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PYRRHIC VICTORIES:
HOW THE SECULARIZATION DOCTRINE
UNDERMINES THE SANCTITY OF RELIGION

By

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Abstract: Over the past 25 years, federal courts have sanctioned displays of religious symbols on public property – including the crèche, the Ten Commandments, and the Latin cross – by privileging their secular value or because nearby secular symbols wash away their religiosity. This paper contends that these cases have resulted in government secularization of the religious. Though the appearance of religion has increased in the Public Square, this effort has been partially self-defeating because the distinctive substance of religion has been eroded by this jurisprudence, thereby weakening the sanctity of religion. Minimizing the religious import of these symbols makes dialogue over the proper reach of the Establishment Clause effectively impossible.

I. Introduction

The Supreme Court has sanctioned displays of Christian crèches,¹ Jewish menorahs,² and the Judeo-Christian Ten Commandments.³ Lower courts have rejected Establishment Clause claims against the display of the Latin cross on public property,⁴ and a lower court has ruled that kneeling, bowing one's head, and clasping one's hands do not constitute prayer.⁵ All of these decisions justify the inclusion of religious symbols and practices in public venues on the grounds that they are not actually religious. Though this rationale seems to embrace a bizarre contradiction, federal courts have ruled that in these particular contexts, the government is not recognizing the religious importance of these icons, but rather the secular or historical values the symbols also underscore. Alternatively, courts have declared that the placement of secular symbols near the religious ones effectively wash away their theological significance. Ironically, many on the Religious Right celebrate these court decisions as victories for the advancement of religion, while the long term consequences of these decisions prove harmful to religion. Many separationist advocates rue these court decisions because they demonstrate the influence Christianity maintains in formulating governmental policy.⁶

¹ Lynch v. Donnelly, 465 U.S. 668 (1984).

² County of Allegheny v. ACLU, 492 U.S. 573 (1989).

³ Van Orden v. Perry, 545 U.S. 677 (2005).

⁴ Trunk v. City of San Diego, 568 F. Supp. 2d 1199 (2008); American Atheists v. Duncan, 528 F. Supp. 2d 1245 (2007).

⁵ Borden v. School District of East Brunswick, No. 05-cv-05923 (2006).

⁶ Linda Greenhouse, *Justices Allow a Commandments Display, Bar Others*, THE NEW YORK TIMES, June 27, 2005.

These decisions undermine the sanctity of religion by desacralizing fundamental religious tenets, practices, and symbols. When government affirms the presence of religion – its scriptures, symbols, and rituals – in the Public Square for historical or other secular reasons, two mutually exclusive conclusions are possible: (1) emphasis on the secular value of religion is a ruse and the government is actually recognizing the religious value of these public displays, or (2) government is assigning public value to these various expressions of religion by secularizing them. If the first conclusion is true, it poses a massive threat to the Establishment Clause as the government is orchestrating a fraud upon the Constitution. The implications of the second conclusion constitute the substance of this essay. The government undermines the sanctity of religion by stripping these religious symbols and scriptures of their religious import.

Government in America, while secular, has, at the same time, been appreciative of the sociopolitical contributions made by religion. This recent development in law undermines that appreciation by recognizing religious symbols and texts as something less than holy.

Section II of this Paper examines three areas of Establishment Clause jurisprudence which document the extent to which federal courts have secularized religious displays: crèche and menorah display cases, Ten Commandment display cases and the Latin cross display cases. I argue that the presence of secular objects, such as Santa Claus or snowmen, does not diminish the religious significance of the crèche. Likewise, judicial attempts to emphasize the secular or cultural heritage of the Ten Commandments or the Latin cross do not give adequate respect to the religious power these symbols carry. This section also examines a case in which a lower court judge attempted to secularize the act of prayer.⁷ Section III will assess the harm by a civil assault on the sanctity of religion in these cases and place this analysis within current Establishment Clause literature. Critics have argued that complex symbols can have different

⁷ BORDEN, *supra* note ____.

meanings to different people, which would make the dilemma of government secularizing religion a false choice. I draw upon the work of Ronald Dworkin and Sanford Levinson to respond to this critique. Section IV concludes the essay by weighing the pragmatic approach adopted by conservative Christian litigators against the religious principles undermined in the process.

II. Surveying Modern Establishment Clause Jurisprudence

A. Public Displays of the Crèche and the Menorah

The Supreme Court first laid the groundwork for this jurisprudence in a challenge to a public display of a nativity scene came from Pawtucket, Rhode Island. The display, located in a shopping district, included figures of Santa Claus and his reindeer, a Christmas tree, a banner reading “Season’s Greetings,” images of carolers, and (somewhat bizarrely) a clown and an elephant.⁸ The display also contained a “life-sized” nativity scene depicting the birth of Jesus Christ, also known as a Christian crèche.

It is clear from the oral argument in *Lynch v. Donnelly* (1984) that proponents of a government-sanctioned display of religion were willing to secularize religion as a deliberate strategy to achieve a legal victory. Their argument offered the greatest potential for escaping the snares of the *Lemon* test.⁹ First, the government's action must have a secular legislative purpose. Second, the government's action must not have the primary effect of either advancing or inhibiting religion. Third, the government's action must not result in an “excessive government entanglement” with religion. The city’s attorney told the Court that Christmas had become a “secular folk holiday,” a description of a religious festival that should have offended any

⁸ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 206 (2 Revised ed. 1994).

⁹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

adherent to Christianity. They further argued that the promotion of religion through the crèche was “overwhelmed by secular” displays – an acknowledgment that belief related to “the birth of the Christ” had been superseded by secular interests. The city’s attorney also argued that the crèche could be justified by history and tradition. At that time, displays of the crèche on public grounds or with government sponsorship were common in many communities across the country, and the display in Pawtucket had been ongoing for 40 years.¹⁰

The Court, in a 5-4 decision, sided with the city and allowed the crèche to remain on display. Writing for the majority, Chief Justice Warren Burger largely adopted the rationale offered by the city that the purpose of the overall display, both the crèche and the secular elements, served a secular purpose – namely recognizing a national holiday. Thus the crèche, though recognized as a religious symbol, was deemed to create a benefit to religion that is only “indirect, remote, and incidental”¹¹ because of the context in which it is displayed and because it is a “passive symbol.”¹² Chief Justice Burger acknowledged that a “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”¹³ So, in order to avoid that eventuality, he minimized the religious component of the crèche. In this case, while the Court did not directly secularize a religious symbol, it articulated the principle that surrounding a religious symbol with enough secular symbols reduces the religious symbol to a *de minimus* contribution.

In her concurring opinion, Justice Sandra Day O’Connor called the crèche a “traditional symbol” of Christmas that has “cultural significance” in addition to its “religious aspects.”¹⁴

¹⁰ Fred Barbash, *Justices Consider Santa Clauses, Colored Lights and Creches*, WASHINGTON POST, October 5, 1983, at A3.

¹¹ LYNCH, *supra* note ____ at 683-84.

¹² *Id.* at 686.

¹³ *Id.* at 680.

¹⁴ *Id.* at 681 (O'Connor, J., concurring).

Rather than applying the *Lemon* test, Justice O'Connor proposed a new Establishment Clause theory – the endorsement test. This test, which became more popular with the Court in subsequent cases, inquires “whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of a religion].”¹⁵ Justice O'Connor and the chief justice analogized the display of the crèche to the display of religious artwork in a government-funded museum, a situation that did not create First Amendment difficulties.

