

ARTICLES

FALSE FACTS AND HOLY WAR: HOW THE SUPREME COURT'S ESTABLISHMENT CLAUSE CASES FUEL RELIGIOUS CONFLICT

JOHN M. BICKERS*

*"Rustic shepherds, worthless reproaches, mere stomachs, we know how to say many lies like the truth, and, whenever we wish, we know how to tell the truth."*¹

I. INTRODUCTION: THE MUSES AND TRUTH

The ancient Greek author Hesiod received his inspiration to write a history of the Olympian Gods from the Muses. They began by telling him they *could* tell him the truth, but they also knew how to tell him lies. They lied when they thought it was necessary to accomplish what they had decided was a greater good.

Like the Muses, the Justices of the Supreme Court are nine in number. Like the Muses, the justices can tell false things as well as true ones. In the messy area of government-religious speech, the Supreme Court's opinions sometimes contain facts that seem plausible but are false. They are "lies like the truth."² The Court seems to offer these facts without malice, in an attempt to find a neutral solution to a problem that is incapable of having such an answer. The Court seeks to find a way to reduce the potential ferocity of religious tension in our society, but such attempts have ironically resulted only in an increase in conflict due to the inevitable nature of advocacy within a constitutional system.

This paper will propose that the very attempt to resolve religious disputes by presenting false facts accelerates and intensifies conflict. Ideologically opposing forces seize each offered settlement from the Court as a tool to advance their own goal: either the increase or elimination of government-religious speech. In failing to accept that religious conflict is inevitable in a free society, the Court's

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. My thanks to Kelsey Braido and Carol Furnish, who provided invaluable research assistance; Samuel J. Levine and Christopher Lund, for their very helpful comments on a late version of the Article; and my colleagues at the Central States Law School Association, who sat through an earlier version and helped me to reorient it. Errors are of course my own.

1. Hesiod, *Theogony*, ll. 26-28 (Wm. Blake Tyrrell trans., 1997), available at <https://msu.edu/~tyrrell/theogon.pdf> [<https://perma.cc/V4B3-LU5H>].

2. *Id.*

promulgation of false facts merely exacerbates that conflict. Only through a frank recognition of the problem and a deliberate redrawing of boundaries for the Establishment Clause can the Court offer some of the peace its decisions have so far sought in vain.

Part II of this Article will demonstrate the nature of the war over the boundary between government and religion. To show the contours of the battlefield, this part begins by offering a quick review of the many tests offered by the Court and its various members for resolving challenges to government-religious speech. Some of these tests, taken seriously, would eliminate a great deal of our public history in ways that much of the nation would likely not tolerate. The remaining tests, while protective of tradition, would allow for a militant sectarianism that much of the country would find equally intolerable. Thus, the court alternates among the tests, presents vague escape hatches from the tests' obvious meanings, or simply offers facts that do not parallel the actual behavior of the participants in the case. This part will then examine some possible reasons for the multiplicity of malleability of these tests, including a retreat from objective virtue, a desire to limit social disorder, and the wish to protect the Court's own institutional role. This part concludes with a brief introduction to the primary combatants in the war: those who seek to increase dramatically the voice of the government in religious matters and those who seek to curtail significantly government expression that speaks to matters of faith.

Part III will open by considering some of the most prominent cases, which have deployed false facts. It will focus on cases involving either monuments or legislative prayer, as it is in these areas that the Muses' technique of telling falsehoods for the benefit of humans has been most prominent. This part will then expound upon a dangerous byproduct of the breakdown of a workable Establishment Clause: the inability to police the border between politics and religion. Untrammelled majority rule in government-religious pronouncements has had deleterious effects on American minorities through our history and into this new century. A quick survey of some of these events, concluding with the attempts in 2017 to impose limits on travel that were arguably based on religion, will illustrate the dangers of the status quo. This part will conclude with illustrations of the combatants clearly using the Muses' idea and deploying false facts to either increase or decrease the government's ability to speak on matters of faith. The Court's mythical narratives are transformed into weapons to continue the war, something far from the Court's seeming goal of reducing religious-based tension in the body politic.

Part IV will turn to a real solution, albeit one that causes understandable discomfort for scholars and judges alike. This paper proposes that only incorporating an admittedly artificial distinction, based on time, into standing doctrine offers any real hope of establishing peace concerning the proper place of religion in the public life of the United States. Justice Breyer offered such a possible solution in the Ten Commandments cases of 2005. Although the Supreme Court has not yet embraced such an answer, some lower courts seem to have used such an approach in resolving cases before them. This Article concludes by taking the position that Justice Breyer's careful, fact-based treatment of government-religious speech cases should be converted into an overt

rule of standing. In short, an objector would have standing to challenge any new government religious speech, but not old religious speech. Such a rule, artificial as it may seem, offers the best hope of bringing peace to an area of fierce, and perhaps dangerous, contention in our legal system.

II. THE RELIGIOUS CONFLICT

A. *The Field of Battle: The Troublesome Tests*

Eschewing the usual lament about the chaos of this area of constitutional law,³ it is nonetheless worth quickly reviewing a handful of the most frequently used tests that might be applicable in evaluating religious speech by the government. It is apparent that in many areas of Establishment Clause jurisprudence, relative stability exists because the Court has settled on a framework for that particular area.⁴ In assessing religious speech by the government, though, the multiplicity of tests⁵ means that a justice or group of justices may choose which test to deploy on any given occasion. This is an

3. See, e.g., RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045, 2045 (2010) (noting a “deeply divided and often inconsistent Court has created significant complexity in this area”); Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) (“[T]he Supreme Court’s Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.”); Michael I. Meyerson, *The Original Meaning of “God”: Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 MARQ. L. REV. 1035, 1037 (2015) (“The Supreme Court has never figured out how to evaluate the constitutionality of the myriad religious references that pervade American public life. The Court seemingly alternates between ad hoc, one-case-at-a-time jurisprudence and prudential avoidance of the constitutional issue altogether.”); Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 33 (2005) (noting that the Ten Commandments decisions “have done nothing to clear away the fog obscuring religious display cases or Establishment Clause jurisprudence generally”).

4. For example, access by religious groups to public space is judged along the lines developed in free speech law for designated public fora. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Likewise, public funding for religious education is analyzed as a question of true private choice. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The multiplicity of tests in these areas gives rise to the appearance that the law is in chaos. That is not necessarily so, and the diversity of analysis merely shows that the Court has subdivided the Establishment Clause into a number of discrete types of problems.

5. Indeed, Professor Meyerson has warned that examining the earliest cases may not help us reduce the number of tests to one in this area. Meyerson, *supra* note 3, at 1053 (noting “even the most rudimentary form of case synthesis in the area of governmental religious expression is impossible”).

inherently messy and inexact process.⁶

1. Lemon.—Almost a quarter-century after *Everson*'s proclamation that the Establishment Clause means “at least this,”⁷ Chief Justice Burger endeavored to syncretize the cases that had followed. His attempt to do so in *Lemon v. Kurtzman*⁸ famously married an inquiry into the purpose of the government action, an examination into the action's principal effect, and a warning to avoid entanglement of religion and government that was “excessive.”⁹

There was likely hope that the *Lemon* formation would serve as a Grand Unified Theory of the Establishment Clause,¹⁰ but that was not to be. Indeed, Chief Justice Burger himself authored a major opinion on the Establishment Clause a dozen years later, *Marsh v. Chambers*,¹¹ in which he mentioned that the Court of Appeals had applied *Lemon*,¹² but he otherwise ignored it.¹³

6. See Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1144 (2010) (suggesting that there are times when decision-making requires us to “rely on our intuitive judgments - judgments influenced by our cultural heritage, particular upbringing, and professional training”); see also Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363 (2015) (offering a thoughtful defense of a quest for coherence as motivating judges, not mere *ad hoc* preferences).

7. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”).

8. 403 U.S. 602 (1971).

9. “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612-13 (citations omitted).

10. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring).

11. 463 U.S. 783 (1983).

12. *Id.* at 786.

13. The Court upheld the practice of legislative prayer. The reason for ignoring *Lemon* is probably best illustrated by the dissent, which, like the Court of Appeals, would meticulously apply *Lemon* to strike down the practice. *Id.* at 796 (Brennan, J., dissenting) (“In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”) *Id.* at 800-01.

That pattern continued. Sometimes the Court used *Lemon*,¹⁴ and sometimes it did not.¹⁵ When *Lemon* was absent, sometimes it was specifically rejected,¹⁶ but other times, as in *Marsh v. Chambers*, it was simply ignored.¹⁷ While perhaps not quite a B-movie monster,¹⁸ it is difficult to avoid the sense that *Lemon*'s use is contrived. When used in the context of government speech, *Lemon*'s purpose prong presents particular difficulties, as will appear throughout the rest of this Article.

2. *Coercion*.—The on-again, off-again use of *Lemon* allowed other justices to offer their own paradigms for applying the Establishment Clause in areas of government speech. One view destined to receive seeming unanimous support is a prohibition on coercion; surely, preventing the government from requiring people to profess a religious belief is close to the core meaning of the Establishment Clause.¹⁹

The difficulty has come in defining what government action can fairly be labeled coercion. Some justices have found the psychosocial pressure of a non-denominational benediction opening a middle-school graduation²⁰ or a loudspeaker prayer before a football game coercive.²¹ Other justices, while acknowledging that coercion is an evil prohibited by the Constitution, would have approved of those forms of government speech,²² as well as the use of a church

14. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583-85 (1987); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

15. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”).

16. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, C.J., plurality opinion); *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

17. 463 U.S. 783 (1983); see also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

18. Among the many critical comments on *Lemon* by justices and scholars, none have earned the well-earned fame of Justice Scalia’s caustic observation in a case involving a church seeking after-school access to school property:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.

Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

19. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

20. *Lee*, 505 U.S. at 592-93.

21. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000).

22. See, e.g., *Lee*, 505 U.S. at 640 (Scalia, J. dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support

as the setting for a public high-school graduation.²³ In the area of government-religious speech, a reliance on coercion alone would essentially read the Establishment Clause out of the Constitution: any observer could avert her eyes from a statue declaring a particular faith as the correct faith.

3. *Endorsement*.—There was never a perfect fit between the *Lemon* test, designed in the context of school-funding cases, and religious speech by the government. Any such speech, display, or permanent monument was in danger of being tripped up by *Lemon's* purpose-prong. Possibly reluctant to bear responsibility for a judicial-iconoclasm movement, the justices famously watered-down *Lemon* by recognizing a proper secular purpose when they saw reindeer.²⁴ Justice O'Connor, clearly troubled by that approach, offered an alternative rubric for thinking about the Establishment Clause. When it came to government speech, she suggested the real evil was the use of the government's bully pulpit to endorse one faith or sect over others. As she memorably phrased it, the evil the Establishment Clause was meant to prevent was "making adherence to a religion relevant in any way to a person's standing in the political community."²⁵

This test, and the idea that the government must not deliver "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[,]"²⁶ was quite popular in academic circles.²⁷ Although it commanded a majority of the Court on a few occasions as the

by force of law and threat of penalty.") (emphasis in original).

23. See *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283-84 (2014) (Scalia, J., dissenting).

24. For much of the twentieth century, an annual appearance in communities throughout the United States was the arrival on the lawn of the courthouse or city hall of a crèche, or nativity scene. The gathering of figures about a manger depicted the Christian story of the miraculous birth of Jesus Christ. When the Court first grappled with a challenge to such a display, it found that the display survived a challenge under *Lemon* because the purpose of celebrating Christmas was a secular one, demonstrated by the fact that the crèche was accompanied by figures of reindeer, a clown, an elephant, a teddy bear, see *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984), and—although it did not make its way into the Supreme Court opinion at the time—a robot. See *Donnelly v. Lynch*, 525 F. Supp. 1150, 1155 (D. R.I. 1981). Counsel for communities across the country thereafter presumably explained to their clients that nativities could remain, provided they were "secularized" with the inclusion of non-religious symbols of the Christmas holiday.

25. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

26. *Id.* at 688.

27. See, e.g., Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 838 (2001); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1049-51 (1986); Jay Wexler, *Government Disapproval of Religion*, 2013 BYU L. REV. 119, 124 (2013). Of course, the test also has its detractors. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148 (1992); Stephen D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

complete, or at least partial, reason for a decision,²⁸ it also engendered a persistent line of objection.²⁹ Nonetheless, it has never been formally repudiated, and so remains, like *Lemon* and coercion, an available rubric for government-speech cases.

4. *History*.—As noted earlier, even the author of *Lemon* was uncommitted to it as a universal test.³⁰ In the most prominent government-religious-speech case he authored after *Lemon*, Chief Justice Burger did not use it.³¹ Instead, in evaluating the practice of opening a state-legislative session with a prayer, he turned to the nation's history.³² He noted the first Congress to operate under the Constitution, the very group of men who passed what was to become the First Amendment, had hired a chaplain and inaugurated their sessions with a prayer.³³ Although noting that a long course of practice did not necessarily preclude a finding of unconstitutionality, he observed that this tradition was so ingrained that the Establishment Clause could not plausibly be applied to forbid it.³⁴

But as with the other tests, this one has a series of built-in difficulties. First, of course, is the variant that is always present when seeking a historical pattern: deciding what counts toward the pattern. Does one give the more weight to the thanksgiving declarations of Presidents Washington and Adams, or President Jefferson's unwillingness to make such a declaration?³⁵

Possibly worse, the consequences of using a true historical test might well be sectarian in a way that would be deeply divisive in modern America. Justice Stevens noted, in an exchange with Justice Scalia during the Ten Commandments cases, that a substantial part of the founding generation was only willing to extend religious protection to Christianity.³⁶ Not everyone in the colonies was a Christian, of course, and President Washington's letter to the Jewish community of Newport, Rhode Island, remains a classic part of Washington's understanding

28. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, 314 (2000) (in an opinion overtly using the *Lemon* test, the Court nevertheless notes that "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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.'") (quoting *Lynch*, 465 U.S. at 688).

29. See, e.g., Justice Scalia's desire for an Establishment Clause jurisprudence that had at its center the idea that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

30. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

31. *Marsh v. Chambers*, 463 U.S. 783 (1983).

32. *Id.* at 786-90.

33. *Id.* at 787-88.

34. *Id.* at 790-91.

35. *Van Orden v. Perry*, 545 U.S. 677, 686-87 (2005); *id.* at 724 (Stevens, J., dissenting).

36. *Id.* at 726 (Stevens, J., dissenting) ("[M]any of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity.").

of the Establishment Clause.³⁷ Yet it is also true that when different religions were discussed in our formative period, speakers typically meant different sects of Christianity.³⁸ In twenty-first century America, with far greater religious diversity and an increasing number of non-religious people,³⁹ such an approach would offer little more than one faith's conquest of the government.

Finally, Chief Justice Burger's critical admission from *Marsh* makes the historical approach even less of a test than most of its competitors. For once a judge concedes that "historical patterns cannot justify contemporary violations of constitutional guarantees,"⁴⁰ the history test has lost its power as a constraint upon judicial decision-making. Indeed, it is impossible to avoid the conclusion that history cannot resolve all matters of constitutionality when one considers that the single most fundamental case in constitutional canon relies upon the fact the Court found the First Congress misunderstood the meaning of Article III of the Constitution.⁴¹ If the First Congress could get *that* wrong, why should they be infallible on everything else?

5. *Monotheism*.—One more possible test appeared in Justice Scalia's dissent in Kentucky's portion of the Ten Commandments cases. Claiming that the Framers were always willing to allow endorsement of monotheism,⁴² Justice Scalia went so far as to suggest that government might freely ignore large sections of the country's religious population: "With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's

37. Responding to a letter expressing their "affection and esteem" for the president, but also noting that some governments had deprived them "of the invaluable rights of free Citizens," President Washington noted that the new government of the United States "gives to bigotry no sanction," and only required that people living in the nation "demean themselves as good citizens." Letter from George Washington, to the Hebrew Congregation in Newport, Rhode Island (August 18, 1790), available at <https://founders.archives.gov/documents/Washington/05-06-02-0135> [<https://perma.cc/PK5D-76YR>].

38. *Van Orden*, 545 U.S. at 727 (Stevens, J., dissenting) (citing Justice Story for the proposition that the purpose of the Establishment clause was not to protect Judaism or Islam, but to prevent competition among Christian denominations).

39. Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 704 (2015) ("While Americans remain overwhelmingly Christian (78.4%), non-Christian religions continue to grow, with Buddhists, Muslims, Baha'is, and others immigrating to the United States in greater numbers."). Professor Flake also observes that "the most remarkable trend" is the growth in the number of Americans who do not identify with a particular faith. *Id.* at 703-04 ("[O]ne-third of adults under age thirty are religiously unaffiliated today—the highest percentages ever in Pew Research Center polling."); see also Nicholas C. Roberts, *The Rising None: Marsh, Galloway, and the End of Legislative Prayer*, 90 IND. L.J. 407, 436 (2015) ("In a 2013 survey, 20% of respondents indicated that they had no religious preference. Only 8% reported no religious preference in 1990.").

40. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

41. *Marbury v. Madison*, 5 U.S. 137 (1803).

42. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 893-94 (2005) (Scalia, J., dissenting).

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.”⁴³

This idea has not appeared again in a Supreme Court opinion in the years since its offering. As the next section will demonstrate, the notion that government may disregard atheism and other faiths is a guiding principle for some combatants in the struggle over the Establishment Clause, regardless of what the founding generation or other giants of American history may have thought.⁴⁴

B. Why Are There So Many Inconsistent Tests?

One abiding mystery is why the Court would spend so long trying to decide what the appropriate test ought to be. There are countless areas where the Court has changed tests,⁴⁵ changed the meaning of the words in the test,⁴⁶ or otherwise altered the meaning of the tests.⁴⁷ The Establishment Clause, with multiple tests deployable at will, represents a different phenomenon. Before examining the consequences of this phenomenon, it is worth a little speculation as to why the Court struggles to decide the proper test.

Professor Ledewitz has recently posited that the Supreme Court has simply given up any project of proclaiming constitutional values and is instead following a nihilistic path.⁴⁸ Under his theory, the Court has simply forfeited any role as a moral guardian for the state.⁴⁹ Among the cases he cites for this

43. *Id.* at 893.

44. *See infra* Part II.D. As to the Founding Fathers, it should not pass unnoticed that the author of the Declaration of Independence may be thought of as one of Justice Scalia’s freely-disregarded believers in an unconcerned deity. *See* Steven K. Green, *Understanding the “Christian Nation” Myth*, 2010 *CARDOZO L. REV. DE NOVO* 245, 257 (2010) (“Most deists, like many of the Founders—Benjamin Franklin, George Washington, Thomas Jefferson—denied the divinity of Jesus, of his substitutional atonement, and the reality of biblical miracles.”).

45. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place.”).

46. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872-73 (1992) (O’Connor, Kennedy & Souter, JJ., announcing that *Roe v. Wade* was affirmed while nonetheless reversing “the trimester framework, which we do not consider to be part of the essential holding of *Roe*”).

47. *Compare* *Lochner v. New York*, 198 U.S. 45, 58 (1905) (striking down hourly limits on bakery workers because there was “no *reasonable* foundation for holding this to be necessary or appropriate as a health law”) (emphasis added), *with* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (upholding a minimum wage for women because “regulation which is *reasonable* in relation to its subject and is adopted in the interests of the community is due process”) (emphasis added).

48. Bruce Ledewitz, *The Five Days in June when Values Died in American Law*, 49 *AKRON L. REV.* 115, 116 (2016).

49. *Id.* at 116-17.

proposition—indeed, the opening salvo of the “five-day war on values” he identifies—was the Establishment Clause case that exemplified the conflict over the meaning of coercion, *Lee v. Weisman*.⁵⁰ Professor Ledewitz notes that the Court not only held that an eighth-grade graduation was coercive because it was so important to the students,⁵¹ but also equated morality with religion, which made the promulgation of virtue forbidden by the Establishment Clause.⁵²

In Professor Ledewitz’s view, the Court once saw itself as a guarantor of the civic virtues necessary for the success of the American Republican experiment.⁵³ The Court’s repudiation of this role in favor of that of a neutral umpire, he argues, means cession of the authority to use values in its decisions.⁵⁴ Content to limit its role to calling balls and strikes,⁵⁵ the Court is now unwilling, or even unable, to call the parties to a dispute to a shared understanding of our values.⁵⁶

This understanding of modern American law is profound, if a little depressing. It is possible, though, that the Court’s rejection of values, at least in Establishment Clause cases, is merely a usefully worn mask. After all, the hymn to neutrality contained in *Everson*⁵⁷ predates the values-based approach of *Brown v. Board of Education* by almost a decade. As will be noted later, values-language is present on all sides in government-religious-speech cases: the value asserted merely changes with the position the justice is defending.

Another possible reason is perhaps even more cynical—it could be that the use of different tests is nothing more than a cloak for religious or political preference. It is certainly possible to derive such a dark meaning from individual comments by the Justices in opinion or argument, and the whole of the “monotheism” test, although admittedly only a minority view, is difficult to square with anything other than mere religious or political preference.⁵⁸ Yet it is also true that the great majority of cases, in the Supreme Court and elsewhere, appear to be good-faith attempts to solve the Establishment Clause’s puzzle. Justice O’Connor, for example, wrote passages that represent both a deferential

50. 505 U.S. 577 (1992).

51. Ledewitz, *supra* note 48, at 117.

52. *Id.* at 119.

53. *Id.* at 146 (referring to multiple Supreme Court opinions as “highly normative”).

54. *Id.* at 116 (noting that the justices “abdicated authority to set objective standards over a wide range of issues”).

55. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55, 56 (2005) (statement of John G. Roberts, Nominee to be Chief Justice of the United States) (noting his role was to be an umpire, and assuring the Senate Judiciary Committee that he recognized “it’s my job to call balls and strikes, and not to pitch or bat”).

56. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866-67 (1992) (announcing that in cases like *Roe v. Wade*, the Court had resolved an “intensely divisive controversy” because “the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

57. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

58. *See, e.g., supra* notes 29 and 42.

view of religion in the public square⁵⁹ and passages as separationist as anything penned by a justice in the last one-hundred years.⁶⁰ One could attribute a dark motive to this, but the answer that comports more with the tone and tenor of her writing is simply that these cases are difficult, and the same mind can come to different but authentic conclusions.

The most important outcome of the multiple-test phenomenon, though, is unmistakable: it limits certainty. A test simply cannot serve as an effective constraint on the judiciary if its application is optional. Having a test offers some confidence a court is acting in a principled way, but having a multitude of tests, deployable at will, removes any promise of consistency and reawakens fears of judicial aggressiveness.

This can be seen in the lower courts' behavior. The opinions there deploy these tests, often in clusters and frequently with a sense of confusion. For a lower-court judge, wishing not to commit reversible error, the safest course may generally be to analyze the situation under as many tests as possible. After all, the Supreme Court has used this method, even though it clearly adds no legal certainty.⁶¹

C. A Fear of Bulldozers?

Another possible reason for the multiple-test regime is a fear, which may spring from better or worse motives, of the Court functioning as a destroyer of American identity. There are undoubtedly occasions in America's past that would be troubling today. Numerous cities and towns are named in overtly religious ways, some official seals bear images that are unmistakably sectarian, and a not-insignificant number of mottos are clearly prayerful. To cynical observers of the Court, the hesitancy at removing such things reflects no more than a self-serving fear of a pitchfork-and-torches response by the body politic, outraged that the nine justices have, at last, gone too far.⁶² And if *Lemon's* purpose prong is to be

59. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (referring to such affirmations as "In God We Trust" on the coins as "government acknowledgments of religion [that] serve, in the *only* ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society") (emphasis added).

60. See, e.g., *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 883 (O'Connor, J., concurring) (2005) ("Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.").

61. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

62. The Court's forays into government-religious speech have produced hostile reactions that may have surprised the court itself. See, e.g., Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 409, 424 (2015) ("The Engel decision [prohibiting New York's Regents Prayer] alone generated more hate mail than any previous decision in the institution's history, beating out its enormously controversial decision in *Brown v. Board of Education* . . .").

taken literally, they must go too far. There is no way to find a non-religious purpose for the adoption of a religious motto or erection of a religious symbol. One can invoke history, but that only pushes the inquiry further back in time. A serious examination of the original purpose that reveals it to have been religious would mean, under a literal reading of *Lemon*, that courts would have to order a stripping of religion from the public life of the United States. This the Supreme Court has been hesitant to do.

To less cynical people, the Court's hesitancy arises from a legitimate desire to recognize an evolving American experience. To such people, a willingness to abide by some acts of government speech that violate the plain meaning of an applicable test does not show inconsistency or cowardice. Instead, it demonstrates subtle judging, recognizing that complex factors are present in any given situation. A prominent example of this subtlety is the "ceremonial-deism" exception. In his dissent in the crèche-and-reindeer case, *Lynch v. Donnelly*, Justice Brennan adopted Dean Eugene Rostow's idea that precisely what insulated phrases like "In God We Trust" and the Pledge's "under God" from constitutional objection was that "they have lost through rote repetition any significant religious content."⁶³

Whether out of a fearful dodging of the consequences of the Establishment Clause tests, or out of a judicious desire to recognize that the *nation* has evolved regardless of whether one thinks the *Constitution* has, neither a regime that allows for choosing among a variety of tests nor one that creates discretionary-internal exceptions offers any real balm for religious conflict. The former gives rise to the allegation that the courts are practicing results-oriented jurisprudence, while the latter raises the logical question of why there should be such an exception and the practical question of how one figures out when it should be invoked. It is worth noting, for example, that the foremost proponent of the ceremonial-deism exception would have allowed the invocation of God in the national motto as well as in the Pledge of Allegiance,⁶⁴ but would have ordered the removal of a forty-year-old Ten Commandments monument from Texas's state-capitol grounds.⁶⁵

But this desire, whether cynical or not, to avoid the harshest results of application of the tests has not led most justices to a complete retreat from enforcing the Establishment Clause. Perhaps the most powerful example of this came during the exchange between Justices Scalia and Stevens in the Ten Commandments cases of 2005. As noted above, it was during that discussion that Justice Scalia proposed that the Establishment Clause allowed for the acceptance of overtly monotheistic expressions of government approval.⁶⁶ In response, Justice Stevens challenged him to modify his proposed test to one allowing overtly Christian expressions by the government; as Justice Stevens pointed out, when the Founding Fathers spoke in the language of religion, they did so with the

63. 465 U.S. at 716.

64. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring in judgment).

65. *Van Orden v. Perry*, 545 U.S. 677, 737 (2005) (O'Connor, J., dissenting).

66. *See supra* notes 42-44 and accompanying text.

words of Christianity, not some polyglot “monotheism.”⁶⁷ Justice Scalia responded fiercely, recognizing this challenge for what it was.⁶⁸ To accept the government may openly favor Christianity is not to weaken the Establishment Clause, but to read it out of the Constitution altogether. If the U.S. government could announce that Christianity or even a sect of Christianity was the True Religion, what would be the point of forbidding an establishment of religion?

D. The Combatants

1. *The Holy Warriors.*—There are many advocates seeking a greater recognition of faith by the government. For example, a number of lobbying groups and law firms have mission statements that explicitly seek promotion of religious speech and activity by the government.⁶⁹ Some expand their focus to include other issues that are only tenuously connected to religious freedom.⁷⁰ Some narrow “religious freedom” to the promotion of an odd hybrid of Judaism and Christianity,⁷¹ or even a specific subset of Christianity.⁷² Prominent public figures, including executives, legislators, and judges, have also taken up this

67. *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting) (“[T]he history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism.”).

68. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) (referring to Justice Stevens’s evidence of favoritism of Christianity among some of the founders as merely “providing a cloud of obfuscating smoke”).

69. These include, for example, The Becket Fund for Religious Liberty, which defines itself as “the only non-profit, public-interest legal and educational institute that protects the free expression of all religious traditions” but acknowledges that it works “also in defense of the government when it is sued for being religion-friendly.” *History*, BECKET, <http://www.becketlaw.org/about-us/history/> [<https://perma.cc/HEY5-JPN4>] (last visited May 14, 2018).

