the enactment of a challenged legislation. See *Wallace*, 472 U.S. at 59–60 (holding that addition of the phrase "or voluntary prayer" to a moment of silent law that already permitted a moment for "meditation" was either meaningless or intended to unconstitutionally endorse a religious exercise).

<sup>348</sup> See *supra* notes 334–340 and accompanying text.

play other religions' symbols and refused).<sup>349</sup> By contrast, the South Carolina court expressed no special interest in whether license plates bearing other religious symbols had ever been refused, or had even actually been requested, for legislative adoption. Unhelpfully, the Supreme Court in *Lynch* and *County of Allegheny* gave the lower judiciary little guidance on what to do with the fact that the Pawtucket crèche had no accompanying menorah and the Pittsburgh menorah had no accompanying symbol of Ramadan.

The related question of how to appropriately envision and apply the endorsement test's "reasonable observer" lens has also led to some inconsistent reasoning, as the South Carolina "I Believe" and Virginia brick decisions demonstrate. Here, too, the Supreme Court's lack of strong guidance looms. The endorsement approach's "reasonable observer," explained its creator, Justice O'Connor, is "a more collective standard," essentially the "personification of a community ideal of reasonable behavior, determined by the [collective] social judgment" who is also "deemed aware of the history and context of the community and forum in which the religious display appears . . . [and] the general history of the place in which the [symbol] is displayed," including "how the public space in question has been used in the past."<sup>350</sup> While that vantage point may be expressed easily as a theoretical proposition, the Supreme Court has never fleshed out how the courts should be anticipating the "reasonable observer's" behavior. The South Carolina court, for example, was persuaded that the "reasonable observer" would view the legislatively-approved "I Believe" plate as unconstitutionally endorsing Christianity because the legislation had authorized only a Christian display.<sup>351</sup> But to the judge in the Virginia Latin cross brick case, a "reasonable observer" would not be so impulsive in forming his or her reasoning, but instead would connect the specific engraved symbols on each brick with the student whose name appears on it (even though the reasonable observer is charged with the knowledge that the public school made available only one religion's symbol).<sup>352</sup> In both cases, the government had made available only a Christian religious symbol (although, to be fair, the "I Believe" record of governmental purpose was an importantly distinguishing feature). Nonetheless, because the "I Believe" plate would only ever appear on the roadways of South Carolina through the independent, intervening act of an individual motorist choosing to purchase one, why should the selection of what to include among available license plate designs be any more an endorsing act of the state than the selection of what to include among available brick de-

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<sup>349</sup> See *Demmon v. Loudoun Cnty. Pub. Sch.*, 342 F. Supp. 2d 474, 494 (E.D. Va. 2004).

<sup>350</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–81 (1995) (O'Connor, J., concurring).

<sup>351</sup> See *Summers II*, 669 F. Supp. 2d 637, 664–65 (D.S.C. 2009).

<sup>352</sup> See *Demmon*, 342 F. Supp. 2d at 493.

signs?<sup>353</sup> As these two Virginia and South Carolina opinions make clear, the current elasticity of the “reasonable observer” concept (at least as it seems to be understood by the lower courts) easily accommodates either the “yes-endorsing” or “no-endorsing” outcomes to similar fact patterns.

Furthermore, the South Carolina court ruled that the presence of other legislatively-authorized specialty plates on the roadways of the state did not positively contextualize the “I Believe” plates, even when those other plates included “In God We Trust” and “God Bless America” messages. To the South Carolina judge, these other plates were more like the unconstitutionally-framing flowers and evergreens in *County of Allegheny* than the constitutionally-neutralizing candy-canes and Christmas trees in *Lynch*.<sup>354</sup> But why? Wouldn’t every “reasonable observer” motorist on a South Carolina roadway, charged with knowledge of the state’s license plate selection process and the array of available plate options for motorists to purchase, conclude that *no* plate on *any* car was there through *any* reason other than personal motorist preference and choice? If so, that would hardly seem a religious endorsement fairly attributable to the state.<sup>355</sup> This, indeed, seemed to be the prevailing logic in the Virginia bricks opinion.<sup>356</sup> Which understanding of the “reasonable observer” lens is correct? Once again, the existing Supreme Court precedent offers the lower judiciary scant guidance on when to detect alarming floral frames and when to detect neutering candy-canes.

