



2001

Toward a Consensus on Religious Images in Civic Seals under the Establishment Clause: *American Civil Liberties Union v. City of Stow*

Kevin J. McCabe

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Kevin J. McCabe, *Toward a Consensus on Religious Images in Civic Seals under the Establishment Clause: American Civil Liberties Union v. City of Stow*, 46 Vill. L. Rev. 585 (2001).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol46/iss3/3>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2001]

TOWARD A CONSENSUS ON RELIGIOUS IMAGES IN CIVIC SEALS
UNDER THE ESTABLISHMENT CLAUSE: *AMERICAN CIVIL
LIBERTIES UNION v. CITY OF STOW*

I. INTRODUCTION

Issues concerning the relationship between religion and government have aroused controversy since early in the history of our country.¹ Our nation's long-standing preoccupation with this subject is reflected by the inclusion of the Establishment Clause in the First Amendment to the United States Constitution.² Today, as we move forward into the twenty-first century, our nation is becoming an increasingly complex tapestry of religious and cultural diversity.³ Through processes of immigration and cultural change, the proportion of American citizens not subscribing to a Judeo-Christian belief system is reaching unprecedented levels.⁴ In this context, disputes over government practices that seem to favor a particular religion can be extremely disruptive for local communities, often inflaming passions on both sides of the issue.⁵

1. See, e.g., *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 847 (N.D. Ohio 1998) (noting that Establishment and Free Exercise Clauses in First Amendment embody fundamental and irreconcilable tension because our nation's founders were deeply spiritual people, but they feared governmental interference with their religious practices); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 164 (2000) (noting that proper application and relative priority of First Amendment religion clauses have been subject to debate from founding period to present days).

2. See, e.g., Kyle D. Freeman, Note, *Robinson v. City of Edmond: Establishment Clause Jurisprudence and a Case for Governmental Acknowledgement of the Historical Role of Religion*, 32 *TULSA L.J.* 605, 615-18 (1997) (discussing debate concerning passage of religious clauses in Bill of Rights). The Establishment Clause of the United States Constitution provides that, "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

3. See *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) (noting that increased religious diversity has altered composition of America's population since founding period); see also *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* 4 (Steven V. Monsma & J. Christopher Soper eds., 1998) [hereinafter *EQUAL TREATMENT*] (noting growth of religious pluralism in United States).

4. See *EQUAL TREATMENT*, *supra* note 3, at 4 (recognizing growth of Islamic, Hindu, Buddhist and other non-Christian faiths in United States resulting from immigration).

5. See, e.g., *Stow*, 29 F. Supp. 2d at 852 (noting that dispute over presence of religious symbolism in government seal had divided local community); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 *HARV. C.R.-C.L. L. REV.* 503, 507-08 (1992) (noting capacity of issues involving government use of religious symbols to polarize citizens due to lack of middle ground or room for compromise).

Citizens who have been accustomed to the presence of what seemed to be benign or neutral religious symbolism in the public sphere can be highly resistant to changes, which they might view as being forced upon them by supposed outsiders.⁶ At the same time, persons from other backgrounds may find such symbolism oppressive or even inflammatory, causing them to feel like outsiders in the political life of the cities and towns they inhabit.⁷ Meanwhile, modern shifts in the religious composition of the United States are bringing issues concerning the entanglement of religion and government back to the forefront of the national consciousness, infused with a new degree of complexity.⁸ As this trend continues, the courts will assuredly be called upon to re-examine the religious overtones of political life in our increasingly diverse society.⁹ In *American Civil Liberties Union v. City of Stow*,¹⁰ the United States District Court for the Northern District of Ohio was called upon to engage in such an examination in order to resolve a dispute over the presence of a Christian cross in a city's official governmental seal.¹¹ In striking down the disputed city seal, the *Stow* court provided a coherent analytical framework, within which the diverse case law on this issue can be harmonized into one persuasive guiding principle.¹²

This Note discusses the *Stow* decision, and its relevance within the general context of First Amendment Establishment Clause jurisprudence dealing with challenges to religious imagery in government seals and emblems. Part II provides an overview of the case law relevant to this topic.¹³

6. See Peter K. Rofes, *The First Amendment in Its Third Century: Three Wisconsin Pieces to the Constitutional Puzzle*, 1998 WIS. L. REV. 861, 878 (1998) (describing public outrage over legal challenge by supposed "outsider" to cross in City of Wauwatosa, Wisconsin's official seal).

7. See *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 781 (10th Cir. 1985) (en banc) (noting that for Jews, crosses had sometimes represented oppression and persecution, and that today they might convey same message for Moslems from Lebanon or Protestants from Northern Ireland).

8. See, e.g., EQUAL TREATMENT, *supra* note 3, at 3 (noting "increasing religious pluralism" as reason to consider approaches to Establishment Clause interpretation); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1296 (2d ed. 1988) (noting impact of growing religious diversity on law).

9. See WITTE, *supra* note 1, at 173 (noting that lower courts have decided broad range of Establishment Clause questions, while United States Supreme Court rulings have dealt mainly with disputes over religion and education); see also ALBERT J. MENENDEZ, *THE DECEMBER WARS* 161 (1993) (noting that forces pervading court system will impact on religious life of Americans in coming years, through resolution of current constitutional questions).

10. 29 F. Supp. 2d 845 (N.D. Ohio 1998).

11. See *id.* at 847 (noting that basis of suit was dispute over whether municipal seal with religious imagery violated Establishment Clause).

12. For a discussion of the *Stow* court's analysis, the guiding principle at which it arrived and the relevance of its decision for future disputes, see *infra* notes 87-180 and accompanying text.

13. For a discussion of relevant Establishment Clause case law and of cases dealing specifically with religious symbols in government seals, see *infra* notes 17-75 and accompanying text.

Part III sets forth the factual background of the *Stow* case.¹⁴ Part IV reviews the reasoning of the *Stow* court and examines the strengths and weaknesses of the analytical framework put forward by that court in its attempt to harmonize the existing case law on this issue and arrive at a principled standard of decision.¹⁵ Finally, Part V discusses the implications of this decision in the context of general trends in Establishment Clause jurisprudence on the issue of religious symbols in government seals.¹⁶

II. BACKGROUND

A. *Early Establishment Clause Jurisprudence*

In 1947, the United States Supreme Court decided *Everson v. Board of Education*.¹⁷ In that case, more than 150 years after the First Amendment was ratified, the Court made its first close examination and interpretation of the Establishment Clause.¹⁸ The issue to be decided in *Everson* was whether a local school board, acting under a New Jersey statute, could validly reimburse parents for the cost of their children's bus transportation to Catholic parochial schools.¹⁹ The Court held that this practice of reimbursing parents did not violate the Establishment Clause.²⁰ Interestingly, both the majority and dissenting opinions made reference to the

14. For a discussion of the facts of the *Stow* case, see *infra* notes 76-86 and accompanying text.

15. For a discussion of the district court's reasoning in *Stow*, see *infra* notes 87-161 and accompanying text.

16. For a discussion of the implications of the *Stow* ruling for the future of Establishment Clause jurisprudence on the issue of religious symbols in government seals, see *infra* notes 162-184 and accompanying text.

17. 330 U.S. 1 (1947).

18. See ROBERT T. MILLER & RONALD B. FLOWERS, *TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT* 9 (5th ed. 1996) (noting that until 1947, United States Supreme Court did not expressly base any ruling on Establishment Clause grounds). Some earlier cases could have raised Establishment Clause issues, but the Court relied on other bases to support its holdings. See *id.* (discussing early Supreme Court cases involving possible Establishment Clause questions, but decided on other grounds).

19. See *Everson*, 330 U.S. at 3 (discussing government practice challenged in *Everson* lawsuit). The *Everson* Court engaged in a detailed review of the historical context in which the Establishment Clause was drafted and adopted in order to guide its interpretation. See *id.* at 8-14 (discussing historical setting in which First Amendment was drafted). Historical evidence has often been invoked to aid in interpretation of the Framers' intent in drafting the Establishment Clause, sometimes in support of conflicting positions. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 971 (1997) (noting that abstractness of Framers' language and divergences among their views allows historical evidence to support any view).

20. See *Everson*, 330 U.S. at 18 (noting Supreme Court's holding). In upholding the challenged program, the Court analogized it to government practices such as the provision of ordinary police and fire protection for religious organizations, the denial of which would arguably evince an unnecessary hostility towards religion. See *id.* at 17-18 (noting that First Amendment was never intended to cut off

Establishment Clause in terms of a “wall” separating Church and State.²¹ That language has generally been read as articulating a strict separationist viewpoint.²² *Everson* remains a significant case for that foundational analysis and also because it was the first time the Court specifically applied the Establishment Clause to the states.²³

religious institutions from basic government services that are only incidentally related to religious functions).

21. Compare *id.* (stating that “a wall between church and state” had been erected by First Amendment, and that Supreme Court could not allow transgression of that wall by any government practice, but finding that challenged New Jersey law caused no such impermissible breach), with *id.* at 29 (Rutledge, J., dissenting) (noting that First Amendment did in fact create wall between affairs of church and state, but arguing that majority’s ruling had improperly weakened it), and *id.* at 28 (Jackson, J., dissenting) (noting general agreement with Rutledge’s dissent, including his summary of historical efforts to maintain separation between matters of religion and government). The concept of a “wall of separation” as a metaphorical representation of the First Amendment’s religious protections, originated with a letter written by President Jefferson in 1802 to the Danbury Baptist Association of Connecticut. See generally Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson’s “Wall of Separation” Metaphor*, 16 CONST. COMMENT. 627 (1999) (discussing history, context and meaning of Jefferson’s “wall of separation” metaphor).

