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Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment

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I. INTRODUCTION

Commenting on the religious protection guaranteed by the First Amendment in an 1802 letter to the Danbury Baptist Association, Thomas Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.[1]

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[1]Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting then President Jefferson's letter to the Danbury Baptist Association dated Jan. 1, 1802); *see also* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (calling Jefferson's letter a "short note of courtesy" and

With that passage, Mr. Jefferson unwittingly penned a metaphor, the "wall of separation between church and state," that is presently enshrined in the pantheon of legal prose among a select group of phrases such as *Plessy v. Ferguson's* "separate but equal"[2] and criminal law's "reasonable doubt."[3] Each of these phrases earns its exalted position because each captures the essence of an issue that plagues society. The racial inequality given formal sanction in *Plessy's* now abandoned "separate but equal" doctrine continues to be a thorn in our nation's side, while advances in DNA testing expose the disturbingly thin veneer of protection offered by the "reasonable doubt" standard, thereby triggering questions about criminal justice in general.[4] Similarly, the dimensions of Mr.

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noting that it was written fourteen years after the passage of the Bill of Rights); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1565–66 (1989) (pointing out that the famous "wall of separation" metaphor was coined by Roger Williams over 150 years prior to Jefferson's usage of it).

[2]Plessy v. Ferguson, 163 U.S. 537, 537-64 (1896) (upholding a Louisiana law providing for segregated facilities on trains for passengers). The Court wrote that the goal of the Fourteenth Amendment:

> was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544. From this case, then, emerged the "separate but equal" doctrine, which was written as "equal but separate" in the case, but has mutated over time).

[3]*See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (6th ed., Aspen 1995).

[4]For some recent work on race and equality, see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (examining the role of race in criminal justice by exploring topics such as racial profiling); ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY, 1890–2000 (2001). For pieces discussing wrongful convictions that result from the failure of the criminal justice system and its reasonable doubt standard, see generally EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (Yale Univ. Press 1932); BARRY SCHECK, ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Gary Spencer, *$1.5 Million for Convicted Rapist for Earlier Mistaken Prosecution*, N.Y. L.J., July 23, 1997, at 1 (reporting on the unjust rape conviction and compensation of Kerry Kotler); Lisa W. Foderaro, *DNA Frees Convicted Rapist After Nine Years*, N.Y. TIMES, Aug. 1, 1991, at B1, *available at* LEXIS, News Library (recounting the reversal of the rape conviction of Charles Dabbs); Barton Gellman, *DNA Test Clears Man Convicted of SE Rape; Move Keeps Findings out of D.C. Court*, WASH. POST, Mar. 20, 1990, at A12, *available at* LEXIS, News Library (recounting the rape case against Edward Green); J. Michael Kennedy, *DNA Test Clears Man Convicted of Rape Counts*, L.A. TIMES, Jan. 16, 1994, at B1, *available at* LEXIS, News Library

Jefferson's metaphorical First Amendment protection are the subjects of frequent public controversy. The sheer number of newspaper articles that address the issue of the separation of church and state demonstrates the degree to which the topic permeates public discourse.[5] In short, the wall between church and state

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(documenting the facts surrounding the arrest and exoneration of Mark Bravo); Larry King, *Salvaged by Science: DNA Helps Set the Innocent Free*, NEW ORLEANS TIMES-PICAYUNE, May 14, 1995, at A22, *available at* LEXIS, News Library (reporting on the releases of Garrett Davis and David Shepard); James F. McCarty, *DNA Test Lets Prisoner Go Home*, PLAIN DEALER (Cleveland, Ohio), Sept. 17, 1994, at A1, *available at* LEXIS, News Library (recalling the release of Brian Piszczek after DNA tests); James Thorne, *DNA Test Frees Innocent Man*, NEWS & REC. (Greensboro, N.C.), July 1, 1995, at A1, *available at* LEXIS, News Library (documenting the arrest and exoneration of Ronald Cotton following a rape conviction).

[5]Steven Conn, *Religion Is Best Left out of this Nation's Public Discourse*, COLUMBUS DISPATCH, July 3, 2002, at 11A, *available at* LEXIS, News Library (reacting to the *Newdow v. United States Congress*, 492 F.3d 597 (9th Cir. 2002) decision regarding the constitutionality of the Pledge of Allegiance); Alan Cooperman, *DeLay Criticized for "Only Christianity" Remarks*, WASH. POST, Apr. 20, 2002, at A5, *available at* LEXIS, News Library (recounting the criticism aimed at a member of the House of Representatives who said that only Christianity offered reasonable answers regarding the purpose of life); David Fisher, *Council Will Pray . . . to Whomever; Marysville Invocation Must Be 'Non-Denominational,' but Deity's Name Is Allowed*, SEATTLE POST-INTELLIGENCER, Feb. 27, 2002, at B1, *available at* LEXIS, News Library (examining the issue of a town council's use of prayer in light of church-state principles); Josh Loftin, *Civil Rights Under Fire, ACLU Chief Says*, DESERET NEWS (Salt Lake City, Utah), May 3, 2002, at B2, *available at* LEXIS, News Library (noting a lawsuit regarding the sale of a piece of property to the Mormon Church that is alleged to have violated the separation of church and state); Anthony Lonetree & James Walsh, *State Senate Backs Pledge Bill; The Measure, Which Would Require at Least Weekly Recitation of the Pledge of Allegiance, Passed After a Debate on the Nature of Loyalty*, STAR TRIB. (Minneapolis, Minn.), Apr. 26, 2002, at 1A, *available at* LEXIS, News Library; Cody Lowe, *Prayer in School? No Problem, Says Ex-Lobbyist*, ROANOKE TIMES & WORLD NEWS, Apr. 28, 2002, Sec. Extra, at 1, *available at* LEXIS, News Library; Stephen Ohlemacher, *Moments of Silence Approved for Schools; Taft Expected to Sign Compromise Measure*, PLAIN DEALER (Columbus, Ohio), Apr. 24, 2002, at A1, *available at* LEXIS, News Library; Rosanna Ruiz, *School Prayer a Legal Football for Santa Fe; Court Allows Latest Suit to Proceed*, HOUSTON CHRON., Apr. 13, 2002, at A36, *available at* LEXIS, News Library (discussing a lawsuit by a high school student alleging that a ban on pre-game messages violated her First Amendment rights); Liz Sidoti, *States Debate School Moments of Silence*, CHI. TRIB., May 19, 2002, Zone C, at 10, *available at* LEXIS, News Library; Peter Steinfels, *Beliefs; Behind the Concept of the Separation of Church and State, a Scholar Finds Some Unsettling Origins*, N.Y. TIMES, July 6, 2002, at B5, *available at* LEXIS, News Library; Gayle White, *Jefferson Letter Has Unusual History; "Wall of Separation" Wasn't Only Thing on President's Plate*, ATLANTA J. CONST., July 6, 2002, at 1B, *available at* LEXIS, News Library (discussing the circumstances of Jefferson writing the well-known phrase).

divides people from Wisconsin[6] to Florida[7] and from North Carolina[8] to California.[9]

Lying at the heart of the reasons for the ever-present focus on church/state issues is the politicization of religious faith. Organized religious groups routinely inject religion into secular issues such as abortion or tax reform by commenting on them from a religious viewpoint.[10] Moreover, some Christians are members of the

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[6]*See, e.g.*, Anita Clark, *Faith-Based Charity: It's Controversial, but Not New; Wisconsin Has Seen Several Programs and Has Seen the Church-State Issue Raised in Court*, WIS. ST. J., Feb. 4, 2001, at A1, *available at* LEXIS, News Library; Peter Maller, *Speaker Promises to Stay off Religion; Christian Says He Can Still Be Effective at Public High School*, MILWAUKEE J. SENTINEL, Jan. 31, 2002, at 1B, *available at* LEXIS, News Library (describing a speaker's efforts to refrain from discussing religious topics in public schools in order to prevent a violation of the separation between church and state).

[7]*See, e.g.*, Roger Bull, *Is Anything the Matter With Our Motto? "In God We Trust" Inspires Discussion*, FLA. TIMES-UNION (Jacksonville, Fla.), May 13, 2002, at C1, *available at* LEXIS, News Library; Thomas B. Pfankuch, *Faith-Based Prison Dorms, Programs Raise Questions*, FLA. TIMES-UNION (Jacksonville, Fla.), Apr. 29, 2002, at B1, *available at* LEXIS, News Library (discussing a program allowing religious inmates to be housed in a separate dorm that is less crowded and the complaint that the program may violate the separation between church and state); Lois K. Solomon, *Battle over Student-Led Prayer at Graduations Starts to Heat up*, SUN-SENTINEL (Fort Lauderdale, Fla.), Jan. 31, 2002, at 1A, *available at* LEXIS, News Library.

[8]*See, e.g.*, Sherry Jones, *Pledge Ban Elicits Strong Feelings from Area*, MORNING STAR (Wilmington, N.C.), June 28, 2002, at 1A, *available at* LEXIS, News Library (discussing reaction to the *Newdow* decision); Todd Silberman, *Bill Allows Display of Bible Tenets*, NEWS & OBSERVER (Raleigh, N.C.), June 13, 2001, at A1, *available at* LEXIS, News Library (examining a proposal that would allow the posting of the Ten Commandments in schools in possible violation of the First Amendment and Supreme Court precedent).

[9]*See, e.g.*, Richard Fausset, *Charter Schools and Wall of Separation; Education: Religious Groups Operating Tax-Supported Campuses Have Won Praise from Some, but Critics Question the Church-State Ties*, L.A. TIMES, Jan. 27, 2002, Sec. Metro, at 1, *available at* LEXIS, News Library; Charles Levendosky, *Voucher Ruling Sidesteps Constitution*, SAN DIEGO UNION-TRIB., July 7, 2002, at G4, *available at* LEXIS, News Library; Mike Lynch, *Free to Choose; Supreme Court's Decision on Vouchers Is a Victory for Children*, SAN DIEGO UNION-TRIB., July 7, 2002, at G4, *available at* LEXIS, News Library.

[10]*See* Curt Anderson, *Religion; Bills Would Let Churches Be More Politically Active*, L.A. TIMES, May 18, 2002, Part 2, at 21, available at LEXIS, News Library (describing not only the Christian Coalition's support for tax reform, but also the opposition of other religious groups to the proposed reform); Juliet Eilperin, *GOP Seeks to Ease Curbs on Churches in Politics*, WASH. POST, June 3, 2002, at A4, *available at* LEXIS, News Library (noting the staunch anti-abortion stance of the Traditional Values Coalition); Michael Tackett, *Bush Keeps GOP Conservatives Happy; Unlike His Father, President Follows Reagan's Example*, CHI. TRIB., Mar. 10, 2002, Zone C, at 9, available at LEXIS, News Library (commenting on the President's stance on abortion to keep conservative support).

so-called "Christian Coalition," a group with an overt political agenda and whose head, Gary Bauer, ran for the presidency in 2000.[11] Further cementing the nexus between politics and religion, political candidates recognize the block of votes held by various religious groups and are more than willing to invoke religion on the campaign trail.[12] During the most recent presidential election, for example, then Texas Governor George W. Bush named "Christ" as his "favorite political philosopher" while then Vice-President Al Gore followed suit by announcing that he was a "born-again Christian" who frequently queried to himself "W.W.J.D."[13] While such statements may not be affirmative efforts to gain votes, like touting one's record of political achievement, they are efforts, at the very least, to avoid the political death penalty that would inevitably result from being labeled as "anti-religious."[14]

Given the link between religious faith and politics prior to an election, religion historically follows those elected into legislative halls and serves as a significant influence on policy. On the positive side of the historical scale, religious fervor not only ignited the call to abolish slavery in the eighteenth century, [15] but also fueled the social changes brought about during the Civil Rights movement of the 1960s.[16] On the negative end of the historical scale, however, religion has also been a platform for intolerance. During the colonial period, legal unions between church and government existed in at least nine of the thirteen colonies and many of these colonies discriminated against followers of religions without official

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[11]Nina J. Easton, *The Power and the Glory; Who Needs the Christian Coalition When You've Got the White House? The Religious Right's Covert Crusade*, AM. PROSPECT, May 20, 2002 at 20, *available at* 2002 WL 7761447.

[12]*Id.*

[13]Maureen Dowd, *Liberties; Playing the Jesus Card*, N.Y. TIMES, Dec. 15, 1999, at A23, *available at* LEXIS, News Library (the acronym "W.W.J.D." stands for "What Would Jesus Do?").

[14]*See* Peter Steinfels, *Beliefs*, N.Y. TIMES, Jan. 27, 1996, Section 1, at 10, *available at* LEXIS, News Library (noting the view of one columnist that the United States is "drenched in religion").

[15]Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 305-06 (2002) (describing the relationship between religion and the abolition of slavery).

[16]Steven A. Delchin, *Scalia 18:22: Thou Shall Not Lie With the Academic and Law School Elite; It Is an Abomination—Romer v. Evans and America's Culture War*, 47 CASE W. RES. L. REV. 207, 248 (1996) (noting that religion played a significant role in advancing civil rights during the 1960s).

sanction.[17] So, for example, courts in colonial Virginia defined some Baptist preaching as criminal and punishable by up to five months in jail.[18] Similarly, a 1702 Connecticut statute barred citizens from entertaining "any Quaker, Ranter, Adamite, or other notorious heretic,"[19]and Maryland enacted laws to limit the influence of Catholicism within its borders.[20] Despite the positive social changes traceable to the 1960s and the absence of governmental sanction, some modern religious sects continue to suffer discrimination in many aspects of life.[21] Ironically, the mixture of religion and politics simultaneously possesses the power to combat grave social ills and to divide society into segments thereby increasing social conflict.

As evidence of its historical ability to create a societal schism, members of the religious majority ran roughshod over adherents of minority faiths in the political arena prior to the passage of the Establishment Clause. In fact, early Americans apparently worried little about the separation between the secular and the sectarian because the "overwhelming majority" of colonists were Protestant Christians.[22] John Adams remarked that Catholics were as rare as

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[17]LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1–11 (2d ed. 1994) (stating that the colonies "discriminated against Roman Catholics, Jews, and even dissenting Protestants who refused to comply with local laws benefiting establishments of religion." *Id.* at 1. Further asserting that four of the colonies—Rhode Island, Pennsylvania, Delaware, and New Jersey—never had an established religion while New Hampshire had a "diversified and uniquely American" establishment. *Id.* at 11.).

[18]*Id.* at 3 (listing the failure to preach from the Anglican Book of Common Prayer and failure to attend services of the established church as criminal acts in Virginia at the time).

[19]THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 79 (1986) (also noting that Massachusetts could impose the death sentence upon Quakers who refused banishment). *Id.* at 22.

[20]*Id.* at 51 (observing that the law excluded Catholics from public office, prevented them from being lawyers, and prohibited priests from converting citizens or baptizing children except those of Catholic parents); *see also, e.g.*, ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 2 (5th ed. 1996) (noting that Catholics were prohibited from even entering Massachusetts under penalty of death).

[21]*See generally* United States v. Columbus Country Club, 1992 U.S. Dist LEXIS 16438, at *1-5 (E.D. Pa. 1992) (housing discrimination against non-Catholics); U.S. COMMISSION ON CIVIL RIGHTS, RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE 88–94, 259–79 (1979) (describing discrimination against Jews and Catholics in matters of employment).

