

Chapter IV

Ten Commandments, Three Plastic Reindeer, and One Nation...Indivisible

from

Religious Freedom and the Constitution

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Early one December day some years ago, the principal of a public elementary school somewhere on Long Island called the executive director of the New York Civil Liberties Union. “Ira,” he said, “Please don’t tell anyone I’m calling you, but we’re having an assembly next week, and I want to know whether it is okay for us to sing a few Christmas carols.” Ira replied: “Joe, please don’t tell anyone that I told you this, but just go ahead and do it!”

Some disputes about religious liberty can seem either deeply important to a pluralistic society or so trivial that the attention paid them is silly and exasperating. Constitutional questions about Christmas carols are like that, which is our point in recalling the brief telephone exchange between two men, who in different circumstances might have been courtroom adversaries. So too are the roiling controversies we take up in this chapter: Ten Commandment displays, crèches in public parks, and Pledge of Allegiance ceremonies. Perhaps this sense of vacillating between the profound and the irritating is inevitable: the stakes in these cases are purely symbolic, but religious conviction is a domain in which symbols are often very important to Americans.

Whatever else is true, public exhibitions of religious symbols excite intense and heated controversy. The resulting cases provide a starting point for exploring Equal Liberty’s implications for Establishment Clause jurisprudence. At the outset of that exploration, we need an account of how religious symbols matter in American culture. It is to the task of developing such an approach that we first turn.

Public Displays

Cases about crèche displays, town-sponsored Christmas trees, and other public exhibitions of religious symbols came to the Court relatively late in its continuing effort to develop an attractive and workable approach to Establishment Clause cases. Cases about public aid to religious schools first reached the Court in the late 1940s, and the Court's first school prayer cases were decided in the 1960s; in contrast, the first Christmas display case arose in the 1980s. Now, however, the annual Holiday Wars—political and legal skirmishes over whether the government can sponsor displays celebrating Christmas, Hannukah, and soon—have joined eggnog, greeting cards, and fruitcake as staples of December culture in America.

When Supreme Court justices analyze cases about the public display of religious symbols, they tend to use reasons and concepts that fit nicely with the precepts of Equal Liberty. In particular, they usually invoke some version of the endorsement test that Justice O'Connor developed in the Court's very first holiday display case, *Lynch v. Donnelly* (1984). *Lynch* involved the display by the city of Pawtucket, Rhode Island, of a nativity scene or crèche in a park owned by a nonprofit organization and located in the city's shopping district.¹ Justice O'Connor said that the crucial question was whether the display amounted to an endorsement of religion (or of a particular religion):

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition ... [by its] endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.²

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

² *Ibid.* at 688 (O'Connor, J., concurring).

Justice O'Connor's words are music to an Equal Liberty enthusiast's ears. Not everyone finds them convincing, though.³ In *Lee v. Weisman* (1992), a case about a prayer at a public school graduation, Justice Scalia wrote a blistering dissent critiquing Justice O'Connor's endorsement test.⁴ Scalia would recognize Establishment Clause violations only in cases in which somebody suffered "coercion...backed by threat of penalty."⁵ Pawtucket had not forced anybody to say a prayer, or to participate in a ritual, or to visit its homage to the Christmas season. So where, Scalia asked, was the harm?

"Taxpayers were forced to pay for the display," someone might say, "even if they rejected its religious message." But this explanation is question-begging at best; Pawtucket had not spent much taxpayer money on its crèche display.⁶ Suppose that the city had spent none at all, relying entirely on private contributions to pay the modest expenses associated with an officially sponsored display. Would that make a difference? Not under Justice O'Connor's endorsement rationale and not, we think, to most citizens. Complaints about the misuse of taxpayer dollars are a staple of American political rhetoric, but they do a poor job of capturing what is constitutionally troublesome about crèche displays.

If endorsement per se amounts to a constitutional violation, then the fact of disparagement must by itself—unsupplemented by any concerns about coercion or the expenditure of government money—be the relevant harm. To Scalia and other critics of the endorsement test, that injury seems too flimsy and subjective to deserve constitutional

³ For an early critique, see Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test," 86 *Michigan Law Review* 266 (1987).

⁴ *Lee v. Weisman*, 505 U.S. 577, 631, 640-644 (1992) (Scalia, J., dissenting). See also the milder dissent by Justice Kennedy in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (concurring in the judgment in part and dissenting in part), the first case in which the Supreme Court required a town to take down its Christmas display; the Supreme Court eventually upheld the Pawtucket display at issue in *Lynch* on the ground that it was sufficiently secular to pass the relevant tests, including in Justice O'Connor's opinion, the endorsement test.

⁵ *Lee*, 505 U.S. at 642.

⁶ According to the *Lynch* Court, the crèche originally "cost the City \$1365; it now is valued at \$200. The erection and dismantling of the crèche costs the City about \$20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years." 465 U.S. at 671.

attention. After all, people can feel disparaged at the drop of a hat. Indeed, as we shall discuss later in this chapter, some religious believers feel themselves disparaged by the absence of religious symbols from public spaces. And governments might plausibly deny that they intend to disparage anybody with their displays; Pawtucket claimed that its purpose was simply to attract holiday shoppers to local stores, and that might have been so.⁷ Why, then, should we single out the public display of religious symbols as a constitutionally impermissible form of disparagement?

We believe that this question has a sound answer, one consistent with Justice O'Connor's reasoning in *Lynch*. The answer pertains to what we will call the social meaning of religious symbols in American culture. To answer Justice O'Connor's critics fully, we need to develop the idea of social meaning in some detail. Our treatment of it will involve some subtle distinctions, but the basic idea has a venerable pedigree in American constitutional jurisprudence and ought, we believe, to resonate with our readers' understandings. We begin our discussion with a simple example, one to which we will return several times.

Religion, Social Meaning, and Disparagement

Imagine that the officials of a small town—let's say "Fineville"—have decided to erect a handsome highway-spanning arch as the portal to their municipality. Now imagine two different inscriptions they might choose to blaze across their arch. One imagined slogan would be "Fineville—A Nuclear-Free Community." The other would be "Fineville—A Christian Community." Now it is certainly possible that in the Fineville of our imagination questions of nuclear power and/or weapons are a matter of controversy—possibly even heated controversy—and that advocates of things nuclear might be irked at the highly visible side-taking implicated in the nuclear-free-community sign. But it would be odd in the extreme to regard the losing side in the nuclear debate as disparaged in a

⁷ Myron Stoller, a Jewish retail merchant who ran a store in Pawtucket, testified at trial that the city's holiday display was important to his business, though from a commercial standpoint he did not think that it mattered whether the display included a nativity scene alongside its Santa Claus. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1159 (Dist. R.I. 1981).

way that should invoke our constitutional sympathies. When we shift our attention to the Christian-community sign, it is not at all odd to think that non-Christians are so disparaged.

What accounts for this difference? We suggest that public endorsements of religious belief must be understood against the background of four structural features of religion in our society, features that, even if not common to everything that might be called “religion,” are nevertheless common to most of American religion. These features affect the social meaning of religious displays—that is, they affect the meanings that competent participants in American culture may reasonably associate with the government display of religious symbols.

First, religions tend to be comprehensive; they are not discrete propositions or theories, but large, expansive webs of belief and conduct. Second, despite the real diversity within American churches, there are still important respects in which one is either “in” or “out” of a religion. In some of the most cohesive faiths, churches distinguish insiders and outsiders in a strictly enforced, institutional sense: the Mormon church, for example, excommunicates those whom it deems unfaithful. Most American churches are more loosely structured. Catholics can be relatively orthodox or quite secular, and it is possible to be a “secular Jew.” Still, it makes little sense to “mix and match” religions, and groups that pretend to do so, such as the evangelical Christian group Jews for Jesus, only underscore the point. Third, open ritual is prevalent in religion, and participation in ritual—standing up or staying seated, bowing one’s head or not, repeating designated words or remaining silent—plays an important role in signifying who is “in” or “out” of these comprehensive structures in the eyes of individual believers, church communities, and the more general public. Fourth, the perceived stakes of being within or without these structures of belief and membership are often momentous: being chosen or not, being saved and slotted for eternal joyous life or condemned to eternal damnation, leading a life of virtue or a life of sin, acknowledging or repudiating one’s deepest possible debt, fulfilling or squandering one’s highest destiny. Or the stakes may be less transcendental and more mundane, but no less categorical, such as being like us or very different from

us, or being or not being perniciously under the sway of particular leaders or worldwide movements.