22. See, e.g., MILLER & FLOWERS, *supra* note 18, at 10 (noting that *Everson* ruling put forward strict separationist interpretation of Establishment Clause). The strict separationist viewpoint holds that religion and government ought to be kept apart as much as possible. See CHEMERINSKY, *supra* note 19, at 977-83 (describing “strict separation,” and competing viewpoints of “neutrality theory” and “accommodation”). The “neutrality” approach to the Establishment clause maintains that government may not show favoritism amongst religions, nor show any partiality as between religion and secularism. See *id.* at 978 (describing neutrality theory and its reading of Establishment Clause). The “accommodation” approach holds that the Constitution prohibits the literal establishment of a national religion, but does not bar governmental acknowledgment of the importance of religion in society. See *id.* at 981 (describing accommodation approach to Establishment Clause interpretation). Of course, these three major theories are not exhaustive of the possible approaches to Establishment Clause interpretation, and there may be variations within the basic theme of each. See *id.* at 977 n.1 (noting diversity of approaches to First Amendment Religion Clauses).

23. See *Everson*, 330 U.S. at 7-8 (noting that if disputed New Jersey law were to be struck down, it would be as violation of Establishment Clause); see also MILLER & FLOWERS, *supra* note 18, at 9 (noting that *Everson* first applied Establishment Clause to states through incorporation into Fourteenth Amendment). The *Everson* Court gave no analysis to support its application of the Establishment Clause to the states, and it remains somewhat unclear whether any proper basis can be found for that decision in the First and Fourteenth Amendments. See TRIBE, *supra* note 8, at 1156 & n.5 (discussing syntactic and history-based objections to Establishment Clause incorporation). Some commentators have criticized this aspect of *Everson*, but the issue has been primarily confined to academic debate. See, e.g., William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 510 (1998) (arguing against incorporation of First Amendment); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193-94 (1990) (criticizing application of Establishment Clause to states and arguing for partial rollback of incorporation). As such, any wholesale change of position by the Supreme Court on this aspect of incorporation doctrine seems highly unlikely. See Robert R.

In the years following *Everson*, no clear guidelines existed for Establishment Clause decisions.²⁴ The Supreme Court's opinions wavered between adherence to *Everson*'s separationist rhetoric and application of a more accommodationist approach.²⁵ It was not until 1971, when the United States Supreme Court decided *Lemon v. Kurtzman*,²⁶ that an integrated test for Establishment Clause questions finally emerged.²⁷

B. *The Endorsement Formulation of the Lemon Test*

In *Lemon*, the Court faced challenges to a Rhode Island statute that provided for supplements to the salaries of private school teachers and a Pennsylvania statute that provided financial reimbursements to nonpublic schools for books, materials and teacher salaries.²⁸ Both laws were ultimately struck down as unconstitutional.²⁹ In reaching that decision, the Court put forward a three-part test that would come to be known as the *Lemon* test.³⁰ The Court stated succinctly: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"³¹ The three prongs of this test are applied independently, such that a law or government practice failing to satisfy any one of them will be judged unconstitutional.³²

Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 553 (1998) (noting lack of evidence suggesting uncertainty on part of any current Supreme Court Justice as to propriety of Establishment Clause incorporation).

24. See MILLER & FLOWERS, *supra* note 18, at 10-11 (noting lack of clear guidance from Establishment Clause decisions after *Everson*).

25. See *id.* at 11 (noting lack of "clear line of interpretation" in cases decided between *Everson* and *Engel v. Vitale*, 370 U.S. 421 (1962)). For a discussion of separationist and accommodationist viewpoints, see *supra* note 22 and accompanying text.

26. 403 U.S. 602 (1971).

27. See MILLER & FLOWERS, *supra* note 18, at 11 (noting that three elements, commonly referred to as *Lemon* test, were first used together in that case).

28. See *Lemon*, 403 U.S. at 606-07 (noting bases of lawsuit).

29. See *id.* at 607 (holding two challenged state statutes unconstitutional).

30. See *id.* at 612-13 (stating three-part test to be applied for Establishment Clause questions).

31. *Id.* at 612-13 (citations omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The secular purpose and primary effect prongs of the *Lemon* test were first applied in *Abington Township School District v. Schempp*, 374 U.S. 203 (1963), while the excessive entanglement prong was originally put forward in *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). See MILLER & FLOWERS, *supra* note 18, at 11 (noting origins of *Lemon* test's individual elements).

32. See CHEMERINSKY, *supra* note 19, at 986 (noting that each element of *Lemon* must be satisfied independently).

The continuing applicability of *Lemon* has been in question for many years.³³ The test has been heavily criticized for producing inconsistent and unpredictable results.³⁴ Members of the United States Supreme Court have also called *Lemon* into doubt.³⁵ In *Lee v. Weisman*,³⁶ Justice Scalia even went so far as to call for the outright rejection of the test.³⁷ Furthermore, in *Marsh v. Chambers*,³⁸ the Court ruled on an Establishment Clause question without applying the *Lemon* test at all.³⁹ In *Marsh*, the Nebraska Legislature's practice of beginning each session with a prayer by a paid Presbyterian minister was found to be constitutionally permissible based on the "unique history" of the practice, without reference to the three prongs of *Lemon*.⁴⁰

More recently, in a dissent to the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe*,⁴¹ Chief Justice Rehnquist took note of *Lemon*'s "checkered career," reciting an extensive laundry list of Court opinions that have either criticized the test, suggested that it is not binding or decided Establishment Clause questions without reference to it.⁴² The majority in *Santa Fe*, however, made explicit reference to *Lemon*'s secular purpose prong in striking down a school district's chal-

33. See, e.g., *id.* at 987 (noting current and future uncertainty as to status of *Lemon* test); Karst, *supra* note 5, at 503 (predicting, in 1992, that *Lemon* test would soon be replaced by more permissive standard of decision).

34. See generally Thomas C. Marks, Jr. & Michael Bertolini, *Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997) (criticizing *Lemon* and proposing alternative tests); see also Freeman, *supra* note 2, at 621 (criticizing lack of coherence in Supreme Court cases following *Lemon*).

35. See CHEMERINSKY, *supra* note 19, at 987 (noting that Supreme Court Justices having expressed dissatisfaction with *Lemon*, or having supported alternative tests, constitute majority of current Court).

36. 505 U.S. 577 (1992).

37. See *id.*, 505 U.S. at 644 (Scalia, J., dissenting) (noting that majority opinion ignored *Lemon*, supposedly demonstrating irrelevance of that test). In one memorable concurrence, Justice Scalia opined that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys" *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (concurring in judgment but criticizing majority's invocation of *Lemon*).

38. 463 U.S. 783 (1983).

39. See CHEMERINSKY, *supra* note 19, at 1004 (noting that Supreme Court did not apply *Lemon* in *Marsh* decision, affirming constitutionality of state employment of minister for legislative prayers).

40. See *Marsh*, 463 U.S. at 791 (finding that legislative prayer poses no threat to Establishment Clause given history of practice). The majority in *Marsh* made only one reference to *Lemon*, and that was simply to mention that the United States Court of Appeals for the Eighth Circuit had applied that test in striking down the government practice at issue. See *id.* at 786 (noting basis for circuit court ruling). For further discussion of the circumstances and relevance of the *Marsh* case, see *infra* notes 153-57 and accompanying text.

41. 120 S. Ct. 2266 (2000).

42. See *id.* at 2284 (Rehnquist, C.J., dissenting) (collecting opinions that criticize *Lemon*, treat it as non-binding, or fail to apply it).

lenged policy, finding that its clear improper purpose was to encourage the delivery of a prayer at school events.⁴³ Still, the Court did not rely exclusively on *Lemon* for its holding, basing its ruling on other grounds as well.⁴⁴

It would seem, then, that *Lemon* has managed to survive into the twenty-first century, if only as one of several general approaches.⁴⁵ At the very least, the test has not yet been overruled.⁴⁶ Notably, the *Lemon* test has been, and continues to be, applied consistently by lower federal courts in cases dealing with religious symbols in government seals.⁴⁷ Most of these cases have placed particular emphasis on a formulation of *Lemon's* first and second prongs, which asks whether a disputed government practice has the purpose or effect of endorsing religion.⁴⁸

The origins of this endorsement test can be found in the United States Supreme Court's decision in *Lynch v. Donnelly*,⁴⁹ in a concurring

43. See *id.* at 2281-83 (finding policy unconstitutional on its face for lack of secular purpose, and on other grounds). Chief Justice Rehnquist acknowledged the *Santa Fe Independent School District* majority's use of the *Lemon* test, but claimed that the test was applied too stringently, as opposed to using its factors as mere guideposts for analysis. See *id.* at 2284 & n.1 (Rehnquist, C.J., dissenting) (criticizing majority's strict application of *Lemon* test).

44. See *id.* at 2283 (invalidating policy on ground that it established "improper majoritarian election on religion," in addition to improper purpose grounds). The Court also pointed out that the question of whether, from the perspective of an objective observer, the challenged state practice would be perceived as an endorsement of religion, is pertinent for Establishment Clause inquiries. See *id.* at 2278 (noting relevance of endorsement test in deciding Establishment Clause questions). See also Marcia Coyle, *Justices Struggle with a 'Lemon': Landmark Church-State Ruling Needs Updating—But How?*, NAT'L L.J., July 3, 2000, at A1 (noting that *Santa Fe Independent School District* Court relied on parts of *Lemon* test, along with parts of alternative approaches that had arisen out of discontentment with *Lemon*).

45. See generally *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2266 (applying elements of *Lemon* test, along with other approaches, to strike down challenged school district policy).

46. See CHEMERINSKY, *supra* note 19, at 987 (noting that Supreme Court has never explicitly overruled *Lemon* decision, nor rejected its test).