[22]*See* CURRY, *supra* note 19, at 218 (stating that "[a]fter a century and a half of colonial settlement in which the overwhelming majority of citizens were Protestant, a contemporary

comets in Braintree, Massachusetts,[23] and the failure to subscribe to any religious faith during this period was akin to a failure to believe that gravity existed.[24] The marriage of religion and politics during this period simply paved the way for the discriminatory laws like those in Virginia, Connecticut, and Maryland.[25] Although the disparity is not as great as during colonial times, a recent U.S. News & World Report survey reported that Christianity remains the predominant religion of choice for the people of this country.[26] According to that survey, 84.2% of the adult population (159 million adults) is Christian while adherents of all other religions combined account for only 6.5% of the adult population.[27] On the other end of the religious spectrum or lack thereof, 7.6% of the survey's respondents claimed to follow no religious creed whatsoever.[28] Because the number of adherents of non-Christian religions is rising, however, the religious profile of the nation is becoming increasingly diversified.[29]

Given the lopsided disparity in these statistics and despite the Establishment Clause, modern politically active members of the majority faith predictably try to flex their political muscles in an attempt to gain political weight. But unlike the warm reception that greeted the religious majority during the colonial era, the Jeffersonian wall erected in the Establishment Clause of the First Amendment provides a substantial obstacle to obtaining the government's imprimatur for the majority religion. The Establishment Clause declares that "Congress shall make no law respecting an establishment of religion."[30] Recognizing the risks

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would in many instances have been hard put to define where Protestantism ended and secular life began.").

[23]JAMES HENNESEY, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES 77 (1981) (citing 9 John Adams, Works 355 (C. Adams ed., Boston 1856)).

[24]JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 44 (Johns Hopkins Univ. Press 1985) (1946) (observing that disbelief during this period required a divorce from reality).

[25]*See supra* notes 17-20 and accompanying text.

[26] Jeffrey L. Sheler, *Faith in America*, U.S. NEWS & WORLD REP., May 6, 2002 at 40, 43.

[27]*Id.*

[28]*Id.* (1.9% of the survey's respondents had no answer).

[29]*Id.* (the total number of non-Christians in the year 2000 was 13.4 million represented by Jews, Muslims, Buddhists, Hindus, and Sikhs in descending order of percentage of population).

[30]U.S. CONST. amend. I.

associated with religious influence in government and vice versa, the Supreme Court declared that the Establishment Clause extracts religion "from the vicissitudes of political controversy" and places it "beyond the reach of majorities and officials."[31] In light of the increasing religious pluralism of this nation, the Establishment Clause "helps to defuse a potentially explosive situation" by substantially, but certainly not entirely, removing religion from political elections.[32]

Since religion cannot be entirely eliminated from the political realm, the intersecting orbits of religion and politics ultimately produce a sectarian competition for political gain where the "zeal for different opinions concerning religion . . . [has] divided mankind into parties . . . and rendered them much more disposed to vex and oppress each other than to cooperate for their common good."[33] Moreover, the division of citizens into religious factions that "vex and oppress" one another for political ends exacts a substantial toll on society because the clash inevitably creates winners and losers based upon the number of adherents, information, wealth, or the like. Indeed, James Madison forewarned that the majority "may employ Religion as an engine of Civil policy" to reduce "from the equal rank of Citizens all those whose opinions in religion do not bend to those of the Legislative authority."[34] Attesting to the endurance of the problem identified long ago by Madison, Justice O'Connor recognized "the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish" in a 1990 case.[35] Thus, sectarian contests for political clout are simply manifestations of a basic societal conflict—the majority versus the minority—that risks the political disempowerment of adherents of minority religions.

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[31]W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (discussing the purpose of the entire Bill of Rights); *see also* Engle v. Vitale, 370 U.S. 421, 432–33 (1962).

[32]*See supra* note 17 at xiii.

[33]THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

[34]James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT 7-9, 11 (Ams. United for Separation of Church & State, 1965).

[35]Employment Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) (specifically discussing the burdens on the named religions in terms of the free exercise of their religions).

Amid the numerous church/state clashes between members of the majority and minority religions that encompass a spectrum of issues ranging from education[36] to the Pledge of Allegiance,[37] controversies involving the connection between government and Christian symbols on public property increasingly capture the attention of the nation.[38] One of the most publicized controversies surrounding a display of a religious symbol involved Alabama's Judge Roy Moore

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[36]*See, e.g.*, James Dillard, *In Virginia, a Tuition Tax Credit Is More Likely*, WASH. POST, July 7, 2002, at B3, *available at* LEXIS, News Library (discussing the ramifications of the Supreme Court's decision to uphold an Ohio school voucher program in light of the separation of church and state in Virginia's constitution); Jeanette Faulkner, *Voucher Ruling Is a Land-Mine Decision for Christian Schools*, DALLAS MORNING NEWS, July 6, 2002, at 4G, *available at* LEXIS, News Library; Andrew Greeley, *School Choice Shouldn't Involve Religion*, TIMES UNION (Albany, N.Y.), July 6, 2002, at A7, *available at* LEXIS, News Library; Jodie Morse, *A Victory for Vouchers; the Supreme Court Upholds School Choice. But Will Its Decision be the Final Word on Education Reform?*, TIME, July 8, 2002, at 32, *available at* LEXIS, News Library (discussing the Supreme Court's decision to uphold a voucher program in Ohio); Richard Rothstein, *Defining Failed Schools Is Harder Than It Sounds*, N.Y. TIMES, July 3, 2002, Sec. B, at 9, *available at* LEXIS, News Library (stating that the Supreme Court ventured beyond its knowledge by upholding the voucher program in Ohio).

[37]*See, e.g.*, Newdow v. United States Cong., 292 F.3d 597, 612 (9th Cir. 2002) (holding that the 1954 Act of Congress that added the words "under God" to the Pledge and the practice of teacher-led recitation of the Pledge utilizing the words "under God" violated the Establishment Clause); *see also* Howard Fineman, *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 20, *available at* 2002 WL 7294585 (examining the political implications of the *Newdow* decision); Ellen Goodman, *Reasonable Pledge Ruling Stirs Divisiveness*, DESERET NEWS (Salt Lake City, Utah), July 5, 2002, at A17, *available at* LEXIS, News Library; John Leo, *Folly 'round the Flag*, U.S. NEWS & WORLD REP., July 15, 2002, at 4, *available at* 2002 WL 8430747 (calling the 9th Circuit decision a "howler").

[38]*See, e.g.*, Nick Anderson, *Ten Commandments Proposal Illustrates Peril to Politicians*, L.A. TIMES, July 14, 1999, at A5, *available at* LEXIS, News Library; E.J. Dionne, Jr., *Whose Commandments?*, WASH. POST, Mar. 19, 2002, at A21, available at LEXIS, News Library; Steve Gushee, *Keeping Commandments a Tall Order*, PALM BEACH POST, June 19, 1999, at 4D, *available at* LEXIS, News Library; Rev. Brian Henry, *The Plaque Should Stay*, PITTSBURGH POST-GAZETTE, Jan. 7, 2001, at B3, *available at* LEXIS, News Library; Chris Joyner, *County Won't Appeal Ruling*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, May 16, 2002, at B1, available at LEXIS, News Library; Michael Pearson, *Battle Raging over Ten Commandments*, DESERET NEWS (Salt Lake City, Utah), Nov. 13, 1999, at A9, *available at* LEXIS, News Library; John Rivera, *Push for Posting 10 Commandments Gaining in States; "Hang Ten" Campaign Seeks to Bypass Church-State Issue*, BALTIMORE SUN, Feb. 14, 2000, at 1A, *available at* LEXIS, News Library; Rick Wagner, *Will Ten Commandments Plaque Remain?; Sullivan Attorney Says It's Unclear If AG's Ruling Covers County Display*, BRISTOL HERALD COURIER (Va.), Apr. 8, 2002; Jonathan Zimmerman, *Commandments' Foes Miss Point*, ATLANTA J. & CONST., Mar. 21, 2002, at 20A, *available at* LEXIS, News Library.

and his posting of a plaque enumerating the Ten Commandments behind his bench.[39] Judge Moore's display and subsequent litigation in both federal and state courts ignited the passions of those on both sides of the debate, including those of then Governor Fob James who said that "[t]he only way that the Ten Commandments. . . . will be stripped from Alabama's courts will be a force of arms."[40] After being dismissed for the plaintiffs' lack of standing in the Northern District of Alabama,[41] the case wound its way around the state court system and the Alabama Supreme Court eventually dismissed the case.[42] And outside of the courtroom setting, the scores of

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[39]*See generally Ala. Freethought Ass'n v. Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995) (the case also involved the use of prayer prior to court sessions); *see also* Alabama *ex. rel.* James v. ACLU, 711 So. 2d 952, 959 (Ala. 1998) (stating that the Moore litigation had "[f]rom its inception . . . attracted the attention of the national news media, as well as that of the local media").

[40]Sandee Richardson, *James Denounces Courtroom Prayer Ruling*, MONTGOMERY ADVERTISER, February 6, 1997, at 2B. Furthermore, Governor James made numerous other comments about the case. *See, e.g.*, Rick Bragg, *Judge Allows God's Law to Mix with Alabama's*, N.Y. TIMES, Feb. 13, 1997, at A14, *available at* LEXIS, News Library (recounting statements by Gov. James where the refusal to accept removal is comparable to Lincoln's refusal to accept slavery); Sandee Richardson, *Hundreds Rally in Support of Judge in Prayer Case*, MONTGOMERY ADVERTISER, Sept. 12, 1996, at 1A (describing a rally in support of Judge Moore and an address by Gov. James during which he claimed he would use all legal means, including Alabama police and members of the Alabama National Guard, to prevent the removal of the plaque).

[41]Moore, 893 F. Supp. at 1542–43.

[42]State *ex. rel.* James, 711 So. 2d at 958,977; Sandee Richardson, *Before the Rally Thousands Gather in Support of Judge*, MONTGOMERY ADVERTISER, Apr. 12, 1997, at 1A (noting that Judge Moore received the support of three congressman and the Christian Coalition). In the state court system, the case took a circuitous route to its ultimate conclusion. On November 22, 1996, Circuit Court Judge Charles Price ruled that the Ten Commandments display did not violate the Constitution. *State ex rel. James*, 711 So. 2d at 959. However, the ACLU then asked that Judge Price view the actual display in the courtroom setting instead of relying on the evidence of it used at trial. *See* Sandee Richardson, *ACLU Continues Battle with Judge*, MONTGOMERY ADVERTISER, Nov. 23, 1996, at 1A. After so doing, Judge Price reversed himself and found that the display violated the Constitution. *See State ex rel. James*, 711 So. 2d at 959. The Alabama Supreme Court issued a stay in the ruling the following day. *See* Sandee Richardson, *High Court Ruling Delays Ten Commandments Case*, MONTGOMERY ADVERTISER, Feb. 20, 1997, at 1A. Between the time of the stay and the eventual dismissal, Judge Moore gained the support of both the local community and those in Washington. *See* Sandee Richardson, *Rally Draws Thousands; Judge Defends Right of Religion*, MONTGOMERY ADVERTISER, Apr. 13, 1997, at 1A. Recently, a federal court ordered Judge Moore to remove the monument from the courthouse. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002). The court found the monument's non-secular purpose and advancement of religion to be

monuments on public lands that enumerate the Ten Commandments serve as lighting rods for controversy and subsequent litigation. In fact, a nationwide call to post the Ten Commandments on government property is conducted in a systematic fashion by organized groups such as the Ten Commandments Project.[43] Unsurprisingly, court dockets teem with cases involving displays utilizing religious symbols on public property.[44]

"self-evident." *Id.* at 1299. As a result, the court declared that "overwhelming" evidence existed to show that the monument violated the Establishment Clause. *Id.* at 1293. However, an appeal from this decision is planned. Jeffrey Gettleman, *Judge's Biblical Monument Ruled Unconstitutional*, N.Y. TIMES, Nov. 19, 2002, at A1.

[43]John Rivera, *Christians Pushing to "Hang Ten"*, DESERET NEWS (Salt Lake City, Utah), Feb. 26, 2000, at E1, *available at* 2000 WL 15418337 (listing "Hang Ten" as another organized group promoting monuments that enumerate the Ten Commandments).

[44]*See generally* ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999) (involving a holiday display at Christmas); Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997) (objecting to a Ten Commandments display in a county courthouse); Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996) (regarding a challenge to a large cross on a mountain designated as public property); Chabad-Lubavitch v. Miller, 5 F.3d 1383 (11th Cir. 1993) (displaying a menorah during Chanukah); Gonzales v. N. Township, 4 F.3d 1412 (7th Cir. 1993) (challenge to a crucifix in a public park); Kreisner v. City of San Diego, 1 F.3d 775 (9th Cir. 1993) (involving a challenge to a Christmas display on public property); Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993) (consolidation of various challenges seeking the removal of two crosses built on public property overlooking the city and a cross in a town emblem); Doe v. Small, 964 F.2d 611 (7th Cir. 1992) (protesting an outdoor display of sixteen paintings of Christ in a public park during the Christmas season); Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991) (involving a challenge to a biblical statuary display in a municipal park); ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir. 1990) (challenging the display of a manger scene on the grounds of the capitol at Christmas); Smith v. County of Albermarle, 895 F.2d 953 (4th Cir. 1990) (challenging the placement of a crèche on the lawn of a county office building); Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) (display of a menorah in City Hall Park); ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) (protesting the display of a lighted cross on fire station at Christmas); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) (involving the display of a Latin cross in a state park); ACLU v. Hamilton County, 202 F. Supp. 2d 757 (E.D. Tenn. 2002) (objecting to the display of the Ten Commandments in three Tennessee courthouses); Freethought Soc'y v. Chester County, 194 F. Supp. 2d 437 (E.D. Penn. 2002) (challenging a Ten Commandments plaque on the county courthouse); ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024 (Neb. 2002) (challenging a Ten Commandments marker in a public park); ACLU v. McCreary County, 145 F. Supp 2d 845 (E.D. Ky. 2001) (granting preliminary injunction directing the removal of Ten Commandments displays from schools and courthouses); Kimbley v. Lawrence County, 119 F. Supp. 2d 856 (S.D. Ind. 2000) (request and grant of an injunction against the display of the Ten Commandments on the courthouse lawn); Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (challenging a Ten Commandments display at a local school); ACLU v. Pulaski County, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (request for injunction against a Ten Commandments display at the county

The purpose of this paper is to examine the issue of displaying religious symbols on public property, specifically those involving the Ten Commandments, and the resulting confrontation between the Establishment and Free Speech Clauses of the First Amendment. Part II of this piece traces the roller coaster history of Establishment Clause jurisprudence from its early beginnings up through its modern interpretations. Of particular importance are the two seminal cases that describe Establishment Clause protection in cases involving displays that include religious symbols—*Lynch v. Donnelly*[45] and *County of Allegheny v. ACLU of Pittsburgh*.[46] Part III describes the clash between the Establishment and Free Speech Clauses prompted by groups that advocate placing monuments containing religious symbols on public property. In addition, Part III presents the Supreme Court's resolution of the intra-First Amendment conflict spawned by displaying religious symbols on public property, elucidated in *Capitol Square Review and Advisory Board v. Pinette*.[47] Part IV argues that the balance between establishment and free speech measured in *Pinette* spurs a sectarian competition for display space on the public lawn that is played on a non-neutral, majority-dominated field in violation of Establishment Clause principles. To readjust the First Amendment scales, this paper concludes that permanent, unattended monuments carrying religious messages should be barred from public property pursuant to the government's authority to enact reasonable time, place, or manner restrictions on speakers using public property.

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courthouse); Harvey v. Cobb, 811 F. Supp. 669 (N.D. Ga. 1993) (regarding a challenge to a Ten Commandments display); Murphy v. Bilbray, 782 F. Supp. 1420 (S.D. Cal. 1991) (challenging the display of two Latin crosses in a public park on printed materials associated with the city); Mendelson v. City of St. Cloud, 719 F. Supp. 1065 (M.D. Fla. 1989) (protesting the display of a Latin cross on a city water tower); Jewish War Veterans v. United States, 695 F. Supp. 3 (D.C. 1988) (challenging a sixty-five-foot Latin cross displayed on a United States naval base in Hawaii); Freedom from Religion Found. v. Zielke, 663 F. Supp. 606 (W.D. Wis. 1987) (objections to a Ten Commandments monument in a city park); ACLU v. Miss. State Gen. Servs. Admin., 652 F. Supp. 380 (S.D. Miss. 1987) (involving a lighted cross on state-owned property during Christmas); ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984) (an objection to three crosses and a Star of David in a public park); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976) (involving the erection of a large Latin cross in a municipal park).

