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Religious Expression on Public Grounds: Two Approaches to the Relationship between Church and State in the Tenth Circuit

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RELIGIOUS EXPRESSION ON PUBLIC GROUNDS: TWO APPROACHES TO THE RELATIONSHIP BETWEEN CHURCH AND STATE IN THE TENTH CIRCUIT

INTRODUCTION

The Free Speech Clause of the First Amendment to the United States Constitution is one of the hallowed hallmarks of our democratic form of government.[1] Indeed, although presently all democratic governments give some form of protection to expression, nowhere is the protection more fundamental or expansive than in the United States.[2] Religious expression in particular has found considerable protection in the form of the First Amendment's two Religion Clauses.[3] The Establishment Clause provides that the government may not pass laws that establish a state religion, while the Free Exercise Clause mandates that an individual's right to freely practice her own faith may not be infringed upon by the government.[4]

In the period covered by this survey, September 2001 to August 2002, the Tenth Circuit Court of Appeals decided two cases that substantially involved the seminal First Amendment protections of speech and religion. In *Fleming v. Jefferson County School District R-1*,[5] the court had to determine whether or not a school district that was home to a horrifying high school shooting was justified in refusing to include in a school redecoration project certain decorative wall tiles because they contained particular subject matter.[6] In *Summum v. City of Ogden*,[7] the court considered whether a municipality had unconstitutionally infringed upon a religious sect's First Amendment free speech rights when the municipality refused to allow the sect to post a monument containing its religious tenets on public property alongside an already-standing "monument inscribed with the Ten Commandments."[8]

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1. The First Amendment provides, in whole: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. DANIEL A. FARBER, THE FIRST AMENDMENT 1 (1998).

3. *See* Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1711 (2000) (stating that the First Amendment's Religion Clauses are "the principal constitutional protections for religious liberty and the separation of church and state in a nation characterized by religious pluralism").

4. U.S. CONST. amend. I.

5. 298 F.3d 918 (10th Cir. 2002).

6. *Fleming*, 298 F.3d at 920, 922.

7. 297 F.3d 995 (10th Cir. 2002).

8. *Summum*, 297 F.3d at 997-98.

Although both of these cases involved crucial questions concerning the expression of religious messages within publicly-owned spaces, it is significant that they were both decided on free speech grounds, and the Establishment Clause was given little attention in their adjudication. This survey examines this perceived inattention of the Tenth Circuit Court of Appeals to the issues arising from the Establishment Clause, and argues that the cases represent two starkly divergent, yet equally salient, views of the proper relationship between church and state. Part I of the survey focuses on the *Fleming* case. It reviews the United States Supreme Court jurisprudence dealing with free speech in public schools over the past three decades, analyzes the *Fleming* decision itself, and then examines decisions of other circuits in relation to the particular free speech issues that the Tenth Circuit Court of Appeals faced in *Fleming*. Part II outlines a general history of the case law concerning efforts to erect religious monuments on public grounds, examines the Tenth Circuit's decision in *Summum*, and reviews decisions of other circuits regarding similar legal issues. Finally, Part III provides an overview of the import that the *Fleming* and *Summum* decisions may have for the issues of religious expression that face the country today.

I. FREE SPEECH IN PUBLIC SCHOOLS: HISTORICAL TRENDS AND THE TENTH CIRCUIT'S DECISION IN *FLEMING V. JEFFERSON COUNTY SCHOOL DISTRICT R-1*[9]

A. *Student and Private Individual Speech in Public Schools—A Historical Perspective and Legal Framework*

1. Beginnings: *Tinker* and Its Aftermath

The belief that the First Amendment protects student and other private individual expression within the public school setting has not always been commonly held, nor has it been applied with ease by the courts.[10] Indeed, until the 1970s, the general presumption and view was that school authorities retained a superior right and interest in controlling both curriculum content and student behavior that overrode the students' rights to freedom of expression.[11] This presumption in favor of the authority of school districts to curtail student and private individual expression in the public schools, however, met with a resounding turnabout in the landmark United States Supreme Court case of *Tinker v. Des Moines Independent Community School District*.[12]

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9. 298 F.3d 918 (10th Cir. 2002).

10. Edward T. Ramey, Article, *Student Expression: The Legacy of* Tinker *in the Wake of Columbine*, 77 DENV. U. L. REV. 699, 699 (2000).

11. David L. Dagley, *Trends in Judicial Analysis Since* Hazelwood*: Expressive Rights in the Public Schools*, 123 EDUC. L. REP. 1, 2 (1998).

12. 393 U.S. 503 (1969); *see* Dagley, *supra* note 11, at 4.

In *Tinker*, a young woman and her brother wore black armbands to their school to peacefully protest the United States military's presence in Vietnam.[13] After refusing to remove the armbands, the students were sent home by the school principal.[14] The Court found that the school did not have the right to infringe on the students' right to express their anti-war beliefs, even if those beliefs were potentially controversial.[15] As Justice Fortas so famously articulated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16]

Although by no means conferring an absolute right of free expression on public school students,[17] *Tinker* stands for the proposition that public school students and private individuals do have certain fundamental rights of free speech in the school setting that are constitutionally protected and that thus have to be respected.[18] The ruling was "the highwater mark for public school students' First Amendment rights."[19] Subsequent Supreme Court decisions, perhaps as a result of a shift towards a more conservative ideology, began to carve out exceptions to the general recognition of students' rights of expression.[20]

One of these exceptions was first articulated in *Bethel School District No. 403 v. Fraser*.[21] In that case, a high school student named Matthew N. Fraser gave a speech nominating a fellow student for student elective office at an assembly attended by 600 other students.[22] Throughout the speech, Fraser incorporated an explicit sexual metaphor into his references to the candidate.[23] The student reaction to the speech ran the

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13. *Tinker*, 393 U.S. at 504.
14. *Id.*
15. *Id.*at 505-06, 513-14.
16. *Id.* at 506.
17. The Court announced a test based on the degree to which the expression interfered with normal school activities, i.e. student conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. Thus, any conduct that fell under this "substantial and material disruption" umbrella would not be protected. *See id.*
18. *See* Ramey, *supra* note 10, at 702 ("[T]he rhetoric of *Tinker* was a manifestation of respect for and confidence in our nation's young people. The Supreme Court case was a ringing refusal to demean them as second-class citizens, or worse.").
19. Broussard v. Sch. Bd., 801 F. Supp. 1526, 1534 (E.D. Va. 1992).
20. Ramey, *supra* note 10, at 702-03.
21. 478 U.S. 675, 685 (1986).
22. *Bethel*, 478 U.S. at 677.
23. *Id.* at 678. In his concurring opinion, Justice Brennan provided some of the text of Fraser's speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

gamut from confusion and embarrassment to loud approval.[24] Fraser was subsequently suspended from school by the School District for three days and his name was removed from a list of candidates for graduation speaker at that year's commencement ceremony.[25] After he returned to school, Fraser and his father, who was acting as guardian *ad litem*, brought suit in federal district court alleging that the School District infringed upon Fraser's right to free speech under the First Amendment.[26] The district court ruled in favor of Fraser, and the Ninth Circuit Court of Appeals affirmed.[27]

On appeal, the Supreme Court reversed, holding that the School District "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[28] The Court said that schools have a duty to expand their influence beyond books and curriculum and to "teach by example the shared values of a civilized social order."[29] According to the Court, the School District's actions were appropriate because they showed the students that "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[30] Thus, in *Bethel*, the exception that allows public schools to control "speech that is lewd, indecent, or offensive" was born.[31]

In *Hazelwood School District v. Kuhlmeier*,[32] the Court established another exception to students' rights of free speech based on the notion that in some instances schools sponsor, and thus adopt, certain speech.[33] In that case, a principal directed a teacher to remove two student-written articles from a high school newspaper.[34] The Tenth Circuit applied this exception in *Fleming*.[35] This survey will, therefore, examine the *Hazelwood* decision in greater detail below.