Justices William Brennan and Harry Blackmun wrote vigorous dissenting opinions,¹⁶ both of which contended that the majority had undermined the sanctity of religion. Justice Brennan argued that the Court's classification of the crèche as a traditional symbol on par with Santa Claus and his reindeer “is offensive to those for whom the creche has profound significance.”¹⁷ Justice Brennan elaborated an extensive account of the religious meaning of the holiday of Christmas, which reads like a heartfelt expression of his personal Catholic faith. According to Brennan, the crèche is “the chief symbol of the belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption.”¹⁸ Justice Blackmun's more succinct dissent focused squarely on the sanctity of religion. He wrote:

The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory – but it is a Pyrrhic one indeed...Surely this is a misuse of a sacred symbol.¹⁹

¹⁵ *Id.* at 691.

¹⁶ Both dissents end with the phrase “I dissent,” which some consider a more passionate expression of disagreement than the more customary phrase “I respectfully dissent.” See, e.g., Frank J. Murray, *Ginsburg's Dissent Shows Lack of 'Respect'*, THE WASHINGTON TIMES, December 14, 2000, at A11..

¹⁷ LYNCH, *supra* note ____ at 711-12 (Brennan, J., dissenting).

¹⁸ *Id.* at 708.

¹⁹ *Id.* at 727 (Blackmun, J., dissenting).

Five years later the Court again dealt with holiday displays in *County of Allegheny v. ACLU*.²⁰ This case featured challenges to two separate public displays: one of a crèche in the county courthouse and the other a Christmas tree displayed alongside a menorah and a sign “saluting liberty” outside a local government building. The crèche, unlike the one at issue in *Lynch* was not presented with any other secular Christmas displays, and, also unlike *Lynch*, the crèche included a banner declaring: “Gloria in Excelsis Deo.” The Court split 5-4 to strike down the crèche display on Establishment Clause grounds but a different 5-4 majority upheld the display of the menorah and the Christmas tree. The only person to be in the majority for both halves of the case was Justice Blackmun who authored a majority opinion that seems to undermine the position he took in *Lynch*.

Justice Blackmun observed that both Christmas and Chanukah are “cultural events”²¹ in addition to being religious holidays. The cultural significance of Chanukah in modern American society, according to Blackmun, may have derived from its proximity to Christmas. Justice Blackmun also characterized the crèche and the menorah as religious symbols, while he classified the Christmas tree as a secular symbol with religious roots. In addition to their different fact patterns, *County of Allegheny* also broke with *Lynch* in that Justice Blackmun adopted the endorsement test, first developed by Justice O’Connor in her concurrence in *Lynch*, as the relevant inquiry to satisfy the Establishment Clause.

As outlined by Justice Blackmun, government may not favor, prefer, or promote one religious belief over another. This decision left courts to answer the question of whether or not a “reasonable observer”²² would conclude that a religious display had the effect of endorsing a religion. The reasonable observer was defined as a person who has knowledge of the context

²⁰ COUNTY OF ALLEGHENY, *supra* note ____.

²¹ *Id.* at 585.

²² *Id.* at 620.

and history of the display and who has an appreciation for the Constitution's religion clauses. Like the majority in *Lynch* Justice Blackmun believed the broader context of the entire display is crucial in determining a possible constitutional violation. Within that framework, Justice Blackmun concluded that the presence of a banner containing a religious message and the absence of other secular adornments translated into an Establishment Clause violation for the crèche.²³

The other display presented even greater interpretive difficulties. Justice Blackmun reasoned that since the Christmas tree was a secular symbol it could have the effect of secularizing the religious significance of the menorah: "In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter holiday season."²⁴ Justice O'Connor's concurring opinion echoed most of Justice Blackmun's argument, though she refused to secularize the menorah, an argument she described as "strain[ed]."²⁵ Instead, Justice O'Connor upheld the display on the grounds that the message of the overall display (including the sign saluting liberty) promoted a message of religious pluralism. Justice Kennedy criticized Blackmun's approach as "a jurisprudence of minutiae" because it forces courts to consider the placement of "Santas, talking wishing wells, reindeer, or other secular symbols" that might wash away the religious significance of the religious significance of the crèche.²⁶

Justice Brennan wrote an opinion concurring in the judgment of the crèche and dissenting from the judgment related to the menorah and Christmas tree. Justice Brennan, instead, argued

²³ It is noteworthy that Justice Blackmun's dissent in *Lynch* disagreed with the idea that secular objects could detract from the religious value of a crèche, yet he adopts that standard in *Allegheny County*.

²⁴ COUNTY OF ALLEGHENY, *supra* note ____ at 617.

²⁵ *Id.* at 634 (O'Connor, J. concurring).

²⁶ *Id.* at 674 (Kennedy, J., concurring in part, dissenting in part). These symbols were present in *Lynch*, but not in this case.

that the presence of the menorah highlighted the religious significance to the Christmas tree, especially in light of the sign saluting religious pluralism. If the sign's message was true, so the argument went, the display must have honored more than one religion, which made it problematic to declare the Christmas tree as secular in that context. Justice Brennan also rejected the pluralism argument, based on Justice Blackmun's observation that its proximity to the Christmas made Chanukah more prominent. The concept of a winter holiday display was considered offensive to Jews because it "sends an impermissible signal that only holidays stemming from Christianity...favorably dispose the government towards 'pluralism.'"²⁷

B. Public Displays of the Ten Commandments

The Supreme Court first dealt with the constitutionality of public displays of the Ten Commandments in the 1980 case *Stone v. Graham*.²⁸ At issue was a Kentucky law requiring a poster of the Ten Commandments to be placed in every public classroom in the state at private expense. The Court granted *certiorari*, and in the same *per curiam* opinion, summarily struck down the statute on Establishment Clause grounds on a 5-2 vote.²⁹ At the bottom of the Ten Commandments posters in small print was a disclaimer noting that the Ten Commandments provided the basis of the "fundamental legal code of Western Civilization and the Common Law of the United States."³⁰ The Court's majority, however, quickly dismissed the legislature's pretext, noting the Ten Commandments "are undeniably a sacred text in the Jewish and Christian

²⁷ *Id.* at 646 (Brennan, J., concurring in part, dissenting in part).

²⁸ *Stone v. Graham*, 449 U.S. 39 (1980).

²⁹ Two justices voted to dissent on jurisdictional grounds.

³⁰ *STONE*, *supra* note ____ at 39.

faiths”³¹ that cover not just secular legal duties, but sectarian religious duties. As a result, the purpose of the display, the majority reasoned, was “plainly religious in nature.”³²

The Court’s reasoning in *Stone* did not settle the controversy, and the same issue appeared again 25 years later in a pair of cases, *McCreary County v. ACLU*³³ and *Van Orden v. Perry*.³⁴ *McCreary*, which like *Stone*, came from Kentucky, involved a challenge to two Ten Commandments displays erected inside two county courthouses in 1999. After the ACLU brought suit challenging the display, the two counties broadened their displays by including secular documents that had religious components, such as the Mayflower Compact and the Declaration of Independence. *Van Orden*, on the other hand, came from a challenge to a Ten Commandments monument on the state Capitol grounds in Austin, Texas that had been donated by the Fraternal Order of Eagles in 1961.