[45]465 U.S. 668, 668-727 (1984).

[46]492 U.S. 573, 573-679 (1989).

[47]515 U.S. 753, 759 (1995).

II. ESTABLISHMENT CLAUSE JURISPRUDENCE

Reflecting the confusion within Establishment Clause doctrine, individuals who disagree about most other legal topics agree that Establishment Clause jurisprudence is mind-numbingly jumbled.[48] The confusion regarding the Establishment Clause is ultimately traceable to its text: "Congress shall make no law respecting an establishment of religion."[49] The esoteric, open-ended nature of that curt commandment automatically creates questions regarding what constitutes religion and what constitutes an establishment.[50] Beyond those definitional inquiries, the vague language of the Establishment Clause has spawned a variety of academic interpretations as to what the clause actually means.[51] According to the Supreme Court, however, the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[52] In other words, the government is prohibited from exhibiting favoritism either

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[48]Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989) ("[T]he Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective.").

[49]U.S. CONST. amend. I.

[50]For commentary on what constitutes religion, see, for example, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984). For commentary regarding what constitutes an establishment, see, for example, Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C. L. REV. 909 (1987).

[51]*See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (arguing that the Establishment Clause bans forcing citizens to support religion with tax money or coercing them to change or participate in religious practices); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 922 (1986) (arguing for governmental neutrality toward religion and among religions); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938 (1986) (maintaining that the Establishment Clause prohibits aid to religion that coerces nonbelievers); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 195-197 (1992) (taking a separationist view between church and state). *See generally*, Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses.*

[52]Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).

among religious sects or between religion and nonreligion.[53] Despite the Court's seemingly straightforward interpretation, the journey traversed by the Establishment Clause through the judicial system has been, to say the least, rather tortured. At its worst, Establishment Clause jurisprudence is characterized as "embarrassing,"[54] and at its best it is described as having "produced only consistent unpredictability."[55]

*A. The Pre-*Lynch *Evolution of the Establishment Clause*

Prior to 1947, the Supreme Court examined the meaning of the Establishment Clause in a scant few cases.[56] In *Bradfield v. Roberts*, a taxpayer sought to enjoin a federal grant for a hospital operated by the Little Sisters of Charity, a Roman Catholic charity organization.[57] The Court dismissed the challenge by characterizing the hospital as a "secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church" rather than a sectarian enterprise.[58] Later, the Court again tangentially confronted an Establishment Clause issue in *Quick Bear v. Leupp*.[59] In *Quick Bear*, members of the Sioux Indian Tribe alleged that the money distributed from its own trust to pay for Catholic schools in the area violated various Indian appropriation acts that banned sectarian expenditures.[60] The Court acknowledged the legitimate constitutional concerns implicated by the facts, but nevertheless found that the appropriation acts did not apply to monies earmarked for an Indian tribe by a treaty between the tribe and the United States.[61]

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[53]Sch. Dist v. Schempp, 374 U.S. 203, 232 (1963) (Brennan, J., concurring); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring) ("government may not favor religious belief over disbelief").

[54]Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

[55]*Wallace*, 472 U.S. at 112 (1985) (Rehnquist, J., dissenting); *see also* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701 (1986) (declaring that the law concerning religion and the Constitution is in "significant disarray").

[56]Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1716 (2000) (stating that "the Establishment Clause lay substantially dormant" before the *Everson* case in 1947).

[57]175 U.S. 291, 292 (1899).

[58]*Id.* at 298-300.

[59]210 U.S. 50, 77-82 (1908).

[60]*Id.* at 52–53 (the Indian appropriation acts involved those of 1895–98 inclusive).

[61]*Id.* at 80-82.

Following these cursory examinations of Establishment Clause issues, the Court authored its first formal foray into the jungle of Establishment Clause jurisprudence in *Everson v. Board of Education*.[62] *Everson* involved a state and federal constitutional challenge to a municipal government decision that allowed parents to be reimbursed for expenditures made in conjunction with transporting their children to and from schools, including Catholic parochial schools.[63] In upholding the constitutionality of the reimbursement program under the Establishment Clause, the Court described its view of the Establishment Clause and laid the foundation for the modern dissension regarding Establishment Clause jurisprudence.[64] Borrowing from Mr. Jefferson, the Court opined that the Establishment Clause meant "at least" that:

> 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.'[65]

Following its quasi-adoption of a strict separationist position in *Everson*, the Court quickly muddied the waters of Establishment Clause jurisprudence in subsequent decisions. In *McCollum v. Board of Education*, decided just one year after *Everson*, the Court struck down a public school program that provided for one hour of

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[62]330 U.S. 1, 5 (1947).

[63]*Id.* at 3 (the state was New Jersey).

[64]*Id.* 8-18.

[65]*Id.* at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

religious instruction per week by sectarian teachers in public school classrooms.[66] The Court maintained that the "wall of separation" created by the Establishment Clause "must be kept high and impregnable"[67] and eschewed the notion that the First Amendment banned "only government preference of one religion over another" from a historical perspective.[68] Despite agreeing that the program of religious instruction violated the Establishment Clause, the Justices reached no agreement on the dimensions of the wall of separation and, in fact, wrote four separate opinions regarding the need for the barrier.[69] After public outcry against the decision in *McCollum*, the Court upheld a similar program against an Establishment Clause challenge in *Zorach v. Clauson* because the religious instruction in *Zorach*, unlike that in *McCollum*, took place away from public school grounds at a private locale.[70] The Court reasoned that the First Amendment did not stand for the proposition that "in every and all respects there shall be a separation of Church and State."[71] Furthermore, the Court observed that if it adopted a strict separationist view of Establishment Clause protection, then "all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment."[72] After all, said the Court, "[w]e are a religious people whose institutions presuppose a Supreme Being."[73] In the end, *Zorach* counseled that *McCollum's* "impregnable" wall of separation could be breached in certain situations.[74]

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[66]333 U.S. 203, 205–12 (1948) (arguing that the First Amendment banned religious instruction under the auspices of "[t]he operation of the State's compulsory education system").

[67]*Id.* at 212.

[68]*Id.* at 211; *see also id.* at 241 (Reed, J., dissenting) (arguing that history shows that religious instruction is not prohibited by the First Amendment).

[69]*Compare id.* at 212 (Frankfurter, J., concurring) (joined by Justices Jackson, Rutledge, and Burton), *with id.* at 232 (Jackson, J. concurring separately), *and id.* at 238 (Reed, J., dissenting).

[70]343 U.S. 306, 308–10, 315 (1952).

[71]*Id.* at 312 (continuing "[r]ather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."); *but see id.* at 316-17 (Black, J., dissenting) (arguing that the program unconstitutionally mixed religion and the state by using "the State's compulsory public school machinery," a phrase borrowed from *McCollum*, for religious ends).

[72]*Id* at 313.

[73]*Id.*

[74]*See id.* at 315.

As the number of Establishment Clause cases that reached the Court increased, particularly since its *Everson* decision, the Court refined its analysis in four important cases that spanned the 1960s.[75] In *McGowan v. Maryland*, the Court fielded an Establishment Clause challenge to Sunday closing laws that prohibited commercial sales on Sundays and coincidentally matched the designated days of rest for Christian religions.[76] Responding to the challenge, Maryland argued that the laws had a secular purpose, which was "to set one day apart from all others as a day of rest, repose, recreation and tranquility."[77] The Court agreed with the state of Maryland and found that its law had a secular purpose; therefore, the state's Sunday closing laws did not violate the Establishment Clause.[78] Two years later, the Court expanded its *McGowan* decision in *School District v. Schempp*.[79] In *Schempp*, the Court struck down a Pennsylvania law that required public school children to read "[a]t least ten verses from the Holy Bible" and recite the Lord's Prayer at the beginning of each school day.[80] The Court found that the opening exercises were undeniably religious and violated the neutrality that the First Amendment required of the government.[81] To that end, the Court announced that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[82] Notably, the Court confirmed its commitment to examine the effects of a purported Establishment Clause violation later that same year in *Board of Education v. Allen* by stating that the principal or primary effect of legislation must be one that neither promotes nor hinders religion.[83] And finally in *Walz v. Tax Commission*, the Court upheld a tax exemption for "real or personal property used exclusively for

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[75]*See generally* Walz v. Tax Comm'n, 397 U.S. 664 (1970); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); McGowan v. Maryland, 366 U.S. 420 (1961).

[76]366 U.S. at 422 (1961).

[77]*Id.* at 450.

[78]*Id.* at 444–45, 453.

[79]374 U.S. at 205 (1963).

[80]*Id.* at 205–07 (the law also provided that "[a]ny child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.").

[81]*Id.* at 223.

[82]*Id.* at 222 (referring to Everson v. Bd. of Educ., 330 U.S. 1, 8-18 (1947); McGowan v. Maryland, 366 U.S. at 442 (1961)).

[83]392 U.S. 236, 243 (1968).

religious, educational, or charitable purposes."[84] Finding a secular purpose for the exemption,[85] the Court added a layer to its effects analysis by observing that it had to "be sure that the end result – the effect – is not an excessive government entanglement with religion."[86] Thus, the contours of Establishment Clause jurisprudence ripened during the 1960s to move the Court away from its quasi-strict separationist view of the wall of separation with which it entered the decade.

The next stage in the evolution of Establishment Clause jurisprudence unfolded in *Lemon v. Kurtzman*,[87] a 1971 case that cobbled together the various elements from *McGowan*, *Allen*, *Schempp*, and *Walz* into one concise test for an Establishment Clause violation. In *Lemon*, the Court examined the constitutionality of Pennsylvania and Rhode Island statutes that provided public money to parochial schools.[88] Looking back at its decisions to that point, the Court found that the constitutionality of a given legislative enactment could be adjudged by three criteria:[89] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[90] Applying the *Lemon* test, as it has become known, the Court found no evidence that either Pennsylvania or Rhode Island enacted its statute with the intent to promote religion.[91] Indeed, the Court noted that each state enacted statutory limitations to insulate the interaction between government and religion in schools.[92] Nevertheless, the Court concluded that

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[84]397 U.S. 664, 666-67 (1970).

[85]*Id.* at 672 (the secular purpose was "moral or mental improvement").

[86]*Id.* at 674.

[87]403 U.S. 602, 606-07 (1971).

[88]*Id.* at 606 (The Pennsylvania statute provided money to nonpublic schools by reimbursing the schools for expenses associated with teachers' salaries and teaching materials, including textbooks. Under the Rhode Island statute, the state made a supplemental payment of 15% of a teacher's salary directly to teachers in nonpublic schools. *Id.* at 606–07.).

[89]*Id.* at 612.

[90]*Id.* at 612–13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) for the second prong of the test).

[91]*Id.* at 613 (The Court, in fact, found the opposite to be true and said that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws.").

[92]*Id.*

"the cumulative impact of the entire relationship arising under the statutes in each State involve[d] excessive entanglement between government and religion."[93] The Rhode Island statute distributed public monies to schools that were run by sectarian individuals, governed by rules akin to diocesan law, and utilized employment or salary contracts signed or negotiated by a parish priest.[94] While Pennsylvania's statutory safeguard barred distributions for religious instruction,[95] the Court similarly found that the statute fostered "an intimate and continuing relationship between church and state."[96] The Court reasoned that Pennsylvania's statute allowed the government "to inspect and evaluate a church-related school's financial records to determine which expenditures [were] religious."[97] Although neither state statute survived, the *Lemon* test and its implementation in these cases represented the Court's most definitive statement in its history regarding the scope of Establishment Clause protection.

B. Lemon *and Religious Symbols—the Evolution Continues*

After *Lemon* synthesized existing Establishment Clause jurisprudence into one framework, the *Lemon* test became the staple by which to adjudge Establishment Clause violations.[98]

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[93]*Id.* at 614 (The Court stated that it did not need to examine the effect prong of the *Lemon* test because it found that the statutes violated the excessive entanglement aspect of the inquiry. *Id.* at 613.).

[94]*Id.* at 617–18 (despite these connections, the Court further stated that it did not:

> assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.

Id. at 618.).

[95]*Id.* at 621 (stating that the exclusion barred money for "any subject matter expressing religious teaching, or the morals or forms of worship of any sect").

[96]*Id.* at 622.

[97]*Id.* at 621.

[98]Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (noting that in 31 cases involving the Establishment Clause between 1971 and 1992, the Court utilized the *Lemon* test in 30 of those cases. The only case where the Court did not use the *Lemon* test was Marsh v. Chambers, 463 U.S. 783, 795 (1983), where the Court upheld Nebraska's practice of opening legislative sessions with a prayer delivered by a chaplain on the state's payroll based upon the longstanding history of the practice.).

Nevertheless, the doctrine continued to evolve in cases dealing with religious public displays, beginning with *Lynch v. Donnelly*.[99] In *Lynch*, the city of Pawtucket, Rhode Island, annually erected a Christmas display in a privately owned park located in the middle of Pawtucket's shopping district.[100] The Christmas display, owned and maintained by the city, included decorations such as a crèche, reindeer, Santa's house, carolers, a clown, an elephant, a teddy bear, Christmas lights, and a banner that read "SEASONS GREETINGS."[101] The crèche itself consisted of figurines representing Jesus, Mary, Joseph, kings, angels, shepherds, and various animals.[102] Although the display appeared like those "found in hundreds of towns or cities across the Nation," the mere presence of the crèche in Pawtucket's display caused some citizens to mount an Establishment Clause attack against the city.[103]

Investigating the Establishment Clause claim, the Court began by putting some real estate between itself and its quasi-strict separationist view of the past.[104] The Court asserted that Jefferson's wall of separation "is a useful figure of speech" but "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[105] Furthermore, the Court downgraded the *Lemon* test's apparent universal applicability by expressing an "unwillingness to be confined to any single test or criterion" because "no fixed, *per se* rule" could be devised to cover all Establishment Clause cases.[106] Nevertheless, the Court had no problem applying the *Lemon* test to the crèche at issue in *Lynch*.[107] The Court decided that the inclusion of the crèche in Pawtucket's Christmas display satisfied the secular purpose prong of the *Lemon* test because Pawtucket erected the display "to celebrate the Holiday and to depict the origins of that Holiday."[108] Furthermore, the Court concluded that the crèche's inclusion did not have the primary effect

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[99]465 U.S. 668 (1984).

[100]*Id.* at 671.

[101]*Id.*

[102]*Id.* (the figures themselves stood anywhere from 5" to 5' in height).

[103]*Id.*

[104]*Id.* at 672-83.

[105]*Id.* at 673 (referring to Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

[106]*Id.* at 678–79.

[107]*Id.* at 681.

[108]*Id.*

of promoting or endorsing religion to any degree greater than past practices upheld under the Establishment Clause such as using public monies to transport children to private schools or tax exemptions for church-owned property.[109] Turning to *Lemon's* last tier of analysis, the Court failed to find an excessive entanglement between church and state with regard to the crèche's display because of the minimal value of the crèche and the lack of contact between the church and government regarding the content or design of the display.[110] Thus, the Court satisfied itself that *Lemon's* requirements had been fulfilled and upheld Pawtucket's use of a crèche in its Christmas display.[111]

The most noteworthy aspect of the *Lynch* decision appeared in Justice O'Connor's concurrence with the majority decision to uphold the constitutionality of the crèche's inclusion in the display.[112] In her concurrence, Justice O'Connor characterized the principal issue in the case as whether the city endorsed Christianity by using the crèche in its Christmas display.[113] To answer this question, the Court needed to determine not only what message the city intended to send with its display, but also what message viewers actually

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[109]*Id.* at 682 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968) (upholding the use of public money for textbooks for children in private schools); Walz v. Tax Comm'n, 397 U.S. 664, 679-80 (1970) (allowing tax exemptions for church properties); Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (legislative prayer in Nebraska); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (upholding the use of federal money for college buildings at church-related institutions of higher education); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755-67 (1961) (affirming noncategorical grants to religious colleges); McGowan v. Maryland, 366 U.S. 420 451-53 (1961) (upholding Sunday closing laws); Zorach v. Clauson, 343 U.S. 306, 315 (1952) (release programs at public schools for religious instruction); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (affirming the use of money for transporting children to private schools); *see also* William Van Alstyne, *Trends in the Supreme Court; Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 Duke L. J. 770, 783 (1984) (dubbing the test used in Lynch as the "any more than" test).