Finally, the South Carolina court’s ruling on the question of qualified immunity is very nearly a mirror of the Establishment Clause schizophrenia the lower judiciary faces. The South Carolina judge first noted the “flux” and “particularly difficult” nature that marks Establishment Clause precedent,<sup>357</sup> then pronounced the application of that law to these facts “easily . . . predict[able]” to anyone “with a basic understanding of Establishment Clause jurisprudence,”<sup>358</sup> but then ultimately ruled in favor of immunity because “no prior

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<sup>353</sup> Cf. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487–88 (1986) (finding no Establishment Clause “effect” prong infirmity in a program granting tuition assistance to students where those students, in turn, spend that tuition assistance on religious education, since any state money “that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,” and “the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State”).

<sup>354</sup> See *Summers II*, 669 F. Supp. 2d at 669 n.55.

<sup>355</sup> See *supra* note 353 and accompanying text; see generally Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum’s Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315 (2010) (discussing the government speech doctrine, the *Summers* opinions, and the potential ramifications of the Supreme Court’s *Summum* decision).

<sup>356</sup> See *Demmon*, 342 F. Supp. 2d at 493.

<sup>357</sup> *Summers II*, 669 F. Supp. 2d at 666.

<sup>358</sup> *Id.*

controlling precedent” was specifically on point.<sup>359</sup> The incoherency of aggregating these three sentiments is emblematic of the dissonance this body of Supreme Court precedent has caused.

*E. “In God We Trust” Motto*

The Fourth Circuit in 2005 encountered its only challenge to the “In God We Trust” national motto in *Lambeth v. Board of Commissions of Davidson County*.<sup>360</sup> There, in a single, unanimous opinion, the court rejected a challenge to the decision to inscribe the motto, with 18” block letters, into the façade of the Davidson County, North Carolina government center.<sup>361</sup> The court applied the tripartite *Lemon* test, as modified by the endorsement approach, and affirmed the district judge’s Rule 12(b)(6) dismissal of the complaint for failure to state a cognizable claim.<sup>362</sup> First, the court ruled that the phrase’s adoption as the national motto provided a qualifying secular purpose, even though the government had, while authorizing the inscription, emphasized also its religious nature.<sup>363</sup> Second, the court found no unconstitutionally endorsing effect, emphasizing that the proper “effect” inquiry requires an assessment of the county’s “use of the national motto on the façade of the Government Center in its full context.”<sup>364</sup> Calibrated in its proper context “as a statement with religious content, and as one with legitimate secular associations born of its consistent use on coins and currency, and as the national motto,” the court ruled that there was no endorsement.<sup>365</sup>

A reasonable observer contemplating the inscription of the phrase on the Government Center would recognize it as recently installed, but also as incorporating familiar words – a phrase with religious overtones, to be sure, but also one long-used,

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<sup>359</sup> *Id.* at 672.

<sup>360</sup> 407 F.3d 266 (4th Cir. 2005).

<sup>361</sup> *Id.* at 267–68.

<sup>362</sup> *Id.* at 268–69.

<sup>363</sup> *Id.* at 267–70.

<sup>364</sup> *Id.* at 272.

<sup>365</sup> *Id.* The court admonished the plaintiffs for misapprehending the “effect” prong of *Lemon* as an “unconstitutional-unless” inquiry, rather than the correct “constitutional-unless” inquiry. *See id.* at 271 (“[Plaintiffs’ argument] suggests that anything not wholly secular contravenes the Establishment Clause, unless it has been specifically ‘grandfathered’ by longstanding use. The proper analysis is the converse: whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion.”).

with all its accompanying secular and patriotic connotations as our national motto and currency inscription.<sup>366</sup>

Third, the court found no allegation of any ongoing, comprehensive surveillance of religious activity relating to the motto inscription that could qualify as an excessive entanglement.<sup>367</sup>

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Impressions. Ironically, given that the Supreme Court has yet to grant certiorari to resolve an actual Establishment Clause challenge to the national motto, the Fourth Circuit was very well guided in resolving this North Carolina lawsuit. As the appeals court accurately noted, the Supreme Court “has strongly indicated on several occasions, albeit in dicta, that governmental use of the motto ‘In God We Trust,’ does not, at least in certain contexts, contravene the mandate of the Establishment Clause.”<sup>368</sup> Although the Fourth Circuit found that the use of the “In God We Trust” phrase as an inscription on a North Carolina government facility went “beyond the traditional uses of the phrase” (namely, on national currency and as a motto), the court acknowledged that it was influenced significantly by the Supreme Court’s earlier musings.<sup>369</sup> It really is a twist only a bleak poet could admire: the Supreme Court seems to teach best when its teaching is not true teaching at all, but non-binding dicta.

