

Crosses, Menorahs, Crèches, and the Ten Commandments: The Curious Path of Public Religious Symbols in Constitutional America

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In Religion Clause jurisprudence, there is little ground on which every judge, lawyer, scholar, and citizen – of whatever predilection – is certain to agree. The United States Supreme Court rediscovered just such ground in 1986. In a not especially audacious opinion that ruled that a legally blind collegian could – constitutionally – qualify for state vocational rehabilitation services, even if he would use those state funds to assist him in his study to become a pastor, the Court reflected on its success in discerning the boundary between what the Constitution forbids and what it permits. The Court wrote: “[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”¹ Few are likely to quarrel with that observation.

Religious symbols in the public square – Ten Commandment monuments, crèches, menorahs, crosses, mottos, carved inscriptions, solemn sayings, and the like – have been an especially contentious area of Religion Clause jurisprudence. Over the years, the issue has sharply polarized the Justices. On the accommodative side, Chief Justice Warren Burger had 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 overreaction”.² 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 farfetched indeed.”³ On the separationist side, Associate Justice John Paul Stevens had determined that a stone monument on the grounds of the Texas State Capitol depicting a version of the Ten Commandments should be removed because, “at the very least,” the Constitution “has created a strong presumption against the displays of religious symbols on public property.”⁴ 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 fortress and exposure to ‘the winds that would blow’ if the wall were allowed to crumble.”⁵

An exhaustive study of the constitutionality of public displays of religious symbols could be the work of a lifetime. This paper has a far more modest aspiration. It will, first, orient the reader to the Religion Clauses and their application to this issue. It will, second, summarize the leading

¹ *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 485 (1986). 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 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 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 the 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 Free Exercise Clause challenge away, ruling that Washington had the constitutional right to refuse to fund his religious studies. *Locke v. Davey*, 540 U.S. 712 (2004). The “lines of demarcation” are dim indeed.

² *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (plurality).

³ *Id.*

⁴ *Van Orden v. Perry*, 545 U.S. 677, (2005) (Stevens, J., dissenting).

⁵ *Id.* (citation omitted).

opinions decided by the Supreme Court on the issue (but be forewarned – those decisions are lengthy ones). It will, third, highlight the Fourth Circuit state and federal decisions treating the issue. It will, fourth, offer a few closing observations on the current state of this law. This paper’s ultimate objective is not a comprehensive one, but a provocative one – to spur critical thought, discussion, and study of this fascinating constitutional dilemma.

I. ORIGINS

Religious liberty was not explicitly protected in the original Constitution.⁶ The express religious guarantees came a few years later, when the Bill of Rights was ratified in December 1791.⁷ As written and ratified, the opening sixteen words of the First Amendment read: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”.⁸ 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. Together, they are the “Religion Clauses” and form the centerpiece of constitutional religious liberty in the United States.

Each of these two Clauses might well bear on the propriety of publicly displayed religious symbols. 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 embracing (or tending towards an official embrace of) religious beliefs.⁹ In contrast, the second guarantee, the Free Exercise Clause, is seen as more of an individualized, personal assurance of religious liberty.¹⁰ Because government display of a religious symbol could tend to telegraph official government support for the beliefs associated with that symbol, the structural constitutional limitation – the Establishment Clause – has often been the core constitutional value invoked in such challenges. So it is to the meaning of the Establishment Clause that this paper now turns.

Although appended to the Constitution in the waning years of the 18th Century, the Religion Clauses remained largely dormant in constitutional jurisprudence for most of the next 150 years. Few cases invoking their protection percolated up to the United States Supreme Court, and those

⁶ With one exception. 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, para. 3.

⁷ 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 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 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* Preamble to the Bill of Rights at 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).

⁸ U.S. CONST. amend. I.

⁹ *See* *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“the Establishment Clause forbids an established church or anything approaching it.”).

¹⁰ *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (the Free Exercise Clause “embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”).

that did generated very little abiding precedent.¹¹ With one notable exception. In 1879, the Supreme Court decided *Reynolds v. United States*,¹² 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.¹³ “The precise point of the inquiry” in the *Reynolds* appeal, as he saw it, devolved then to this question: “what is the religious freedom which has been guaranteed[?]”.¹⁴ Although the Chief Justice’s answer is interesting,¹⁵ 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. 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.”¹⁶ Chief Justice Waite closed his quotation with a sweeping commendation of Jefferson’s imagery: “Coming at 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.”¹⁷ 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 decision in *Wallace v. Jaffree*, excoriating the continued use of Jefferson’s 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 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

¹¹ 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).

¹² 98 U.S. 145 (1879).

¹³ *Id.* at 162.

¹⁴ *Id.*

¹⁵ 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.

¹⁶ *Id.* at 164.

¹⁷ *Id.*

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.¹⁸

A far more reliable selection for the contemporary understanding of the Establishment Clause, wrote Justice Rehnquist, might be James Madison who, unlike Jefferson, was actually in the United States when the Religion Clauses were drafted, and, unlike Jefferson, was a principal member of the First Congress that voted on the Religion Clause text, and, unlike Jefferson, was a personal participant in the crafting and debating of the syntax that the First Congress would ultimately come to prefer. But, as Justice Rehnquist recounted in his same *Wallace* dissent, in examining the sparse historical record of the Religion Clauses' drafting, "we see a far different picture of its purpose than the highly simplified 'wall of separation between church and State.'" ¹⁹

Representative Madison had taken a 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."²⁰ The draft was subsequently referred to a select committee for review and revision, and then debated in mid-August 1789. 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*.²¹ In the first, Madison is attributed to having

¹⁸ *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 "or voluntary prayer" to a then-existing state statute dictating a one-minute moment of silence "for mediation" 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's] 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>).

¹⁹ *Id.*

²⁰ *Id.* at 94.

