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Frank S. Ravitch

Michigan State University College of Law, fravitch@law.msu.edu

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RELIGIOUS OBJECTS AS LEGAL SUBJECTS

*Frank S. Ravitch**

I. INTRODUCTION

Imagine that you enter a public park and a theater troupe is performing a version of *The Passion of the Christ*¹ in the center square. There are a number of signs nearby advertising various products and services, and there are several street artists performing near the theater troupe. Depending upon your background, you may either find the story consistent with your religious beliefs, be ambivalent, or be offended. In any event, you know what the play is about. Is your understanding of the religious significance of the play altered by the presence of the

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1. *PASSION OF THE CHRIST* (NEWMARKET FILMS 2004).

advertisements and the street performers?

Now imagine that instead of a play, there is a large nativity scene, cross, menorah, or Ten Commandments monument, and that instead of being in a public park, you are on the lawn, courtyard, or entrance of a municipal building or state capitol. Courts have repeatedly struggled with issues raised when the government displays religious objects and symbols or when such objects are displayed by others on government property. Cases have involved objects such as Ten Commandments displays,² crèches (nativity scenes),³ Latin crosses,⁴ menorahs,⁵ and Christmas trees.⁶ The

2. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2739 (2005) (striking down courthouse displays, including Ten Commandments, where displays were created as a means to post the Commandments in the courthouses); *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (plurality opinion) (upholding display of Ten Commandments monument donated by the Fraternal Order of Eagles in 1961 on the land between the Texas State Capitol and the state supreme court building); *Stone v. Graham*, 449 U.S. 39, 42-43 (1981) (per curiam) (striking down a Kentucky statute that required the posting of the Ten Commandments on each public school classroom in the state); see also *King v. Richmond County*, 331 F.3d 1271, 1273 (11th Cir. 2003) (upholding the use of a small seal that included a depiction of the Ten Commandments, but not the text, along with other images); *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 270 (3d Cir. 2003) (upholding the display of a small Ten Commandments plaque on the old entrance to the county courthouse, where the plaque was placed on the building in 1920, and the old entrance where the plaque was located was no longer in use); *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (striking down the display of a large granite Ten Commandments monument placed in the rotunda of the Alabama state courthouse in the middle of the night by the former Chief Justice of the Alabama Supreme Court); *Adland v. Russ*, 307 F.3d 471, 490 (6th Cir. 2002) (striking down the display of a monument donated by the Fraternal Order of Eagles in 1961 on the grounds of the state capitol); *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) (striking down the display of a monument donated by the Fraternal Order of Eagles in 1958 and located on grounds of the city's municipal building).

3. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (striking down the display of a crèche that was not part of a broader display on the Grand Staircase of the courthouse); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (upholding the city of Pawtucket's display of a crèche as part of a broader seasonal display).

4. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (upholding the display of a Latin cross by the Ku Klux Klan on the grounds of the state capitol because the cross was displayed in a public forum open to all kinds of speech); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (per curiam) (striking down a fifty-one foot Latin cross that was erected in the Eugene city park and was designated a war memorial after the court struck down its display in an earlier decision); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993) (striking down the display of two large Latin crosses in separate public parks and the use

results in these cases, especially in cases decided by the United States Supreme Court, have been the subject of a great deal of criticism.⁷ The criticism has often focused either on the desacrilization of religious objects or on the failure to evaluate the impact that such objects have on religious outsiders.⁸ This Article asserts that courts and their critics have generally overlooked or undervalued the significance of treating religious objects as legal subjects in the first place.

Religious objects and religious symbolism generally do not lend themselves well to analysis under any of the legal tests developed by the Supreme Court,⁹ but, of course, courts do not have the luxury of ignoring issues related to religious symbolism when such issues are appropriately raised by parties. Nor should they.¹⁰ Both the courts

of a Latin cross in the city's official insignia under the no preference clause of the California Constitution).

5. See, e.g., *Allegheny*, 492 U.S. at 620 (upholding the display of a menorah, a large Christmas tree, and a sign saluting liberty at the Allegheny city-county building).

6. *Id.*

7. See *infra* Part IV (discussing this criticism and breaking it down into four broad critiques of the Court's religious symbolism jurisprudence).

8. See, e.g., Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 856-58 (2001) (criticizing the Court's minimization of the impact that government displays of religious objects can have on religious minorities); Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 504 (1992) (criticizing the Court's minimization of the impact government display of religious objects can have on religious minorities); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 870-72, 971-72 (1995) (criticizing the Court's desacrilization of religious symbols); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2299-300 (2004) (criticizing the Court's desacrilization of religious symbols).

9. Justice Breyer recently made this point in regard to what he called "borderline" cases involving religious objects. *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring). This Article suggests that none of the current legal tests are up to the task of adequately addressing the constitutionality of religious objects, but courts must address these objects nonetheless.

10. There have been several attempts to take Establishment Clause issues away from the federal courts by limiting the courts' jurisdiction over cases involving such issues. See, e.g., *We The People Act*, H.R. 3893, 108th Cong. § 3.1(A) (2004) (attempting to remove federal court jurisdiction—including Supreme Court jurisdiction—to hear "any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion"); *Religious Liberties Restoration Act*, S. 1558, 108th Cong. § 3 (2003) (attempting to remove lower federal court jurisdiction to

and their critics would face an easier and more fruitful task if they more carefully considered the objects addressed in religious symbolism cases.

This task involves significant interpretive difficulties.¹¹ When a court evaluates a case involving religious objects, it must subject those objects to the prevailing legal rules, norms, and analyses. It thus makes them legal subjects.¹² This creates interpretive problems because of the potentially varied symbolic meanings of many religious objects and the varying messages such objects can hold for different groups.¹³ It also raises questions regarding the nature of “religious objects,” since many symbolism cases involve objects that courts suggest exude varying levels of religiosity depending on their context,¹⁴ and which some critics suggest may or may not be perceived as religious depending on the perceiver’s interpretive presumptions.¹⁵

Thus, religious symbolism cases raise questions that implicate semiotics and hermeneutics. The symbolic meaning of the objects

hear cases involving the display of the Ten Commandments, the use of the word “God” in the Pledge of Allegiance, and the motto “In God We Trust”). This Article suggests that such attempts are inadvisable because of the mischief that could be created if the government were given free reign to use powerful religious objects without any judicial oversight. *See infra* Parts II, V (suggesting that religious objects are powerful symbols for believers and that these symbols are sometimes used by government entities to facilitate a given religion or religions).

11. The interpretive concerns raise questions implicating semiotics and hermeneutics. Janet L. Dolgin, *Religious Symbols and the Establishment of a National “Religion,”* 39 MERCER L. REV. 495, 497-98 (1988); Joel S. Jacobs, *Endorsement as “Adoptive Action”: A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test,* 22 HASTINGS CONST. L.Q. 29, 42-43 (1994); James B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause,* 60 MD. L. REV. 761, 770 (2001); Zick, *supra* note 8, at 2292-97, 2308-11, 2365-74.

12. I am grateful to Robin Malloy for using this terminology during a conversation we had about this project when we were planning a panel on semiotics and law for the 2004 Law, Culture and Humanities meeting.

13. Dolgin, *supra* note 11, at 497-98; William P. Marshall, “*We Know It When We See It*”: *The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 533-34 (1985-1986).

14. *See County of Allegheny v. ACLU*, 492 U.S. 573, 598-602 (1989) (suggesting that the physical context of a display can affect its religious message for constitutional purposes); *Lynch v. Donnelly*, 465 U.S. 668, 676-77 (1984) (also suggesting that the context of a display can affect its religious message).

15. For example, Dolgin suggests that a secularized citizen who identifies as Christian but is not practicing may not perceive a crèche as a religious object. Dolgin, *supra* note 11, at 504. Some of the material set forth later in this Article calls aspects of this criticism into question. *See infra* Parts II, V.

must be determined and analyzed within an interpretive framework where judges' preconceptions interact with the objects being interpreted.¹⁶ Unfortunately, the semiotic and hermeneutic concerns have been addressed by courts in a reflexive way.¹⁷ This has led to 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.¹⁸ Ironically, the United States Supreme Court has led the way in creating this interpretive morass.¹⁹ The Court's recent decisions involving Ten Commandments displays do little to solve this problem and may create additional questions.²⁰

The Court has tended to focus on the message sent to observers by religious objects.²¹ This is a problematic undertaking, however, since the Court has failed to adequately consider the objects "carrying" the message. The Court's approach to religious objects is akin to evaluating a text based on the message it conveys to readers

16. Gadamerian hermeneutics (the philosophical hermeneutics of Hans George Gadamer) provide an excellent framework for understanding this process. For more on philosophical hermeneutics, there are a number of useful primary and secondary texts. Perhaps most important is Gadamer's magnum opus, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Continuum, 2d rev. ed. 1989). See also HANS-GEORGE GADAMER, *PHILOSOPHICAL HERMENEUTICS* (David E. Linge ed. & trans., 1976); HANS-GEORGE GADAMER, *REASON IN THE AGE OF SCIENCE* (Frederick G. Lawrence trans., 1981). In addition to Gadamer's work, there are a number of good books that can serve as introductions to the subject. See, e.g., JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE* (1980); JEAN GRONDIN, *INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS* (Joel Weinsheimer trans., 1994). Examples of sources addressing legal hermeneutics include *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* (Gregory Leyh ed., 1992); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523 (1988); see also Francis J. Mootz, III, *Symposium on Philosophical Hermeneutics and Critical Legal Theory*, 76 CHI.-KENT L. REV. 719 (2000).

17. See *infra* Parts III-V.

18. See *infra* Part II.

19. See *infra* Parts III-V.

20. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2743-45 (2005) (striking down courthouse displays, including Ten Commandments monuments, where displays were created as a means to post the Commandments in the courthouses); *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (plurality opinion) (upholding the display of a Ten Commandments monument donated by the Fraternal Order of Eagles in 1961 on the land between the Texas State Capitol and the Texas Supreme Court building).

21. *County of Allegheny v. ACLU*, 492 U.S. 573, 595-96, 598-600, 613-21. (1989)

without ever seriously considering the words or structure of the text. It is not that the text has a fixed meaning, but rather that any evaluation of the text would be aided by interacting with the horizon of the text—the range of information that can be seen from the “vantage point” of the text.²²

This is not to say that extant judicial and academic discourse is useless. Some Justices (and commentators) have asked good questions, such as what impact a given religious object has on believers,²³ and what impact it has on religious outsiders.²⁴ Yet there are even more basic questions that need to be asked in order to adequately analyze the impact of religious objects on believers and nonbelievers alike. What is a religious object? Is there a difference between religious “objects” and religious “symbols”?

This Article begins by asking and answering some of the threshold questions that have been all but ignored by the Court, but which have a major impact on the issues the Court grapples with in religious symbolism cases. Once we have a working understanding of religious objects and symbols, we can ask the more important questions for constitutional purposes, such as what the objects “mean” to believers and nonbelievers. One thing becomes abundantly clear after engaging in this analysis: there is no such thing as a “passive” religious object or symbol, even though the Court has asserted otherwise.²⁵ Thus, the Court’s analysis in religious symbolism cases, which rests heavily on the assumption that religious objects can be “passive,”²⁶ is inherently flawed regardless of which test the Court applies.

Part II of this Article sets forth a definition for the term “religious object” and relates such objects to broader forms of religious symbolism. It suggests that the courts have grappled with three broad categories of religious objects in the symbolism cases and defines these categories. The three categories are labeled: (1)

22. Cf. GADAMER, TRUTH AND METHOD, *supra* note 16, at 302-07 (explaining the concept of horizons in the interpretive process).

23. *Lynch v. Donnelly*, 465 U.S. 668, 700-01, 708-09, 711-12 (1984) (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting); *Allegheny*, 492 U.S. at 643-45 (Brennan, J., concurring in part and dissenting in part); *id.* at 651 (Stevens, J., concurring in part and dissenting in part).

24. *Allegheny*, 492 U.S. at 645 (Brennan, J., concurring in part and dissenting in part); *id.* at 651 (Stevens, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting).

25. See *Van Orden*, 125 S. Ct. at 2864 (plurality opinion) (referring to a display of the Ten Commandments monument as “passive”); *Lynch*, 465 U.S. at 685 (referring to a crèche as “passive”).

26. *Lynch*, 465 U.S. at 685.

“Pure Religious Objects;” (2) “Multifaceted Religious Objects;” and (3) “Secularized Objects.” The part asserts that the first category is the only one that is dispositive for constitutional purposes.

Part III will provide some background on the key religious symbolism cases, including the spate of recent decisions involving Ten Commandments monuments and similar objects. Cases analyzing the Ten Commandments issue are excellent vehicles for exploring the questions raised in this Article because such decisions provide analysis of religious objects that are primarily multifaceted and which do not neatly fit with other types of religious objects. Part IV sets forth some of the major criticisms of the Court’s approach in religious symbolism cases. This part will suggest that most of the criticisms are valid, but each criticism is related to the inherent problems with treating religious objects as legal subjects. Part V looks at the religious symbolism cases in light of the material in Part II, and demonstrates that the cases and critics miss an important element in religious symbolism cases—the nature of the objects themselves. This oversight explains why none of the current legal tests seem to produce satisfactory answers in religious symbolism cases.

Part VI suggests an alternative approach that is sensitive to the problem of treating religious objects as legal subjects. This approach rejects both the *Lemon*²⁷ and endorsement tests in religious symbolism cases because of their reflexive focus on the immediate context of religious displays,²⁸ but it does take something from both of those tests. It also rejects the “tradition” test that was most recently used by a plurality of the Court in one of the Ten Commandments cases.²⁹ The recommended approach asks whether government action substantially facilitates religion and suggests that the government violates the Establishment Clause any time it calls special attention to a religion’s theological base, even if that is not the government’s intent.³⁰ This is a complex analysis and does not lead to automatic answers when the government displays objects that are not “pure religious objects.” This Article suggests, however,

27. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1972) (adopting a three-part test for Establishment Clause queries).

28. See, e.g., *Allegheny*, 492 U.S. at 616 (applying an endorsement test and relying on context of displays); *Lynch*, 465 U.S. at 684-85 (applying the three-part *Lemon* test and relying on immediate context of displays); *Id.* at 690 (O’Connor, J., concurring) (applying an endorsement test).

29. *Van Orden*, 125 S. Ct. at 2863.

30. See Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 544-58, 566-70 (2004) (setting forth the facilitation test and applying it to religious symbolism cases).

that government can never display “pure religious objects,” except perhaps in a museum setting. This, of course, leads back to questions about the meaning of religious objects.

II. WHAT IS A RELIGIOUS OBJECT?

Religious objects are powerful representations that may connect to deeply held beliefs.³¹ For believers, they may be symbols of and conduits to transcendent and very real truths.³² This may have an impact on how such objects are perceived by nonbelievers who are aware of the power the objects have for believers.³³ For others, such objects may retain some of the power they have for believers, or they may simply be things to look at.³⁴

Of course, not all religious symbols are religious objects.³⁵ In fact, behavior, words, events, or ideas may reflect deep religious symbolism.³⁶ This Article concerns itself primarily with tangible religious objects because these are what the courts most often grapple with in religious symbolism cases.³⁷ Still, the question of what constitutes a religious object remains. Courts have dealt with such disparate objects as crosses, crèches, Ten Commandments monuments, menorahs and Christmas trees.³⁸ Are all of these items “religious objects”? If so, are all religious objects equally “religious”?

This part provides a definition of religious objects, or rather a set of definitions. This is necessary in order to be able to analyze such objects as legal subjects in a nonreflexive way. Before doing this, however, it is essential to get a glimpse of how the Court (and some commentators) has characterized these objects. The Court’s characterization will be discussed in much greater depth in Part III.

In *Lynch v. Donnelly*,³⁹ Justice Burger, writing for the Court, described a crèche as follows: “The crèche, like a painting is passive; admittedly it is a reminder of the origins of Christmas. Even the

31. Zick, *supra* note 8, at 2309-11.

32. *Id.*; I. PAUL TILLICH, SYSTEMATIC THEOLOGY 240 (1951).

33. Brownstein, *supra* note 8, at 854-57; Karst, *supra* note 8, at 504.

34. *See supra* note 15 and accompanying text (discussing how secularized Christians might view a crèche).

35. Tillich’s definition of religious symbols would include an event, an act, a story, or an object. A.R. McGlashan, *Symbolization and Human Development: The Use of Symbols in Religion from the Perspective of Analytical Psychology*, 25 RELIGIOUS STUD. 501, 501 (1989) (citing I. PAUL TILLICH, DYNAMICS OF FAITH (1957)).

36. *Id.*

37. *See infra* Part III (discussing the various religious objects involved in religious symbolism cases).

38. *Id.*; *see also supra* notes 2-6 and accompanying text.

39. 465 U.S. 668 (1984).

traditional, purely secular displays extant at Christmas, with or without a crèche, would inevitably recall the religious nature of the Holiday.”⁴⁰ Putting aside for the moment the highly questionable assertions that a painting is “passive” and that any Christmas display can be “purely secular,” the idea that a crèche is “passive” is simply out of touch with well accepted theological thought regarding religious symbols,⁴¹ as well as at least some anthropological thought.⁴² Interestingly, Justice Rehnquist, writing for the plurality in *Van Orden v. Perry*, referred to the Ten Commandments monument involved in that case as “passive,” both before and after acknowledging its religious significance.⁴³

A number of commentators have suggested that Justice Burger’s description of the holiday display in *Lynch*, which included the crèche, was the result of a reflexive application of his and the other Justices’ preconceptions regarding such objects. These preconceptions, the argument goes, were both highly secularized and Christocentric.⁴⁴ This seems a valid critique. One might think that Justice O’Connor’s endorsement test would have helped to resolve such concerns, given its focus on the message sent by objects,⁴⁵ but her concurring opinion in *Lynch* did little to suggest that she viewed the crèche all that differently from the majority.⁴⁶

In *Van Orden*, Justice Rehnquist acknowledged that the Ten Commandments are religiously significant, but he did so while

40. *Id.* at 685.

41. CHARLES H. LONG, SIGNIFICATIONS: SIGNS, SYMBOLS, AND IMAGES IN THE INTERPRETATION OF RELIGION 2 (1986); McGlashan, *supra* note 35, at 501; TILlich, *supra* note 32, at 240. Long’s reference to the power of symbols and signs may at first seem to conflict with Tillich’s rather clear distinction between symbols and signs, but in context it does not seem that Long’s description is at odds with that of Tillich. Regardless, both agree about the power of religious symbols including religious objects.

42. Zick, *supra* note 8. See generally CLIFFORD GEERTZ, *Ethos, World View, and the Analysis of Sacred Symbols*, in THE INTERPRETATION OF CULTURES 126 (1973) (providing an anthropological analysis of sacred and religious symbols).

43. 125 S. Ct. 2854, 2864 (2005).

44. See, e.g., Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 354 (1986) (criticizing the Court’s decision in *Lynch* as being essentially Christocentric, while also demeaning religion); Dolgin, *supra* note 11, at 504-05 (suggesting that the Court turned Christmas into a secularized, yet sectarian, religious event).

45. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (setting forth the endorsement test and demonstrating that the test is focused on the perception of endorsement).

46. This becomes apparent when one reads the majority opinion in *Lynch* and Justice O’Connor’s concurrence. While the legal methodologies differed between the two opinions, the view of the religious object did not. Compare *id.* at 668 (majority opinion), with *id.* at 687 (O’Connor, J., concurring).

attempting to show how they can also have secular relevance⁴⁷—i.e., he acknowledged the “religious significance” of the Commandments, but he did not adequately analyze the significance of that “significance.” Legal tests in this area seem to operate to reinforce the apparent preconceptions of the justices regarding the nature of specific religious objects or religious objects generally.