It is certainly true, as the Fourth Circuit recounted, that the Supreme Court has often intimated that the national motto will readily survive Establishment Clause scrutiny.<sup>370</sup> But that intimation has never been fully explained to us. It may well be that the nation’s motto does, and ought to, survive constitutional challenge, but less clearly understood is why this is so (and how that conclusion squares with existing Court precedent). The confusion is readily demonstrated. The motto declares: “In God We Trust.” As the country’s motto, the sentiment prescribes a nation-defining norm—that our country (and, far more personally and intimately, that “we”) have, as a principle of government, laid our trust in (capital “G”) “God.” But the Court has taught as a canon of Establishment Clause doctrine that “the government may not favor . . . religion over irreligion.”<sup>371</sup> If that is truly to be the meaning ascribed to the Establish-

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 272–73.

<sup>368</sup> *Id.* at 271 (citations to U.S. Supreme Court dicta omitted).

<sup>369</sup> *Id.*

<sup>370</sup> See *supra* note 185 and accompanying text.

<sup>371</sup> *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 875–76 (2005); *accord* *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (noting “a principle at the heart of the Establishment Clause [to be] that government should not prefer one religion to another, or religion to irreligion”); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“[N]either a

ment Clause, how can “In God We Trust” not be faulted as an unconstitutional advancement or endorsement of “religion” over “irreligion”? Yet, members of the Court seem quite sanguine in approving these sorts of national invocations of the divine, notwithstanding what the Court may have pronounced as governing principle in other contexts.<sup>372</sup> Perhaps this does comport with *Lemon*’s three prongs and the endorsement test in ways not clear to spectators. Or perhaps the Court has settled on some other, unspoken Establishment Clause standard that it proposes to apply to longstanding national traditions.<sup>373</sup> Or perhaps this is just the unavoidable consequence of the cobbling together of a five-vote consensus among jurisprudentially divided Court members. In any event, the resulting precedent incoherence only adds to the lower judiciary’s uncertainty in this area.

#### F. Symbol-Like—The Pledge of Allegiance

Also just once, the Fourth Circuit encountered a challenge to the Establishment Clause constitutionality of the Pledge of Allegiance. In *Myers v. Loudoun County Public Schools*,<sup>374</sup> an Anabaptist Mennonite objected to the

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State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (“[T]he First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers.”). *But cf. Van Orden v. Perry*, 545 U.S. 677, 684 n.3 (2005) (plurality) (“[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.”).

<sup>372</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35–36 (2004) (O’Connor, J., concurring) (“The Court has permitted government, in some instances, to refer to or commemorate religion in public life . . . I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation’s origins. Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses, it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today . . . The reasonable observer . . . , fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.” (citations omitted)).

<sup>373</sup> See *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting) (“A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”).

<sup>374</sup> 418 F.3d 395 (4th Cir. 2005).

compulsory exposure of his two school-age sons to the Pledge, as commanded by the Virginia Pledge recitation statute.<sup>375</sup> Although the Virginia law entitled objecting children to stand or sit silently during the daily Pledge recitation, the plaintiff-father felt the exercise was indoctrinating his sons into a “‘God and Country’ religious worldview,” in violation of the precepts of his faith.<sup>376</sup> A three-judge panel of the Fourth Circuit rejected the claim, though each of the three judges wrote separately (and none applied the *Lemon* tripartite test). The lead opinion relied on “[t]he history of our nation,”<sup>377</sup> the Supreme Court’s approval of legislative prayer in *Marsh v. Chambers*,<sup>378</sup> the Court’s repeated dicta that the Pledge is constitutional,<sup>379</sup> and the fact that “not one Justice has ever suggested that the Pledge is unconstitutional.”<sup>380</sup> Consequently, the lead opinion resolved: “If the founders viewed legislative prayer and days of thanksgiving as consistent with the Establishment Clause, it is difficult to believe they would object to the Pledge, with its limited reference to God.”<sup>381</sup> It was, after all, a patriotic exercise, not a religious one, reasoned the judge.<sup>382</sup> The second opinion, largely concurring in the lead decision, approved the Pledge based on the consistency of the Supreme Court’s dicta on the question and on the Pledge’s non-religious, patriotic nature.<sup>383</sup> The third and final opinion, assessing the issue as what otherwise would be an “extremely close case,” approved the Pledge solely on the “decades-long succession of statements from the [Supreme] Court that answers the specific question before us.”<sup>384</sup>