In the 25 years since *Stone*, two major relevant changes had taken place. The Supreme Court’s personnel had changed significantly. Second, conservative Christian groups – sometimes referred to as the Religious Right – had become active in politics, both generally and especially within the courts.³⁵ Mathew Staver³⁶ of the Liberty Council represented *McCreary County* before the Supreme Court, and over a dozen conservative Christian organizations submitted *amicus* briefs on these two cases. The American Center for Law and Justice, another prominent Religious Right litigation group, submitted an *amicus* brief in *Van Orden*, chronicling in great detail the cultural and secular influence of the Ten Commandments. The brief even cited a variety of journal articles from secular disciplines which utilize the term “Ten

³¹ *Id.* at 41.

³² *Id.* at 43.

³³ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

³⁴ *VAN ORDEN*, *supra* note ____.

³⁵ See HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005).

³⁶ I contacted Mathew Staver seeking comments on my manuscript. After receiving an invitation from him to send along a copy, I never heard back.

Commandments,” such as an Executive Health magazine article entitled the “The Ten Commandments of Buying TV Fitness Gadgets.”³⁷ The ACLJ brief did not even try to preserve the religious meaning of the First Table of the Ten Commandments either; they argued the entire text had secular value.³⁸ This win-at-any-cost strategy is consistent with Professor Hacker’s account of the Christian right’s litigation strategy,³⁹ and it received criticism from an unlikely member of the Supreme Court.

Like the ACLJ, Texas Attorney General Greg Abbott based his position at oral argument on the notion that the Ten Commandments form the historical basis for American law, thus creating a legitimate secular purpose for the display, Justice Antonin Scalia retorted: “You’re watering it down to say the only message is a secular message. I can’t agree with you. ‘Our laws come from God.’ If you don’t believe it sends that message, you’re kidding yourself.....I would consider it a Pyrrhic victory for you to win on the grounds you’re arguing.”⁴⁰ Although he used language identical to Justice Blackmun’s dissent in *Lynch*, Justice Scalia nonetheless reached the opposite conclusion. Justice Scalia has argued that the role of Christianity did not amount to an establishment of a national religion because it does not coerce individuals into worshipping against their will.⁴¹

Despite Justice Scalia’s admonition, the secular value of the Ten Commandments became the lynchpin for both cases. In a five-to-four decision on *McCreary*, the Court ruled that the Kentucky Ten Commandments display violated the Establishment Clause, while on *Van Orden*,

³⁷ Brief for American Center for Law and Justice at 24-26, *VAN ORDEN*, *supra* note ____.

³⁸ The First Table describes the commandments imposing a purely religious duty, such as not taking the Lord’s name in vain, whereas the duties imposed by the Second Table, such as the prohibition on killing, have secular equivalents in most legal systems. See ROGER WILLIAMS & JAMES CALVIN DAVIS, ON RELIGIOUS LIBERTY 116-21 (2008).

³⁹ HACKER, *supra* note ____.

⁴⁰ Linda Greenhouse, *Justices Consider Religious Displays*, THE NEW YORK TIMES, March 3, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9A05E3D7133DF930A35750C0A9639C8B63&sec=&spon=&&sc p=6&sq=van%20orden%20v.%20perry&st=cse> (last visited Mar 12, 2009).

⁴¹ Scalia’s Establishment Clause jurisprudence is somewhat similar coercion test was first developed by Justice Kennedy in his opinion in the *Allegheny County* case.

a five-to-four majority upheld the constitutionality of the Texas display. The only member of the Court to be in the majority in both cases was Justice Stephen Breyer whose opinion asserted the context and history of the two cases differed so greatly that the two Ten Commandments monuments served different purposes. From Justice Breyer's perspective, the Kentucky displays of the Ten Commandments, which originally were not displayed with any other items, were intended to achieve "substantially religious objectives of those who mounted them."⁴² The Texas monument, however, fit within a broader display of items marking the secular history of Texas, and thus, in Breyer's opinion, the Ten Commandments served a secular purpose. Notably, Breyer presented the case through a false dichotomy. If the Court struck down the display, it would lead "the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."⁴³ But, if striking down the monument was hostility to religion, then by that logic, would it not follow that allowing the display should represent recognition of religion?

Breyer's rational secularization of the Ten Commandments led to criticism from both ideological wings of the Court. Chief Justice Rehnquist wrote the plurality opinion in *Van Orden*, upholding the religious value of the Ten Commandments but dismissing the threat posed to the Establishment Clause by the public display of such a monument. Justice John Paul Stevens' dissent in *Van Orden* gave a backhanded compliment to the plurality opinion in that case, even though that opinion led to a contradictory conclusion on the Establishment Clause question. "Thankfully, the plurality does not attempt to minimize the religious significance of the

⁴² VAN ORDEN, *supra* note ____ at 703 (Breyer, J., concurring).

⁴³ *Id.* at 704.

Ten Commandments,” Stevens wrote, implicitly referencing Breyer’s concurrence. “Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.”⁴⁴

In his concurring opinion, Justice Clarence Thomas echoed a critique similar to the one expressed at oral argument by Justice Scalia. Like Scalia, however, Thomas still upheld the Ten Commandments displays, but on originalist grounds that would not force the government to secularize religion. He wrote: “The Court’s foray into religious meaning either gives insufficient weight to the views of non-adherents and adherents alike, or it provides no principled way to choose between those views.”⁴⁵ In dicta, Justice Thomas also took issue with the Court’s logic in *Elk Grove Unified School District v. Newdow*,⁴⁶ wherein the Court sustained the constitutionality of the phrase “one Nation under God” in the Pledge of Allegiance partially on the grounds that such a nonsectarian reference to God serves a secular purpose. Justice Thomas argued: “Telling either nonbelievers or believers that the words ‘under God’ have no meaning contradicts what they know to be true.”⁴⁷

In that case, Justice O’Connor justified keeping “under God” in the Pledge by laying out a test for “ceremonial deism,” which includes a prong for minimal religious content.⁴⁸ What seems like minimal religious content to one person is a deeply held religious value for others. For instance, Jews will often write the word God as G-d because of a biblical commandment to not let the word God be defaced. Some Jews also avoid speaking the word “Adonai,” which translates to “the Lord,” outside of prayer or study.⁴⁹ While describing the words “under God” as religious in nature, Justice O’Connor argues that this reference can serve a secular purpose by

⁴⁴ *Id.* at 716-17 (Stevens, J., dissenting).

⁴⁵ *Id.* at 693 (Thomas, J., concurring).

⁴⁶ *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

⁴⁷ VAN ORDEN, *supra* note____ at 693-94 (Thomas, J., concurring).

⁴⁸ NEWDOW, *supra* note____ at 42-43.

⁴⁹ Jeffrey Wolfson Goldwasser, ASK THE RABBI - WHY SOME JEWS SPELL GOD, "G-D"? ABOUT.COM, http://judaism.about.com/od/reformjudaismfaq/f/god_spelling.htm (last visited Dec 8, 2010).