As we have observed throughout, Americans are keenly sensitive to distinctions in religious identity. Though most American faiths are reconciled to the fact of religious pluralism and to the consequent need for religious tolerance, they nonetheless continue to insist on the unique truth of their beliefs and the special significance of their religious identity. In the late 1950s the sociologist Will Herberg said that in the United States, the question “What are you?” usually calls for an answer drawn from the list “Protestant, Catholic or Jew.”⁸ The list may have grown—to include, for example, “Muslim”—but the basic point still holds: in the United States, religion plays a major role in defining civic identity.

All this means that public endorsements of religion carry a special charge or valence. Such endorsements signify who is “in” and “out” of competing large-scale social and ideological structures, and assign powerful and pervasive judgments of identity and stature to the status of being in or out. Religious endorsements valorize some religious beliefs and those who hold them, and thereby disparage those who do not share those beliefs.

There is thus a deep and crucial difference in the meaning of the two Fineville signs, and the disparagement of non-Christians implicated in the social meaning of the second sign is inconsistent with the requirement of evenhandedness—of what we have called “equal regard”—that lies at the heart of the Establishment Clause.

This understanding of public religious endorsements is not just a matter of a statistical generalization about personal sensibilities. Sensitivities vary across groups and over time. Moreover, by making constitutional law so dependent upon personal reaction, we would risk creating a “tyranny of the squeamish”: an especially thin-skinned group would have

a better chance of getting doctrines offensive to it excised from publicly sponsored speech. It might seem more reasonable to tell the group to toughen up a bit.

Nor does this understanding of a public religious endorsement depend on what the public officials had in mind when they chose to make the endorsement. A particular official or group of officials may not intend to contribute to the disparagement of persons in their community and yet do or say something that constitutes such a disparagement, just as an individual speaker might overlook or misunderstand the linguistic meaning of her words.

The pernicious element of disparagement that inheres in public religious endorsements like Fineville's sign is a product of the social meaning of such endorsements. The social meaning of an event or a public expression is the meaning that a competent participant in the society in question would see in that event or expression. Social meaning is in this respect like linguistic meaning, which depends upon the understanding and use of language by a competent practitioner in the relevant linguistic community. In our national community, the structure of religious belief and affiliation is such that endorsements carry with them the taint of disparagement. And in our national community, "Fineville—A Christian Community" disparages non-Christians, while "Fineville—A Nuclear-Free Community" merely irritates nuclear advocates.

The concept of social meaning—whether invoked by that name or explicitly invoked at all—is important in thought and discourse about justice in political communities, and in fact it has a venerable pedigree in constitutional jurisprudence. The first Justice Harlan called upon it in his justly famous dissent in *Plessy v. Ferguson* over a century ago. *Plessy* involved a constitutional challenge to a Louisiana law mandating that whites and blacks ride in separate railway cars. The majority of the Court rejected the challenge, insisting that no harm to constitutional equality was at stake. At one point, the majority came close to the heart of the case, only to demonstrate a peculiar inability to see the world as it clearly was:

⁸ Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* 36 (2d ed. 1960). Herberg observed that "to have a name and identity, one must belong somewhere; and more and more one

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁹

In response, Justice Harlan insisted that “the real meaning” of the Louisiana law was unduckable, namely, “that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”¹⁰ Harlan thus saw “separate but equal” railway cars as carrying an insidious social meaning that contributed to the perpetuation of social caste, and for that reason, as plainly unconstitutional. We think Harlan’s invocation of social meaning was morally precocious, and that his concept of such meaning was very similar to the one we are using here. Like us, he believed that certain practices had a disparaging effect that was “real” and not reducible either to the personal intentions of their sponsors or to the personal perceptions of observers.¹¹ These practices pertain to important constituents of identity—most notably, race and religion—that, within American culture, function as especially significant markers of social division.

A Double-Edged Sword?

When we discussed Justice Scalia’s dissent in *Lynch*, we adverted briefly to one frequently heard objection to the endorsement test. Some people contend that the test is

‘belongs’ in America by belonging to a religious community, which tells one *what* he is.” Ibid. at 40.

⁹ Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

¹⁰ Ibid. at 560 (Harlan, J., dissenting).

¹¹ The concept of social meaning also figured prominently in one of the most powerful justifications for Brown v. Board of Education, 347 U.S. 483, 494 (1954), the case in which the Supreme Court repudiated Plessy’s doctrine that “separate but equal” facilities could satisfy the demands of the Equal Protection Clause. At the time, critics of the decision suggested that segregated institutions might be constitutionally acceptable if they were in fact equally good. In a famous article, Charles L. Black, Jr. replied that separate was not equal because “the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority.” Charles L. Black, “The Lawfulness of the Segregation Decisions,” 69 *Yale Law Review* 421, 427 (1960).

incoherent because government cannot help but endorse some sort of controversial message about religion. Governmental embrace of religious symbols might disparage nonbelievers, but the absence of religious symbols might equally well disparage believers. If so, there is no getting away from the problem.

We think this argument wrong in a number of ways. Let's go back for a minute to Fineville, with its portal sign "Fineville—A Christian Community." Suppose several residents of Fineville take the town to court, and ultimately secure a judgment to the effect that the sign is unconstitutional because it has the social meaning that persons other than Christians of a certain sort are not full members of the community—because, in our conceptual vocabulary, it disparages nonmainstream believers. The town officials take down the sign and replace it with another: "Fineville—Home of the Riding Lawnmower." (It's a long story; don't ask.)

Now, some, possibly many, residents of Fineville may be irked by this turn of events; they may feel that the first sign was a valuable means of expressing their solidarity with regard to a matter of great importance to them. But it would be bizarre to say that the social meaning of taking the sign down is that mainstream Christians are not full and respected members of the community. And that is so whether we take the relevant community to be Fineville, the state, or the nation. In what possible sense could persons in Fineville who wanted the old sign plausibly claim to be disparaged?

Two possibilities suggest themselves, the first more palatable than the second. First, when the court in question ruled that the old sign violated the Constitution because it disparaged non-Christians, it determined that Fineville had behaved wrongly with regard to persons other than mainstream Christians in the community. Thus, there is an opprobrious dimension to the Court's judgment. But that is just a function of constitutional adjudication generally: there will often be a moral dimension to constitutional disputes, and persons on the losing side may understand themselves to have been criticized by an official organ of the state. The social meaning of the court's decision

does not on this account include the message that anyone is less than a full member of any relevant community.

Second, we could imagine a claim of disparagement that ran as follows: “We, the fellowship of like-thinking religious believers who live in Fineville are entitled to recognize what we have in common and to take pride in what makes us special; nonbelievers can choose to live here as less than full members of our community, or they can choose to live elsewhere...it’s a free country. When the court insisted that we suppress our public celebration of who we are, it denied our specialness. That is a form of disparagement.” It is certainly possible that the social meaning of the court’s decision and the resulting removal of the Christian-community sign in our hypothetical includes the proposition that mainstream Christians have no pride of place in Fineville or elsewhere in our country, that persons who are not mainstream Christians enjoy equal constitutional stature. Yet, if insistence on equal status offends a group of persons because it demotes them from a superior status, their taking offense, obviously, is not what we would or should regard as a constitutionally cognizable harm.

When Is a Display an Endorsement?

In *Lynch*, after propounding the endorsement test, Justice O’Connor went on to observe that not all public displays of religious material constitute endorsements—or, as we would put it, that not all displays of this sort have a social meaning that includes the disparagement of some members of the community on the basis of their religious beliefs.

We agree with Justice O’Connor about this point (though not with the conclusion she ultimately drew from it). To see why, we return again to the fictional hamlet of Fineville and imagine two more cases. First, it is the Christmas season, and the Fineville City Council directs the Parks Department to display a large crèche in a prominent location in the public park that surrounds the City Hall; and second, in a remarkable coup, the Fineville City Art Museum borrows and displays one of Fra Angelico’s paintings of the Annunciation as part of its “Treasures of the Italian Renaissance” exhibition. These two

events are likely to have very different social meanings. The social meaning of the crèche includes disparagement of those who do not embrace Christianity as their religious belief, while the social meaning of the art exhibition does not. Why is this so?