Any legal approach to religious objects should account for the fact that they are not just passive “things,” but rather powerful conduits for religious meaning and cultural meaning, at least for believers. The *Lynch* Court did not adequately analyze the nature of the crèche. Moreover, to the extent the Court did evaluate the object, it failed to look at what theologians have long understood about the power of religious symbolism.⁴⁸ This is also true of the plurality opinion in *Van Orden* and the Court’s opinion in *County of Allegheny v. ACLU*, where the Court analyzed several religious objects in different settings.⁴⁹

While *Lynch* and *Allegheny* framed the point differently,⁵⁰ both Courts were quite focused on the potential message sent by the relevant religious objects in their given setting.⁵¹ This, however, is the wrong inquiry; an object does not send messages as though it were some sort of informational strobe light. Rather, objects hold a range of messages to be discovered by those who interact with them.⁵² The observer brings his or her preconceptions to the interaction, and the object holds a range of possible messages for the observer that can be fleshed out as the observer’s preconceptions interact with the object.⁵³ Depending on how reflective the observer is, this process can be instantaneous or play out as the observer interacts with the object.⁵⁴ Still, the object holds meaning based on the tradition(s) to which it relates (including its history, religious

47. *Van Orden*, 125 S. Ct. at 2862-64.

48. *See Lynch*, 465 U.S. at 680-88 (suggesting that crèche could be desacrilized by its context, even if it retains its religious meaning more generally).

49. *Van Orden*, 125 S. Ct. at 2858-65; *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (analyzing a crèche on the grand staircase of the courthouse and a menorah displayed near a Christmas tree on the grounds of city-county building). *Allegheny* is discussed in much greater detail at *infra* Parts III.A., III.C.

50. *See infra* Part III.A.

51. *Id.*

52. *Cf. GADAMER, TRUTH AND METHOD*, *supra* note 16, at 302-07 (discussing the concept of horizons and the role of text and interpreter in the interpretive process).

53. Eskridge, *supra* note 16, at 623-24.

54. *Cf. id.* (discussing the role of reflection in challenging one’s preconceptions when one confronts a text).

significance, and cultural significance), and assuming the observer shares or is aware of this tradition, the horizon of the object acts as a constraining force on interpretation.⁵⁵ This will be discussed further in Part V. For now, it is important to gain a better understanding of the religious objects that hold potential meaning for those who interact with them.

The theologian Paul Tillich characterized religious symbols as pointing beyond themselves to important religious meaning, while simultaneously participating “in the reality to which [they] point.”⁵⁶ More specifically, in the context of a broader discussion of religious symbols, Tillich wrote that “[r]eligious symbols are double-edged. They are directed toward the infinite which they symbolize *and* toward the finite through which they symbolize them. They force the infinite down to finitude and the finite up to infinity. They open the divine for the human and the human for the divine.”⁵⁷

Similarly, anthropologist Clifford Geertz has written that religious symbols “function to synthesize people’s ethos—the tone, character, and quality of their life, its moral and aesthetic style and mood—and their world view—the picture they have of the way things in sheer actuality are, their most comprehensive ideas of order.”⁵⁸

Far from being the passive “things” depicted by the Court, religious symbols, including objects, can point to transcendental truth and are constitutive for the believer. Any attempt to define religious objects, then, must determine what objects possess such traits and what objects do not, as well as how one would define objects that fall in between. Again, the purpose for undertaking this task is simply that courts must treat religious objects as legal subjects and thus determining the “nature” of these objects to the greatest extent possible is important.

Tillich and Geertz are from quite different disciplines, yet they both write of the power of religious symbols. Of course, while both have been highly influential, they have each been controversial within their respective fields. Significantly, their views on religious symbols have generally been met with agreement, although that

55. GADAMER, *TRUTH AND METHOD*, *supra* note 16, at 302-07; Eskridge, *supra* note 16, at 620-24.

56. McGlashan, *supra* note 35, at 501 (referring to Tillich’s definition of religious symbols).

57. TILlich, *supra* note 32, at 240. Religious symbols include more than simply tangible objects. *Id.*

58. GEERTZ, *Religion as a Culture System*, in *THE INTERPRETATION OF CULTURES*, *supra* note 42, at 87, 89. For an excellent and detailed discussion of the relevance to law of Geertz’s work in the symbolism area, including a reasonably detailed discussion of “sacred symbols,” see Zick, *supra* note 8.

agreement is not universal. The prominent theologian Abraham Joshua Heschel disagreed with Tillich regarding his definition of religious symbols.⁵⁹ For present purposes, however, it is significant that Heschel's disagreement with Tillich was over the religious value of symbols rather than the power they hold for believers,⁶⁰ which is the relevant focus for the present Article. While Heschel suggests that religious symbols reduce G-d to a fiction and demean religion,⁶¹ and thus he rejects Tillich's notion that symbols have any real connection to the divine or the infinite, Heschel acknowledges the power religious symbols have.⁶² Therefore, his critique of Tillich does not undermine the idea that religious symbols are powerful; it suggests that power is dangerous rather than wondrous.⁶³ Moreover, aspects of Roman Catholic theology may be in tension with Tillich's dichotomy between the infinite and the divine, but, if anything, these differences enhance the theological power of religious objects rather than diminish it.⁶⁴

I refer to Tillich and Geertz here because it seems logical to focus on the religious and cultural impact of religious symbols in the context of this Article. Moreover, their views of religious symbols are consistent with a wide range of semiotic theory.⁶⁵ Thus, the following discussion of religious objects is consistent with a wide range of thought on religious symbolism. The key is to understand the power that religious objects have for believers and the potential impact this power may have on believers and nonbelievers when

59. ABRAHAM JOSHUA HESCHEL, *MAN'S QUEST FOR GOD: STUDIES IN PRAYER AND SYMBOLISM* 129-30 (1954).

60. Aaron L. Mackler, *Symbols, Reality, and God: Heschel's Rejection of a Tillichian Understanding of Religious Symbols*, 40 *JUDAISM* 290, 291-92 (1991).

61. *Id.* at 290.

62. HESCHEL, *supra* note 59, at 139; Mackler, *supra* note 60, at 292.

63. Mackler compares Heschel to Tillich:

Heschel shares important elements of Tillich's understanding of symbols. "A real symbol is a visible object that represents something invisible; something present representing something absent," which may make that thing (e.g., the Divine) present by partaking in its reality. Such a symbol, though powerful, is dangerous, for it may idolatrously be understood to be equivalent to the Divine.

Mackler, *supra* note 60, at 292 (citing HESCHEL, *supra* note 59, at 139).

64. An excellent example of this would be church doctrine regarding relics and the connection between relics and G-d. JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM* 298-99 (1975) (quoting the Second Ecumenical Council Nicea regarding relics: "[T]he honor paid to the image passes on to the one who is represented, so that the person who venerates an image venerates the living reality whom the image depicts," and also noting similar statements from the Second Council of the Vatican).

65. *Cf.* Marshall, *supra* note 13, at 513-14 (discussing Raymond Firth's definition of "symbol").

these objects are displayed by government or on government property.

A. *Classifying “Religious” Objects*

In order to address the issues raised in later sections of this Article it is essential to discuss the various types of objects that courts have addressed. This section will introduce three categories into which these objects generally fall: (1) “Pure Religious Objects;”⁶⁶ (2) “Multifaceted Religious Objects;”⁶⁷ and (3) “Secularized Religious Objects.”⁶⁸ A deeper analysis of each category will be set forth after a review of several significant religious symbolism cases.⁶⁹ Significantly, the courts intuit but generally do not analyze the different categories into which religious objects fall. In fact, because courts often fail to consider the nature of the religious objects they analyze, they sometimes end up treating “pure religious objects” the same as “secularized religious objects,”⁷⁰ and this has created a great deal of mischief in the relevant legal doctrine.⁷¹ Paying more attention to the religious objects themselves would make it harder for courts—specifically the Supreme Court—to reflexively act on preconceptions when analyzing religious objects as legal subjects.⁷²

1. *Pure Religious Objects*

Objects of veneration, objects used in religious ritual, and some objects that represent core religious principles (such as a crèche) can easily be defined as religious objects. This Article refers to these as “pure religious objects.”⁷³ These objects raise immediate concerns

66. See *infra* notes 73-80 and accompanying text.

67. See *infra* notes 81-86 and accompanying text.

68. See *infra* notes 87-88 and accompanying text.

69. See *infra* Parts V, VI.

70. *Lynch* and *Allegheny* provide examples of this lack of distinction among the different types of religious objects. In *Lynch*, the crèche was treated essentially as just another object in a broader holiday display that included a number of secularized objects associated with Christmas. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J. concurring). In *Allegheny*, the menorah was treated as such because of its location near a Christmas tree—an arguably secularized religious object—and a sign saluting liberty, a totally secular object. *County of Allegheny v. ACLU*, 492 U.S. 573, 614 (1989).

71. The Court's doctrine has been criticized by numerous scholars from a variety of perspectives. This criticism is discussed in greater detail at *infra* Part VI.

72. See *infra* Part V.

73. I derive this term from the notion of “pure symbols” in the free speech area. Calvin Massey defines pure symbols as “those in which the symbol's corporeal existence is necessarily fused with the message it conveys” Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 HASTINGS CONST.

when displayed by the government.⁷⁴ While a more detailed discussion will be provided later in this Article, it is important to note that objects such as crèches, crosses, and menorahs fall into this category.⁷⁵ Pure religious objects relate to the rituals or represent the central stories of a given religion as understood by any of the traditions within a religion, or they are venerated.⁷⁶ They do not by themselves hold much, if any, secular meaning. They, to use Tillich's conceptualization, point to the infinite.⁷⁷ What religious symbols symbolize for a believer is often profound and transcendent, yet the Court's doctrine in the religious symbolism cases does not reflect this.⁷⁸ One possible exception is *Stone v. Graham*,⁷⁹ where the Court at least acknowledged the sacredness of the Ten Commandments. Ironically, while the Ten Commandments are sacred to several faiths, the Court never analyzed whether the form of display proscribed by the challenged Kentucky statute would be sacred.⁸⁰ While the Ten Commandments themselves are undoubtedly sacred to those who believe in them, would a wall plaque that includes a note suggesting a connection between the

L.Q. 369, 373 (1990); see also Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 369 (2004) (discussing how the message in certain symbols invites reply through the use of those same symbols). Pure religious objects, like "pure symbols," signify through their corporeal existence a message regarding the infinite. For example, the display of a pure religious object in a museum may affect the relationship between the government and that object for constitutional purposes and may affect the message that object sends to some observers, but its physical form still signifies the infinite and the divine. See TILLICH, *supra* note 32, at 240.

74. See *infra* Part VI (applying the "facilitation test" to the government's display of religious objects).

75. See *infra* Parts III, VI.

76. Some religious objects or symbols may hold little meaning for one tradition within a religion but may for others. For example, a rosary would hold religious meaning for Catholics but not for most Protestants even though both are part of the broader Christian tradition. An object need not be a powerful symbol for all traditions within a religion in order to be considered a pure religious object. It need only be so for one tradition (so long as it is recognized as being powerful for those within the tradition by some outside the tradition).

77. TILLICH, *supra* note 32, at 240; McGlashan, *supra* note 35, at 501.

78. See *infra* Part III (addressing Court's doctrine in religious symbolism cases).

79. 449 U.S. 39, 41-42 (1981) (per curiam). In the more recent Ten Commandments cases, however, the Court acknowledged the religious nature of the Commandments in a manner that did not seriously analyze the relevance of their religious nature. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2739 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854, 2863 (2005); see *infra* notes 204-315 and accompanying text.

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

Commandments and secular law be sacred? Would it even be a religious object?

2. *Multifaceted Religious Objects*

The answers to the two questions mentioned above—"it depends" and "yes"—lead us to the next category of religious objects: "multifaceted religious objects." Multifaceted religious objects share traits with pure religious objects in that they are relevant to the theology of a given religion or religious tradition. They are not, however, objects used in rituals or objects that are generally venerated.⁸¹ Most importantly, they are objects that may symbolize deeper religious meaning for believers and nonbelievers, but they may hold widely varying messages even for believers.

For example, a pure religious symbol like a crèche symbolizes a sacred moment for most devout Christians, and even if theological interpretations and personal and emotional responses vary, the power of the story represented in the crèche still exists for believers.⁸² A Ten Commandments monument may or may not illicit the same type of response, especially when it includes other secular symbols or writings. Many believers may respond to the object's symbolism and the powerful religious message that potentially inheres in the Ten Commandments.⁸³ Others, however, may not. For example, some believers may see it as a political statement (as might many nonbelievers). In fact, other than in synagogues, one rarely sees the depiction of the Ten Commandments in houses of worship, and the Jewish community has not generally been associated with attempts to display the Ten Commandments on government property.

There is more of a disjunction between the symbol and the symbolized with a Ten Commandments monument accompanied by other texts than with a crèche.⁸⁴ The former suggests that the Ten

81. While these objects are not generally venerated or used in rituals, disputes over them have sometimes led to prayer and other religious ceremonies near the objects. A good example of this is provided by the situation resulting from the behavior of former Alabama Supreme Court Justice Roy Moore. People regularly prayed near the Ten Commandments monument he installed in the state courthouse building. *Glassroth v. Moore*, 335 F.3d 1282, 1286, 1291 (11th Cir. 2003).

82. *Lynch v. Donnelly*, 465 U.S. 668, 700-01, 708-09, 711-12 (1984) (Brennan, J., dissenting); *id.* at 727 (Blackmun, J., dissenting); Zick, *supra* note 8, at 2309-10, 2371.

83. This was apparent in the response to former Justice Moore's Ten Commandments monument. See *supra* note 81 and accompanying text; *infra* Part III.D.

84. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 189 (1993) (suggesting that the

Commandments are important, but there is no automatic latent suggestion as to why, while the latter represents a more direct and more purely religious message. This might be so even if the Ten Commandments monument does not include other symbols or texts. However, this does not mean that Ten Commandments monuments displayed by government are automatically constitutional.⁸⁵ In the religious symbolism context, the messages an object may hold for observers are often varied, but the power inhering in the object may crosscut the variety of messages it holds. The recent U.S. Supreme Court decisions involving the Ten Commandments will be discussed later in this Article. Those decisions include some new approaches, but end up raising the same old problems.⁸⁶

3. *Secularized Religious Objects*

The final category of religious objects is “secularized religious objects.” These are objects generally associated with a particular religion and/or its holidays, but which do not themselves have a specific theological base or which have lost association with any such base even for believers. These objects are not “religious objects” in the same sense that pure and multifaceted religious objects are, but because courts must sometimes address them, they are included in the present discussion. Secularized religious objects may symbolize a religious holiday or be connected to a religion, but they are not themselves imbued with theological relevance (or they have lost their theological relevance over time). Perhaps the best examples of such objects are Christmas trees and Santas. A discussion of the constitutionality of displaying such objects is left to later sections of this Article.⁸⁷ For now, it is enough to note that there are significant differences between these objects and “pure religious objects,” and there are also differences between these objects and “multifaceted religious objects.”⁸⁸ Yet, the display of secularized religious objects should not always be constitutional.

Court in *Stone* overlooked the possibility that the Commandments might “inculcate some of the admittedly spiritual but not necessarily religious values with which many of the Commandments are concerned . . .”).

85. See *infra* notes 194-391, 522-44 and accompanying text.

86. See *infra* notes 204-315 and accompanying text.

87. See *infra* Parts V, VI.

88. The latter types of objects have a closer connection between their corporeal existence and the meaning they signify. See Massey, *supra* note 83, at 373. Or put differently, they symbolize the infinite or the divine, while secularized religious objects do not necessarily do so. See TILLICH, *supra* note 32, at 240. Multifaceted objects fall somewhere in between as the term suggests, but they do evoke greater signification of the infinite or divine than secularized religious objects would.

Before exploring this further, however, it is useful to look at the Court's approach to religious objects. It is also useful to look at lower court cases involving religious objects that the Court has never directly addressed. This will help frame a deeper discussion of the nature of the various types of religious objects and whether it is constitutional for government to display them.

III. THE RELIGIOUS SYMBOLISM CASES

The United States Supreme Court has decided six cases involving the display of religious objects or symbols by government entities or on public property. In *Lynch v. Donnelly*⁸⁹ and in *County of Allegheny v. ACLU*,⁹⁰ the Court addressed the display of crèches by government entities. *Allegheny* also involved the display of a large Menorah next to an even larger Christmas tree accompanied by a sign saluting liberty.⁹¹ In *Stone v. Graham*,⁹² the Court addressed a Kentucky statute that required a copy of the Ten Commandments to be placed on a wall in all public school classrooms in the state. More recently, in *McCreary County v. ACLU*,⁹³ the Court struck down displays at two Kentucky courthouses that included the Ten Commandments. Moreover, in *Van Orden v. Perry*,⁹⁴ the Court upheld the display of a Ten Commandments monument on the grounds of the Texas State Capitol. Finally, in *Capitol Square Review & Advisory Board v. Pinette*,⁹⁵ the Court addressed the placement of a large cross on government property that was deemed a public forum. In *Capitol Square*, the public forum issue was dispositive of the outcome.⁹⁶ Each of these cases will be discussed below. In addition, there are a number of lower court decisions addressing everything from large Latin crosses⁹⁷ to Ten Commandments monuments.⁹⁸

89. 465 U.S. 668 (1984).

90. 492 U.S. 573 (1989).

91. *Id.* at 614.

92. 449 U.S. 39 (1981) (per curiam).

93. 125 S. Ct. 2722 (2005) (plurality opinion).

94. 125 S. Ct. 2854 (2005).

95. 515 U.S. 753 (1995).

96. *Id.* at 754.

97. A surprising number of cases have involved government display of crosses. See *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); *Carpenter v. City & County of San Francisco*, 93 F.3d 627 (9th Cir. 1996); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 1 (D.D.C. 1987); *ACLU v. City of St. Charles*, 622 F. Supp. 1542 (N.D. Ill. 1985); *Eugene Sand & Gravel, Inc. v.*

This part will set forth the ways in which courts have approached a variety of religious objects and symbols. The section will be organized around the objects themselves. Thus, there will be separate subparts devoted to crèches, crosses, menorahs, Ten Commandments displays, Christmas trees, and other holiday displays. Naturally, some of these objects overlap in a given display, and this too will be discussed. A major focus, however, will be Ten Commandments displays because of the unique and important questions they raise.⁹⁹

A. *Crèches*

In *Lynch*, the Court considered whether a crèche that was placed in a park in Pawtucket, Rhode Island, as part of a larger Christmas display that included such things as a Santa Claus house and plastic reindeer, violated the Establishment Clause.¹⁰⁰ The city owned the display and clearly supported and sponsored its erection in the park.¹⁰¹ Thus, this was a case involving a government-supported display. The Court held that the display was constitutional, ostensibly applying the *Lemon* test, which was the then-prevailing test for Establishment Clause claims.¹⁰² In applying that test the Court utilized an analysis similar to reasoning it had used in *Marsh v. Chambers*¹⁰³ to uphold the practice of legislative prayer. The Court noted the long history of various forms of government interaction with religion, such as legislative chaplains. The Court acknowledged the religious meaning of the crèche, yet held that holiday displays like that in Pawtucket are part of a long tradition connected to the winter holiday season and that Christmas has a secular aspect in addition to its religious aspects.¹⁰⁴

The Court focused heavily on the importance of the broader context of the display, which included “a Santa Claus house, reindeer pulling a sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures [of a] clown, an elephant, and a teddy bear,

City of Eugene, 558 P.2d 338 (Or. 1976) (en banc); *Lowe v. City of Eugene*, 463 P.2d 360 (Or. 1969) (en banc); see also *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th Cir. 2002) (involving sale of public land on which a large Latin cross stood under circumstances that raised constitutional concerns under the state’s “Establishment Clause”); *Gonzales v. N. Township*, 4 F.3d 1412 (7th Cir. 1993) (involving public display of a crucifix).

98. See *infra* Part III.D.

99. See *supra* note 2 and accompanying text; *infra* Part III.D.

100. *Lynch v. Donnelly*, 465 U.S. 668, 670 (1984).

101. *Id.* at 671-72.

102. *Id.* at 678-85, 687.

103. 463 U.S. 783 (1983).