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Impressions. Like the national motto, the Supreme Court’s dicta on the Pledge of Allegiance guided the Fourth Circuit smoothly, even though the Supreme Court has never definitively ruled on the Pledge’s constitutionality. It bears noting, however, that the three judges, although agreeing on result, refused to accept one another’s reasoning. It is a further testament to the confusion for the lower courts that lies in the wake of the Supreme Court’s precedent in this area. Nonetheless, it is also incontestable that on the question of out-

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<sup>375</sup> *Id.* at 397–98.

<sup>376</sup> *Id.* at 398.

<sup>377</sup> *Id.* at 402 (Williams, J.).

<sup>378</sup> *Id.* at 403–04 (discussing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

<sup>379</sup> *Id.* at 405–06.

<sup>380</sup> *Id.* at 406 (emphasis removed).

<sup>381</sup> *Id.* at 405.

<sup>382</sup> *Id.* at 407.

<sup>383</sup> *Id.* at 408–09 (Duncan, J., concurring).

<sup>384</sup> *Id.* at 409–11 (Motz, J., concurring).

come, the Supreme Court's guidance—albeit in non-building dicta—successfully guided the lower court.

*G. Symbol-Like—The Easter Holiday*

Lastly, in 1999, in *Koenick v. Felton*,<sup>385</sup> the Fourth Circuit passed on the constitutionality of a Maryland statute that ordered public school holidays on Good Friday and Easter Monday. The court began by noting the prevailing confusion over how best to test for Establishment Clause comportment, and the numerous devices developed by the Supreme Court to perform that inquiry (namely, the *Lemon* tripartite test, the denominationally-preferentialist strict scrutiny test, the endorsement test, the coercion test, and the neutrality test).<sup>386</sup> Bereft of any sound advice for how to choose among these tests, and noting that *Lemon* had not been overruled, the court defaulted to the *Lemon* formula, enhanced by the endorsement approach.<sup>387</sup> The court found a convincing secular purpose in the need to avoid “the high rate of absenteeism expected on these [Easter holi]days among students and teachers.”<sup>388</sup> The court detected no unconstitutional effect, since the holidays were granted to all students and teachers, not just Christians, made no express religious preference nor gave religious adherents any additional or further benefit, and do not exhort students and teachers to attend religious services.<sup>389</sup> Concededly, religiously observant Christians would be facilitated in their faith by the dating of these holidays, but that caused the Fourth Circuit no qualm: “[A] statute does not automatically violate the Establishment Clause simply because it confers an incidental benefit upon religion.”<sup>390</sup> Finally, the court found no excessive entanglement caused by choosing the Easter holiday dates because the school board was obligated merely to consult commercially printed calendars to do so.<sup>391</sup>

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<sup>385</sup> 190 F.3d 259 (4th Cir. 1999).

<sup>386</sup> *Id.* at 264 n.5.

<sup>387</sup> *Id.* at 264–65, 267.

<sup>388</sup> *Id.* at 266.

<sup>389</sup> *Id.* at 267.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 268–69. This facile treatment of entanglement belies what might have been a somewhat more difficult entanglement question. In its opinion, the court acknowledged that Christian denominations differ on the dating of Easter, and the school board chose the Roman Catholic and Protestant Christian dating, while rejecting the Eastern Orthodox calendar. Nevertheless, reasoned the court, any resulting “entanglement” was still inconsequential since whichever dating method is chosen, the exercise remained simply a calendar consultation one. *Id.* Whether the very act of choosing triggered a further entanglement question, the court did not explore.