We can begin to understand the difference when we realize that the proper question is “What is the meaning of the display?” as opposed to “What is the meaning of the object that is being displayed?” Ordinarily these questions produce the same answer, because governments will properly be understood to express the meaning of the symbols they invoke. So when a government erects a crèche, that act will have the social meaning of celebrating the birth of Jesus Christ and thereby affirming those faiths that embrace Jesus Christ as a figure of reverence. When this is true, the social meaning of the display will be more or less the same as the meaning of the object displayed, and with a sectarian object like a crèche, that meaning will include the disparagement of nonbelievers.

Sometimes, however, governments will properly be understood in effect to be holding a religious object at arms length, to be putting quotation marks around religious text or a contextual frame around a religious object. Our story about the Fineville City Art Museum’s display of one of Fra Angelico’s paintings of the Annunciation is like that. The content of the painting is exquisitely religious: the Annunciation—in which the Angel Gabriel tells Mary that she will conceive the child Jesus—is a an event depicted and celebrated most prominently within Catholic theology. And Fra Angelico depictions are faithful to their subject—Gabriel is undeniably an angel, and his message spills forth in explicit Hebraic text. But Fra Angelico is a great painter, and his works are widely appreciated for their extraordinary artistic force and their importance in the evolution of Western art. The display of the painting in a museum, as a great and important work of the Italian Renaissance, would properly be understood as an instance of framing rather than embracing the religious content of the painting, and thus the display would not carry the bitter social meaning of disparagement.

This distinction—between invoking the sacred meaning of a religious object and framing that meaning—more or less tracks the distinction in the philosophy of language between

“using” and “mentioning.” In a later section we will present some excerpts from the Ten Commandments. Were our project in this book different than it is, we might be offering the Commandments to support a claim about theological truth. We would then be *using* the Commandments. In fact, though, we include these quotations simply as a reminder of what the Commandments say, so that we can go on to discuss the constitutional status of their public display. We are not using the Ten Commandments; we are *mentioning* them.

There are many examples of the public quoting or framing of religious material. The federal government maintains the San Antonio Missions National Historical Park, which preserves for public appreciation four missions, the greatest concentration of Catholic missions in North America. These were established by Franciscan friars bent on extending the influence of Spain and of the Catholic church. The historical and architectural significance of these buildings makes them worthy objects of public appreciation. Their public presentation by the Park Service—from the name of the park onward—makes them a clear instance of historical framing.

The name San Antonio itself is an instance of the framing of religious content. “Saint” or its equivalent is something of a commonplace in community names in the United States; other prominent examples include St. Paul, San Diego, and San Francisco. There can be no doubt that these names have religious origins, but we think it would be just plain silly to suppose that any constitutional violation results. “St. Paul” now has at least two meanings: it refers to a Christian saint and to a city in Minnesota, and the latter meaning is secular. Acceptance of the city’s historical name does not imply that residents or officials admire or venerate the eponymous saint—any more than use of the name Germantown, Maryland, implies that current residents are from, or support, Germany.

Fig Leaves versus Frames

Having used the Italian Renaissance and Fra Angelico as our prime example of the public framing of objects with religious content, we are tempted to borrow from an adjacent tradition of Italian painting: in the late 1600s and thereafter for a century or so, church

functionaries—more prudish than their predecessors had been—ordered the addition of fig leaves to quite prominent works of art, like Michelangelo’s Sistine Chapel ceiling and Masaccio’s depiction of Adam and Eve in the Brancacci Chapel in the church of Santa Maria del Carmine in Florence. Modern restorations have removed these fig leaves, leaving the human figures in their original undressed state; but the fig leaf has survived as a metaphor for a fairly flimsy disguise.

Fig leaves come to mind because sometimes public officials stick a kind of fig leaf on religious displays. These cover-ups do nothing to deflect the social meaning of the displays; in fact in some instances these thin disguises may have the perverse effect of emphasizing the religious social meaning that lies just underneath. This problem has been very much at the center of the Supreme Court’s unwieldy jurisprudence about crèches, Christmas trees, and other holiday displays. The justices seem in those cases to be struggling to find a way to distinguish between frames and fig leaves—between, that is, thinly disguised cases of endorsement/disparagement, on the one hand, and cases in which the community in question is framing or mentioning religious materials, on the other. To date, the results have been a bit clumsy. Consider what some commentators have come to think of as the “three plastic animals rule,” which is yet another product of *Lynch*, the case about Pawtucket’s crèche display.

We have thus far emphasized the more abstract parts of Justice O’Connor’s opinion, including its endorsement test. When it came time to decide upon the constitutionality of Pawtucket’s display, Justice O’Connor produced a conclusion about which we are less enthusiastic. She emphasized that the crèche was part of a larger display, along with such items as colored lights offering “Season’s Greetings,” a Santa, flying reindeer, a clown, an elephant, and a teddy bear. Justice O’Connor—who cast the decisive vote in the case—suggested that by surrounding a crèche with a few Santas and flying reindeer, a town frames it in a way that separates the crèche’s theological content from the government’s authority.¹² That, we think, is a mistake. The reindeer do subtly change the

¹² Justice O’Connor wrote that “the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of

meaning of the crèche display—they suggest a less theologically rigorous, more commercialized form of religious belief, one that will be offensive to some devout Christians as well as to some non-Christians. But the Santa and his reindeer neither secularize the crèche nor mark it as only one of several competing religious and philosophical symbols valued by citizens. They are at best a fig leaf, not a frame.

As we said earlier, a public display of religious material is the meaning that a competent member of the community would attach to the display. Some lower federal courts seem to have exactly this in mind when they ask whether “a reasonable observer would believe that a particular action constitutes an endorsement of religion.” Such an observer may in part be attributing a purpose to the officials who chose to mount the display, but the question of whether a competent observer would believe the officials to have intentionally lent their support to religion is not the same as the question of what the officials actually had in mind. So, if our much-referenced officials of Fineville choose to erect a crèche in a prominent place in the park adjacent to their city hall solely out of the belief that doing so will put people in a holiday mood and boost the sales of local merchants, this craven but secular impulse is to a large degree beside the point. That the Fineville officials happen to be singularly obtuse does not determine how members of their community will or should read their actions.

That some observers take offense on religious grounds to a public display, however, does not justify the conclusion that the display’s social meaning is that of endorsement or disparagement. Some residents of Fineville may take offense—on religious grounds—at the display of the Fra Angelico. But Equal Liberty is about finding fair rules of cooperation among a religiously diverse people. From the vantage of Equal Liberty, we have to be concerned not only about disparagement but also about the tyranny of the thin-skinned.¹³

a religious painting, negates any message of endorsement of that content.” Lynch, 465 U.S. at 692 (concurring opinion).

¹³ As Justice O’Connor herself has pointed out, “There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.” *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 80

Similarly, social meaning is not deflected by poorly informed public reaction. Suppose Fineville has a public display area in the park adjacent to the City Hall, where private groups are permitted to erect displays; qualifying displays are chosen in some content-neutral way—say, on the principle of “firstcome, firstserved” or by drawing lots. A church group receives a permit to use the space and puts up a controversial, and explicitly religious, exhibit. Under these circumstances, Fineville hasn’t endorsed anything other than the principle of free and robust expression. The religious content of the display comes from a private choice; indeed, it is entirely possible that the government’s officials, as well as a large majority of voters, will disagree with the church group’s message.

It is possible, of course, that a passerby, recognizing the site as public property, will mistakenly believe that the government has sponsored the display. But it would be impractical and unwise to base the government’s constitutional obligations not on whether it has in fact endorsed a religious or theological position, but on whether some citizens might mistakenly think it to have done so. After all, citizens who see a religious display in a government-sponsored public forum might mistakenly believe that government has endorsed the display; other citizens who see a public school or public park without religious symbols might mistakenly believe that the government has discriminated against religion. The government would have a constitutional obligation to defer to the confusion of both groups. Such a rule would saddle us with a tyranny of the poorly informed, in which the government’s most fundamental obligations would be controlled in significant part by the befuddlement of whatever groups least understood its actions.