70. The American Center for Law and Justice, although founded “to protect religious and constitutional freedoms,” acknowledges that it also advocates in areas such as national security and “protecting patriotic expression.” *Our Mission*, AM. CTR. FOR LAW AND JUSTICE, <https://aclj.org/our-mission/about-aclj> [<https://perma.cc/P9R8-LJR8>] (last visited May 14, 2018).

71. The Alliance Defending Freedom, which represented the Town of Greece in its Supreme Court litigation, announced its concern that as “secular forces chip away at our nation’s Judeo-Christian roots, religious freedom is increasingly threatened.” The organization makes the claim that “rights are grounded in the unique, Judeo-Christian concept of man’s inherent dignity as a creature made in God’s image, endowed with reason, free will, and an eternal soul.” *Issues: Our First Freedom*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/issues/religious-freedom> [<https://perma.cc/F436-R7GP>] (last visited May 14, 2018).

72. Although the Becket Fund proudly touts the fact it seeks to protect all faiths, organizations such as Liberty Counsel, associated with Liberty University, offer a narrower focus: one of its prominent Religious Freedom issues is titled “You Can Help Us Save Christmas,” which includes announcements of their achievements such as “[r]estoring nativity scenes that have been banned from public property[.]” *You Can Help Us Save Christmas*, LIBERTY COUNSEL, <https://www.lc.org/christmas> [<https://perma.cc/274P-ZMES>] (last visited May 14, 2018).

cause.⁷³ For the Holy Warriors, and their supporters on the Supreme Court, complaints by Fervent Separationists are petty. In objecting to the denial of certiorari when a lower court prevented a public-school graduation from taking place in a church, Justice Scalia reduced the opponents' objections to mere matters of taste.⁷⁴

2. *The Fervent Separationists.*—But it takes two forces to have a war, and an opposing side takes up arms against these Holy Warriors. There is a group of Fervent Separationists, likewise organized into associations and firms that steadfastly fight to strengthen the wall between Church and State.⁷⁵ As with their ideological foes, there are individuals who play leading roles in the struggle.⁷⁶ It sometimes seems no cause is too small to catch the interest of those engaged in protecting their view of religious liberty from those they portray as theocrats.⁷⁷

73. Probably none more prominently than Alabama's Roy Moore, whose tenure in the state judiciary has twice included suspension from the bench for acting in accordance with what he believed were his religious duties. First, as Chief Justice in Alabama he installed an enormous Ten Commandments monument in the courthouse one summer night in 2001. Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 289 (2007). When he refused to comply with the order of a federal court to remove it, he was himself removed from office. *Id.* at 290. After the people of Alabama returned him to the court, and the Supreme Court found a right to marital equality in the Fourteenth Amendment, he was removed a second time; this followed his order to the probate judges of Alabama to ignore the U.S. Supreme Court and refuse to issue marriage licenses to same sex couples. Marsha B. Freeman, *Holier than You and Me: 'Religious Liberty' is the New Bully Pulpit and its New Meaning is Endangering Our Way of Life*, 69 ARK. L. REV. 881, 888 (2017).

74. *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283 (Scalia, J., dissenting) ("Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky.").

75. *E.g.*, The American Atheists Legal Center, like the Becket Fund, sees themselves as fighting for "religious equality for all Americans," but does so by defending "what Thomas Jefferson called the 'wall of separation' between state and church created by the First Amendment." *Our Vision*, AM. ATHEISTS, <https://www.atheists.org/about/our-vision/> [<https://perma.cc/KWQ4-M39U>] (last visited May 14, 2018).

76. *E.g.*, Michael Newdow, a prominent atheist physician and attorney, was granted leave by the Supreme Court to represent himself in a suit designed to prevent elementary school teachers from including the words "under God" when leading their classes in the Pledge of Allegiance. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 3, 5 (2004).

77. *See, e.g.*, *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1182, 1185 (D. N.M. 2006), *aff'd*, 541 F.3d 1017 (10th Cir. 2008) (objecting to the use of crosses in the emblems of maintenance vehicles and schools in Las Cruces—"the crosses"—New Mexico); Pat Rice, *Warranted or not, the cross in DeLand's seal creates a First Amendment debate*, DAYTONA BEACH NEWS-JOURNAL (Sep. 8, 2013, 12:01 AM), <http://www.news-journalonline.com/article/LK/20130908/News/605073260/DN/> [<https://perma.cc/93FH-PJVK>] (discussing a demand by Americans United for Separation of Church and State that the Florida city remove the cross from

Intriguingly, Fervent Separationists include not only atheists and agnostics, but also religious people who voice a much older argument: the idea that entwining religion with government damages, rather than advances, the faith.⁷⁸

3. *The Inevitability of War*.—When any area of the law contains two such committed sets of foes, it is inevitable that they will struggle. In such settings, the advocate’s perspective is always different from that of a judge or scholar. The judges and scholars seek to understand the legal formulae and apply the legal tests to reach the “right” legal result. But, for the advocates who wage such holy wars, the constitutional test is always a tool to deploy in seeking the result that benefits the client. As Clarence Darrow noted about advocates long ago, they seek to win.⁷⁹

III. THE RELIANCE ON FALSE FACTS

A. Some Prominent Uses of False Facts as a Way Out

Out of a desire to avoid the harsh realities of the *Lemon* test, combined with an unwillingness to eviscerate completely the Establishment Clause, a Muse-like path of lying to rustic shepherds arose. In several prominent cases, the Court’s depiction of facts bore little resemblance to any that a journalist might report.⁸⁰ The focus on purpose in the *Lemon* test often made such distortions necessary, as the facts’ reality evinced a purpose that was far from secular.

its 131 year-old city seal); Tom Shortell, *Lehigh County sued over Latin cross in seal*, MORNING CALL (Aug. 20, 2016, 7:45 PM), <http://www.mcall.com/news/local/mc-lehigh-county-seal-lawsuit-20160819-story.html> [<https://perma.cc/DE4H-KW78>] (discussing a lawsuit by the Freedom From Religion Foundation against Lehigh County for its inclusion of a Latin Cross in the center of a decades-old seal that also included “a heart said to symbolize Allentown, the U.S. and Pennsylvania flags, bunting, the Liberty Bell, factories and a farm scene”).

78. Timothy J. Tracey, *Just Because You Can, Doesn’t Mean You Should: Equal Protection, Free Speech, and Religious Worship*, 36 N. ILL. U. L. REV. 58, 61 (2016) (“Christian lawyers pushed for sectarian prayer at state and local legislatures. But they failed to consider that they denigrated prayer in the process The lawyers, thus, gutted prayer of its spiritual character to get it to pass muster under the Establishment Clause.”). Professor Dane’s criticism may be even sharper, noting that neither the majority nor the dissent in *Town of Greece* took religion seriously. Perry Dane, *Prayer is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J.L. & RELIGION 611, 628 (2014) (“But if the purpose of official prayer is not (ahem) to pray, then all the lesser purposes the Court allows, including lending ‘gravity to public business,’ are merely play-acting - using and abusing religion for secular ends.”).

79. CLARENCE DARROW, *CRIME: ITS CAUSE AND TREATMENT* 128 (1922) (noting that the law furnishes “a tribunal where the contending lawyers can fight, not for justice, but to win Oftentimes the only question settled in court is the relative strength and cunning of the lawyers.”).

80. Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. 1211, 1211 (2011) (referring to efforts to “manipulate the findings of fact”).

1. *The Meaning of Monuments: The Cross and the Klan.*—Sometimes, the Court has deployed facts in ways that suggest a willingness to see only what is visible. This was the case with the Latin cross that the Ku Klux Klan sought to erect in December 1993 in a city square in Columbus, Ohio.⁸¹ Because Justice Scalia's plurality opinion limited itself to the question of whether the Establishment Clause justified the exclusion of religious speech from an otherwise public forum, it specifically ignored any possible political meaning of the cross when erected by the Klan.⁸² For the purpose of this case, the cross would be treated by the Court as an unadulterated religious symbol.

It was left to Justice Thomas's concurrence to note the obvious: "the fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected by the Ku Klux Klan is a purely religious symbol."⁸³ After a short recounting of the Klan's use of crosses as "a symbol of white supremacy and a tool for the intimidation and harassment,"⁸⁴ Justice Thomas concluded that the proposed display "had a primarily nonreligious purpose."⁸⁵

Justice Thomas nonetheless agreed with applying the tests as if the speech were religious. Ultimately, the Court was unwilling to examine deeply motive or meaning, concluding that the religious expression was purely private and occurred in a designated public forum that was publicly announced and open to all equally.⁸⁶

2. *The Meaning of Monuments: The Cross on the Rock.*—Half a continent away, a different fate awaited a similar Latin cross. This cross stood on Sunrise Rock, a bit of federal land in California.⁸⁷ Although a silent sentinel in the desert, the cross nonetheless underwent an extraordinary procedural history that peaked judicially in the Supreme Court's decision in *Salazar v. Buono*.⁸⁸

The abridged version of the cross's story goes like this: members of the Veterans of Foreign Wars erected a wooden cross on federally owned land in the California desert.⁸⁹ They did so to honor soldiers who died in World War I, a fact they acknowledged with two wooden signs.⁹⁰ Over time, the cross and signs

81. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758 (1995).

82. *Id.* at 760.

83. *Id.* at 770 (Thomas, J., concurring).