²¹ *Id.* at 95. 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 records 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 history. 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

“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.”²² 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 that, if the word ‘national’ was introduced, it would point the amendment directly to the object it was intended to prevent.”²³ 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.”²⁴

Whether “wall of separation” is actually a fitting metaphor or a misplaced one is probably 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 lost to us forever. 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 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.²⁵

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.²⁶ 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.²⁷ With that declaration, all manner

religion at all.” *Id.* at 96. It was to this and other concerns that Representative Madison evidently addressed his attention when he spoke.

²² *Id.*

²³ *Id.* at 96.

²⁴ *Id.* at 98.

²⁵ Citing legislative history, once observed the late Judge Harold Leventhal, 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, 214n.143 (1983). In few areas of legislative study is Judge Leventhal’s memorable turn-of-phrase more apt than in the dissection of the debates over the Religion Clauses.

²⁶ 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)).

²⁷ *See* *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); *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 . . .”).

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[?]”.²⁸ His answer (a “wall of separation” between religion and government) is not especially authoritative on the Establishment Clause’s meaning; after all, the *Reynolds* bigamy case wasn’t even an Establishment Clause challenge, but rather a Free Exercise Clause dispute.²⁹

Sixty-eight years later, Associate Justice Hugo Black took a try at describing the Establishment Clause’s meaning in *Everson v. Board of Education*, 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 memorable cadence:

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.”³⁰

Though a fine piece of prose to be sure, Justice Black’s list is also not especially ideal. First, dramatic though it may be, it contains no footnotes to any authority (beyond a single citation to the Mormon bigamy case for the Jefferson quote at the end).³¹ 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 much for Justice Black to cite to. But in the absence of any 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.³² Third, after installing his foreboding “thou-shalt-not” list of

²⁸ *Id.*

²⁹ *See Reynolds v. United States*, 98 U.S. 145, 164 (1878).

³⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

³¹ It is true that what precedes this paragraph – a recounting of earlier religious strife here and abroad – is supported by authority. But this critical 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*. *Everson*, 330 U.S. at 15-16.

³² 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 ‘Congress shall make no law . . . abridging the freedom of speech, or

constitutional 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.³³ In any event, whatever insights one might draw from Justice Black’s *Everson* list, this much is true: the paragraph’s broad, sweeping, categorical generalities make it difficult to apply as a “test” in any reliable or predictable way 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.³⁴ 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) 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:

1. The *Lemon* Tripartite Test: Which inquires whether the challenged government action had a secular purpose, whether its principal or primary effect neither advanced nor inhibited religion, and whether it avoided fostering an excessive governmental entanglement with religion.³⁵
2. The Endorsement Test: Which retained but modified the *Lemon* tripartite test, by affixing an “endorsement-or-disapproval” focus to the first and second inquiries,

of the press.’ I read ‘no law . . . abridging’ to mean *no law abridging*.”) (emphasis in original); an unqualified, categorically unyielding approach to constitutional interpretation that the Court has never embraced. *Cf.* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“the 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.”). He was also the craftsman of the likewise sweeping “no-set-of-facts” 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”); which the Court has since renounced. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) (“after puzzling the profession for 50 years, this famous observation has earned its retirement”).

³³ *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.”).

³⁴ *See* STEVEN G. GEY, *RELIGION AND THE STATE* 219-94 (2d ed. 2006).

³⁵ *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).

thus asking whether the government's actual purpose in its challenged action was to endorse or disapprove of religion, and then whether, regardless of actual purpose, the challenged action conveyed a message of religious endorsement or disapproval.³⁶

3. 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.³⁷
4. The Narrow Coercion Test: Which asks whether the challenged government action, by force of law and threat of penalty, coerced religious orthodoxy or financial support of religion.³⁸
5. The Substantive Neutrality Test: Which inquires whether the challenged government action was not neutral, but was instead undertaken with the ostensible, predominant objective to advance religion.³⁹
6. The Formal Neutrality Test: Which inquires whether the challenged government action provided benefits or advantages to religion as merely a component of a broader, neutrally-applicable program offered to a wide array of beneficiaries, none of whom were selected or identified on the basis of religion.⁴⁰
7. The Non-Preferentialist Test: Which asks whether the challenged government action provided benefits or advantages to religion on a sect- or denominationally-preferential basis.⁴¹
8. 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.⁴²
9. The Divisiveness Test: Which inquires whether the challenged government action incited religious strife.⁴³
10. 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 context and consequences measured in light of those purposes.⁴⁴

³⁶ See *Lynch v. Donnelly*, 465 U.S. 668, 690(1984) (O'Connor, J., concurring).

³⁷ See *Lee v. Weisman*, 505 U.S. 577, 587 & 593 (1992) (Kennedy, J.)

³⁸ See *Lee v. Weisman*, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting)

³⁹ See *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 860 (2005) (Souter, J.).

⁴⁰ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002) (Rehnquist, C.J.).

⁴¹ See *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

⁴² See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 49-52 (2004) (Thomas, J., concurring).

⁴³ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 725-26 (2002) (Breyer, C.J., dissenting).

⁴⁴ See *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

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” list which his catalogue actually omits). These might include:

11. The Framers’ Evidence 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.⁴⁵
12. 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.⁴⁶
13. 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.⁴⁷
14. 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.⁴⁸
15. 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.⁴⁹
16. 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

⁴⁵ See *Marsh v. Chambers*, 463 U.S. 783, 790-92 (1983) (Burger, C.J.).

⁴⁶ See *Van Orden v. Perry*, 545 U.S. 677, 702-03 (2005) (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 County*, 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.”) (emphasis in original).

⁴⁷ See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, ___ (2004) (O’Connor, J., concurring).

⁴⁸ See *School District of Abington Township v. Schempp*, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring).

⁴⁹ See *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (O’Connor, J.).

faith, directly compelled its observance, or exhorted to religiosity to such a degree that it constitutes proselytizing.⁵⁰

17. The Context-Specific Approach: Which concedes that the search for a “grand unified theory” to govern all Establishment Clause disputes has proven unsuccessful, and ought to be replaced by a less unitary approach having different tests to address narrowed, more homogeneously grouped categories of disputes.⁵¹

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 whatever form any 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 the constitutionality of publicly displayed religious symbols. It is small wonder that the Supreme Court’s religious symbol cases mirror that confusion, and reveal a line that is, in its own words, “blurred, indistinct, and variable.”⁵² A brief summary of those cases follows.