104. *Lynch*, 465 U.S. at 674-78, 682, 686-87.

hundreds of colored lights, [and] a large banner that [read] 'SEASONS GREETINGS'. . . ."¹⁰⁵ It also noted the display's connection to the secular and commercial aspects of the holiday. In this context, the display as a whole represented the secular aspects of Christmas.¹⁰⁶ Thus, while the crèche is a religious symbol,¹⁰⁷ it did not foster a government establishment of religion in the context of the broader display and the holiday season, because that context demonstrated both a secular purpose and a primary effect that neither advanced nor inhibited religion.¹⁰⁸ In a passage that has particular import for the topic of this Article, the Court referred to the crèche as "passive."¹⁰⁹ The Court also found no entanglement because of the low cost of the display and held that political divisiveness, which was an element of entanglement at that time, was insufficient by itself to support an Establishment Clause claim.¹¹⁰ In short, the Court acknowledged the fact that a crèche is a religious symbol but essentially ignored or minimized any significant discussion of the challenged object itself.

In a concurring opinion, Justice Sandra Day O'Connor introduced the "endorsement test."¹¹¹ While many people have questioned Justice O'Connor's application of that test in *Lynch*,¹¹² the test itself has become highly influential, especially in cases involving government-supported or endorsed religious symbols.¹¹³ Justice O'Connor wrote:

105. *Id.* at 671.

106. *Id.* at 679-83, 685-86.

107. *Id.* at 687; Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1002-03 (1989) (arguing that some critics of the decision misunderstand the majority's secularization position; it did not result from a conclusion that the crèche lost its religious meaning because of its placement, but rather the majority employed a broad notion of the secular and found that the religious symbol served a secular purpose in the context involved).

108. *Lynch*, 465 U.S. at 679-85, 687.

109. *Id.* at 685. This passage is discussed in much greater detail at *supra* Part II.

110. *Id.* at 683-85.

111. *Id.* at 687 (O'Connor, J., concurring).

112. *See infra* Part IV (discussing scholarly criticism of the Court's religious symbolism cases, including criticism of Justice O'Connor's application of the endorsement test).

113. For example, in the Court's first religious symbolism case after *Lynch*, *County of Allegheny v. ACLU*, 492 U.S. 573, 592-97 (1989), the Court applied the endorsement test, and the test has been applied in numerous religious symbolism cases by lower courts. *See, e.g., infra* Part III.D. (discussing Ten Commandments cases that involved the application of the endorsement test along with other relevant tests).

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹¹⁴

Later, in her concurring opinion, she characterized the inquiry into the display as follows:

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.¹¹⁵

As has been pointed out repeatedly in the scholarly literature, Justice O'Connor's application of this test—a test that was at least ostensibly concerned with religious ingroup/outgroup dynamics in the political realm—seemed to betray the words of the test.¹¹⁶ This

114. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (citation omitted).

115. *Id.* at 690.

116. See, e.g., Steven D. Smith, *Symbols, Perception, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 291-95 (1987) (arguing that the reasonable observer standard under the endorsement test creates several problems, including offending "the central principle of Justice O'Connor's own test" by favoring the majority perspective); March D. Coleman, Comment, *The Angel Tree Project*, 58 U. PITT. L. REV. 475, 489 (1997) (arguing that Justice O'Connor's reasonable observer standard is problematic in that it ignores the "actual perceptions of real citizens . . ."); cf. Marshall, *supra* note 13, at 537 (arguing that the "objective" reasonable observer standard in Justice O'Connor's application of the endorsement test is likely to actually end up reflecting the subjective views of the judge(s) applying it).

is especially vivid when one learns in the dissenting opinions that the city and mayor supported keeping “Christ in Christmas.”¹¹⁷ Justice O’Connor found that the city’s purpose was not to endorse Christianity, but rather to celebrate the secular aspects of a public holiday that has “cultural significance.”¹¹⁸ Her discussion of effects follows a similar line of reasoning:

Pawtucket’s display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions.¹¹⁹

Thus, while Justice O’Connor would have applied a different test than the *Lynch* majority, her analysis under that test is quite similar to the majority’s approach. In fact she acknowledged this in her concurring opinion.¹²⁰ The physical context of the crèche figured prominently in her analysis as does the privileging or desacrilization, depending on one’s perspective, of Christmas.¹²¹ Justice William J. Brennan, Jr. filed a dissenting opinion joined by Justices Harry Blackmun, Thurgood Marshall and John Paul Stevens,¹²² and Justice Blackmun filed a dissenting opinion joined by Justice Stevens.¹²³ The dissenting opinions pointed out that had the Court applied the *Lemon* test in the manner it had in other cases under the Establishment Clause, the government-sponsored crèche would not have survived scrutiny.¹²⁴ Justice Brennan’s dissenting opinion also pointed out that placing a patently religious symbol

117. *Lynch*, 465 U.S. at 726 (Blackmun, J., dissenting); *id.* at 700-01 n.6 (Brennan, J., dissenting).

118. *Id.* at 691 (O’Connor, J., concurring).

119. *Id.* at 692.

120. *Id.* at 687.

121. *Id.* at 692-93.

122. *Id.* at 694 (Brennan, J., dissenting).

123. *Id.* at 726 (Blackmun, J., dissenting).

124. *Id.* at 704 (Brennan, J., dissenting); *id.* at 726-27 (Blackmun, J., dissenting).

representing an event central to Christian theology in the context of a broader display of items connected to the Christmas holiday is likely to favor the dominant Christian tradition, and thus could not be saved by relying on the commercialized aspects of the holiday.¹²⁵ Such government action favoring one religion would violate the *Lemon* test.¹²⁶ Moreover, both dissents argued that by minimizing the religious import of the crèche in the context of the display the Court both degraded the religious meaning of the symbol and the holiday and failed to address the exclusionary message the display sent to non-Christians.¹²⁷

In *Allegheny*, the Court also addressed a crèche display.¹²⁸ As will be discussed below, that case also involved the display of a Menorah and a Christmas tree.¹²⁹ The Court's analysis of the crèche utilized the endorsement approach set forth by Justice O'Connor in *Lynch*.¹³⁰ As in *Lynch*, the physical context of the crèche display was central to the Court's decision.¹³¹ The crèche was owned by the Holy Name Society, a Roman Catholic organization, and was located on the grand staircase of the county courthouse. It was not surrounded by sundry plastic figures and other "secular" symbols of the "holiday season," as had been the crèche in *Lynch*.¹³² It was surrounded on three sides by a wooden fence, and red and white poinsettia plants were placed around the crèche.¹³³ There was a sign denoting that the crèche was donated by the Holy Name Society, and there were small evergreen trees decorated with a red bow that basically blended into the crèche's manger scene.¹³⁴

Justice Blackmun, writing for the Court, held that the display of the crèche violated the Establishment Clause because, unlike the crèche in *Lynch*, the crèche in the Allegheny County Courthouse sent a message endorsing Christianity and "nothing in the crèche's setting detract[ed] from that message."¹³⁵ Government may "acknowledge Christmas as a cultural phenomenon" but may not celebrate it as a "Christian holy day."¹³⁶ The crèche, which has an obvious religious message, is a celebration of the religious aspects of

125. *Id.* at 697, 700-02 (Brennan, J., dissenting).

126. *Id.*

127. *Id.* at 708-09, 711-12; *id.* at 726-27 (Blackmun, J., dissenting).

128. *County of Allegheny v. ACLU*, 492 U.S. 573, 578-81, 598-602 (1989).

129. *Id.* at 578, 581-87, 613-21.

130. *Id.* at 592-95.

131. *Id.* at 598-600.

132. *Id.* at 580-81, 598-99.

133. *Id.* at 580.

134. *Id.*

135. *Id.* at 598-602.

136. *Id.* at 601.

the holiday.¹³⁷ Interestingly, *Lynch* and *Allegheny* together stand for the proposition that a patently religious symbol, the crèche, can somehow become adequately secularized if part of a larger holiday display celebrating the “secular aspects” of Christmas.¹³⁸ The Court did not hold that the crèche loses its religious nature based on its context,¹³⁹ but rather that in some contexts its religious message is appropriately secularized such that government may display it.¹⁴⁰ This argument is inconsistent with the general understanding of religious objects and symbols.¹⁴¹

Justice Anthony Kennedy, in an opinion joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Byron White, strongly dissented from this portion of the Court’s holding.¹⁴² Justice Kennedy would have upheld the display of the crèche based on his reading of *Lynch* and *Marsh*.¹⁴³ Instead of applying the endorsement test, he would have applied a test based on religious coercion.¹⁴⁴ Significantly, he recognized the religious nature of the crèche,¹⁴⁵ which will be discussed later in this Article.¹⁴⁶ There are also a number of decisions by lower courts involving crèches that are generally consistent with the Court’s reasoning in *Lynch* and *Allegheny*.¹⁴⁷

B. Crosses

Perhaps the most famous case involving the display of a cross on government property is *Capitol Square Review & Advisory Board v. Pinette*,¹⁴⁸ which involved the display of a large cross on the grounds of the Ohio Statehouse. The cross was placed there by the

137. *Id.* at 598-601.

138. *See generally Allegheny*, 492 U.S. 573; *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

139. *See Smith*, *supra* note 117, at 1002.

140. *Id.*

141. *See infra* Part V.

142. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

143. *Id.* at 662-63, 679.

144. *Id.* at 659-74, 677-79.

145. *Id.* at 662-64.

146. *See infra* Part V.

147. Lower court decisions that claim to be consistent with the Court’s approach in *Lynch* and *Allegheny* include *ACLU v. Schundler*, 168 F.3d 92, 99-104 (3d Cir. 1999); *Elewski v. City of Syracuse*, 123 F.3d 51, 53-55 (2d Cir. 1997); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 383 (9th Cir. 1996); *Smith v. County of Albemarle*, 895 F.2d 953, 956, 960 (4th Cir. 1990); *Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 740-42 (E.D. Mich. 2003).

148. 515 U.S. 753 (1995).

Ku Klux Klan, a notorious hate group.¹⁴⁹ The Court held that the square was a public forum for speech purposes.¹⁵⁰ Because the government wanted to exclude the cross from the square, a public forum, the State needed to articulate a compelling governmental interest to support the exclusion of the religious message.¹⁵¹ This is because the State's actions in attempting to exclude the cross constituted content discrimination.¹⁵² The State's reason for excluding the cross was compliance with the Establishment Clause.¹⁵³ The Court acknowledged that compliance with the Establishment Clause could constitute a compelling government interest,¹⁵⁴ but determined that the State's action in this case was not mandated by the Establishment Clause because it does not prohibit private religious expression in a public forum.¹⁵⁵ Thus, the State could not exclude the cross without violating the Free Speech Clause.¹⁵⁶ Of course, there was a strong argument that the expression was not primarily religious, but rather hate-based given the source.¹⁵⁷

A plurality of the Court rejected what it referred to as the "transferred endorsement test"—essentially the endorsement test advocated by Justice O'Connor.¹⁵⁸ "Transferred endorsement" was the plurality's shorthand for the idea that the State could be liable for endorsement of religion if a reasonable observer would perceive the expression of private actors on public land as endorsed by the government.¹⁵⁹ The plurality rejected the idea that actions of private individuals could be endorsed by the government in a public forum even if an outsider might mistake the private action for state action.¹⁶⁰

Because it was resolved primarily under the Free Speech Clause, the Court's opinion involved little discussion of the nature of the religious object involved. Yet the dissenting opinions evidenced a great concern about the religious nature of the cross and the

149. *Id.* at 757-59.

150. *Id.* at 759, 761.

151. *Id.* at 761.

152. *Id.*

153. *Id.*

154. *Id.* at 761-62.

155. *Id.* at 762-70.

156. *Id.* at 765-70.

157. *Id.* at 770-71 (Thomas, J., concurring); *id.* at 798 (Stevens, J., dissenting).

158. *Id.* at 764.

159. *Id.* at 764-70.

160. *Id.*

message its placement on Ohio's Capitol Square would send.¹⁶¹ Justice Stevens' dissenting opinion demonstrated concern about the perspective of religious outsiders.¹⁶² For example, when a nonbeliever or religious minority passes Capitol Square and sees a large cross, it is quite possible that she will perceive the cross as a symbol of majoritarian dominance even if she realizes that the government did not erect it.¹⁶³ This is bolstered by the fact that the majority religion in the United States (including Ohio) is Christianity (although there are certainly a diversity of Christian sects and denominations).¹⁶⁴ Thus, it is likely that to the extent religious symbols that share religious messages are exhibited on the Square, the vast majority of these messages will be Christian, or at the very least, reflective of mainstream Western religions.¹⁶⁵ This may be compounded during the holidays since Christmas trees and appropriate "holiday" decorations may be displayed by government.¹⁶⁶ Justice Stevens therefore suggests that the resulting message to nonbelievers and religious minorities may be, to use Justice O'Connor's language, that they are outsiders and not full members of the community.¹⁶⁷ The fact that the Square is a public forum does not change this fact.¹⁶⁸

While *Capitol Square* is the only United States Supreme Court case involving the display of a cross on government property, there are a number of cases in the lower courts. Significantly, many of these cases involve government display of crosses rather than

161. *Id.* at 797 (Stevens, J., dissenting); *id.* at 817 (Ginsburg, J., dissenting).

162. *Id.* at 799-800.

163. *Cf. id.* at 798 (Stevens, J., dissenting) (reasoning that some citizens might perceive the cross "as a message of exclusion—a statehouse sign calling powerfully to mind their outsider status"); see also STEPHEN M. FELDMAN, PLEASE DO NOT WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) (discussing perceptions of Christian dominance in American history and the difference between insider and outsider views regarding religion in public life).

164. See, e.g., Mark G. Valencia, Comment, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579, 1634 (1996) ("The vast majority of American adults (86.5%) identify themselves as Christian.").

165. This is reflected in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), where a crèche (*Lynch*), and a Christmas tree and menorah (as well as a crèche) (*Allegheny*), were the displays at issue. It is also reflected in the types of objects that are generally involved in cases in the lower courts. See generally Part III (discussing a number of court decisions involving crèches, crosses, menorahs, Ten Commandments monuments and objects such as Christmas trees and Santas).

166. *Allegheny*, 492 U.S. 573 (1989); *Lynch*, 465 U.S. 668 (1984).

167. *Allegheny*, 492 U.S. at 650-51, (Stevens, J., dissenting).

168. *Id.*

private displays in a public forum. For example, in *Separation of Church & State Committee v. City of Eugene*,¹⁶⁹ the United States Court of Appeals for the Ninth Circuit held that a fifty-one foot tall concrete Latin cross that had been erected in a public park and subsequently designated a war memorial, violated the Establishment Clause.¹⁷⁰ The cross was illuminated on certain holidays.¹⁷¹ In a per curiam opinion, the court held that the display endorsed Christianity:

There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause. Because the cross may reasonably be perceived as governmental endorsement of Christianity, the City of Eugene has impermissibly breached the First Amendment's "wall of separation" between church and state.¹⁷²

Thus, the court acknowledged in unequivocal terms that the cross is a religious symbol.¹⁷³

Judge O'Scannlain filed an opinion concurring in the result.¹⁷⁴ He would have engaged in a more fact-sensitive inquiry into the context of the display, but, like the majority, he acknowledged the potential religious message of the cross in the context at issue.¹⁷⁵ Moreover, there have been a number of surprisingly similar cases decided under the United States Constitution and several state constitutions.¹⁷⁶ Most of these cases seem to treat crosses as pure religious symbols.

C. Menorahs

As noted earlier,¹⁷⁷ the *Allegheny* decision also addressed the placement of a menorah outside the City-County Building.¹⁷⁸ The menorah was owned by Chabad-Lubavich, a Hasidic Jewish group,¹⁷⁹ and was placed near a large Christmas tree and a sign saluting

169. 93 F.3d 617 (9th Cir. 1996) (per curiam).

170. *Id.* at 618-20.

171. *Id.* at 618.

172. *Id.* at 620 (footnote omitted).

173. *Id.*

174. *Id.* at 620 (O'Scannlain, J., concurring in the result).

175. *Id.* at 624-26.

176. *See supra* note 97 and accompanying text.

177. *See supra* Part III.A.

178. *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989).

179. *Id.* at 587. Although the menorah was owned by Chabad, it was "stored, erected, and removed each year by the city." *Id.*

liberty.¹⁸⁰ The Court acknowledged the religious nature and history of the menorah¹⁸¹ and its associated holiday, Chanukah.¹⁸² Yet, the Court held that the context of the menorah—situated near the Christmas tree and a sign saluting liberty—did not endorse either Judaism specifically or religion generally.¹⁸³ Rather, the Court held the display sent a message recognizing religious pluralism and cultural diversity.¹⁸⁴ The Court viewed the display as representing the winter holiday season rather than a specific religion or holiday.¹⁸⁵ In her concurring opinion, Justice O'Connor stressed that the message sent by the display to a reasonable observer was a message of tolerance and good tidings for the holiday season.¹⁸⁶ Even though the majority provided a rather detailed discussion of the theological and historical relevance of the menorah, the Court's approach demonstrates that there is an important difference between explaining the history of a religious object or discussing its role in ritual or theology and carefully considering what an object's theological or ritualistic role says about it.

Justices Brennan and Stevens authored opinions dissenting from the Court's holding regarding the menorah.¹⁸⁷ Justice Brennan, joined by Justices Marshall and Stevens, agreed with the majority that Chanukah and the menorah are religious but disagreed that the context of the display could adequately secularize the menorah.¹⁸⁸ Interestingly, Justice Brennan also questioned the notion that the Christmas tree was necessarily a secular symbol (even if it could be in some contexts)¹⁸⁹ but ultimately focused primarily on the meaning and message of the menorah. In his view, the menorah was purely a religious object.¹⁹⁰ Justice Stevens, in an opinion joined by Justices Brennan and Marshall, argued that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."¹⁹¹ Both Justice Brennan and Justice Stevens were

180. *Id.* at 582.

181. *Id.* at 583-85.

182. *Id.* at 585.

183. *Id.* at 617-20.

184. *Id.* at 619-20.

185. *Id.* at 617-20.

186. *Id.* at 635-36 (O'Connor, J., concurring in part and concurring in the judgment).

187. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part); *id.* at 646 (Stevens, J., concurring in part and dissenting in part).

188. *Id.* at 643-45 (Brennan, J., concurring in part and dissenting in part).

189. *Id.* at 638-41.

190. *Id.* at 643-44.

191. *Id.* at 650 (Stevens, J., concurring in part and dissenting in part).

concerned that the Court's decision would offend believers and nonbelievers alike by minimizing the religious meaning of the object involved—in this case a menorah—and by minimizing the impact such displays have on religious outsiders and nonbelievers.¹⁹² A number of lower courts have followed the *Allegheny* Court's analysis.¹⁹³

D. *Ten Commandments Displays*

In *Stone v. Graham*,¹⁹⁴ the Court held that a Kentucky law requiring the posting of the Ten Commandments in every public school classroom in the state violated the Establishment Clause. The law required the inclusion of a notation “concerning the purpose of the display,” which focused on the “secular application of the Ten Commandments” in legal codes.¹⁹⁵ *Stone* is a short per curiam opinion,¹⁹⁶ but it is notable for purposes of the discussion herein. Specifically, the Court stated, “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faith, and no legislative recitation of a supposed secular purpose can blind us to that fact.”¹⁹⁷ As this passage suggests, the Court held that the law failed the secular purpose prong of the *Lemon* test because there was no valid secular purpose for mandating the posting of a sacred text on the walls of every public school classroom in the state.¹⁹⁸

Justice Rehnquist dissented, suggesting that the State may have had a valid secular purpose for posting the Ten Commandments because of the Commandments' impact on Western legal codes.¹⁹⁹ Thus, the State could conclude “that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import.”²⁰⁰ Obviously, there was serious disagreement over the “undeniably” sacred nature of the Ten Commandments in *Stone*. This Article argues the *Stone* majority's view of the nature of the Ten Commandments is more in keeping with theological and anthropological views of religious symbols and objects.²⁰¹

Any potential that this language from *Stone* had to convince the

192. *Id.* at 644-46 (Brennan, J., concurring in part and dissenting in part); *id.* at 650-52 (Stevens, J., concurring in part and dissenting in part).