[110]*Lynch*, 465 U.S. at 684. The opinion explains that:

> [t]here is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the city owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*.

[111]*Id.* at 685.

[112]*See id.* at 687-94 (O'Connor, J., concurring).

[113]*Id.* at 690.

received from the display.[114] By synthesizing the inquiry in this manner, Justice O'Connor combined *Lemon's* purpose and effect prongs into one test that examined whether the government intended to endorse religion from either an objective or subjective viewpoint, the latter of which recognized that the message sent may be different from the message received by the viewer.[115] The "crucial" component of this inquiry focused on whether governmental action, intended or not, made "religion relevant, in reality or public perception, to status in the political community."[116] In other words, an impermissible governmental endorsement of religion occurred when government action conveyed a message "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[117]

Applying this newly minted "endorsement" test, Justice O'Connor concluded that Pawtucket did not objectively intend to endorse religion.[118] For Justice O'Connor, the purpose of including the crèche was not to promote the religiosity of the crèche but simply to celebrate Christmas using a traditional symbol associated with the holiday.[119] Furthermore, the crèche itself did not "communicate a message that the government intend[ed] to endorse the Christian beliefs represented by the crèche."[120] The "overall holiday setting change[d] what viewers may fairly understand to be the purpose of the display" just like a museum environment dissociated the content of a painting from endorsement of the message conveyed by that content.[121] In Justice O'Connor's eyes, then, the display merely celebrated a public holiday with significant secular aspects irrespective of the sectarian nature of the crèche.[122]

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[114] *Id.*

[115] *Id.* (stating that "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community").

[116] *Id.* at 692.

[117] *Id.* at 688.

[118] *Id.* at 693.

[119] *Id.* at 691. Justice O'Connor also stated her belief that the city did not intend to favor religion over non-religion. *Id.*

[120] *Id.* at 692.

[121] *Id.*

[122] *Id.*

Five years later, the Court signaled its assent to Justice O'Connor's endorsement test in another important case involving religious symbols, *County of Allegheny v. ACLU of Pittsburgh*.[123] In *Allegheny*, two holiday displays that included religious symbols came under Establishment Clause fire.[124] The first display involved a Roman Catholic group's placement of a crèche on the "Grand Staircase" within the county courthouse during the Christmas season with the permission of the county.[125] A wooden fence enclosed the crèche on three sides while red and white poinsettia plants and an evergreen tree adorned the fence itself.[126] Furthermore, a plaque reading "This Display Donated by the Holy Name Society" was affixed to the fence.[127] The second display combined a forty-five-foot Christmas tree, a sign at the foot of the Christmas tree entitled "Salute to Liberty," and an eighteen-foot Chanukah menorah at the entrance to the City-County Building located one block from the courthouse and its display.[128] Although owned by a religious group, the City of Pittsburgh stored, placed, and removed the menorah on an annual basis.[129] Like *Lynch*, then, the inclusion of religious symbols in holiday displays appeared to place church and state in an uncomfortably close relationship for Establishment Clause purposes.

After traversing the Court's past Establishment Clause doctrine, including *Lynch*,[130] Justice Blackmun embraced the endorsement test because it not only rejected the idea that the Court would accept some governmental endorsement of religion, but also provided an

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[123]492 U.S. 573, 593-94 (1989).

[124]*Id.* at 579-87.

[125]*Id.* at 579–81 (explaining that the Holy Name Society placed the crèche on the "Grand Staircase," which was described as the "most beautiful" and "most public" part of the courthouse. The county used the crèche and the staircase itself in its annual Christmas caroling celebration).

[126]*Id.* at 580.

[127]*Id.*

[128]*Id.* at 581–87. The sign 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." *Id.* at 582.

[129]*Id.* at 587.

[130]*Id.* at 594 (maintaining that the *Lynch* decision was "none too clear.") *Lynch* contained two lines of thought, the "any more than" rationale and the incidental benefits theory, both of which failed to provide sufficient guidance for future decisions.

analytical tool to determine when such endorsement occurred.[131] Utilizing the endorsement test, Justice Blackmun's opinion examined the setting in which individuals viewed the crèche on the staircase within the courthouse.[132] Justice Blackmun noted that, unlike the elephants, clowns, and reindeer that surrounded that crèche in *Lynch*, nothing in the display of the crèche on the Grand Staircase muted its religious message.[133] The flowers on the fence of the Grand Staircase display did not detract from the religious message but rather drew attention to and actually enhanced the crèche's religious message.[134] Furthermore, the location of the display on the Grand Staircase at the seat of government suggested an impermissible governmental endorsement of a religious message because "[n]o viewer could reasonably think that it occupie[d] this location without the support and approval of the government."[135] To that end, the sign designating a Roman Catholic organization as the owner of the crèche failed to prevent governmental endorsement of the message conveyed by the crèche in the display.[136] Instead, the presence of the sign simply showed that the government lent its support to the Roman Catholic message even though the government itself did not sponsor the message.[137] In the end, the Court permanently enjoined the display of the crèche on the staircase in the county courthouse in a close 5-4 decision.[138]

If the constitutionality of the crèche placed an easy question before it, the Court faced a "closer constitutional question" when examining the display involving the menorah at the City-County Building.[139] Although Justice Blackmun characterized the menorah as a religious symbol, the menorah represented a holiday with both sectarian and secular aspects.[140] Moreover, the placement of the

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[131] *Id.* at 595 (referring to the notion that impermissible government messages convey to some that they are outsiders and to others that they are insiders).

[132] *Id.* at 597.

[133] *Id.* at 598 (stating that the crèche is "capable of communicating a religious message" and that "the crèche stands alone: it is the single element of the display on the Grand Staircase").

[134] *Id.* at 599.

[135] *Id.* at 599–600.

[136] *Id.* at 600-01.

[137] *Id.*

[138] *Id.* at 602.

[139] *Id.* at 613.

[140] *Id.* at 613–14 (noting that the religious component of the menorah's message commemorated "the miracle of the oil as described in the Talmud.").

menorah next to the Christmas tree symbolized two faith traditions—one Jewish and one Christian—instead of just one like the crèche on the staircase.[141] In that light, the question became whether Pittsburgh's display of these symbols represented an impermissible endorsement of both Jewish and Christian faith traditions or recognized each as part of a traditional secular holiday celebration.[142] Answering this question, Justice Blackmun argued that the Christmas tree, a secular symbol, dominated the city's display in front of the City-County Building; therefore, pairing the menorah with the larger tree conveyed a message to the observer that the city recognized more than one manner of celebrating the Christmas holiday.[143] In other words, the combination of the tree and menorah signified "a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition" and not an impermissible dual endorsement of the Jewish and Christian faiths.[144] In addition, the "Salute to Liberty" sign at the foot of the tree confirmed that the display served to recognize cultural diversity and not to endorse the Jewish faith.[145] As a result, the menorah's display did not present a "sufficiently likely" probability that observers would understand it as disapproving of their religious choices thereby relegating them to the status of political outsiders in their communities.[146] Thus, the display of the menorah did not violate the endorsement test in the minds of six members of the Court.[147]

Although five members of the Court embraced the endorsement test in *Allegheny*, Justice Kennedy's opinion stood out for its criticism of the majority's acceptance of the endorsement test into

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[141] *Id.* at 614-15.

[142] *Id.* at 614–16 (commenting that it would discriminate against Jews to allow Pittsburgh to celebrate Christmas based upon cultural tradition but not Chanukah).

[143] *Id.* at 616–17 (noting that the Christmas tree was once a sectarian symbol but that it has lost its religious overtones).

[144] *Id.* at 617–18 (asserting that there were no suitable substitutes for the menorah—"an 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah.").

[145] *Id.* at 619.

[146] *Id.* at 620.

[147] *Id.* at 620–21. Justice Blackmun, however, did observe that this conclusion did not preclude a finding that the display of the menorah violated the purpose or entanglement prongs of the *Lemon* test, which were issues that the lower court did not address. *Id.*

Establishment Clause jurisprudence.[148] In fact, Justice Kennedy declared the endorsement test to be "flawed in its fundamentals and unworkable in practice."[149] If the Court applied the endorsement test without regard to historical practice, the Court would strike down scores of governmental practices upheld against previous Establishment Clause challenges, such as Thanksgiving Day proclamations and various portions of the United States Code.[150] According to Justice Kennedy, utilizing the endorsement test in the absence of historical or precedential references equated to a "jurisprudence of minutiae" that required courts to "consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols" to draw attention away from the religious symbol in the same display.[151] Engaging in this examination of "minutiae" involved, for example, calculating the secular symbols' distance from the sectarian symbol, the "prominence" of the display's location, and gauging the insulating effect of the secular symbols on the sectarian symbol.[152] Given all of its shortcomings, Justice Kennedy concluded that the endorsement test "could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure."[153] For now, the endorsement test represented a "most unwelcome addition to our tangled Establishment Clause jurisprudence."[154]

Refusing to apply the majority's endorsement test, Justice Kennedy unveiled a new standard by which to analyze Establishment Clause issues. For Justice Kennedy, the Establishment Clause simply required that the government remain neutral toward religion.[155] As a result, government practices that merely accommodated, acknowledged, or offered support for

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[148] *Id.* at 668.

[149] *Id.* at 669.

[150] *Id.* at 670–72 (containing numerous examples of permissible practices that would be impermissible under the majority's endorsement test).

[151] *Id.* at 674.

[152] *Id.* at 674–75 (humorously noting that "municipal greenery must be used with care.").

[153] *Id.* at 675.

[154] *Id.* at 668. For a more complete elucidation of Justice Kennedy's coercion test, see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301-11 (2000); Lee v. Weisman, 505 U.S. 577, 580-99 (1992).

[155] *County of Allegheny*, 492 U.S. at 656-58.

religion were perfectly acceptable in light of "our political and cultural heritage" as well as past cases before the Court.[156] To that end, Justice Kennedy opined that the majority misunderstood *Lynch* because that decision did not hinge on that crèche being surrounded by "candy canes, reindeer, and other holiday paraphernalia."[157] Instead, the traditional holiday season in general served as the appropriate context for these symbols,[158] and the holidays as a whole have been traditionally acknowledged by governmental bodies. According to Justice Kennedy, the border between permissible acknowledgement and impermissible endorsement must be jealously guarded because government may permissibly acknowledge religion.[159] To that end, a review of past cases revealed two principles that served to create the barrier between acknowledgement and endorsement—"government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[160] Applying this "coercion" test, Justice Kennedy found no evidence to suggest "that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way."[161] As a result, neither the crèche nor the menorah posed a "realistic risk" of creating an establishment of religion.[162] With regard to the banning of the crèche based upon the imprecise endorsement test, Justice Kennedy asserted that the majority's decision reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require."[163]

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[156]*Id.* at 657–58 (citing the accommodation in Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)). *see generally* Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Bd. of Educ. v. Allen, 392 U.S. 236 (1968). Justice Kennedy further argued that adhering to the principal effect of promotion test "would require a relentless extirpation of all contact between the government and religion." *County of Allegheny*, 492 U.S. at 657.

[157]*County of Allegheny*, 492 U.S. at 665–666 (arguing that "[n]othing in Chief Justice Burger's opinion for the Court in *Lynch* provides support for these distinctions" and also asserting that the location of the symbols on public property was irrelevant to the analysis).

[158]*Id.* at 665.

[159]*Id.* at 659.

[160]*Id.* (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[161]*Id.* at 664.

[162]*Id.*

[163]*Id.* at 655,664.

Responding to Justice Kennedy's assault on the endorsement test, Justice O'Connor took the opportunity to answer the criticisms in her concurrence with the majority result.[164] Rather than ignoring history and precedent as Justice Kennedy asserted, the endorsement test accounted for both as "part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."[165] Despite its fact intensive inquiry, Justice O'Connor maintained that the endorsement test reflected the essential protection guaranteed by the Establishment Clause that government is prohibited from making religion relevant to one's political standing in the community.[166] Moreover, Justice O'Connor contended that the Court had yet to develop a superior test to determine the existence of Establishment Clause violations.[167] The coercion test, in Justice O'Connor's opinion, failed to protect a citizen's religious liberty or respect the religious pluralism of the nation.[168] In fact, the Court had recognized the inadequate protection offered by a coercion standard by itself in prior cases; therefore, the Court never relied on coercion, whether indirect or direct, as the sole benchmark for Establishment Clause violations.[169] Justice O'Connor asserted that to require coercion of any nature to be "an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy."[170] In short, the endorsement test best

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[164]*Id.* at 622–37 (Justice O'Connor concurred in the result but differed with the reasoning set forth by Justice Blackmun's majority opinion with regard to the menorah. According to Justice O'Connor, the secular dimensions of the menorah did not have to be examined to determine that the display failed to endorse Judaism or religion in general. *Id.* at 633-37. The theme of the display simply involved liberty and pluralism as indicated by the sign, the tree, and the inclusion of the religious symbol. *Id.* at 634. Furthermore, the menorah did not endorse religion in comparison to nonreligion. *Id.* at 635. The display acknowledged a holiday celebrated by both religious and nonreligious people.).

[165]*Id.* at 630–31. For example, the longstanding nature of practices like legislative prayer led to the conclusion that such acts did not violate the Establishment Clause despite their religious ties.

[166]*Id.* at 627-28.

[167]*Id.* at 631.

[168]*Id.* at 627-28.

[169]*Id.* at 628 (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973)); Engel v. Vitale, 370 U.S. 421, 430 (1962).

[170]*Id.* (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 922 (1986).

captured the notion that religious liberty is most protected when government is barred from favoring one set of religious tenets over those of a different religious faith.[171]

III. THE LINK BETWEEN ESTABLISHMENT AND FREE SPEECH

For the present time, the endorsement test has triumphed over both theoretical competitors[172] and derisive detractors[173] to become the preeminent analytical tool employed in Establishment Clause cases involving religious symbols.[174] Most recently, however, non-holiday displays on public grounds that include religious symbols present a unique constitutional challenge to the applicability of the endorsement test. Cognizant of the endorsement test and trying to get around it, these displays frequently combine the Ten Commandments and other historical documents such as the Declaration of Independence or the Bill or Rights on a single, stone monument. Ignoring the obvious religiosity of the Decalogue,[175] advocates of the displays insist that the inclusion of the Ten Commandments does nothing more than avert today's "moral meltdown" by reminding viewers of the moral principles that played an important role in the historical development of this nation's law.[176] Apparently of a like mind, a number of state capitals and

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[171]*See id.* at 631.

[172]*See, e.g.*, *supra* notes 155-163 and accompanying text (describing Justice Kennedy's coercion test).

[173]*See, e.g.*, Am. Jewish Cong. v. Chicago, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting) (arguing that "[i]t would be appalling . . . [to have] witnesses testifying that they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane"); ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting) (calling the endorsement test the "St. Nicholas too" test); Nancy Dunne, *Putting Christ Back into Christ-mas*, FIN. TIMES (London), Dec. 21, 1984, at I4, *available at* LEXIS, News Library (referring to the "two plastic reindeer rule").