II. THE SUPREME COURT’S RELIGIOUS SYMBOL RULINGS

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

The Supreme Court’s religious symbol jurisprudence begins late, in 1980, with *Stone v. Graham*. 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 a remarkable move, the U.S. Supreme Court granted the writ of certiorari and, in a per curiam opinion, without briefing or oral argument, summarily reversed the Kentucky ruling. 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 code” and the United State’s common law. The Court explained that the Ten Commandments are “undeniably a sacred text” whole 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.”⁵³ 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.⁵⁴ Ruling that the Kentucky mandatory posting law violated the first of *Lemon*’s three required inquiries (the requirement of a secular purpose), the Court reversed.

⁵⁰ See *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring and dissenting).

⁵¹ See *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 718-21 (1994) (O’Connor, J., concurring). See also *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (“While the Court’s prior tests provide useful guideposts . . . , no exact formula can dictate a resolution to such fact-intensive cases.”).

⁵² *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

⁵³ *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (per curiam).

⁵⁴ *Id.* at 41-43.

The Ten Commandments Late, Part I:
McCreary County v. American Civil Liberties Union (2005)

A quarter-century later, on the same day in June 2005, the Court announced two Ten Commandments display rulings; in the first (*McCreary County*), a 5-4 majority struck down a display by two counties in Kentucky, and in the second (*Van Orden*), a 5-4 majority upheld a display in Texas. The voting Justices were identical in each case, except for Justice Breyer whose fifth vote created the majorities.

The counties of McCreary and Pulaski are smaller sized counties in south central Kentucky, near the Tennessee border.⁵⁵ In 1999, gold-framed copies of the Ten Commandments were installed in both courthouses in visible, high-traffic areas.⁵⁶ The ACLU brought suit, prompting both counties to erect expanded displays 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).⁵⁷ Following an injunction ordering 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.⁵⁸

The majority in *McCreary County* applied the tripartite test from *Lemon*, finding that the erection/modification-and-supplementation/removal-and-replacement history of the displays demonstrated that the two counties had violated the first prong (secular purpose) of *Lemon* by acting with a purpose to advance religion. After noting the intrinsic religious intensity of the full text of the Ten Commandments, the Court wrote that any reasonable observer, 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 constitutionally required to embody religious neutrality.”⁵⁹ The majority, however, emphasized that its ruling was not categorical, and that it was not purporting to pass on the constitutionality of every use or display of the Ten Commandments. 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

⁵⁵ McCreary County actually borders Tennessee, with a population estimated in 2011 to be just under 20,000. See U.S. Census Bureau, State & County QuickFacts – McCreary, Ky., <http://quickfacts.census.gov/qfd/states/21/21147.html> (last visited Nov. 16, 2012); see also Official McCreary County Website, <http://www.mccrearycounty.com>. Pulaski County, adjacent and to the north, had a population estimated to be just under 65,000 in 2011. See U.S. Census Bureau, State & County QuickFacts – Pulaski, Ky., <http://quickfacts.census.gov/qfd/states/21/21199.html> (last visited Nov. 16, 2012); see also Official Pulaski County Website, <http://www.pcgovt.com>. As a point of reference, Kentucky’s estimated population in 2011 was 4,369,356, with its largest county, Jefferson County, at just under 750,000. See U.S. Census Bureau, State & County QuickFacts – Jefferson, Ky., <http://quickfacts.census.gov/qfd/states/21/21111.html> (last visited Nov. 16, 2012).

⁵⁶ *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 852 (2005).

⁵⁷ *Id.* at 853-54.

⁵⁸ *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 country.” *Id.* at 856.

⁵⁹ *Id.* at 873.

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.⁶⁰

However, because the Kentucky counties' displays lacked such neutrality-contextualizing features, and were the product of a purpose found to be religious, not secular, they were unconstitutional.

The four-Justice dissent, written by Justice Scalia, took special note of this qualification by the majority, offered (Justice Scalia surmised) “to dispel that impression that [the majority’s] decision will require governments across the country to sandblast the Ten Commandments from the public square.”⁶¹ 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”.⁶² Reasoned the dissent, “in 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.”⁶³

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. In 1961, the Fraternal Order of Eagles presented to the people of Texas 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.⁶⁴ 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.⁶⁵ 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.”⁶⁶ The plurality then took the reader on tour of the pervasive presence of Moses and Ten Commandments imagery throughout 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.”⁶⁷ Because the Ten Commandments have “an undeniable historical meaning,” and because “[s]imply

⁶⁰ *Id.* at 874.

⁶¹ *Id.* at 907 (Scalia, J., dissenting).

⁶² *Id.* at 906 (Scalia, J., dissenting).

⁶³ *Id.* at 900 (Scalia, J., dissenting) (emphasis in original).

⁶⁴ *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality).

⁶⁵ *Id.* at 683.

⁶⁶ *Id.* at 686.

⁶⁷ *Id.* at 688-90.

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.⁶⁸

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 ordered 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 tradition.”⁶⁹ That tradition, he reasoned, “does not compel the government to purge from the public square all that in any way partakes of the religious.”⁷⁰ 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 decided that “as a practical matter of *degree* this display is unlikely to prove divisive.”⁷¹

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 heavily credit his “strong presumption” against governmental religious displays, and force the Texas monolith’s removal.⁷² His lengthy dissent focused on the powerfully religious language of obligation carved into the Ten Commandments, and would have held that permitting government to display sacred religious texts “makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion.”⁷³ Separately, Justice Souter emphasized how a display of the literal text of the Ten Commandments, unlike a merely symbolic illustration of tablets, allowed passersby to sense that the monolith, “quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.”⁷⁴

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

A Ten Commandments monument, along with 14 others, stand 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.⁷⁵ 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.⁷⁶ In *Pleasant Grove City v. Summum*, all nine Justices rejected the religion’s insistence that the town was obligated on free speech grounds to give Summum “equal

⁶⁸ *Id.* at 690-92.