Impressions. Although not a traditional physical symbol case, the Fourth Circuit's Easter holiday case addressed a figurative symbolism of sorts in the association by government with an importantly religious and highly sectarian holiday. It is telling in several respects. The court quite summarily resolved its uncertainty over which Establishment Clause test to import. Lacking any thoughtful guidance from the Supreme Court as to which of its various Establishment Clause testing formulations to employ, the Fourth Circuit did not struggle amidst the missing clarity. Instead, the court defaulted to the longstanding (and not overruled) *Lemon* tripartite test with an endorsement lens. The opinion is also noteworthy in how it understood the amorphous "incidental benefit upon religion" principle.<sup>392</sup> Again, left without meaningful instruction on when a governmental benefit to religion is "incidental" (and thus constitutionally tolerable) and when it is something more (and thus constitutionally proscribed), the Fourth Circuit seemed to construe "incidental" to encompass any benefit that, though unquestionably valuable to the facilitation of a particular sect's religious exercise, was also capable of being of secular benefit to all, irrespective of faith.

#### V. SOME FINAL OBSERVATIONS

Good teaching is more a giving of right questions  
than a giving of right answers.

*Josef Albers*

Justice O'Connor, the craftswoman of the endorsement test that is so often featured in religious symbols analyses, has written that the United States Supreme Court's "primary purpose is to guide and shape the development of federal law generally, so as to enable lower courts to perform their responsibilities more effectively and fairly and to guarantee equal justice to all citizens."<sup>393</sup> To "guide and shape" in this context is to teach, to devise an enabling analytical framework that invests those very same lower courts with the tools neces-

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<sup>392</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) ("Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental . . ."). But see *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 595 (1989) (noting that the *Lynch* "opinion observes that any benefit the government's display of the crèche gave to religion was no more than 'indirect, remote, and incidental,'—without saying how or why" (citations omitted)).

<sup>393</sup> SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 211 (2003); see also William T. Coleman, Jr., *The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes*, 52 *FORDHAM L. REV.* 1, 20 (1983) ("The value of Supreme Court decision-making is not in how many individual disputes are resolved, but rather in the clarity and cohesiveness of the legal guidance it provides the highest courts of the various states, the lower federal and state courts and the political branches of government.").

sary to discharge their decisional work reliably, predictably, and legitimately. Measured against that benchmark, how has the Supreme Court fared in teaching Establishment Clause symbols analysis?

At the “boots-on-the-ground” level, where the daily, heavy-lifting work of adjudication is performed, the lower courts have, largely and understandably, come away frustrated after their study of the controlling jurisprudence emanating from the perch atop the federal hierarchy. Judge Ervin of the Fourth Circuit, for instance, called the precedent “often-dreaded and certainly murky;”<sup>394</sup> his Fourth Circuit colleague Judge Williams added that the precedent is “sometimes marked by befuddlement and lack of agreement.”<sup>395</sup> Judge Suhrheinrich of the Sixth Circuit despaired of the “Establishment Clause purgatory.”<sup>396</sup> Judge Fernandez from the Ninth Circuit labeled the precedent “dark materials”—“indefinite and unhelpful.”<sup>397</sup> Judge Kelly from the Tenth Circuit bemoaned the “judicial morass.”<sup>398</sup> The indefatigable Judge Posner of the Seventh Circuit sighed that “[t]he case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provid[ing] no guidance.”<sup>399</sup> From some quarters, even outright derision has been dumped on the Court, as courts and commentators smart about the “St. Nicholas, too” test,<sup>400</sup> the “two-plastic reindeer rule,”<sup>401</sup> constitutional scrutiny built to examine how closely nativity scenes “resemble[] a miniature golf

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<sup>394</sup> Koenick v. Felton, 190 F.3d 259, 263 (4th Cir. 1999) (Ervin, J.).

<sup>395</sup> Myers v. Loudoun Cnty. Pub. Schs., 418 F.3d 395, 406 (4th Cir. 2005) (Williams, J.).

<sup>396</sup> Am. Civil Liberties Union v. Mercer Cnty., 432 F.3d 624, 636 (6th Cir. 2005).

<sup>397</sup> Card v. Everett, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring).

<sup>398</sup> Green v. Haskell Cnty. Bd. of Comm’rs, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting).

<sup>399</sup> Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting).