2. Public Forum Analysis: *Perry Education Ass'n v. Perry Local Educators' Ass'n*[36]

Perry Education Ass'n v. Perry Local Educators' Ass'n,[37] is possibly the most important Supreme Court case involving the public forum

24. *Id.* at 678.
25. *Id.*
26. *Id.* at 679.
27. *Id.*
28. *Id.* at 685.
29. *Id.* at 683.
30. *Id.* at 685-86.
31. Dagley, *supra* note 11, at 8.
32. 484 U.S. 260 (1988).
33. *Kuhlmeier*, 484 U.S. at 270-73.
34. *Id.* at 262-64.
35. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 923-26 (10th Cir. 2002).
36. 460 U.S. 37 (1983).
37. 460 U.S. 37.

doctrine.[38] In that case, a collective bargaining agreement between a board of education and a teachers' union mandated that only that union, and not a rival union, could use a school district's interschool mail delivery system.[39] A rival teachers' union was excluded from using the mail system because under the collective bargaining agreement, it was not the recognized bargaining agent for the district's teachers.[40] The rival union consequently sued the school district and alleged that denying it access to the mail system violated its free speech rights.[41]

The Supreme Court's analysis was based on the character of the forum in question.[42] The Court separated the properties that fall under this public forum doctrine into three different categories.[43] Public fora are public areas such as parks and streets "which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[44] The government may not ban all speech in these fora.[45] The government can only implement a restrictive, content-based regulation when the "regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."[46]

At the other end of the public property spectrum is the nonpublic forum.[47] A nonpublic forum is one that is publicly owned but that has a "governmental function other than the open and unfettered exchange of ideas."[48] The government's power to regulate nonpublic fora is similar to the power a private owner has to control his property.[49] The government may not only adopt reasonable restrictions on the time, place, and manner of expression, but may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[50] Nonpublic fora include post offices, municipal buildings, and public schools.[51] Thus, in a nonpublic forum, the government retains its most expansive authority to restrict expression on public premises.[52]

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38. Dagley, *supra* note 11, at 5.
39. *Perry*, 460 U.S. at 39.
40. *Id.* at 40-41.
41. *Id.* at 41.
42. *Id.* at 44.
43. *Id.* at 44-46.
44. *Id.* at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
45. *Id.*
46. *Id.*
47. Dagley, *supra* note 11, at 5.
48. *Id.*
49. *Id.* at 5-6.
50. *Perry*, 460 U.S. at 46.
51. Dagley, *supra* note 11, at 5-6.
52. *See id.*

The third type of public property, the limited access public forum, falls somewhere between these two other categories.[53] The limited access public forum is a forum that was previously nonpublic but has been opened by the government for the public to use in expressive activity.[54] The government has affirmatively changed the character of these fora to allow for the expressive activity.[55] The government may restrict expression in the same manner and to the same degree as a traditional public forum.[56] Restrictions on speech in limited access public fora based on content are prohibited unless the restriction is "narrowly drawn to effectuate a compelling state interest."[57]

The *Perry* Court ultimately ruled that the interschool mail system at issue was a nonpublic forum.[58] Thus, the School District had the right to limit the activities carried on through the system to those that comport with the purpose the government selected for the property.[59]

Public forum analysis has become a very useful tool for analyzing restrictions on free speech in the public school setting.[60] In addition, the test set forth in *Perry* has become "the governing standard for regulation of speech on public property."[61] Accordingly, the public forum method of analysis was the starting point for the Tenth Circuit Court of Appeals in its adjudication of the dispute in *Fleming*.[62] However, the crux of the court's analysis ultimately depended upon the doctrines set forth in another Supreme Court case that involved free speech in public schools.

3. The *Hazelwood* Standard: School-Sponsored Speech

The fundamental holding of *Hazelwood School District v. Kuhlmeier*[63] is that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[64] In *Hazelwood*, three student staff members of a high school newspaper sued a School District because their school principal decided to excise two articles from an issue before it was printed.[65] One of the omitted articles was about the experiences students had with teen pregnancy and the other about the

53. *See Perry*, 460 U.S. at 45-46.
54. *Id.* at 45.
55. *Id.*
56. *Id.* at 46.
57. *Id.*
58. *Id.*
59. *Id.* at 50-51.
60. Dagley, *supra* note 11, at 5.
61. FARBER, *supra* note 2, at 174.
62. *Fleming*, 298 F.3d at 929.
63. 484 U.S. 260 (1988).
64. *Hazelwood*, 484 U.S. at 273.
65. *Id.* at 262-64.

impact of divorce on students at the school.[66] The principal was concerned that the articles could harm the school's younger students.[67] He was also concerned that readers would be able to identify the students referred to in the articles even though the authors used fictitious names.[68]

In an opinion written by Justice White, the Supreme Court decided that there was, as Professor Edward Ramey has put it, "an operative distinction between speech which a school must tolerate and speech which a school must sponsor."[69] The *Tinker* decision mandates that schools must abide most student speech that transpires on school premises.[70] However, regarding school-sponsored speech, the *Hazelwood* court said:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[71]

The Court's definition of school-sponsored speech was fairly expansive.[72] School-sponsored speech encompasses "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[73] These are activities that the Court asserted could "fairly be characterized as part of the school curriculum, *whether or not they occur in a traditional classroom setting*, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[74] Thus, the *Hazelwood* Court broadened the definition of curriculum to include anything that someone might reasonably believe the school sponsored.[75]

Hazelwood placed greater limitations on students' rights of expression and deferred more to the educational aims and methods of school officials than *Tinker*.[76] This shift could be attributable to fall-out from the rebellious student uprisings of the 1960s or to changes in the Court's

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66. *Id.* at 263.
67. *Id.*
68. *Id.*
69. Ramey, *supra* note 10, at 706.
70. *Hazelwood*, 484 U.S. at 270-71.
71. *Id.* at 271.
72. *See* Dagley, *supra* note 11, at 9.
73. *Hazelwood*, 484 U.S. at 271.
74. *Id.* (emphasis added).
75. Dagley, *supra* note 11, at 9.
76. *See* JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 327 (2000).

makeup in recent years.[77] The Tenth Circuit Court of Appeals applied *Hazelwood* and the expanded authority of school officials in *Fleming*.[78]

B. Circuit Court Applications of the School-Sponsored Speech Exception

1. Tenth Circuit: *Fleming v. Jefferson County School District R-1*[79]

a. Facts

On April 20, 1999, two students from Columbine High School, Eric Harris and Dylan Klebold, entered the school and went on a shooting rampage.[80] They killed twelve students and one faculty member.[81] The shooters also took their own lives.[82] The Jefferson County School District ("the District") decided to reopen the school the following fall.[83] It realized, however, that the "prospect of reintroducing students to the [Columbine High School] building posed significant mental health challenges."[84] School officials were concerned that various "sensory clues" might remind students of the attack.[85]

To help alleviate these concerns, Elizabeth Keating, the school librarian, and Barbara Hirokawa, an art teacher, urged the District to continue an ongoing student art project that placed individually designed and painted 4-inch-by-4-inch glazed tiles on the hallway walls throughout the school.[86] After she consulted with various District administrators, the area administrator who oversaw Columbine High, Barbara Monseu, gave preliminary approval for Keating and Hirokawa to implement an expanded version of the tile project.[87] The District issued a press release that gave two central reasons for the tile project.[88] First, participating in the tile project would give students the opportunity to become comfortable with their school surroundings again.[89] In addition, students who participated would play a part in reconstructing their school.[90]

In order to help the community heal, the District also asked members of the victims' families, emergency workers who responded to the incident, and health care professionals who cared for the wounded to participate.[91] Hundreds of individuals who were related to the shooting

77. *Id.*
78. *See Fleming*, 298 F.3d at 929-34.
79. 298 F.3d 918 (10th Cir. 2002).
80. *Fleming*, 298 F.3d at 920.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 921.
88. *Id.* at 920.
89. *Id.* at 920-21.
90. *Id.* at 921.
91. *Id.*

ultimately painted tiles.[92] In order to better fulfill the aims of the project, the District and Ms. Monseu issued guidelines for the tiles.[93] These guidelines were imposed primarily to "assure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy."[94] Participants were not to make any references to the attack, the date the attack occurred, incorporate students' names or initials, Columbine memorial ribbons, or religious symbols, or include any material that was "obscene or offensive."[95]

Teachers from Columbine High School informed the participants of the guidelines and supervised the painting.[96] The plaintiffs objected to the guidelines.[97] These participants wished to paint tiles that included the names of their lost loved ones and religious symbols.[98] The supervising faculty informed these participants that they were free to paint the tiles as they wished, but if the tiles violated the guidelines, they would not be used to decorate the walls and would instead be given back to the designers for their personal use.[99]