Hence the importance of the idea of an “objective” social meaning, turning on the way that a reasonable (and reasonably well-informed) member of a community would understand the actions of public officials who undertake to display material that has

(1995). (O’Connor, J., with whom Breyer, J. and Souter, J., join, concurring in part and concurring in the judgment).

religious content. So to assert, as we have, that the reindeer garnish in *Lynch v. Donnelly* does not undo the religious message of the Pawtucket crèche is to make a claim about the meaning that members of the Pawtucket community would ascribe to the crèche. The religious valence of a depiction of the birth of Christ is such that we are pretty confident that Pawtucket's crèche carries with it an insistence that Christmas, however secular many of its trappings may have become, ultimately marks one of the most profound events in Christian theology, and that Pawtucket officially joins in a celebration of that event.

It does not follow that nativity scenes are somehow banished material, too culturally hot for public spaces. As we've seen, were there an evenhanded public forum for private displays, a crèche could be erected in such a space; likewise, one could be carried through the streets in an officially licensed parade. Under many circumstances, one could be displayed in a museum as historically or artistically important. And although we are doubtful about Pawtucket's reindeer and teddy bears, we can imagine displays that include a crèche and avoid the problem of endorsement. Fineville might mount a display of "When the Spirit Moves Us," in celebration of much of the range of spiritual commitments of members of the community, including, possibly, music and art. A crèche in such a setting could easily satisfy the obligation that it be framed, or held at arm's length.

Nor is Christmas itself necessarily off-limits. Christmas trees are part of a Christian religious celebration. Yet the tree's role in American culture has become partially secularized, associated as much with Santa Claus, "Happy Holidays," and the "Christmas shopping season" as with the birth of Jesus Christ. Some Jewish families have Christmas trees. We are inclined to think that the Christmas tree has become sufficiently secular that public sponsorship does not amount to a "religious display" in the sense of embracing a religious message. The counterargument is, however, obvious—it is, after all, a "Christmas" tree. The tree is a genuine borderline case, and, as with any such case, reasonable people will differ about where to draw the line.

Context, Close Cases, and a Modicum of Certainty

In the real world, public displays of religious material will serve up many hard cases. As suggested by the examples of the Catholic missions and the City of San Antonio, the preservation of religious materials over time can shift the meaning of their display away from endorsement and toward historical memorialization. So, for example, some cities incorporate crosses and other religious imagery into town seals that appear on the sides of police cruisers and elsewhere. We think that such emblems may be constitutional, even if recently designed and adopted, so long as they incorporate other aspects of local history along with the religious ones. Nothing in the Constitution requires towns to ignore or suppress religion's contributions to their history. Indeed, the inclusion of religious symbols in town insignias (which some people regard as an inappropriate endorsement of religion) is no different from the inclusion of churches in historical preservation programs (which some people regard as an inappropriate infringement upon religion): both are efforts to preserve and memorialize contributions to a town's heritage and character. So long as they are motivated by genuine historical concern and so long as the state does not discriminate for or against religion (or particular sects), both policies are constitutionally permissible.

That said, tradition and historical pedigree will not save sectarian symbols in other contexts. So, for example, a prominent cross in a courtroom would be a problem even if it had been there for a very long time: litigants would quite reasonably regard the cross as a suggestion that Christianity enjoyed favored status in the eyes of the court (of course, this point applies *a fortiori* if a judge attempts to introduce a cross into a courthouse that lacked one, as Judge Roy Moore attempted to do with the Ten Commandments in Alabama¹⁴—but our point here is that, in a courtroom, the passage of time does not drain the symbol of its sectarian meaning).

Town emblems and courtroom crosses represent extreme cases; between them are a host of more difficult ones. For example, a large cross stands on publicly owned property on

¹⁴ See *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1294-1295 (M.D. Ala. 2002).

Mt. Soledad in San Diego, California. The cross was erected in 1954 to honor America's war dead and became a symbol of the city. In 1989 Philip K. Paulson, a local resident, sued, claiming that the cross violated the Establishment Clause and demanding that it be removed. His suit began a legal battle that continues today. San Diego might want to keep the cross for historical reasons, but it is equally possible—if not probable—that citizens value it for the Christian message of respect it was originally intended to convey. They understand it, in other words, as a continuing endorsement of the religious view its creators expressed. It would be reasonable for other, less sympathetic viewers to interpret the cross in that way.¹⁵

Context, it should be clear, is critically important to these examples. Insignias, crests, and emblems may incorporate religious imagery without expressing a religious viewpoint. By contrast, if a religious symbol is not specially marked or set off in some way (such as by inclusion alongside other elements in an insignia or other composition), it continues to express a religious message. Government display of a marble cross means something different if the cross appears among other carvings in an exhibition at a public art museum than if the cross appears in isolation on a judge's bench in a courtroom. Competent participants in American culture must be sensitive to these differences in context, and constitutional doctrine must take them into account.

That said, it would not be satisfactory to leave this area in a state of constant uncertainty, with every case a fresh occasion for the delicate assessment of context. If our constitutional approach to religious displays is radically contextual and uncertain, public officials will be poorly guided (and, worse, encouraged to push at the ill-defined limits of what is permitted), and there will be more roiling controversy and expensive litigation. This kind of uncertainty can make us worse off with regard to the project of treating each other with respect and toleration notwithstanding the diversity of our spiritual commitments. Imagine, for example, how things would be if Establishment Clause

¹⁵ Though Paulson had prevailed over the city in several court rulings, San Diego continues to look for ways to keep the cross in place. Kelly Wheeler, "Judge Refuses Hearing on Motion to Vacate Mount Soledad Cross Ruling," *City News Service*, Oct. 31, 2005 (available on Lexis/Nexis); Randal C. Archibold, "High on a Hill above San Diego, a Church-State Fight Plays Out," *New York Times*, Oct. 1, 2005, p. A9.

doctrine regarding public school prayer had announced that some prayers were fine and others were forbidden, so that dogged school officials would craft prayer after prayer to be closely parsed by judges charged with enforcing the Constitution. Some degree of clarity and predictability is a good thing for everyone involved in these controversies.

One way for the Supreme Court to achieve that goal is to be less indulgent of claims that a mere juxtaposition of religious and nonreligious items can provide a “frame”—rather than a mere “fig leaf”—for religious symbols. Usually the social meaning of religious displays will be more or less the same as the meaning of the object displayed. So, for example, the meaning of a Fra Angelico does not depend on its inclusion in an art museum alongside secular works. Suppose that Fineville had no art museum, but that a tycoon who had grown up there bequeathed to the municipality a single brilliant painting. It would be constitutional for the town to display the painting in its city hall—the religious elements of the painting are framed, literally as well as figuratively, by their inclusion within the tradition and vocabulary of visual art. Conversely, a crèche in the park is still a crèche in the park, whether or not it is accompanied by plastic bears. The “three plastic animals” rule is the unfortunate result of supposing that mere juxtaposition with secular symbols will change what it means for government to display a religious one.

Of course, sometimes juxtaposition does matter. We have already given the example of a marble cross in a museum, accompanied by other carvings. Here the fact of inclusion within a collection matters more than it did in the case of Fra Angelico’s painting—and, unlike the case of the painting, it would be genuinely problematic for the town to display the cross by itself in City Hall. Yet, on closer inspection, this example actually reinforces how rarely inclusion of a symbol within a larger collection can legitimate an otherwise impermissible display. The example trades upon the idea that the cross is not only in a collection but in a *museum*—a cultural space that facilitates critical distance between observers and the artifacts they examine. Hanging other carvings alongside a cross in City Hall would provide a fig leaf, not a frame.

Friezes and Follies: The Ten Commandments Cases

The recent cases about the Ten Commandments nicely illustrate the limits of mere juxtaposition as a framing device. Like crèches, the Ten Commandments are undeniably religious. While they include widely shared moral precepts such as “Thou shalt not kill,” they begin with an announcement that “I am the Lord thy God,” and the first five commandments continue in this sectarian vein (there are actually several versions of the Commandments, all of which begin with five distinctly religious commandments but which differ from one another in their wording—this fact, of course, creates another problem from the standpoint of religious freedom, since public officials who post the Commandments must necessarily choose among versions of varying theological significance). In 1981, in its first religious display case, *Stone v. Graham*, the Court held that a statute that required posting of the Ten Commandments on Kentucky public school classroom walls was a violation of the Establishment Clause, despite the fact that the money for the project was raised privately and despite the presence of a remarkably transparent fig leaf. At the bottom of each copy of the Commandments, in small type, Kentucky announced that “the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”¹⁶

Twenty years later, some Kentucky officials decided to try again. This time, two counties placed copies of the Ten Commandments on their courthouse walls, and the school district of a third county had copies posted in classrooms. Once again, the Kentucky counties defended their actions by saying that the Commandments had secular significance by virtue of the role they played in the origins of American law.¹⁷

There is not much historical evidence for this claim. Indeed, American law is in some respects inconsistent with the Commandments: American law does not require the

¹⁶ *Stone v. Graham*, 449 U.S. 39 (1981); *ibid.* at 39 n. 1 (quoting Ky. Rev. State. §158.178[2]).