193. *See supra* note 147 and accompanying text.

194. 449 U.S. 39 (1981) (per curiam).

195. *Id.* at 39 n.1.

196. *Id.* at 39-43.

197. *Id.* at 41.

198. *Id.* at 40-43.

199. *Id.* at 45 (Rehnquist, J., dissenting).

200. *Id.*

201. *See supra* Part II; *infra* Part V.

Court to seriously consider the impact of the religious nature of religious objects was never realized. In subsequent cases, the Court paid lip service to the historical or theological relevance of religious objects, but any serious consideration of the power of these objects ended there.²⁰² This trend continued in the Court's most recent Ten Commandments decisions, which have added confusion regarding the principles and legal tests applicable in religious symbolism cases.²⁰³

Over the last five years, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have each decided cases involving Ten Commandments displays.²⁰⁴ Two of those cases recently reached the Supreme Court.²⁰⁵ In *McCreary County v. ACLU*,²⁰⁶ the Court held that Ten Commandments displays in two separate county courthouses were unconstitutional.²⁰⁷ The Court relied on the secular purpose prong of the *Lemon* and endorsement tests.²⁰⁸ The history of the displays in question played a significant role in the Court's analysis. Each of the displays originally consisted of a framed copy of the Ten Commandments taken from the King James version of the Bible.²⁰⁹ The courthouse displays were readily visible to those using the courthouse.²¹⁰ In response to a lawsuit aimed at forcing the counties to remove the displays, the counties modified the displays to include a variety of other documents, including a "passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, 'In God We Trust;' [and] a page from the Congressional Record . . ." declaring 1983 the year of the Bible.²¹¹

202. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *supra* Parts III.A.-III.B.

203. See *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (plurality opinion).

204. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (striking down the display of a Ten Commandments monument in the rotunda of the Alabama state courthouse); *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (upholding the display of a small Ten Commandments plaque on the old entrance to the county courthouse); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (upholding the use of a small seal that included a depiction of the Ten Commandments, but not the text, along with other images); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (striking down the display of a Ten Commandments monument on the grounds of the Capitol); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (striking down the display of a Ten Commandments monument located on grounds of the city municipal building).

205. See *McCreary County*, 125 S. Ct. 2722; *Van Orden*, 125 S. Ct. 2854.

206. 125 S. Ct. 2722.

207. *Id.* at 2745.

208. *Id.* at 2732-33.

209. *Id.* at 2728.

210. *Id.*

211. *Id.* at 2729.

Each of the documents mentioned G-d, and some documents were edited to include only the religious references contained in them.²¹² The district court granted the plaintiffs' request for a preliminary injunction despite these modifications to the displays.

In response, the counties posted a third version of the displays that included fuller versions of some of the same documents contained in the second version, but also included some additional documents that did not reference G-d.²¹³ The new displays also included a "prefatory document" that claimed the displays contained "documents that played a significant role in the foundation of our system of law and government."²¹⁴ The prefatory document suggested that the Ten Commandments influenced the Declaration of Independence, but made no attempt to connect the Ten Commandments to the other items in the display.²¹⁵ This unsubstantiated connection was highly relevant to both the Court of Appeals for the Sixth Circuit and the United States Supreme Court.²¹⁶

The Supreme Court's majority opinion was authored by Justice David Souter²¹⁷ and focused heavily on the history of the display and the lack of a secular purpose evinced by that history.²¹⁸ The Court's analysis began with a promising quote from *Stone v. Graham* recognizing that the Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths,"²¹⁹ but rather than analyzing that point or what it might mean under the Establishment Clause, the Court moved into its secular purpose analysis, recognizing that the *Stone* court found the religious nature of the text relevant in determining that there was no secular purpose.²²⁰ The Court's secular purpose analysis utilized the *Lemon* test, but explained that the purpose analysis in that test is meant to assure government neutrality between religions "and between religion and nonreligion."²²¹ The Court then applied endorsement analysis, explaining that when government favors religion or a particular religion, it sends a message to "nonadherents 'that they are outsiders,' not full members of the political community, and an accompanying message to adherents that they are insiders, favored

212. *Id.* at 2739.

213. *Id.* at 2730-31.

214. *Id.* at 2731.

215. *See id.* at 2739-41.

216. *See id.*

217. *Id.* at 2727.

218. *See id.*

219. *Id.* at 2732.

220. *See id.* at 2732-42.

221. *Id.* at 2733.

members” of the political community.²²²

The majority rejected the counties’ invitation to reject or minimize the secular purpose test. Explaining why analysis of secular purpose is possible and not simply an exercise in getting into government actors’ heads, Justice Souter wrote, “[t]he eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act.”²²³

According to the Court, if an objective observer would perceive the predominant purpose behind a government action as religious, the government is “taking religious sides.”²²⁴ In determining what an objective observer would perceive, the history and context of the display—of which the observer is presumed to be aware—are quite important.²²⁵

The Court recognized that the *Stone* court had found the Commandments to be an “instrument of religion,” and that this was decisive under the facts in that case.²²⁶ Still, the Court held that there is no per se rule against displaying the Ten Commandments.²²⁷

At this point in the opinion the analysis gets quite interesting, at least in relation to the points made in this Article. Justice Souter acknowledged the theological significance of the Commandments and the impact of their divine origin.²²⁸ In so doing, he pointed out that the text of the Commandments is a powerful indication of their religious nature and the likely religious purpose in displaying them.²²⁹ The opinion noted that where the text is absent, it is less likely that an observer will perceive the depiction of tablets, etc., as religious.²³⁰ Conversely, when the text is present, “the insistence of the religious message is hard to avoid” absent a context that suggests “a message going beyond an excuse to promote [a] religious point of view.”²³¹ As a result, when the government places the text of the Commandments “alone in public view,” as the counties did in the first of the three displays, the religious purpose is obvious.²³² Moreover, surrounding the text with other historical documents,

222. *Id.*

223. *Id.* at 2734.

224. *Id.* at 2735.

225. *Id.* at 2734-37.

226. *Id.* at 2737-38.

227. *Id.*

228. *Id.* at 2738-39.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 2739.

whose main connection is that they contain religious references, would only make a reasonable observer more likely to perceive a religious purpose.²³³

The counties' third display, which included a number of secular documents in addition to the text of the Ten Commandments, was ostensibly intended to represent the foundations of American law.²³⁴ The Court recognized that in a vacuum such a display might have a secular purpose,²³⁵ but in light of the history of the courthouse displays and the odd choices of historical documents—including the Magna Carta and the Declaration of Independence but not the Constitution or the Fourteenth Amendment²³⁶—the displays could not survive secular purpose analysis.²³⁷ The Court found especially odd the attempts to link the Ten Commandments, which are of divine origin, with the Declaration of Independence, which derives governmental power from the people.²³⁸

The Court held that neutrality, although an elusive and variable concept, is an important focus of the religion clauses because the framers were concerned about the civic divisiveness that can be caused when the government takes sides in religious debates.²³⁹ This militates against the constitutionality of government displays that evince a religious purpose.²⁴⁰ Because there are historical arguments that support both sides, the Court rejected the dissent's brand of strict originalism. Additionally, given the long line of precedent recognizing neutrality as a guiding principle, the Court did not find the dissent's reading of history persuasive.²⁴¹

Justice O'Connor, who joined the majority, filed a concurring opinion.²⁴² She argued that, given the religious divisiveness in nations without some level of separation and given the success of the American experiment with separation—both for religion and society more generally—it makes little sense to reject core Establishment Clause principles and allow the government to favor one religion or set of religions over others or over non-religion.²⁴³ She cited to the American tradition of religious voluntarism and

233. *See id.*

234. *Id.*

235. *See id.* at 2741.

236. *Id.* at 2740-41.

237. *Id.* at 2739-41.

238. *Id.* at 2740-41.

239. *Id.* at 2742-43.

240. *Id.* at 2743-45.

241. *Id.* at 2744.

242. *Id.* at 2746 (O'Connor, J., concurring).

243. *Id.*

wrote that when government endorses one religious tradition or another, it can distort the marketplace of ideas and foster divisiveness.²⁴⁴ Displays such as those in *McCreary County* violate the endorsement principle.²⁴⁵

Justice Scalia filed a strongly worded dissent, which was joined by Justice Thomas and Chief Justice Rehnquist and in part by Justice Kennedy.²⁴⁶ Justice Scalia relied on originalist arguments to assert that the government can endorse monotheistic religious traditions so long as it does not discriminate against other religious views or play favorites in terms of funding or other aid.²⁴⁷ Justice Scalia pointed to statements and actions by various Framers and a number of historical practices endorsing monotheism.²⁴⁸

As Justice Souter pointed out, Justice Scalia's history is quite selective because it leaves out other historical information that may suggest support for a broader separation or a preference for specific Protestant religious views rather than monotheism broadly.²⁴⁹ Justice Kennedy did not join this portion of the dissenting opinion. Justice Scalia also criticized the majority for its focus on secular purpose, arguing that determining legislative purpose is not a fruitful task for the judiciary, as a purpose analysis can cause a great deal of mischief.²⁵⁰ Justice Scalia looked to government coercion or government action that proselytizes or disparages a particular religion(s).²⁵¹ He found such coercion or disparagement lacking in this case and in all cases involving "passive" religious displays.²⁵²

Interestingly, Justice Scalia did acknowledge the religious nature of the Ten Commandments, but he morphed them into some sort of nonsectarian, monotheistic acknowledgment of a common heritage.²⁵³ This ignores the power and significance of the choice to use the King James version of the Commandments, but at least Justice Scalia is forthright about the religious nature of the Commandments themselves. Unfortunately, like the majority, he does little to openly discuss the implications of the religious nature of the object. It is interesting, given his rejection of endorsement-

244. *Id.* at 2746-47.

245. *Id.* at 2747.

246. *Id.* at 2748 (Scalia, J., dissenting).

247. *Id.* at 2748-49.

248. *Id.* at 2748-53.

249. Justice Souter, while acknowledging these problems, goes on to rely on originalist arguments himself. *Id.* at 2743-45.

250. *Id.* at 2757-63 (Scalia, J., dissenting).

251. *Id.* at 2761-62.

252. *Id.* at 2762.

253. *Id.* at 2759-63.

type analysis, that Justice Scalia argued that the context of the displays dispel any argument that they lack a secular purpose.²⁵⁴ Rather, he argued that the displays manifest a purpose to recognize the influence of the Commandments on American law and the long-standing and common practices of the nation.²⁵⁵

Van Orden and *McCreary County*, though decided the same day, seem to conflict with each other.²⁵⁶ *Van Orden* is a split decision; Justice Rehnquist wrote the opinion for the plurality. Significantly, there are four Justices in the plurality and four dissenting Justices.²⁵⁷ Thus, Justice Breyer's opinion concurring in the judgment seems to be the key opinion. This is quite similar to the famous *Bakke* case,²⁵⁸ where the Court was split four-four and Justice Powell's concurring opinion became the key precedent.²⁵⁹ Unfortunately, Justice Breyer's opinion seems more a policy compromise than a guidepost for future courts, albeit a reasonable policy compromise.²⁶⁰ Before addressing Justice Breyer's concurrence, however, it is useful to address the plurality opinion.

The case involved the display of a Ten Commandments monument on the ground between the Texas State Capitol and Supreme Court building.²⁶¹ The monument was one of many monuments scattered around the grounds of the Capitol.²⁶² Its location did not call to it any special attention. The monument was donated in 1961 by the Fraternal Order of Eagles, who paid the cost of its erection.²⁶³ There was little evidence of the legislative intent behind accepting the monument, and no evidence of the religiously motivated purpose evident in *McCreary County*.²⁶⁴

The plurality opinion begins by asserting that the Establishment Clause has a dual nature. It recognizes both "the strong role played by religion and religious traditions throughout our [n]ation's history" and that "governmental intervention in religious matters can itself endanger religious freedom."²⁶⁵ The

254. *Id.*

255. *Id.*

256. *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (plurality opinion); *McCreary County*, 125 S. Ct. 2722.

257. *See Van Orden*, 125 S. Ct. at 2858 (Justices Rehnquist, Scalia, Kennedy, and Thomas were in the plurality; Justices Stevens, Ginsburg, O'Connor, and Souter dissented).

258. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

259. *Id.* at 268-72.

260. *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment).

261. *Id.* at 2858.

262. *Id.*

263. *Id.*

264. *Id.* at 2858, 2864 n.11.

265. *Id.* at 2859.

plurality applies analysis quite similar to that applied in *Lynch*; it does not apply either the *Lemon* or the endorsement tests.²⁶⁶

Thus, the plurality focuses on the “unbroken history of official acknowledgments by all three branches of government of the role of religion in American life . . .” as asserted in *Lynch*.²⁶⁷ The opinion then recites several historical examples that support this proposition and cites *Marsh v. Chambers*²⁶⁸ and *Lynch* in combination with dicta from other cases.²⁶⁹ The opinion next discusses the religious monuments and sculptures adorning federal buildings in the District of Columbia, including the United States Supreme Court. This is all used as evidence that the Ten Commandments can have a secular meaning as well as a religious meaning: the decalogue’s historical role in American law and culture.²⁷⁰ Significantly, this seems to conflict with the Court’s earlier holding in *Stone*,²⁷¹ but the plurality distinguishes *Stone* since it involved public schools, where courts generally apply heightened Establishment Clause analysis.²⁷²

From the perspective of this Article, there are two especially significant aspects of the plurality opinion. First, it repeats the argument from *Lynch* that religious objects can be “passive.”²⁷³ Second, it creates an artificial dualism like that in *Lynch*, which suggests that monuments such as the one in Texas can have “a dual significance, partaking of both religion and government.”²⁷⁴ The argument seems to be that so long as the monument “partakes” of an appropriate secular “significance,” the religious “significance,” while still there, is somehow sterilized for Establishment Clause purposes.²⁷⁵ As explained elsewhere in this Article, that argument is flawed. The dual nature suggested by the plurality may, however, be a recognition of the fact that Ten Commandments displays are multifaceted.²⁷⁶

Justice Scalia filed a short concurring opinion referencing his dissent in *McCreary County*.²⁷⁷ Justice Thomas wrote a concurring opinion repeating his call in earlier cases to reevaluate incorporation

266. *Id.* at 2861-64.

267. *Id.* at 2861.

268. 463 U.S. 783 (1983).

269. *Van Orden*, 125 S. Ct. at 2861-62.

270. *Id.* at 2862-63.

271. *Stone v. Graham*, 449 U.S. 39 (1981) (per curiam).

272. *Van Orden*, 125 S. Ct. at 2863-64.

273. *Id.* at 2861, 2864.

274. *Id.* at 2864.

275. *See generally id.*

276. *See supra* Part V.

277. *Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring).

of the Establishment Clause,²⁷⁸ and arguing that, to the extent that it is incorporated, the touchstone of Establishment Clause analysis should be legal coercion.²⁷⁹ A refreshing aspect of Justice Thomas' opinion is that he openly acknowledges and engages with the religious nature of religious objects,²⁸⁰ even if the conclusions he draws from that engagement are questionable.²⁸¹ In relation to *Elk Grove Unified School District v. Newdow*,²⁸² which involved the words "under God" in the Pledge of Allegiance, and the religious objects cases, Justice Thomas wrote:

Telling either nonbelievers or believers that the words "under God" have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning Even when this Court's precedents recognize the religious meaning of symbols or words, that recognition fails to respect fully religious belief or disbelief.²⁸³

Justice Thomas goes on to point out that the Court's endorsement approach "either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views."²⁸⁴ Unfortunately, rather than analyze how the nature of religious symbols speaks to their constitutionality from the perspective of the object, Justice Thomas ends up relying on his view of the intent of the framers to find the display of such objects constitutional.²⁸⁵ Thus, while he comes close to seriously engaging the power of these objects, he, like the other Justices, falls back into a contested doctrinal argument, in this case one based on history.

Several themes emerge in Justice Breyer's concurring opinion. First, Justice Breyer views this as a "borderline" case to which no legal test can be appropriately applied.²⁸⁶ This leaves only the "exercise of legal judgment" for determining the outcome.²⁸⁷ Justice Breyer stresses, however, that such legal judgment is "not a personal judgment;" "[r]ather . . . it must reflect and remain faithful

278. *Id.* at 2865 (Thomas, J., concurring).

279. *Id.*

280. *Id.* at 2866-67.

281. *Id.* at 2865-68.

282. 542 U.S. 1 (2004) (holding that plaintiff Newdow lacked standing, and, thus, never reaching the Pledge issue).

283. *Van Orden*, 125 S. Ct. at 2866-67 (Thomas, J., concurring).

284. *Id.* at 2867.

285. *Id.*

286. *Id.* at 2869 (Breyer, J., concurring in the judgment).

287. *Id.* at 2869.

to the underlying purposes of the clauses, and it must take account of context and consequences measured in light of those purposes.”²⁸⁸ Second, Justice Breyer, like the plurality, writes that the purpose of the Establishment Clause is to maintain some level of separation between church and state while avoiding hostility to religion, although it seems clear that Justice Breyer weighs these factors differently than the plurality.²⁸⁹ Third, Justice Breyer asserts that avoiding religious divisiveness is a major goal of the Establishment Clause, but that this can cut both ways.²⁹⁰ Therefore, the type of religious purpose evidenced in *McCreary County* is unconstitutional, but attempts by the “government to purge from the public sphere all that in any way partakes of the religious” would be as well.²⁹¹ Fourth, Justice Breyer argues that longstanding religious displays do not generally raise the same Establishment Clause concerns as new attempts to display religious objects because the longstanding displays are less likely to be divisive, assuming their context and purpose adequately secularizes them.²⁹² This seems to be an attempt to protect against Establishment Clause challenges of most longstanding government displays that include religious themes—recognition of a form of symbolic ceremonial deism, if you will.

Unfortunately, like the plurality—in fact, even more so than the plurality—Justice Breyer argues for a dualistic (or triadic) analysis of the symbolic meaning of the Ten Commandments. He argues that the Commandments, while religious, can also represent “a secular moral message,” and, in some contexts, “a historical message.”²⁹³ He uses these potential secular messages, in light of the physical and historical context of the monument, to argue that the display in this case was meant to reflect Texas’ moral and historical traditions and not the religious aspects of the display.²⁹⁴ Thus, like the plurality, Justice Breyer seems to recognize the Ten Commandments’ multifaceted nature without seriously considering the impact of the religious facets of the monument. Like the plurality, he essentially argues that the religious aspects of the monument, while there, are appropriately desacrilized.²⁹⁵ Even as he argues that no legal test can be applied to borderline cases, Breyer engages in an endorsement-like analysis, unlike the plurality.²⁹⁶ Justice Breyer

288. *Id.*

289. *Id.* at 2868-69.

290. *Id.* at 2871.

291. *Id.* at 2868, 2871.

292. *Id.* at 2871.

293. *Id.* at 2869-70.

294. *Id.* at 2869-71.

295. *Id.*

296. *See id.* (analyzing the context of the display to determine the message it

rejects most of the plurality's reasoning and seems to carve out a narrow group of cases involving longstanding religious monuments or displays whose physical and historical context make them appear less divisive than they may appear in other historical or physical settings.