⁶⁹ *Id.* at 704 (Breyer, J., concurring).

⁷⁰ *Id.* at 699 (Breyer, J., concurring).

⁷¹ *Id.* at 703-04 (Breyer, J., concurring). How peculiarly individually 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.

⁷² *Id.* at 708 (Stevens, J., dissenting).

⁷³ *Id.* at 735 (Stevens, J., dissenting).

⁷⁴ *Id.* at 738 (Souter, J., dissenting).

⁷⁵ *Pleasant Grove City v. Summum*, 555 U.S. 460, 465 & n.1 (2009).

⁷⁶ *Id.* at 465.

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.⁷⁷ The Court noted, however, that government speech was not unbounded; “[f]or example, government speech must comport with the Establishment Clause.”⁷⁸ Since, however, only a Free Speech Clause claim had been asserted, the Establishment Clause question was not squarely implicated by the appeal.⁷⁹

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 a Santa Claus house, reindeers, a sleigh, a Christmas tree, carolers, candy-striped poles, colored lights, and a “Season’s Greetings” banner.⁸⁰ A divided 5-4 Court ruled the display constitutional in *Lynch v. Donnelly*, relying principally on the *Lemon* tripartite test. The four-Justice lead plurality opinion found 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 no administrative entanglement between the City and religion had occurred.⁸¹ 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”⁸² and because the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any.”⁸³

Justice O’Connor’s concurrence gave the plurality its fifth vote, though she would have preferred her own “endorsement” inquiry as a modification to the first and second inquiries of the *Lemon* test. So adjusted, she found the City’s purpose was not to promote Christianity, but only the public holiday, through the use of “traditional” symbols, and the effect of the City’s display did not communicate an endorsement of Christianity but only a celebration of a secular holiday.⁸⁴

⁷⁷ *Id.* at 481.

⁷⁸ *Id.* at 468.

⁷⁹ 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 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).

⁸⁰ *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

⁸¹ *Id.* at 679-85 (plurality).

⁸² *Id.* at 680 (plurality).

⁸³ *Id.* at 673 (plurality).

⁸⁴ *Id.* at 690-93 (O’Connor, J., concurring).

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.⁸⁵ 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”.⁸⁶ 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.”⁸⁷

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 fixed with a sign noting that the display had been donated by the Holy Name Society.⁸⁸ The neighboring city-county building hosted a 45-foot Christmas tree next to 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.”⁸⁹

The challenge to these two displays produced perhaps the most disheartening Establishment Clause decision ever released by the U.S. Supreme Court. Justice Blackmun wrote the lead opinion. 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 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.⁹⁰ Unlike the crèche approved five Terms earlier in *Lynch*, the crèche in Pittsburgh lacked a context that “detract[ed] from the crèche’s religious message” because it “stands alone,” without Santas or reindeer or candy-canes.⁹¹ A majority found that the evergreens and poinsettia plants were

⁸⁵ *Id.* at 698-704 (Brennan, J., dissenting).

⁸⁶ *Id.* at 698 (Brennan, J., dissenting).

⁸⁷ *Id.* at 725-26 (Brennan, J., dissenting).

⁸⁸ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 579-81 (1989).

⁸⁹ *Id.* at 581-87.

⁹⁰ 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.

⁹¹ *Id.* at 598 (opinion approved by five Justices).

not contextualizing but instead acted as a “floral frame” that “contribute[d] to, rather than distract[ed] from, the endorsement of religion conveyed by the crèche.”⁹² The majority also ruled that the display’s positioning – on the “Grand Staircase” of the 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.”⁹³

As for the menorah, Justice Blackmun wrote alone. The positioning of the menorah next to a Christmas tree, and accompanied by the “Salute to Liberty” official governmental message, he reasoned, created an “overall holiday setting”, particularly because the City had no “less religious” symbol choices other than the menorah from which to select to celebrate Chanukah.⁹⁴ 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 qualify as a religious endorsement.⁹⁵

The four dissenting Justices also agreed that the menorah display was constitutional, but they would have approved the Pittsburgh crèche display as well. Led by Justice Kennedy, the dissenters discerned “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.”⁹⁶ Justice Kennedy reasoned both are “purely passive symbols” which passersby “are free to ignore,”⁹⁷ and “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodations is minimal.”⁹⁸ The fact that either the *Lemon* tripartite test or the endorsement approach advocated by Justice O’Connor would invalidate these displays was, to Justice Kennedy, cause to disqualify those two tests. “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.”⁹⁹

Conversely, Justices Brennan, Marshall, and 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”.¹⁰⁰ These Justices would also install a “strong presumption” against public use of religious symbols, which neither display would survive.¹⁰¹

Crosses, Unattended:
Capitol Square Review & Advisory Board v. Pinette (1995)

The plaza surrounding the statehouse in Columbus is called Capitol Square, and for over a hundred years it has been a public forum for speeches, gatherings, and festivals.¹⁰² After a rabbi sought (and received) approval to erect a menorah next to the state’s annual Christmas tree, the Ku

⁹² *Id.* at 599.

⁹³ *Id.* at 599-600.

⁹⁴ *Id.* at 613-21.

⁹⁵ *Id.* at 632-37 (O’Connor, J., concurring).

⁹⁶ *Id.* at 664 (Kennedy, J., concurring in part and dissenting in part).

⁹⁷ *Id.*

⁹⁸ *Id.* at 662.

⁹⁹ *Id.* at 670.

¹⁰⁰ *Id.* at 637-46 (Brennan, J., concurring in part and dissenting in part).

¹⁰¹ *Id.* at 650-52 (Stevens, J., concurring in part and dissenting in part).

¹⁰² *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 757-58 (1995).