“solemnizing public occasions.”⁵⁰ While I would agree that the words “under God” do not refer to a specific religion,⁵¹ O’Connor argues that a reasonable observer “would not perceive these acknowledgments as signifying a government endorsement...of religion over nonreligion.”⁵² Using religion to legitimate state functions should raise the specter of theocracy. By treating these religious invocations as serving a secular purpose, Justice O’Connor is stating that the concept of God is devoid of theological meaning because it cannot be used to distinguish between religion and nonreligion.

C. Prayer Cases

Marcus Borden is the football coach at East Brunswick High School in New Jersey. For fifteen years, Borden joined his team in prayer activities led by a local minister at dinner before a football game and in the locker room. In 1997, the school’s athletic director stopped the minister from delivering the prayer. Instead, the minister wrote a prayer, which a player on the team then delivered. From 2003 to 2005, Borden alternated between leading the team in prayer himself and having a student volunteer initiate the prayer. When the school district attempted to limit Borden’s involvement in the religious activity, he resigned. Borden changed his mind and was reinstated when he promised to comply with the school district’s policy.

Borden then initiated a lawsuit to “show his respect for his players, respect for The Team Prayers, and respect for East Brunswick's football tradition by engaging in two silent acts during The Team Prayers: (i) bowing his head during grace; and (ii) taking a knee with his team in the locker room.”⁵³ A photo in the Boston Globe demonstrates Borden engaging in a third form of

⁵⁰ NEWDOW, *supra* note___ at 36 (O'Connor, J., concurring).

⁵¹ Of course, this reference does imply favoritism for monotheistic religions.

⁵² NEWDOW, *supra* note___ at 36 (O'Connor, J., concurring).

⁵³ Borden v. School District of East Brunswick, 523 F.3d 153, 162-63 (2008).

potentially religious activity – clasping his hands together.⁵⁴ Borden’s lawyer told the *New York Times* “The event of a high school football team saying a prayer is such a part of the culture of our country that it is not a religious event.”⁵⁵ The Alliance Defense Fund, a key Christian conservative litigation group, filed an amicus brief in support of Borden’s contention that he was not engaging in religious activity by bowing his head and kneeling.⁵⁶ On the other hand, the Interfaith Alliance, joined by Jewish, Muslim and Sikh religious groups submitted an amicus brief warning the Third Circuit against secularizing actions that are intimately associated with prayer in a variety of religions.⁵⁷

Federal District Court Judge Dennis Cavanaugh granted Borden’s request, noting: “I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one’s head and taking a knee as a sign of respect for his players’ actions and traditions, nor do I believe would a reasonable observer.”⁵⁸ The school district appealed to the Third Circuit Court, and a three-judge panel reversed Judge Cavanaugh. Judge Michael Fisher concluded: “Based on the history and context of Borden’s conduct in coaching the EBHS football team over the past twenty-three years, Borden is in violation of the Establishment Clause when he bows his head and takes a knee while his team prays.”⁵⁹

⁵⁴ Stan Grossfeld, *An Issue of Fair Pray*, THE BOSTON GLOBE, November 7, 2006, http://www.boston.com/sports/schools/football/articles/2006/11/07/an_issue_of_fair_pray/ (last visited Dec 7, 2010).

⁵⁵ Michael S. Schmidt, *Coach Sues for the Right To Pray With His Team*, NEW YORK TIMES, November 23, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9F07E1DE1631F930A15752C1A9639C8B63>.

⁵⁶ Alyssa Farah, *Praying-coach case heads to Supreme Court*, WORLDNET DAILY, November 22, 2008, <http://www.wnd.com/?pageId=81692>.

⁵⁷ Interfaith Alliance Weighs in on School Prayer Case, , <http://www.interfaithalliance.org/news/87-interfaith-alliance-weighs-in-on-school-prayer-case> (last visited Dec 7, 2010).

⁵⁸ BORDEN, *supra* note ____ at 164.

⁵⁹ *Id.* at 174.

Judge Fisher said that even if Borden did not intend to violate the Establishment Clause by bowing his head and kneeling, a reasonable observer would likely come to that very conclusion given his history of religious activities. If a coach who did not have this history had raised this lawsuit, the Court of Appeals might decide the case differently, though in a concurring opinion Judge Theodore McKee disagreed with this conclusion.⁶⁰ To Judge McKee, the plaintiffs in this case are trying to create cognitive dissonance where none should occur – that somehow the actions of bowing one’s head and kneeling can mean one thing for Coach Borden in church and another thing in a locker room.

Though the U.S. Supreme Court declined to hear this case,⁶¹ in other school prayer cases the Court has proven more adept at properly classifying religious conduct. For instance, in *Lee v. Weisman*,⁶² the Court was asked to review a school district policy that allowed prayers at graduation ceremonies so long as they met certain guidelines, one of which is that the prayer must be nonsectarian. Before the case reached the Supreme Court, a three-judge panel on the First Circuit Court of Appeals ruled that such a prayer would not violate the Establishment Clause because a nonsectarian prayer was akin to promoting a civil religion.⁶³ Justice Kennedy’s majority opinion noted that while a nonsectarian prayer would be “more acceptable,”⁶⁴ he did not attempt to secularize this form of prayer. Instead, he argued against attempts to minimize the harm done by such a prayer as “an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.”⁶⁵

⁶⁰ BORDEN, *supra* note ____ at 179-80 (McKee, J., concurring).

⁶¹ Borden v. School District of East Brunswick, 2009 U.S. LEXIS 1640 (2009).

⁶² Lee v. Weisman, 505 U.S. 577 (1992).

⁶³ Weisman v. Lee, 908 F.2d 1090 (1990).

⁶⁴ LEE, *supra* note ____ at 589.

⁶⁵ *Id.* at 594.

D. Public Displays of the Latin Cross

The effects of the decisions on religious symbols discussed above have trickled down the federal court system. Indeed, their credulity has been stretched further by a new line of cases clustered around the question of whether or not a public display of the Latin cross violates the Establishment Clause. Two federal district court judges have written opinions⁶⁶ denying an Establishment Clause violation based on the secular significance of the cross, and the U.S. Supreme Court recently addressed the issue in dicta.⁶⁷

For almost a century, the scenic landscape of Mt. Soledad, a public park located in San Diego, California, has featured a Latin cross. The most recent of the three iterations of the cross is a 29 feet tall recessed-concrete monument. The La Jolla town council sponsored a dedication ceremony on Easter Sunday, 1954, a service that featured Bible readings, prayers, and the singing of the hymn “Onward Christian Soldiers.” The memorial has often served as a site for subsequent Easter services, but the site has not been used for services on Veterans Day.⁶⁸ This cross was erected by the Mt. Soledad Memorial Association in honor of fallen veterans from World Wars I and II and the Korean War.

Despite this rationale, no plaques were placed by the cross to honor the war dead until 1989, when one plaque was added to the display. That year also marked the start of litigation over the constitutionality of the display. Dozens more plaques honoring individual veterans were added to the display in 2000. Subsequently, numerous travel guides, road maps, and the phone book referred to the site as the “Soledad Easter Cross” until litigation over its constitutionality began in the late 1980s. In 2006, Congress seized the site from the city via eminent domain in

⁶⁶ AMERICAN ATHEISTS, *supra* note ____; TRUNK, *supra* note ____.

⁶⁷ Salazar v. Buono, 129 S.Ct. 1313 (2010).