Justice Stevens wrote a dissenting opinion that focuses heavily on the religious nature of the Ten Commandments and, more importantly, takes the question of the Commandments' religiosity seriously.²⁹⁷ He, like Justice Thomas, does not believe that context can detract from the religious meaning of the Commandments, at least not when the full text of the Commandments are displayed.²⁹⁸ He also points out the intense theological disputes that can arise in relation to the choice of text for the Commandments. Like the majority in *McCreary County*, Justice Stevens focuses heavily on the concepts of neutrality and separation.²⁹⁹ He expresses great concern about the potential divisiveness of a display with such obvious theological significance. In light of that theological significance, he distinguishes displays of the Ten Commandments that focus on the Commandments' text from other displays with religious content that the Court has upheld.³⁰⁰ In his view, such displays inherently create religious insiders and outsiders and thus violate the neutrality and separation principles.³⁰¹

Justice Stevens also attacks the plurality (and Justice Scalia's *McCreary County* dissent) for relying on isolated statements of the Framers and on the Framers' contemporary practices. He notes that persuasive evidence exists to counter that history with a more separationist version and that the sectarian nature of a Ten Commandments display has little to do with the practices supported by history and the nation's longstanding traditions regarding public acknowledgment of religion.³⁰² Essentially, he rejects the hard-originalist approach as being indeterminate and the tradition approach as being irrelevant under these facts.³⁰³ He also notes that if one wanted to take a true hard-originalist approach, it would be possible to support religious discrimination and favoritism by the states against non-Protestants (and against many Protestant groups as well).³⁰⁴ Justice Stevens comes closest to taking the "religious" in

sends).

297. *Id.* at 2873 (Stevens, J., dissenting).

298. *Id.* at 2874-82.

299. *Id.* (Stevens, J., dissenting).

300. *Id.*

301. *Id.* at 2874-75.

302. *Id.* at 2882-90.

303. *Id.*

304. *Id.* at 2886-87.

religious objects seriously, but his analysis remains external to the objects and, thus, differs from that suggested in this Article.³⁰⁵

Justice O'Connor filed a short concurrence cross-referencing her concurrence in *McCreary County* and stating her general agreement with Justice Souter's dissenting opinion.³⁰⁶ Justice Souter wrote a dissenting opinion arguing that the context of the Texas display, especially the fact that the full text of the Commandments appear on the monument, demonstrates a form of religious favoritism that violates the neutrality principle (and implicitly endorses religion).³⁰⁷ He argues that unless context alters the message, government cannot display "an obviously religious text" consistently with the neutrality principle.³⁰⁸ Justice Souter looks at the Fraternal Order of Eagles's purpose in donating the monument, the State's purpose for placing it on the capitol grounds, and the physical attributes of the monument—which included sizing and capitalizing words that reinforce the most religious aspects of the text—and concludes that the state was clearly sending a religious message by displaying the monument.³⁰⁹ He rejects the State's arguments that the purpose was to recognize the Commandments' role as a foundation of secular law in Texas and the nation as a whole.³¹⁰ In this regard, Justice Souter notes that the Ten Commandments are a divine injunction to follow the laws stated therein, and that the monument was designed to accentuate the divine.³¹¹

Although the monument was physically placed on the twenty-two acre capitol grounds with sixteen other monuments, because the monuments have no common theme, the Commandments' message is not altered.³¹² Justice Souter does argue, however, that Ten Commandments displays—especially those not including the text of the Commandments—would be constitutional if they were appropriately contextualized by other objects to suggest that the total display is about the historical role of the Commandments in western law.³¹³ He chides the plurality for relying on generalities in earlier cases rather than on more relevant cases such as *Stone*,³¹⁴ and he argues that the plurality's attempt to limit *Stone* to the

305. *Id.* at 2873-90.

306. *Id.* at 2891 (O'Connor, J., concurring).

307. *Id.* at 2892 (Souter, J., dissenting).

308. *Id.*

309. *Id.* at 2893.

310. *Id.* at 2895-96.

311. *Id.* at 2893.

312. *Id.* at 2895.

313. *Id.* at 2893-94.

314. *Id.* at 2895-96.

classroom setting was against the lessons of that case and others.³¹⁵

Although the law relating to public display of religious objects by government entities seems uncertain after *McCreary County* and *Van Orden*, some things are clear. For example, if the display does not have a secular purpose, it is unconstitutional because a majority of the Court in *McCreary County* held that the secular purpose prong of the *Lemon* test (as merged with a focus on endorsement) applies to these monuments. But what if there is an adequate secular purpose or the purpose is not clear? Would the Court apply the effects test or the tradition approach of the *Van Orden* plurality? Clearly the *Van Orden* plurality would apply the tradition approach, but it is unclear whether Justice Breyer would do so in cases that are not “borderline,” and, of course, Justice Breyer did not agree with the bulk of the plurality opinion. Meanwhile, the four dissenting Justices in *Van Orden* would apply something resembling the endorsement test to the effects of the Ten Commandments monument.

Significantly, dicta in *McCreary County* seems to support this approach. It would seem that Justice Breyer’s concurrence in *Van Orden* is the key, but unfortunately Justice Breyer’s opinion is not terribly concrete. He does hint, however, that considerations central to *Lemon* and endorsement analysis, such as physical context, might be relevant when a case is not “borderline.” Therefore, it appears that a majority of the Court would apply the *Lemon* test and/or the endorsement test, or something resembling these tests, to the effects of government-supported Ten Commandments displays. So questions regarding the physical and historical context of a given display will most likely continue to be relevant in religious symbolism cases, and the risks of undervaluing or overvaluing the religious nature of certain objects will remain.

Two recent decisions by the United States Court of Appeals for the Eleventh Circuit demonstrate the important role context can play in cases involving government use or display of the Ten Commandments. In *King v. Richmond County*,³¹⁶ the Eleventh Circuit upheld the use of a small county seal with a picture of the Ten Commandments on it. The seal did not contain the text of the Commandments,³¹⁷ and no one in the county knew why the Commandments icon was included in the seal because it had been created in the late nineteenth century.³¹⁸ There was some

315. *Id.* at 2896-97.

316. 331 F.3d 1271, 1273-74, 1286 (11th Cir. 2003).

317. *Id.* at 1274. The seal depicted the Roman numerals I-X but not the text of the Commandments. *Id.*

318. *Id.* The seal had been used “for more than 130 years,” but no one knew

speculation that it was meant to symbolize law; the seal was generally used to authenticate legal documents and when it was developed, many citizens were illiterate.³¹⁹ The court applied the *Lemon* test as augmented by the Endorsement test, and thus inquired as to whether the primary purpose or effect of the seal was to endorse religion. Entanglement was not an issue in the case.³²⁰ The court discussed in detail the importance of physical context in religious symbolism cases, and held that in context the seal neither had the purpose nor the effect of endorsing religion given its size, placement, use, the inclusion of secular symbols in the seal, and the fact that the seal did not include the Ten Commandments' text.³²¹

The seal does seem to have much less "sacred" connotation than some of the Ten Commandments displays discussed below. The fact that the text of the Commandments was not included could potentially affect whether the seal is viewed as a religious object.³²² The test proposed later in this Article suggests that the seal is constitutional, but for different reasons than those expressed in the decision.³²³

In *Glassroth v. Moore*,³²⁴ the Eleventh Circuit held that the Chief Justice of the Alabama Supreme Court's placement of a large granite Ten Commandments monument in the Rotunda of the state courthouse violated the Establishment Clause.³²⁵ Former Chief Justice Roy Moore installed the monument in the middle of the night while a film crew from Coral Ridge ministries, an Evangelical Christian group, filmed the installation.³²⁶ The monument was topped with the full text of the King James version of the Ten Commandments in tablet form; all other text was smaller and below the Ten Commandments.³²⁷

Former Chief Justice Moore never consulted the other Justices before installing the monument,³²⁸ and he refused to remove the monument when ordered to do so by a federal court.³²⁹ Significantly, former Chief Justice Moore made several statements demonstrating

the "purpose for the seal's design." *Id.*

319. *Id.* at 1277.

320. *Id.* at 1276-86.

321. *Id.* at 1277-86.

322. *Id.* at 1285-86.

323. *See infra* Part VI.

324. 335 F.3d 1282 (11th Cir. 2003).

325. As a result of this behavior, Moore was removed from the bench in November 2003. Manuel Roig-Franzia, *Alabama Judge is Removed*, WASH. POST., Nov. 14, 2003, at A-01.

326. *Glassroth*, 335 F.3d at 1286.

327. *Id.* at 1285-86.

328. *Id.* at 1285.

329. *Id.* at 1288.

his view that the monument was a religious object.³³⁰ The case received a great deal of media attention, but as a matter of constitutional law, the case was easy to decide; former Chief Justice Moore's behavior erased any doubt that his purpose in erecting the monument was to promote religion, specifically Christianity.³³¹ Moreover, given the circumstances surrounding the monument's installation, its location, and its context in the courthouse, the effect of the monument was to endorse Christianity.³³² Thus, the court, analyzing the effects prong through the lens of the endorsement test, held that the monument violated the first two prongs of the *Lemon* test.³³³ While former Justice Moore's problematic behavior drew a lot of attention to this case, *Glassroth* is not by itself the best case for analyzing the constitutionality of Ten Commandments displays. After *McCreary County*, this case is an even easier example because of the obvious lack of a secular purpose.³³⁴

In *Adland v. Russ*,³³⁵ the United States Court of Appeals for the Sixth Circuit struck down a Kentucky legislative resolution requiring that a Ten Commandments monument be moved from storage to the grounds of the Kentucky Capitol as part of a "historical and cultural display" in which "the Ten Commandments monument physically dominat[ed]" the display.³³⁶ The Fraternal Order of Eagles donated the monument to the state in 1971, and it was displayed at the Capitol until 1980, when it was placed in storage during construction on the Capitol grounds.³³⁷ The resolution, which also included quotes from various historical sources referencing G-d or the Bible, required that the monument be put back on the Capitol grounds.³³⁸ The court held that the resolution did not have a secular legislative purpose and that the placement of the monument on the Capitol pursuant to the resolution would be an endorsement of religion.³³⁹ Significantly, the court noted that government displays of the Ten Commandments do not automatically violate the Constitution. A display that was not dominated by the Ten Commandments and that included a variety of other legal or historical documents, thus providing an

330. *Id.* at 1286-87.

331. *Id.* at 1296-97.

332. *Id.* at 1297.

333. *Id.* at 1296-97.

334. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

335. 307 F.3d 471 (6th Cir. 2002).

336. *Id.* at 487.

337. *Id.* at 475-76.

338. *Id.* at 476-77.

339. *Id.* at 479-84.

appropriately secular context, might be constitutional.³⁴⁰ Dicta in *McCreary County* would seem to support this conclusion. Judge Batchelder dissented, arguing that the case was not yet ripe.³⁴¹

In *Books v. City of Elkhart*,³⁴² the Seventh Circuit likewise addressed a situation involving a Ten Commandments monument that was placed on government property after having been donated by the Fraternal Order of Eagles.³⁴³ The monument was donated to the City of Elkhart in 1958 and was placed on the grounds of the city municipal building.³⁴⁴ The case includes an interesting historical discussion about the evolution of the program through which the Fraternal Order of Eagles donated such monuments to government entities around the country.³⁴⁵ The Court reiterated the holding in *Stone v. Graham*³⁴⁶ that the Ten Commandments are unmistakably a religious symbol.³⁴⁷ It then held that the context of the display, including the religious nature of the speeches given when it was erected in 1958, demonstrated that there was no secular purpose for the display. The court rejected the secular purpose espoused by the City “on the eve of” the litigation.³⁴⁸ Moreover, the court held that the primary effect of the monument was to endorse religion.³⁴⁹ Because the monument stood permanently on the grounds of the municipal building, the seat of the city government, and its context in no way detracted from its religious message to non-adherents, its tenure on prominent city property did not alter this religious effect.³⁵⁰ Judge Manion concurred in part and dissented in part, disagreeing with the majority’s analysis under the *Lemon* test.³⁵¹

Similarly, in *ACLU Nebraska Foundation v. City of Plattsmouth*,³⁵² a panel of the United States Court of Appeals for the Eighth Circuit held that Plattsmouth, Nebraska’s display of a Ten Commandments monument donated by the Fraternal Order of Eagles in 1965 was unconstitutional.³⁵³ The display was located in a

340. *Id.* at 489-90.

341. *Id.* at 490 (Batchelder, J., dissenting).

342. 235 F.3d 292 (7th Cir. 2000).

343. *Id.*

344. *Id.* at 295.

345. *Id.* at 294-95 (noting that the program was influenced by filmmaker Cecil B. DeMille, among others).

346. 449 U.S. 39 (1980) (per curiam).

347. *Books*, 235 F.3d at 302.

348. *Id.* at 304.

349. *Id.*

350. *Id.* at 304-07.

351. *Id.* at 311 (Manion, J., concurring in part and dissenting in part).

352. 358 F.3d 1020 (8th Cir. 2004), *vacated by* 419 F.3d 772 (8th Cir. 2005).

353. *Id.* at 1020.

city park, and the court held that the monument violated both the purpose and effects prongs of the *Lemon* test.³⁵⁴ Under Eighth Circuit precedent, the endorsement “test” is a gloss on the effects prong of *Lemon*, and thus a finding that the monument had an impermissible effect also demonstrated that the monument endorsed religion.³⁵⁵

Unlike *Books*, the record contained none of the facts surrounding the donation or erection of Plattsouth’s monument. There was, however, evidence that the city maintained the monument and reinstalled it after it was toppled in 2001.³⁵⁶ The court found that given the inherently religious nature of the Ten Commandments, the City could not have had a secular purpose for initially installing and maintaining the monument.³⁵⁷ The court also held that the primary effect of the monument was to endorse religion.³⁵⁸ The court considered the broader context of the monument, which included the fact that it was the only monument in its general area in the park and the only park monument with a religious theme.³⁵⁹ The court rejected the City’s argument that the display was constitutional under *Marsh v. Chambers*³⁶⁰ because unlike legislative prayer, government display of Ten Commandments monuments is not a longstanding and ubiquitous practice.³⁶¹ This holding would seem to be in tension with the plurality opinion in *Van Orden*, but under Justice Breyer’s concurring opinion in that case, the other factors considered relevant by the *City of Plattsouth* court might support the conclusion that the Plattsouth’s monument was unconstitutional.

Judge Arnold concurred with the court’s analysis and holding under *Lemon*,³⁶² but would have also held (unlike the majority) that the display discriminated in favor of Christianity and Judaism in violation of the Supreme Court’s decision in *Larson v. Valente*.³⁶³ Judge Bowman dissented from the court’s analysis under *Lemon* and would have upheld the display of the monument as consistent with the Establishment Clause.³⁶⁴ The Eighth Circuit has agreed to

354. *Id.* at 1034-42.

355. *Id.* at 1040-41.

356. *Id.* at 1026.

357. *Id.* at 1036-38.

358. *Id.* at 1041-42.

359. *Id.* at 1040-41.

360. 463 U.S. 783 (1983).

361. *City of Plattsouth*, 358 F.3d at 1042.

362. *Id.* at 1042-43 (Arnold, J., concurring in part and concurring in the judgment).

363. 456 U.S. 228 (1982).

364. *City of Plattsouth*, 358 F.3d at 1043 (Bowman, J., concurring in part

hear this case en banc and has thus vacated the opinion,³⁶⁵ but the reasoning in the opinion—especially regarding the religious nature of the Ten Commandments—remains relevant to the discussion here.

Freethought Society v. Chester County presented a different factual context for the display of the Ten Commandments.³⁶⁶ In *Freethought Society*, the Ten Commandments were on a plaque that was placed near the old entrance of the county courthouse. The plaque was installed on the courthouse in 1920 and remained there for eighty-two years.³⁶⁷ The courthouse, but not the plaque, was placed on the National Register of Historic Places.³⁶⁸ The entrance where the plaque was located was closed in 2001 in favor of an entrance that was part of a newer addition to the building.³⁶⁹ This was done for security and efficiency reasons.³⁷⁰ Evidence suggested that the City had made little effort to maintain or call attention to the plaque since its 1920 dedication.³⁷¹ There were a few smaller plaques and signs in the same general area.³⁷² The long history and now relatively isolated location of the plaque were highly relevant to the court's decision.³⁷³

In analyzing the purpose of the plaque, the court held that it had to analyze the City's purpose for not removing the plaque in 2001.³⁷⁴ The City's stated purpose in 2001 was the historical preservation of the building. The court found that historical preservation was an adequate secular purpose given the longstanding history of the plaque and the building and the fact that the City had done nothing to call attention to the plaque.³⁷⁵ It also relied on the argument that the city commissioners viewed the Ten Commandments as a "foundational legal document." According to the court, this augmented the secular purpose of historic preservation.³⁷⁶

The court also applied the endorsement test to gauge the effects of the plaque and held that the plaque was not an unconstitutional

and dissenting in part).

365. See *supra* note 353.

366. 334 F.3d 247 (3d Cir. 2003).

367. *Id.* at 249-50.

368. *Id.* at 253.

369. *Id.* at 250, 253.

370. *Id.* at 253-54.

371. *Id.* at 252.

372. *Id.* at 254.

373. *Id.* at 256-69.

374. *Id.* at 261-62.

375. *Id.* at 267-69.

376. *Id.* at 268.

endorsement of religion.³⁷⁷ In applying the endorsement test, the court “adopted” Justice O’Connor’s view that the reasonable observer under that test is “presumed to have an understanding of the general history of the display and the community in which it is displayed”³⁷⁸ Thus, a reasonable Chester County resident observing the plaque would know that the plaque had been there for over eighty years, was not erected by recent administrations, and that the city did not call attention to the plaque. Also relevant to the reasonable observer would be the current context of the display, which was no longer at the main entrance.³⁷⁹ Based on its history and physical context, the court held that the county could keep the plaque on the courthouse building.³⁸⁰

The Tenth Circuit addressed the Ten Commandments monument issue in a different context in *Summum v. City of Ogden*.³⁸¹ The City of Ogden, Utah erected a Ten Commandments monument on the lawn outside the city municipal building.³⁸² The monument had been donated in 1966 by, you guessed it, the Fraternal Order of Eagles.³⁸³ In this case, Summum, a religious group, asked to erect its own monument near the Ten Commandments monument.³⁸⁴ When the city declined, Summum sued, arguing that the Ten Commandments monument violated the Establishment Clause and that the denial of the request to erect their own monument constituted viewpoint discrimination under the Free Speech Clause.³⁸⁵ On appeal, Summum conceded the Establishment Clause issue because of an earlier Tenth Circuit decision that seemed to directly undermine its claim.³⁸⁶ Interestingly, the Tenth Circuit suggested in a footnote that this concession may have been unnecessary.³⁸⁷ As a result of the concession, the case was decided on free speech grounds.

The City argued that the Ten Commandments monument was the City’s own speech and not that of the Fraternal Order of Eagles, and thus it was not engaging in viewpoint discrimination by maintaining the Ten Commandments monument and denying the Summum’s request to erect the other monument.³⁸⁸ The court

377. *Id.*

378. *Id.* at 259.

379. *Id.* at 262-67.

380. *Id.* at 266-67, 269-70.

381. 297 F.3d 995 (10th Cir. 2002).

382. *Id.* at 997-98.

383. *Id.*

384. *Id.* at 998.

385. *Id.* at 999.

386. *Id.* at 999-1000.

387. *Id.* at 1000 n.3.

388. *Id.* at 1003.

disagreed, citing evidence that the monument did not clearly constitute the City's own speech and thus the denial of requests to erect monuments by other religious groups constituted viewpoint discrimination favoring the Christian or Judeo-Christian viewpoint or disfavoring other religious viewpoints.³⁸⁹ In an unusually ironic move, the City attempted to defend itself against the claim of viewpoint discrimination by arguing that it had a compelling interest to exclude the Summum monument: avoidance of an Establishment Clause violation.³⁹⁰

The irony of the City's position—i.e., that despite its erection of the Ten Commandments monument, it would violate the Establishment Clause if it allowed the other monument—was not lost on the court. The court rejected the City's claim that the Ten Commandments monument was different because the city had the right to erect monuments that reflected the general values of its citizens, and held that the City did not have a compelling interest for excluding the Summum monument from what the court had implicitly found to be a limited public forum.³⁹¹ Whether such a forum existed under the facts, and whether the Ten Commandments monument really constituted the Eagles' speech rather than the city's, are questionable, but since the court was not faced with the Establishment Clause question (except as a defense to viewpoint discrimination), the implications of the free speech holding for future Ten Commandments monument cases is unclear. The *Van Orden* plurality might suggest that the City could post the Ten Commandments as its own speech while not posting other religious objects, but since the *Van Orden* plurality did not address the free speech question, this is unclear.