47. See *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995) (applying *Lemon* test to determine constitutionality of religious symbol in government seal); *Murray v. City of Austin*, 947 F.2d 147, 154 (5th Cir. 1991) (same); *Harris v. City of Zion*, 927 F.2d 1401, 1411-15 (7th Cir. 1991) (determining constitutionality of two different government seals under *Lemon* test); *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 780 (10th Cir. 1985) (en banc) (applying *Lemon* test in city seal dispute); *Webb v. City of Republic*, 55 F. Supp. 2d 994, 997 (W.D. Mo. 1999) (same); *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 847-48 (N.D. Ohio 1998) (same); see also *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989) (noting lower court's application of *Lemon*, but remanding case to resolve remaining issue of material fact as to second prong effects test).

48. For a discussion of cases applying an endorsement formulation of the *Lemon* test's first and or second prongs in the context of Establishment Clause challenges to religious symbols in government seals, see *infra* note 128 and accompanying text.

49. 465 U.S. 668 (1984).

opinion by Justice O'Connor.⁵⁰ Under this formulation, the presence or absence of a message suggesting endorsement of religion in a government practice is generally assessed from the perspective of a reasonable, informed observer.⁵¹ Since its inception, this incarnation of the *Lemon* test has been invoked, and sometimes criticized, in Supreme Court opinions with varying degrees of consistency.⁵²

C. *Establishment Clause Challenges to Religious Symbols in Government Seals*

Several federal courts have considered the constitutional propriety of government seals that contained religious symbols.⁵³ The first case to deal with a challenge to such a seal was *Friedman v. Board of County Commissioners of Bernalillo*,⁵⁴ which arose in the United States Court of Appeals for the Tenth Circuit.⁵⁵ In *Friedman*, the Tenth Circuit faced a challenge to the county seal of Bernalillo, New Mexico, which included a cross.⁵⁶ The seal also included a Spanish inscription meaning "With This We Conquer" which was placed below the cross.⁵⁷ The *Friedman* court relied on the sec-

50. See *id.* at 691-92 (O'Connor, J., concurring) (putting forward endorsement formulation for first and second prongs of *Lemon* test); see also, MILLER & FLOWERS, *supra* note 18, at 12 (noting that Justice O'Connor had put forward new formulation of *Lemon* test, which focused on whether government practices were indicative of endorsement or disapproval of religion, to decide whether impermissible purposes or effects were present) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)). The endorsement test is one of several modifications and replacements that Supreme Court justices have from time to time implemented as correctives for the weaknesses of the *Lemon* test. See, e.g., Freeman, *supra* note 2, at 623-26 (discussing endorsement test, psychological coercion test and legal coercion test, put forward by various Justices to compensate for failings of *Lemon*).

51. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772-73 (1995) (O'Connor, J., concurring) (emphasizing that endorsement test is applied from perspective of reasonable, informed observer).

52. See MILLER & FLOWERS, *supra* note 18, at 13 (noting that three Supreme Court decisions between 1987 and 1991 used Justice O'Connor's formulation, out of nine Establishment Clause cases that were heard). But see *id.* at 16 (stating that Justice Scalia, speaking for plurality in *Capitol Square Review & Advisory Board v. Pinette*, denied any status to endorsement test). Notably, the Supreme Court made repeated references to the concept of endorsement in a recent decision involving prayer in public schools. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2282 (2000) (noting that enactment of school policy was unconstitutional, based on impermissible purpose and perception of endorsement for student prayer).

53. For a discussion of cases dealing with religious symbols in government seals, see *infra* notes 54-75 and accompanying text.

54. 781 F.2d 777 (10th Cir. 1985) (en banc).

55. See *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 849 (N.D. Ohio 1998) (noting that this type of question was first considered in Tenth Circuit).

56. See *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 770, 778 (10th Cir. 1985) (noting basis of lawsuit). The challenged cross in *Friedman* was quite prominent within the Bernalillo seal, standing nearly a foot high on the county vehicles that featured it. See *id.* at 779 n.1 (noting relative size of cross within county seal).

57. See *id.* at 779 (describing contents of Bernalillo seal). One commentator has suggested that the motto, "Con Esta Vencemos" or "With This We Conquer," can be traced to the Emperor Constantine the First, who, before an important

ond prong of the *Lemon* test to find the Bernalillo seal unconstitutional.⁵⁸ In doing so, the court focused on Justice O'Connor's endorsement formulation of *Lemon*'s second prong effects test.⁵⁹

In 1991, the Seventh and Fifth Circuits each weighed in on this issue.⁶⁰ In *Harris v. City of Zion*,⁶¹ the United States Court of Appeals for the Seventh Circuit found that the city seals of Rolling Meadows, and Zion, Illinois, each of which included a cross, were unconstitutional.⁶² Like the Tenth Circuit in *Friedman*, the *Harris* court relied on the endorsement formulation of the *Lemon* test, ruling that both seals represented an impermissible endorsement of Christianity.⁶³ In contrast, the United States Court of Appeals for the Fifth Circuit, in *Murray v. City of Austin*,⁶⁴ ruled that the City of Austin's official insignia, which included a cross, did not

battle, "purportedly saw a blazing cross in the sky and said, 'In this sign I shall conquer.'" See Karst, *supra* note 5, at 521 n.66 (discussing possible origin of phrase in seal). Notably, after winning that battle, Constantine "consolidated the Christian church into a single establishment and converted to Christianity." See *id.* (noting connection between Christianity and origins of motto in seal). The *Friedman* court, however, heard conflicting testimony on the meaning of the motto and found that the evidence was unclear. See *Friedman*, 781 F.2d at 779 (discussing evidence regarding meaning of motto in Bernalillo seal).

58. See *Friedman*, 781 F.2d at 780-81 (reversing lower court's finding that challenged seal could satisfy *Lemon*'s second prong effects test).

59. See *id.* at 781 (stating that *Lemon*'s effects prong asks whether disputed government practice "conveys a message of endorsement or disapproval," regardless of its purpose (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))). The *Friedman* court took notice of the pervasive use of the seal in Bernalillo County, making clear that this factor differentiated the present case from holiday display disputes. See *id.* at 782 (noting use of seal on vehicles, paperwork and sheriff's uniforms).

60. See *Stow*, 29 F. Supp. 2d at 849-50 (reviewing circuit court rulings on challenges to government seals with religious images).

61. 927 F.2d 1401 (7th Cir. 1991).

62. See *id.* at 1415 (striking down two challenged seals as unconstitutional). The City seal of Zion consisted of a shield, which included, in addition to the cross, a dove holding a branch, a crown with a sword and the name "Zion." See *id.* at 1403-04 (describing contents of Zion seal). The court also found that the City of Zion's logo and emblem, which included elements similar to the city seal, were unconstitutional. See *id.* at 1404, 1415 (noting design of logo and emblem, and finding them unconstitutional). The Rolling Meadows seal included a leaf, a water tower with two industrial buildings and a church, in addition to the contested cross. See *id.* at 1403 (describing design of Rolling Meadows' seal).

63. See *id.* at 1415 (holding that contested seals were unconstitutional, as endorsements of particular religious beliefs). The *Harris* court agreed with the trial court's analysis that the Zion seal might also violate the "purpose" prong of the *Lemon* test. See *id.* at 1413 (noting improper purpose of seal as possible alternative basis for ruling). The court also noted that the Rolling Meadows seal was viewed throughout the year, differentiating it from annual holiday displays with religious elements. See *id.* at 1412 (noting that year-round use of government seal furnished stronger case for finding of unconstitutionality than suits challenging short term seasonal displays).

64. 947 F.2d 147 (5th Cir. 1991).

violate the Establishment Clause.⁶⁵ The court stated that the insignia “passes constitutional muster” under the *Lemon* test, and also under any standard that might be derived from other rulings by the Supreme Court.⁶⁶ Among the Supreme Court cases specifically listed in that context was *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*,⁶⁷ in which a majority of the Court apparently relied on the endorsement formulation of the *Lemon* test.⁶⁸ Still, the *Austin* court declined to lay down a constitutional “bright line test” for the use of religious symbols in government seals, instead expressly deciding the case on “the totality of its unique facts and circumstances.”⁶⁹

It seemed that the United States Supreme Court might be ready to rule on the issue of religious symbols in government seals in 1996, when the Court fell one vote short of granting certiorari for *Robinson v. City of Edmond*.⁷⁰ The United States Court of Appeals for the Tenth Circuit had revisited the issue of religious symbols in government seals in *Robinson*, again holding that a seal containing a cross violated the Establishment

65. *See id.* at 158 (finding no constitutional violation for presence of cross in disputed insignia). The official “seal” of Austin is a star, however, the parties to this case used the terms “seal” and “insignia” interchangeably. *See id.* at 150 n.3 (noting that parties treated terms as equivalent). In any event, the *Murray* court never differentiated the Austin insignia from the city seals dealt with in other cases on the basis of that nomenclature. *See generally Murray*, 947 F.2d 147 (treating insignia as equivalent concept in discussion of city seal cases). Furthermore, the *Stow* decision only used the term “seal” in discussing the *Murray* case. *See, e.g., Stow*, 29 F. Supp. 2d at 850 (using “seal” terminology, rather than “insignia,” in discussion of *Murray* decision). For the purposes of this Note, the terms will be treated as synonymous.

66. *See Murray*, 947 F.2d at 158 (noting that Austin insignia need not be held unconstitutional under various Supreme Court decisions). The court mentioned a number of then-recent Supreme Court rulings in addition to *Lemon*, and stated that they would not compel a finding of unconstitutionality for the Austin insignia. *See id.* (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Marsh v. Chambers*, 463 U.S. 783 (1983)).

67. 492 U.S. 573 (1989).

68. *See Stow*, 29 F. Supp. 2d at 848 (noting that Justice O’Connor’s endorsement test had received some support from other Justices and that Supreme Court majority had apparently relied on it in deciding *Allegheny*). The *Murray* court repeatedly made reference to the concept of endorsement in its Establishment Clause analysis. *See, e.g., Murray*, 947 F.2d at 156, 158 (making reference to endorsement test in determining that Austin City insignia was not unconstitutional).