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 barred it from approving such an unattended display.¹⁰³ Resolving the Klan's subsequent court challenge in *Capitol Square Review and Advisory Board v. Pinette*, seven Justices ruled that the Establishment Clause would not bar approval by the state of the Klan's request for such private expressive speech in a quintessentially public forum. Justice Scalia and three of his colleagues favored a broad, categorical approach which would hold that the Establishment Clause cannot be violated by purely private religious expression occurring, with the state's consent, in public forum accessible to all equally.¹⁰⁴ Three other Justices, lead by Justice O'Connor, would reach the same conclusion, but only after first confirming that a "reasonable observer" would not conclude that the state was endorsing religion or any particular religious creed.¹⁰⁵ The two dissenting Justices, noting the unattended nature of 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 to the government, would have upheld the Board's refusal to grant Klan a permit.¹⁰⁶

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

A retired national park service employee sought to obtain the removal of a cross erected atop Sunrise Rock in the federal Mojave National Preserve in southeastern California.¹⁰⁷ After a federal trial court found the cross to violate the Establishment Clause and ordered its dismantling, Congress ordered 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 it constituted an attempt to preserve the cross in violation of its earlier ruling.¹⁰⁸ On appeal, the Supreme Court reversed. Three Justices, led by Justice Kennedy, favored a rehearing by the district judge to correct a misanalysis; those Justices concluded that the trial court had improperly tested the propriety of Congress' land-transfer statute.¹⁰⁹ Justice Kennedy noted one misapprehension that the trial judge had made: "The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."¹¹⁰ Justices Scalia and Thomas, in turn, would reverse, but for lack of Article III standing, finding that the plaintiff's injury – offense by the display of a cross on government property – had been abated by Congress' transfer action.¹¹¹ The four 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.¹¹²

Crosses, Unresolved:
Utah Highway Patrol Association v. American Atheists, Inc. (2011)

¹⁰³ *Id.* at 758-59.

¹⁰⁴ *Id.* at 770 (plurality).

¹⁰⁵ *Id.* at 772-83 (O'Connor, J., concurring).

¹⁰⁶ *Id.* at 797-815 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

¹⁰⁷ *Salazar v. Buono*, 130 S. Ct. 1803, 1812 (2010).

¹⁰⁸ *Id.* at 1813-14.

¹⁰⁹ *Id.* at 1815-21 (Kennedy, J.).

¹¹⁰ *Id.* at 1818.

¹¹¹ *Id.* at 1825-28 (Scalia, J., concurring).

¹¹² *Id.* at 1828-42 (Stevens, J., dissenting); *id.* at 1842-45 (Breyer, J., dissenting).

and *Mount Soledad Memorial Association v. Trunk* (2012)

Twice recently, the Supreme Court refused certiorari to lower court opinions that had found government uses of crosses to offend the Establishment Clause. In October 2011, the Court denied review of the Tenth Circuit’s decision to hold unconstitutional the placement of white roadside crosses in memory of fallen highway patrol officers.¹¹³ In an unusual move, Justice Thomas wrote a published dissent to the certiorari denial. “[O]ur Establishment Clause precedents,” he wrote, “remain impenetrable, and the lower courts’ decisions ... remain incapable of coherent explanation.”¹¹⁴ Citing liberally to lower court religious symbol cases, Justice Thomas noted how “we have learned the a crèche displayed on government grounds violates the Establishment Clause, except when it doesn’t,”¹¹⁵ that “a menorah displayed on government property violates the Establishment Clause, except when it doesn’t,”¹¹⁶ that a “Ten Commandments [monument] on government property also violates the Establishment Clause, except when it doesn’t,”¹¹⁷ and that “a cross displayed on government property violates the Establishment Clause, ... except when it doesn’t.”¹¹⁸ Mindful of this lower court quagmire, Justice Thomas urged that the Court “should not now abdicate our responsibility to clean up our mess.”¹¹⁹

In June 2012, the Court 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.¹²⁰ 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.”¹²¹ Although Justice Alito agreed that certiorari was properly denied because the 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.”¹²²

The Pledge of Allegiance:
Elk Grove Unified School District v. Newdow (2004)

A divorced parent without legal custody brought suit under the Establishment Clause to challenge the statutorily-mandated practice in California of beginning each school day by having his daughter and her classmates recite the Pledge of Allegiance—with the “under God” phrase that Congress had ordered inserted in 1954—(although California’s policy permitted unwilling students to simply remain quiet). The Ninth Circuit found that both the Pledge itself and the California statute requiring school days to begin with its recitation were unconstitutional.¹²³ That opinion

¹¹³ Utah Highway Patrol Ass’n v. American Atheists, Inc., 132 S. Ct. 12 (2011).

¹¹⁴ *Id.* at 22 (Thomas, J., dissenting from denial of certiorari).

¹¹⁵ *Id.* at 17-18.

¹¹⁶ *Id.* at 18.

¹¹⁷ *Id.* at 18-19.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 22.

¹²⁰ Mount Soledad Memorial Ass’n v. Trunk, 132 S. Ct. 2535 (2012).

¹²¹ *Id.* at 2535 (Alito, J., issuing statement).

¹²² *Id.* at 2536..

¹²³ Elk Grove Unified School District v. Newdow, 542 U.S. 1, 9-10 (2004). The Ninth Circuit later amended its opinion, this time omitting its earlier holding that the Pledge itself was unconstitutional, ruling that such a holding need not be reached in view of its invalidation of the California statute requiring the Pledge to be recited. *Newdow v. U.S.*

instantly unleashed a tsunami of potent opposition. The President declared the opinion “just nuts”; 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.¹²⁴ The Supreme Court granted certiorari in the case, *Elk Grove Unified School District v. Newdow*, and reversed. 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.¹²⁵ 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.”¹²⁶ Justice O’Connor wrote separately to explain how, under an endorsement analysis, the Pledge was merely “ceremonial deism” and, thus, non-endorsing: “It would be 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.”¹²⁷ And Justice Thomas wrote separately to advocate his view that the Establishment Clause is not a protection of individual liberties, and should be “dis-incorporated” from the Fourteenth Amendment.¹²⁸

Monument-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 that 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.¹²⁹ 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.¹³⁰

Monument-Like – “God Save This Honorable Court” Invocation:

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 claimants; this time, a divided court (in a 109-page series of opinions) denied relief. *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007 (9th Cir. 2010).