The District ultimately removed eighty to ninety tiles that had escaped earlier review from the walls because they violated the guidelines.[100] In September 1999, Ms. Monseu met with some of the people who had objected to the guidelines and agreed to relax some of the restrictions.[101] Participants were told that they could include the name and initials of their children, dates other than April 20, and the Columbine memorial ribbon.[102] However, religious symbols, the date of the attack, and offensive or obscene materials were still prohibited.[103]

The plaintiffs were not satisfied with the relaxed standards.[104] They filed suit in federal district court under 42 U.S.C. §§ 1983 and 1988, alleging that the District infringed upon their free speech rights and violated the Establishment Clause of the First Amendment.[105] The district court granted judgment for the plaintiffs on the free speech claim, and judgment for the District on the Establishment Clause claim.[106] The Dis-

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* The Plaintiffs wished to include "Jesus Christ is Lord," "4/20/99 Jesus Wept," "There is no peace says the Lord for the wicked," and signs of the cross in their designs. *Id.*
99. *Id.*
100. *Id.* at 921-22.
101. *Id.* at 922.
102. *Id.*
103. *Id.*
104. *See id.*
105. *Id.*
106. *Id.* at 920 n.1.

trict appealed the ruling on the free speech issue to the Tenth Circuit Court of Appeals.[107]

b. Decision

The plaintiffs did not appeal the judgment against them on the Establishment Clause.[108] Thus, the Tenth Circuit Court of Appeals did not address the issue, stating bluntly that "only the Free Speech Clause issue [was] before [them]."[109] However, the Tenth Circuit reversed the district court's ruling on the free speech claim.[110] It diverged from the lower court's central holding that the speech in question was *not* school-sponsored speech.[111]

To elucidate the reasoning behind its reversal, the court began its analysis by pointing out that "three main categories of speech . . . occur within the school setting."[112] Of the three, the court ruled that the tile project was a nonpublic forum.[113] This issue was not really disputed, however, because both "parties concede[d] that the tile project does not constitute a traditional public forum or a designated public forum, and [the court's] review of the record comport[ed] with this analysis."[114] Moreover, the District never opened the tile project to "indiscriminate use" by the general public or the participants.[115] Thus, "[t]he level of control that the District retained over the tile project" made the project a nonpublic forum.[116]

The district court ruled that the tiles were not school-sponsored speech under *Hazelwood.*[117] According to the Tenth Circuit, the district court concluded that in order to be school-sponsored speech, it had to derive from "activities conducted as part of the school curriculum."[118] The Tenth Circuit asserted that the district court had read *Hazelwood* too narrowly.[119] Instead, school-sponsored speech consists of "activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns."[120] Speech bears the imprimatur of the school if it is "so closely connected to the school that it appears the school is somehow sponsoring the speech."[121] In addition, "the level of

107. *Id.* at 920.
108. *Id.* at 920 n.1.
109. *Id.*
110. *Id.* at 934.
111. *Id.* at 923.
112. *Id.*
113. *Id.* at 929-30.
114. *Id.* at 929.
115. *Id.*
116. *Id.* at 929-30.
117. Fleming v. Jefferson County Sch. Dist., 170 F. Supp. 2d 1094, 1108 (D. Colo. 2001).
118. *Fleming*, 298 F.3d 924 (quoting *Fleming*, 170 F. Supp. 2d at 1108).
119. *Id.*
120. *Id.*
121. *Id.* at 925.

involvement of school officials in organizing and supervising an event affects whether that activity bears the school's imprimatur."[122] The Tenth Circuit stated that "expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school."[123] The court defined pedagogical as "related to learning."[124] The court noted that "[m]any cases have applied a *Hazelwood* analysis to activities outside the traditional classroom where, so long as the imprimatur test is satisfied, the pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment."[125]

The *Hazelwood* Court was not ambiguous about requiring greater deference to school officials who are charged with educating the nation's youth.[126] The Tenth Circuit followed this direction and gave

> substantial deference to educators' stated pedagogical concerns. The [*Hazelwood*] Court recognized that its articulated standard for school-sponsored expression was 'consistent with [its] oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.'[127]

The Tenth Circuit found that the tile project satisfied both prongs of the test for school-sponsored speech.[128] The court's finding that the tiles bore the imprimatur of the school was based on the belief that people would imply that the school approved of them from the fact that they were permanently attached to the walls.[129] Moreover, the significant level of the school's involvement with the tile project strongly suggested that the school had in some way approved of its content.[130] Finally, the court dismissed the district court's argument that the tiles were all individually painted by members of the *surrounding community* and not by school officials:

> No doubt the variety and number of tiles would lead an observer to understand that the school itself did not paint the tiles. However, the observer would likely perceive that the school had a role in setting

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 925-26.
126. *Hazelwood*, 484 U.S. at 273 & n.7.
127. *Fleming*, 298 F.3d at 925 (quoting *Hazelwood*, 484 U.S. at 273).
128. *Id.* at 931.
129. *Id.* at 930.
130. *Id.* ("When coupled with organizing, supervising, approving the funding, and screening the tiles," the court wrote, "the school's decision permanently to mount them on the walls conveys a level of approval of the message.").

> guidelines for, and ultimately approving, the tiles it allowed to become a part of the school itself, which in this case, it did.[131]

The Tenth Circuit also found that the goal of the project implicated legitimate pedagogical concerns.[132] According to the court, "[t]he purpose of reacquainting the students with the school and participating in community healing falls under the broad umbrella that courts have given to pedagogical purposes."[133] Furthermore, the fact that the tile project involved people outside of the school's staff and student body didn't diminish the project's pedagogical character.[134] "[S]o long as a pedagogical purpose is present," opined the court, "we do not believe that the existence of broader and consistent objectives, such as community involvement, should result in the loss of the proper pedagogical purpose."[135]

In addition, the court found that the District's restriction of religious content on the tiles was reasonably related to legitimate pedagogical concerns.[136] The District contended that the tiles containing religious messages had to be prohibited because 1) they might remind viewers of the shooting, and 2) displaying them would make walls "a situs for religious debate, which would be disruptive to the learning environment."[137] The court clearly agreed with the District because it found that the ban "was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls."[138] To buttress its holding, the court described the absurd situations that might arise if the school did not have the authority to restrict such expression.[139] Referring to its conclusion that the District had the right to make decisions based on *viewpoint* or the *content* of particular expression, the court stated:

> If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as "God is Hate," once it allows tiles that say "God is Love." When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it.[140]

The Tenth Circuit acknowledged that the circuit courts of appeals were split about whether schools could impose viewpoint-based limita-

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131. *Id.*
132. *Id.* at 931.
133. *Id.*
134. *Id.* at 931-32.
135. *Id.* at 932.
136. *Id.* at 933, 934.
137. *Id.* at 933.
138. *Id.* at 934.
139. *Id.*
140. *Id.*

tions on school-sponsored speech. [141] Significantly, the potential for the plaintiffs to appeal this decision to the United States Supreme Court ended in January 2003, when the Supreme Court denied a writ of certiorari and refused to hear the case.[142]

2. Other Circuits

a. Eighth Circuit: *Henerey v. City of St. Charles*[143]

i. Facts

Adam Henerey, a sophomore at St. Charles High School in St. Charles, Missouri, requested to run for junior class president.[144] In order to run, each candidate had to meet with a student council advisor and sign a contract of obligation where the candidate agreed to follow all school rules, which Henerey signed.[145] Sometime later a member of the student counsel told Henerey that campaign fliers and posters had to be approved by the school administration before they were disseminated.[146] Henerey obtained the school's approval to use the campaign slogan, "Adam Henerey, The Safe Choice."[147] On the day of election, he handed out approximately eleven condoms attached to stickers containing his campaign slogan in the School's hallways.[148] The School subsequently disqualified Henerey from the election because he had not obtained the School's approval to hand out condoms attached to the campaign stickers.[149] Henerey later sued, alleging that the School violated his free speech rights.[150] The district court found that the student counsel election occurred in a nonpublic forum and that disqualifying Henerey from the election was reasonably related to legitimate pedagogical concerns and, thus, constitutional.[151]

ii. Decision

The Eighth Circuit Court of Appeals agreed with the district court that the election took place in a nonpublic forum and that the student campaign materials used in the election were school-sponsored speech.[152] The main issue for the court, then, was whether the School District's

141. *Id.* at 926 (discussing the split in circuits regarding the issue of content-based restrictions of expression in the public school setting).