69. *See Murray*, 947 F.2d at 158 (giving basis for holding). The *Murray* court apparently placed significant weight on the fact that Austin’s insignia, and the cross therein, were derived from the family crest of Stephen F. Austin. *See id.* at 149 (noting that insignia was based on family crest of City’s namesake, and “Father of Texas,” Stephen F. Austin). Stephen F. Austin has been a revered figure in the history of Texas and is widely credited with having played a pivotal role in the events which led to the Texas Revolution and the creation of the Lone Star Republic. *See GREGG CANTRELL, STEPHEN F. AUSTIN: EMPRESARIO OF TEXAS 2* (1999) (discussing historical role of Stephen F. Austin).

70. 68 F.3d 1226 (10th Cir. 1995), *cert. denied* 517 U.S. 1201 (1996).

Clause.⁷¹ Chief Justice Rehnquist's dissent to the Supreme Court's denial of certiorari identified a possible circuit split on the question of whether a city seal containing a religious symbol, specifically a cross, violates the First Amendment.⁷² Nonetheless, in the absence of a decision from the Supreme Court to provide guidance on this specific issue, the lower federal courts have been left to seek a principled basis for decisions from the available case law.⁷³ In *American Civil Liberties Union v. City of Stow*,⁷⁴ the United States District Court for the Northern District of Ohio arrived at a "guiding principle" for such decisions, prohibiting the pervasive governmental usage of blatantly sectarian religious symbols.⁷⁵

III. FACTS IN *AMERICAN CIVIL LIBERTIES UNION v. CITY OF STOW*

In *Stow*, the American Civil Liberties Union of Ohio, Inc. (ACLU), and the City of Stow, Ohio, each brought suits to decide whether the inclusion of a Christian cross in the City of Stow's official seal violated the Establishment Clause of the First Amendment.⁷⁶ Both parties filed mo-

71. *See id.* at 1233 (holding city seal with cross unconstitutional). The seal challenged in *Robinson* consisted of four quadrants, which contained a cross, in addition to a tower, a covered wagon and a steam engine with an oil derrick. *See id.* at 1228 (describing contents of challenged seal). The court found that the disputed seal, like the seal in the *Friedman* case, conveyed an unconstitutional message of endorsement for Christianity. *See id.* at 1233 (finding that observers would perceive impermissible message from seal). The Tenth Circuit also dealt with a challenge to a government seal with alleged religious content in *Foremaster v. City of Saint George*, 882 F.2d 1485 (10th Cir. 1989). *See id.* at 1231 (noting that *Foremaster* case involved challenge to city seal depicting local Mormon temple). Reversing a grant of summary judgment by the United States District Court for the District of Utah in favor of the City of Saint George, the *Foremaster* court held that an issue of material fact remained as to whether the seal conveyed a message of endorsement. *See Foremaster*, 882 F.2d at 1492 (remanding case for trial on issue of seal's effect).

72. *See City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (6-3 decision) (Rehnquist, C.J., dissenting) (noting possible circuit split as reason to grant certiorari). Chief Justice Rehnquist's dissent, which was joined by Justice Scalia and Justice Thomas, also suggested that resolution might be required for a possible circuit split over the standing requirements for plaintiffs challenging symbols in government seals. *See id.* at 1201-02 (noting unresolved standing issue). Generally, the standing requirements for citizens pressing claims under the Establishment Clause have been much more permissive than ordinary standing rules. *See WITTE*, *supra* note 1, at 150-51 (discussing unique "relaxed" standing rules that have been developed for Establishment Clause questions).

73. *See Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (noting that no indication as to Supreme Court's views can be taken from denial of certiorari).

74. 29 F. Supp. 2d 845 (N.D. Ohio 1998).

75. *See id.* at 850 ("The guiding principle running through the cases appears to be that, if done carefully, a governmental body may use a religious, but not a sectarian, concept or symbol on a daily basis.").

76. *See id.* at 847 (discussing who parties to lawsuit were). The ACLU filed suit on behalf of its clients, described as John and Jane Does one, two and three. *See id.* (noting that ACLU represented three anonymous parties). The individual lawsuits by the ACLU and the City of Stow were consolidated in this one action. *See id.* (noting consolidation of actions for trial).

tions for summary judgment on the sole issue of whether the design of the seal was constitutionally permissible.⁷⁷

The challenged seal appeared on Stow's City Hall, as well as on the City's government vehicles, flag, stationary and tax forms.⁷⁸ The seal was divided into four quadrants of equivalent size.⁷⁹ Each of the quadrants included symbolic images representing life in Stow, three of which were non-religious in nature.⁸⁰ The upper left quadrant, however, included a large cross resting on an open book.⁸¹ The City's pleadings described the cross as "stylized" and noted that it did not contain nails.⁸² The ACLU asked the court to find that the inclusion of the cross and open book within the seal represented an unconstitutional endorsement of religion, as a matter of law.⁸³ The City contended that "taken as a whole, the seal [did] not endorse any particular religion, or even religion in general," but

77. *See id.* (noting cross motions for summary judgment by parties to lawsuit). The parties also disputed whether the seal violated Article I, Section 7 of the Ohio Constitution, but the court found it unnecessary to resolve that issue. *See id.* at 847, 853 (noting alternative basis for challenge to seal, under Ohio State Constitution). Article I, Section 7 of Ohio's State Constitution provides, in relevant part, that "no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." OHIO CONST. art. I, § 7. There has been no indication from the courts of Ohio that they would give any stricter construction to these terms than the Supreme Court has given to the comparable provisions of the First Amendment to the United States Constitution. *See S. Ridge Baptist Church v. Indus. Comm'n*, 676 F. Supp. 799, 808 (S.D. Ohio 1987) (noting that Ohio courts have not read provisions of State Constitution to extend protections beyond those of Religion Clauses in First Amendment to United States Constitution).

78. *See Stow*, 29 F. Supp. 2d at 847 (noting widespread use of seal in Stow). The City of Stow is located in Ohio, with an estimated 1992 population in excess of 28,000 persons, living in an area covering approximately seventeen square miles. *See U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 806* (12th ed. 1994) (providing statistical information about Stow).

79. *See Stow*, 29 F. Supp. 2d at 847 (describing composition of seal). The official seal was designed by a local resident and adopted after a citywide competition in 1966. *See id.* (discussing origins of disputed city seal).

80. *See id.* (noting contents of seal). The non-religious images in the Stow City seal included representations of a factory, a home, and a scroll with a quill and ink bottle. *See id.* (describing non-religious images appearing in other quadrants of seal).

81. *See id.* (describing religious imagery in seal); *see also id.* at 854 (providing photocopy image of disputed seal).

82. *See id.* at 851 (noting description of seal in City's pleadings).

83. *See id.* at 847 (setting forth basis of ACLU motion for summary judgment). Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See FED. R. Civ. P. 56(c)* (providing federal standard for summary judgment).

rather, that the cross and book symbols simply acknowledged the general spiritual or philosophical concerns held by people in any community.⁸⁴

The court concluded that a reasonably informed and objective observer would infer from the prominent depiction of a Christian cross in Stow's seal that adherence to Christianity was relevant to a citizen's political standing in the city.⁸⁵ Based on this finding, the court granted summary judgment to the ACLU, holding that the seal violated the Establishment Clause of the First Amendment to the United States Constitution.⁸⁶

IV. ANALYSIS

A. Narrative Analysis

The *Stow* court began its analysis by noting that application of "strict scrutiny" is appropriate when assessing the constitutionality of a government action "suggestive of a 'denominational preference.'"⁸⁷ The district court then restated the elements of *Lemon's* test for Establishment Clause violations.⁸⁸ The court also stated the rule that government practices challenged under the Establishment Clause must withstand scrutiny under each of *Lemon's* three prongs independently.⁸⁹ The court acknowledged that the Supreme Court has not treated the *Lemon* test as "the 'be-all' and 'end-all' in Establishment Clause cases," but asserted that the Court had applied it "almost exclusively."⁹⁰ Reference was also made to the regular-

84. See *Stow*, 29 F. Supp. 2d at 847 (noting arguments by City of Stow in support of motion for summary judgment).

85. See *id.* at 853 (setting forth district court's findings).

86. See *id.* (noting court's resolution of dispute in favor of ACLU, on motions for summary judgment).

87. See *id.* at 847 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 608-09 (1989)). In *Allegheny*, the United States Supreme Court faced an Establishment Clause challenge to two holiday displays on public property, which contained symbolism that was arguably religious in nature. See *Allegheny*, 492 U.S. at 578. In the *Allegheny* opinion, Justice Blackmun spoke for a majority of the Court in stating that special vigilance would be required for government practices suggesting favoritism of particular religious groups. See *id.* at 608-09 (noting application of strict scrutiny where government practice was suggestive of denominational favoritism); see also *id.* at 578 (noting that Justice Blackmun spoke for Court in portion of *Allegheny* opinion requiring application of strict scrutiny, though some other parts of opinion were not joined by majority).

88. See *Stow*, 29 F. Supp. 2d at 847 (noting application of *Lemon* test for Establishment Clause questions). The *Stow* court restated the *Lemon* test as follows: "First, the governmental action in question must have a secular purpose. Second, its principal or primary effect must be one that 'neither advances nor inhibits' religion. And, third, the action must not foster an excessive government entanglement with religion." *Id.* at 848.

89. See *id.* at 847-48 (citing *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (noting that three elements of *Lemon* test must be met independently)).

