Chapter 3:
The First Amendment and Public Religious Displays: Questions of Government, God, Place, and Time

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On May 5, 2008, after considerable debate, the City Council of Los Alamitos, in southern California, tabled a motion to install a plaque in their chambers reading "In God We Trust." Council members had claimed that posting the national motto was patriotic, reverent, and "the right thing to do." A single objector from the community argued that the plaque would be a violation of the separation of church and state and asked to the council to "protect the minority and represent all the people by staying secular." In the end, the Mayor Pro Tem carried the day by suggesting the city allow a month to survey its citizens, giving them the opportunity to endorse or denounce the idea.[1]

The small plaque that raised so much debate is emblematic of an ongoing conflict in the United States. At what point does a public religious display violate the First Amendment? When does a monument, a cross, a crèche, or a simple expression of faith in a supreme being constitute an improper promotion of religion? And, when does restriction on such a display constitute an infringement of free speech? To explore these confounding issues, this chapter will first review some of the core concepts relating to religious displays. Next, it will consider rulings on holiday displays and displays in public schools, before examining the most problematic expressions, fixed displays in the public square. Finally, the chapter will look to the future for potential resolutions to religious display dilemmas.

Fundamentals

Judicial rulings on religious displays typically rely on the Supreme Court's decision in *Lemon v. Kurtzman*, 1971.[2] The three-prong "Lemon test" requires that when justifying its conduct, the government must demonstrate a secular purpose, must show that the primary effect of its act does not advance or inhibit religion, and that its actions do not foster excessive entanglement between government and religion.

History and tradition complicate those standards, however, and are sometimes used to justify the government's endorsement of religious elements. Ritualized references to God are sometimes rationalized as "ceremonial deism."[3] The Pledge of Allegiance and the national motto, "In God We Trust," explained Supreme Court Justice Brennan, "are protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content."[4] Their purpose is seen as nationalistic and inspirational, ubiquity having effaced their sectarian significance.

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[1] Smith, Brian, "Council Tables 'In God We Trust' Idea," *News Enterprise*, 14 May 2008, 1, 3. See also Los Alamitos City Council meeting minutes, available at http://www.ci.los-alamitos.ca.us.

[2] 403 U.S. 602 (1971)

[3] The term was originated by Eugene Rostow. For a fuller discussion of the issue, see Steven B. Epstein's "Rethinking the Constitutionality of Ceremonial Deism," *Columbia Law Rev.iew*, 96 (1996): 2083-2174.

[4] *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984).

Religious display disputes are also complicated by conflicts between free speech rights and public forum constraints. There are three basic types of public forums, each accountable to different standards. First, free speech in traditional (e.g., street-corners and parks) or designated (e.g., municipal art displays or theatres) public forums cannot be regulated for content, but only for questions of time, place, and manner that would impact a significant state interest. In contrast, restrictions on limited public forums (e.g. schools or meeting halls) may be restricted to certain types of groups or topics. Finally, non-public forums (e.g., prisons and airports) are public properties not traditionally available for free expression. As with limited public forums, the government is within its rights to impose rational and viewpoint-neutral constraints. Identifying the type of forum is critical to establishing how speech in that venue can be regulated.

At the Holidays

Two Supreme Court cases have laid the groundwork for rulings on holiday displays. In the first, *Lynch v Donnelly*, in 1984, the Court held that the city of Pawtucket, Rhode Island did not violate the establishment clause by including a crèche in its annual holiday display.[5] The traditional theme and overall content of the holiday display—which included Santa, reindeer, and Christmas tree elements—subsumed the nativity scene's religious theme. Writing for the Court, Chief Justice Burger said that in applying the *Lemon* standards, the Court found no substantial religious purpose, advancement of religion, or entanglement. The crèche, he said, was an example of "ceremonial deism," one of the many routine references to America's religious heritage. Justice Sandra Day O'Connor, in a concurring opinion that has helped to illuminate endorsement standards, pointed to the potential for religious displays to violate the establishment clause by implying insider or outsider status to viewing members of the political community. She did not, in spite of this, find inappropriate ramifications in Pawtucket's. The sectarian implications of the display were incidental to the whole.