84. *Id.*

85. *Id.* at 771. Indeed, on another occasion, Justice Thomas relied on a compelling analogy offered by a state that suggested the real communicative value of a Latin cross in the hands of the Klan: that a white person waking to discover a burning cross outside his home would call the police, but would call the fire department if the item were a burning circle or square. *Virginia v. Black*, 538 U.S. 343, 391 (2003) (Thomas, J., dissenting).

86. *Capitol Square Review*, 515 U.S. at 770 (Scalia, J.).

87. *Salazar v. Buono*, 559 U.S. 700, 706 (2010).

88. *Id.* at 705-06.

89. *Id.* at 706.

90. In their entirety, the signs read "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884." *Buono*

eroded, and, at some point, the signs totally disappeared.⁹¹ People continued to gather for worship at the cross, especially on Easter Sunday.⁹² The cross itself was replaced several times, culminating in 1998, when a gentleman removed what remained of the existing cross, and replaced it with a much more durable version made of metal pipe.⁹³

The next year, a retired National Park Service employee asked the National Park Service for permission to install a Buddhist Stupa near the Christian Cross.⁹⁴ Rejecting this attempt to create a designated-public forum on Sunset Rock, the National Park Service instead planned to remove the cross.⁹⁵ Congress intervened, preventing the spending of any appropriated funds to remove the cross.⁹⁶ The ensuing legal battle would last for eleven years—more than twice the length of World War I itself, and almost a decade longer than the U.S.’s participation in World War I. The judicial battle reached its own version of November 1918 in 2010, when the Supreme Court opined in a by-now gloriously procedurally-mucky case.⁹⁷

The Ninth Circuit had nixed a federal-land swap that would make the land containing the cross private, and hence not subject to the Establishment Clause.⁹⁸ Although the Supreme Court disagreed about many things, five justices agreed

v. Kempthorne, 502 F.3d 1069, 1072 (9th Cir. 2007).

91. *Id.*

92. *Id.*

93. *Id.* The gentleman, Mr. Henry Sandoz, drilled holes into Sunrise Rock to secure the metal cross. *Id.*

94. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205-06 (D. Cal. 2002). The retired employee, Mr. Herman R. Hoops, wrote the letter under the name “Sherpa San Harold Horpa.” *Id.* He later recounted that he developed the idea in conjunction with another retired NPS officer, Frank Buono, who would become the lead plaintiff in the lawsuit. *Id.* Asking for permission to add a second religious symbol, Mr. Hoops explained, would prevent the government from fighting him on the facts. *Id.*; see also Thomas Curwen, *A Mojave Desert cross brings a lot of things to bear*, L.A. TIMES (Oct. 21, 2012), <http://articles.latimes.com/2012/oct/21/local/la-me-mojave-cross-20121022> [<https://perma.cc/Y7H9-RLPF>].

95. *Buono*, 212 F. Supp. 2d at 1206.

96. *Id.* at 1206. A year later, Congress declared the cross a national memorial honoring U.S. participation in the First World War. *Id.* at 1206-07.

97. *Salazar v. Buono*, 559 U.S. 700, 707-11 (2010). As a technical matter, the case before the Supreme Court concerned only “whether the District Court properly enjoined the Government from implementing the land-transfer statute.” *Id.* at 714. At least one scholar, though, has argued that the plurality at least was re-litigating the Establishment Clause matter that ought to have been *res judicata*. See David B. Owens, *From Substance to Shadows: An Essay on Salazar V. Buono and Establishment Clause Remedies*, 20 B.U. PUB. INT. L.J. 289 (2011). As the following paragraphs suggest, I concur with Professor Owens.

98. *Buono*, 502 F.3d at 1085-86. The Court of Appeals concurred with the District Court’s assessment that the government had engaged in “herculean efforts” to maintain the cross where it had been “without actually curing the continuing Establishment Clause violation.” *Id.* (quoting *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (D. Cal. 2005)).

that the Court of Appeals was wrong.⁹⁹ Justice Kennedy, with the full agreement of Chief Justice Roberts and the partial agreement of Justice Alito, held that the lower courts had been insufficiently deferential to the government's rationale for creating the land transfer.¹⁰⁰ In short, even though the government wanted to preserve the cross, this was not prohibited by the Establishment Clause, because "[p]rivate citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message."¹⁰¹

Justice Alito agreed with most of Justice Kennedy's reasoning, but would not have remanded the case for the lower courts to reconsider the land swap more deferentially.¹⁰² He found ample evidence in the record that Congress had not sought to establish a religion, but rather wished to "commemorate our Nation's war dead and to avoid the disturbing symbolism that would have been created by the destruction of the monument."¹⁰³

Justice Scalia, joined by Justice Thomas, argued the federal courts had no jurisdiction in the case: "our authority is limited to 'announcing the fact and dismissing the cause.'"¹⁰⁴ He argued the issue in the case was not Frank Buono's standing to seek the removal of the cross, but Frank Buono's standing to prevent the federal government from transferring ownership of a parcel of land.¹⁰⁵ Because he concluded that Buono lacked such standing, remaining "within the bounds of our constitutional authority" required eliminating the injunction against the land transfer.¹⁰⁶

What is astonishing about the Muse-like opinions of the justices whose votes reversed the lower court is the way in which they discussed the case's facts. At issue was a Latin cross, made of metal pipe, without any identifying sign. Such a display would appear to be a Christian one—indeed, all the justices voting to allow the cross to remain (albeit in private hands) acknowledged that fact in some fashion.¹⁰⁷

The justices seemed more eager to describe the cross, though, in terms of

99. *Salazar*, 559 U.S. at 700.

100. *Id.* at 715 ("By dismissing Congress's motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage.").

101. *Id.*

102. *Id.* at 723 (Alito, J., concurring in part and concurring in judgment).

103. *Id.* at 729.

104. *Id.* (Scalia, J., concurring in judgment) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

105. Indeed, Justice Scalia noted that, as Buono had objected to there being a cross on public land, his objection had been "entirely effective in remedying that complaint, having induced Congress to abandon public ownership of the land." *Id.* at 733.

106. *Id.* at 735.

107. "Although certainly a Christian symbol . . ." *Id.* at 715 (Kennedy, J.); "The cross is of course the preeminent symbol of Christianity . . ." *Id.* at 725 (Alito, J.); Buono "has no objection to Christian symbols on private property." *Id.* at 732 (Scalia, J.).

purpose—a purpose that must surely be invisible to anyone seeing the cross without any sign. For example, Justice Kennedy called the object in question a *monument* twice and a *memorial* another dozen or so times.¹⁰⁸ All of this was part of a rhetorical exercise that led Justice Kennedy to conclude that “a Latin cross is *not merely a reaffirmation of Christian beliefs*,”¹⁰⁹ a staggering assessment.¹¹⁰ Justice Alito used the same technique. His opinion mentioned Christianity only twice, made three references to a memorial, nineteen to a monument (often modified by the adjective “historic”), and four to World War I.¹¹¹ Perhaps because his focus was limited to standing, or perhaps because he authored the idea that the government might choose to favor monotheistic religions, Justice Scalia seemed least interested in characterizing the facts in a particular way, merely noting Buono’s hostility to Christian displays on public land and acknowledging Congress’s expressed desire to preserve the object as a “war memorial.”¹¹² At oral argument, Justice Scalia went even further, believing it “an outrageous conclusion” that a cross only honored Christians, because the cross is “the most common symbol” of final-resting places.¹¹³ As Professor Laycock has noted, this comment “can be made only from deep inside a Christian worldview. Unthinking Christians may intend a cross to honor all the war dead, but that does not create any sensible theory by which the cross actually honors non-Christians.”¹¹⁴

The cross in Columbus and the cross on Sunrise Rock were symbolically equivalent. Each stood on public land representing the critical moment of Christianity—the crucifixion. Yet to reach its conclusions, the Court treated one as a form of religious speech and the other as a secular recollection of an unmentioned war.

108. *See generally id.*

109. *Id.* at 721 (emphasis added).

110. Laycock, *supra* note 80, at 1239 (“All the secondary meanings to which the cross has been put are derived from, and dependent on, this primary meaning Why does the cross honor deceased Christian soldiers? Because it symbolizes the promise that they will rise from the dead and live forever.”).

111. Justice Alito joined Justice Kennedy in acknowledging the religious dispute at issue here: “The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock.” *Salazar*, 559 U.S. at 725. As the phrasing of that sentence suggests, the very first word in the next sentence is “but.” *Id.*

112. *Id.* at 732. Justice Scalia did, however, make one assessment of the facts that exceeds believability by claiming that the government’s reversion interest in the statute “does not depend on whether the cross remains.” *Id.* Even a casual review of the facts in this case, to say nothing of the expressed desire of the Veterans of Foreign Wars to preserving “the seven-foot-tall cross,” confirms that the preservation of the Latin cross was always the entire point, notwithstanding; Justice Scalia’s claim that the VFW might replace the cross with some other symbol or convey the land to someone who would. *Id.* at 726 n.4.

113. Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 559 U.S. 700 (2010) (No. 08-472), 2009 WL 3197881.