142. *See* Fleming v. Jefferson County Sch. Dist. R-1, 123 S. Ct. 893 (2003); Jim Hughes, *U.S. High Court Leaves Alone Ruling Against Tiles' Display*, DENV. POST, Jan. 14, 2003, at 8A.

143. 200 F.3d 1128 (8th Cir. 1999).

144. *Henerey*, 200 F.3d at 1131.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1133.

decision "was reasonably related to legitimate pedagogical concerns."[153] On this point the court concurred with the district court's finding that the decision was reasonable.[154] As the court explained, "School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded, an interest that was particularly strong in the present case because the condom distribution occurred within the context of a school-sponsored election."[155] Implicit in this view is the belief that educators have a right to preclude speech based on a message's content.[156] The Eighth Circuit affirmed the district court's judgment in favor of the City of St. Charles because the decision to disqualify Henerey was reasonably related to legitimate pedagogical concerns, and because "Henerey's distribution of the condoms carried with it the implied imprimatur of the school."[157]

b. Ninth Circuit: *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*[158]

i. Facts

Planned Parenthood, a nonprofit organization that offers family planning and reproductive health education programs, submitted advertisements to the school newspapers and athletic programs within a school district ("the District") for publication.[159] The majority of the schools in the District refused to publish the advertisements.[160] As a result, Planned Parenthood filed suit alleging that the District had infringed on the organization's right of free speech.[161] The district court ruled that the school publications were nonpublic forums under *Hazelwood* and that the District's decision to reject the advertisements in question was reasonable.[162] Planned Parenthood appealed the ruling.[163]

ii. Decision

The Ninth Circuit Court of Appeals concluded that the publications sponsored by the District's schools, including advertising pages, were nonpublic fora, and, thus, the District could control what expression was included.[164] The court dismissed the contention that the District had opened the advertising portions to indiscriminate use by the public be-

153. *Id.*
154. *Id.* at 1135.
155. *Id.*
156. *See id.* ("[Even if the School] was motivated by a disagreement with the content of [his] speech, it does not follow that a First Amendment violation necessarily occurred.").
157. *Id.* at 1135-36.
158. 941 F.2d 817 (9th Cir. 1991).
159. *Planned Parenthood*, 941 F.2d at 820, 821.
160. *Id.* at 821.
161. *Id.* at 820.
162. *Id.* at 821.
163. *Id.*
164. *Id.* at 830.

cause "the school district here showed an affirmative intent to retain editorial control and responsibility over all publications and advertising disseminated under the auspices of its schools."[165] Further, the court ruled that the District's practice of not publishing controversial advertisements was reasonable, viewpoint neutral, and constitutional.[166] Finally, the court rejected Planned Parenthood's argument that *Hazelwood* applies only to *student* speech and not to other private speech that occurs in a school setting.[167] "Although the facts of *Hazelwood* dealt with student expression," stated the court, "its rationale was not so limited. The Court . . . remarked on a school's ability to regulate reasonably the speech not only of students, but also 'teachers, and other members of the school community.'"[168] Thus, the Ninth Circuit panel upheld the District's decision to exclude Planned Parenthood's advertisements.[169]

c. Eleventh Circuit: *Searcey v. Harris*[170]

i. Facts

The Atlanta School Board ("the School Board") created a "Career Day" program to allow community members to come to schools to give students information about career opportunities and the skills required for particular jobs.[171] In February 1983, the Atlanta Peace Alliance ("APA") requested permission from several high schools to distribute information in the offices of guidance counselors, run advertisements in school newspapers, and participate in school Career Days.[172] The APA was a local organization devoted to promoting peaceful, non-military solutions to conflicts.[173] The School Board ultimately denied the APA access to the schools because of the APA's controversial viewpoint towards the military,[174] and the APA then brought a claim charging that the School District infringed on the free speech rights of its members.[175] The district court found for the APA and granted a preliminary injunction prohibiting the School Board from denying the APA the same access afforded to military recruiters.[176] The School Board appealed.[177]

165. *Id.* at 824.
166. *Id.* at 829-30.
167. *Id.* at 827.
168. *Id.* (quoting *Hazelwood*, 484 U.S. at 271).
169. *Id.* at 830.
170. 888 F.2d 1314 (11th Cir. 1989).
171. *Searcey*, 888 F.2d at 1316.
172. *Id.*
173. *See id.* at 1318.
174. *Id.* at 1323, 1326.
175. *Id.* at 1316.
176. *Id.* at 1316-17.
177. *Id.* at 1315.

ii. Decision

The Eleventh Circuit Court of Appeals affirmed the district court's ruling but modified parts of the School Board's regulations for Career Days.[178] The court agreed that the Career Day program was a nonpublic forum, and, thus, the School Board could impose some restrictions on who may speak.[179] However, the court also noted that in order to be constitutional, the restrictions had to be both reasonable and viewpoint neutral.[180] The court concluded that a regulation that precluded an organization from participating in a Career Day event when the organization's objective was to dissuade students from entering a particular occupation or from partaking of a particular educational opportunity was neither reasonable nor viewpoint neutral.[181] The court found that it was reasonable to preclude an organization from denigrating opportunities presented by another group.[182] It was, however, unreasonable to "prohibit a group from presenting negative factual information about the disadvantages of specific job opportunities because such information is useful to students making decisions about careers."[183] Further, allowing one group to present the advantages of a career, while forbidding another group to proffer information about the disadvantages of the same career, was viewpoint discrimination.[184] Specifically, the court stated "the School Board denied plaintiffs access to the forum for the reason of plaintiffs' viewpoint towards the military."[185] Accordingly, the Eleventh Circuit affirmed the district court's ruling.[186]

C. Analysis

This survey's limited review of decisions by federal circuit courts of appeals that involved the school-sponsored speech exception indicates that the circuit courts have honored *Hazelwood*'s directive to defer to school authorities about expression in the schools. The circuits disagree, however, about whether the schools must make viewpoint neutral decisions about speech.[187] The Tenth Circuit takes a very unambiguous position on the issue. In *Fleming*, the court took the position that "*Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech."[188] As *Searcey*[189] and *Planned Parenthood*[190] demon-

178. *Id.* at 1325-26.
179. *Id.* at 1320.
180. *Id.* at 1319.
181. *Id.* at 1322-24.
182. *Id.* at 1324.
183. *Id.*
184. *Id.*
185. *Id.* at 1326.
186. *Id.*
187. *See Fleming*, 298 F.3d at 926 ("Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral.").
188. *Id.*
189. *Searcey*, 888 F.2d at 1324.
190. *Planned Parenthood*, 941 F.2d at 830.

strate, however, some circuits still adhere to the notion that restrictions on school-sponsored speech must be content neutral, or else they violate the First Amendment.

Although the case involved controversial issues of religious expression in a public place, the Tenth Circuit panel did not analyze the facts of *Fleming* under the Establishment Clause.[191] To some proponents of a strong separation between church and state, the court might appear to have abdicated its constitutional duty to enforce the Establishment Clause. The plaintiffs, however, did not appeal the district court's judgment in favor of the School District on its Establishment Clause claim,[192] and, thus, the court was not bound to address the issue.[193] Still, it is interesting that the court did not explicitly raise any concerns that posting several clearly Christian messages on the wall of a publicly funded school might violate the strictures of the Establishment Clause.

Importantly, the decision did mandate that the tiles containing *religious* expressions be removed from the walls of the school.[194] This command hews to the long-standing view that, as Thomas Jefferson wrote so long ago, a solid "wall" should be erected between church and state.[195] This restrictive perspective on the proper relationship between religion and government has long been referred to as a "separationist" position.[196] According to this view, the separation is crucial to protecting individual freedoms of religion.[197] If the government closely allied itself with religious views, there would be "inevitable coercion" to participate in the government's chosen religion.[198] Thus, according to the separationists, the strict division is necessary to ensure the protections guaranteed by the

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191. *Fleming*, 298 F.3d at 920 n.1.

192. *Id.*

193. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.4, at 53-54 (2d ed. 2002) (noting the requirement that, for a case to be heard by a federal court, there must be an actual dispute between two parties, and that "it is firmly established that federal courts cannot issue advisory opinions").

194. *See Fleming*, 298 F.3d at 921, 933 (stating that some of the tiles in question were clearly religious in nature and that the public school district's restriction of these religious symbols was proper).

195. *See* Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), *in* THE PORTABLE THOMAS JEFFERSON 303-04 (Merrill D. Peterson ed., 1975).

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Id.