The second case, the *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, involved two holiday displays in public venues: one, a crèche beside the main staircase inside the county courthouse, and, the other, a menorah located outside a city-county building.[6] The crèche was a stand-alone display, prominently placed, accompanied by a sign reading "Glory to God in the Highest." The crèche was ruled a violation of the establishment clause, an endorsement of Christianity in the eyes of the reasonable observer. In contrast, the menorah was allowed by the Court, which found that it recognized cultural diversity, rather than endorsed a particular religion. In part, the ruling was due to the proximity of a Christmas tree and a sign promoting liberty. And, in part, it was a reflection of the dearth of more secular symbols relating to Hanukah, which would parallel the Christmas tree. As in the *Lynch* ruling, religious content was less a problem for the Court than establishing an inclusive, overarching context. Specific religious elements are permissible when exhibited among diverse religious and secular displays.

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[5] 465 U.S. 668 (1984).
[6] 492 U.S. 573 (1989).

Diversity without favoritism has been critical to decisions regarding holiday displays in public forums. Competing belief systems are entitled to equal treatment. That was the finding, for example, in 2006, in *Ritell v. the Village of Briarcliff Manor.*[7] Ritell had been denied permission to install a crèche in a public park, adjacent to a nine-foot menorah and a live fir tree decorated with lights visible only at night. Ritell objected to the unimpressive and, moreover, exclusively secular Christmas symbol. District Judge William Connor agreed, saying the village had created an "imbalance" and, "in the mind of a reasonable observer, the impression of selective endorsement of the Jewish Faith."[8] The court's fact-specific analysis showed the Village had failed to meet the second prong of the *Lemon* test. Rather than allow Ritell to install his crèche, however, the Village opted to remove both the menorah and the tree's decorations.[9] The crèche was not installed and no one, it appears, was satisfied by ruling.

While the shift to secular symbols had suggested a solution to the conflicts inherent in public holiday displays, it is clearly not a perfect solution. Some practioners of Christianity object to symbology that emphasizes cultural or material aspects of Christmas, while minimizing or ignoring the spiritual fundamentals.[10] Considered in the light of Justice Sandra Day O'Connor's articulation of endorsement standards in *Lynch*, nativity scenes or other religious representations may represent Christmas in public settings, providing they are incorporated into a broad spectrum of displays, which include other religions' and secular symbols.

Holiday displays can and often do meet constitutional standards concerning establishment and endorsement, but each challenge calls for close review of purpose, context, and effects. In the main, holiday displays in state-sponsored venues are considered justified—and meet the first prong of the Lemon test—when their purpose is to promote a festive atmosphere and recognize diverse religious winter holidays. Diversity and the inclusion of secular symbols are the keys to meeting the second prong of the Lemon test—not to have a primary effect of advancing religion or appearing to advance religion in the eyes of a reasonable observer. The third prong, which disallows excessive entanglement between church and state, recognizes the inevitability of a limited relationship between the two. Displays that meet the first two tests are likely to meet the third, as well. Rulings on holiday displays are also contingent on the notion of public forums, especially since many of the displays in question are privately provided and located in venues traditionally available for free expression. Even if intentions are benign, government entities must refrain from content-based restrictions on free expression in public forums.

In Public Schools

Public schools are public forums, as well, but they have long been considered limited forums, buffered from public or individual demands for free speech. Because schools are charged with the education of children, the courts are wary of efforts to impose sectarian perspectives. Accordingly, the purpose prong of the Lemon test is particularly relevant, since it insists on

[7] 466 F.Supp.2d 514 (2006)
[8] Id. at 527.
[9] See Anahad O'Connor, "Dispute Over Crèche Pulls Down Tree and Menorah, Too," *New York Times*, 23 December 2006, sec. B, p.8, late edition, East Coast.
[10] See, for example, *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (2004) and *Skoros v. the City of New York*, 437 F.3d 1 (2006).

secular motivation from school officials. As limited forums, public schools are also shielded from outsiders' efforts to impose doctrine. While contemporary decisions have protected schools and students, however, they may also have motivated some backlash from religious activists.