114. Laycock, *supra* note 80, at 1240.

3. *Legislative Prayer: Preaching to Legislators.*—Another pair of cases that illustrates the false-facts phenomenon concerns legislative prayer. An early case involved a challenge to Nebraska’s practice of appointing a chaplain to open legislative sessions with prayer.¹¹⁵ Famously, the Court used it as the opportunity to create a bypass around the *Lemon* test: Chief Justice Burger, the author of the *Lemon* test, noted that the court below had used it to strike down the practice.¹¹⁶ Then he simply ignored it, focusing instead on “Nebraska’s practice of over a century, consistent with two centuries of national practice . . .”¹¹⁷

In describing what was at issue in the unicameral legislature of Lincoln, Nebraska, the Court did not so much distort the facts as downplay some to a surprising degree. For example, the Court acknowledged that Nebraska had paid “the same minister for 16 years” to be the chaplain, and even published his prayers at taxpayer expense for several years.¹¹⁸ The Court, though, was unable to “perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.”¹¹⁹ To do so, it ignored the fundamental logic of majority rule, which prompted Justice Stevens’s dissent.¹²⁰ Even more, the Court dismissed the evidence at trial that directly contradicted the Court’s notion that the chaplain was chosen not on the basis of denomination but because of “his performance and personal qualities.”¹²¹ Indeed, “[a]ll witnesses at trial agreed that the prolonged retention of one chaplain fosters the impression that his religion is the ‘official’ or ‘normal’ religion of the State.”¹²² The Chairman of the Legislature’s Executive Board even conceded that “most legislators would object if a non-Christian were appointed,” and that the legislature would not permit “a Buddhist monk or a Sioux medicine man to give the daily prayer over . . . the length of [the chaplain’s] tenure.”¹²³

The trial accumulated evidence that the majority of the state legislature unapologetically selected a representative of one of the strongest sects of the strongest faith in the State to be the official chaplain, and had even published his

115. *Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

116. *Id.* at 786.

117. *Id.* at 790.

118. *Id.* at 785 n.1. The District Court, which had declined to enjoin the practice of legislative prayer, had enjoined the printing of prayers, as it had “no secular purpose.” *Chambers v. Marsh*, 504 F. Supp. 585, 591 (D. Neb. 1980). The Nebraska legislature did not appeal the ruling on printing prayers. Petition for Writ of Certiorari at 9, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23), 1982 WL 1034558.

119. *Marsh*, 463 U.S. at 793.

120. “Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah’s Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.” *Id.* at 823 (Stevens, J., dissenting).

121. *Id.* at 793.

122. Brief for the Respondent at 3, *Marsh v. Chambers*, 463 U.S. 783 (No. 82-23), 1983 WL 952093.

123. *Id.* at 2-3.

prayers at taxpayer offense.¹²⁴ But the Court simply ignored this evidence and found the practice permissible.¹²⁵

4. *Legislative Prayer: Preaching (with One's Back) to Legislators.*—The Supreme Court's latest visit to the legislative-prayer battlefield provided the opportunity to create even more Muse-like confusion over facts. To read the majority's rendition of the background of *Town of Greece v. Galloway*¹²⁶ is to discover that Greece, a small New York community, had a practice of opening town meetings with a brief invocation.¹²⁷ The invocations were open to leaders of a variety of faiths from the community,¹²⁸ preceded by no particular directive or command from the town council,¹²⁹ and were generally inoffensive moments of tradition designed to achieve the purpose of bringing the town council together.¹³⁰ According to the Court, these prayers, like those in *Marsh*, were directed to the government officials themselves.¹³¹ Thus, they created no coercion in the community,¹³² nor any reason to suspect that the government was endorsing any faith. The majority conceded that most of the invocations were given by Christian officials, but noted that was merely a result of demographics.¹³³

It was left to Justice Breyer to note that although Greece was largely Christian, it contained a Buddhist temple, and had several Jewish synagogues just outside the town's borders.¹³⁴ He also noted that during the decade at issue, only four of the 120 invocations were done by non-Christians, and that all of these occurred during the year in which the original plaintiffs complained about the religious practice.¹³⁵

Additionally, Justice Kagan's dissent noted the "chaplain of the month"

124. *Marsh*, 463 U.S. at 785 n.1.

125. *Id.* at 795.

126. 134 S. Ct. 1811 (2014).

127. *Id.* at 1816.

128. *Id.* ("[The town's] leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.").

129. *Id.* at 1826 ("The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity.").

130. *Id.* at 1816 ("The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community . . .").

131. *Id.* at 1825 ("The principal audience for these invocations is not, indeed, the public, but lawmakers themselves . . .").

132. *Id.* at 1826 ("[R]espondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion.").

133. *Id.* at 1824 ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.").

134. *Id.* at 1839 (Breyer, J., dissenting).

135. *Id.*

faced the citizens attending the meeting, and not the Town Board.¹³⁶ The chaplains routinely asked the attending citizens to stand and “pray as we begin this evening’s town meeting.”¹³⁷ And Board members would often note the end of the prayer by making the sign of the cross and saying “Amen.”¹³⁸

None of these facts by themselves, of course, necessarily compels a different result from *Marsh*. Taken together, though, they present a very different picture than that offered by the Court.¹³⁹ Nebraska’s chaplain, for example, faced the legislators—and religious leaders commonly face their audience.¹⁴⁰ Here, though, it is difficult to reconcile the Court’s assertion that the town’s officials were the intended target of the invocations with the reality that the chaplains faced *away* from them. While there are religious traditions in which the leader at times faces away from the target audience, in those settings the leader is facing a holy item or its symbol.¹⁴¹

Other facts made the picture look even more sectarian and coercive. In addition to Justice Kagan noting that the citizens in attendance were few in number and almost invariably there to receive an award or present a complaint,¹⁴² the briefs indicate that high-school students participating in a government course were required to attend.¹⁴³ Also, witnesses assessed the average attendance at ten, or even fewer than ten.¹⁴⁴ The town Supervisor—who replaced a moment of silence with the prayer practice—invited the chaplain to lead “*our* prayer.”¹⁴⁵ Finally, the selection process bore little resemblance to the casual respect for religious pluralism suggested by the Court.¹⁴⁶

136. *Id.* at 1846 (Kagan, J., dissenting).

137. *Id.* at 1847.

138. *Id.*

139. Arguing that the Court was far too deferential to the majority faith, Professor Garfield characterized the message to communities as that they need not try to accommodate minority religions: “A bird’s-eye view of *Town of Greece* reveals that the Greece board made no effort—zero—to accommodate the town’s religious minorities.” Alan E. Garfield, *And the Wall Comes Tumbling Down: How the Supreme Court Is Striking the Wrong Balance between Majority and Minority Rights in Church-and-State Cases*, 68 ARK. L. REV. 789, 806 (2015) (emphasis added).

140. *See, e.g., Town of Greece*, 134 S. Ct. at 1848 (Kagan, J., dissenting).

141. *See, e.g.,* Martin Mosebach, *Return to Form: The Fate of the Rite is the Fate of the Church*, FIRST THINGS (Apr. 2017), <https://www.firstthings.com/article/2017/04/return-to-form> [<https://perma.cc/F79K-TUUP>] (noting that while he was a Cardinal, Pope Benedict had opposed the reform that turned the Priest conducting the Eucharistic celebration around because “never in her history, aside from a very few exceptions, had the Church celebrated the liturgy facing the congregation”).

142. *See Town of Greece*, 134 S. Ct. at 1846 (Kagan, J., dissenting).

143. *See* Brief for Respondents at 6, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (No. 12-696), 2013 WL 5230742.

144. *Id.* at 2.

145. *Id.* at 8 (emphasis added).

146. Of the four non-Christian prayers that occurred in 2008, the year the litigation began, two were from a Jewish layman who was a friend of Board member, one was a Wiccan Priestess who

Since the Court's decision, little has changed in Greece. Subsequent meetings have evidenced a procedure extraordinarily slanted in favor of Christian ministers, with the anomalous year of 2008 looking more and more like it existed to fortify a litigation position. The Court was willing to accept that the Town of Greece "made reasonable efforts to identify all of the congregations located within its borders," and the fact that "nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths."¹⁴⁷ It is at least suggestive, though, that during the initial year of litigation, the Town was able to have one-third of the "chaplains of the month" be non-Christian. But since then, the invocations have reverted to something much closer to pre-2008 figures. A review of the bi-monthly town minutes for two years after the decision indicates that of the 22 reported invocations, 19 were unmistakably Christian.¹⁴⁸ A representative of the Baha'i faith gave the only religious but non-Christian invocation.¹⁴⁹ And two atheists, including one of the plaintiffs from the case, gave invocations.¹⁵⁰ The Town may well have read the Court's decision in the same way as the Deputy General Counsel of the Beckett Fund: that the religious wars are over because *Marsh* trumps *Lemon*, and that a regime of sectarian prayer at lower levels of government is now fully constitutional.¹⁵¹

requested the opportunity after seeing reports about the controversy, and the fourth was the leader of a local Baha'i Temple added by the Town to its list of "pastors" after the onset of litigation. *Id.* at 13. Further, the scheduling clerk noted in a court filing that she would, in the future, use a rotation system of an amended list that included "Jewish groups - several of which appear[ed] to be cemeteries." *Id.* at 13-14. This does not appear to have happened by the time of the Respondent's filing in the U.S. Supreme Court. *Id.* at 14. As one scholar noted, "the Town did nothing to achieve even the semblance of religious equality in its selection procedures. For the majority of the Court, *nothing* was good enough." Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway*, 48 LOY. L.A. L. REV. 371, 426 (2014) (emphasis added).

147. *Town of Greece*, 134 S. Ct. at 1824.

148. *All Board Meetings*, TOWN OF GREECE, <https://greeceny.gov/all-board-meetings> [https://perma.cc/R8ZX-97ET] (last visited June 11, 2018).