196. *See* CHEMERINSKY, *supra* note 193, at 1149-50.

197. *Id.* at 1150.

198. *Id.*

Constitution.[199] While the court in *Fleming* did not expressly affirm the separationist theory, its reasoning appears to support that perspective. The court stated that in the public school setting, school officials have a "legitimate interest in avoiding religious controversy and disruption resulting from the posting of religious speech."[200]

In an era replete with various horrific school shootings, the tragedy at Columbine High School represents the worst: in a few hours, the community in which the school sat lost fourteen students and one faculty member.[201] That sobering fact might have been reason enough for the School District and the court to defer to the wishes of the grieving families and friends who lost loved ones in the killing and agree to permit the attachment of the controversial tiles to the hallway walls of the school. Instead, the court applied free speech precedent and made its determination by applying *Hazelwood*.[202] When the court held that the Jefferson County School District did have the right to control what would be permanently affixed to its walls,[203] it gave another victory to those who believe that it is school officials, in "their role as 'a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment[,]'"[204] who should be given the most prominent voice in determining what is and is not proper for the school environment.

II. RELIGIOUS DISPLAYS ON PUBLIC PROPERTY AND THE TENTH CIRCUIT'S DECISION IN *SUMMUM V. CITY OF OGDEN*[205]

A. *The Legal Background: The* Lemon *Test and Subsequent Developments*

For the past three decades, cases involving religious expression on public property have primarily involved Establishment Clause disputes and have been governed largely by the landmark United States Supreme Court decision of *Lemon v. Kurtzman*.[206] In that case, the legislatures of Rhode Island and Pennsylvania had both enacted statutory programs providing for the reimbursement of expenses incurred by private church-related schools for teacher salaries, textbooks, and other educational materials for certain secular subjects.[207] The plaintiffs in the case, citizen-taxpayers from both states, claimed that the provisions were unconstitutional because they violated the Establishment and Free Exercise Clauses

199. *Id.*
200. *Fleming*, 298 F.3d at 933.
201. *Id.* at 920.
202. *See id.* at 924.
203. *Id.* at 934.
204. *Hazelwood*, 484 U.S. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
205. 297 F.3d 995 (10th Cir. 2002).
206. 403 U.S. 602 (1971).
207. *Lemon*, 403 U.S. at 606-07.

of the First Amendment and the Due Process Clause of the Fourteenth Amendment.[208]

Although the Court recognized that its precedent did "not call for total separation between church and state[,]"[209] it nonetheless held that both statutes were unconstitutional and violated the First Amendment's religion clauses.[210] The Court announced a three-pronged test to determine whether the government has impermissibly encroached onto private religious affairs in a given case.[211] Under the test, for a statute or state practice to be permissible: (1) it must have a secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not create "excessive government entanglement with religion."[212]

The *Lemon* test, as it came to be known, was the preeminent test in Supreme Court Establishment Clause cases throughout the 1970s and early 1980s.[213] For all its use, however, the test never elicited enthusiastic and widespread support from the Court.[214] Indeed, it drew much criticism from commentators.[215] Perhaps as a result of this criticism and lack of consensus within the Court following the formulation of the *Lemon* test, the Court has since turned to several other methods of Establishment Clause analysis, including a "historical practice" inquiry[216] and a "coercion" test.[217] In addition, the "endorsement" test that was espoused by Justice O'Connor is perhaps the approach that has been the most favored in recent years.[218] Under the endorsement test, a government statute or action violates the Establishment Clause if "a reasonable observer would conclude that official activity 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[219]

The endorsement test has gained particular significance resolving disputes about religious displays on public property. Two cases decided

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208. *Id.* at 606.

209. *Id.* at 614; *see* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state").

210. *Lemon*, 403 U.S. at 607, 625.

211. *See* Tarik Abdel-Monem, Note, *Posting the Ten Commandments as a Historical Document in Public Schools*, 87 IOWA L. REV. 1023, 1025-26 (2002).

212. *Lemon*, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

213. *See* Dustin Zander, Note, *Thou Shalt Not Post the Ten Commandments on the Courtroom Wall: Judge Roy Moore and the Constitution*, 9 KAN. J.L. & PUB. POL'Y 371, 372 (1999).

214. *See* Choper, *supra* note 3, at 1721 (observing that "[t]he Court was never willing to truly abide by the Lemon Test").

215. *See generally* Michael W. McConnell, *Stuck With a* Lemon*: A New Test For Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A. J. 46 (1997) (criticizing the *Lemon* test); Choper, *supra* note 3, at 1720-21 (criticizing the *Lemon* test).

216. *See* Abdel-Monem, *supra* note 211, at 1028-29.

217. *See* Choper, *supra* note 3, at 1723-24.

218. *Id.* at 1723.

219. *Id.* (quoting *Lynch*, 465 U.S. at 688).

by the Court in the 1980s[220] and one decided in the 1990s[221] exemplify the drift away from the controversial *Lemon* test towards the more coherent endorsement inquiry.

In *Lynch v. Donnelly*,[222] the City of Pawtucket, Rhode Island, erected a Christmas display in a city shopping area that included a crèche depicting the Nativity scene.[223] Residents of the city and members of the local chapter of the American Civil Liberties Union ("ACLU") brought an action in federal district court alleging a violation of the Establishment Clause.[224] The Court applied the *Lemon* test, inquired into historical practices, and ruled that there was not a violation.[225] The Court cited "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[226] It determined that in the context of the holiday season and the traditions of the Christmas celebration, there was "insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[227] It is important to note that the Court made it clear that the *Lemon* test was not absolutely mandatory, stating, "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[228] Indeed, in finding the crèche a permissible holiday display, both the majority,[229] and more markedly, Justice O'Connor in a concurring opinion, incorporated an endorsement analysis.[230]

Five years later the Supreme Court decided *County of Allegheny v. ACLU*.[231] There, the Allegheny County government in the State of Pennsylvania allowed a Roman Catholic group to erect a crèche on the grand staircase of the Allegheny County Courthouse.[232] Similarly, the City and County of Pittsburgh, Pennsylvania, agreed to permit an 18-foot Chanu-

220. *See* County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (holding that a crèche displayed on the grand staircase of a county courthouse violated the Establishment Clause, but that a menorah placed outside a city-county building did not); *Lynch*, 465 U.S. at 687 (holding that a city's inclusion of a crèche depicting a Christian Nativity scene in a holiday display did not violate the Establishment Clause).

221. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (holding that a municipal board's agreement to authorize the placement of a cross on public grounds at the request of the Ku Klux Klan did not violate the Establishment Clause).

222. 465 U.S. 668 (1984).

223. *Lemon*, 465 U.S. at 671.

224. *Id.*

225. *Id.* at 672, 687.

226. *Id.* at 674.

227. *Id.* at 680.

228. *Id.* at 679.

229. *Id.* at 681-82 (asserting that displaying the crèche did not benefit or endorse religion more that the actions that the Court previously upheld as not violating the Establishment Clause).

230. *Id.* at 689 (O'Connor, J., concurring) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.").

231. 492 U.S. 573 (1989).

232. *Allegheny*, 492 U.S. at 579-80.

kah menorah to be erected alongside a Christmas tree outside of the City-County Building that the City and County owned jointly.[233] Local residents and members of the local chapter of the ACLU combined to file suit against the City and County, alleging that they had violated the Establishment Clause.[234]

In a divided opinion,[235] the Court ruled that the crèche was a violation of the Establishment Clause, but the menorah was constitutionally permissible.[236] The majority opinion noted that the endorsement analysis that Justice O'Connor presented in her concurring opinion in *Lynch* provided "a sound analytical framework for evaluating governmental use of religious symbols."[237] Thus, the majority decided the issue based on an endorsement inquiry[238] and found that the crèche, standing alone on the grand staircase, conveyed a clear religious message[239] that a reasonable observer would believe the County was endorsing.[240] Applying the same principles to the menorah, the majority concluded that the menorah, when placed next to a Christmas tree and a mayor's sign celebrating liberty, was more a salute to diverse secular holiday traditions than a message about the Jewish faith.[241] Consequently, the overall secular nature of the display in question made it highly unlikely that residents of Pittsburgh would believe that it was an endorsement of either the Jewish or Christian religions.[242] "On the contrary," stated the majority, "for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[243]

By contrast, in a dissenting opinion, four justices applied a "coercion" analysis and found that placing the crèche in the Allegheny County Courthouse was not in violation of the Establishment Clause.[244] In so doing, the justices expressly questioned the propriety of disregarding Court precedent in favor of the newer endorsement test.[245] Instead, the dissent argued for an approach that would recognize "the tradition of

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233. *Id.* at 582, 587.