There have been other recent cases involving Ten Commandments displays,³⁹² but the discussion above highlights the variety of factors and analytical approaches that courts have used in these cases. The important thing for present purposes is that Ten

389. *Id.* at 1004-06.

390. *Id.* at 1009-11.

391. *Id.* at 1006-09.

392. A number of these cases involve attempts to post the Ten Commandments in public schools. For example, *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004), involved an attempt to post the Ten Commandments along with other documents in public schools as well as in the courthouse. *See also* *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927 (6th Cir. 2002) (involving Ten Commandments displays in public schools); *cf.* *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (finding that the Establishment Clause was violated where the state accepted a Ten Commandments monument and displayed it on the grounds of the statehouse).

Commandments displays have been characterized in different ways by different courts (and sometimes in different ways by the same court). Thus, they have been characterized as purely religious, as multifaceted, and as secularized by their context. As will be seen, most Ten Commandments monuments are multifaceted.³⁹³ The various characterizations of such monuments are evidence of their multifaceted nature. This will be explored further in Parts V and VI.

E. Christmas Trees and Other Holiday Displays

The constitutionality of government displays of Christmas trees and other similar holiday displays was essentially resolved by *Lynch* and *Allegheny*, where the Court presumed such displays were constitutional.³⁹⁴ The opinions of the Court in both cases scarcely questioned the constitutionality of Christmas trees and objects such as Santas, elves, and plastic reindeer.³⁹⁵ Even Justice Brennan's partial concurrence in *Allegheny*, which suggests that a Christmas tree can have significant religious meaning in some contexts, seems to assume that a Christmas tree by itself is not a religious object.³⁹⁶ Lower courts have followed suit. Such analysis—or lack thereof—is problematic.³⁹⁷

The next section will address some common critiques of the legal doctrine in religious symbolism cases. After that, the Article will focus on the problems inherent in treating religious objects as legal subjects. This will be followed by discussion of a proposed legal test that might account for some of the concerns that arise when religious objects become legal subjects.

IV. CRITIQUES OF THE PREVAILING LEGAL DOCTRINES

The doctrine developed by the Court in religious symbolism cases has been the subject of intense criticism. While this criticism is quite rich and diverse, it generally falls into one (or more) of four broad categories: the artificial secularization critique; the majoritarian dominance critique; the contextual critique; and the traditionalism critique. Moreover, scholars have questioned the efficacy of both the endorsement test and broader investigations of

393. See *infra* Parts V, VI.

394. See generally *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

395. *Allegheny*, 492 U.S. at 601; *Lynch*, 465 U.S. at 687.

396. *Allegheny*, 492 U.S. at 639 (Brennan, J., concurring in part and dissenting in part).

397. See *infra* Part V.

the “message(s) sent” by a given government action.³⁹⁸ To the extent the latter critiques connect with the four broad criticisms discussed herein, they will be included in this discussion, but given this Article’s general ambivalence toward the endorsement test, the critiques focused on that test itself are not as relevant.

For present purposes, it is important to point out that this Article asserts that each of the four broad critiques is valid, but that the problems that arise in religious symbolism cases are inherent to reflexively treating religious objects as legal subjects. The way in which the Court has analyzed such objects only worsens the situation and gives added validity to the critiques. Of course, these critiques are not necessarily separate, and many commentators have used a combination of some or all of the critiques. This Article asserts, however, that the critiques are nothing more than a discussion of the effects of treating religious objects as legal subjects. The cause lies in deeper concerns that go to the very nature of religious objects and symbols and the very nature of judicial interpretation. Before reaching those concerns, it is worth briefly setting forth and exploring each of the critiques.

A. *The Artificial Secularization Critique*

The artificial secularization critique suggests that the Court’s doctrine in religious symbolism cases leads to an artificial characterization of religious objects that eviscerates, ignores, or minimizes their religious nature and messages.³⁹⁹ One might also refer to it as the “desacrilization critique.” As Professor Steven Smith has pointed out, the Court never held in *Lynch* that the crèche lost its religious nature by inclusion in a broader holiday display.⁴⁰⁰ Yet, those who have criticized the Court for its desacrilization of religious objects in the religious symbolism cases have a valid concern.

While the Court did not hold that the crèche in *Lynch* or the menorah in *Allegheny* were any less religious objects because of their inclusion in broader displays,⁴⁰¹ it did hold that the religious messages sent by the objects were appropriately secularized.⁴⁰² The idea that sacred objects can be robbed of their sacred meaning by

398. See Smith, *supra* note 116, at 314 (questioning the efficacy of the endorsement test).

399. Underkuffler-Freund, *supra* note 8, at 871-72, 971-72 (condemning the Court’s desacrilization of religious symbols); Zick, *supra* note 8 (criticizing the Court’s desacrilization of religious symbols).

400. Smith, *supra* note 117, at 1002-03.

401. *Id.*

402. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

placement in a broader display is not in keeping with the general understanding of the nature of religious objects and symbols.⁴⁰³ The plurality opinion in *Van Orden*, which asserts that objects can maintain their religious nature while also having a nonreligious nature,⁴⁰⁴ does not alleviate this critique because the plurality relies on *Lynch*-like reasoning and uses the dual nature of the object in a manner that essentially desacrilizes the Commandments.⁴⁰⁵ Moreover, the fact that some people may not perceive a religious message in these contexts is not all that surprising since it is unlikely that everyone will fully perceive the religious power of the objects even without the added context of the broader display.

An important aspect of this critique is that it can be used to attack both the opinion in *Lynch* and Justice O'Connor's application of the endorsement test.⁴⁰⁶ The critique suggests that focusing on the message sent by a display is problematic because religious objects may send different messages to nonbelievers and believers, as well as to religious outsiders and insiders.⁴⁰⁷ Looking at the message a given religious object sends will have a tendency to either privilege a secularized view in order to uphold the display or acknowledge the religious nature of the object, thus, in all likelihood, striking down the display.⁴⁰⁸ The critique would suggest that the latter is acceptable but the former is not.⁴⁰⁹ Of course, some who have advocated this critique would argue that recognizing the religious nature of a religious object does not necessitate a holding that the government may not display it.⁴¹⁰ This is essentially Justice Scalia's argument in his dissenting opinion in *McCreary County*.⁴¹¹

There are, of course, serious problems with the Court's attempt to use physical or thematic context to desacrilize a religious object or symbol.⁴¹² Religious objects and symbols hold powerful meaning for

403. See *supra* Part II.

404. *Van Orden v. Perry*, 125 S. Ct. 2854, 2863-64 (2005) (plurality opinion).

405. *Id.*

406. *Lynch*, 465 U.S. at 668; *id.* at 690-91 (O'Connor, J., concurring).

407. Dolgin, *supra* note 11, at 497-98 ("[A] religious symbol, like any symbol, may have one set of meanings at one time, in one place or for one group, and other sets of meanings elsewhere or for other people."); Neil R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 84 (1990) ("The messages that words convey to a community depend on the contexts in which the community members receive the words.").

408. See Smith, *supra* note 117, at 1002; Zick, *supra* note 8, at 2367.

409. Zick, *supra* note 8, at 2370.

410. Smith, *supra* note 117, at 1000-01.

411. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748-50, 2758-64 (2005) (Scalia, J., dissenting).

412. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic*

believers.⁴¹³ Contrary to the Court's assertion in *Lynch*, they are not passive.⁴¹⁴ Physical or thematic context cannot take away the deeply spiritual meaning that many devout Christians perceive when viewing a crèche.⁴¹⁵ At most, the believer might feel that the broader context of a crèche demeans its sacred meaning when that context includes other objects, but that does not minimize the sacred meaning of the crèche itself.⁴¹⁶ The artificial secularization critique recognizes this fact and suggests that viewing religious displays through the "lowest" (secularized) common denominator demeans the religious nature of the objects displayed. This Article suggests that this is a byproduct of treating religious objects as legal subjects without first adequately considering what constitutes a religious object.⁴¹⁷ The artificial secularization critique makes a lot of sense, but to the extent it views objects as sending messages to observers, as opposed to holding meaning with which observers can interact through the interpretive process, it mistakes the way in which the objects are interpreted by those who interact with them.

B. *The Majoritarian Dominance Critique*

The majoritarian dominance critique suggests that the Court's doctrine in religious symbolism cases minimizes the impact and message sent to religious outsiders and nonbelievers by government display of religious objects.⁴¹⁸ The displays almost always represent objects of dominant, or at least less marginalized, religious groups, and thus the failure to find such displays unconstitutional in many circumstances amounts to a de facto establishment of majority religious preferences.⁴¹⁹ A corollary of this critique suggests that it is not so much larger religious groups that benefit from the Court's approach, but rather the dominant secularized religious culture.⁴²⁰

Critique of the Endorsement Test, 104 MICH. L. REV. 492 (2005); Zick, *supra* note 8, at 2368-74.

413. See *supra* Part II.

414. *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984).

415. Dolgin, *supra* note 11, at 503-05; Hill, *supra* note 407; Zick, *supra* note 8, at 2368-74.

416. See *supra* Part II.

417. See *infra* Part V.

418. See, e.g., Brownstein, *supra* note 8, at 855-58 (criticizing the Court's minimization of the impact government display of religious objects can have on religious minorities); Karst, *supra* note 8, at 504-05 (arguing that religious minorities suffer when the government displays symbols of the majority religion).

419. Brownstein, *supra* note 8, at 855-58; see also *supra* notes 162-65 and accompanying text.

420. Cf. CARTER, *supra* note 84, at 94-95 (pointing out religious nature of the display of religious objects and the ridiculousness of treating them as though

This critique can be used in tandem with the artificial secularization critique, and it is not uncommon to read articles or dissenting opinions which suggest that the Court's approach in religious symbolism cases both demeans the religious nature of the symbols and disregards the message such symbols send to nonbelievers and religious outsiders.⁴²¹

Interestingly, the concern underlying this critique—that the Court further marginalizes religious outsiders and nonbelievers by suggesting government displays of religious objects from the dominant faiths in a given area are constitutional—is played out in the Court's battles over the endorsement test.⁴²² As some commentators have suggested, the phrasing of that test held the initial promise of sensitivity to the impact of government religious activities on religious minorities, but the Court's subsequent application of the test, at least in the religious symbolism cases, has not lived up to that promise.⁴²³ Critics frequently blame Justice O'Connor's adoption of the reasonable observer standard because her reasonable observer, who is charged with knowledge of local customs and settings, is quite similar to a member of the dominant religious group in a given area.⁴²⁴

This critique is reflected in the dispute between Justices O'Connor and Stevens in their respective opinions in *Capitol Square Review and Advisory Board v. Pinette*,⁴²⁵ in which they debate the perspective of the "reasonable observer" under the endorsement test.⁴²⁶ Justice Stevens would have made the reasonable observer a member of a religious outgroup or a nonbeliever, while Justice O'Connor would have used a more general reasonable observer standard that did not consider outsider perspectives as clearly.⁴²⁷ Those espousing the majoritarian dominance critique generally either reject the use of the endorsement test or advocate an approach more in keeping with Justice Stevens' application of the

they are not religious in a book addressing the cultural dominance of secular values in America).

421. See Dolgin, *supra* note 11, at 498; Smith, *supra* note 117; Zick, *supra* note 8, at 2368-74.

422. See *supra* note 418 and accompanying text.

423. Coleman, *supra* note 116, at 489 (arguing that there are problems with Justice O'Connor's reasonable observer standard because it ignores the perspectives of "actual perceptions of real citizens").

424. Feigenson, *supra* note 407, at 87-88.

425. 515 U.S. 753 (1995).

426. *Id.* at 778-80 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 799-800 (Stevens, J., dissenting).

427. *Id.* at 779-80 (O'Connor, J., concurring in part and concurring in the judgment).

endorsement test.⁴²⁸

Of course, this critique is not limited to the Court's application of the endorsement test. In fact, the critique has an even more compelling application in relation to the "longstanding tradition" approach used by the Court in *Lynch* and *Marsh* and the plurality in *Van Orden*.⁴²⁹ After all, longstanding traditions rarely reflect the practices and beliefs of religious outsiders,⁴³⁰ and the fact that they have not been challenged may say more about the subordinated role of religious outsiders than it does about longstanding community acceptance of a given practice.⁴³¹ Longstanding traditions that reflect religious dominance have been compared by some critics to the "longstanding tradition" of Jim Crow because in both cases the dominant group was able to control the perpetuation of the tradition while social mores helped silence objectors.⁴³²

Finally, one of the most salient features of this critique is that in cases like *Lynch*, the physical and thematic context of the display, far from evincing a celebration of a secular holiday, reflects even further Christian dominance.⁴³³ This should seem an obvious critique since Christmas, or "Christ's Mass," is not celebrated in any form by most non-Christians, some smaller Christian groups, and many atheists.⁴³⁴ Far from sending a nonreligious message, the placement of Santas, reindeer, elves, and Christmas trees near a crèche sends a message that Christianity is the preferred religion.⁴³⁵ Rather than detracting from the religious meaning of the crèche, these other figures reinforce that the display is about Christmas, which is not "our" holiday.⁴³⁶ The same message may be sent to Muslims, Buddhists, or atheists by a large Christmas tree, Menorah and sign saluting liberty—i.e., some outsiders might question whose liberty is being saluted by this display.⁴³⁷ The declaration of Christmas as a national holiday, a fact recognized in *Lynch*, adds insult to injury under this critique.⁴³⁸ Thus, the context of religious objects does not cure and, in fact, may exacerbate the concerns

428. Doglin, *supra* note 11; Feigenson, *supra* note 407, at 93-101.

429. *Van Orden v. Perry*, 125 S. Ct. 2854, 2863 (2005); *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983).

430. See generally FELDMAN, *supra* note 163 (discussing the existence and impact of Christian dominance in American culture and law).

431. *Id.*

432. Karst, *supra* note 8, at 511-12.

433. Ravitch, *supra* note 29, at 567.

434. *Id.* at 569.

435. *Id.* at 567.

436. *Id.*

437. *Id.* at 569.

438. See *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

raised by this critique. Like the artificial secularization critique, this critique has the vice of often referring to the “message sent” by a given religious object.

C. *The Contextual Critique*

This critique suggests that the Court’s focus on the physical, historical, and/or thematic context of religious objects in religious symbolism cases downplays the message sent by the objects themselves,⁴³⁹ and often ignores the fact that “nonreligious objects” in a given context may reinforce the religious message sent to outsiders by the “religious objects.” This latter point is shared with the majoritarian dominance critique.⁴⁴⁰ Thus, the message sent to non-Christians by the display of a crèche *with* Santa and his reindeer is relevant to this critique.⁴⁴¹

In many ways, this critique is a natural corollary to the first two critiques since both of those assert that physical context cannot alter aspects of the message sent by a religious object.⁴⁴² Yet the contextual critique can stand on its own as well. Central to this critique is the idea that the physical context or setting of a patently religious object cannot generally alter its meaning for constitutional purposes when it is displayed by government.⁴⁴³ Neither can its thematic context—that is, the fact that it is connected to the holiday season.⁴⁴⁴ It is either constitutional to display the object or not, and that answer is dependent on the physical or thematic context of the object only in the rarest of circumstances.⁴⁴⁵ A circumstance in which the setting of the display should arguably affect outcomes under this critique is where a religious object is displayed in specific settings, such as in a museum,⁴⁴⁶ or by a private group in a traditional public forum.⁴⁴⁷ Thus, this critique by itself is primarily

439. Zick, *supra* note 8, at 2367-74; Matthew Paul Kammerer, Note, *County of Allegheny v. ACLU: Perpetuating the Setting Factor Myth*, 21 U. TOL. L. REV. 933, 941-43, 945 (1990).

440. *See supra* Part IV.B.

441. Ravitch, *supra* note 30, at 569-70.

442. *See supra* Parts II, IV.A.-B.

443. *See generally* Kammerer, *supra* note 438 (criticizing the use of physical context in the Court’s analysis of religious objects).

444. The Court in *Lynch* relied heavily on this thematic context to uphold the display of the crèche in that case. *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984).

445. Kammerer, *supra* note 439, at 942-43.

446. This is consistent with O’Connor’s discussion of museum paintings in her *Lynch* concurrence. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

447. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

doctrinal,⁴⁴⁸ but it can involve more theoretical concerns about the meaning of objects and symbols and the nature of judicial interpretation.⁴⁴⁹ Along with the first two critiques, the contextual critique makes a great deal of sense given theological and anthropological views of religious objects and symbols,⁴⁵⁰ but it shares the vice of referring to “messages sent” by religious objects.

D. *The Traditionalism Critique*

This critique questions the Court’s use of “longstanding tradition” to uphold religious displays by government or on government property.⁴⁵¹ *Lynch* is a good example of the Court’s use of tradition to uphold a government display of a religious object.⁴⁵² In *Lynch*, the Court upheld the display of a crèche, at least in part, because of the “longstanding tradition” of holiday displays.⁴⁵³ This approach is also reflected in the plurality opinion in *Van Orden*⁴⁵⁴ and in some lower court decisions such as *Chester County*.⁴⁵⁵ The critique asserts that the Court has never adequately explained why such longstanding tradition should affect results in these cases. Nor has the Court adequately explained the seeming discrepancies between situations where the Court allows such tradition to affect outcomes and those where it does not.⁴⁵⁶ One is reminded of the comparisons to Jim Crow in the majoritarian dominance critique above.⁴⁵⁷

If the display of a purely religious object would otherwise be unconstitutional, could a longstanding tradition of displaying the object make it constitutional? The answer would appear to be no if

448. The critique is primarily doctrinal in the sense that it often focuses on the doctrinal flaws of using physical and thematic context rather than empirical or theoretical concerns over the nature of meaning inherent in a contextual analysis of this sort.

449. Zick, *supra* note 8, at 2368-73 (criticizing focus on context while focusing on the meaning of sacred symbols).

450. See *supra* notes 56-65 and accompanying text.

451. See generally *Lynch*, 465 U.S. at 684-85 (suggesting longstanding tradition in the United States supports constitutionality of the city’s display of crèche); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (suggesting that tradition supports the constitutionality of legislative prayer).

452. *Lynch*, 465 U.S. at 684-85.

453. *Id.*

454. *Van Orden v. Perry*, 125 S. Ct. 2854, 2854 (2005) (plurality opinion).

455. See *supra* notes 366-80 and accompanying text (discussing the *Chester County* case).

456. Compare *Marsh*, 463 U.S. at 795 (upholding the “traditional” practice of legislative prayer), with *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down the practice of prayer at public secondary school graduations).

457. See *supra* note 432 and accompanying text.

the object is a cross,⁴⁵⁸ so why should the answer be any different if the object is a crèche?⁴⁵⁹ This critique asserts that tradition is at most a factor to be considered in determining the context of a display. At worst, it is an excuse for upholding displays that would never pass constitutional muster otherwise.⁴⁶⁰ This Article suggests that the notion of “longstanding tradition” should play only a minimal role in the constitutional analysis of religious objects or symbols, unless the tradition being evaluated is the religious tradition associated with the object or symbol.⁴⁶¹

V. THE PROBLEM WITH TREATING RELIGIOUS OBJECTS AS LEGAL SUBJECTS

As the above critiques demonstrate, the Court’s approach to religious objects is devoid of the tools necessary to analyze these diverse and often deeply powerful symbols. Contrary to the assertions of many of the critics, however, the answer does not lie in simply finding a better version of the endorsement test or in instituting some other test. The Court has failed in its semiotic task so completely that any test used without serious consideration of the religious and cultural power often held by religious objects would create problems similar to those created by the current doctrine. Witness Justice O’Connor’s use of the endorsement test in *Lynch* and *Allegheny* and the criticism thereof.⁴⁶² Yet, because these objects do not have a fixed meaning for all observers, the task of deriving meaning from such objects may seem impossible.⁴⁶³ This Article asserts that it is not the “meaning” of the object that matters most—since meaning is variable—but rather its power.⁴⁶⁴

It must be recalled that the Court has essentially analyzed religious objects without paying much attention to what counts as a religious object or how such objects operate in the lives of believers and nonbelievers.⁴⁶⁵ Moreover, once the Court developed its reflexive approach to religious objects, it applied it in a reflexive way that was heavily affected by the preconceptions of the Justices⁴⁶⁶

458. See *supra* notes 97, 148-76 and accompanying text.

459. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (upholding the city’s display of a crèche).