The Supreme Court's 1980 ruling in *Stone v. Graham* is often cited as precedent.[11] Reversing a Kentucky trial court decision, the Supreme Court ruled that the state's statute requiring the posting of the Ten Commandments in all public school classrooms was unconstitutional because it failed the purpose prong of the *Lemon* test. "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls," stated the Court, "is plainly religious in nature."[12] The majority was not swayed by the addition of a small notation alerting readers to the secular value of the document, nor by the fact that the displays were privately funded. The majority opinion reflects a cautious approach, wherein religious inducements are seen as inappropriate for government-sponsored educational environments.

Similarly, lower courts have also disallowed images of Jesus Christ in public school settings. In both *Joki v. Board of Education of the Schuylerville Central School District* and *Washegesic v. Bloomingdale Public* Schools displays of Jesus were declared unconstitutional.[13] In *Joki*, a ten by twelve foot painting of Jesus' crucifixion scene was mounted in a high school auditorium. The New York District Court found a conflict with the effects prong of the *Lemon* test, since the display had "the effect of placing the imprimatur of state authority upon that religious message."[14] In *Washegesic*, where a portrait of Jesus had hung in a secondary school hallway for thirty years, the Sixth Circuit Court of Appeals determined that all three prongs of the *Lemon* test had been violated: "The portrait is moving for many of us brought up in the Christian faith, but that is the problem. The school has not come up with a secular purpose. The portrait advances religion. Its display entangles the government with religion."[15] In both cases, images of Jesus Christ were found inappropriate for display in publicly funded schools.

More recently, in *Edward DiLoreto v. Board of Education of the Downey Unified School District* the 9th District U.S. Court of Appeals confirmed the right of school officials to decline to display the Ten Commandments.[16] The school's Baseball Booster Club had sponsored a fundraiser, offering commercial advertising space on a fence alongside the school's baseball field. The sign designs submitted by DiLoreto, however, were dominated by the Ten Commandments. School officials, wary of First Amendment conflicts, consulted with the California Attorney General's office. California Attorney General Dan Lungren found no violation of the either the state or federal establishment clauses and no reason to reject the message.[17] School board representatives initially agreed to post DiLoreto's message, before canceling the fundraising program altogether. DiLoreto then sued the school district, claiming his right to free speech had been violated. His claim was ultimately rejected by the Appeals

[11] 449 U.S. 39 (1980)
[12] Id. at 41.
[13] 745 F. Supp. 823 (1990). 33 F.3d 679 (1994).
[14] 745 F. Supp 823, 825 (1990).
[15] 33 F.3d 679, 683 (1994).
[16] 74 Cal. App. 4th 267 (1999).
[17] 79 Ops. Cal. Atty. Gen. 196 (1996).

Court, since his sign would have given "the impression that the state has placed its imprimatur on a particular religious creed."[18] Although the original impetus behind the advertisements was secular (fundraising), DiLoreto's sign would have subverted that purpose by advancing his religious perspective. The school district was within its rights to restrict controversial speech on school grounds.

The controversy over the Wren Chapel cross at the College of William and Mary in Williamsburg, Virginia again illustrates again the volatility of school-based disputes. The college was chartered as an Anglican institution in 1693, but has been publicly funded since 1906. In October of 2006, college president Gene Nichol changed the display policy for of a two-foot-high brass, table-top cross that had stood in the Wren Chapel, on campus, since the 1930s. Rather than leaving the cross on permanent display—subject to temporary removal for events by special request—the cross would be stored onsite, but out-of-sight, displayed at the altar only during appropriate religious occasions. "The chapel," Nichol said, "is also used frequently for college events that are secular in nature—and should be open to students and staff of all beliefs."[19] He hoped to make both the building and the college more inclusive.

Reaction to Nichol's policy was dramatic. Students introduced a bill in the Student Assembly calling for permanent display of the cross. Other students set up an internet petition site called "savethecross.org," which garnered more than 17,000 signatures. State legislation was introduced which would have blocked the policy change. An alumnus filed suit claiming violations of free speech and religion, causing him to suffer "pain and weeping."[20] Dozens of alumni either rescinded pledged donations or vowed to withhold future gifts, including James W. McGlothlin, whose revoked pledge was valued at $10 to $12 million. "Not one more nickel until no more Nichol," wrote one alumnus.[21] Calls for the president's ouster were widespread. In response, students and alumni formed Our Campus United, a forum for more temperate discussion. And the college, in turn, formed a committee to investigate the school's policies regarding religion.