149. *Id.*

150. *Id.*

151. Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO SUP. CT. REV. 71, 84 (2013-14). Scholars who disagree with Mr. Rassbach on the desirability of the conclusion tend nevertheless to agree with his conclusion itself. See, e.g., Erwin Chemerinsky, *Appearances Can Be Deceiving: October Term 2013 Moved the Law to the Right*, 17 GREEN BAG 2D 389, 394 (2014) ("Under any theory of the Establishment Clause, the Town of Greece acted unconstitutionally."); Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10 DUKE J. CONST. L. & PUB. POL'Y 45, 45 (2014) ("The Establishment Clause is pretty much done.").

B. The Danger of False Facts: Majority Rule

Consistent among these cases is that the Court uses false facts to obscure the government's religious purposes. To some, that may not be troubling; indeed the goal of the Holy Warriors may be to put government religious speech on the same footing as government speech on any other topic, subject to none of the First Amendment's limitations.¹⁵² Even if one does not share the fear of proponents of the endorsement test, an additional danger of such an outcome is the possible subjection of minority faiths to real discrimination in the applicability of the law. Majority faiths will always create exceptions to any rules that would otherwise impinge on their own religious practices; they have no need to do so for minority faiths. One need not rely merely on the logic of democratic theory in fearing false facts in Establishment Clause cases: the history of the U.S. contains sufficient examples of the phenomena that one can confidently predict its continuation.¹⁵³

I. A Nineteenth-Century Example.—The nineteenth century, a time of growth in the American identity, saw several examples of overt majority oppression of minority faiths. The pilgrimage of the Church of Jesus Christ of Latter-day Saints was motivated by attempts to avoid both governmental and extra-judicial harassment.¹⁵⁴ When the migration came to rest, the nation responded with an unprecedented set of limitations on the Mormons.¹⁵⁵

The Latter-day Saints' initial revelation promoted polygamy.¹⁵⁶ But this practice by the early Mormons scandalized their neighbors,¹⁵⁷ and even reached across the Atlantic to feature in the birth of the greatest literary detective.¹⁵⁸ The majority's reaction included both legal restraint and extra-legal violence,

152. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559, 562-63 (2005).

153. Of course, there are contrary examples, in which the majority worked diligently to protect the rights of minority faiths. Such circumstances—such as the oath or military service accommodations often available to Quakers, see *City of Boerne v. Flores*, 521 U.S. 507, 557-58 (1997)—may be limited to minority faiths that do not threaten majority religions.

154. L. Rex Sears, *Punishing the Saints for their "Peculiar Institution": Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581, 582-85 (2001).

155. Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 111 (1989) ("Congress passed legislation which suspended civil and common law rights of Mormons, including the spousal privilege against testimony and the rights to vote and to serve on juries. Congress provided for the prosecution, conviction, and imprisonment of hundreds of Mormon men. Congress also refused to admit Utah into the Union as a state. Finally, in 1890, the Supreme Court upheld earlier legislation which revoked the legal charter of the Mormon Church and provided for the forfeiture of virtually all of its property to the federal government.").

156. *Id.*

157. See, e.g., Christine Talbot, "Turkey is in Our Midst": *Orientalism and Contagion in Nineteenth Century Anti-Mormonism*, 8 J.L. & FAM. STUD. 363 (2006) (demonstrating the reliance by nineteenth-century critics of the Church of Jesus Christ of Latter-day Saints on the tropes of racism and disease to the body politic).

158. See ARTHUR CONAN DOYLE, *A STUDY IN SCARLET* (1887).

including the murder of the founder, Joseph Smith.¹⁵⁹

Although the crisis was averted, and Utah's statehood secured, after the Mormon Church renounced polygamy,¹⁶⁰ there remained an uneasy relationship between the Mormons and the majority of Christians in the United States.¹⁶¹ This story, often with a focus on a key Supreme Court contribution, *Reynolds v. United States*,¹⁶² is told as part of the saga of the Free Exercise Clause.¹⁶³ But there is a critical Establishment Clause lesson to be taken away from the story of the Mormons in the nineteenth century, as well. For just as it is true that the government of the United States was unwilling to tolerate polygamy, so too had been the earlier willingness of the authorities within the Mormon faith to make exceptions for that very same phenomenon. For although the territorial legislature of Utah did not specifically permit plural marriages, they did grant the church power to solemnize marriages permitted by the church's revelations.¹⁶⁴ The common law did not allow such marriages, but the legislature, in 1854, confirmed Governor Brigham Young's assertion that the common law did not affect Utah by prohibiting territorial courts from relying on any source of legal authority that did not come from the legislature or the governor.¹⁶⁵ Thus, members of the Church of Jesus Christ of Latter-day Saints, as a local majority in the Utah Territory, created rules that left space for their own religious practice; once they were subsumed into a larger, hostile majority, that space was taken away.¹⁶⁶

159. Sears, *supra* note 154, at 584.

160. Professor Gedicks described the change as having come when the Church of Jesus Christ of Latter-day Saints was "on the brink of financial ruin and legal oblivion." Gedicks, *supra* note 155, at 111.

161. Even after statehood, with its accompanying guarantee that Utah would never allow polygamy, the House of Representatives refused to seat B.H. Roberts, elected as Utah's representative in 1898, because he practiced polygamy. Sears, *supra* note 154, at 640-47. Also, there was an extensive (but failed) movement in the Senate to exclude or expel Senator Reed Smoot, who was not himself a polygamist but was a member of the Quorum of the Twelve Apostles, a key governance body with the Mormon church. *Id.* at 647-50.

162. 98 U.S. 145 (1878).

163. See, e.g., Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937-42 (1989); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990); Frank S. Ravitch, *The Unbearable Lightness of Free Exercise under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court*, 44 TEX. TECH L. REV. 259, 266-67 (2011); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 219 (1992).

164. Sears, *supra* note 154, at 588.

165. *Id.*

166. A similar phenomenon occurred later in the century as immigration from Catholic and Jewish areas of Europe increased. While justices and scholars dispute how hostile to Roman Catholicism the proposed—and almost passed—Blaine Amendment to the U.S. Constitution was, it unquestionably gained at least some of its support from those voters and politicians who were hostile to Catholicism. *Compare Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J. plurality)

2. *Twentieth-Century Examples.*—If the events of the nineteenth century seem sufficiently distant to be nonthreatening, later years confirm the continuation of the pattern. The Twentieth Century saw similar combinations of extra-judicial terror and legal impediment cast toward those whose faith varied from the majority. Well known is the fact that the rejuvenated Ku Klux Klan added Catholics and Jewish immigrants to African-Americans on their target list.¹⁶⁷ Likewise, a fair amount of hostility was directed at the Jehovah's Witnesses.

Ironically, the Witnesses angered many of those around them because they shared a belief with the Quakers: the inability to swear allegiance other than to God. When the Supreme Court held that a Pennsylvania school district could expel the ten- and twelve-year old Gobitis children for refusing to perform a flag salute,¹⁶⁸ violence against Jehovah's Witnesses surged.¹⁶⁹ Other Americans visited so much hostility upon this minority faith that the Supreme Court took up the same question again only three years later.¹⁷⁰ In an astonishing reversal, the Court utterly overturned this very recent precedent.¹⁷¹ Along the way, it offered perhaps

(“Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”), with Robert D. Goldstein, *The Structural Wall of Separation and the Erroneous Claim of Anti-Catholic Discrimination*, 13 *CARDOZO PUB. L. POL’Y & ETHICS J.* 173, 215-16 (2014) (arguing that the motivation behind the Blaine Amendment was not hostility to Catholicism as a faith, but to papal assertions of temporal power that were feared to be illiberal and anti-democratic).

167. Wayne R. Allen, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 *GA. L. REV.* 819, 825-26 (1991).

168. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591, 597-600 (1940). The Court held that the nation “may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.” *Id.* at 600.

169. Brett G. Scharffs, *Echoes from the Past: What We Can Learn about Unity, Belonging and Respecting Differences from the Flag Salute Cases*, 25 *BYU J. PUB. L.* 361, 371-72 (2011) (“Hundreds of instances of vigilantism against Jehovah’s Witnesses who refused to salute the flag were reported in just the week following the decision. These included mob beatings, burning of Jehovah’s Witnesses Kingdom Halls, and attacks on houses where Jehovah’s Witnesses were believed to live.”).

170. Only two years later, three justices who had joined the Gobitis opinion expressed their regrets for having done so. In *Jones v. City of Opelika*, 316 U.S. 584 (1942), a taxation case that had little in common with Gobitis other than the faith of the petitioners, Justices Black, Douglas, and Murphy authored a joint dissent that called for the Court to reconsider *Gobitis*: “Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided The First Amendment does not put the right freely to exercise religion in a subordinate position.” *Id.* at 623-24.

171. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The rejection of *Gobitis*

the most sweeping statement of the centrality of freedom of conscience that the Court had ever authored: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁷²

Before that reversal, though, governments at the state and local level, as key political actors, reacted to the *Gobitis* decision by adopting flag-salute laws themselves.¹⁷³ One could argue that this was patriotic and not an attempt to exert religious power. Yet, it is also the case that at the same time legislatures throughout the nation were maintaining the power of blue laws, there were requirements that businesses be closed on Sunday in conformity with the practice of mainstream Christianity.¹⁷⁴ The Supreme Court itself upheld the practice, both when challenged as a violation of the Establishment Clause¹⁷⁵ as well as when members of their different faiths sought an exemption from a rule his or her religion did not impose.¹⁷⁶ Thus, the pattern repeated: majority faiths build the laws to accommodate their own needs, and minority religions are treated quite differently.