90. See *id.* at 848 (noting continued application of *Lemon* test).

ity with which the circuit courts had continued to rely on *Lemon*.⁹¹ The *Stow* court then took note of the Supreme Court's use of the "endorsement" formulation of the *Lemon* test, as stated by Justice O'Connor's concurring opinion in *Lynch*.⁹²

1. District Court's Analysis of Guiding Case Law

The district court made it clear that the United States Court of Appeals for the Sixth Circuit had never ruled on a challenge to a cross in a municipal seal.⁹³ The court then set out a straightforward synopsis of the three decisions in which other circuit courts had ruled on this issue as a matter of first impression.⁹⁴ Notably, this review of case law made no mention of *Robinson v. City of Edmond*,⁹⁵ as that case was not a decision of first impression for the Tenth Circuit.⁹⁶

Reviewing the decisions of the Tenth Circuit in *Friedman* and the Seventh Circuit in *Zion*, the *Stow* court noted that those rulings had both found city seals containing crosses to be impermissible under the Establishment Clause.⁹⁷ The district court stated that those two decisions had expressly relied on the finding that the seals in question had each conveyed the message that Christianity was being endorsed.⁹⁸ The court's opinion also took note of the references made by the *Friedman* and *Zion* courts to the pervasive usage of the seals that they struck down.⁹⁹

The *Stow* court next reviewed the *Murray* case, contrasting the Fifth Circuit's holding that the cross in the City of Austin's insignia did not

91. *See id.* (noting regular use of *Lemon* test by circuit courts). The district court gave particular attention to the continuing application of *Lemon* by the United States Court of Appeals for the Sixth Circuit. *See id.* (citing *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997) (applying *Lemon* test); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1482 (6th Cir. 1995) (same); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992) (en banc) (same)).

92. *See id.* at 848-49 (discussing endorsement test spelled out by Justice O'Connor in her concurring opinion for *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)).

93. *See id.* at 849 (noting that Establishment Clause challenge to cross in government seal was matter of first impression for Sixth Circuit).

94. *See id.* at 849-50 (discussing circuit court rulings in *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777 (10th Cir. 1985) (en banc), *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), and *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991)).

95. 68 F.3d 1226 (10th Cir. 1995).

96. *See Robinson*, 68 F.3d at 1230 (noting that Tenth Circuit had already dealt with same question in *Friedman*); *see also Stow*, 29 F. Supp. 2d 845 (making no mention of *Robinson* decision in its review of cases on Establishment Clause challenges to government seals).

97. *See Stow*, 29 F. Supp. 2d at 849-50 (discussing *Friedman* and *Zion* decisions).

98. *See id.*

99. *See id.* at 849 (noting widespread, year-round usage of seals struck down in *Friedman* and *Zion*).

violate the Establishment Clause, with the *Friedman* and *Zion* decisions.¹⁰⁰ Still, the *Murray* decision was not described in terms to suggest that it could not be reconciled with the *Friedman* and *Zion* rulings.¹⁰¹ In fact, the district court described the *Murray* holding in language that conformed with the general endorsement test framework, explaining how the *Murray* court focused on the context of the disputed insignia to find that a reasonable observer would not have perceived any endorsement of religion from it.¹⁰²

From the three circuit court opinions that the *Stow* court reviewed, two rejecting seals with crosses and one upholding such a seal, the court distilled its “guiding principle”¹⁰³—that although governmental bodies may carefully make use of religious concepts or symbols, they may not make use of a sectarian concept or symbol on a daily basis.¹⁰⁴ The court stated that “general references to a higher, spiritual authority must be permissible to give full effect to the Free Exercise Clause,” but held that this logic cannot save government practices that are clearly tied to one particular faith or sect.¹⁰⁵ The court made it plain that government practices would invariably run afoul of the Establishment Clause when the appearance of such sectarian symbolism was pervasive and ongoing, as it was with the usage of *Stow*’s seal.¹⁰⁶

2. District Court’s Application of the Lemon Test

Applying the *Lemon* test, the district court first found that there was no evidence of the city having harbored any improper purpose, for en-

100. *See id.* at 850.

101. *See id.* (discussing basis of *Murray* court’s decision).

102. *See id.* (noting *Murray* court’s emphasis on context). Regarding the impact of Austin’s insignia upon reasonable observers, the *Stow* Court stated that “in its context, [the cross] does not endorse religion in any true or meaningful sense of the word” *Id.* (quoting *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991)).

103. *See id.* (stating that one guiding principle runs through circuit court rulings on Establishment Clause challenges to government seals).

104. *See id.* (setting forth guiding principle distilled from case law). *Black’s Law Dictionary* defines sectarian as “[d]enominational; devoted to, peculiar to, [or] pertaining to . . . the interest of a sect, or sects.” BLACK’S LAW DICTIONARY 1353 (6th ed. 1990). Sect, in turn, is defined as “a party or body of persons who unite in holding certain special doctrines or opinions concerning religion” *Id.*

105. *See Stow*, 29 F. Supp. 2d at 850 (noting that careful use of nonsectarian religious or spiritual symbolism is not prohibited under this principle, and that this approach will not conflict with Free Exercise Clause). The Free Exercise Clause is the portion of the First Amendment that, in conjunction with the Establishment Clause’s prohibition against laws involving the establishment of religion, further prohibits laws “restraining the free exercise” of religion. *See* U.S. CONST. amend. I.

106. *See Stow*, 29 F. Supp. 2d at 850 (stating that violation of Establishment Clause will generally be found for daily governmental use of symbolism that clearly refers to beliefs or practices of one particular religion). For a discussion on the pervasive usage of *Stow*’s seal, see *supra* note 78 and accompanying text.

dorsing Christianity or otherwise, in using the seal.¹⁰⁷ It was determined that inclusion of the cross was intended merely to display an important aspect of the community, with the secular purpose of representing Stow's people and government.¹⁰⁸ The seal faced a more serious challenge under *Lemon's* second prong.¹⁰⁹ The district court used the endorsement formulation in its application of *Lemon's* second prong effects test.¹¹⁰ The question of whether the Stow City seal had the impermissible effect of endorsing religion was assessed from the point of view of a "reasonable observer."¹¹¹ The City's attempts to defend its seal by referencing to practices like the Thanksgiving holiday, which have passed constitutional muster despite obvious religious content, were rejected because those practices did not endorse any particular religion.¹¹² In contrast, the cross in Stow's seal was found to have the effect of endorsing one specific faith, that of Christianity.¹¹³ Claims that the cross was not necessarily a Christian cross were rejected as inconsistent with what would be perceived by any reasonable observer.¹¹⁴

The significance of the cross in Stow's seal, as a symbol of Christianity in particular, was held to be unmistakable.¹¹⁵ In that respect, the Stow seal was held to be indistinguishable from those in the *Friedman* and *Zion* cases.¹¹⁶ The court noted, however, that the Austin City insignia, upheld

107. *See id.* at 851 (finding no evidence to suggest that the seal should fail under *Lemon's* secular purpose prong).

108. *See id.* (discussing the City of Stow's legitimate purpose in adopting its official seal).

109. *See id.* (noting that Stow's "real challenge" in defending their seal comes under *Lemon's* second prong effects test).

110. *See id.* (analyzing Stow's seal under endorsement formulation of *Lemon's* second prong). The court applied the endorsement test "as stated by Justice O'Connor in *Lynch v. Donnelly*, 'whether irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

111. *See id.* (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989)). The *Allegheny* opinion stated that in determining whether the disputed holiday displays conveyed a message of endorsement, the perspectives of Christians and Jews, as well as people of other faiths, ought to be considered. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989) (discussing application of reasonable observer standard to religious endorsement questions).

112. *See Stow*, 29 F. Supp. 2d at 851 (distinguishing Stow's seal from generally accepted government practices that neither endorse nor advance any particular religion, and therefore do not violate Establishment Clause).

113. *See id.* (noting that cross in seal conveyed message of endorsement for Christianity by excluding other belief systems).

114. *See id.* (noting that religious nature of cross is beyond dispute (citing *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc))).

115. *See id.* at 851-52 (noting that cross, as symbol, is indisputably representative of Christianity).

116. *See id.* at 852 (finding no meaningful difference).

in *Murray*, could be distinguished from the Stow seal.¹¹⁷ The Stow seal was found to convey an unmitigated message of endorsement for a particular religion, unlike the Austin insignia, which was found to be permissible because its unique historic derivation negated the impact on observers that would otherwise accompany the presence of a cross in a government seal.¹¹⁸

The City's attempt to draw support from *ACLU v. Capitol Square Review & Advisory Board*,¹¹⁹ a then-recent ruling by the United States District Court for the Southern District of Ohio, upholding the Ohio State motto of "With God All Things Are Possible," was also rejected.¹²⁰ Contrary to the City's contention, the Southern District's ruling had been based on the finding that the motto, unlike the Stow seal, would more likely be understood as an acknowledgment of religion generally, rather than as an endorsement of one particular faith.¹²¹ Given that each of the City's efforts to defend its seal failed to overcome the endorsement formulation of *Lemon's* second prong, it was unnecessary for the court to continue its analysis under the third prong, the excessive entanglement test.¹²² The seal, as designed, could not pass muster under the second prong of the *Lemon* Test, and thus the court held that the seal violated the Establishment Clause.¹²³ The court took pains, however, to make clear that its ruling did not completely preclude localities from acknowledging the

117. *See id.* (noting that Austin insignia could be differentiated from Stow seal based on its historical derivation, if not on its appearance, because derivation of insignia was well known in Austin and would presumably impact perceptions of reasonably informed observers).

118. *See id.* (noting that in context, Stow's seal would much more likely result in perception of "second-class citizen[ship]" for adherents of non-majority beliefs than would Austin's insignia). For a discussion on how the unique derivation of Austin's insignia affects its treatment under the endorsement test, see *infra* notes 141-52 and accompanying text.

119. 20 F. Supp. 2d 1176 (S.D. Ohio 1998), *aff'd en banc*, 2001 U.S. App. LEXIS 3964 (6th Cir. Mar. 16, 2001).

120. *See Stow*, 29 F. Supp. 2d at 852 (rejecting City's attempt to rely on *ACLU v. Capitol Square Review & Advisory Bd.* ruling). The challenged Ohio motto, "With God All Things Are Possible," was taken from a passage in the New Testament of the Christian Bible. *See ACLU v. Capitol Square Rev. & Advisory Bd.*, 210 F.3d 703, 703 (6th Cir. 2000) (noting origins of disputed motto).