⁶⁸ PETER IRONS, GOD ON TRIAL: DISPATCHES FROM AMERICA'S RELIGIOUS BATTLEFIELDS 85 (2007).

order to circumvent ongoing litigation in state courts.⁶⁹ Litigation then moved back into federal court, beginning with a challenge to the legitimacy of the land transfer, which was dismissed for lack of standing.

In 2008, federal District Court Judge Larry Burns issued a ruling on the merits of the case, dismissing the Establishment Clause issues raised by the plaintiffs, the Jewish War Veterans of America. Judge Burns conceded that the Latin cross is “a universally-recognized religious symbol,” but focused his attention on the constitutionality of the entire war memorial, of which the cross is one facet.⁷⁰ Citing anti-war protesters who used a number of crosses to highlight the number of troops who have died in the war in Iraq, Judge Burns contended: “Depending on the context in which it is displayed, the cross may evoke no particular religious impression at all.”⁷¹

This analogy is hollow. The reasons why the cross made for an effective anti-war protest symbol is the assumption that most soldiers in the U.S. armed forces are Christians, and that, when they die, they are likely to be buried under a cross headstone. In no way does this connection strip the Latin cross of its religious significance; it merely completes a causal chain linking the cross to a symbol of death through its religious significance. The judge also referenced cross headstones in military cemeteries as evidence of the cross being a secular symbol of death. This argument is similarly faulty in that it conflates religious accommodation (of the religious heritage of individual soldiers) with government endorsement of religion.

⁶⁹ Randall C. Archibold, *High on a Hill Above San Diego, a Church-State Fight Plays Out*, THE NEW YORK TIMES, October 1, 2005, http://query.nytimes.com/gst/fullpage.html?res=9B00E2D71330F932A35753C1A9639C8B63&sec=&spon=&page_wanted=1 (last visited Apr 15, 2009).

⁷⁰ TRUNK, *supra* note ____ at 1207.

⁷¹ *Id.* at 1213.

Similar to other cases considered in this paper, Judge Burns attempted to downplay the prominence and significance of the cross compared to other elements in the display. Though the cross in question is the tallest, highest, and most visible element in the display, the judge noted that it is not the largest. According to the judge, the rest of the display is “replete with secular symbols” that diminish the religious influence of the cross.⁷² Since the cross is not supplemented with altars, religious texts, a chapel, or even benches that might encourage religious devotion, Judge Burns concluded, “When the cross is considered in the context of the larger memorial and especially the numerous other secular elements, the primary effect is patriotic and nationalistic, not religious.”⁷³ At the same time, Judge Burns adopts the same false dichotomy employed by Justice Breyer in *Van Orden* – that a contrary judicial ruling would “envinc[e] a hostility to religion.”⁷⁴

A somewhat similar case is also working its way through the federal court system. The Utah Highway Patrol Association (UHPA), a private organization, sought permission to erect public monuments to honor fallen troopers. However, the UHPA chose a 12-foot tall white metal cross to be the basis for each monument to be constructed on public land though paid for by private funds. When the group American Atheists filed suit to challenge the constitutionality of these monuments, the State of Utah curiously chose not to defend them the using the argument of religious accommodation to reflect the religious beliefs of the individual troopers. The UHPA maintained that “only a cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety” (UHPA 2007). Yet the UHPA stated in court that if the family of a Jewish trooper requested a different memorial symbol be used, they

⁷² *Id.* at 1214.

⁷³ *Id.* at 1217. For a thorough critique of conflating patriotism with religious orthodoxy, see ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1 ed. 1992).

⁷⁴ TRUNK, *supra* note ____ at 1212.

would accommodate that request. At this point reason breaks down. If the cross is secular, why would the UHPA feel compelled to accommodate other religious viewpoints?

Even more curious was the logic employed by U.S. District Court Judge David Sam siding with the UHPA and the State of Utah. Judge Sam ruled that the displays did not endorse a particular religious belief because a majority of Utahans are members of the Church of Jesus Christ of Latter-day Saints (LDS), which does not consider the cross to be a religious symbol. This line of thought is problematic on a couple of levels. First, it implied that the First Amendment can take on different meanings in different sections of the country according to local demographics. Fidelity to this theory would mean that erecting a cross on public land in a traditionally Jewish neighborhood would not violate the Establishment Clause because a majority of that community does not view the cross as religiously significant to them. I seriously doubt that, many Jews in that scenario would agree with the judge's assessment.

Second, Judge Sam's observation ignored the requirements of the "reasonable observer" test. If a reasonable observer's religious beliefs influence her conclusions about religious displays, the reasonable observer test becomes hopelessly subjective. Also, given the sensitivity expressed by the UHPA towards respecting the wishes of the families of the fallen troopers, the more relevant question to be answered might be not the religious beliefs of the general population but the religious beliefs of each fallen trooper. Evidence indicates that not every fallen trooper was a member of the LDS faith.⁷⁵ Finally, the judge's questionable rationale totally ignores the pluralistic roots of the Constitution's protections of religious freedom by using the coercive force of law to ratify the dominant religion at the expense of other religious and non-religious viewpoints.

⁷⁵ Geoffrey Fattah, *Crosses honoring troopers protested*, DESERET MORNING NEWS, December 2, 2005, <http://www.deseretnews.com/article/1,5143,635165645,00.html> (last visited Apr 16, 2009).

Like the judge in the Mt. Soledad cross case, Judge Sam looked to military cemeteries as evidence of the secular value of the cross as a symbol of death. In addition, he wrote, “Like the Christmas tree, which took on secular symbolism as Americans used the tree without subscribing to a particular religious belief, the cross has attained a secular status as Americans have used it to honor the place where fallen soldiers and citizens lay buried...regardless of their religious beliefs.”⁷⁶ Judge Sam did not attempt to quantify how many of those fallen soldiers and citizens so honored were non-Christians. Even setting aside obvious empirical problems in the judge’s reasoning, the more dangerous implication of such a declaration is that it undermines the deeply held religious beliefs of thousands of Christian war dead. And like the Mt. Soledad case, a judicial opinion forbidding the public display of the cross would “exhibit hostility toward religion,”⁷⁷ even though the cross is otherwise considered secular.

The Tenth Circuit Court of Appeals reversed Judge Sam in a unanimous opinion of a three-judge panel.⁷⁸ Judge David Ebel described the cross as “unequivocally a symbol of the Christian faith” and that the memorial setting provided no contextual clues that the cross should be interpreted in any other fashion. The fact that the displays contain biographical information about the trooper does not change the meaning of the display because most drivers would not stop their car to examine the memorial, and even if they did the cross is the dominant symbol in the display. Judge Ebel stated that the Establishment Clause prevents endorsements of minority religions as well as dominant ones, rejecting the argument made about Mormons and their belief in the cross. Judge Ebel also refuted the contention that the cross served as a universal symbol of

⁷⁶ AMERICAN ATHEISTS, *supra* note ____ at 1258.

⁷⁷ *Id.* at 1212.