<sup>400</sup> Am. Civil Liberties Union v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting) (“[A] city can get by with displaying a crèche if it throws in a sleigh full of toys and a Santa Claus, too. The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?”).

<sup>401</sup> Joshua D. Zarrow, *Of Crosses and Crèches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 495 n.113 (1986).

course,”<sup>402</sup> and an analytical approach “more commonly associated with interior decorators than with the judiciary.”<sup>403</sup>

The judges are not alone in their exasperation. Former Solicitor General of the United States Rex Lee once offered this condemning assessment: “A decent argument can be made that the net contribution of the Court’s precedents toward a cohesive body of law [in the Religion Clauses area] . . . has been zero.”<sup>404</sup>

Nonetheless, noble laborers as they have always been, the interpretative and applicative work of the lower judiciary toils on unabated.

As this Article’s study of the State and federal courts within the region of the Fourth Judicial Circuit reveals, the lower judiciary struggles mightily to fill the analytical and nuance gaps left by the Supreme Court. The Court has articulated a multitude of tests, but left the lower courts largely undirected on which test to apply to which circumstance and when. On this score, the courts within the Fourth Judicial Circuit region have steered a path around the numerous different formulations, settling most often on perhaps the most prominent (albeit oft-criticized) approach, the *Lemon* tripartite test, modified with the endorsement lens. Have they guessed correctly? The Supreme Court has guarded that secret with the vigilance of a gambler concealing his hole card.

Assuming they have decrypted the proper analytical test, the lower courts understand that the endorsement inquiry requires them to gaze through the informed eyes of a “reasonable observer,” but they have never been thoroughly taught how, functionally, that lens is supposed to work. Consequently, the lower court opinions are marked by a lack of uniformity. One court’s “reasonable observer” gazes at Latin-cross-only personalized bricks and perceives no impropriety, while another gazes at Latin-cross-and-stained-glass-window-only personalized license plates and detects endorsement. Although the “reasonable observer” construct could be understood either way, it almost certainly cannot mean both.

The lower courts also readily acknowledge the Supreme Court’s admonition that context matters in resolving Establishment Clause symbol challenges, and they dutifully recite back that instruction in their opinions. But, generalities aside, what, specifically, must be done with context? That, too, has evaded the Court’s explanation. The Supreme Court has emphasized that some

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<sup>402</sup> *Am. Civil Liberties Union v. Cnty. of Allegheny*, 842 F.2d 655, 669 (3d Cir. 1988) (Weis, J., dissenting) (“I have found no indication that the Pawtucket display survived constitutional scrutiny because . . . it closely resembled a miniature golf course with candy-striped poles, talking wishing wells, and cut-out elephants.”), *aff’d in part and rev’d in part*, 492 U.S. 573 (1989).

<sup>403</sup> *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

<sup>404</sup> Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 BYU. L. REV. 337, 338 (1986).

secular context will adjust positively (and thus constitutionally) the received message from a symbol display (like candy-canes and Christmas trees in Pawtucket), while other secular context will adjust negatively (and thus unconstitutionally) the received message from a symbol display (like “framing” poinsettias and evergreens in Pittsburgh). But the decoder-ring for discerning when the adjustment is positive and when negative has not been shared with the lower judiciary. In the absence of that guidance, the lower court opinions reveal inconsistency here as well. For example, a Christian brick included amongst an array of swimming, wrestling, and graduation-year bricks is constitutionally contextualized, but a Christian license plate included amongst an array of college alumni, sporting, and civic plates is not. And the muddle is only likely to get worse, as the myriad of factual permutations multiply. How many reindeer and snowmen must surround a crèche? Does it matter if they are grouped to one side, and the crèche set off on the other? How close must they be to one another? Is sixty feet too far? Must they be looking away from the crèche? What if they are looking at it instead? Could that context be deemed an adorational or reverential pose?

Likewise, the lower courts acknowledge that a symbol’s placement in a prominent, governmentally-intense position calls for special analytical care, but they never seem clear on what that care ought to entail and when it will trigger an invalidation. So, again, inconsistency abounds. One court finds a religious symbol’s placement on a municipal building’s front yard to be the state’s “symbolic embrace” of religion, in violation of the Establishment Clause, while another rules that a different religious symbol’s placement inside a courthouse (and, indeed, displayed dramatically behind the courtroom bench) to be an appropriate location, snugly comporting with the Establishment Clause. Graded charitably, this is all hardly indicative of “A” teaching work.