In April 2007 the committee announced a compromise. The cross would be permanently displayed in a glass case near the front of the chapel, alongside a plaque explaining the college's Anglican history. During appropriate religious services, the cross would be moved to the altar. In addition, objects from other religious traditions would be welcomed in the chapel's sacristy. The arrangement was accepted with some grumblings; the college, however, subsequently declined to renew President Nichol's contract. On February 12, 2008, Nichol announced he would not complete his term in office. He claimed, and the college denied, that he was offered "substantial economic incentives" if he would refrain from blaming his release

[18] 74 Cal. App. 4th 267, 276 (1999).
[19] "W & M Removes Chapel Cross to be Inclusive," *Richmond Times Dispatch*, 29 October 2006, sec. B, p. 2.
[20] Angley, William, "Law School Alum Suing College to Return Cross to Wren Permanently," *Flat Hat*. 13 Feb. 2007; available from http://www.flathatnews.com/news/318/law-school-alum-suing-college-to-return-cross-to-wren-permanently.; Mahoney, Brian, "Judge Dismisses Wren Cross Lawsuit," *Flat Hat*, 1 June 2007; available from http://www.flathatnews.com/news/940/judge-dismissed-wren-cross-lawsuit.
[21] "No Cross, No Cash," Blog. http://nocrossnocash.blogspot.com/.

on ideological differences.[22]

On the Public Square

As with the Wren Chapel cross dispute, history and tradition impact many Establishment Clause controversies dealing with public monuments. The "whos," "whens," and "whys" of religious displays in public venues are critical to their constitutional status. The courts have issued a number of relevant rulings,[23] culminating in 2005 in a pair of decisions that highlight the weight of history in determining the legality of public displays with religious overtones. *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*[24] and *Van Orden v. Perry*[25] also touch on a second, but related issue, which bears on the notion of ceremonial deism and the role of the Constitution in protecting non-believers. Are state-sponsored references to "God" justified by custom and history? Or does the mention of a supreme being constitute a generalized endorsement of religion? The Court's final count reflects the complexity of these issues; both cases were decided with bare majorities of five to four.

McCreary v ACLU

Purpose and the presence of an incriminating, rather than legitimizing history were central to the Supreme Court's ruling on the posting of the Ten Commandments in *McCreary v. ACLU*.[26] In 1999, McCreary and Pulaski Counties, in Kentucky, had installed large framed copies of the Ten Commandments in prominent locations in their courthouses. After the American Civil Liberties Union filed suit objecting to the displays, the counties amended their original postings with eight smaller historical documents, each with religious elements, including Abraham Lincoln's 1863 proclamation for a day of national prayer, the Magna Carta, the Declaration of Independence, and the lyrics of "The Star Spangled Banner." When the district court ordered the revised displays removed, the counties installed third versions, each titled "The Foundations of American Law and Government Display." They featured the Commandments among eight other documents, all equally sized. The counties claimed the displays were intended to be educational. The District Court, the Court of Appeals of the Sixth Circuit, and, finally, the Supreme Court disagreed.

The Court's decision was grounded in the principle of governmental neutrality, measured under the auspices of the purpose prong of the *Lemon* test. Writing for the majority, Justice Souter explained that a display of the Ten Commandments was not inherently inappropriate, even though the document had been identified as explicitly religious in *Stone v Graham*, some twenty-five years earlier. "Detail," he wrote, "is key."[27] The issue in McCreary was intent—and the counties' claims for secular motivation were belied by the pro-religious bias that

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[22] See both Gene Nichols' email to the community, 12 February 2008, available from http://www.wrengateblog.com/letters.html and "Q & A Regarding BOV's Decision on the Contract of Gene Nichol," *W&M Office of University Relations,* 13 Feb. 2007, at www.wm.edu/news/?id=8676.

[23] See, for instance, *Anderson v. Salt Lake City Corp*., 475 F.2d 29 (1973); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (2001); *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (2002); *Glassroth v. Moore*, 335 F.3d 1282 (2003).

[24] 545 U.S. 844 (2005).

[25] 545 U.S. 677 (2005).

[26] 545 U.S. 844 (2005).

[27] Id. at 846.

marked the original displays. By attempting to impose a Judeo-Christian standard of behavior onto the pubic, they lost their claims to neutrality.