[174]*See, e.g.*, Books v. City of Elkhart, 235 F.3d 292, 306 (7th Cir. 2000); Murray v. City of Austin, 947 F.2d 147, 153-58 (5th Cir. 1991); Foremaster v. City of St. George, 882 F.2d 1485, 1491 (10th Cir. 1989); *see also* Steven C. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 444 (2000) (stating that the endorsement test "commands" the support of a majority of the Court).

[175]Stone v. Graham, 449 U.S. 39, 41 (1980) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths . . . .").

[176]Carolyn Bower, *Parents, Students Debate Posting Commandments*, ST. LOUIS POST-DISPATCH, June 20, 1999, at C3, *available at* LEXIS, News Library (stating that we live in an amoral society and the Commandments provide standards to guide lives); *see also* David

courthouses already openly display the Ten Commandments on their lawns or within the buildings themselves.[177] Because these monuments are stationed on public property, a different variable is placed under the endorsement microscope that is less overt and of much greater constitutional import when compared to those generally discussed in the holiday display cases—the constitutional right to free speech based upon the physical location of the display.

Like every other constitutional protection, the Establishment Clause does not exist in a vacuum but instead coexists with other constitutional mandates, especially its First Amendment sibling—the Free Speech Clause. The Free Speech Clause of the First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech."[178] At its heart, the Free Speech Clause of the First Amendment protects "the free flow of ideas and opinions on matters of public interest and concern"[179] because "the best test of truth is the power of the thought to get itself

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Waters, *Freedom of Which Religion in Particular?*, THE COM. APPEAL (Memphis, Tenn.), Jan. 26, 2000, at B1, *available at* LEXIS, News Library (describing a rally in support of the Ten Commandments for "decent, morally minded individuals"); John Rivera, *Christians Pushing to "Hang Ten,"* DESERET NEWS (Salt Lake City, Utah), Feb. 26, 2000, at E1, *available at* LEXIS, News Library (noting the statement of Janet Parshall, spokeswoman for the Family Research Council, that the Ten Commandments constitute a "moral code of behavior"); Robert Parham, *Ten Commandments and a Number of Views; To Many, America's Cultural War over the Separation of Church and State Comes down to the Display of 10 Mandates*, ORLANDO SENTINEL, Apr. 2, 2000, at G1, *available at* LEXIS, News Library (quoting a member of Congress from Alabama saying that posting the Ten Commandments is "one step that states can take to promote morality").

[177]*See supra* note 44 (providing a brief list of the litigation involving the appearance of religious symbols on government property); *see also* Joan Lowy, *Religion, Morality Gain More Attention in State Legislatures; Critics Say Posting Ten Commandments, Other Measures Aren't Cure for Societal Ills*, DALLAS MORNING NEWS, Mar. 26, 2000, at 21A, *available at* LEXIS, News Library (providing a list of legislative actions taken in a number of states that seek to allow the posting of the Ten Commandments on public property); Robert Parham, *Ten Commandments and a Number of Views; to Many, America's Cultural War over the Separation of Church and State Comes down to Display of 10 Mandates*, ORLANDO SENTINEL, Apr. 2, 2000, at G1, *available at* LEXIS, News Library (recalling that the House of Representatives passed a measure that allowed the Ten Commandments to be displayed in courthouses and other public buildings but that the bill never passed the Senate). For a discussion of the House's legislative action in general, see Joel L. Thollander, *Thou Shall Not Challenge the Court? The Ten Commandments Defense Act as a Legislative Invitation for Judicial Reconsideration*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 205, 210-25 (2000/2001).

[178]U.S. CONST. amend. I.

[179]Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

accepted in the competition of the market."[180] Although the tenet freely admits ideas into the marketplace, one cannot convey whatever message one wants whenever or wherever one wants on public property.[181] Governmental regulatory power frequently extends to the places, times, and ways of communication available to private speakers on public property.[182] Because the opinions of the elected generally reflect those of the majority to be elected in the first place, the exercise of regulatory power by the elected threatens to banish minority or unpopular opinions from public discourse even before they enter the public arena.[183] Thus, a constant tension exists between the free entry of ideas into the marketplace for public inspection and the regulation of private speakers on public land attempting to propel their ideas into that same marketplace.[184]

To assess the relationship between governmental ability to regulate speech on public property, the Court succinctly delineated what is known as its forum analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[185] Speakers have the greatest communicative freedom in traditional public forums, which are defined as public areas that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens,

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[180]Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Whitney v. California, 274 U.S. 357, 374–377 (1927) (Brandeis, J., concurring) (explaining why a state is barred from restricting free speech). For other values encouraged by the protection of free speech, *see, e.g.*, Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983) (free speech promotes the well-being of society and government); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (free speech nurtures self-realization).

[181]Of course, government may speak on its own behalf. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000); Rosenberger v. Rector & Visitors, 515 U.S. 819, 833 (1995) (observing that the government may speak in a non-neutral fashion).

[182]United States v. Grace, 461 U.S. 171, 177 (1983) (describing reasonable time, place, and manner restrictions that can be constitutionally implemented by government when regulating speech on public property).

[183]First Nat'l Bank v. Bellotti, 435 U.S. 765, 785–86 (1978) (arguing that a First Amendment violation occurs when legislatures skew public debate by favoring one opinion over another).

[184]Niemotko v. Maryland, 340 U.S. 268, 273-74 (1951) (Frankfurter, J., concurring) (stating that government has long "grappled with the claims of the right to disseminate ideas in public places as against claims of an effective power in government to keep the peace and to protect other interests of a civilized community").

[185]460 U.S. 37, 45-50 (1983). For a history of the public forum doctrine, see generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

and discussing public questions."[186] Despite the latitude given to speakers in traditional public forums, government may enforce a content-based exclusion if such is "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[187] In addition, the government may also enforce "time, place, and manner" restrictions on speech in traditional public forums provided they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[188] To take but one example of what constitutes a traditional public forum, the Court struck down a restriction on picketing on public streets in *Carey v. Brown* because public streets have traditionally been used as gathering places for public debate.[189] In short, the ability of the government to restrict communicative activity in public places that have been historically utilized for such activity is "sharply circumscribed."[190]

In contrast to the protection afforded speakers in traditional public forums, *Perry* instructed that the government may exert greater control over communicative activity in "designated public forums" and "nonpublic forums." A "designated public forum" is a piece of public property that the government opens to the public for the purpose of expressive activity even though the property is not traditionally used for communicative purposes,[191] such as state university meeting rooms[192] or theaters.[193] Once opened for expressive activity, the government must apply the same rules that curtail its regulatory ability over speech in the traditional public forums to the designated forum during the period that the designated forum remains available to the public. So, for example, permissible governmental regulations limiting the use of a designated public

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[186]*Perry*, 460 U.S. at 45 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

[187]*Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

[188]*Id.* (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 132 (1981)); *see also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Schneider v. State, 308 U.S. 147, 160 (1939).

[189]447 U.S. at 460 (1980).

[190]*Perry*, 460 U.S. at 45.

[191]*Id.*

[192]Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a state university could not exclude a religious student group from access to university facilities after making such facilities available for student groups in general).

[193]S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975).

forum include reasonable time, place, and manner restrictions.[194] Similarly, the government may enforce reasonable time, place, and manner regulations on speech activity in nonpublic forums, which are those public properties not traditionally used for expressive activity or designated for public communication.[195] In addition, the government "may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[196] Indeed, *Perry* itself involved the Court's determination that a public school's internal mail system constituted a nonpublic forum because the system was not generally available for public usage.[197] In sum, the Court ratchets up the ability of the government to restrict speech as it moves up the pyramid of forum analysis from the traditional public forum to the nonpublic forum.

Within the context of Establishment Clause challenges to holiday displays, the importance of the forum lurked in the shadows of Santa and candy canes in the endorsement calculus without regard to its constitutional ramifications. Though not directly addressed in *Lynch*, the Court noted at the outset of its opinion that the crèche at issue was located in a private park like others located in public parks throughout the country. This fact became more visible as the endorsement test matured in holiday display cases. For example, Justice Blackmun's majority opinion in *Allegheny* argued that "[n]o viewer could reasonably think that it [(the crèche)] occupies this location [(on the Grand Staircase)] without the support and approval of the government."[198] Moreover, the Grand Staircase did not "appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche

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[194]*Perry*, 460 U.S. at 46 (stating that "[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum").

[195]*Id.*

[196]*Id.* (referring to United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

[197]*Id.* (reaching this conclusion despite the access to the mail system possessed by non-school groups like the Cub Scouts). However, the Court found that other groups that had access to the mail system were similar in character to school groups. This was unlike the nature of the plaintiffs in the case who were concerned with the interests of teachers. *Id.* at 48.

[198]County of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1984).

in that location for over six weeks would then not serve to associate the government with the crèche."[199] Reading between the lines, the Grand Staircase in the courthouse failed to qualify as a traditional public forum because it did not have a recognized history or tradition of allowing unfettered communicative activity. Indeed, Justice Blackmun explicitly stated as much by noting that "the crèche here does not raise the kind of 'public forum' issue" faced by the Court in past cases because the Grand Staircase was not denominated as a public forum.[200] Even Justice Kennedy tangentially commented on *Allegheny's* forum in his criticism of the majority's analysis by opining that Court precedent cannot be understood to mean that "the use of public property necessarily converts otherwise permissible government conduct into an Establishment Clause violation."[201] Thus, the emphasis placed upon the physical components in the holiday display cases buried any underlying concern with free speech rights in a given forum.

However, as the volume of Establishment Clause cases expanded, the characterization of the forum assumed an increasingly prominent position in the analysis. In *Kreisner v. City of San Diego*, the Ninth Circuit upheld the display of eight Biblical scenes of the life of Jesus in a public park during the Christmas season.[202] Pivotal to its decision, the Ninth Circuit noted that the park was a traditional public forum and the city had not denied anyone access to the park for purposes of communicative activity.[203] Following suit, the Seventh Circuit upheld the display of sixteen paintings that attempted to "put Christ back into Christmas"[204] because they were located in "a quintessential public forum well removed from the seat of the City government"[205] and "public forums must be open to

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[199]*Id.* at 600 n.50.

[200]*Id.* (referring to McCreary v. Stone, 739 F.2d 716, 717 (2d Cir. 1984), where a nativity scene in a public park raised a public forum issue).

[201]*Id.* at 667.

[202]1 F.3d 775, 776–79 (9th Cir. 1993).

[203]*Id.* at 785–86 (noting that the park was not a designated public forum); *see also* McCreary v. Stone, 739 F.2d 716, 730 (2d Cir. 1984) (upholding the display of a crèche in a traditional public forum during the holidays), *aff'd by an equally divided Court sub nom.* Bd. of Trs. v. McCreary, 471 U.S. 83 (1985).

[204]Doe v. Small, 964 F.2d 611, 612 (7th Cir. 1992).

[205]*Id.* at 613.

religious speech."[206] On the other hand, the Second Circuit dismissed an argument that the sponsor of a menorah in a public park had a right to use the public forum for expressive conduct and reversed a lower court ruling that upheld the display against an Establishment Clause challenge.[207] Likewise, the Fourth Circuit prohibited the display of a stand-alone crèche on the front lawn of the County Office Building and cast aside the free speech concerns associated with that traditional public forum.[208] Thus, courts took divergent views of the importance of free speech in the public forum when examining religious displays on public property to determine whether such violate the Establishment Clause.

Recognizing the obvious disagreement among the circuit courts in these cases and realizing that the issue touched upon the fundamental relationship between the Establishment and Free Speech Clauses, the Supreme Court took its turn at the microphone in *Capitol Square Review and Advisory Board v. Pinette*.[209] In *Pinette*, the Ku Klux Klan (KKK) petitioned the Capitol Square Review and Advisory Board (Board) for permission to erect a Latin cross on Capitol Square (Square), a ten-acre park surrounding the Ohio state capitol building.[210] Prior to receiving the KKK's application, the Board granted permission to place unattended displays of both a Christmas tree and a menorah on the Square.[211] Despite having no policy against allowing unattended displays and granting the two prior applications, the Board denied the KKK's request to place its cross

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[206]*Id.* at 619; *see also* Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1395 (11th Cir. 1993) (upholding a menorah's display in a public forum).

[207]Kaplan v. City of Burlington, 891 F.2d 1024, 1029–30 (2d Cir. 1989) (relying on County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) and noting that the menorah stood by itself on government property and that no viewer could think that it occupied its position without government approval).

[208]Smith v. County of Albemarle, 895 F.2d 953, 958–60 (4th Cir. 1990).

[209]515 U.S. 753, 759 (1995) (justifying the grant of certiorari on the basis of the split of opinion on the issue between the Sixth and Eleventh Circuits versus the Second and Fourth Circuits). The latter two circuits, as previously described, generally prohibited displays regardless of the forum's traditional role as a center for expressive conduct.

[210]*Id.* at 757–58. Pinette, by the way, was the leader of the Ohio KKK at the time. *Id.* at 758. Furthermore, Ohio Admin. Code Ann. § 128-4-02(A) (1994) made the Square available for public debate. *Id.* at 757-58.

[211]*Id.* at 758 (noting that the KKK sought permission to erect its cross after the Board granted permission to put a Christmas tree and a menorah on the square).

on the Square during the 1993 holiday season.[212] The KKK found no relief through its administrative appeals, so it sought to enjoin the Board's decision.[213] Finding a receptive audience in the Southern District of Ohio, the KKK won an injunction against the Board's decision and planted its cross on the Square.[214] The Sixth Circuit subsequently affirmed the district court and the Board appealed to the Supreme Court.[215]

Writing for a plurality in *Pinette*, Justice Scalia first pointed out that the issue before the Court was simply whether a private, unattended display of a religious symbol in a public forum violated the Establishment Clause and not one involving discrimination based on the KKK's message.[216] To that end, the Court found that the KKK's cross constituted private religious speech entitled to the full protection of the Free Speech Clause of the First Amendment.[217] However, the Court also noted that the protection offered by the First Amendment did not guarantee that speakers could convey their messages on all government owned property because of the Court's forum analysis.[218] Referring to *Perry*, the Court reiterated that the state could enact content-neutral reasonable time, place, and manner restrictions in general, but if it wanted to regulate the content of messages, such regulations had to be "necessary, and narrowly drawn, to serve a compelling state interest."[219] In this case, the Board admitted that it denied the KKK's petition because of its religious message.[220] As a result, the Board argued that it sought to

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[212]*Id.* (explaining that the Board informed the KKK by letter that their denial "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts.").

[213]*Id.* at 758–59.

[214]*Id.* at 759.

[215]*Id.* (referring to 30 F.3d 675, 676 (1994)).

[216]*Id.* at 759–60 (noting the KKK's assertion that the Board denied their petition because it disagreed with their political viewpoint, but the lower courts did not address that issue so the Court refused to address it). The petition itself only required that a group meet various safety, sanitation, and noninterference requirements. *Id.* at 757–58.

[217]*Id.* at 760 (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226, 248-49 (1990); Widmar v. Vincent, 454 U.S. 263, 277-78 (1981); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981)).

[218]*Id.* at 761.

[219]*Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[220]*Id.*

avoid an Establishment Clause violation by granting permission to erect the cross thereby giving the appearance that the government endorsed Christianity.[221] Thus, the resolution of the case boiled down to whether the Board's decision was necessary and narrowly tailored to meet a compelling state interest.