121. *See Stow*, 29 F. Supp. 2d at 853 (noting that district court in *Capitol Square Review & Advisory Board* followed line of cases distinguishing between government actions acknowledging religion generally, and practices conveying endorsement of particular religious beliefs). It is worth noting that the District Court for the Southern District of Ohio's decision in *Capitol Square Review & Advisory Board* has since been upheld by the United States Court of Appeals for the Sixth Circuit sitting en banc. *See ACLU v. Capitol Square Review & Advisory Board*, 2001 U.S. App. LEXIS 3964 (6th Cir. Mar 16, 2001) (affirming district court's ruling).

122. *See Stow*, 29 F. Supp. 2d at 851 (finding that seal unconstitutionally endorsed Christianity, without deciding whether seal fostered excessive entanglement between government and religion).

123. *See id.* at 853 (granting ACLU's motion for summary judgment on ground that seal was unconstitutional as matter of law).

importance of religion to their citizens.¹²⁴ As for non-sectarian options, which might properly be used by governments to symbolize the importance of religion in their communities, the court suggested using “hands clasped in prayer, or even a reference to God.”¹²⁵

B. Critical Analysis

1. District Court's Application of the Lemon Test

The district court's statement that “[w]hile the Supreme Court has been unwilling to endorse the *Lemon* test as the ‘be-all’ and ‘end-all’ in Establishment Clause cases, it has continued to apply it almost exclusively,” glosses over the serious dissatisfaction surrounding that test.¹²⁶ Nonetheless, application of *Lemon* in the context of Establishment Clause challenges to government seals is well supported by case law.¹²⁷ The court's focus, in its application of *Lemon*, on whether the seal would convey a message of endorsement to a reasonably informed observer, is also well supported in this context.¹²⁸ Furthermore, the court's attention to the pervasive and year-round use of the Stow City seal is also a common element in opinions dealing with religious symbolism in government seals.¹²⁹

124. *See id.* (noting that there are many nonsectarian ways for cities to recognize importance of religion to local community).

125. *See id.* at 852 (discussing ways that religion might be acknowledged without running afoul of Establishment Clause).

126. For a discussion on criticisms of the *Lemon* test and inconsistencies in its application, see *supra* notes 33-44 and accompanying text.

127. For a discussion of cases applying the *Lemon* test in the context of Establishment Clause challenges to religious symbols in government seals, see *supra* note 47 and accompanying text.

128. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995) (noting that primary issue in case was whether challenged seal violated *Lemon* test's second prong, which, expressed “in endorsement test terms,” asks whether any message of favoritism for a particular religion was being conveyed); *Murray v. City of Austin*, 947 F.2d 147, 156 (5th Cir. 1991) (“giving special consideration to the endorsement test” in analysis of dispute over city insignia); *Harris v. City of Zion*, 927 F.2d 1401, 1415 (7th Cir. 1991) (holding that seals for cities of Rolling Meadows and Zion unconstitutionally endorsed particular religious faith); *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (noting that government cannot cause members of minority faiths to feel like outsiders through endorsement of majority's religion); *Webb v. City of Republic*, 55 F. Supp. 2d 994, 1000 (W.D. Mo. 1999) (noting that inclusion of Christian fish symbol in city seal had impermissible effect of endorsing that religion); *see also Foremaster v. City of St. George*, 882 F.2d 1485, 1492 (10th Cir. 1989) (remanding case for further proceedings to decide whether challenged seal conveyed message of endorsement).

129. *See Robinson*, 68 F.3d at 1232 (noting pervasive use of seal); *Murray*, 947 F.2d at 167 (Goldberg, J., dissenting) (stating that evidence suggested pervasive use of Austin insignia); *Harris*, 927 F.2d at 1408-09 (noting that Rolling Meadows and Zion seals were displayed widely throughout year); *Friedman*, 781 F.2d at 782 (contrasting pervasive appearance of government seal with short term use of holiday creche displays); *Webb*, 55 F. Supp. 2d at 1000-01 (noting continuous invasion of non-Christian residents' lives by appearance of Christian symbol in City of Republic's seal).

By giving special attention to the pervasive nature of the use of government seals, courts have set this particular issue apart as a discrete Establishment Clause question, distinguishable from the complicated case law of holiday display cases.¹³⁰

2. *The Guiding Principle*

The *Stow* court never acknowledged the potential circuit split on this issue identified by Justice Rehnquist's dissent to the denial of certiorari for the *Robinson* decision.¹³¹ Rather than directly denying the existence of a circuit split, the court simply distilled a single decisional guideline that harmonizes the rulings of the circuit courts.¹³² The centerpiece of the *Stow* court's analysis must be this "guiding principle," derived from the cases the court reviewed.¹³³ This principle, that a governmental body cannot use a "sectarian concept or symbol on a daily basis," effectively harmonizes the existing circuit court decisions on religious symbols in government seals, while providing clear and practical guidance for this specific area of Establishment Clause inquiry.¹³⁴ The *Stow* decision's guiding principle for the discrete issue of government seal challenges complements *Lemon*'s test for general Establishment Clause questions, allowing the court to arrive at one consistent and plausible result.¹³⁵

130. See *MENENDEZ*, *supra* note 9, at 151 (noting lack of useful guidance for local officials from ambiguous rulings in holiday display cases). The Supreme Court's rulings on holiday displays have been quite sensitive to physical context, alternatively upholding and striking down uses of religious symbols depending on their immediate surroundings. See, e.g., *CHEMERINSKY*, *supra* note 19, at 1002 (noting that United States Supreme Court's plurality opinion in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), found one display containing *reche* unconstitutional, but upheld another display containing *menorah*). For Justices O'Connor and Blackmun, whose votes in *Allegheny* resulted in one display being invalidated and the other upheld, the critical difference between the two was the presence or absence within the displays of other, secular, symbolic elements. See *id.* (noting that context was deciding factor for critical swing votes in *Allegheny*). Decisions on government seals, in contrast, have repeatedly struck down seals that contained non-religious elements along with the challenged religious elements. See, e.g., *Robinson*, 68 F.3d at 1228 (invalidating seal that contained covered wagon and other symbols, in addition to cross); *Harris*, 927 F.2d at 1403 (striking down seals with non-religious elements, including water tower and dove).

131. See *generally Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (making no reference to possible circuit split on religious symbols in government seals). For a discussion on Chief Justice Rehnquist's dissent to the United States Supreme Court's denial of certiorari for the *Robinson* decision, see notes 70-72 and accompanying text.

132. See *Stow*, 29 F. Supp. 2d at 850 (discussing "guiding principle running through" decisions of Seventh, Tenth and Fifth Circuits).

133. See *id.* (attempting to harmonize rulings in *Murray*, *Harris* and *Friedman*).

134. For a discussion on the *Stow* court's decision as a practical guide for cities and courts confronted with similar questions, see *infra* note 161 and accompanying text.

135. See *Stow*, 29 F. Supp. 2d at 849-50 (deriving principle from circuit court decisions that applied *Lemon* test, to guide analysis of government seal disputes).

3. *Harmonizing the Murray Ruling*

The Fifth Circuit's *Murray* decision poses the most obvious challenge for any standard of decision that would harmonize the case law on this issue.¹³⁶ This is a crucial point because, by harmonizing the decisions of the circuit courts, the *Stow* opinion brings further stability into an area of law that is already fairly settled.¹³⁷ The difficulty, however, lies in reconciling this one decision, holding that a cross in a government seal is permissible, with the weight of authority holding similar seals unconstitutional.¹³⁸ The *Stow* court, however, resolved this apparent conflict by pointing out that the *Murray* court's analysis was entirely consistent with the endorsement test framework that has been employed consistently throughout the case law on this issue.¹³⁹ Simply put, the *Stow* court recognizes *Murray* as a decision focusing on the impact that a particular cross would have on reasonable, informed observers, rather than a decision taking a novel stance on the effect of crosses generally.¹⁴⁰

The *Stow* court distinguished the Austin City insignia from the Stow seal on the basis that a reasonable non-Christian resident of Austin would not be made to feel like a "second-class citizen," because of the unique derivation of the Austin seal.¹⁴¹ Implicitly, the *Stow* court is saying that

136. See *City of Edmond v. Robinson*, 517 U.S. 1201, 1201 (1996) (Rehnquist, C.J., dissenting) (noting contrast between Seventh Circuit's *Harris* decision, striking down seal with cross, and Fifth Circuit's ruling in *Murray*, upholding insignia with cross). But see *Murray v. City of Austin*, 947 F.2d 147, 156 (5th Cir. 1991) (expressly recognizing that other circuits had struck down government seals with religious symbolism, but attributing difference to varying facts rather than recognizing any circuit split).

137. For a discussion of the trend toward stability in this area of law, see *infra* notes 173-78 and accompanying text.

138. For a discussion of the cases striking down city seals with religious imagery that were reviewed by the *Stow* court, see *supra* notes 97-99 and accompanying text.

139. See *Murray*, 947 F.2d at 158 (finding no message of endorsement in Austin insignia, when taken in context). By recognizing that the *Murray* decision rested on the finding that Austin's insignia did not convey any message of endorsement, the *Stow* court brought that ruling into harmony with the decisions of the other circuits on this issue. See *Stow*, 29 F. Supp. 2d at 852 (noting that historic derivation of cross within Austin insignia was well-known and, therefore, relevant to impression that reasonably informed observer would take from it).