Importantly, in the majority opinion, neutrality was extended to all persuasions. Justice Souter stated that the "government may not favor one religion over another, or religion over irreligion."[28] Justice Scalia strongly objected. "With respect to public acknowledgment of religious belief," he wrote, "it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[29] Justice O'Connor, in a concurring majority opinion, disputed Scalia's partisan reading of history. We cannot accept, she wrote, "the theory that Americans who do not accept the Commandments' validity are outside the First Amendment's protections. There is no list of approved and disapproved beliefs appended to the First Amendment and the Amendment's broad terms ('free exercise,' 'establishment,' 'religion') do not admit of such a cramped reading."[30] The gap between the two positions looms large over future decisions.

Van Orden v. Perry

As a counterpart to the *McCreary* decision, the Court, on the same day, ruled to let stand a monument on the grounds of the Texas state capitol that prominently featured the Ten Commandments. In *Van Orden v. Perry*, the object in dispute was a six-foot granite monolith located in a twenty-two acre public park, among thirty-eight other monuments and markers commemorating diverse aspects of Texas' political and legal history.[31] It had been donated by the Fraternal Order of Eagles in 1961, as part of their program to combat juvenile delinquency. Thousands of similar plaques and prints and more than 150 monuments were distributed nationwide by the Eagles during the 1950s and '60s, some even into the mid-1980s.[32] The Eagles hoped the memorials would provide American youth with practical encouragement to lead upstanding lives.

The majority opinion focused on the "passive" nature of the monument and its place in the historic narrative of the United States. First, the Court ruled, that the display was not confrontational—it awaited its audience on an expanse of lawn, rather than ensnared it in an obligatory corridor. Second, and more importantly, the monument was justified, explained Justice Rehnquist, in that it reflected the religious heritage of the U.S. and, as such, was characteristic of the many quasi-religious practices and displays found on government sites throughout the country, including in the courtroom of the Supreme Court. While the display was religious, Rehnquist argued, it had "a dual significance, partaking of both religion and government."[33] Justice Breyer, in agreement, emphasized the monument's secular message and the pointed to the forty years it had stood uncontested as a measure of its inoffensiveness. In a dissenting opinion, Justice Stevens argued that neutrality should be the Court's critical

[28] Id. at 875
[29] Id. at 893
[30] Id. at 884.
[31] 545 U.S. 677 (2005).
[32] See the Fraternal Order of Eagles website at www.foe.com for more information on the organization and the history of its memorials.
[33] 545 U.S. 677, 692 (2005)

guiding principle, and that government endorsement of any text that commands the reader to "have no other gods before me" was a violation of the Establishment Clause.[34] Justice O'Connor, also dissenting, referred back to her opinion in *McCreary*, calling again for a firm separation between government and any endorsement of religion. By one vote, the marker stood.

The Mount Soledad Cross

While the *McCreary* and *Van Orden* disputes have reached the end of the judicial line, the Mount Soledad Cross case is still wending its way through the court system. *Trunk v. the City of San Diego* is only the latest iteration in one of the longest running litigations over a religious symbol in the public square. [35] The cross was erected in 1954 by the Mt. Soledad Memorial Association (MSMA), with the authorization of the city of San Diego. It was dedicated on Easter Sunday as a memorial for veterans of WWI, WWII, and the Korean War, although for its first thirty-eight years nothing marked it as a memorial. The steel and concrete "Easter Cross," as it was commonly identified,[36] stretches 43 feet above the 822-foot summit of Mt. Soledad, overlooking the La Jolla area and an interstate highway. Both religious and non-religious groups used the site for a variety of events.

In 1989, the first challenge to the cross was mounted, which argued that it violated both the federal and California State Constitutions. In federal and district courts, the plaintiff's case was upheld and the city was ordered to remove the cross. In the meantime, the MSMA instituted a number of changes to the Mt. Soledad site, adding, among other items, explanatory and memorial plaques and dedicated paving stones. These amendments failed to affect the legal status of the cross. So, in 1994, the city made the first of two attempts to transfer ownership of the plot to a private party. But because the transfers were predicated on intent to maintain the cross, both sales were invalidated. A negotiated agreement to move the cross to a nearby church property also foundered when the city council decided to put the plan on a citywide ballot. Although the measure was approved by voters in November of 2004, the council refused to comply with the referendum and relocate the cross. For the next two years, defenders of the cross worked to sidestep city and state involvement by transferring ownership of the Mt. Soledad memorial to the federal government. More lawsuits, appeals, and contentious campaigns ensued, with the plaintiffs aided by the ACLU and the defendants by the Thomas More Law Center, a religious rights advocacy group. The contest shifted, at last, in August of 2006, when Congress moved to acquire the property and authorize the MSMA to continue its maintenance as a veterans' memorial.