¹²⁴ See STEVEN G. GEY, RELIGION AND THE STATE 446 (2d ed. 2006).

¹²⁵ *Elk Grove Unified School District*, 542 U.S. at 17-18.

¹²⁶ *Id.* at 31 (Rehnquist, C.J., concurring).

¹²⁷ *Id.* at 44-45 (O’Connor, J., concurring).

¹²⁸ *Id.* at 45-52 (Thomas, J., concurring).

¹²⁹ *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.

¹³⁰ See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 29-30 (2004) (Rehnquist, C.J., concurring) (commenting that the motto, like other similar references, “strongly suggest that our national culture allows public recognition of our Nation’s religious history and character”); *County of Allegheny v. American 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.”).

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 Office with the closing “So help be God” phrase (which was, by then, moot, given that the Inaugural Address had been delivered) and also that, in hearing this 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.”¹³¹ The Court rejected both requests.¹³² 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.¹³³

III. THE FOURTH CIRCUIT FEDERAL AND STATE COURT SYMBOL RULINGS

It is, all in all, quite an opaque inheritance to the lower courts. There is little surprise that they have largely come away frustrated after their study of the controlling jurisprudence. Judge Ervin of the Fourth Circuit, for instance, called the precedent “often-dreaded and certainly murky.”¹³⁴ Judge Suhrheinrich of the Sixth Circuit labeled it “Establishment Clause purgatory.”¹³⁵ Judge Fernandez from the Ninth Circuit described the precedent as “dark materials” – “indefinite and unhelpful.”¹³⁶ Judge Kelly from the Tenth Circuit bemoaned the “judicial morass.”¹³⁷ The indefatigable Judge Posner of the Seventh Circuit offered 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 provide no guidance.”¹³⁸ From some quarters, even outright derision has been dumped on the Court, as courts

¹³¹ Newdow v. Roberts, 603 F.3d 1002 (D.C. Cir. 2010).

¹³² *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 *Marsb* had cited the practice as “a quintessential example of a permissible religious reference”).

¹³³ See *McCreary County v. American 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 School District v. Newdow*, 542 U.S. 1, 29-30 (2004) (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”); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 630-31 (1989) (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.”).

¹³⁴ *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999) (Ervin, J.).

¹³⁵ *American Civil Liberties Union v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005).

¹³⁶ *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (Fernandez, J., concurring).

¹³⁷ *Green v. Haskell County Bd. of Comm’rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting).

¹³⁸ *Doe ex rel. Doe v. Elmbrook School District*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting).

and commentators smart about the “St. Nicholas, too” test,¹³⁹ the “two-plastic reindeer rule,”¹⁴⁰ nativity scenes that must “closely resemble[] a miniature golf course,”¹⁴¹ and a constitutional standard “more commonly associated with interior decorators than with the judiciary.”¹⁴²

Exasperation aside, how have the lower courts worked through this Establishment Clause precedent? An examination of the religious symbol rulings from the federal and state courts within the Fourth Circuit offers some insights.

A. Ten Commandment Monuments

Four times the courts within the Fourth Circuit have assessed Ten Commandments displays. In 1997, the Fourth Circuit in *Subre v. Haywood County*¹⁴³ 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 appears 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 contained an abridged Ten Commandments and the United States and North Carolina flags.¹⁴⁴ The County had argued that Mr. Suhre lacked standing because, although a resident and taxpayer, he never changed his personal conduct as a consequence of the presence of the Ten Commandments tablets.¹⁴⁵ The Fourth Circuit rejected the argument and, noting that Mr. Suhre comes 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. “These forms of contact,” wrote the Fourth Circuit, “are the sort that courts have routinely recognized as sufficient to establish standing in Establishment Clause cases.”¹⁴⁶

On remand back to the district court, a bench trial was convened to resolve Mr. Suhre’s dispute. There, Judge Thornburg found for the County and against Mr. Suhre. The Court began by identifying the *Lemon* tripartite test as the proper judiciary standard for inquiry, modified (as Justice O’Connor had advocated) by the endorsement test.¹⁴⁷ Examining the recorded remarks from the 1932 dedication ceremony, the Court found the County had the secular purpose “to honor and respect the development of the judicial system.”¹⁴⁸ Then, citing Justice Stevens’ discussion in his *County of Allegheny* concurrence/dissent of how the U.S. Supreme Court courtroom’s Ten

¹³⁹ *American 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 creche 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?”).

¹⁴⁰ Note, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 495 (1986).

¹⁴¹ *American Civil Liberties Union v. County 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).

¹⁴² *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

¹⁴³ 131 F.3d 1093 (4th Cir. 1997) (*Subre I*).

¹⁴⁴ *Id.* at 1084-85; *Suhre v. Haywood County (Subre II)*, 55 F. Supp. 2d 384, 385-87 (W.D.N.C. 1999)

¹⁴⁵ *Subre I*, 131 F.3d at 1087.

¹⁴⁶ *Id.* at 1090.

¹⁴⁷ *Subre II*, 55 F. Supp. 2d at 393.

¹⁴⁸ *Id.* at 394.