234. *Id.* at 587-88.

235. *Id.* at 578; *see* Abdel-Monem, *supra* note 211, at 1032 (stating that Justice Blackmun wrote the divided decision).

236. *Allegheny*, 492 U.S. at 621.

237. *Id.* at 595.

238. *Id.* at 597.

239. *Id.* at 598 ("Nothing in the context of the display detracts from the creche's religious message.").

240. *Id.* at 601-02 ("[Allegheny County has] chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. . . . nothing more is required to demonstrate a violation of the Establishment Clause.").

241. *Id.* at 616-20.

242. *Id.* at 620.

243. *Id.*

244. *Id.* at 655 (Kennedy, J., dissenting).

245. *Id.* at 668 (Kennedy, J., dissenting) ("[The endorsement test is] a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.").

government accommodation and acknowledgment of religion that has marked our history from the beginning."[246] Through this approach, government would receive more "latitude in recognizing and accommodating the central role religion plays in our society."[247] Inherent in the dissent's approach is an aversion to what the dissent refers to as "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."[248] The dissent asserted that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[249] Above all, though, the "accommodationist" approach urged by the dissent is grounded primarily on the belief that the presence of state *coercion* should be the governing factor in identifying violations of the Establishment Clause.[250] The dissent, therefore, found the crèche in *Allegheny* to be a permissible religious holiday display.[251]

Finally, in *Capitol Square Review & Advisory Board v. Pinette*,[252] a municipal advisory board ("the Board") responsible for regulating access to a state-owned plaza surrounding the statehouse in Columbus, Ohio, refused to allow the Ohio Ku Klux Klan ("the Klan") to erect a cross within the confines of the plaza.[253] A federal district court issued an injunction mandating that the Board give the Klan access to the grounds.[254] The Board gave the required permission but appealed the decision.[255] The Court held that placing the cross in the public plaza was not a violation of the Establishment Clause and, thus, the Board could not deny the Klan access.[256] While seven justices joined the opinion of the Court, two justices filed separate dissenting opinions.[257]

According to the majority, religious expression does not offend the Establishment Clause if (1) it is purely private expression, and (2) it "occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[258] According to the plurality opinion, because the Klan's cross was a purely private expression, and because the Board's policy regarding displays on the plaza grounds was neutral, there could be no violation of the Establishment Clause.[259] The majority concluded that this was so even if the Board's policy caused some incidental

246. *Id.* at 663 (Kennedy, J., dissenting).
247. *Id.* at 657 (Kennedy, J., dissenting).
248. *Id.* at 655 (Kennedy, J., dissenting).
249. *Id.* at 657 (Kennedy, J., dissenting).
250. *Id.* at 659 (Kennedy, J., dissenting) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise").
251. *Id.* at 655 (Kennedy, J., dissenting).
252. 515 U.S. 753 (1995).
253. *Pinette*, 515 U.S. at 758.
254. *Id.* at 759.
255. *Id.*
256. *Id.* at 770.
257. *See id.* at 756 (Both Justice Stevens and Justice Ginsburg filed dissenting opinions.).
258. *Id.* at 770. See Dagley, *supra* note 11, at 5, for a summary of public forum analysis.
259. *See* Choper, *supra* note 3, at 1737.

benefit to religion, and even if some observers might perceive a governmental endorsement of religion.[260] In ruling in favor of the Klan, the plurality effectively carved out an exception to the endorsement test and created its own *per se* rule.[261]

Despite this newly articulated *per se* rule, however, five of the justices still supported the endorsement test.[262] Thus, even though the accommodationists on the Court prevailed, as Professor Jesse H. Choper has put it, "[T]hey lost the war of determining a replacement for the *Lemon* test. The more separationist position of endorsement now has garnered five votes, and that would seem to be the prevailing test for alleged violations of the Establishment Clause, at least until the next Justice comes along."[263]

B. Circuit Courts Addressing Religious Displays on Public Property

1. Tenth Circuit: *Summum v. City of Ogden*[264]

a. Facts

In 1966, the City of Ogden, Utah ("the City"), erected a monument inscribed with the Ten Commandments on a lawn outside the City's municipal building.[265] The monument was given to the City by a community group called the Fraternal Order of Eagles.[266] Along with the text of the Ten Commandments, the monument was also inscribed with two Stars of David, the Greek letters "Chi" and "Rho," an "all-seeing eye," a pyramid, an eagle, an American flag, some Phoenician letters, and a depiction of a scroll containing the message, "Presented to the City of Ogden and Weber County, Utah, by Utah State Aerie Fraternal Order of Eagles 1966."[267] Placed alongside the monument on the lawn were a police officer memorial and a sister city tree and plaque.[268] Additionally, various historical markers were placed in an area set apart from the monument.[269]

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260. *Id.*

261. *See id.* at 772 (O'Connor, J., concurring) ("I see no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context."); *id.* at 784 (Souter, J., concurring) ("This per se rule would be an exception to the endorsement test, not previously recognized and out of square with our precedents.").

262. *Pinette*, 515 U.S. at 762-69; *Id.* at 772-73 (O'Connor, J., concurring); *Id.* at 783-84 (Souter, J., concurring); *Id.* at 797, 799 (Stevens, J., dissenting); *see id.* at 817-18 (Ginsburg, J., dissenting); *see also* Choper, *supra* note 3, at 1737-38 (stating that Justices O'Connor, Souter, Breyer, Stevens, and Ginsburg wrote that any government endorsement of religion violates the Establishment Clause).

263. Choper, *supra* note 3, at 1738.

264. 297 F.3d 995 (10th Cir. 2002).

265. *Summum*, 297 F.3d at 997.

266. *Id.* at 998.

267. *Id.* at 997-98.

268. *Id.* at 998.

269. *Id.*

Summum, a religious group formed in 1975 and chartered in Utah, sought to have the City remove the monument.[270] The City refused.[271] Summum then requested that the City agree to place a privately funded monument inscribed with the group's "Seven Principles" in the same area as the Ten Commandments monument.[272] Again, the City refused.[273] Summum then brought suit in federal district court alleging violations of its First Amendment rights under the Establishment and Free Speech Clauses.[274] The district court ruled that there was no Establishment Clause violation because the Ten Commandments monument was largely secular in nature.[275] It found that the City adopted the speech located on the permanent monuments on the lawn as its own.[276] Consequently, the court thought that granting Summum's request would be tantamount to allowing a group to dictate what the City would or would not express.[277] In addition, the court held that the City did not violate the Free Speech Clause.[278] Summum appealed the trial court's decision on its free speech claim to the Tenth Circuit.[279]

b. Decision

The Tenth Circuit Court of Appeals began its discussion by noting that at oral argument, Summum's counsel conceded that, absent *en banc* reconsideration of the Tenth Circuit's decision in *Anderson v. Salt Lake City Corp.*,[280] the court could not reverse the district court's grant of summary judgment in favor of the City regarding the Establishment Clause claim.[281] However, the court also suggested in a footnote of its opinion that Summum's concession was perhaps not wise.[282] First, according to the court, the United States Supreme Court's ruling in *Stone v. Graham*,[283] as well as the Tenth Circuit's own ruling in *Summum v. Callaghan*,[284] cast some doubt on "the health" of the *Anderson* decision.[285] Secondly, the court noted that the ruling in *Anderson* depended upon an inquiry into the *purpose* and *effect* of the government's decision to allow

270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 999.
275. *Id.* at 1000.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. 475 F.2d 29, 30-34 (10th Cir. 1973) (holding that a municipality did not violate the Establishment Clause when it permitted a monument of the Ten Commandments to be erected as part of a passive, secular display on public grounds).
281. *Summum*, 297 F.3d at 1000.
282. *Id.* at 1000 n.3.
283. 449 U.S. 39 (1980) (holding that public schools could not post the Ten Commandments in classrooms because of their unambiguous religious nature).
284. 130 F.3d 906, 913 n.8. (10th Cir. 1997) ("Our decision in *Anderson* has been called into question by the Supreme Court in *Stone v. Graham*").
285. *Summum*, 297 F.3d at 1000 n.3.