⁷⁸ *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (2010).

death, stating: “there is no evidence in the record that the cross has been universally embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death.”⁷⁹

A third cross case deserves mention. The U.S. Court of Appeals for the Ninth Circuit had struck down a display of the Latin cross in a national preserve in the Mojave Desert on the grounds that the cross is a sacred Christian symbol.⁸⁰ After that decision, Congress sold the single acre containing the cross to a private land owner in the hopes of escaping the reach of the Establishment Clause. The legitimacy of that land transfer was upheld by the U.S. Supreme Court in *Salazar v. Buono*.⁸¹

Though this case did not require the Supreme Court to decide whether the public display of a cross amounted to an Establishment Clause violation, Justice Scalia nonetheless discussed this issue during oral argument. In a seeming reversal of his position in the Ten Commandments cases, Justice Scalia argued, “The cross is the most common symbol of the resting place of the dead.” When challenged by an ACLU attorney arguing the case that no Jewish soldiers are buried under cross headstones, Scalia responded, “I don’t think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead.”⁸² Notably, Justice Scalia did not address this issue in his concurring opinion in the case.

Justice Kennedy, who authored the plurality opinion, considered the message sent by the public display of the cross in dicta. He utilized the same argument as Scalia and the district court judges cited above: “Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles,

⁷⁹ *Id.* at 1161.

⁸⁰ *Buono v. Norton*, 371 F.3d 543 (2004).

⁸¹ *SALAZAR*, *supra* note ____.

⁸² Adam Liptak, *Religion Largely Absent in Argument About Cross*, THE NEW YORK TIMES, October 8, 2009, http://www.nytimes.com/2009/10/08/us/08scotus.html?_r=1&scp=1&sq=mojave%20cross&st=cse (last visited Nov 7, 2009).

battles whose tragedies are compounded if the fallen are forgotten.”⁸³ Chief Justice Roberts echoed this perspective in his concurring opinion, but he also argued that removing the cross would exhibit hostility towards religion.⁸⁴

Justice Stevens responded to this argument in his dissent by stating that a cross headstone represents an accommodation of a soldier’s religion, not a universal symbol of sacrifice. Stevens wrote, “[The cross] is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith.”⁸⁵ According to Stevens: “Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.”⁸⁶

III. Assessing the Harm Done to the Sanctity of Religion

The desacralization critique of these cases has been made before both by scholars and constitutional advocates. Religious liberty advocacy groups have warned the Supreme Court against this jurisprudential course since it first embarked on it. After the Court announced its decision in *Lynch*, a spokesman for the National Council of Churches (1984) criticized the case because it had put the birth of Jesus Christ “on the same level as Santa Claus and Rudolph the Red-Nosed Reindeer.” In *Allegheny County*, Justice Stevens’ opinion cited the *amicus* briefs submitted by the American Jewish Congress, which argued that the presence of a Christmas tree “does not defeat the religious impact of the Menorah,” (1989, 41) and the American Jewish Committee, which argued that “many Jews would strongly object to the secularization of the menorah, a religious symbol” (1989, 52). In an *amicus* brief submitted in *Van Orden*, the Baptist Joint Committee and the Interfaith Alliance Foundation argued that when justifying the display

⁸³ SALAZAR, *supra* note ____ at 22.

⁸⁴ *Id.* at 1822 (Roberts, C.J., concurring).

⁸⁵ *Id.* at 1836, n.8 (Stevens, J., dissenting).

⁸⁶ *Id.* at 1835.

of the Ten Commandments on secular grounds “government lends its weight to distorted readings of sacred texts; indeed, government litigators deliberately desecralize these sacred texts” (2005, 7).

The secularization critique also has been made in Establishment Clause literature. Sinsheimer applied the communications theory of ideographs to evaluate how judges use language to frame their decisions in religious display cases. For example, Ann Sinsheimer pointed out that judges who are sympathetic to public displays of the Ten Commandments refer to such a monument as a “plaque,” rather than as a “tablet,” a term with greater religious overtones.⁸⁷ Janet Dolgin criticized the *Lynch* majority for making a “serious misconstruction of the meaning of the crèche for religious Christians and non-Christians alike.” The result in *Lynch* is achieved by “demeaning” the crèche’s religious significance.⁸⁸

Frank Ravitch concluded that the Court’s jurisprudence under this portion of the Establishment Clause is marked by a “general failure to explore adequately the power of religious objects and a strong tendency to characterize them in a manner that reinforces a secularized, yet majoritarian, view of religion in public life.”⁸⁹ Finally, Timothy Zick criticized the handling of religious symbols through the endorsement test, as it is currently constructed, because its reasonable observer does not include any appreciation for religion. Professor Zick’s prescription to the problem of interpreting sacred symbols is to adopt an ethnographic methodology,⁹⁰ drawn largely from the anthropological work of Clifford Geertz.⁹¹

⁸⁷ Ann Sinsheimer, *The Ten Commandments as a Secular Historic Artifact or Sacred Religious Text: Using Modrovich v. Allegheny County to Illustrate How Words Create Reality*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 325 (2005).

⁸⁸ Janet L Dolgin, *Religious Symbols and the Establishment of a National Religion*, 39 MERCER L. REV. 495, 503-05 (1987).

⁸⁹ Frank S Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1015 (2005).

⁹⁰ Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2003).

⁹¹ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1977).

This paper hopes to build on this critique in two ways. First, I have demonstrated the pervasiveness of the desacralization doctrine across a variety of different cases. Second, I will respond to countervailing criticisms. Supporters of the Court's current doctrine likely will argue that, while this line of thinking may stoke the passions of academics, this debate would not affect ordinary citizens who encounter these religious displays on a daily basis. Regardless of whether or not the government considers the Ten Commandments secular, citizens of Texas who walk the grounds of their capitol are free to make their own determination as to the meaning of that display. Such a personal conclusion would not leave them feeling as though government has sullied their religious beliefs by secularizing a religious display.

Justice Samuel Alito echoed this perspective in a recent government speech case, *Pleasant Grove City v. Summum*.⁹² He argued that the notion that a public monument has one objective message that the government is endorsing "fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one like 'Beef. It's What's for Dinner.'" To buttress his claim, he cited the example of the mosaic "Imagine" in New York's Central Park, which could be interpreted to be a reflection of John Lennon unfulfilled musical potential, the song "Imagine," or a call to imagine a world without war or famine.⁹³

This is not a particularly persuasive argument. The very reason judicial institutions produce opinions in addition to their rulings is because rationales for legal outcomes matter greatly within our democratic system. An opinion that secularizes a religious symbol or practice in order to display it is of immense importance because the court has privileged only one legitimate meaning for that display. Ronald Dworkin's theory of constructive legal

⁹² *Pleasant Grove City v. Summum*, 555 U.S. ____ (2009), <http://www.supremecourtus.gov/opinions/08pdf/07-665.pdf> (last visited Mar 10, 2009).

⁹³ *Id.* at 11-12.

interpretation holds that judicial opinions tell a story about underlying community values. Thus, the key for judges is asking “[w]hich story shows the community in a better light, all things considered, from the standpoint of political morality?”⁹⁴ Stripping religious symbols and practices of their theological significance reflects a blatant disregard of (or at least a callous indifference to) the religious beliefs of so many of its citizens.

The vision of religion projected in these cases is shallow, one in which legal posturing can easily overcome the potency of religious belief. By emphasizing history over theology, these cases implicitly hold that religion is unconnected to questions of political morality, despite the Religious Right’s insistence to the contrary. One might argue that religion is intimately tied to questions of political morality in its proper place – the private sphere. If that were the case, it seems oxymoronic to publicize that which is private, and it also leads us to ask whether that publicity amounts to an endorsement of religion.