460. Ravitch, *supra* note 29.

461. See *infra* Part V.

462. Feigenson, *supra* note 402, at 87-88; Smith, *supra* note 115.

463. Dolgin, *supra* note 11, at 497-98; Feigenson, *supra* note 406, at 84-86; Zick, *supra* note 8, at 2365-66.

464. See *infra* Part VI.

465. See discussion *supra* Parts III.A., III.C. (concerning *Lynch* and *Allegheny*).

466. Zick, *supra* note 8, at 2367-74.

that were both secularized and Christocentric.⁴⁶⁷ Of course, there is no set meaning for religious symbols, and the Court could never create a test that would show what a given object “means” in any general sense.⁴⁶⁸ This is exactly the problem since that is precisely what the court has attempted to do.⁴⁶⁹ The traditional approach applied in *Van Orden* does not solve this problem because it looks to the meaning of the object in a given context, and more importantly, because it presumes the “traditional” view or use of an object in public life supplies its “meaning,” at least for legal purposes.⁴⁷⁰

While religious objects hold no fixed meaning for the general public, we do know that they hold powerful and profound—even if varied—meaning for believers.⁴⁷¹ This points to a problem inherent in treating religious objects as legal subjects: in order to craft a coherent doctrine, the Court is tempted to create a general meaning for these objects, but religious objects may hold vastly different meaning for both believers and nonbelievers.⁴⁷² By relying on a more secularized meaning as it did in *Lynch* and *Allegheny*, the Court minimizes the power these objects hold and fails to distinguish between objects that are sacred and those that are truly secularized.⁴⁷³

The simple reality of treating religious objects as legal subjects is that, short of a bright-line test either prohibiting or permitting government to display religious objects, the objects will be distorted through the legal lens simply by being subject to the process of legal reasoning.⁴⁷⁴ The only question is how much distortion should be tolerated. Before turning to this question it is useful to briefly explain why a bright line test is undesirable.

In Parts II and III of this Article, the array of religious objects that have been subjected to legal analysis was cataloged and an attempt to categorize the objects was undertaken. It is the diversity of this array of objects that militates against a bright-line test either permitting or prohibiting their display by government. After all, a test that categorically allowed government to display all religious symbols would allow, to use Justice Kennedy’s famous example, a

467. See *supra* Parts IV.A., IV.B. (discussing the secularization and majoritarian dominance critiques of the Court’s decisions, respectively).

468. See *supra* Parts II, IV.

469. In both *Lynch* and *Allegheny*, the Court attempted to find a meaning for the religious objects involved based on their context. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

470. *Van Orden v. Perry*, 125 S. Ct. 2854, 2862 (2005) (plurality opinion).

471. See *supra* notes 56-65 and accompanying text.

472. Dolgin, *supra* note 11, at 497-98.

473. Zick, *supra* note 8, at 2367-74.

474. This is implicit in the analysis *supra* Part II.

state government to place a cross on the roof of its capitol.⁴⁷⁵ Even if a dichotomy were drawn between permanent and temporary displays, the state would still be allowed to erect crosses on government property with taxpayer dollars. While some might find this to be unproblematic,⁴⁷⁶ government use of pure religious symbols would go a long way toward promoting the represented religion(s). It seems clear that such a situation would fail every test the modern Court has used to analyze Establishment Clause cases.

On the other hand, a strict separationist approach prohibiting government from displaying any religious object would prohibit the depiction of the Ten Commandments in the frieze on the Supreme Court building even though it is surrounded by numerous secular objects related to law. If taken to a true extreme, it may prohibit religious paintings from hanging in government-funded museums.⁴⁷⁷ Even if an exception is made for art in museums, the failure to distinguish between religious objects and secularized objects with some tangential connection to religion might be problematic. For example, even if the display of a Santa and a Christmas tree should be unconstitutional,⁴⁷⁸ what about a display of “jingle bells” without either of the aforementioned icons of Christmas?

As the analysis in the next part suggests, given a choice between the two bright-line approaches, the separationist approach may be better because it appears more protective of religious outsiders while allowing private display of religious symbolism to thrive, but it is still a very blunt instrument for dealing with a complex phenomenon. This is why a middle ground is better. The problem is that while the Court was correct to consider the context of religious displays as a variable through which to analyze specific religious objects in those displays, it never adequately analyzed the objects themselves, in essence making context a determinative variable regardless of what was supposedly being contextualized by the physical setting. This is highly problematic and not a terribly well-informed middle ground.

The next part of this Article will propose using the facilitation test, which I have proposed elsewhere,⁴⁷⁹ in religious symbolism cases. Regardless of the test adopted, however, it is necessary to

475. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

476. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

477. Of course, as Justice O'Connor has pointed out, such museum displays should generally be constitutional. See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

478. See discussion *infra* Part VI.

479. Ravitch, *supra* note 30, at 544-58.

seriously consider the place of a given religious object in relevant religious traditions, as well as its impact on religious outsiders. With the exception of “pure religious objects,” this consideration will not be determinative, and some legal test will need to be applied; thus, some distortion of the religious object when it becomes a legal subject is bound to occur. Given the seeming dominance of both secularized and Christocentric traditions among the Justices and judges engaging in this analysis, it would also be useful if the applicable test included elements that reign in the Justices’ own prepossessions, to use Justice Jackson’s famous terminology,⁴⁸⁰ or, to use Hans George Gadamer’s terminology, their own preconceptions.⁴⁸¹

By carefully considering the nature of the object being analyzed, the impact of judicial preconceptions can be countered as they come into contact with the horizon of the object, to use Gadamer’s terminology, even if these preconceptions ultimately play into the analysis under a given legal test.⁴⁸² If a court first decides that an object is a pure religious object because it is used in ritual, represents an important theological meaning, or is an object of veneration, it would be much harder to justify government display of the object in terms that suggest it is passive and desacrilized by its context.⁴⁸³ A Justice or judge confronting such a situation would have to explain why government display of such an object is or is not constitutional given its religious and cultural power. The context of the object would still be relevant, but the court, having acknowledged the power and role of the object for believers, would have to carefully explain how the context of the object could desacrilize it adequately so that its display by government does not facilitate religion. A purely reflexive jurisprudence such as that in *Lynch* would work poorly here; although, perhaps, that is to be expected.⁴⁸⁴

It is important to clarify the role of meaning and context in this analysis. Both context and meaning are relevant to the equation,

480. Ill. *ex rel.* *McCullum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

481. See *supra* note 16 and accompanying text.

482. See Frank S. Ravitch, *Struggling With Text and Context: A Hermeneutic Approach to Interpreting and Realizing Law School Missions*, 74 ST. JOHN’S L. REV. 731, 734-44 (2000) (discussing the process of interpretation in Gadamerian theory).

483. See *supra* Part II.

484. This is to be expected because, unless the court looks more carefully at the objects being analyzed in the religious symbolism cases, the Justices are bound to integrate their preconceptions into the process of interpreting the context of those objects. See *supra* notes 16, 52-55 and accompanying text.

but neither can dictate outcomes because both are inherently indeterminate. Context can involve a number of factors such as physical proximity, and the framing and interpretation of the context of religious objects is not terribly useful without considering the objects themselves. The meaning of a religious object is also variable depending on who perceives it. Yet we do know that religious objects have powerful, even if varied, meaning for believers, and it is this power that makes government interaction with the objects so problematic. While the context of an object may limit this power vis-à-vis government—for example, where a religious painting is displayed in a public museum or a Buddhist Bell donated by Japan is displayed in a town that was involved in the development of nuclear weapons⁴⁸⁵—the context does not operate in a vacuum. The object itself must be analyzed to see what is being contextualized. Thus, while the context and meaning held by an object may be relevant variables, it is the power of the religious object that is key.

An obvious retort to this approach would be that by choosing the power an object may hold for believers as an important reference point, the approach does make meaning somewhat determinative. The response to this is “absolutely.” The reason these objects are so highly contested is precisely because they are “religious” or argued to be so. Thus, looking at the religious aspects of religious objects, even if they vary, seems a logical first step in evaluating the constitutionality of displaying such objects. This does not require an assertion that objects have specific meaning that is fixed, but rather that some religious objects are imbued for believers with a great deal of spiritual meaning and power. The specific “meaning” of the object may vary even for believers depending on their preconceptions, but the connection between the real world and the divine inheres in the object for the believer. Once the religious aspects of the object are addressed, the context of the object can be considered. Thus, when the object displayed is tied to the dominant faith in a given area, its display by government is especially suspect since the power of the object is particularly salient in such a context.

Significantly, there is one type of religious object case in which a categorical rule can come close to working. In situations in which religious objects are displayed by private parties in a public forum that shows no favoritism toward religion or a particular religion, the general rule should be in keeping with *Capitol Square Review & Advisory Board v. Pinette*.⁴⁸⁶ As will be explained in the next section,

485. *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 (6th Cir. 2000).

486. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995). *See also supra* notes 128-47 and accompanying text.

the reason for this is that such displays will rarely substantially facilitate religion.⁴⁸⁷ Still, this should not be an absolute rule, as it was in the plurality opinion in *Capitol Square Review & Advisory Board*, because it is conceivable that a forum could be so overcome by religious symbols from one or a few religions that religion could be substantially facilitated.⁴⁸⁸ This will not, however, be the usual situation.⁴⁸⁹ Significantly, any argument by a government entity that its own display of a religious object is protected as free speech should fail even if government presents itself as an identified speaker in a public forum. When government displays religious objects, there is no serious way to counter the government endorsement (with a small “e”) of the religious object.⁴⁹⁰

VI. THE FACILITATION TEST AND RELIGIOUS SYMBOLISM

I have described the basics of the facilitation test elsewhere.⁴⁹¹ Thus, this part will provide an overview of that test and an in-depth discussion of its application in religious symbolism cases. Under the facilitation test, government action that substantially facilitates or discourages religion violates the Establishment Clause. Significantly, the facilitation test focuses heavily on the effects of government action. The government’s purpose is only relevant when there is relatively clear evidence of intent to favor or discriminate against religion.⁴⁹²

Facilitation is not the same thing as support. One can provide attenuated support for something without facilitating it.⁴⁹³ Facilitation is about furthering the religious activities of a program or entity or about furthering religious practice or the stature of a given religion or of religion generally. Moreover, the facilitation test requires that the facilitation be substantial to be actionable. Substantial facilitation is more than simply giving some minor support to a religious institution—it is not a strict separationist

487. See *infra* Part VI.

488. *Id.*

489. *Id.*

490. Cf. Wasserman, *supra* note 83, at 390-91 (suggesting difficulty of engaging in effective counter speech when responding to powerful symbols).

491. Ravitch, *supra* note 30, at 544-58.

492. The evolution of the display in *McCreary County* would be a good example of such intent. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2723-24 (2005). The behavior of former Alabama Supreme Court Chief Justice Roy Moore would also be a good example. See *supra* notes 323-32 and accompanying text.

493. “Facilitate” is defined as “to make easier; help bring about,” MERRIAM-WEBSTER DICTIONARY (1994), and to “ease a process.” THE OXFORD DESK DICTIONARY (1995).

concept. It is a balancing approach that relies on several narrow principles.⁴⁹⁴ Significantly, substantiality is tied to the government action—i.e., whether a substantial effect of the action is to facilitate religion.⁴⁹⁵

The facilitation test will not provide bright-line answers in some contexts, but it might in others. Bright-line answers, however, are not the primary goal of the facilitation test. Rather, as I have stated elsewhere, reasonable consistency is the most that can be expected.⁴⁹⁶ Any test that arises in the Establishment Clause context must function in a space where thousands of religious traditions thrive among hundreds of millions of people in a complex regulatory state. This is why the facilitation test focuses on the real world impact of government action. Such a focus is necessary given the massive web of government activities and programs in the modern regulatory state. Moreover, the facilitation test is based on the notion espoused by many scholars and jurists that religion is constitutionally special or different (this does not always inure to the benefit of religious entities). Therefore, religious entities and exercises should only be treated the same as nonreligious entities and exercises when treating them differently would substantially discourage religion *and* where treating them the same would not cause government to substantially facilitate religion.

I do not suggest that the facilitation test is determinate in the sense that notions of formal neutrality or strict separation claim determinacy. There is no universal principal of facilitation that can be automatically applied to varied factual contexts to yield consistent results. Underlying the test is a narrow view of separation—which mandates that government cannot facilitate the religious mission of religious institutions or enhance the stature of religion vis-à-vis irreligion or of a specific religion(s)—and a narrow view of accommodation—which requires that government not discourage religion, but must allow religious organizations equal access to public forums. The focus on separation recognizes that the United States is a nation with exceptional religious diversity and that many people within our diverse nation may be affected when government engages with religion to the point that it substantially facilitates religion or a specific religion. At the same time, the focus on accommodation reflects the idea that we are generally “a religious people”⁴⁹⁷ even if many citizens are not, and thus if government excludes or discriminates against religion or religious

494. Ravitch, *supra* note 30, at 544-47.

495. *Id.* at 548.

496. *Id.* at 548-49.

497. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

entities in our complex regulatory state, it may substantially discourage religion (which also violates the facilitation test). Whether a government favors or discriminates against religion to a degree that violates the facilitation test can only be determined by looking at the nature and effects of the government action involved in a given case.

Thus, in attempting to minimize government encouragement or discouragement of religion, the facilitation test recognizes that as a practical matter, any choice will to some extent encourage or discourage religion, but as Professor Douglas Laycock has argued, the goal must be to minimize the encouragement and discouragement of religion, not to make it nonexistent.⁴⁹⁸ The substantiality requirement in the facilitation test is meant to help provide balance here. If the government action in question substantially facilitates the religious mission or status of a religion, religious individual, or religious organization, it encourages religion and conflicts with the separation principle. Moreover, allowing such substantial facilitation cannot be said to simply accommodate religion because religion would be receiving an important benefit from government, be it material or symbolic. Conversely, if the facilitation is not substantial, it is more likely that religion is not being encouraged. Thus, allowing the government action is less likely to conflict with the separation principle.

As will be seen, the display of religious symbols is very much connected to the question of whether a given display is a private display in a public forum or something else.⁴⁹⁹ *Lynch* and *Allegheny* (the menorah portion) would have come out differently under the facilitation test, but most other symbolism cases, including *McCreary County* and *Van Orden*, would likely have come out the same way, albeit for reasons different from those stated in the opinions. The facilitation test uses some aspects of the Court's approach, such as the relevance of physical and thematic context, but context plays quite a different, and more narrow, role than it did in *Lynch* and *Allegheny*.⁵⁰⁰

The facilitation test rejects the endorsement test but retains some of its aspects. A number of reasons for rejecting the endorsement test, at least as it is applied by Justice O'Connor, have

498. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1004 (1990) ("Absolute zero is no more attainable in encouragement and discouragement than in temperature. We can aspire only to minimize encouragement and discouragement.").

499. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (showing that free speech concerns arise when private entities display objects in public forum).

500. Ravitch, *supra* note 30, at 566-70.

been set forth by others and thus need not be repeated in detail here.⁵⁰¹ Given the multiple meanings that religious objects can hold and the powerful meaning they can hold for believers, a test that focuses on the perception of objects will ultimately be incoherent. Whose perspective will govern?⁵⁰² Whether we go with religious outsiders or insiders could yield quite different answers, and, given the nature of religious objects, there may be no possible “reasonable person” to try to rely upon in analyzing a religious object.⁵⁰³ More importantly, the notion that objects can project meaning is an inaccurate depiction of the interpretive process. As noted above, objects hold meaning that can be fleshed out when an observer interacts with an object.⁵⁰⁴ Thus, the observer’s preconceptions play a role in the message an object holds for that observer. Yet the horizon of the objects, the array of information that is known about the objects for those within given traditions, does act as a constraining force on the potential meaning an observer may derive from them.⁵⁰⁵

Government display of religious objects is problematic in part because the government is giving added attention to the religious tradition(s) reflected in the display. It is the government’s conduct vis-à-vis the object, not religion generally, that tends to favor religion by facilitating it.⁵⁰⁶ Unlike the endorsement test, the facilitation test is not directly concerned with the effect of government actions on reasonable observers. Still, a government action that substantially facilitates religion is likely to result in a perception of endorsement by observers, but whether it does or does not will not alter the conclusion that such an action would be unconstitutional.⁵⁰⁷

Additionally, the facilitation test generally rejects looking at legislative purposes given the problems with determining the purpose of a broad group of individuals acting as a legislative body.

501. Feigenson, *supra* note 407, at 83-93.

502. *Id.* at 84.

503. *Id.* at 87-88; Smith, *supra* note 116, at 292-93.

504. *See supra* notes 52-55 and accompanying text.

505. *Id.*

506. For example, despite the court’s argument in *King County*, discussed *supra* at notes 316-323 and accompanying text, the county seal involved in that case may have endorsed religion over irreligion because it included the Ten Commandments symbol, but given the other factors considered by the Eleventh Circuit, such as the absence of the text of the Ten Commandments and the county’s limited use of the seal, the seal would not substantially facilitate religion. Yet if the seal were widely used, or contained the text of the commandments, it would most likely substantially facilitate religion.

507. Ravitch, *supra* note 30, at 569-70.

It does, however, allow a purpose analysis in situations where a government actor, including a legislature, demonstrates a clear purpose to favor religion. An example of such a situation is provided by the troubling behavior of former Alabama Supreme Court Chief Justice Roy Moore discussed in *Glassroth v. Moore*.⁵⁰⁸

Under the facilitation test, most government displays of pure or multifaceted religious objects that give special attention or recognition to a religious holiday or a given theology substantially facilitate religion; through such expression, government gives the specified religion (or religion in general), a special place in the public consciousness.⁵⁰⁹ The effect of such a display gives added attention to the religion whose symbol is being displayed. As will be seen, government display of secularized religious objects does not generally violate the facilitation test, but it can in some circumstances.

A. *The Facilitation Test and Pure Religious Objects*

The situation presented in *Lynch v. Donnelly* is an easy one to analyze under the facilitation test.⁵¹⁰ The crèche at issue in *Lynch* is a pure religious object, and to non-Christians and devout Christians alike, a few plastic reindeer and other plastic figures reflecting the Christmas holiday cannot adequately (if at all) dilute the special recognition given to Christmas and the birth of Jesus, which Christmas celebrates.⁵¹¹ Christmas, whether celebrated in its commercialized form or as a religious holiday, is simply not a holiday celebrated by many non-Christians. Thus, the government display of a crèche during the Christmas season, regardless of the context of that religious object, inherently gives special attention and recognition to the holiday and beliefs of a single religion, and therefore substantially facilitates religion.

The same would be true of a government display of a cross.⁵¹² Like a crèche, a cross is a pure religious object and government display of this object gives special attention to the dominant Christian faith.⁵¹³ There is no secular impact in a cross display. In

508. 335 F.3d 1282, 1284-86 (11th Cir. 2003) (explaining how former Chief Justice Moore installed a massive stone tablet of the Ten Commandments in a central location in the courthouse in the middle of the night without informing the other justices and with a film crew from Coral Ridge Ministries). For further discussion of this case, see *supra* Part III.D.

509. This is irrespective of whether that special place is perceived by a given member or members of the public as “endorsement.”