the Ten Commandments monument to be posted, and "[t]he fact that the municipality at issue in Anderson (Salt Lake City) maintained a proper purpose in displaying that municipality's Ten Commandments Monument does not establish that the City of Ogden maintained such a proper purpose."[286]

Once the court dispensed with the Establishment Clause issue, it turned to the remaining free speech issue.[287] The court first made a public forum inquiry[288] and determined that the permanent monuments on the lawn of the municipal building were nonpublic forums.[289] Therefore, the municipality could restrict access to the forum as long as the restrictions were reasonable and viewpoint neutral.[290] In support of its contention that these two conditions had been satisfied, the City presented two distinct arguments.[291] First, the City stated that it had adopted the speech on the Ten Commandments monument as its own.[292] Thus, the City argued that it had eliminated any form of private speech in the forum and could not be seen as discriminating between any potential private speakers.[293] Alternatively, the City argued that even if it had discriminated by allowing the Ten Commandments monument and simultaneously rejecting the Summum monument, such discrimination was reasonable and viewpoint neutral because of the heightened historical relevance of the Ten Commandments to the community as compared to that of the Summum group's Seven Principles.[294]

The court rejected these two arguments in turn.[295] First, the court analyzed the City's claim that it had adopted the speech[296] by applying the four factors adopted in *Wells v. City and County of Denver*.[297] The four factors articulated in *Wells* were: (1) whether the central purpose of the sign or monument in question was to promote the views of the municipality; (2) whether the municipality exercised editorial control over the content of the sign or monument; (3) whether the literal speaker was an employee of the municipality; and (4) whether the ultimate responsi-

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286. *Id.* Thus, unlike the *Fleming* Court, the court in *Summum* at least explicitly referred (albeit in a footnote) to the *potential* for an Establishment Clause violation on the part of the government if it accepted the religious expression onto public property. *See id.*; Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 995, 920 n.1 (10th Cir. 2002).

287. *Id.*

288. *See* Dagley, *supra* note 11, at 5.

289. *Summum*, 297 F.3d at 1002.

290. *Id.* at 1002-03.

291. *Id.* at 1003.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 1004, 1006.

296. *Summum*, 297 F.3d at 1004.

297. 257 F.3d 1132, 1140-42 (10th Cir. 2001) (affirming a district court's ruling that upheld a city's refusal to post a Winter Solstice sign devoted to atheist beliefs within the city's fenced-off winter holiday display).

bility for determining the content of the sign or monument rested with the municipality.[298]

Applying these four factors to the instant case, the court determined that the City might have satisfied only the fourth.[299] The central purpose of the monument was to advance the views of the Fraternal Order of Eagles, not the City.[300] Furthermore, the City never exercised *any* editorial control over the monument.[301] Rather, the Eagles had controlled what was expressed and had given a finished product to the City.[302] The court also believed that the Eagles were the true speakers of the monument's message, notwithstanding the fact that the monument stood on municipal grounds.[303] Lastly, though, the court observed that "[a]rguably . . . . the City may be charged with ultimate responsibility for the content of the Monument."[304]

In considering whether the City had adopted the speech as its own, the court also attributed great importance to the "after-the-fact nature of the City of Ogden's effort to claim adoption of that speech."[305] The court alluded to the Supreme Court's concern over "post hoc rationalizations [that] may obscure viewpoint discrimination."[306] The court felt that the City of Ogden had not shown any pre-litigation evidence of its adoption of the speech in question.[307] Thus, in view of the four factors from *Wells* and the "the caselaw's particular concern for post hoc rationalizations in the Free Speech context," the court concluded that "the speech represented by the Ten Commandments Monument represents the speech of the Eagles rather than that of the City of Ogden."[308]

The court then turned to the City's historical relevance justification.[309] In ruling against the City on this claim, the court did not conclude that "a municipality may never maintain a nonpublic forum to which access is controlled based upon 'historical relevance' to the given community."[310] Rather, the court decided that the City could not base its actions on such a claim because it had failed to utilize sufficient safeguards to ensure that the historical relevance justification did not become merely a "post hoc facade for viewpoint discrimination."[311]

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298. *Summum*, 297 F.3d at 1004.
299. *Id.* at 1004-05.
300. *Id.* at 1004.
301. *Id.*
302. *Id.*
303. *Id.* at 1004-05.
304. *Id.* at 1005.
305. *Id.*
306. *Id.*
307. *Id.* at 1006.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*

In order to show that its historical relevance justification did have a sound basis, the City had to show either an official written policy supporting such a justification or a "well-established practice" of utilizing the historical relevance criterion.[312] On both counts, the court concluded, the City failed to provide sufficient evidence supporting its position.[313] Thus, in its failure to show any official policy allowing the simultaneous approval of the Ten Commandments monument and the rejection of the Summum monument, the City had "unreasonably, and in violation of the Free Speech Clause, risked viewpoint discrimination in the relevant forum."[314]

The court concluded its discussion by addressing the City's defense that allowing Summum to erect a monument on municipal grounds would violate the Establishment Clause.[315] Interestingly, in analyzing this Establishment Clause claim, the court applied elements of two of the three major Establishment Clause inquiries: the *Lemon* test, and the "coercion" analysis.[316] The court concluded that the City would not violate the Establishment Clause by erecting the Summum monument.[317] Contrary to what the City argued, the purpose inquiry under the *Lemon* test focuses on the *government's* purpose for allowing the speech in question, not on the *religious entity's* purpose in requesting the expression.[318] In the instant case, there was no evidence presented that pointed to any potential for an improper purpose on the part of the City if it allowed Summum to erect its monument.[319] Rather, the evidence in the record showed that the only viable motive that could be attributed to the City if it honored Summum's request would be "a concern for equal access."[320] The City, rather ironically, argued that erecting the Summum monument would cause a reasonable observer to conclude that the City endorsed the Summum religion.[321] The court reached the contrary conclusion and said that a reasonable observer would actually "note the fact that the lawn of the municipal building contains a diverse array of monuments, some from a secular and some from a sectarian perspective."[322]

Thus, the court held that there was, in fact, a violation of the Free Speech Clause because the City's restriction of Summum's expression

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312. *Id.* at 1007.
313. *Id.* at 1008-09.
314. *Id.* at 1009.
315. *Id.*
316. *See id.* at 1009-10.
317. *Id.* at 1010.
318. *Id.*
319. *Id.* at 1011.
320. *Id.*
321. *Id.* ("The City['s argument was] . . . somewhat ironic . . . in light of the City's simultaneous insistence that the display of the Ten Commandments Monument alone does not violate the Establishment Clause").
322. *Id.*

was not reasonable or viewpoint neutral.[323] Accordingly, the Tenth Circuit reversed the district court's grant of summary judgment in favor of the City regarding the free speech claim.[324]

2. Other Circuits

a. Seventh Circuit: *Grossbaum v. Indianapolis-Marion County Building Authority*[325]

i. Facts

In 1993, the Indianapolis-Marion County Building Authority ("the Building Authority") in Indianapolis, Indiana, refused to allow the plaintiffs, Rabbi Abraham Grossbaum and Lubavitch of Indiana, Inc., an Orthodox Jewish organization, to erect a menorah in the lobby of the Indianapolis City-County Building during the Jewish holiday of Chanukah.[326] For many years prior to this denial, the Building Authority had given the plaintiffs permission to erect a menorah.[327] However, because of complaints that the menorah's presence violated the Establishment Clause, the Building Authority issued a new policy in 1993 disallowing the display of "seasonal religious symbols" in the City-County Building.[328] This new policy initially included the prohibition of Christmas trees, but after the Building Authority was informed by its legal counsel that courts traditionally view Christmas trees as conveying secular rather than religious messages, the Building Authority decided to have Christmas trees erected in the lobby during the holiday season.[329] The plaintiffs, alleging that the Building Authority was engaging in content and viewpoint discrimination in violation of the First Amendment, brought suit in district court seeking injunctive and declaratory relief.[330] The district court ruled against the plaintiffs and held that the Building Authority had not exhibited viewpoint discrimination when it simultaneously allowed Christmas trees and rejected the menorah.[331] The plaintiffs then appealed to the Seventh Circuit.[332]

ii. Decision

The Seventh Circuit Court of Appeals first noted that the forum in question was nonpublic and, as such, government restrictions on speech were permissible only if they were reasonable and viewpoint neutral.[333]

323. *See id.* at 1011-12.
324. *Id.* at 1012.
325. 163 F.3d 581 (7th Cir. 1995).
326. *Grossbaum*, 163 F.3d at 582.
327. *Id.*
328. *Id.* at 583.
329. *Id.*
330. *Id.*
331. *Id.* at 584.
332. *Id.* at 582.
333. *Id.* at 587.