Commandments sculpture survives because it was contextualized alongside images of great, secular lawgivers, the Court found that the effect of the Haywood County’s display was not endorsing: “the fact is that the plaques are 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. . . . This ‘signals respect’ not for religion but for the law. ‘It would be absurd to exclude such a fitting message from a courtroom.’”¹⁴⁹

Also in 1999, the Charleston County Court of Common Pleas in *Young v. County of Charleston*¹⁵⁰ enjoined the County Council from acquiring and displaying a Ten Commandments plaque in the Council’s anteroom. As in *Subre*, the Court applied the tripartite *Lemon* test, modified by the endorsement approach.¹⁵¹ The Court studied the Court’s opinions in *Stone*, *Lynch*, and *County of Allegheny*, noted that the plaque contained “undeniably a sacred text in the Jewish and Christian faiths,” and observed how it was to appear alone on the anteroom wall, without any additional, contextualizing materials.¹⁵² 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*.”¹⁵³

Finally, in 2005, a federal trial court in *Chambers v. City of Frederick*¹⁵⁴ rejected an Establishment Clause challenge to 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. The city had the land appraised, accepted bids, considered each bidder’s ability to pay and willingness to abide by land covenants which obligated the land’s upkeep and maintenance, and ultimately awarded the title to the Fraternal Order of Eagles.¹⁵⁵ A resident later accused the city of a sham transfer, and alternatively, that reasonable observers would misunderstand the now-private parcel to be public. The district court rejected both arguments, relying on the *Lemon* tripartite test and the endorsement approach.¹⁵⁶ First, the court found nothing unusual about the land conveyance, noting instead the city’s valid secular purpose “to dissociate itself from the commandments monument.”¹⁵⁷ Second, the court ruled that a reasonable observer – charged with familiarity of the history and context of the display – would not be misled but would understand the city’s intention was to dissociate itself from the monument and not to advance religion.”¹⁵⁸

B. The Crèche Displays

Twice, the courts of the Fourth Circuit have encountered crèche display litigations. In the first, *Smith v. County of Albemarle*,¹⁵⁹ the Court examined the County of Albemarle, Virginia’s decision

¹⁴⁹ *Id.* at 395-36 (quoting *County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring and dissenting)).

¹⁵⁰ 1999 WL 33530383 (S.C. Charleston Cty. C.P. Jan. 21, 1999).

¹⁵¹ *Id.* at *3.

¹⁵² *Id.* at *4-*5. Obviously, the trial judge in 1999 was unable to consider the reasoning offered by the Supreme Court in its 2005 opinions in *McCreary County* and *Van Orden*.

¹⁵³ *Id.* at *5.

¹⁵⁴ 373 F. Supp. 2d 567 (D. Md. 2005).

¹⁵⁵ *Id.* at 570-71.

¹⁵⁶ *Id.* at 571-72.

¹⁵⁷ *Id.* at 572.

¹⁵⁸ *Id.* at 573.

¹⁵⁹ 895 F.2d 953 (4th Cir. 1990).

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 sponsors. Episodically, the county office building’s lawn had been used for other activities, including pageants, fundraising billboards, sunrise services on Easter, weddings, concerts, and a demonstration.¹⁶⁰ The district court had declared the display unconstitutional, and a divided panel of the Fourth Circuit affirmed, relying on the *Lemon* tripartite test, modified by the endorsement analysis, and mindful of the Supreme Court’s opinions in *Lynch* and *County of Allegheny*.¹⁶¹ First, the Fourth Circuit agreed that the crèche violated the Establishment Clause because, unlike in *Lynch* and akin to *County of Allegheny*, it appeared alone, without any contextualizing secular symbols, because it was seated prominently in front of an official government building, and because the disclaimer sign was found to be insignificant.¹⁶² Next, the Court 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.¹⁶³

Nine years later, the Fourth Circuit revisited the Establishment Clause/Speech Clause intersection in *Warren v. Fairfax County*,¹⁶⁴ 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.¹⁶⁵ The County had denied her request, noting that only County residents or employees were eligible to use this public forum.¹⁶⁶ 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.¹⁶⁷

C. 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.¹⁶⁸ The act authorized the issuance of specialty license plates for private motorists which, according to the law, “must contain the words ‘I Believe’ and a cross superimposed on a stained glass window.”¹⁶⁹ Unlike normal specialty plate procedures which originate by application from private groups, the “I Believe” plate was developed and designed by the state itself. Four religious leaders and two religious-cultural organizations sued to permanently enjoin the issuance of these license plates as violations of the Establishment Clause. Applying the tripartite *Lemon* test, along with the endorsement approach, the federal district court entered summary judgment for the plaintiffs, granting their requested injunction.¹⁷⁰ The Court first found

¹⁶⁰ *Id.* at 955.

¹⁶¹ *Id.* at 956-58.

¹⁶² *Id.* at 958. The dissenter, Judge Sol Blatt, sitting by designation, would have found no Establishment Clause violation, given the disclaimer sign and the fact that other groups were permitted to use the lawn for their own purposes. *Id.* at 961 (Blatt, J., dissenting).

¹⁶³ *Id.* at 958-60. 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’”).

¹⁶⁴ 196 F.3d 186 (4th Cir. 1999).

¹⁶⁵ *Id.* at 188-89; *id.* at 199 (Niemeyer, J., dissenting).

¹⁶⁶ *Id.* at 189.

¹⁶⁷ *Id.* at 190.

¹⁶⁸ *Summers v. Adams*, 669 F. Supp. 2d 637, 645 (D.S.C. 2009).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 657.

that, in expressly authorizing a faith-specific religious license plate which required the inclusion of Christian 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.”¹⁷¹ Neither of the two asserted secular goals (expanding motorists’ choices of possible plates and accommodating Christian plate wishes, like the specialty plate program accommodates fraternities, sororities, and other groups) persuaded the Court. The Court next ruled that the act’s primary effect was to promote and endorse Christianity, since 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.”¹⁷² Finally, in taking sides in the Christian debate over which symbols to display and how, and in later deciding which other religions to include on license plates and which to avoid, the state had, ruled the Court, excessively entangled itself in religious matters.¹⁷³

D. The Pledge of Allegiance

The Fourth Circuit has once encountered a challenge to the Establishment Clause constitutionality of the Pledge of Allegiance, in *Myers v. Loudoun County Public Schools*.¹⁷⁴ There, an Anabaptist Mennonite objected to the forcible exposure of his two school-age sons to the Pledge, as commanded by the Virginia Pledge recitation statute.¹⁷⁵ 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.¹⁷⁶ A three-judge panel of the Fourth Circuit rejected the claim, though each Judge wrote separately (none of whom applied the *Lemon* test). The lead opinion approved the Pledge as both a historically-confirmed proper acknowledgement of religion and as a patriotic exercise, not a religious one.¹⁷⁷ 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.¹⁷⁸ The final opinion, assessing the issue as an otherwise “extremely close case,” approved the Pledge solely on the “decades-long succession of statements from the [Supreme] Court that answers the specific questions before us.”¹⁷⁹

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*.¹⁸⁰ There, in a single, unanimous opinion, the Court rejected a challenge to the decision to inscribe the motto into the façade of the

¹⁷¹ *Id.* at 658.