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

511. Braveman, *supra* note 44, at 368-74.

512. See *supra* Part III.B. (discussing cases involving crosses).

513. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617,

fact, even when such displays have been categorized as war memorials, courts have quite logically pointed out that using the cross as a memorial suggests that only Christian war casualties are being represented.⁵¹⁴ This raises other constitutional concerns in addition to the Establishment Clause concerns.⁵¹⁵ The cross is theologically significant, and for some Christian sects, it is both an object used in ritual and an object of veneration.⁵¹⁶ It is a sectarian, pure religious object, and its display by government substantially facilitates religion by calling special attention and giving special approval to Christianity (or a specific Christian sect depending on the type of cross). It is this special attention, rather than how that attention is perceived by a hypothetical observer, that violates the facilitation test.

A menorah is also a religious object for purposes of the facilitation test.⁵¹⁷ The menorah is an object used in religious rituals and it has theological meaning.⁵¹⁸ Government display of the menorah gives special recognition to the holiday of Chanukah and may give special recognition to both Jewish and Christian religious traditions when the menorah is combined with Christmas decorations, such as Christmas trees.⁵¹⁹ The fact that Chanukah is a minor Jewish holiday does not alter the fact that government is calling special attention and giving its "endorsement" to that holiday. Moreover, the fact that Judaism is not a dominant religion is beside the point since government can give special attention to, or be favorably disposed to, minority as well as dominant religious traditions; in essence, government might be demonstrating that some religious minorities are more equal than others.⁵²⁰ While it is refreshing to see government pay special attention to a non-Christian minority religion like Judaism, this does not make the government display constitutional.

The special attention or recognition requirement would not be met, however, by a religious painting in a museum; in such a

620 (9th Cir. 1996).

514. *Id.*; see also cases cited *supra* at Part III.B.

515. I am referring, of course, to possible concerns under the Equal Protection Clause.

516. *Separation of Church & State Comm.*, 93 F.3d at 620.

517. *County of Allegheny v. ACLU*, 492 U.S. 573, 633-34 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 643 (Brennan, J., concurring in part and dissenting in part).

518. *Id.* at 643 (Brennan, J., concurring in part and dissenting in part).

519. *Id.* at 639-46 (Brennan, J., concurring in part and dissenting in part).

520. Think of the message that a large Christmas tree, a menorah, and a sign saluting liberty outside of a government building might send to a Muslim citizen in the current political climate.

setting, the recognition given to religion is reduced by the context of the display. Religion is not substantially facilitated. Yet if the same painting were hung in the main hall of the state capitol building (not as part of a larger exhibit), the situation might be different.⁵²¹ The nature of the object is more important than its physical context in determining how far this analysis would go, but this shows that context may remain relevant for pure religious objects in limited circumstances.

Displaying pure religious objects calls special attention to, or gives special recognition to, a religious holiday or a specific religion or religions. By maintaining such displays on government property, the government is speaking religiously.⁵²² When it does so in a fashion that supports religion generally or a specific religion, the favored religion(s) gain a substantial forum in the public consciousness. Unlike the endorsement test, the facilitation test rejects the notion that government displays of pure religious objects in situations like those in *Lynch* or *Allegheny* can ever be constitutional, because by their very nature such displays reinforce the religion(s) whose objects are displayed. This is not meant to minimize the potential conclusion under the endorsement test that the display of such objects may reinforce those whose faith is favored or alienate those whose faith is left out.⁵²³ It simply acknowledges that such feelings are the likely byproduct of government engaging in actions that support a specific religion or religions. It is the support that violates the facilitation test, not the response of those who view the support, to the extent the two can be detached.

For this reason some, but not all, multifaceted (and even some

521. Questions about why that painting was chosen would also be relevant, thus reintroducing a limited purpose analysis (to determine if the decision was made to favor a particular faith or religion generally). For example, consider the difference between a mural of the Ten Commandments exhibited as part of a broader display of art in a public art museum and the actions of the current chief justice of the Alabama Supreme Court. Former Chief Justice Moore, who is known as the "Ten Commandments" Justice, snuck a large stone engraving of the Ten Commandments into the Supreme Court building in the middle of the night without consulting his fellow justices. The large stone monument was displayed prominently in the courthouse, and former Chief Justice Moore refused to allow other displays to receive similarly prominent attention. See Manuel Roig-Franzia, *Biblical Display in Court Rejected*, CHI. TRIB., Nov. 19, 2002, at 10.

522. See generally E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183 (1994).

523. *County of Allegheny v. ACLU*, 492 U.S. 573, 597-98, 601-02, 605, 612-13 (1989); *id.* at 625-27 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 650-51 (Stevens, J., concurring in part and dissenting in part).

secularized) religious objects may not be displayed by government. When such objects are involved, however, context becomes an important factor. Thus, government display of some, but not all, Ten Commandments monuments is unconstitutional.

B. The Facilitation Test and Multifaceted and Secularized Religious Objects

Ten Commandments displays are the hardest to analyze under the facilitation test because they are highly multifaceted objects. Putting aside cases like *Glassroth v. Moore*,⁵²⁴ in which the government actor acts in complete disregard of the beliefs and emotions of religious outsiders and even the most basic constitutional norms long recognized by the Court under the Establishment Clause, Ten Commandments display cases are hard cases. If all that is displayed on a large monument is the Ten Commandments, including the text of the Commandments, the display would most likely violate the facilitation test because the government display of such an object would call special attention to the theological meaning and power the object holds. Yet if the display is much smaller or involves other motifs, the situation might be different.

Under the facilitation test, we are not concerned with the message such a display “sends” to insiders or outsiders, but rather with the attention the government display gives religion or a specific religion(s). The potential meaning the object holds for insiders and outsiders is part of this equation, but it is not the entire equation.⁵²⁵ One problem with Ten Commandments monuments that include the text of the Commandments is that the Jewish, Protestant, and Roman Catholic texts vary (and there are variations among different Protestant traditions).⁵²⁶ Thus, any attempt to make the text the centerpiece of a display would give special recognition to a specific religion. Under this analysis government display of the monuments created by the Fraternal Order of Eagles, which were involved in a number of cases, would be unconstitutional.⁵²⁷ This is consistent

524. 335 F.3d 1282 (11th Cir. 2003).

525. Cf. Ravitch, *supra* note 29, at 570 (stating that feelings of endorsement “are the likely by-product of government engaging in actions that support a specific religion or religions. It is the support that violates the facilitation test, not the response of those who view the support . . .”).

526. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1478-79 (2005); Steven Lubet, *The Ten Commandments in Alabama*, 15 *CONST. COMMENT.* 471, 474-76 (1998).

527. *Van Orden v. Perry*, 125 S. Ct. 2854, 2873 (2005) (Stevens, J., dissenting); see *supra* Part III.D. (including the discussion of five cases involving Ten Commandments monuments donated to local governments by the

with the outcomes, if not the reasoning, in most of these cases.⁵²⁸ At best these monuments, which were designed to be sensitive to Roman Catholics, Protestants, and Jews,⁵²⁹ call special recognition to the three major Western religious traditions in the United States.

Other displays might survive the facilitation test. A monument to law that included the Commandments as part of a broader motif, especially without the text of the Commandments, would be constitutional so long as the Commandments (and religious texts generally) did not have a disproportionate place in the monument and there was some logical and supportable connection between the Commandments and the other objects displayed.⁵³⁰ There would be no duty to exclude the Commandments from such a monument simply because they are of religious origin because, in context (and here context matters), religion is not given special recognition or approval by government since the Ten Commandments can represent the religious roots of some Western legal norms.⁵³¹

Similarly, the seal in *King v. Richmond County*⁵³² and the small plaque in *Freethought Society v. Chester County*,⁵³³ would be constitutional under the facilitation test. The former would be constitutional because it did not include the text of the Commandments and, in context, the Commandments icon does little to give religion substantial special recognition.⁵³⁴ The latter would be constitutional because the plaque was not moved when the entrance to the courthouse was moved, and because it is not visible

Fraternal Order of Eagles).

528. *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020, 1024-25, 1042 (8th Cir. 2004), *rehearing granted en banc & opinion vacated*, No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. 2004) (holding that the City violated the Establishment Clause by displaying a Ten Commandments monument donated by the Fraternal Order of Eagles in 1965 in a city park); *Adland v. Russ*, 307 F.3d 471, 475 (6th Cir. 2002) (striking down a display on the grounds of the State Capitol of a monument donated by the Fraternal Order of Eagles in 1961); *Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000) (holding the same for monument donated in 1958 and located on the grounds of a City municipal building).

529. *Books*, 235 F.3d at 294.

530. *ACLU v. McCreary County*, 354 F.3d 438, 447-54 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004).

531. *Adland*, 307 F.3d at 489-90.

532. 331 F.3d 1271 (11th Cir. 2003); *see discussion, supra Part III.D.*

533. 334 F.3d 247 (3d Cir. 2003); *see discussion, supra Part III.D.*

534. *King*, 331 F.3d at 1283-86. While the *King* court relied on the context and makeup of the seal to uphold its use under the *Lemon* and endorsement tests, *id.*, some of the factors the court relied upon, especially the fact that the text of the Commandments was not included on the seal, would also be relevant to analysis under the facilitation test.

from the street.⁵³⁵ Given its location, the plaque does not give special recognition to religion.⁵³⁶ Had the entrance not been moved the situation would be different.

McCreary County would be the easier of the two recent Ten Commandments cases under the facilitation test. The facts in that case suggest that it is one of the few cases where purpose would be adequate to find government action unconstitutional. As the majority opinion points out, the pattern of behavior evidenced by the counties makes clear that their purpose was to post the Ten Commandments in some form, and preferably a form that most stressed their religious significance.⁵³⁷ Such a purpose is intended to facilitate religion, specifically Protestant religion since the King James version was used. When state actors act with the goal of facilitating religion, the attempt itself substantially facilitates religion because a government entity—and here the facilitation test would mirror the majority opinion—is taking sides regarding religion.⁵³⁸

Van Orden would be a much harder case under the facilitation test. It is clear that the posting of a Ten Commandments monument on government property facilitates religion, but does it substantially facilitate religion? As mentioned above, this is where context may become more relevant. The facilitation test would give no recognition to the longstanding traditions the plurality and Justice Breyer cite⁵³⁹ because most of those traditions have little to do with the question of posting a sectarian text (even if it is claimed to be multisectarian) on government property.⁵⁴⁰ Yet simply finding that the posting of such a text on state property violates the principle of separation of church and state and thus the Establishment Clause is

535. *Freethought Soc'y*, 334 F.3d at 253-54. The court did consider these factors in its analysis under the *Lemon* and endorsement tests, but these factors would take on a more important role under the facilitation test because they go directly to whether the government is calling special attention or giving special recognition to religion or a religion.

536. The court noted:

To read the text of the Commandments, it is necessary to climb the steps leading to the historic entrance But since this entrance was closed in 2001 for security reasons and to cut costs . . . , and the new entrance is located further north along the sidewalk, there is no reason for a visitor to the courthouse to climb these steps.

Id. at 253-54.

537. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2738-41 (2005).

538. *Id.* at 2742-44.

539. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment).

540. *Id.* at 2882-83 (Stevens, J., dissenting).

inadequate as well.⁵⁴¹ Certainly separation is a relevant principle in the analysis, but absent substantial facilitation, there should be no problem under the separation principle as used in the facilitation test.⁵⁴² Given the location of the monument and the many other monuments in the area, it would be hard to say that religion is substantially facilitated by the monument. Although it might be argued that the monument calls additional attention to religion, it does not call substantial attention to it in context. This is a close case, but given the facts of the case, the Texas monument would not violate the facilitation test. If the same monument were placed in front of a municipal building, courthouse, or even directly in front of a state capitol,⁵⁴³ the answer would be different because substantial attention would be called to the monument and the text of the Commandments. The same was simply not true in *Van Orden*, given the Texas monument's location vis-à-vis the nearby buildings on the huge Capitol grounds.⁵⁴⁴

A Christmas tree is a symbol of Christmas. Yet a Christmas tree is not a pure religious object. Rather, it is either a multifaceted or secularized object, given the role it plays in the modern Christmas season, the fact that most people are unaware of its connection to Christian theology, and its absence from Christmas celebrations until roughly the Reformation (and scattered use after that).⁵⁴⁵ According to the Court, a Christmas tree is not a symbol of a purely religious holiday, but rather of a nationally recognized holiday with religious meaning for some and religious roots.⁵⁴⁶ The Court's decisions in this regard have been soundly criticized both because of the Court's characterization of the holiday and because of its characterization of the objects related to that holiday.⁵⁴⁷ Simply put, Christmas is not a secular holiday nor is it a truly national holiday for Americans who do not share the dominant Christian faith or tradition. If Christmas were a "public" holiday and a Christmas tree were a *completely* secularized object, it would be more likely that those who practice other faiths would be willing to

541. *Id.* at 2874-77.

542. Ravitch, *supra* note 30, at 547-48.

543. *See* cases discussed *supra* notes 324-91 and accompanying text.

544. *Van Orden*, 125 S. Ct. at 2858 (plurality opinion).

545. For an interesting discussion of the history of Christmas trees from their earliest known uses in Germany in the late 1500s to today, see TRISTRAM POTTER COFFIN, *THE BOOK OF CHRISTMAS FOLKLORE* 19-21 (1973); PENNE L. RESTAD, *CHRISTMAS IN AMERICA: A HISTORY* 57-74 (1995); PHILLIP V. SNYDER, *THE CHRISTMAS TREE BOOK: THE HISTORY OF THE CHRISTMAS TREE AND ANTIQUE CHRISTMAS TREE ORNAMENTS* 11-39 (1976).

546. *County of Allegheny v. ACLU*, 492 U.S. 573, 662-63 (1989).

547. *See supra* Part IV.

have one. Yet a devout Jew, Muslim, Hindu, or other non-Christian would be unlikely to have a Christmas tree since Christmas is neither a Jewish, Muslim, Hindu, or Buddhist holiday, nor is it considered a "public" holiday by many Atheists. The irony that it is called a Christmas (or Christ's Mass) tree rather than a winter tree or holiday tree, seemed lost on the Court in *Allegheny*.⁵⁴⁸

Thus, a Christmas tree, which is associated only with the Christian holiday of Christmas, cannot be considered nondenominational just because that holiday has taken on a commercial aspect as well. The fact, relied upon by the *Lynch* majority, that "official announcements" of Congress have declared Christmas a national holiday⁵⁴⁹ are not determinative because Congress' announcements in this regard would be unconstitutional under the facilitation test. It would be acceptable under that test for Congress to close all nonessential government operations because of the likelihood and administrative reality that many people will take the day off.

It is, however, accurate to say that a Christmas tree is currently a secularized symbol of a religious holiday for many Americans.⁵⁵⁰ Yet it is significant that it remains a symbol of that holiday and thus integrally connected to the dominant religion in the United States. The same could be said of Santa Claus, the common name for St. Nicholas, a religious figure.⁵⁵¹ While a celebration of the Saint himself would have serious religious connotations, the modern persona of Santa Claus is, much like the Christmas tree, a potentially secularized symbol of a religious holiday.⁵⁵² Children in practicing religious minority families do not generally get visits from Santa, and, in fact, the Christmas season can be a very trying time for such children.⁵⁵³

The question remains, would a government display of Christmas trees and Santa Claus violate the facilitation test? There is no question that display of these icons of Christmas facilitates religion by calling continued attention to the holiday. The question is whether it "substantially" facilitates religion. To determine this we must look to the objects themselves. The objects are certainly connected to the holiday of Christmas, but they do not have the

548. See generally *Allegheny*, 492 U.S. 573.

549. *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

550. See *supra* note 539 and accompanying text.

551. RESTAD, note 540, at 45.

552. Kent Greenawalt has astutely used the term "Ambiguous Symbols" to describe such objects. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 794-95 (1984).

553. See generally FELDMAN, *supra* note 163 (discussing existence and impact of Christian dominance in American culture and law).

same theological significance as a pure religious object or even a Ten Commandments monument. Over time they have become somewhat secularized,⁵⁵⁴ but not nondenominational. These objects don't hold the same religious power that pure religious objects hold, but they are a powerful signal of a major holiday celebrated by the dominant religion in the United States. When the government displays these objects, it calls attention to Christmas, but not necessarily to the theological implications of Christmas. Interestingly, religious minorities might be more likely to see these objects as substantially facilitating religion than Christians.⁵⁵⁵ The facilitation test, however, is concerned with the object and not with the task of deciding among such perceptions. Given the minimal theological significance of a Christmas tree or Santa Claus, these objects can generally be displayed by the government along with snowflakes, candy canes, and other objects connected to the winter season, but because they remain secularized *religious objects*, the context of the display is quite relevant to this analysis.

Most governmental holiday displays that include objects closely affiliated with Christmas, such as Christmas trees and Santas, *along with secular objects, such as snowflakes and snowmen*, would not violate the facilitation test without some connection to the religious aspects of the holidays. Such displays call attention to Christmas, but they do not substantially facilitate the religious nature of that holiday. Yet a display that only included symbols of Christmas, such as Christmas trees and Santas, could violate the facilitation test under limited circumstances despite the lack of pure religious objects if such displays add government's powerful voice to the already overwhelming cacophony of voices giving special attention and support for the *Christmas* season as opposed to the *winter* season. This is so despite the fact that some of the objects involved are not pure or even multifaceted religious objects.

Perhaps the best example of such a display (or event, rather) is the lighting of the White House Christmas tree by the President, an event in which the leader of the nation *formally* lights an object that represents a major holiday of the nation's dominant religion. This gives special attention or recognition to that holiday in a significant way. A future non-Christian President who refuses to have or light the White House Christmas tree might suffer politically, and the failure to light the "traditional" tree might cause a good deal of controversy. Of course, while the President lighting the tree, as well

554. See *supra* note 545 and accompanying text.

555. Cf. Feldman, *supra* note 163 (explaining how the power differential between dominant religious traditions and religious outgroups can affect how each perceives government support of religious traditions).

as some other governmental Christmas displays, violate the facilitation test, challenging these displays is a battle from which one might wisely abstain.⁵⁵⁶ Significantly, displays that are focused on winter, but which also have elements that some associate with Christmas such as jingle bells or candy canes, would not even raise a question under the facilitation test; government would be free to create such displays.⁵⁵⁷

Finally, when private entities display religious objects in a public forum, religion is rarely substantially facilitated.⁵⁵⁸ The only exceptions occur where government gives favored access to or otherwise favors particular religious objects or religious objects generally, or where a forum is so dominated by religious objects of a given religion that the fact it is government property could suggest government is giving special recognition to a specific religion. Such will rarely be the case in a public forum.

VII. CONCLUSION

When religious objects become the subject of litigation, they become legal subjects. As such, the lens of the law has had a tendency to significantly distort their nature and impact. This is evidenced by the almost deafening criticism of the Court's religious symbolism cases. This need not be the case. If courts took greater care in analyzing the objects at the center of religious symbolism cases, they might be able to develop a less reflexive legal doctrine. A doctrine that values and integrates the religious aspects of religious objects would be less reflexive. This might cause some displays apparently favored by many judges to be found unconstitutional, but it would help prevent the legal lens from desacrilizing deeply religious objects and ignoring the power they hold for believers and

556. It is important to note that a particular government action may violate the Establishment Clause, yet it may be unwise to challenge that action because it may do more damage than good to the cause of protecting against government establishments when the likely public response to the challenge is weighed against the benefits of bringing the claim. This may be particularly true in situations where the challenged practice is one of ceremonial deism. An example might be the recent challenge to the Pledge of Allegiance, where the Court had already approved exemptions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). See also *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), *vacated on other grounds by*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The backlash against the Ninth Circuit decision striking down the 1954 amendment that added the words "under God" to the pledge was intense. Howard Fineman, *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 20.

557. Assuming, of course, the displays do not include an object such as a crèche.

558. Ravitch, *supra* note 30, at 570-71.

the potentially alienating meaning they may hold for nonbelievers.

This Article suggests that courts have been dealing with different categories of religious objects in the religious symbolism cases and that different types of religious objects might warrant a different analysis. The Article proposes a test that considers whether a government display of a religious object substantially facilitates religion. In the end, however, any test the Court uses should be sensitive to the nature and variety of the objects it is analyzing. Unfortunately, the current doctrine all but ignores such issues.