The most recent ruling on the cross, therefore, bears on both federal constitutional standards and contemporary rulings. In a summary judgment issued on July 29, 2008, District Court Judge Larry Alan Burns found the Mt. Soledad memorial, inclusive of its cross, to be constitutional. His analysis relied on the *Lemon* test, as informed by *McCreary* and *Van*

[34] Id. at 735.

[35] --- F.Supp.2d ----, (2008) WL 2917123 (S.D.Cal.). The full citation for this case was not yet available at time of printing.

[36] From 1954 to 1989, the Thomas Bros. annual San Diego area maps described the monument as the "Mt. Soledad Easter Cross." See "The Mt. Soledad Cross" at www.aclu.org/religion/govtfunding/26524res20060824.html.

Orden, along with two related Ninth Circuit decisions, *Buono v Kempthome* (ruling in opposition to a land swap engineered to preserve a cross on public land) and *Card v City of Everett* (ruling in favor of another Eagles' Ten Commandments monument).[37]

In analyzing the purpose and entanglement prongs of the *Lemon* test, Judge Burns excluded from consideration all events prior to Congress' acquisition of the memorial and refused speculation regarding Congressional motivations. He considered only the formal statement of purpose. Consequently, the purpose prong was satisfied by Congress' declared intention to preserve the memorial for veterans and their families and the question of entanglement was moot, since the federal government's involvement was negligible. The remaining prong tests effect—whether religion is advanced through government action, in this case, whether a reasonable observer would interpret the cross as governmental advocacy for Christianity. While rejecting the pre-2006 saga of the cross for the purpose prong, however, Burns assumed similar knowledge among reasonable observers. He claimed that with awareness of local history and geography, those observers would infer a nationalistic or patriotic message, rather than official religious partiality. His reasonable observers are informed observers.[38] The sectarian significance is further diluted, Burns argued, by the monument's isolated location, the presence of secular elements, and the generic use of crosses for political or other non-Christian purposes. Finally, Burns cited the passive nature of the memorial, which, having no explicit religious text, was even less likely to violate the Establishment Clause than Ten Commandment displays. Burns, in sum, found the Soledad cross to be constitutional. The plaintiffs' ACLU attorneys are considering their appeal.

Potential Solutions and Persistent Issues

No legislative policy will ever unweave religion from government in the cultural cloth of the United States. There are ways, however, to systematize the sometimes fuzzy wall that should partition church from state according to the mandates of First Amendment. For holiday displays, the guiding principles are inclusion, diversity, and fair access to clearly codified public forums. Municipalities governing holiday displays need to set clear ground rules and then abide by them. Courts that contend with the inevitable challenges need to conduct fact-specific, contextual reviews, bearing in mind that the role of religious holiday displays is to celebrate and support America's patchwork community of individuals. For public schools, the standards are more restrictive. Religious materials may be used to educate on academic topics, but not to inculcate moral perspectives. And public school facilities, as limited public forums, are not open to all messages or messengers. Neutrality takes precedence over free speech rights. School officials and the judiciary must assiduously apply the first two prongs of the *Lemon* test. Purpose and effect must not favor or promote religion or godliness. Although debates over sectarian holiday and public school displays can be complicated by social pressures, questions of their constitutionality can for the most part be resolved using these existing standards.

[37] 527 F.3d 758 (2008); 520 F.3d 1009 (2008).
[38] Burns here also cites *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

Religious displays in the public square present problems not so easily addressed, however. Although challenges to displays like the Eagles' Ten Commandments monuments and the Soledad cross are informed by many of the same rulings that control holiday and school displays, the issues involved are more complex. History plays a much larger role in determining legal status—and evokes a larger measure of social response. A powerful tension exists between preserving religious heritage and respecting our evolving American society. Future judicial determinations will depend, in part, on finding a balance between America's religious traditions and the needs and rights of her sometimes non-traditional population.