Dworkin reminds judges that their opinions “are themselves acts of the community personified.”⁹⁵ If conservative Christian litigation groups are correct in their assertions that America is a Christian nation, they have encouraged the development of a doctrine that undermines that basic value. The opinions analyzed in this paper demonstrate a personification of the American body politic that places little value on the sanctity of religion in the public square. These opinions do not even accurately reflect the personification of non-Christian or non-Jewish Americans. Though these Muslim, Sikh, or atheist citizens may not embrace the theological significance of a Ten Commandments monument, they at least understand that this type of symbol carries religious meaning for millions of their fellow Americans.

⁹⁴ RONALD DWORKIN, *LAW'S EMPIRE* 249 (1986).

⁹⁵ *Id.* at 248.

Selecting only one rationale in a judicial opinion effectively negates the legitimacy of all other meanings, according to Sanford Levinson.⁹⁶ It is an opportunity cost that courts must impose to ensure the predictability and uniformity of law. Justice Alito's opinion in *Summum* exemplifies this argument; in supporting the Court's government speech doctrine, Alito cited a prior government speech opinion: "It is the very business of government to favor and disfavor points of view."⁹⁷ Justice Alito concluded that privately donated monuments displayed on government property amounts to government speech, which further bolsters the harm to the sanctity of religion done in these cases. Elsewhere, Professor Levinson noted: "If formal schooling is the most obvious example of self-conscious civic education designed to create, or at least maintain, a privileged notion of community identity, the relevance of public monuments and the like should now be clear."⁹⁸

The importance of legitimacy also lies at the heart of the endorsement test that Justice O'Connor developed in *Lynch* (even if O'Connor reached the opposite conclusion on the merits of the case).⁹⁹ She wrote: "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."¹⁰⁰ Far from being made preferred members of the community,

⁹⁶ Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1994). This reality that causes Levinson to conclude that courts should avoid the task of assigning social value to cultural symbols. However, courts have little choice but to wade into this thicket of evaluating religious symbols if they are faithfully to evaluate the meaning of and assure adherence to the First Amendment.

⁹⁷ *SUMMUM*, *supra* note___ at 5.

⁹⁸ SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 85 (1998).

⁹⁹ Similarly, the "wall of separation" approach to the Establishment Clause originated in *Everson v. Board of Education* 330 U.S. 1, despite the fact that the Court in that case ultimately sanctioned the policy reimbursing parents for transportation costs to send their children to private schools.

¹⁰⁰ *LYNCH*, *supra* note___ at 688 (O'Connor, J., concurring).

government has undermined the sanctity of numerous Jewish and Christian beliefs by either directly or indirectly secularizing these symbols and practices.

Courts further damage the sanctity of religion when they assume that the placement of secular objects in close proximity to a religious symbol can remove that symbol's religious significance, a claim that has been correctly criticized as using a "secular fig leaf"¹⁰¹ fraught with "serious problems"¹⁰² and even just plain "ludicrous."¹⁰³ This does not mean that context is insignificant; to the contrary, when properly applied, context can provide very useful signals by the government about its intentions. The task of the Herculean judge, according to Dworkin is to make a legal interpretation that best "fits and justifies" past legal practice.¹⁰⁴ The application of context in these cases falls short of achieving a good fit. In *Lynch* the Court fails to appreciate the fact that the secular Christmas symbols displayed by the town derive their significance from the religious origin of Christmas. As Ravitch has noted: "Far from sending a nonreligious message, the placement of Santa, reindeer, elves and Christmas trees near a crèche sends a message that Christianity is the preferred religion."¹⁰⁵

Unlike *Lynch*, the other objects displayed in near the Texas Capitol – honoring war veterans, women, children, and others¹⁰⁶ – have little connection to the Ten Commandments, and yet in *Van Orden* Justice Breyer attempted to weave them together into a coherent and unified presentation. But what would be more relevant is the immediate context of the Ten Commandments monument, such as any text explaining the nature of the government's intentions by erecting the monument. Yet no such text exists. The religious meaning of the Ten

¹⁰¹ Zick, *supra* note___ at 2373.

¹⁰² Ravitch, *supra* note___ at 1060.

¹⁰³ Matthew Paul Kammerer, *County of Allegheny v. A.C.L.U.: Perpetuating the Setting Factor Myth*, 21 U. TOL. L. REV. 933-55, 955 (1989).

¹⁰⁴ DWORKIN, *supra* note___ at 239.

¹⁰⁵ Ravitch, *supra* note___ at 1060.

¹⁰⁶ Texas State Preservation Board, MONUMENTS GUIDE, <http://www.tspb.state.tx.us/spb/gallery/monulist/MonuList.htm> (last visited Apr 22, 2009).

Commandments is the dominant meaning of the symbol. Without the theological significance, the Ten Commandments would cease to have much secular or historical influence. Thus, to pass the reasonable observer test, the government has the responsibility to explain why a secondary meaning of the symbol is being emphasized rather than the dominant meaning.

Context would also provide an indication of governmental endorsement over a religious display in front of a state capitol because a reasonable observer would conclude that displays at that location would be representative of a community's moral values. This problem would not be present in other contexts, for example, religious art at a government-sponsored museum. In that situation, the Establishment Clause's reasonable observer could easily conclude the museum was endorsing the aesthetic and cultural of the art. Curators often display artwork that makes social or moral critiques that the curator (or the curator's boss, the state) would not endorse. Making artistic decisions on these criteria does not secularize religion because a curator's decision is not a Dworkinian act of the community personified because artwork in a museum comes from many different cultures and many different times. Even if an art exhibit featured works from modern America, a constructive interpretation of an art exhibit would attempt to put the artwork in the best light from the perspective of aesthetics, not political morality.

Judges, according to Dworkin, are interpreters because all social practices (including law) have meaning. That is, social practices are more than just accidents of history; they exist in support of a social value or principle. All forms of interpretation, whether artistic, scientific, or legal, must attempt to understand the purpose of the practice being interpreted. This purpose may not be the same as what the creator of the practice intended, but it does not mean that any purpose may be imposed at random upon a particular practice. Interpreters must pay careful attention to the relevant data, which suggests that judges should give great weight to legal facts

in determining the purpose served by a religious symbol or practice.¹⁰⁷ Thus, Judge Sam was perhaps too quick to dismiss the evidence that the Mt. Soledad Cross was often used for religious purposes.

Rather than being concerned with describing a social practice as it is, Dworkin urges a constructive interpretation, which involves “imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”¹⁰⁸ In refuting the notion that interpretation should be concerned with accuracy (such as the intentions of the author), Dworkin points out that interpreting a practice requires analyzing the practice independent of what members of society intend to express by participating in the practice. The consequence of this argument is that social scientists must participate in the practice in order to interpret it. This ethnographic approach to interpretation is similar in nature to Zick’s criticism of the Supreme Court.¹⁰⁹

Applied to religious symbols and practices cases, the Court could not conclude that a symbol is religious simply because most people who walk by it think it is religious. Instead Dworkinian interpreters process through three stages: a “preinterpretive” stage in which the content of the practice is identified, an interpretive stage in which an interpreter selects “a general justification” for the practice, and a “postinterpretive” stage in which the interpreter “adjusts his sense of what the practice ‘really’ requires so as to better serve” the original justification.¹¹⁰ A judge interpreting the Ten Commandments display in Austin, Texas might justify the display on the grounds that it serves an important educational interest – educating the public of the connection between parts of the Ten Commandments and modern law. The judge

¹⁰⁷ DWORKIN, *supra* note____ at 47.