Undertaking to resolve the issue, the Court opined that avoiding an Establishment Clause violation constituted a sufficiently compelling interest to regulate speech based on content.[222] The fundamental question presented here, according to Justice Scalia, was whether or not an Establishment Clause violation existed in light of two previous cases encompassing similar issues—*Widmar v. Vincent* and *Lamb's Chapel v. Center Moriches Union Free School District*.[223] In both *Widmar* and *Lamb's Chapel*, the Court deemed school policies that barred religious uses of facilities generally available for non-religious uses to be violations of the Free Speech Clause of the First Amendment.[224] Although the schools argued that their exclusions avoided Establishment Clause violations, the Court retorted that the schools opened their forums to a range of expressive conduct and that "an open forum . . . does not confer any imprimatur of state approval on religious sects or practices."[225] Moreover, the Court characterized any benefit inuring to religion by using the school facilities/open forums as being "incidental."[226] As a result, neither of the cases raised Establishment Clause concerns.

Seeing the obvious need to distinguish *Widmar* and *Lamb's Chapel*, the Board asserted that the location of the public forum next to the "seat of government" gave the appearance that government endorsed the message of the KKK's cross; therefore, the presence of the cross within the public forum violated the endorsement test.[227] However, the plurality deemed the endorsement test irrelevant because of the "crucial difference between *government* speech

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[221] *Id.*

[222] *Id.* at 761–62.

[223] *Id.* at 762 (citing *Lamb's Chapel*, 508 U.S. 384, 394-95 (1993); *Widmar*, 454 U.S. 263, 271 (1981)).

[224] *Id.*

[225] *Id.* at 763 (citing *Widmar*, 454 U.S. at 274).

[226] *Id.* at 762–63 (citing *Widmar*, 454 U.S. at 274); *Lamb's Chapel*, 508 U.S. at 395) (stating that "any benefit to religion or the Church would have been no more than incidental").

[227] *Id.* at 763 (noting that the state of Ohio, like the schools in *Widmar* and *Lamb's Chapel*, created an open forum on public property).

endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[228] Justice Scalia wrote that accepting the Board's argument would be equivalent to accepting the notion that endorsement could be transferred from a private speaker in an open forum to the government on the basis of observer error.[229] Even though mistakes may occur, "erroneous conclusions do not count" where the forum is open and the display is privately sponsored.[230] Simply put, the plurality refused to recognize a "transferred endorsement" test.[231] In fact, the plurality asserted that the endorsement test only applied in cases where the government either conveyed a religious message or adhered to a policy that discriminated in favor of private religious messages.[232] Here, the government neither "fostered" the mistake by speaking in its own right nor "encouraged" the mistake by favoring some messages over others.[233] If courts recognized a transferred endorsement test, government would have to weigh a "host of imponderables" when trying to balance the free exercise rights of citizens with the avoidance of an establishment with litigation being the penalty for an incorrect balance.[234] Ultimately, the plurality held that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[235]

Although Justice Scalia's opinion only earned the support of a plurality of the Court, both Justice O'Connor and Justice Souter wrote concurrences with the judgment that were joined by two other members of the Court thereby making the judgment a majority decision. Justice O'Connor wrote to fend off yet another attack to

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[228]*Id.* at 765 (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)) (alteration in original).

[229]*Id.* at 766.

[230]*Id.* at 765.

[231]*Id.* at 767.

[232]*Id.* at 764–65 (citing Lynch v. Donnelly, 465 U.S. 668, 685-87 (1984); County of Allegheny v. ACLU, 492 U.S. 573, 599-600 and n.50 (1989); Bd. of Educ. v. Grument, 512 U.S. 687, 708–10 (1994)).

[233]*Id.* at 766.

[234]*Id.* at 768 (noting that the "imponderables" included "[h]ow close to government is too close? What kind of building, and in what context, symbolizes state authority?"). The litigation would be for violating either the Free Exercise or Establishment Clauses. *Id.*

[235]*Id.* at 770.

the endorsement test in the form of Justice Scalia's "exception to the endorsement test for the public forum context."[236] Unlike the plurality opinion that confined the endorsement test to cases of direct governmental involvement or favoritism, Justice O'Connor argued that a violation of the Establishment Clause could occur in a number of contexts outside of the two set forth by the plurality.[237] To that end, the plurality opinion took an "exceedingly narrow view of the Establishment Clause" by failing to recognize that the Establishment Clause barred a government from insulating itself from the effects of its acts under the guise of formally neutral policies.[238] In the public forum context, like the one here, the basic test for an Establishment Clause violation remained whether or not the government's maintenance of the public forum had the effect of conveying a message endorsing religion even if the government did not intend or encourage that result.[239] An Establishment Clause violation, in this context, is not based upon some notion of transferring endorsement, but simply on the idea that "the State's own actions . . . and their relationship to the private speech at issue, *actually convey* a message of endorsement."[240] Applying the endorsement test to *Pinette's* facts, Justice O'Connor noted that many of the factors found significant by the plurality would also be relevant to the endorsement test in this context—lack of governmental involvement, use of a public forum, and the private sponsorship of the cross.[241] So instead of relegating the endorsement test to the backseat when private speech occurs in a public forum, Justice O'Connor found that the endorsement test actually yielded the same end result in this case.[242]

Following Justice O'Connor's concurrence, Justice Souter penned another criticism of the plurality's creation of a *per se* exception to

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[236]*Id.* at 772 (O'Connor, J., joined by Justices Souter and Breyer, concurring in part and concurring in the judgment).

[237]*Id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment) ("I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism.").

[238]*Id.* at 777 (O'Connor, J., concurring in part and concurring in the judgment).

[239]*Id.*

[240]*Id.* (observing that the state's actions amounted to "operating the forum in a particular manner and permitting the religious expression to take place therein") (alteration in original).

[241]*Id.* at 775 (O'Connor, J., concurring in part and concurring in the judgment).

[242]*Id.* ("None of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly.").

the endorsement test for the public forum context.[243] According to Justice Souter, the plurality's limitation of the endorsement test failed to have any foundation in the Court's jurisprudence.[244] Contrary to the plurality opinion, cases like *Widmar* and *Lamb's Chapel* confirmed that the Court takes the nature and effect of the forum into account as part of the endorsement test's contextual investigation, rather than excluding it if the forum happens to be characterized as open.[245] In both of those cases, the Court examined specific facts regarding private speech in a public forum including whether other groups possessed equal access to the forum and whether there was governmental association with the messages of the speakers using the open forum.[246] As a result, Justice Souter argued in favor of applying the endorsement test in the public forum context because "it is reasonable for an observer to attribute the speech . . . to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."[247] Here, Justice Souter characterized the Board's concern about violating the Establishment Clause by allowing the KKK to place its cross on the Square as "understandabl[e]."[248] Nonetheless, the Board's denial of the KKK"s application failed to be "narrowly drawn" because at least two alternatives existed.[249] The Board could have either required that an adequate disclaimer be affixed to the cross, or designated an area for unattended displays accompanied by a disclaimer dissociating the state from the messages.[250] In light of the Board's failure to pursue such alternatives, Justice Souter ultimately agreed with the plurality that the Board's decision misconstrued the line between free speech and establishment.[251]

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[243] *Id.* at 783-84 (Souter, J., concurring in part and concurring in the judgment) (Justices O'Connor and Breyer joining this concurrence).

[244] *Id.* (calling the exception "out of square with our precedents").

[245] *Id.* at 788–91 (Souter, J., concurring in part and concurring in the judgment).

[246] *Id.* at 790–91 (Souter, J., concurring in part and concurring in the judgment).

[247] *Id.* at 786 (Souter, J., concurring in part and concurring in the judgment).

[248] *Id.* at 793 (Souter, J., concurring in part and concurring in the judgment).

[249] *Id.* at 793 (Souter, J., concurring in part and concurring in the judgment) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[250] *Id.* at 793–94 (Souter, J., concurring in part and concurring in the judgment).

[251] *Id.* at 794 (Souter, J., concurring in part and concurring in the judgment).

IV. RELIGIOUS SYMBOLS, NEUTRALITY, AND RESTRICTING FREE SPEECH IN THE PUBLIC FORUM

As its jurisprudential history and multiplicity of analyses prove, Establishment Clause questions are among the most difficult to answer, particularly when the issue involves the use of religious symbols. Indeed, the time-honored adage that "hard cases make bad law" is strikingly *à propos* when referring to the jungle of Establishment Clause jurisprudence that has grown up around the relationship between government and religious displays. Cases like *Pinette* prove even more nettlesome because they not only involve the Establishment Clause and its chaos theory, but also force the Court to walk a constitutional high wire that balances the competing interest of free speech. Recognizing that any decision rendered under such circumstances would appear to diminish the constitutional protection of either the Establishment or Free Speech Clauses, *Pinette* avoided the intra-First Amendment clash altogether by asserting that no such confrontation existed. The public forum for the KKK's speech vanquished any issue arising from Establishment Clause concerns because other speakers remained free to construct displays of their own on the Square without governmental interference. From the plurality's view, then, *Pinette* did not weaken the guarantee of the Establishment Clause but rather offered full protection for the messages conveyed by speakers pursuant to neutral governmental policies.

Given its protection of free speech, *Pinette* flashes a green light to groups seeking to post symbols in public forums. Because public areas surrounding courthouses and the grounds of state capitols are characterized as public forums for relatively unfettered expressive conduct,[252] politically active leaders of religious groups advocate

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[252]Cox v. Louisiana, 379 U.S. 559, 562 (1965); *see also* Lehman v. Shaker Heights, 418 U.S. 298, 313 (1974) (Brennan, J., dissenting) ("More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances."); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (stating that the grounds of the statehouse are appropriate for protest because they receive the protection of a public forum); Adderly v. Florida, 385 U.S. 39, 41 (1963) (explaining that state capitol grounds were open for public use to express dissent with legislative decisions); Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1388 (11th Cir. 1993) (characterizing the rotunda of the Georgia Statehouse as a designated public forum, which provides the speaker the protection associated with a traditional public forum). *But see* State v. Linares, 655 A.2d 737, 749 (Conn. 1995) (finding that legislative halls are nonpublic forums).

posting religious items like the Ten Commandments in these forums as a way to bring what they view as morality back into everyday life.[253] For example, a movement sponsored by the Family Research Council known as "Hang Ten" actively supports the placement of monuments containing the Ten Commandments on public property throughout the nation.[254] Notably, "Hang Ten" and similar groups in favor of religious displays generally do not advocate posting the Ten Commandments or other religious symbols on privately owned billboards near roadways or in the front yards of those wishing to promote the message. If they did, ironically, more observers would likely see the messages. Instead, advocates of these displays recognize the high probability for mistaken transference and push for new displays at the seat of government to take advantage of the speech amplification available in that location.[255] Furthermore, "Hang Ten" vociferously argues in favor of the constitutionality of the thousands of Ten Commandments monuments currently residing on public property.[256] Seizing on *Pinette* for ammunition, defenders

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[253]*See supra* note 176.

[254]Terry Horne, *Commandments Display Challenged Again; ICLU Files Lawsuit, The Third Such in Indiana, in Washington County on Behalf of a Libertarian*, INDIANAPOLIS STAR, Aug. 19, 2000, at 1B, *available at* LEXIS, News Library (stating that the Family Research Council is a "conservative religious group"); Hanna Rosin and William Claiborne, *Taking the Commandments Public: Indiana Passes Bill Allowing Display in Schools, Other Government Facilities*, WASH. POST, Feb. 8, 2000, at A3, *available at* LEXIS, News Library (discussing "Hang Ten").

[255]E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1200 (1994) ("When it speaks, government by its sheer size and sway will have a disproportionate influence on public perceptions.").

[256]Jabeen Bhatti, *Statute Wars Have Roots in 1950's Hollywood; Commandments Displays at Issue*, WASH. TIMES, May 22, 2002, at A1, *available at* LEXIS, News Library (placing the number of the monuments containing the Ten Commandments at "4000 or so"). Apparently, the markers have their origin in a 1946 Minnesota case where a judge found that a juvenile boy had never heard of the Ten Commandments. *Id.* After this discovery, the judge began an effort in conjunction with the Fraternal Order of Eagles to post the Ten Commandments in courts across the country. *Id.* The story took a turn straight out of Hollywood, literally, in 1956. *Id.* In that year, Cecil B. DeMille remade "The Ten Commandments" and took the opportunity to promote his film and what he viewed as morality. *Id.* Utilizing a design similar to that in the movie, a number of stone monuments containing the Ten Commandments were manufactured and cast members such as Charlton Heston and Yul Brynner traveled the nation to donate the markers that serve as the focal points for many modern cases. *Id.* Despite their extended stay on public property, "no one acquires a vested or protected right in violation of the Constitution by long use, even when the span of time covers our entire national existence and indeed predates it." Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970); *see also* Nancy Lofhom, *Ten Commandments:*

of these monuments assert that the monuments are nothing more than an exercise of the right to free speech. In fact, "the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion."[257]

In addition to taking shelter under *Pinette*, "Hang Ten" and other groups with a similar agenda also attempt to put distance between their displays and an impermissible establishment of religion by arguing that the displays convey no religious messages whatsoever. Typically, advocates of displays point out that the religious messages of monuments containing religious symbols are diluted by the contents of the monuments themselves. For example, a controversial 7-foot tall monument in the shape of two stone tablets to be placed on the lawn of the Indiana Statehouse not only contained the Ten Commandments, but also portions of the Bill of Rights and the Indiana Constitution.[258] Similarly, sponsors of "Foundation Rock," a monument to be erected by a Florida community, planned "to dilute the Ten Commandments within a larger canon of as many as 15 other documents" of historical significance.[259] As a result, supporters of these monuments maintain that the monoliths are not designed to influence religious choices but instead recognize the role of religion in the nation's history.[260] And even without historical

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Historical or Religious? Grand Junction Debates Whether Granite Tablet Should Stay at City Hall, DENVER POST, Feb. 26, 2001, at B-4, *available at* LEXIS, News Library (stating that the Eagles donated "hundreds—some say thousands—of these tablets to communities across the country."); John Rivera, *Christians Pushing to Hang Ten*, DESERET NEWS (Salt Lake City, UT) Feb. 26, 2000, at E1, *available at* LEXIS, News Library (noting that in addition to its advocacy of monuments containing the Ten Commandments, "Hang Ten" also distributed 175,000 book covers to students with the Ten Commandments on them). Furthermore, "Hang Ten" is not the only group that actively supports displays of the Ten Commandments on public property. Another such group is the Ten Commandments Project. *Id.*

[257]Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at A1, *available at* LEXIS, News Library (attributing the statement to Jay Sekulow, former chief counsel for the American Center for Law and Justice). Pat Robertson now holds the position. *Id.*

[258]Ind. Civ. Liberties Union v. O'Bannon, 259 F.3d 766, 768-69 (7th Cir. 2001), *cert. denied*, O'Bannon v. Ind. Civ. Liberties Union, 122 S. Ct. 1173 (2002).

[259]Billy Townsend, *No Sign of Accord on Commandments Display; Key Could Be Whether They're Displayed Alone or in a Collection*, THE LEDGER (Lakeland, FL), Feb. 17, 2002 at A1, *available at* LEXIS, News Library.

[260]Rev. Brian Henry, *The Plaque Should Stay*, PITTSBURGH POST-GAZETTE, Jan. 7, 2001, at B-3, *available at* LEXIS, News Library (asserting that the country was founded on Christian

references, proponents of religious monuments never fail to invent a secular purpose for their placement. For example, those in favor of retaining a 12-foot cross on a water tower in *Mendelson v. City of St. Cloud* urged that removing the cross would be dangerous because it served as a landmark for fisherman and pilots[261] while a 26x35 foot Latin cross standing in a state park allegedly promoted tourism according to the defendants in *ACLU v. Rabun County Chamber of Commerce*.[262] In sum, proponents of religious displays concoct any number of justifications that serve to dissociate the religious symbol from its religious import.