¹⁷ See *McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722, 2728-31 (2005). *McCreary* dealt only with the courthouse displays. In a related case, the Supreme Court refused to review the appellate

worship of a particular (or any) god, and it prohibits stealing but not mere coveting. The Commandments and American law do both prohibit murder, theft, and adultery—but the Commandments are not unique in this regard. Nor did the Commandments loom large in debates at the American founding. Of course, one might say that the Commandments played an important role in the development of Western culture, and that they must therefore have had some influence on the formation of American law; and, likewise, one might observe that many of the American founders regarded the Ten Commandments as important to their personal moral views, and so they must have had some effect on their conceptions of law. But these connections are vague and general. If one were to look for particular documents that had specific importance to American law, one would fix upon Blackstone’s *Commentaries* long before considering the Ten Commandments.¹⁸ The only reason for singling out the latter is their connection to a favored religious tradition.

The Supreme Court had rightly rejected the blunt “fundamental to American law” argument in *Stone*. Thus, when the American Civil Liberties Union (ACLU) sued, the Kentucky officials tried a version of the “three plastic animals” defense. All three counties surrounded the copies of the Commandments with various documentary fragments: a bit of the Declaration of Independence, a congressional vote declaring 1983 the “Year of the Bible,” the motto “In God We Trust,” Abraham Lincoln’s pronouncement “The Bible is the best gift God has given to man,” and so forth.¹⁹ Then, when it became clear that these materials were not going to deflect the courts’ view of the social meaning or the constitutional infirmity of the posted Commandments, the counties adopted a new and much enlarged display of the Commandments, which included the full text of the “Star Spangled Banner,” the Declaration of Independence, the Mayflower Compact, and the Magna Carta. The new display bore the title “The Foundations of American Law and Government Display” and included assertions concerning the bedrock status of the Ten Commandments in American law.²⁰

court’s finding that the schoolhouse display was unconstitutional under the clear precedent in *Stone*. Harlan Co. v. ACLU, 125 S. Ct. 2988 (2005).

¹⁸ See, e.g., Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* 195 (2d ed. 2005).

¹⁹ McCreary County, 125 S. Ct. at 2729-30.

²⁰ *Ibid.* at 2730-31.

Kentucky officials undoubtedly had a precedent in mind when they composed these displays. As it happens, the Ten Commandments are represented in the United States Supreme Court's own courtroom. They are part of a frieze that circles the room near its ceiling. The frieze depicts Moses delivering the Ten Commandments; it also depicts many other famous lawgivers. John Paul Stevens had said in an earlier case that the Supreme Court frieze posed no constitutional problem: it conveys a message of "respect not for great proselytizers but for great lawgivers."²¹ Kentucky's officials apparently concluded on this basis that if the Ten Commandments were incorporated into a broader display, their presence in schools and courtrooms would pose no problem.

Unfortunately for those officials, considering their display in light of the Supreme Court frieze serves only to highlight their constitutional problem. First, the Supreme Court frieze depicts Moses with tablets but quotes only the secular portion of the Commandments (that is, the last five commandments)—and does so in Hebrew. Even were this carving to appear by itself, it is arguably more like Fra Angelico's paintings than a marble cross—it might, in other words, be regarded and appreciated as an artwork rather than an expression of religious sentiment. Kentucky, by contrast, simply presented the text of the Ten Commandments.

Second, the Supreme Court frieze as a whole is immediately recognizable as a coherent composition; "great lawgivers" is the obvious theme, and the theme makes sense in a courthouse. In Kentucky's collection, everything besides the Ten Commandments was an afterthought, and the linkage among them was obscure, notwithstanding the explanatory caption "The Foundations of American Law and Government Display."

Finally, the other elements in the Supreme Court frieze help put distance between the government and its display of Moses. It would be bizarre for any observer to suppose that the U.S. government had endorsed Confucianism by displaying Confucius in the frieze;

²¹ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 652-653 (Stevens, J., concurring in part and dissenting in part).

the juxtaposition of Confucius with Moses helps to defeat the inference that the government was endorsing Judaism or Christianity. Kentucky, on the other hand, surrounded the Ten Commandments with symbols of American government. That juxtaposition exacerbates rather than diminishes the problem: the problem with government displays of religious symbols is that they connect the status of American citizenship to a particular religious tradition. Ironically, Kentucky's officials looked for a fig leaf and found ...well, perhaps we had best say a "spotlight."

Whatever else Kentucky's frantic efforts to cover up the naked display of the Ten Commandments can be thought to have achieved, they surely did not improve the social meaning of the Kentucky counties' display. At the end of the day, no competent member of these communities could have failed to understand the social meaning of any of the evolving forms of the display: the display was an endorsement of the Christian tradition and, by implication, a disparagement of those who reject that tradition.

When the Kentucky case reached the Supreme Court, in *McCreary County v. ACLU of Kentucky* (2005), five justices had no trouble recognizing that the Kentucky display was a fig leaf, not a frame. The Court held that the display was unconstitutional; Justice Souter, writing for the majority, commented that a reasonable observer of the Kentucky display would either "throw up his hands" in puzzlement or else "suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."²²

Four justices dissented, but not because they mistook Kentucky's flimsy fig leaf for an effective frame. Instead, they embraced the view that the Stone Court had rejected—namely, that the Ten Commandments "have a proper place in our civic history" so that "even placing them by themselves can be civically motivated." The display in *Stone*, the dissenters suggested, would have been permissible had it been in a courthouse rather than a school. Three of the dissenters—Scalia, Rehnquist, and Thomas—also defended Kentucky's display on a more radical ground. They said that the Establishment Clause

²² *McCreary County*, 125 S. Ct. at 2741.

left the government entirely free to endorse religion over nonreligion and, indeed, to endorse monotheism over other forms of religion. That view, which Scalia tried to defend on historical grounds, is of course at radical odds with the principles of Equal Liberty.²³

The Court ruled the same day on a second Ten Commandments case that most people regarded as more difficult than the Kentucky case. The Ten Commandments monument at issue in *Van Orden v. Perry* is a six-foot-high red granite block that sits on the grounds of the Texas state capitol in Austin. The Ten Commandments are etched on the stone in large letters (the first commandment, “I AM the LORD thy GOD” is engraved in larger letters than the others). A private organization, the Fraternal Order of Eagles, donated the monument to Texas in 1961. Its stated purpose was to discourage juvenile delinquency, and the order made similar gifts to several other states—so, not surprisingly, cases parallel to the Texas one have arisen in other states, including Utah, Colorado, and Indiana. There is also an amusing commercial element to the story of the stone’s origins: Cecil B. DeMille helped fund the Eagles’ monuments to promote his film *The Ten Commandments*.²⁴ The monument does not appear to have excited much controversy at the time it was donated, and the stone sat more or less obscurely on the capitol grounds for four decades without provoking any litigation.

Various other monuments dot the capitol grounds in Texas. There are seventeen in total, including ones honoring or commemorating Texas law enforcement; Texans who served in the Korean War, World I, and Pearl Harbor; pioneer women of early Texas; Texas youth; the Statue of Liberty; and Confederate soldiers (twice). The Texas legislature has characterized the capitol grounds as displaying “statues, memorials, and commemorations of people, ideals, and events that compose Texan identity.”²⁵

²³ Ibid. at 2761 (Scalia, J., with whom Thomas, J., Rehnquist, C.J., and Kennedy, J., join, dissenting); ibid. at 2748-57 (Scalia, J., with whom Thomas, J., Rehnquist, C.J., join, dissenting).

²⁴ *Van Orden v. Perry*, 125 S. Ct. 2854, 2858, 2877 (2005). The Utah, Colorado, and Indiana cases are *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *State v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995); and *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), respectively.

²⁵ Tex. H. Con. Res. 38, 77th Leg. (2001).