In a nonpublic forum context, the government violates First Amendment free speech rights and the rule that requires viewpoint neutrality when it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[334] The court, therefore, had to decide whether the holiday season was an "includible subject" for discussion in the lobby and the religious display just one particular viewpoint, or whether religious displays in general were a subject that could be properly excluded as part of a reasonable and viewpoint neutral restriction.[335]

The Court concluded that the Building Authority's policy that excluded the menorah "was constructed to prevent one thing: seasonal holiday displays of a religious character."[336] Because the Building Authority permitted other groups with non-religious messages to apply for space within the City-County Building lobby, and because the court believed that religious material was a viewpoint and not a general subject in this context, the court found that the Building Authority was unconstitutionally discriminating based on the plaintiff's perspective.[337] The court held that "the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause."[338]

b. Seventh Circuit: *Books v. City of Elkhart*[339]

i. Facts

The City of Elkhart, Minnesota ("the City"), erected a monument inscribed with the Ten Commandments on a lawn in front of the City's Municipal Building.[340] The monument was a gift from the Fraternal Order of Eagles and was placed on the lawn near a monument that honored Revolutionary War soldiers buried in Elkhart County and another that celebrated freedom.[341] William Books and Michael Suetkamp, residents of the City, brought suit in federal district court alleging that the City violated the Establishment Clause.[342] The district court granted summary judgment in favor of the City and the plaintiffs then appealed to the Seventh Circuit.[343]

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334. *Id.* (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
335. *Id.* at 588.
336. *Id.* at 590.
337. *Id.* at 591-92.
338. *Id.* at 592.
339. 235 F.3d 295 (7th Cir. 2000).
340. *Books*, 235 F.3d at 295.
341. *Id.* at 295-96.
342. *Id.* at 294.
343. *Id.*

ii. Decision

In an opinion written by the same judge who authored the *Grossbaum* opinion,[344] the Seventh Circuit Court of Appeals ruled that the Ten Commandments monument *did* violate the Establishment Clause, and thus, the district court's decision had to be reversed.[345] Citing the *Lemon* test as "the prevailing analytical tool for the analysis of Establishment Clause claims,"[346] the court determined that the City had failed the first and second prongs of the test.[347] In ruling against the City, the court expressed a distrust of the City's contention that the purpose of the monument was largely secular.[348] Instead, the court found that "the purpose in displaying this monument was to promote religious ideals."[349]

C. Analysis

As in the *Fleming* decision, the dispute that the Tenth Circuit Court of Appeals addressed in *Summum* did not involve the Establishment Clause.[350] Counsel for Summum conceded in oral argument that, absent the overturning of the Tenth Circuit's decision in *Anderson*, precedent mandated that the City prevail on its motion for summary judgment regarding the Establishment Clause claim, and the court declined to pursue the matter.[351] However, the court questioned whether Summum's concession was wise.[352] Based on the Supreme Court's strongly worded assertion that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact,"[353] Summum may have had sufficient justification to argue that the Ten Commandments, under any test, are inherently religious in nature and displaying them on government property entails impermissible entanglements between religion and government. On the other hand, the Supreme Court's divided opinion in *Pinette*,[354] in which the plurality opinion afforded government entities substantially more leeway in allowing private religious expression on public property,[355] could stand as a significant and recent obstacle to Establishment Clause claims.

Regardless, in the end, *Summum* was, like *Fleming*, decided on free speech grounds.[356] The basis for the decision was the notion that, in a

344. *See id.* at 294; *Grossbaum*, 63 F.3d at 582.
345. *Books*, 235 F.3d at 304, 307, 308.
346. *Id.* at 301.
347. *Id.* at 304, 307.
348. *See id.* at 304.
349. *Id.*
350. *See Summum*, 297 F.3d at 1000; *Fleming*, 298 F.3d at 920 n.1.
351. *Summum*, 297 F.3d at 1000.
352. *Id.* at 1000 n.3.
353. *Stone*, 449 U.S. at 41.
354. *See Pinette*, 515 U.S. at 756.
355. *See id.* at 770.
356. *See Summum*, 297 F.3d at 1000; *Fleming*, 298 F.3d at 934.

nonpublic forum, the government can only restrict expression if the restriction is reasonable in light of the purposes of the forum and is viewpoint neutral.[357] Included in the reasoning behind the decision, however, is the more recent view that, as the Supreme Court declared in *Pinette*, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[358]

Thus, *Summum* represents the more inclusive and accommodationist view of government's proper role in regulating and recognizing religious expression. According to the approach, religious beliefs should be accorded the same treatment as nonreligious beliefs and the government may acknowledge them in a manner that does not offend the principles of the First Amendment's Establishment Clause.[359] As Professor Erwin Chemerinsky writes, "[U]nder the accommodation approach the government violates the establishment clause only if it literally establishes a church, coerces religious participation, or favors one religion over others."[360] Moreover, according to Chemerinsky, the accommodationist perspective argues that the Supreme Court "should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government."[361]

In ruling that the City could not refuse to include Summum's monument on municipal grounds while displaying the Ten Commandments,[362] the Tenth Circuit seems to adhere closely to the principles supporting the nascent movement to recognize the prominent role of religion in the nation's culture and governance.[363] Even though the expression in question was religious in nature, and even though certain exceptions to the right to free speech exist in First Amendment jurisprudence, the court declared that the monument proposed by Summum "does not fall within these limited exceptions and thus constitutes protected speech."[364]

CONCLUSION

The history of Establishment Clause jurisprudence has been marked by a tension created by the interplay of two competing values: the separation of church and state and government neutrality towards religion.[365] Heightening this tension is the enduring conflict between the Establish-

357. *Summum*, 297 F.3d at 1002-03.
358. *Pinette*, 515 U.S. at 760.
359. CHEMERINSKY, *supra* note 193, § 12.2.1, at 1154.
360. *Id.* at 1153.
361. *Id.*
362. *Summum*, 297 F.3d at 1011.
363. *See* County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting).
364. *Summum*, 297 F.3d at 1001.
365. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1071 (2002).

ment Clause itself and the Free Exercise Clause.[366] As the First Circuit Court of Appeals noted in *Knights of Columbus v. Town of Lexington*,[367] "[T]he Establishment Clause pulls in the direction of separating church and state, while the Free Exercise Clause pushes in the direction of permitting the unfettered expression of religious doctrine."[368] Government actions designed to facilitate religious expression may be challenged as "impermissible establishments," while government restrictions of religion may be seen as violating "the free exercise thereof."[369] The Tenth Circuit's decisions in *Fleming* and *Summum* reflect the difficulties involved in the government's attempt to avoid these scenarios. In one case, the court was clearly inclined to keep religious content off the walls of a public school and, thus, avoid any perceived governmental endorsement.[370] In the other, the court looked to other values such as equal treatment and historical tradition in finding that an out-of-the-mainstream church had a right to voice its beliefs alongside more prominent sects on public property.[371] These two results embody two distinct visions of the role of religion in our society and government, and their examples will probably be followed for years to come as the republic strives to find a balance between the religious and the secular and between faith and science. Considering the historical volatility of such struggles, perhaps the decision in *Fleming* was the better result, as its reasoning left faith and religious expression to what might be their more appropriate settings—our nation's houses of worship.

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366. CHEMERINSKY, *supra* note 193, § 12.1.1, at 1140.

367. 272 F.3d 25 (1st Cir. 2001) (holding that a town's ban on unattended structures on a town green did not infringe on a religious organization's rights of free speech).

368. *Town of Lexington*, 272 F.3d at 35.

369. CHEMERINSKY, *supra* note 193, at 1140.

370. *See* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 930, 933 (10th Cir. 2002) ("The presence of permanently affixed tiles on the walls implicates the school's approval of those tiles" and public schools have a "legitimate interest in avoiding religious controversy and disruption resulting from the posting of religious speech.").

371. *See* Summum v. City of Ogden, 297 F.3d 995, 1008-09, 1011 (10th Cir. 2002) (The court found no discernible city policy of accepting monuments based on historical relevance and concluded that "[t]he Free Speech Clause of the First Amendment compels the City of Ogden to treat with equal dignity speech from divergent religious perspectives.").

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