Regardless of the camouflage used, monuments like the one proposed in Indiana are most accurately seen as efforts to proselytize on behalf of the religion associated with the symbol, which is more often than not Christianity. In the case of a "Hang Ten-like" monument, for example, the religious symbol at issue is a representation of the Decalogue because it is undeniably a sacred text communicating religious tenets.[263] If "Hang Ten-like" monuments truly represented acknowledgements of the significance of religion in the nation's history, the monuments would be developed with that end in mind. But contrary to their supposed historical panorama, many monuments are altered to find the right mix of religious and historical material that will allow the monument to pass Establishment Clause muster. Often, "it's simply a matter of finding the right display."[264] For example, leaders in Wilkesboro,

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principles and displaying the Ten Commandments serves as a reminder of the religious origin of the nation); Robert Siegel, *Legal Fight in Kentucky and Indiana to Display Ten Commandments on Grounds of State Capitols, All Things Considered* (NPR radio broadcast, August 25, 2000) (According to a Kentucky state senator, hanging the Ten Commandments was part of a historical and cultural display because "no one can deny that the Ten Commandments are historical."); Terry Horne, *Commandments Display Challenged Again; ICLU Files Lawsuit, the Third Such in Indiana, In Washington County on Behalf of a Libertarian*, INDIANAPOLIS STAR, Aug. 19, 2000, at 1B, *available at* LEXIS, News Library (noting that a desire to post the Ten Commandments as part of historical displays motivated a bill to allow the posting of the Decalogue); Matt Moline, *Monument Stirs Little Debate*, TOPEKA CAPITOL J., July 24, 2000, *available at* LEXIS, News Library (containing a statement by a local politician asserting that the founders "used the Ten Commandments as a blueprint—for eternity, almost").

[261]719 F. Supp. 1065, 1066 (M.D. Fla. 1989).

[262]698 F.2d 1098, 1101 n.1, 1109 (11th Cir. 1983) (the cross also allegedly served as a memorial).

[263]Stone v. Graham, 449 U.S. 39, 41 (1980).

[264]Townsend, *supra* note 259 at A1.

North Carolina, offered to add the Declaration of Independence and the Magna Carta to a Ten Commandments display in response to litigation regarding the constitutionality of the display of the Decalogue by itself.[265] Furthermore, the Governor of Mississippi admitted that secular symbols were added to an image of a Latin cross created with lights on a state-owned twenty-story building in Jackson, Mississippi, in an attempt to make the display constitutional.[266] The bottom line for those seeking to erect a religiously motivated display is that "if at first you don't succeed, try, try again."

Instances like these are readily distinguishable from other religious symbols in public places that truly depict the historical intersections between law and religion. The best example of such a representation is the relief that adorns the interior of the Supreme Court itself. The frieze on the south wall of the Court contains a number of images representing great lawgivers, including Moses holding the Ten Commandments, Solomon, Lycurgus, Confucius, Hammurabi, and Octavian.[267] Although many of these classical figures are rather obscure for just about any and all viewers, the motivating idea for the relief was to depict the progression of law from ancient through modern times.[268] Contrary to the intention of the Supreme Court frieze, the constant chiseling of "Hang Ten-like" monuments demonstrates that their true aim is not to illustrate history but to convey a religious message among historical documents by launching so many combinations of symbols at Jefferson's wall like groups of clay pigeons to see which arrangement will surmount the obstacle. In plain terms, the incessant physical metamorphosis of many proposed monuments demonstrates that their true aim is not to serve as ceremonial bows to

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[265]*Other Documents Added to Courthouse Display*, ORLANDO SENTINEL, June 14, 2000 at A14, *available at* LEXIS, News Library.

[266]ACLU v. Miss. State Gen. Servs. Admin., 652 F. Supp. 380, 381-82 (S.D. Miss. 1987) (describing the added symbols as including bells, a Christmas tree, and a large sign containing the words "Joy" and "Peace"); *see also* ACLU v. Schundler, 168 F.3d 92, 96 (3d Cir. 1999) (noting that the Ten Commandments display had been altered); ACLU v. Pulaski County, 96 F. Supp. 2d 691, 693 n.1 (E.D. Ky. 2000) (Ten Commandments display changed post-injunction).

[267]Information Sheet, Office of the Curator, Supreme Court of the United States, August 18, 2000. Also included in the south wall frieze are Menes (one of the earliest individuals denoted as a lawgiver), Solon (an Athenian lawgiver), and Draco (an Athenian who was first to write down laws on paper).

[268]*Id.*

history but rather to gain governmental imprimatur for a religious message. The end result is that a symbol held sacred by adherents becomes a pedestrian, non-sacred pawn in a power struggle with Establishment Clause interpretation.[269]

Given the religiosity of the controversial monuments enumerating the Ten Commandments, the issue becomes whether the placement of "Hang Ten-like" monuments on public property violates the Establishment Clause in light of *Pinette's* balance of free speech versus establishment. Although still subject to criticism, *Pinette* is understandable within the context of its facts and the display at issue. Even if the endorsement test applied to the forum in *Pinette*, the appearance of governmental approval is reduced because of the temporary nature of the displays at issue. The KKK received permission to place its cross on the Square for only two months.[270] Christmas decorations and menorahs are similarly transient because they commemorate seasonal events. Furthermore, the KKK's cross constituted only one of several displays on the same piece of government property throughout the year.[271] Once the KKK and other churches removed their crosses, other displays undoubtedly took their places just as Christmas decorations rapidly give way to those reminding consumers of Valentine's Day. In short, the appearance of governmental support is drastically reduced because regular observers of the forum are less likely to transfer governmental approval of the messages if all of the messages emanating from the forum change in a regular fashion.

Unlike the temporary nature of the displays in *Pinette* and like cases, however, "Hang Ten" and others seek to display religious symbols in a manner best characterized as permanent. As evidence

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[269]*Schundler*, 168 F.3d at 96 (3d Cir. 1999) (noting that in denying the preliminary injunction, the lower court stated that "by making these additions, defendants have sufficiently demystified the [holy], they have sufficiently desanctified sacred symbols, and they have sufficiently deconsecrated the sacred.") (alteration in original).

[270]Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 759 (1995). That is not to say, however, that an impermissible endorsement could never be attributed to a temporary display. One might imagine a sudden flood of Latin crosses appearing in front of the statehouse for a very brief time with the permission of the government that would appear to violate Establishment Clause principles. Moreover, one might imagine that a government might only allow the display of a crèche for a short time and consistently reject applications by Jewish groups to display a menorah in the same area, which would seem to be equally impermissible.

[271]*Id.* at 809 (Stevens, J., dissenting) (for example, local craftsmen and the United Way had displays on the Square).

of their permanency, sponsors donate sizable monuments that would be expensive and/or arduous to remove if only intended to be temporary. For example, sponsors erected a 6-foot tall monument of the Ten Commandments to adorn a courthouse lawn in Kansas[272] while donors fashioned a 4-foot tall plaque enumerating the Decalogue to affix to an exterior wall of a Pennsylvania courthouse.[273] Obviously, neither the donors of the 7-foot tall monument accepted for display by the state of Indiana nor the state of Indiana itself intended for the massive stone tablets to be placed on the statehouse lawn for only a month or two. In fact, during a speech to accept the donated monument, the Governor of Indiana stated that the monument was to be "an integral part of the Statehouse setting . . . ."[274] Thus, these monuments are permanent and not holiday adornments representing speech limited in time.

Recognizing the constancy of the messages conveyed by the singular, permanent monuments displayed at the seat of government calls into question *Pinette's* tipping of the First Amendment balance in favor of free speech based upon equal access to a public forum. Unlike the usual transitory nature of messages in the crowded public forum, recent sponsors of lone, unattended religious monuments usurp part of the public forum into a permanent platform for their thinly veiled religious messages. Given the dimensions of the monuments, other speakers cannot utilize the same space for their expressive conduct. However, the "Court has never held that a private party has a right to place an unattended object in a public forum."[275] Furthermore, even Justice Kennedy recognized "that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular

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[272]Matt Moline, *Monument Stirs Little Debate*, TOPEKA CAPITAL J., July 24, 2000, *available at* LEXIS, News Library.

[273]Jane Eisner, *There's No Denying Religious Nature of Ten Commandments*, PHILA. INQUIRER, Mar. 10, 2002, at E2, *available at* http://www.philly.com/mld/philly/archives/ (last visited January 7, 2003).

[274]Ind. Civ. Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001) *cert. denied*, O'Bannon v. Ind. Civ. Liberties Union, 122 S. Ct. 1173 (2002).

[275]*Pinette*, 515 U.S. at 802 (Stevens, J., dissenting).

religion."[276] As the Court noted in *Engel v. Vitale*, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[277]

In that light, the constitutionality of a monument bearing a religious message cannot turn on whether the monument permanently stands on the roof or on the state/courthouse lawn. Instead, the permissibility of "Hang Ten-like" monuments turns on the length of time each monument is allowed to be displayed. If overtly religious symbols may become secularized with time, thereby losing their religious import,[278] then religious messages placed permanently on public grounds possess the power to become associated with governmental approval as time passes because the road presumably runs both directions. Moreover, government officials clearly possess the power to regulate which monuments are placed in locations at the seat of government characterized as public forums. For example, the KKK had to apply for permission to erect its cross on the Square, and donors in Plattsmouth, Nebraska, had to apply for permission to construct a permanent Ten Commandments monument on public property in that small community.[279] As a result, observers justifiably conclude that the lawns of statehouses and courthouses, much like the Grand Staircase in *Allegheny*, are not the types of places where individuals may just plant any monument without governmental approval. Contrary to *Pinette's* assertion, observers are not making mistakes regarding which monuments

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[276]County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring) (citing Friedman v. Bd. of County Comm'rs of Bernalillo County, 781 F.2d 777, 778 (10th Cir. 1985) (en banc); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1100-11 (11th Cir. 1983); Lowe v. City of Eugene, 463 P.2d 360, 544 (1969)).

[277]370 U.S. 421, 431 (1962).

[278]*See generally* Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 584 (1998) (characterizing secularization as the process by which religious symbols lose their religiosity with the passage of time or within certain contexts).

[279]*Pinette*, 515 U.S. at 758–59; ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1027 (D. Neb. 2002) (noting that permanent markers may not be placed on public lands in Nebraska without prior governmental permission); *see also* Summum v. Callaghan, 130 F.3d 906, 910 (10th Cir. 1997) (noting that Summun, a church formed in Utah, petitioned to have a monument containing its tenets placed on the county courthouse's front lawn next to a Ten Commandments monolith).

receive governmental approval but instead are concluding correctly that those monuments that never leave the public forum remain there with the imprimatur of the government. Rather than being a disinterested observer of speech at its doorstep, state action keeps a close eye on the permanent messages conveyed on its property. In the public forum, then, a threat to Establishment Clause values stems from the duration of religious speech regardless of location.

But by inoculating free speech in public forums against the endorsement test without regard to the duration of a given display, *Pinette* ignites a competition for display space on the public lawn. *Pinette* provides religious groups with a competitive opportunity to set up displays using religious symbols to get their unique messages out vis à vis those of other displays, particularly those affiliated with other religious groups. Once the governmental body grants permission for one monument with a religious symbol, it cannot deny the applications of others without violating the neutral principle of equal access to the public forum. In *Pinette*, for example, the KKK sought to place its cross on the square "because 'the Jews' were placing 'a symbol for the Jewish belief'" on the property.[280] After the KKK planted its cross, a local church petitioned the Board for permission to erect its own cross "for the purpose of overwhelming the Klan's cross."[281] Placed in a tough position, the Board subsequently invited all local churches associated with the local council to erect a display, which ultimately created a Square "strewn with crosses."[282] In the end, a self-perpetuating race for the forum develops that threatens to clog the forum with competing religious messages as rival religious sects joust for space on public property in the name of free speech.

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[280]*Pinette*, 515 U.S. at 797. The symbol that evoked the KKK's response was the display of a menorah during the season of Chanukah. *Id.* at n.2.

[281]*Id.* at 792.

[282]*Id.* (noting that the Opposition's brief termed the invitation "blanket permission" for "all churches friendly to or affiliated with" the particular church council that initiated the petition to erect a cross); *see also, e.g.*, ACLU v. Eckels, 589 F. Supp. 222, 224 (S.D. Tex 1984) (explaining that members of the Jewish community in Houston petitioned to have a Star of David erected in a public park after Latin crosses were already standing on the property); Lynch v. Donnelly, 465 U.S. 668, 702 (1984) ("Jews and other non-Christian groups . . . can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands.").

While free speech deserves its lofty constitutional status, the threat to Establishment Clause values emerges from the shadow of the Free Speech Clause when religious groups are permitted to plant permanent religious messages on the public lawn. Simply put, "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."[283] To that end, a government certainly cannot allow "a religious group to turn a public park into an enormous church" without running afoul of the Establishment Clause.[284] Within the context of the current religious display cases involving the Ten Commandments, monuments erected at the behest of the majority religious tradition dominate the public forum. The symbols that incite controversy are generally those of Christendom. For instance, *Pinette* involved a Square "strewn with crosses" from various local churches, not a forum wallpapered with the Wiccan Rede. Indeed, a controversy surrounding a symbolic representation of Buddha, Shiva, or any other non-Christian deity on the statehouse lawn is mere fantasy because those symbols remain on the sidelines of the public forum. In that light, permitting rival religious sects to compete for the public lawn contravenes a basic purpose of the Establishment Clause—to end "the war of all sects against all"—that dominated the political and cultural landscapes of both England and the colonies.[285]

Like many conflicts, "the war of all sects against all" is not played on a level field but is instead skewed in favor of the majority faith. To that end, the absence of symbols reflecting the richness of this nation's religious pluralism is not due to a lack of adherents of non-majority faith traditions. Again, 14.1% of the population (approximately 26.6 million people) follows a religion other than Christianity or no religion at all.[286] The reason that other representations fail to make their way into the public forum is that those who make decisions regarding placement of monuments pick and choose among the messages to observers on public land in a manner favorable to the majority faith. For example, a small church

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[283]*Pinette* 515 U.S. at 777; *see also* Doe v. Small, 964 F.2d 611, 625 (7th Cir. 1992) (stating that domination "degenerates into endorsement").

[284]Doe v. Small, 964 F.2d 611, 625 (7th Cir. 1992).

[285]Kathleen M. Sullivan, *Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–98 (1992).

[286]U.S. News & World Report, *supra* note 27 at 43.

in Utah, Summum, requested permission from the Salt Lake City city council to post a monument with church tenets next to a monolith of the Ten Commandments that stood on the front lawn of the county courthouse.[287] The council denied the request claiming that the property was to be developed for a jail or other new buildings inconsistent with the addition of Summum's monument.[288] Reading between the lines, the city council simply refused to allow the county to be associated with whatever message was conveyed by Summum's monument. Similarly, it is rather fanciful to imagine that a governmental body would accept a display of either the Quran in the aftermath of September 11th or allow a giant swastika to be posted on the lawn of a government building even though it may serve as a religious symbol.[289] Thus, equal access is not a neutral policy but rather one that blocks alternative monuments from being placed on the public lawn by providing the majority with a method to dictate which symbols gain access to the public forum.

Despite the absence of representations of their faiths, members of non-majority faiths are loathe to object to long-standing majority symbols on public property. However, "the silence of religious minorities may signal something quite different from disinterest."[290] When it comes to alleging a transgression of the Establishment

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[287] Summum v. Callaghan, 130 F.3d 906, 910 (10th Cir. 1997).

[288] *Id.* In fact, Summum applied for permission to erect a monument a total of three times but the council failed to respond to the last two requests. *Id.* at 911. Summum also contacted Salt Lake City officials in an effort to procure permission for its monument, but city officials simply replied that decisions regarding the placement of monuments remained with the county. *Id.* at n.5; *see also* Bob Mims, *Judge Rules Sect Can't Place Tenets Near Ten Commandments in Ogden; Summum Sect Can't Place Tenets Near Courthouse*, SALT LAKE TRIB., Feb. 2, 2001, at A1, *available at* LEXIS, News Library (noting that apparently, the modifications to the grounds did not occur, as the county vacated the area and the existing Ten Commandments display was removed); Gentleman, *supra* note 42 (reporting that Judge Moore denied a request from African-American groups to place a plaque of the Rev. Dr. Martin Luther King Jr.'s "I Have a Dream" speech in the courthouse and refused to place a representation of an atom on courthouse space on behalf of an atheist group).