140. See *Stow*, 29 F. Supp. 2d at 852 (noting that awareness of Austin's insignia's historic derivation would greatly reduce chances that an impermissible message would be conveyed to non-Christian residents); see also *Murray*, 947 F.2d at 158 (deciding case on "totality of its unique facts and circumstances" without establishing "a bright line test to apply in future challenges"); cf. *Knapp v. Leonardo*, 46 F.3d 170, 182 (2d Cir. 1995) (Oakes J., dissenting) (distinguishing motto "Annuit Coeptis," meaning "He (God) has favored our undertakings," found in some courtrooms on reverse side of "the Great Seal of the United States," from items with genuine religious content, based on "immediacy of impact" on observers).

141. See *Stow*, 29 F. Supp. 2d at 852 (distinguishing between city seals of Stow and Austin). In distinguishing the Austin insignia from the Stow seal, the court also implicitly distinguishes it from those rejected in the *Harris* and *Friedman* cases, having stated that no "meaningful distinction" exists between them and the Stow

because of the Austin City insignia's derivation, the cross appearing in it ceases to be, for any reasonable observer, the sort of sectarian symbol that the cross in Stow's City seal was found to be.¹⁴²

The crucial method for differentiating the *Austin* seal from those that were struck down in other cases is to focus on the symbolic message conveyed, rather than considering only physical or visual content.¹⁴³ It is on this critical distinction that the *Edmonds* decision can be misleading, implying that *Murray* cannot be reconciled with *Friedman* and *Harris*, by declining "to hold that some visible . . . religious images are permissible while other identically visible religious images are not."¹⁴⁴ Relative visibility of items in a seal need not even be a factor in an Establishment Clause inquiry if the challenged item does not convey some message of endorsement.¹⁴⁵

The common element shared by the seals struck down in *Friedman* and *Stow* is that they both contained a cross that was intended to, and did in fact, carry an independent symbolic message.¹⁴⁶ A reasonable observer

seal. *See id.* (finding Stow seal indistinguishable from seals struck down in other circuits).

142. *See id.* (focusing on historical derivation of Austin's insignia to show why it could be upheld while Stow's seal must be struck down); *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting) ("The significance of a symbol lies in what it represents.")

143. *See Murray*, 947 F.2d at 156 (noting that, under endorsement formulation of effects test, message conveyed by use of religious symbolism is determinative factor).

144. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1233 (10th Cir. 1995) (refusing to differentiate between crosses of equivalent visibility based on context within seal). In its concern over courts becoming "immersed in the minutiae of graphic design, . . . rulers and calipers in hand, scrutinizing each symbol for acceptable proportion, color and gloss," the *Robinson* opinion loses sight of the fact that the context of a symbol can influence perceptions of observers. *See id.* (quoting *Murray*, 947 F.2d at 170 (Goldberg, J., dissenting)). The *Stow* court properly recognizes the fact that consideration of the effect of an image similar to the cross in Austin's seal properly includes whatever contextual matters a reasonable observer would take into account in ascertaining its meaning. *See Stow*, 29 F. Supp. 2d at 852 (noting that observers in Austin would know that insignia was derived from family crest, and such knowledge would impact on their perception of what message it conveyed).

145. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.")

146. *See, e.g., Stow*, 29 F. Supp. 2d at 847 (discussing Stow's claims regarding intended meaning of symbols in its seal). The City did not dispute that the symbols in its seal were intended to convey meaning, but sought, unsuccessfully, to label the message of the seal's challenged quadrant as an acknowledgment of "Ultimate Concern[s]" of the community generally. *See id.* at 851 (finding that reasonable observer would perceive message of "official connection between the city and Christianity" from seal); *see also Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc) (noting testimony of one county commissioner, indicating that Bernalillo's cross represented role of Catholic Church in settlement of Southwest).

would understand those crosses, as they appeared within their respective seals, as independent elements conveying particular messages on behalf of their respective cities.¹⁴⁷ Once it has been established that those crosses conveyed a symbolic message, the historical association between crosses and Christianity makes that message sectarian in nature.¹⁴⁸

The cross appearing in the City of Austin's insignia was not a sectarian symbol because it did not carry any independent symbolic message on behalf of the city.¹⁴⁹ As one element in the family crest of Stephen F. Austin, the cross originally conveyed a symbolic message, and it was so intended.¹⁵⁰ Nonetheless, when that family crest was incorporated into Austin's insignia, its components lost their independent significance and the crest as a whole came to represent only the historical personage of Stephen F. Austin.¹⁵¹ A reasonable observer, aware of the basic and perhaps self-evident fact that Austin's city insignia embodies the family crest of a historic figure, would not then interpret the internal elements of that crest as conveying any message of endorsement or otherwise on the city's behalf.¹⁵²

Support for the idea that the historical context of a government practice is a relevant factor for deciding Establishment Clause questions can be found in the Supreme Court's *Marsh* ruling.¹⁵³ Though *Marsh*, unlike

147. See, e.g., *Friedman*, 781 F.2d at 782 (emphasizing fact that cross in Bernalillo's seal was only visual element set off by rays of light); *Stow*, 29 F. Supp. 2d at 851 (finding that images in seal were intended to symbolize significant aspects of life in Stow).

148. See *Stow*, 29 F. Supp. 2d at 852 (noting that "cross is 'the principal symbol of Christianity around the world . . .'" (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995))); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (noting that religious symbols, such as crosses, convey spiritual messages on church's behalf, just as state symbolism carries political meaning on government's behalf); M. Colleen Connor, *The Constitutionality of Religious Symbols on Government Property: A Suggested Approach*, 37 J. CHURCH & Sr. 385, 385 (1995) (noting that symbols will often become closely tied to particular religious beliefs because of role such symbols play in practices of specific religious groups).

149. See *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (noting that effect of Austin's insignia, when viewed in its entirety, was to commemorate distinctive local history and to distinguish government activities).

150. See *id.* at 149 (noting that cross was added to family crest to signify fact that one of Stephen F. Austin's ancestors took part in crusades).

151. See *id.* at 150 (noting that cross was included in insignia as part of family crest of Stephen F. Austin, for whom city was named); see also *TRIBE*, *supra* note 8, at 1294 (discussing capacity of context to neutralize religious messages, as important exception to rules prohibiting government use of "religious tools").

152. See *Stow*, 29 F. Supp. 2d at 852 (noting that general knowledge in Austin, of insignia's derivation, affects message conveyed).

153. See *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983) (reviewing historical background of government sponsored prayer at legislative sessions, in analysis of Establishment Clause challenge to that practice). The *Marsh* opinion provides some guidance as to how much weight ought to be accorded to the historical context of a government practice for Establishment Clause questions. See *id.* at 790 (noting that although long-standing and continuous practice cannot establish right to violate Constitution, such continuity should also not be ignored in decid-

Murray, was decided without relying on *Lemon*, the logic of the two decisions runs parallel.¹⁵⁴ The *Marsh* ruling was based in part on historical evidence that the delegates to the Continental Congress did not consider the practice of government sponsored prayers in the legislature “as symbolically placing the government’s ‘official seal of approval on one religious view.’”¹⁵⁵ This “seal of approval” language can be fairly read as stating that the founders did not view legislative prayers as “endorsing” any particular religion.¹⁵⁶ As such, the Supreme Court has held that a government practice does not threaten disestablishment principles because its historical background suggested that the founders did not perceive it as carrying any message of endorsement.¹⁵⁷ In that context, it seems quite consistent that the Fifth Circuit in *Murray* would look to the commonly known historical background of a government practice to determine whether reasonable persons would perceive an impermissible message of endorsement from it.¹⁵⁸

By recognizing the consistency running through the *Murray* decision and the other circuit court rulings on this issue, the *Stow* decision was able to put forward a comprehensive guiding principle for dealing with this type of dispute.¹⁵⁹ Furthermore, the identification of a consensus among the courts of appeals on this issue will tend to discourage further litigation of similar disputes, with the concomitant effect that the law on this issue is likely to become frozen in place.¹⁶⁰ As for the practical value of the ruling for cities seeking guidance on how to deal with similar disputes, it remains

ing constitutionality); see also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and concurring in judgment) (noting that background of government practice is pertinent to Establishment Clause inquiry because reasonable observer takes background into account in determining whether message of endorsement is conveyed).

154. For a discussion of the facts and holding of the *Marsh* case, see *supra* notes 38-40 and accompanying text.

155. *Marsh*, 463 U.S. at 792 (quoting *Chambers v. Marsh*, 675 F.2d 228, 234 (8th Cir. 1982)).

156. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2278 (2000) (using “seal of approval” phrase in discussion of whether challenged school practice conveyed message of endorsement).

157. See *Marsh*, 463 U.S. at 791 (finding support for upholding contested legislative prayer in historical evidence suggesting that First Amendment draftsmen did not see any threat to Establishment Clause from similar government activities).

158. See *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (noting similarity of challenged use of insignia to practice disputed *Marsh*; in its long history, lack of evidence suggesting intent to promote any particular faith and absence of risk of establishment of religion); cf. *TRIBE*, *supra* note 8, at 1294-95 (noting that within historical context, practices can lose their religious significance).

159. See *Stow*, 29 F. Supp. 2d at 850 (noting that one guiding principle—prohibiting daily government usage of sectarian symbols—runs through rulings of circuit courts).

160. For a discussion on how the weight of authority prohibiting blatantly sectarian seals acts to deter further litigation on the issue, see *infra* notes 173-78 and accompanying text.

to be seen whether local governments will be amenable to using the non-denominational symbolism that the court suggests.¹⁶¹

V. AFTERMATH OF THE *STOW* RULING AND IMPORTANCE FOR FUTURE DISPUTES

A. *Epilogue*

Following the district court's disposition of the *Stow* case, the City came to an agreement with the ACLU to resolve their dispute.¹⁶² A new seal with the words "In God We Trust" replacing the cross was adopted, and the crosses on older seals were covered up with tape pending their removal.¹⁶³ *Stow's* City Council had originally voted to spend the estimated one hundred thousand dollars it could have taken to challenge the district court's ruling, but they finally chose to accept the ruling and remove the cross.¹⁶⁴ The City ended up spending about six thousand dollars—three thousand dollars to the insurance carrier that had paid for the legal defense of the seal and about three thousand dollars to purchase the new seals to comply with the court's decision.¹⁶⁵ The fact that the insurer

161. See *Stow*, 29 F. Supp. 2d at 852 (noting that reference to God or image of "hands clasped in prayer" might be acceptable ways for government to acknowledge religion). Some evidence can be found to indicate that the *Stow* court's suggestion of nonsectarian references to God might not be an entirely satisfactory solution for politicians trying to appease local voters. See Rofes, *supra* note 6, at 880 (noting that after one Wisconsin city replaced cross in its seal with "In God We Trust" motto to avoid potential lawsuit, its formerly popular mayor was nearly voted out of office in favor of opponent whose two main campaign promises were to provide free doughnuts at his office on Thursdays and to bring back old logo).