¹⁷² *Id.* at 663.

¹⁷³ *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 “Absolutely 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.

¹⁷⁴ 418 F.3d 395 (4th Cir. 2005).

¹⁷⁵ *Id.* at 397-38.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 401-02 (Williams, J.).

¹⁷⁸ *Id.* at 408-09 (Duncan, J., concurring).

¹⁷⁹ *Id.* at 409-11 (Motz, J., concurring).

¹⁸⁰ 407 F.3d 266 (4th Cir. 2005).

Davidson County, North Carolina government center. The Court applied the tripartite *Lemon* test, as modified by the endorsement approach.¹⁸¹ Approving the district court’s Rule 12(b)(6) dismissal of the complaint for failure to state a cognizable claim, the Court held that the language’s adoption as the national motto provided a qualifying secular purpose; that the motto was “patriotic and ceremonial” rather than “theological or ritualistic”, and thus transmitted an effect that neither favors religion nor imparts to a reasonable observer a sense of endorsement; and finally that there was no allegation of any ongoing, comprehensive surveillance of religious activity relating to the motto inscription that could qualify as an excessive entanglement.¹⁸²

F. The Easter Holiday

Finally, in 1999, in *Koenick v. Felton*,¹⁸³ the Fourth Circuit passed on the constitutionality of a Maryland statute that ordered public school holidays on Good Friday and Easter Monday. Once again, the Court applied the tripartite *Lemon* test, as adjusted by the endorsement lens (though only after noting the Court’s confusing experimentation with various other tests, like the coercion and neutrality inquiries).¹⁸⁴ The unanimous, single-opinion panel denied the challenge. First, the Court noted the requirement of a “clearly”—but not “entirely”—secular purpose, and found it readily in the school board’s explanation that high rates of absenteeism among students and teachers (with resulting waste of scarce educational resources) would be expected on Good Friday and Easter Monday (and, additionally, on Yom Kippur and Rosh Hashanah), which justified creating these holidays.¹⁸⁵ Next, the Court found no violative effect in the holidays, observing that the school board did not prescribe what students and teachers were to do during those days, and that students and teachers of all faiths benefitted equally from the time off.¹⁸⁶ Finally, the Court found no excessive entanglement since the school board need only consult a calendar to identify the dates of these religious celebrations.¹⁸⁷

IV. OBSERVATIONS

Tests are 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, predictable, reliably-applied standard for Establishment Clause constitutionality has not been its competence to build tests. After all, judicial tests are 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 seeing the destination. The Court’s enduring problem has been its inability to agree on where that road should go. Atmospheric, undirecting generalities aside, what does constitutional religious liberty really mean? To be fair, perhaps this shortcoming should come as no surprise, since the starting line – the drafters and ratifiers and their original intentions – remain mired in debate.

¹⁸¹ *Id.* at 268-69.

¹⁸² *Id.* at 267-73.

¹⁸³ 190 F.3d 259 (4th Cir. 1999).

¹⁸⁴ *Id.* at 264-65.

¹⁸⁵ *Id.* at 265-66.

¹⁸⁶ *Id.* at 267-68.

¹⁸⁷ *Id.* at 268-69. Interestingly, the Court acknowledged that Christian denominations differ on the dating of Easter, and the school board chooses the Roman Catholic and Protestant Christian dating, while ignoring the Eastern Orthodox calendar. Nevertheless, the “entanglement” was still inconsequential to the court since whichever dating method is chosen, the exercise remained simply a calendar consultation one.

At the “boots-on-the-ground” level, where the daily, heavy-lifting work of adjudication is performed, the lower courts have rightly complained about the lack of a clear direction from the perch atop the federal hierarchy, but their work has gone on unabated. As this survey of Fourth Circuit case law verifies, their efforts have been commendable. Although the Supreme Court continues to dabble with different tests, the courts of the Fourth Circuit have seemed to largely settle on two – the *Lemon* tripartite test (as adjusted by endorsement concepts) and the *Marsh* historical lineage approach (for longstanding, traditional practices). Although the sometimes-yes/sometimes-no “interior decorating” elements of the constitutional search in Ten Commandments and crèche disputes are plainly unsettling, the courts of the Fourth Circuit look to be fairly faithful in forecasting which types of displays cross the line the Supreme Court’s precedents have set and which do not. None of the displays tested by the Fourth Circuit courts really seem to lie at the outer margins of constitutionality; measured only by the incumbent precedent from the Supreme Court, the Fourth Circuit courts have not yet battled through a really tough fact pattern. For example, none of the Ten Commandments monuments or crèches tested was *partially* contextualized, and no cross case has yet bubbled up to the Fourth Circuit courts.

This is not to accept that the Supreme Court’s precedent in this area has been sound, or its tests constitutionally accurate (or, for that matter, even helpful), and that frustration is unlikely to pass us by anytime soon. That may just be the way of things in the realm of a constitutional guarantee that is uncodified, non-specific, imprecise, and ephemeral. But in studying how this one Circuit and its courts have applied this existing case law to resolve powerfully contentious religious debates, it is hard to resist at least a sense of admiration for the effort.