What explains the Supreme Court’s ineffective instruction? Perhaps it is because, in the abstract, constitutional tests are so easy to build. The Court’s construction of ten of them (or seventeen or nineteen of them, depending upon how one counts) is certainly proof of that. What has beguiled the Supreme Court in its quest to install a sound standard for Establishment Clause assessment, one that is capable of predictable and reliable application, has not been its competence to build tests. Judicial tests are, after all, really nothing more than pathways for reasoning—the road an analysis ought to follow in order to come to a correct conclusion. The trick with tests isn’t so much defining the road, it’s clearly seeing the destination. Here has been the Court’s enduring problem. Its members have been unable to agree on where the road should go. Atmospheric, undirecting generalities aside, what *does* constitutional religious liberty really mean? What does it mean for the daily jurists who must do the work of giving that guarantee the correct meaning and application? And, as the

Supreme Court routinely re-incants, what does it mean that this interpretative work must never be performed in any manner that is hostile to religion?<sup>405</sup>

This whole business could be much easier. There are analyses that would yield unquestionably predictable results. Former Chief Justice Burger suggested one such approach in *Lynch*: “Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.”<sup>406</sup> The required constitutional analysis is fairly straightforward if one accepts that all religious symbols in the public square are lawful since none poses any meaningful threat of ordaining a national faith. Former Associate Justice John Paul Stevens suggested a much different, but equally easier approach in *Van Orden*, when he wrote that the Constitution ought to “create[] a strong presumption against the displays of religious symbols on public property.”<sup>407</sup> Here, too, the required analysis is simple if one accepts that all religious symbols in the public square are presumptively unlawful, absent extraordinary circumstances otherwise.

It now, however, appears fairly certain that the United States Supreme Court finds each of these views to be unacceptably blunt tools for determining symbol constitutionality. The unavoidable consequence of that conclusion seems to mean that whether a symbol survives or fails will hinge on delicate, fact-specific impressions of “advancement” or “endorsement” that may well escape smooth, linear alignment. This, in turn, portends very little definitive future help for the lower judiciary struggling at the margins.

In our increasingly religiously pluralistic Nation, an unsettled focus on the meaning of the Establishment Clause in religious symbol cases is not something to be cheered. Religious symbols abound in America. They dot the countryside, decorating parks and halls and courthouses and vestibules and rotundas.<sup>408</sup> In many respects, they have become quintessentially and emblematically

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<sup>405</sup> See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005) (cautioning that courts must “neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage”); *id.* at 704 (Breyer, J., concurring) (affirming that “a hostility toward religion . . . has no place in our Establishment Clause traditions”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (admonishing that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (explaining that the First Amendment “requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary” and that “[s]tate power is no more to be used so as to handicap religions than it is to favor them”); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring) (“The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.”).

<sup>406</sup> *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (plurality opinion).

<sup>407</sup> *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).

<sup>408</sup> See *id.* at 688–90 (plurality opinion).

Americana, even down to the communities and geographic features they name.<sup>409</sup> This is an area in heavy need of sensible, analytically thoughtful constitutional guidance. Unfortunately, the tepid path staked by the Supreme Court leads invariably to unpredictable footfalls by the lower judiciary. However we each self-identify on the issue of religion—as a core (or “the” core) human value, as a mischievous fable, or somewhere in between—judicial missteps tend to strike a citizenry in a very direct and intimately personal way. In the end, missteps here mark a failure of teaching. It is a failure that hearkens back to Chief Justice John Marshall’s eloquent caution nearly two hundred years ago of the essential need for his Court to teach well:

The Judicial Department comes home in its effects to every man’s fireside: It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?<sup>410</sup>

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<sup>409</sup> Consider, for sampling, the cities of San Francisco, St. Paul, Las Cruces, and Corpus Christi, or Bible Grove Township in Illinois, or Christian County in Missouri, or the Sangre de Cristo Mountains in New Mexico.

<sup>410</sup> O’Donoghue v. United States, 289 U.S. 516, 532 (1933) (quoting Chief Justice Marshall’s advice during the 1829–30 debates on the Virginia State Convention).