¹⁰⁸ *Id.* at 52.

¹⁰⁹ Zick, *supra* note____.

¹¹⁰ DWORKIN, *supra* note____ at 66.

might then think that the Ten Commandments monument is not what is really required to achieve this objective because it contains no other materials explaining this connection.

The judge would then return to the drawing board and consider that the objects that a state displays on its capitol grounds are reflections of the values of that state. Professor Levinson noted that monuments “are ways by which a specific culture names its heroes, those ‘people who made us what we are in a prideful way.’”¹¹¹ How does a Ten Commandments monument fit into this justification? What is the basis for the pride in the Ten Commandments? Without any other context explaining the monument, the judge falls back on the primary meaning of the Ten Commandments – religion. This justification makes sense in that many Texans are Christians and religion is a powerful force in that society.

Dworkin’s interpretive theory assumes that “individuals have a right to equal concern and respect”¹¹² by their government, a theory very similar to the conception of justice as fairness articulated by John Rawls.¹¹³ These cases might not seem to undermine this mandate because no one religious group is being deemed socially superior if courts deny that these symbols and practices are religious. If religion is central to a person’s identity, however, secularizing religious symbols and practices undermines the value of religion and, in turn, the value of a person’s identity. This disregard for an individual’s dignity through these cases could constitute a denial of equal respect. Dworkin emphasizes this principle in the hopes of protecting minority rights against tyrannical majority rule, but these cases demonstrate the principle can serve the Christian majority in America.

¹¹¹ LEVINSON, *supra* note ____ at 65.

¹¹² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1978).

¹¹³ JOHN RAWLS, *A THEORY OF JUSTICE: ORIGINAL EDITION* (2005).

IV. Conclusion

My primary goal is to convince courts to give adequate respect to the sanctity of religion, an approach that has been lacking in the current jurisprudence. Recognizing the religious import of these symbols and practices does not preordain the outcome of the case. Justice Thomas, who upheld the display of the Ten Commandments,¹¹⁴ used the same argument about the sanctity of religion as Justice Brennan.¹¹⁵ Whether Justice Thomas or Brennan has a better approach to the proper reach of the Establishment Clause is beyond the scope of this analysis. Under the Court's current approach, this type of Establishment Clause dialogue is impossible. Desacralizing religious symbols and practices effectively ends the constitutional debate over these public displays by short-circuiting the Constitution. Acknowledging these symbols and practices for their core meaning allows judges to move from understanding the facts of the case to analyzing how the Establishment Clause provides a resolution to the controversy.

In its Free Speech Clause jurisprudence, the Court never attempts to minimize the importance of a message in order to engage in a similar short-circuiting of the Constitution. In *R.A.V. v. St. Paul*,¹¹⁶ though Justice Scalia struck down a city ordinance against certain types of hate speech, he did not attempt to devalue the significance of burning a cross in a person's front yard, calling such behavior "reprehensible."¹¹⁷ Even in the infamous "BONG HiTS 4 Jesus" case, the Court refused to lower the importance of the message being litigated. The student who made the banner containing the cryptic phrase called his message "meaningless and funny," but Chief Justice Roberts concluded that the message's reference to illegal drugs deserved to be

¹¹⁴ VAN ORDEN, *supra* note ____ (Thomas, J., concurring).

¹¹⁵ LYNCH, *supra* note ____ (Brennan, J., dissenting); COUNTY OF ALLEGHENY, *supra* note ____ (Brennan, J., dissenting).

¹¹⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹¹⁷ *Id.* at 392.

evaluated in a more consequential light.¹¹⁸ Surely the most precious symbols and practices of the nation's religions deserve the same serious treatment.

Unfortunately, the current jurisprudence has been ratified several times by the Supreme Court, in no small part because of the support of litigation groups whose members whose faith plays a central role in their lives. For example, the popular televangelist Pat Robertson was instrumental in founding the American Center for Law and Justice. Robertson has publicly stated that the Christmas tree has pagan roots and therefore should not be considered “an integral part of Christianity.”¹¹⁹ However, it is precisely because the Christmas tree was not deemed to be Christian by the Supreme Court in *Lynch* that lawyers and jurists created the secular basis upon which the crèche can be displayed publicly. Similarly, when a Ten Commandments monument outside the Alabama Supreme Court building was removed by court order, hundreds of protestors screamed “God haters!” and wore t-shirts that read “Jesus is the standard.”¹²⁰ Ironically, though, it was groups on the Christian right that argued in *Van Orden* and *McCreary County* that the Ten Commandments should be publicly celebrated for their historical and cultural contributions and that the theological import of these monuments should be deemphasized.

Strategically the desacralization approach utilized by some Christian right litigation groups makes sense. The desacralization doctrine has found support on the Supreme Court for the last 25 years. No one can argue with the fact that advancing this doctrine has produced the desired policy result for the Christian right – religious symbols remain on display in public.

¹¹⁸ *Morse v. Frederick*, 551 U.S. 393, 402 (2007).

¹¹⁹ Nancy Gibbs, *No Ho Ho.*, TIME, 2007, <http://www.time.com/time/magazine/article/0,9171,1686800,00.html> (last visited May 9, 2009).

¹²⁰ Jeffrey Gettleman, *Alabama Ten Commandments monument is hauled away*, THE INTERNATIONAL HERALD TRIBUNE, August 29, 2003, http://mutex.gmu.edu:2084/us/lnacademic/frame.do?tokenKey=rsh-20.5137.988864130083&target=results_listview_resultsNav&reloadEntirePage=true&rand=1241898105511&returnToKey=20_T6521588534&parent=docview (last visited May 9, 2009).

From a larger perspective, though, this is a shortsighted strategy that is at least partially self-defeating because securing these public displays compromises their religiosity through judicial fiat. A strategy that is considered effective politically may be ineffective or even damaging when judged from a religious perspective. It is precisely these conservative Christian groups that seek to view politics through a religious perspective.

To be sure, though, the implications of these decisions affect many more people than those on the Christian right. Millions of Americans Christians of all denominations, and, as a result of *County of Allegheny*, millions of American Jews have watched their government toss aside any possibility that their religious symbols and practices possess a sacred quality that is entitled to judicial notice and respect. The null hypothesis is that judges are more accurate interpreters than I give them credit for – that these symbols and practices are considered secular by most Americans. It is one thing that many Christians may view Santa Claus or a Christmas tree as secular symbols, despite their religious origins, but I seriously doubt that this logic can be extended to more fundamentally religious symbols.

Thus, I fall back on the alternative hypothesis – courts are failing to give adequate attention to the religious nature of these symbols and practices. The disregard for religion in these cases has raised the ire of religious liberty groups, scholars, and justices from both ideological wings of the U.S. Supreme Court. I fully agree with Justices Blackmun and Scalia:¹²¹ these are, indeed, Pyrrhic victories. As Justice Black once stated: “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution

¹²¹ At least, I agree with Justice Scalia’s position in 2005 during the debate over the Ten Commandments cases and Justice Blackmun’s position in *Lynch*.

that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”¹²²

¹²² Engel v. Vitale, 370 U.S. 421, 431-32 (1962).