[289] Daniel Parish, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 286 (1994) (stating that "[a] swastika can serve both as a reminder of Nazi tyranny and as a symbol of Buddhism."); *see also* Colorado v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1048 (Colo. 1995) (quoting Fox v. City of Los Angeles, 587 P.2d 663, 665 (1978), which referred to the "Jain swastika" as a religious symbol).

[290] Hewitt v. Joyner, 940 F.2d 1561, 1567 (9th Cir. 1991), *cert. denied* by Joyner v. Hewitt, 502 U.S. 1073; *Fox*, 587 P.2d 663, 666 (1978) (discussing the city attorney's observation that citizens of Los Angeles had failed to complain about the lighting of a cross for over 30 years).

Clause, that something else is the fear of the consequences and persecution that follow public dissent from the majority view.[291] Those opposed to the mixture of religion and government propagated by these religious displays quickly find that they are on the front lines of the church/state controversy and are subject to public derision. Astutely, supporters of majoritarian religious displays on public land marry law and religion thereby making any opposition to the marriage appear to be a vote for an amoral society, at least as defined by Christian principles. As a result, individuals who object to the mixture of government and religion represented in these monuments are automatically labeled as "barbarians . . . ransacking America" or "anti-Christian" by supporters of the displays.[292] Worse yet, the antagonistic sentiment against dissent from the goals of "Hang Ten" caused a South Carolina official to exclaim "screw the Buddhists and kill the Muslims" at a public meeting.[293] In sum, dissent from the practice of posting symbols of the majority faith on public land subjects one to a public flogging in the form of a stream of invective criticism.

Unfortunately, public derision is not the only social punishment risked by those who believe that monuments on public lands that contain religious symbols or messages violate the Establishment Clause. After winning the removal of a Ten Commandments plaque from the side of a Pennsylvania county courthouse, for example, a plaintiff received a number of threatening telephone and email

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[291]Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 610 (1995) ("Victims of religious liberty violations do not want even to file a claim in court, even when we assure them they would win, because of the hostility, enmity, persecution, and attacks they would face."); *see also* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996) ("The ostracism that befalls plaintiffs who challenge cherished governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.").

[292]Steve Benen, *The Ten Commandments Crusade,* CHURCH & ST., May 1, 1999, at 9, *available at* LEXIS, News Library (containing the "barbarians" remark, among others); Ed Matusek, *On Christianity: What the Founding Fathers Meant*, DALLAS MORNING NEWS, July 9, 2000 at 3J, *available at* LEXIS, News Library.

[293]Lyn Riddle, *Ten Commandments: S.C. Council Enters Display Fray*, ATLANTA J. & CONST., June 5, 1997, at 13A, *available at* LEXIS, News Library (quoting the statement of a South Carolina Board of Education member).

messages including one that said, "[y]ou're going to get it."[294] Threats of this nature cannot be taken lightly given the experiences of others who took positions on the church/state divide contrary to the majority. In Oklahoma, the negative consequences for filing an Establishment Clause claim regarding religious practices in public schools included taping upside-down crosses on the lockers of the plaintiff's children and a physical attack from a school employee in the form of banging the plaintiff's head against a car door.[295] While these might be extreme examples, the warning for rocking the boat is made clear to those who would do so—object at your own risk.

Because of the state action in the form of choosing the messages permanently housed on the public forum and the risk of harm that accompanies those choices, the government shoulders some modicum of responsibility for avoiding mistakes involving message sponsorship, particularly with regard to permanent, unattended displays. By allowing the majority to control access to the public lawn pursuant to a facially neutral policy, the state fosters exactly the type of mistaken transference of endorsement from private sponsor to the government rebuked in *Pinette*. Fortunately, the government possesses the ability to readjust the First Amendment balance in the form of reasonable time, place, or manner restrictions on speech in public forums. Reasonable time, place, or manner restrictions do not restrict a speaker's message, but instead regulate when, where, or how a speaker may communicate a given message.[296] Pursuant to its regulatory ability, a ban on privately sponsored, permanent monuments displaying religious symbols realigns the crucial values of free speech and establishment in the First Amendment scales. A ban (when) of this nature simply prohibits a group from speaking via

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[294]Steve Benen, *Ten Commandments Fever: Decalogue Advocates Turn Up the Heat with Legislation in Congress, State Legislatures*, CHURCH & ST., Apr. 1, 2002, at 4, *available at* LEXIS, News Library; *see also*, Jewish War Veterans v. United States, 695 F. Supp. 3, 8 (D.C. 1988) (noting that the plaintiff received threats after objecting to a cross on public property); Freedom from Religion Found., Inc., v. Zielke, 663 F. Supp. 606, 608 (W.D. Wis. 1987) (recalling that one of the plaintiffs in a lawsuit regarding a display of the Ten Commandments in a public park received threats after initiating the litigation).

[295]Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 456 (1997). The family hog also had its throat slit by someone who obviously objected to the litigation. *Id.* In addition to these wrongs, someone set fire to the family home, completely destroying it. *Id.*

[296]William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 126 (1982).

a permanent display (how) on government owned property (where). Furthermore, a ban on permanent displays is unrelated to the suppression of free expression in that it prohibits both religious and non-religious groups from placing permanent monuments on the public lawn.[297] Moreover, the prohibition on permanent displays is justifiable apart from its regulation of speech in that it prevents the visual clutter on government property that accompanies an open door policy regarding permanent displays.[298] A ban on unattended, permanent displays simply prevents the public lawn from being "strewn with crosses."

While a ban on permanent displays curtails speech, it only limits a very specific manner of communication and leaves ample channels of communication available to speakers in the public forum, including those who desire to convey a religious message. For example, holiday displays involving religious symbolism fall outside the purview of a ban on permanent displays because they are only temporary. Similarly, brief displays promoting specific community-wide goals, such as a sign bearing a thermometer representing a United Way campaign,[299] are also beyond the reach of the ban. Moreover, nothing prevents religious groups, or any other group for that matter, from gathering on the steps of the statehouse to preach their views with the aid of placards, leaflets, bullhorns, or other modes of communication. Thus, the ban is narrowly tailored to resuscitate the compelling interest protected by the Establishment Clause[300] in the face of the subterfuge perpetrated by permanent monuments under the guise of free speech.

Feeling under attack whenever any speech limitation is proposed, religious groups emphatically denounce any attempt to limit their messages as an "ill-disguised hostility towards religion."[301] Given that the majority of the controversies revolve around Christian symbols, vocal Christians instinctively characterize any regulation

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[297]United States v. Albertini, 472 U.S. 675, 687 (1985) (discussing requirement of content-neutral restrictions).

[298]Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 816-17 (1984) (upholding a prohibition on the posting of political signs on public property).

[299]Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 809 (1995).

[300]Widmar v. Vincent, 454 U.S. 263, 271 (1981) (avoiding an Establishment Clause violation may be a "compelling" state interest).

[301] Mary Ann Glendon, *Religious Freedom and Common Sense*, N.Y. TIMES, June 30, 1997 at A11.

on religious speech as an effort to remove God from society and as an infringement on their way of life.[302] From their perspective, advocates see no endorsement of religion by planting permanent monuments bearing religious messages on public grounds but instead believe that they are "standing with the Bible."[303] Objections to speech limitations that invoke religion or the Bible, however, belie the true intention underlying the monuments. If, as proponents claim, monuments that include religious symbols only pay tribute to history, then their prohibition cannot be properly characterized as anti-religion but instead as being anti-history. In other words, if the presence of the controversial monuments have zero preference for one religion over another or for religion over non-religion, then the negative is also true—the absence of the monuments have zero preference for one religion over another or for non-religion over religion. As a result, reasonable regulations of religious speech like that advocated by "Hang Ten" are not hostile to one particular religion or religion in general but instead defend the rich religious diversity of this nation.

V. CONCLUSION

Although the present neutral policy of equal access to a forum without governmental support seems benign, surface equality frequently masks underlying inequality. *Plessy v. Ferguson's* embrace of the "separate but equal" doctrine hid the marked differences between the races traceable to segregation until *Brown v. Board of Education* shed light on the injustice and put it asunder.[304] Similarly, the Court found injustice in the form of vote dilution in cases like *Reynolds v. Sims* even though each citizen ostensibly

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[302]Honorable Roy S. Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347, 358, 368 (1998/99); *see also* Amy Bayer, *Fighting Words Cost Buchanan; While Critics Assail His In-Your-Face Rhetoric, He Remains Unapologetic*, SAN DIEGO UNION-TRIB., Mar. 12, 1996, at B12, *available at* LEXIS, News Library (recalling Buchanan's claim that "Christian-bashing is a popular indoor sport").

[303]Bob Fowler, *Ten Commandments can be Posted*, KNOXVILLE NEWS-SENTINEL, July 25, 1999, at AC6, *available at* LEXIS, News Library.

[304]Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896); Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954) (finding the "separate but equal" doctrine to be unconstitutional).

possessed equal access to the voting booth itself.[305] To that end, the *Reynolds* Court reminded the country that "the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination'."[306] The same is true of the neutral policies of equal access for all religious speakers in religious display cases arising in public forums. Simply put, neutrality is a concept limited by the personal predilections of those who implement policy. Those who decide what monuments are displayed at the seat of government invariably favor some religious displays over others. Given that the vast majority of citizens are Christians, odds are that the Christian symbols of the majority faith receive favorable treatment and the evidence shows that symbols associated with Christianity dominate the public forum. Summum's tenets of "psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender" are not going to be placed on a monument near the seat of government or in a courtroom at any time in the near future pursuant to a policy of equal access that promotes religious tolerance.[307] If adherents of minority faiths in this country, such as Hindus, petition for inclusion of their monuments on public property, the far more likely result is that they will be met with a response reminding them that they can go to India "to put up their own rock."[308]

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[305]377 U.S. 533, 562 (1964) (concerning an equal protection challenge to the application of a 1903 Alabama legislative apportionment scheme in light of population changes). The Court famously announced that "legislators represent people, not trees or acres" and added:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

Id.; Avery v. Midland County, 390 U.S. 474, 484-85 (1968) (applying the "one person-one vote" standard of *Reynolds* to a county in Texas).

[306]*Reynolds*, 377 U.S. at 563 (citing Lane v. Wilson, 307 U.S. 268, 275 (1939)); Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960)).

[307]Bob Mims, *Judge Rules Sect Can't Place Tenets Near Ten Commandments in Ogden; Summum Sect Can't Place Tenets Near Courthouse*, SALT LAKE TRIB., Feb. 2, 2001, at A1, *available at* LEXIS, News Library.

[308]Townsend, *supra* note 259, at A1 (continuing that "[w]e certainly don't owe Hindus or Islam (a place on the . . . monument.)"); *see also Inflaming Intolerance*, LOUISVILLE COURIER-J., Feb. 17, 2000, at 10A (noting that supporters of posting Christian symbols justify the exclusion of symbols associated with other religions by announcing that the boats that came to this land did not hold atheists, Buddhists, or Hindus, but instead carried Christians who traveled in search of a land to practice their religion).

Regardless of any proclaimed religious tolerance, sentiments like "if you don't like it, then leave" reflect the religious intolerance percolating beneath the surface of placid neutral policies. A facially neutral policy that allows domination of a public forum near the seat of government by the permanent religious messages of one religious tradition in the absence of others prefers some religious sects over others and, at the very least, favors religion over nonreligion. As a result, the jurisprudentially hypothesized neutral policy of equal access promotes the idea that there are "ins" and "outs" and is not truly neutral in reality.[309] In addition to feelings of exclusion,[310] the domination of the public forum to the detriment of the "outs" affects the physical behavior of some outside the religious majority.[311] In *Jewish War Veterans v. United States*, for example, one Jewish individual altered his travel route to avoid seeing a Latin cross on U.S. Navy property because the cross made him feel like an "alien."[312] Trying to remedy this sense of exclusion in their community, officials in a small Georgia town altered the Ten Commandments display in their community. The improved monument contained the Ten Commandments, the Lord's Prayer, and a single, empty frame engraved with the words "[t]his is for those of other beliefs . . . ."[313] All of the other faith traditions in that

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[309]Barry W. Lynn, *Ten Commandments Don't Belong on Your Courthouse*, PITTSBURGH POST-GAZETTE, Dec. 31, 2000, at E-1, *available at* LEXIS, News Library.

[310]Suhre v. Haywood County, 131 F.3d 1083, 1085 (4th Cir. 1997) (reporting that an atheist feared that the law would not be applied fairly to him after seeing a Ten Commandments display behind a courtroom bench).

[311]Ray Suarez, *Legislation Passed Allowing the Ten Commandments To Be Displayed in Public Buildings, Talk of the Nation* (National Public Radio broadcast, June 21, 1999) (containing a letter pointing out that Muslim youths are not only subject to derision for the way they dress, but also feel a sense of exclusion as a result of Christian displays of the Ten Commandments on government property); *see also* Jeffrey Cohan, *A Man of Conviction; Avowed Atheist Questions Legality of Documents*, PITTSBURGH POST-GAZETTE, Jan. 22, 2001, at A-9, *available at* LEXIS, News Library (describing an atheist's feelings of exclusion in response to a Ten Commandments display on the wall of a courthouse); Jeffrey L. Sheler, *The Mormon Moment*, U.S. NEWS & WORLD REPORT, Nov. 13, 2000, at 64, *available at* LEXIS, News Library (describing the ostracism experienced by some individuals in Utah and the West when others discovered that they were not Mormon).

[312]695 F. Supp. 3, 8 (D.C. 1988); *see also* Washegesic v. Bloomingdale Pub. Schs., 33 F.3d 679, 682 (6th Cir. 1994) (noting that a portrait of Jesus Christ in a public school impaired the usage of the facility by non-adherents).

[313]Dahleen Glanton, *Crusading for a Christian Nation; Groups Across the Country Are Defying the Courts and Invoking Patriotism as They Fight for Displays of the 10 Commandments*

community got one small frame next to two undeniably Christian symbols, which does nothing to promote a sense of inclusion or advance the ideal of religious tolerance within the community. If anything, an offering of that nature further isolates members of non-majority religions. To combat the exclusion fostered by the dominance of the public forum allowed under existing government policy, the only remedy that is truly neutral is to ban all permanent religious messages from public grounds. In the end, banning "Hang Ten-like" displays is a reasonable weight to add to the First Amendment balance in an effort to return free speech and establishment to the neutral position of a standoff.

In addition to its promotion of meaningful neutrality, a ban on permanent religious markers bearing religious messages begins to correct a fundamental failure of the law in this important area—predictability. Rather than ordering private or group affairs in accordance with legal principles, the unstable tangle of Establishment Clause jurisprudence actually promotes efforts to circumnavigate the law precisely because of the uncertainty of the outcome. As a result, groups with religious agendas push the envelope with their displays and those bold enough to object find themselves engaged in protracted and costly litigation over the constitutionality of the displays. However, the abundance of litigation over these displays wastes the resources of both parties—not to mention those of the courts. Religious groups might better use their resources more efficiently and effectively on proselytizing efforts that do not force a constitutional collision, such as handing out flyers to passerby on the sidewalk, and the same is true of those who object to the public representations. Implementing a ban on permanent markers levels a currently uneven playing field by making clear that any and all such displays are impermissible and resolves this particular church/state battle. As a result, resources can be allocated to the next major Establishment Clause issue because unlike the uncertainty of Establishment Clause jurisprudence in general, one thing that is sure is that there is another major church/state issue looming on the horizon.

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and School Prayer, CHICAGO TRIB., Dec. 10, 2001, at Zone N, p.1, *available at* LEXIS, News Library.