162. See Karen Farkas, *Stow Nears End of City Seal Battle*, PLAIN DEALER (Cleveland), Apr. 16, 1999, at 1B, available at 1999 WL 2358458 (noting resolution of dispute underlying *Stow* case).

163. See *id.* (discussing steps taken by City of *Stow* to comply with district court's ruling). The open book that had appeared in the same quadrant of the *Stow* seal as the cross, was retained. See Donna J. Robb, *Stow Council Picks New Design for Seal*, PLAIN DEALER (Cleveland), Feb. 13, 1999, at 1B (noting that "unmarked open book on the seal, commonly seen as a Bible" will be kept in new seal).

164. See Farkas, *supra* note 162, at 1B (discussing *Stow* City Council's decision not to pursue appeal). The Mayor of *Stow* explained that the resolution of the case was a compromise because *Stow* would be able to keep some measure of spiritual symbolism in its seal. See *id.* (discussing Mayor's reaction to resolution of seal dispute). But see Robb, *supra* note 163, at 1B (noting that coalition of local citizens felt that ruling had taken away their free speech rights, and that settlement was contrary to will of *Stow's* citizens).

165. See generally Farkas, *supra* note 162 (noting costs to City for legal defense, and replacement of seals). Donations covered much of the eight thousand dollar deductible on *Stow's* insurance policy, leaving the three thousand dollar remainder to be paid from City funds. See *id.* (discussing sources of funds for legal expenses).

would not have paid for an appeal of the district court's ruling was apparently a factor in the city's decision not to pursue further litigation.¹⁶⁶

B. *Impact*

The *Stow* decision is the ruling of a federal district court and, therefore, carries only persuasive weight as legal precedent for other districts.¹⁶⁷ The true importance of this decision lies in the fact that it persuasively synthesizes and harmonizes the existing case law on challenges to religious symbols in government seals.¹⁶⁸ The Supreme Court's Establishment Clause jurisprudence from the last century has left an exceptionally complicated body of precedent for lower courts to apply.¹⁶⁹ Without a Supreme Court opinion speaking directly to this issue, localities and lower courts dealing with challenges to city seals will seek out guidance elsewhere.¹⁷⁰ The *Stow* decision serves this need by finding the common ground among the circuit court decisions on this issue, and distilling them into one guiding principle for dealing with religious symbolism in government seals.¹⁷¹

Cities facing a costly and divisive battle in the courts can look to the *Stow* court's synthesis of the case law on this issue to predict whether their seals will survive a challenge, or whether any compromise choices might be acceptable to all parties.¹⁷² Also, as the weight of authority prohibiting blatantly sectarian symbols in municipal seals continues to grow, localities will be increasingly reluctant to engage in dubious litigation over seals that seem unlikely to withstand judicial scrutiny.¹⁷³ The *Stow* ruling strength-

166. *See id.* (noting that lack of insurance coverage for legal fees discouraged further litigation).

167. *See* RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 20 (1997) (noting that law of federal district court begins and ends at boundaries of that district); KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 28-29 (Paul Gewirtz ed., Michael Ansaldi trans., Univ. of Chi. Press 1989) (noting that precedents of federal district courts are not binding on one another).

168. For a discussion of the *Stow* opinion's synthesis of the Establishment Clause case law on religious symbols in government seals, see *supra* notes 131-61 and accompanying text.

169. *See* WITTE, *supra* note 1, at 149 (noting Supreme Court's difficulty integrating various principles brought into Establishment Clause analysis by individual justices).

170. *See* David L. Gregory & Charles J. Russo, *The Supreme Court's Jurisprudence of Religious Symbol and Substance*, 28 *LOY. U. CHI. L.J.* 419, 424 (1997) (concluding that Supreme Court's decisions regarding religious symbols do not provide much useful guidance to government decisionmakers).

171. *See Stow*, 29 F. Supp. 2d at 852 (noting that although Establishment Clause prohibits use of sectarian symbolism in seal, cities may acknowledge religion in general if done with care).

172. *See id.* at 853 (noting that many nonsectarian options remain that would allow *Stow* to acknowledge importance of religion to its citizens).

173. *Cf.* MENENDEZ, *supra* note 9, at 144-45 (discussing actions taken by local governments to avoid costly litigation over holiday displays).

ens this trend by downplaying any possible split among the circuits.¹⁷⁴ If cities faced with similar Establishment Clause challenges choose simply to avoid litigation by removing disputed symbols from their seals, the law on this issue will remain as it currently stands.¹⁷⁵

The City of Stow's decision not to appeal in this case foreshadows the possible reluctance of other municipalities to engage in litigation over similar questions, suggesting that the law in this area will indeed become fixed in its present state.¹⁷⁶ Despite public pressures, other cities have already chosen to accept compromises rather than litigate or appeal similar issues in the courts.¹⁷⁷ The City Attorney for one such municipality said publicly that "his ethical obligations as a lawyer," and the threat of being sanctioned for filing frivolous pleadings, would preclude him from defending their seal given the current state of First Amendment law.¹⁷⁸

To avoid litigation and pacify voters, cities may follow the *Stow* court's opinion by using clearly non-sectarian images to acknowledge religion, or they might follow the City's example by falling back on symbolic items like the "In God We Trust" motto, with its constitutionality already firmly established.¹⁷⁹ When localities choose to defend similar seals in the courts, however, the *Stow* decision will stand convincingly for the proposition that the courts have reached a consensus against daily governmental usage of sectarian images.¹⁸⁰

174. See *Stow*, 29 F. Supp. 2d at 849-50 (noting that one principle runs through rulings of Tenth, Seventh and Fifth Circuits on this issue).

175. See WITTE, *supra* note 1, at 173 (noting that local governments often compromise voluntarily on Establishment Clause disputes in order to avoid expensive lawsuits).

176. See *id.* at 174 (discussing "voluntary 'First Amendmentization' of religion and politics," by local governments).

177. See Rofes, *supra* note 6, at 877-78 (noting Wauwatosa City Government's decision to remove cross from seal rather than face potential litigation); see also John Rogers, *After Court Fight, City Removes Christian Symbol from Its Seal*, PATRIOT LEDGER (Quincy, Mass.), July 21, 1999, at 12, available at 1999 WL 8467855 (discussing Republic, Missouri's decision to remove Christian fish symbol from its seal, rather than appeal court ruling). But see Karst, *supra* note 5, at 509 (arguing that local politicians are likely to knowingly intensify divisions over religious symbols in government for political gain).

178. See Rofes, *supra* note 6, at 877 (noting Wauwatosa City Attorney's reasons for counseling against litigating city seal dispute); see also FED. R. CIV. P. 11(b) (providing that attorney filing pleadings certifies that "legal contentions therein are warranted by existing law or by a nonfrivolous argument").

179. See Farkas, *supra* note 162, at 1B (noting that City of Stow replaced cross in seal with "In God We Trust" motto); cf. *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996) (rejecting challenge to statutes establishing "In God We trust" as national motto). The *Gaylor* court pointed to repeated and uncontradicted support, in United States Supreme Court dicta, for the constitutionality of the national motto. See *id.* at 217 (noting support for upholding national motto).

180. Cf. *Webb v. City of Republic*, 55 F. Supp. 2d 994, 1000 (W.D. Mo. 1999) (noting that absent special factors similar to those present in *Murray*, legal precedent is settled on prohibition of religious symbols in city seals).

C. *Conclusion*

The district court's opinion laments the fact that this issue has caused so much dissension in the Stow community, given the likelihood that few residents ever noticed its contents prior to this dispute.¹⁸¹ Furthermore, being forced by the courts to alter the symbols of their local civic pride has surely caused genuine distress to defenders of the Stow seal and others like it.¹⁸² On this point, however, we can look to the statement of the Tenth Circuit in *Friedman*: "The comfort of the majority is not the main concern of the Bill of Rights."¹⁸³ In our modern, pluralistic society, the *Stow* decision stands clearly for the principle that the time has finally come to banish divisive sectarian imagery from government seals.¹⁸⁴

Kevin J. McCabe

181. See *Stow*, 29 F. Supp. 2d at 852 (expressing regret that publicity surrounding legal battle over Stow's seal had increased its divisive impact).

182. See Farkas, *supra* note 162, at 1B (noting that some Stow residents were offended that cross in seal was covered in order to comply with district court ruling); see also Rogers, *supra* note 177, at 12 (noting that residents reacted with "[g]asps, hisses and shouts of '[s]pineless cowards'" to announcement that Republic, Missouri would remove Christian fish symbol from city seal, pursuant to district court ruling); cf. Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 401 & n.217 (2000) (mentioning *Stow* decision and also making reference to *Webb* decision, which struck down seal with Christian fish symbol, while criticizing discouragement of religion by Clinton-appointed judges).

183. *Friedman v. Bd. of County Comm'rs of Bernalillo*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc).

184. See *Stow*, 29 F. Supp. 2d at 852 ("If there is to be a use of a religious symbol in a regular, daily context . . . , the governmental entity must take great care that the symbol draws people together, and does not create a wedge among them.").