In its legal arguments, Texas analogized the collection of monuments to a museum, pointing out that they were under the care of the Capitol Curator. The U.S. Court of Appeals for the Fifth Circuit, in an opinion by the distinguished judge Patrick E. Higginbotham, stopped short of accepting the museum analogy but nevertheless agreed with Texas that “the manner in which the seventeen monuments are presented on the state grounds” would not lead a “reasonable observer” to see the display as an “endorsement of the Commandments’ religious message.”²⁶ As a circuit court judge, Higginbotham was bound to follow *Lynch*’s problematic holding that juxtaposing plastic animals with a crèche display could eliminate the constitutional problems that would otherwise render it unconstitutional. And there is no doubt that Texas’s collection of monuments had more integrity than Kentucky’s litigation-driven hodgepodge.

That said, we think that the Texas case, like *Lynch* itself, ultimately illustrates again that mere juxtaposition of secular and religious symbols is unlikely to solve constitutional problems that would exist if the religious items were displayed alone. There can be no doubt about the religious content of the Texas monument. Unlike, say, the frieze of Moses in the United States Supreme Court building, the Texan granite block prominently features the text of the Commandments; to study the monument is to read them. Nor do the monuments in Austin amount to a coherent composition that, like the Supreme Court frieze, could put some distance between state authority and the message of the monuments. The granite Decalogue has no special connection to Texas identity—a point made plain, if evidence were needed, by the fact that the Eagles donated identical monuments to Indiana, Utah, and other states. And insofar as the Texas collection is about constituents of Texan identity, it repeats the problem of Kentucky’s display. The other elements in the display reinforce, rather than alleviate, the concern that Texas is making full membership in its political community dependent on embracing the precepts or symbols of a particular religious tradition.

The most significant difference between the Texas and Kentucky displays is historical rather than spatial. Kentucky officials inserted the Ten Commandments into schools and

²⁶ Van Orden v. Perry, 351 F3d 173, 180-181 (5th Cir. 2003).

courthouses—especially sensitive venues—at a time of national agitation over religious symbols. It is hard to view their decision as anything other than a deliberate act of provocation, and, not surprisingly, it spurred immediate litigation. Texas officials accepted the monument decades ago, and it does not seem to have stirred an immediate response. Indeed, if the granite block has a special connection to Texas history, it acquired it by virtue of sitting so long on the Capitol grounds—so that an observer might look at it and say, “Well, this is an example of how Texas officials once viewed their relationship to the public” (something one might also say, perhaps, about the two memorials commemorating Confederate war dead).

In that respect, the Texas monument is not so different from the Mt. Soledad cross in San Diego—arguably, both have become (literally) part of the local landscape. As with the cross, though, we suspect that most people who value the Texas monument (and most people who object to it) do so because of its religious message, not because of its independent historical significance or its place in Texas culture. If so, the right response would be to remove the monument. We understand, though, why courts, including both the court of appeals and the Supreme Court, have shrunk from that conclusion. It is the same reason that the head of the New York ACLU saw no need to prevent willing children from singing carols in school. The monument sat obscurely in Austin for forty years, and many people would be upset by its removal—is it really so much to put up with? That is more or less what Justice Breyer, who cast the deciding vote in *Van Orden v. Perry*, said: “This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.”²⁷

The Pledge of Allegiance

If judges and commentators could survey the range of religious liberty cases and vote on one as “The Case We Would Most Like to See Go Away,” we expect the clear winner—

²⁷ *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring in the judgment).

by a large margin and with support from people with otherwise diverse views—would concern the Pledge of Allegiance. Questions about the constitutionality of the Pledge surfaced prominently in 2002, when a U.S. court of appeals panel agreed with Michael Newdow, who had sued, claiming that the inclusion of the phrase “under God” in the Pledge made its public school recitation a religious ceremony like a prayer, and hence subject to the absolute rule of *Engel v. Vitale* (1962) barring such ceremonies in the public schools.²⁸ Newdow was the noncustodial parent of his daughter, and on this ground the Supreme Court held that he lacked the standing to challenge the Pledge of Allegiance on her behalf. That holding had the effect not just of preventing the Supreme Court from deciding the question, but of erasing the decisions of the lower courts as well.²⁹ But the court of appeals decision made clear how open a question the constitutional status of the Pledge is, and another round of litigation about it has already commenced.³⁰

Patriotism and religion are a potentially combustible mixture, and the constitutional challenge to the Pledge of Allegiance seems particularly fraught. Part of what makes the case seem so dangerous is the sense that it poses an all-or-nothing choice between two bad outcomes: on the one hand, the Pledge could be understood to be the constitutional equivalent of a school-sponsored prayer, in which case it would indeed be unconstitutional, without any further analysis. That view seems to make a great deal of two words in an oath of allegiance that is not really about religion at all, in stark contrast to the Lord’s Prayer and other public school prayer exercises.³¹ The result would be to deprive significant numbers of Americans of the opportunity to solemnize their allegiance to their country in a fashion that they find congenial and fitting.

²⁸ *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003); *Engle v. Vitale*, 370 U.S. 421 (1962).

²⁹ *Elk Grove United School District v. Newdow*, 542 U.S. 1 (2004).

³⁰ See, e.g., *Myers v. Loudon Co. Schools*, 418 F.3d 395 (4th Cir. 2005) (pledge does not violate Establishment Clause).

³¹ Justice O’Connor’s observations on this point are apt: “I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority...A reasonable observer would note that petitioner school district’s policy of Pledge recitation appears under the heading of ‘Patriotic Exercises,’ and the California

On the other hand, the Pledge could be treated not as a religious exercise of any sort, but as...well, a pledge; it could be treated, in other words, as the Pledge of Allegiance itself was treated between the time of the Court's decision in *West Virginia State Board of Education v. Barnette* (1943)³² and 1954, when Congress added the words "under God" to the Pledge.³³ *Barnette* gave all students the constitutional right not to participate in the Pledge ceremony, but permitted the ceremony to stand as a voluntary exercise designed by Congress and sponsored by public school officials throughout the country. This too seems an unfortunate outcome. As tepid and banal as the Pledge's reference to God is, it nonetheless has two closely related vices: first, its social meaning includes the suggestion that only those comfortable with proclaiming the United States to be a nation "under God" are worthy to formally declare their allegiance; and second, it in fact permits only those who can comfortably participate in such a proclamation to formally declare their allegiance.

As an independent matter, the Pledge in its present form seems to violate at least the spirit of Article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." We presume that this principle should apply to the ordinary office of "citizen" as well as to special ones (such as "judge" or "governor").³⁴ A requirement that one utter religious words to declare fidelity to the United States seems to us a kind of "religious test" prohibited by Article VI—even though, of course, Melanie Newdow would not be stripped of citizenship for refusing to pledge allegiance.

law which it implements refers to 'appropriate patriotic exercises.'" Newdow, 124 S. Ct. at 2325 (O'Connor, J., concurring in the judgment).

³² *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). On the context, see Vincent Blasi and Seana Shiffrin, "The Story of *West Virginia State Bd. of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought," in Michael C. Dorf, ed., *Constitutional Law Stories* 433-475 (2004).

³³ Act of June 14, 1954, chap. 297, 68 Stat. 249.

³⁴ In *Torcaso v. Watkins*, 367 U.S. 488 (1961), a unanimous Supreme Court held unconstitutional a Maryland law that required officeholders in that state to declare their belief in God. The Court rested its decision on the Free Exercise and Establishment Clauses, holding that they (and the Fourteenth Amendment) had incorporated and extended the principle of the "no religious oaths" clause of Article VI. *Ibid.* at 491-493. It was common at the time of the founding for state laws to insist on such declarations,

We see a constitutional path between banning the Pledge in its present form and putting up with its not inconsiderable constitutional vices, a path that seems more favorable to the concerns of Equal Liberty than does either of these outcomes. That path—overlooked so far by the lawyers, judges, and commentators caught up in the Pledge of Allegiance controversy—becomes clear if we think for a moment about a variety of public ceremonies in which God is fleetingly invoked as a means of solemnizing secular commitments. One of these is the truth-telling oath required of witnesses called to testify in courts of law. Another is the oath to uphold the Constitution and laws taken by lawyers as a condition of admission to the practice of law, as well as by public employees and applicants for citizenship. Yet another is the oath of office taken by many public officials, including national officials, who are required by the Constitution itself to take such an oath.³⁵ All of these have in common a familiar form of solemnization, namely, the emphatic affirmation of commitment embodied in the closing phrase “so help me God.” Some go further, and require the oath-taker to place his or her hand on a Bible when reciting the oath. All these oath ceremonies have one other feature, which we think is of critical importance: every one of them makes available an alternative, secular form of declaration that does not involve the Bible, the invocation of God, or any other religious reference.