The problem is apparent in opinions like Scalia's in *McCreary* and Burns in *Trunk*. Scalia explicitly disregards Americans outside Judeo-Christian culture. Burns expects reasonable observers to be complaisant and conversant with local history and traditions. Both favor insider standpoints over individual rights, convention over non-conformity. Decisions like *Van Orden* send the same message, albeit in a milder manner—that Christian perspectives carry more weight.

While the framers of the Constitution were unquestionably shaped by their participation in a Christian culture, their overriding message was one of personal liberty under an impartial government.[39] Current demographics show that the U.S. remains a predominantly, but not exclusively, Christian nation. Recent polls report roughly 78% of Americans self-identify as Christians, about the same percentage that reports a belief in God. However, between four and five percent profess no belief in God and roughly the same percentage adhere to non-Christian belief systems (including Jews, Muslims, Hindus, Buddhists, and others).[40] The quandary, then, is melding the policies of the past with the realities of the present.

Public religious displays present two problems: one looking backward and one forward. In hindsight, we have potentially thousands of public memorials, monuments, displays that venerate religion. It seems unlikely, unwise—even Orwellian—to attempt to wipe the face of the country clean of these markers. The key to their fate lies in the constructs of public forums. If religious acknowledgments are private speech in an open public forum, then they need to be legally and publicly identified as such. If they are government speech, the case for historic justification must be strong. It should be remembered, also, that relics of the xenophobic 1950s are not artifacts bequeathed from the Founding Fathers. Only fact-specific analyses at the highest levels of scrutiny will determine if displays from the past should be preserved in their present locations or removed.

The danger in preserving religious public monuments lies, in part, in the precedent they set for the future. We need, therefore, to delineate a policy that will respond to changing realities in the U.S. We need a watershed ruling, one that will recognize the past as the past, without impugning the rights of present and future citizens. The Supreme Court hints at this with *McCreary*, rejecting modern installations that might have been forgiven in previous decades. Yet as we look at public reactions to recent challenges to religious displays, it becomes

[39] See Craig R. Smith and David M Hunsaker, *The Four Freedoms of the First Amendment* (Long Grove: Waveland, 2004), ch 2,3.
[40] "U.S. Religious Landscape Survey." Pew Research Center, available from http://religions.pewforum.org/.

apparent that the weight of Christian tradition continues to exert a drag on the movement toward equitable pluralism. Just as in campaigns for emancipation, women's suffrage, and civil rights, progress is a process of national maturity. The time must be right.

In 1956, when Congress adopted the national motto, "In God We Trust," the country was deep into the Cold War and on the waning edge of the McCarthy era. Just two years earlier, the words "under God" had been added to the Pledge of Allegiance. And one year earlier, Congress had unanimously voted to have "In God We Trust" inscribed on all U.S. coins and currency. It was to remind citizens of the "self-evident truth" that America's freedom was based on "faith in God and the desire of Americans to live by His will and by His guidance."[41] In the span of a few short years, "In God We Trust" supplanted what had been the de facto motto of the U.S. since its inception: "E pluribus unum"—"one unity composed of many parts." "In God We Trust" was deemed a "superior and more acceptable motto."[42]

A half-century later, the Los Alamitos City Council members agreed. They unanimously voted to post that revised motto in their chambers. After a month of polling, only ten percent of community members had registered opposition. With that, Los Alamitos joined some thirty California cities in a movement started in Bakersfield, California, to encourage every American city to display the motto. "Patriotism," said the group's president, "is love of God and love of country."[43] But if our country is to respect the freedom and diversity of all Americans, it would perhaps be better served by a return to our original motto and the "one unity" that inspired our nation's founders.

[41] Representative Charles Bennett, the sponsor of the legislation, 101 Cong Rec. 4384 (1955), quoted in Epstein, p. 2123.
[42] From Congressional Record—Senate (1956), p. 13917, quoted in Epstein, p. 2124.
[43]Sullivan, Jacquie, quoted in Holland, John, "Sonora Officially Trusts a Deity Council Votes to Display 'In God We Trust' on Wall at City Hall; Critics Steam," *The Modesto Bee*, 10 August 2007, Sec. B, p. 1.