Why are we so tolerant of these religiously tinged ceremonies of fidelity to the truth, to the law, and to the obligations of public office? Three features seem critical to their place in a democracy that values Equal Liberty. First, these are, in their essence, ceremonies of secular fidelity; religion enters the picture largely as a familiar means of solemnizing these secular commitments. Second, the religious invocations in these ceremonies tend to be terse, and relatively generic. Third, and most important, these oaths are offered together with an alternative secular form of commitment; the would-be oath-taker can eschew the invocation of God, and instead solemnly promise or affirm that he or she will tell the truth, uphold the law, or discharge the responsibilities of the office to the best of

and the Constitution’s pointed elimination of any such requirement was deliberate, widely noticed, and much discussed. Kramnick and Moore, *The Godless Constitution* 32-45.

her or his ability. The shorthand for this choice is the opportunity to either “swear” (the religious form) or “affirm” (the secular form) to act in the required way.

For example, the Constitution requires the president to promise to execute his office faithfully, and it assumes that most presidents will make this promise in the form of an oath. The framers recognized that swearing an oath was a religious act in much the same sense as uttering “under God” when saying the Pledge—in their view, “swearing” meant “swearing to God” or “on a Bible.” Therefore, in light of the principle set forth in Article VI, the framers carefully stipulated that officeholders, such as the president, had a nonreligious option: they could either “swear (or affirm)” to carry out their responsibilities and uphold the Constitution.³⁶ Likewise, federal law guarantees that courtroom witnesses may swear or affirm to tell the truth, the whole truth, and nothing but the truth.³⁷

By offering a secular form of commitment in these ceremonies of fidelity, governments avoid the constitutional vices that plague the Pledge of Allegiance in its present form. While the Pledge includes the social meaning that only those able to commit themselves to “one Nation, under God,” are worthy of the role of committed citizen, these other ceremonies of fidelity leave the choice of religious and secular form to the individual who participates in the ceremony. It is a private, not a governmental choice that invokes God as its means of solemnization. And while the Pledge excludes from its ceremony of fidelity anyone who chooses not to pledge fidelity to “one Nation, under God,” all these other ceremonies permit those who choose not to invoke God to participate.

³⁵ See U.S. Const., art. I, § 1, cl. 8; *ibid.*, art. VI, cl. 3.

³⁶ U.S. Const., art. II, § I, cl. 8.

³⁷ See, e.g., Fed. R. Civ. P. 43(d) (“whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof”); and Fed. R. Evid. 603, advisory committee’s note (explaining that the rule “is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children”). See also *Gordon v. Idaho*, 778 F.2d 1397, 1400-01 (1985) (district court had a constitutional obligation to find alternative formula for witness who refused, on religious grounds, either to “swear” or to “affirm” that he would tell the truth); and *Moore v. United States*, 348 U.S. 966 (1955) (per curiam) (witness who declined on religious grounds to use the word “solemnly” in an affirmation to tell the truth could testify without using that word). For a summary of the historical trend allowing affirmations as substitutes for oaths, see Comment, “Religion-plus-Speech: The Constitutionality of Juror Oaths and Affirmations under the First Amendment,” 34 *William and Mary Law Review* 287, 293-295 (1992).

By now the reader will have anticipated our position: in their present form, public school Pledge of Allegiance ceremonies are indeed unconstitutional, but they can be easily fixed, and fixed without depriving those who hold dear the Pledge in its present form of the opportunity to recite it. Like the other ceremonies of fidelity that are a commonplace in American life, the Pledge of Allegiance references God in a terse, generic, and relatively nonsectarian way.³⁸ And like these other ceremonies, the Pledge is fundamentally about a secular commitment, not a ritual of religious entreaty or obeisance. But unlike these other ceremonies, the Pledge endorses a religious view as Congress's (and the school district's) own; and unlike these other ceremonies, the Pledge requires that every person who wishes to join in the ceremony act as though he or she also endorses that view. These constitutional vices can be cured by giving schoolchildren the same choice as presidents—the choice between pledging their fidelity in religious terms or pledging their fidelity in secular terms.

It is not hard to imagine how this can be arranged. Congress could stipulate an alternative, secular form of the oath. After some reflection, we have our own favorite candidate: “one Nation, under law.”³⁹ School districts could then instruct their students that there are two perfectly appropriate forms of the Pledge, neither one of which is better suited than the other to the enterprise of marking allegiance. A simultaneous recital could then follow, with students invited to speak the Pledge in the terms of their choosing. Were this done, we think the constitutional objections to the Pledge and to the language “under God” would be fully met. No one would be denied the opportunity to proclaim America “one Nation, under God,” but neither would anyone be forced to make that

³⁸ Of course, no reference to God can be entirely neutral among religions, and the Pledge's reference is not: it refers to a singular “God,” whereas some religions respect multiple deities, and others are “not based upon belief in a separate Supreme Being.” 124 S. Ct. at 2326 (O'Connor, J., concurring). That is why we say the Pledge's reference to God is *relatively* (not completely) non-sectarian. We regard its theological content as sufficiently minimal to satisfy constitutional requirements, provided that it is coupled with an equally respected and nonreligious alternative.

³⁹ We owe the suggestion to Robert K. Durkee, vice president and secretary of Princeton University. Durkee observed that Princeton has adopted an analogous practice with regard to its alma mater, “Old Nassau,” which had referred to university alumni as “my boys” and “her sons.” In 1987 the university (which coeducated beginning in 1969) substituted “we sing” and “our hearts” for these words (the change

proclamation upon penalty of being denied the opportunity to pledge his or her allegiance. Congress and public school authorities would leave the question of how to characterize what or whom our nation is “under” to parents and their children. And with that, we hope (no doubt in vain) that perhaps we can all get along.

An Armistice in the Culture Wars?

As America’s debate about religion’s public role intensifies, the idea that we should “all just get along”—not just about the Pledge of Allegiance, but about religious freedom more generally—starts to appeal to more and more observers. Some judges and scholars, searching for a path to peace, have blamed courts for creating needless disputes. These commentators suggest that when courts limit religious expressions by the government, they create a powerful backlash and hence do more harm than good. If so, then perhaps courts should give the government more latitude to display religious symbols. For example, Justice Breyer made an argument of this kind to explain why he cast the deciding vote in favor of Texas in *Van Orden v. Perry*, the decision that permitted the state to maintain its Ten Commandments monument. If the Court were to force Texas to remove the monument, wrote Justice Breyer, it might thereby “encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”⁴⁰

Breyer’s olive branch went unappreciated. Immediately after the decisions in the Kentucky and Texas cases, conservatives promised new efforts to install Ten Commandments monuments, and liberals predicted new lawsuits to stop them. Charles W. Colson, the conservative commentator (and convicted Watergate conspirator), expressed delight that the Kentucky decision was “so outrageous” because it would provoke “people in churches across America” to “get busy and demand the right kind of

makes sense in context). Princeton’s alumni, depending on their generation (and their sentiments), now sing both versions simultaneously without disruption.

⁴⁰ *Van Orden*, 125 S. Ct. at 2871 (concurring opinion).

appointments to this court.”⁴¹ He added that “there is no bigger issue on the Christian agenda.”⁴²

One might conclude that Breyer’s hope for peace was unrealistic. But perhaps the problem was that his plan was not bold enough. Breyer made clear that his pragmatic considerations about avoiding divisive decisions applied only in a “borderline case” such as the Texas one;⁴³ in the Kentucky case, where the state’s endorsement of religion was (in Breyer’s estimation) more patent, he joined the five-to-four majority that held the displays unconstitutional. Maybe the Court can cool tempers in America’s debates about religion only if it gives the government much broader freedom to sponsor and exhibit religious symbols.

[Constitutional law scholar] Noah Feldman, for example, has recommended that the Court impose fewer constitutional restrictions on government display of religious symbols, but tighter limits on the government’s authority to subsidize religious institutions and practices. He describes his proposal as promoting “a shift to symbolic inclusion,” and he predicts that after this shift “the fevered pitch of debate should tone down.”⁴⁴ Other scholars have offered different proposals with similarly pragmatic objectives and orientations. Like Feldman, Steven Smith worries that the Court’s Establishment Clause decisions have “provoked both resentment and resistance” from religious groups, hence generating precisely the sort of religious strife that the Court sought to avoid.⁴⁵ Unlike Feldman, though, Smith sees no formulaic solution; in his view, “The judicial imposition of any set of consistent and explicit principles is likely to undermine the possibilities for compromise and forbearance, and hence to aggravate the dangers of civil strife and alienation.” For Smith, the only way to make progress is

⁴¹ David D. Kirkpatrick, “Conservatives to Seek Voters’ Support for Commandments,” *New York Times*, June 29, 2005, p. A18.

⁴² *Ibid.*

⁴³ *Van Orden*, 125 S. Ct. at 2871.

⁴⁴ Noah Feldman, *Divided by God: America’s Church-State Problem-and What We Should Do about It* 16, 237 (2005).

⁴⁵ Stephen D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 116 (1995).

through pragmatic muddling: “Civil peace ...must be the product of prudence, not of principle imposed from above.”⁴⁶

One prominent political scientist put the argument to us in blunt and simple terms. The Court, he said, ought to husband its resources carefully, saving them for disputes that really matter—about, for example, coercion, discrimination, or large government expenditures. When it comes to purely symbolic disputes about Christmas displays, the Pledge of Allegiance, and religious monuments, he asked, “Why not just let sleeping dogs lie?”

“Well, for openers, the dogs aren’t sleeping,” we replied. Controversies are raging about government displays of religious symbols. When scholars call for courts to behave more prudently or pragmatically, they seem to assume that these disputes will vanish, or at least subside, when courts defer to legislative majorities. But that assumption is implausible if not demonstrably false. Intense cultural disputes about religion and other topics arise and persist without judicial involvement. For example, the judiciary has never tried to regulate religious speechmaking by officeholders, but President George W. Bush’s expressions of religious sentiment have been extremely controversial. Or, to take an example from another domain, the Supreme Court has (thus far) rejected calls to enforce Second Amendment rights, but few issues are so divisive in the United States as gun control.⁴⁷

In fact judicial deference can itself sometimes inflame controversies that were more or less dormant. The decision in the *Peyote Case*, for example, gave legislatures more latitude, not less, but the case provoked a political firestorm that has run for fifteen years. When the Supreme Court decided its first major Establishment Clause case in 1947, it deferred to a local school district’s decision about whether to subsidize bus fare for children attending Catholic schools. Controversy grew, rather than diminished, in the wake of the ruling; Protestant leaders denounced and formed a new national interest

⁴⁶ Ibid. at 117.

⁴⁷ For further discussion, see Christopher L. Eisgruber, *Constitutional Self-Government* 100-101 (2001).

group, Protestants United for Separation of Church and State, to oppose the Court's allegedly pro-Catholic jurisprudence (the group has evolved away from its sectarian roots and has become a widely respected civil rights organization, Americans United for Separation of Church and State).⁴⁸ The fact is that people on both sides of disputes about religious freedom (and religious symbols in particular) care deeply about the outcome, and they will continue to care (and to argue) regardless of what the courts decide.

Nor does it seem at all sensible to suppose that the law suits about crèches, the Ten Commandments, and the Pledge of Allegiance are the root cause of the social fissures that worry Feldman, Smith, and other observers. American politics manifests religiously inflected divisions on many important issues. Some of these are issues about religious freedom—such as school prayer, public funding for religious schools, and the teaching of evolution; others—such as abortion and gay rights—are not. These controversies have deep roots in American culture, and it is little more than wishful thinking to suppose that the Supreme Court can make religious conflicts “less threatening to our national unity and more easily subjected to being managed”⁴⁹ by taking a more permissive attitude toward town Christmas displays.

Why would anyone think otherwise? If we dig down beneath all the pragmatic declarations about strategies for achieving peace, we find, ultimately, a moral judgment: people ought not to care so much as they do about public sponsorship of religious symbols. Thus, for example, Feldman says that non-Christians who find a message of exclusion in a governmentally sponsored Christmas display are just making an arbitrary “interpretive choice.”⁵⁰ Courts ought to respond with tough love: instead of restraining the government's authority to express religious messages, judges should make clear to

⁴⁸ Robert Wuthnow, *The Restructuring of American Religion: Society and Faith since World War II* 73, 115 (1988).

⁴⁹ Feldman, *Divided by God* 16.

⁵⁰ *Ibid.* at 242 (“it is largely an interpretive choice to feel excluded by the fact of other people's religion”). Of course, what is at issue is not “the fact of other people's religion,” but the fact of government sponsorship and support of it.

offended parties that they should react differently—in Feldman’s words, “The answer is for them to strengthen their own identities and be proud of who they are.”⁵¹

As a strategy for peace and reconciliation, we think that this recommendation is simply naive. People do feel excluded when the government endorses one or another religion, whether they ought to or not. Feldman’s position might nonetheless be tenable as a moral argument—an argument, that is, about what sorts of harms a people committed to religious freedom ought to recognize and redress—but we think that this is a badly flawed moral claim. Indeed, despite his benign intentions, Feldman sounds remarkably like Justice Brown, the eighteenth-century jurist who said that if African-Americans regarded segregation as a “badge of inferiority” it was only because “the colored race chooses to put that construction upon it.”⁵² As we have already argued, contrary to the view of Justice Brown, African-Americans were right to perceive an insult in segregation. Americans today are likewise correct when they discern a message of exclusion in governmentally sponsored religious displays. It does not follow that they ought always to sue—it is often an act of virtue to ignore insults, however real or hurtful they may be, and undoubtedly we as a country would be better off if Americans (on all sides) could do so more often. It does mean, however, that it is just plain wrong for us to pretend, when people do sue over a display, that no injury has been done them.

Arguments to the effect that those offended by mainstream religious symbols ought not to rock the boat suffer an unfortunate asymmetry. They counsel minorities to buck up and suffer a bit of disparagement in order to avoid producing a nasty backlash. But what would fuel the predicted backlash? The majority’s deep attachment to its symbols, of course. This is counsel to the weak to yield to the strong, pure and simple. Our Constitution can do much better than that.

Perhaps this last is a good note upon which to end this chapter. The matters we have taken up here share the quality of stirring passionate controversy. They also seem to

⁵¹ Ibid. at 240.

⁵² Plessy, 163 U.S. at 551.

inspire a kind of take-no-prisoners mentality, in which one side wants to purge the public space of anything remotely religious and the other insists not just on public space but upon the privilege of public endorsement.

There is an important lesson to be learned from the extreme passions these cases provoke: in the realm of our spiritual commitments, symbols matter a lot. When the highest-ranking judge of the State of Alabama wraps himself around the Ten Commandments, candlelight vigils follow; when a federal court of appeals pronounces the Pledge of Allegiance unconstitutional, threats to amend the Constitution ensue. When Michael Newdow—a physician, not a practicing lawyer—represents himself before the Supreme Court of the United States in his case challenging the Pledge, he speaks with a passion that appears to rock the Court and that stirs even the jaded *New York Times* to comment. On a personal note, when we submit a friend-of-the-court brief to the Supreme Court, urging the moderate course with regard to the Pledge that we described above, we receive a rancorous e-mail from a fellow academic, excoriating us for our willingness to appease the supporters of the Pledge in its present form. The social meaning of sacred texts and symbols and of religious references more generally is not an abstraction but a reality that burns red hot.

There is another lesson to be taken from our excursion through the controversies surveyed in this chapter. The middle path we find ourselves urging in the Pledge of Allegiance controversy is characteristic of our prescriptions for religious liberty. This is not an accident. Neither is it the product of a pragmatic effort to temper discord, nor an artifact of our moderate academic inclinations. It is instead the natural product of viewing the question of religious freedom from the vantage of Equal Liberty. Early on, we noted that Equal Liberty does not ask whether and when religion is good or bad. Equal Liberty seeks to set out fair terms of cooperation for a religiously diverse people who accept the obligation to treat one another with respect as equal members of our political community. That being our enterprise, it is not surprising that more often than not we find ourselves supporting principles that treat the concerns of both sides of these disputes as having some call on constitutional outcomes.