The flag salute to which the *Barnette* and *Gobitis* families objected had no mention of any divine power. In 1954, Congress added the words “under God” as a direct response to the Soviet Union’s alleged godlessness.¹⁷⁷ Congress, in doing so, made no attempt to hide the fact it disfavored atheists. Although several constitutional attacks were made by opponents of the new words throughout the

by *Barnette* was so complete that the Court did not again cite *Gobitis* for its principal holding for almost half a century. When the Court opted to decrease the reach of the Free Exercise Clause, though, they dusted off *Gobitis*, using it as an illustration of “more than a century of our free exercise jurisprudence” in which the Court had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Emp’t Div. Dep’t Human Res. v. Smith*, 494 U.S. 872, 878-79 (1990).

172. *Barnette*, 319 U.S. at 642.

173. Scharffs, *supra* note 169, at 372.

174. *McGowan v. Maryland*, 366 U.S. 420, 422 (1961). The Court noted that such laws existed even in colonial times, and began at least as early as the reign of Henry III in the thirteenth century. *Id.* at 431-32.

175. The Court refused to conclude that the Establishment Clause would forbid government action that “merely happens to coincide or harmonize with the tenets of some or all religions.” *Id.* at 442.

176. On the same day as *McGowan*, the Court rejected a claim from a furniture store owner who kept a Saturday closing day as required by his Orthodox Judaism. *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961). The Court found that the existing system of a blue law that simply happened to coincide with the majority faith did not limit this minority religion, it “simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.” *Id.* at 605.

177. H.R. REP. NO. 83-1693, at 1-2 (1954), as reprinted in 1954 U.S.C.C.A.N. 2339, 2340 (“The inclusion of God in our pledge . . . would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.”).

remainder of the century, the Court continuously rebuffed them. The only Supreme Court case to confront the issue directly avoided it on standing grounds;¹⁷⁸ state courts and lower-federal courts have swatted away objections to formal declarations of reliance upon the Almighty in both federal and state pledges.¹⁷⁹

3. *Current Examples.*—Newspapers of the nineteenth century and radio and television broadcasts of the twentieth provide ample examples of minority religions being the subject of discrimination in a legal regime where false facts disguise reality. Internet alerts and social-media posts of today offer a sad confirmation that things have not changed.

Since the September 11th attacks of 2001, the fear of a supposed Islamic takeover of the United States has fueled a rise in attempts to legally hinder that religion. Numerous states and subsets of states have sought legal, or even constitutional, prohibitions on the use of Sharia law.¹⁸⁰ Sometimes these bans are overt and explicit and single out Islam as a particular threat. Oklahoma took this approach; deprived of false facts, federal courts can easily reject this form or religious discrimination.¹⁸¹

Other times, though, the Muses' willingness to falsify facts has allowed prohibitions to remain. Such bans are not focused on Sharia alone. Instead, like Kansas, they prohibit courts from citing *any* source of foreign law.¹⁸² This apparent neutrality seems to satisfy the prohibition against sectarian discrimination¹⁸³ that troubled at least one federal court in considering a state prohibition on Sharia law.¹⁸⁴ The neutrality is only apparent, however: such statutes are generally based on model legislation drafted by a private

178. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004).

179. *See, e.g., Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 740 (Mass. 2014); *Croft v. Perry*, 604 F. Supp. 2d 932, 934 (N.D. Tex. 2009); *Myers v. Loudoun Cty. Sch. Bd.*, 251 F. Supp. 2d 1262, 1277 (E.D. Va. 2003).

180. In Oklahoma, the proposed change to the state constitution, the Save Our State Amendment, included the following requirement: "The courts shall *not look* to the legal precepts of other nations or cultures. Specifically, the courts shall *not consider international law or Sharia Law.*" *Awad v. Ziriax*, 670 F. 3d 1111, 1117-18 (10th Cir. 2012) (emphasis in original).

181. *Id.* at 1128-29 (finding strict scrutiny required because "the Oklahoma amendment specifically names the target of its discrimination").

182. The Kansas legislature, in 2012, adopted a statute making unenforceable any decision if the court "bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions[.]" KAN. STAT. ANN. § 60-5103 (West 2012).

183. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

184. *Awad*, 670 F.3d. at 1128 ("The Larson test applies because the proposed amendment discriminates among religions.").

organization, the American Public Policy Alliance.¹⁸⁵ That organization, in presenting its model legislation, made no attempt to disguise its purpose: “to protect American citizens’ constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, *especially Islamic Shariah Law*.”¹⁸⁶ Indeed, the brief web page summarizing the model statute and encouraging its use invokes Sharia law as a threat to American jurisprudence six times; no other foreign legal system is mentioned at all.¹⁸⁷

There is little reason to believe that while the people of Oklahoma were intentionally seeking to discriminate on the basis of religion, the legislators of Kansas were not. The only distinction between the two appears to be that the Kansas state legislature had better learned how to deploy false facts in pursuit of their desired agenda. By hiding their purpose behind a seemingly neutral one, they asked a federal court to allow an anti-Islamic measure by treating it as the equivalent of a war memorial and not a cross.

Of course, the most prominent recent example of the false-facts problem has been in the attempts by President Trump, through a series of executive orders, to deliver on a campaign promise to create an immigration and travel ban based on Islam.¹⁸⁸ A week after his inauguration, the President issued an executive order that sought “to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.”¹⁸⁹ Such an action is unsurprising; indeed, one would be troubled by an American presidency seeking to allow exploitation of the United States. The order did not, as the campaign statements had, identify Muslims as a particular threat to the United States. Instead, the order required cabinet officers to review the procedures used to screen potential arrivals in the United States; suspended for ninety days all entry from a group of nations identified in the order only by reference to a statute; and

185. Large parts of the Kansas statute appear to be identical to the model. *Compare American Laws for American Courts: Model Legislation*, AM. PUB. POL’Y ALL., <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> [<https://perma.cc/Z46C-H57E>] (last visited May 15, 2018), with KAN. STAT. ANN. §§ 60-5101–5108 (2012).

186. See *American Laws for American Courts: Model Legislation*, *supra* note 185 (emphasis added).

187. *Id.* (claiming to have found “extensive evidence that foreign laws and legal doctrines are introduced into US state court cases, including, notably, Islamic law known as Shariah, which is used in family courts and other courts in dozens of foreign Muslim-majority nations”).

188. Jenna Johnson, *Trump calls for ‘total and complete shutdown of Muslims entering the United States,’* WASH. POST (Dec. 7, 2015, 7:43 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.f2a003be9096 [<https://perma.cc/3CU8-K8KN>] (“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on,” then-candidate Trump reading an official statement at a campaign rally in South Carolina, but “adding the word ‘hell’ for emphasis.”).

189. Exec. Order No.13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) [hereinafter Exec. Order No. 13769].

suspended all refugee admissions for four months.¹⁹⁰

President Trump's surrogates openly described the transition from Mr. Trump's campaign promises to what the order contained by revealing the deployment of false facts. For example, former-mayor Rudy Giuliani argued it would be legal to accomplish the new President's campaign promise to ban Muslims as long as the written policy "focused on, instead of religion, *danger*."¹⁹¹

While it might be said that this first executive order focused on danger, it also overtly used religion. As noted, the order suspended the operations of the refugee program for four months.¹⁹² It then directed the administration to prioritize religious claims for refugee status once the program resumed, but only for cases in which "the religion of the individual is a minority religion in the individual's country of nationality."¹⁹³ As the executive order was linked to seven countries, all with large Islamic majorities, the focus on minority religions excluded Muslims while offering possible protection to Christian and Jewish refugees.¹⁹⁴

In the ensuing lawsuits, several federal-district courts rapidly enjoined the executive order.¹⁹⁵ The Court of Appeals for the Ninth Circuit declined to grant an emergency stay of a nationwide temporary-restraining order preventing the implementation of the order issued by Judge Robart.¹⁹⁶ The appellate court did so by focusing on due process, and specifically reserved any issue of possible violation of the Establishment Clause.¹⁹⁷ Nonetheless, the court noted both the claims presented "numerous statements by the President about his intent to implement a 'Muslim ban,'"¹⁹⁸ and the Supreme Court precedent provided that

190. *Id.*

191. Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally'*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.0dc5f9592351 [<https://perma.cc/PE2Q-FXTU>] (emphasis in original). Later, Mayor Giuliani reversed course, denying that he had been involved in the crafting of the executive order. See Olivia Beavers, *Giuliani walks back claims of involvement in Trump's travel ban*, THE HILL (May 23, 2017, 10:28 PM), <http://thehill.com/homenews/administration/334869-giuliani-walks-back-claims-of-involvement-in-trumps-travel-ban> [<https://perma.cc/V78K-EBBM>] (noting that the statement that he had "not participated in writing any of the Executive Orders on that subject issued by the Trump administration," came in an affidavit filed in an unrelated case involving a Turkish client).

192. Exec. Order No. 13769, *supra* note 189.

193. *Id.*

194. The countries were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. Wang, *supra* note 191. Interestingly, the order does not mention them by name, referring instead to a statute, 8 U.S.C. § 1187(a)(12) (2018), which lists two of them (Iraq and Syria) and authorizes the Secretary of Homeland Security to designate other areas of concern. *Id.*

195. *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 465917, at *1 (E.D. Va. Feb. 3, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1045950, at *2-3 (W.D. Wash. Feb. 3, 2017).

196. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

197. *Id.* at 1167-68.

198. *Id.* at 1167.

“circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose.”¹⁹⁹

On March 6, 2017, the White House withdrew Executive Order 13769 and replaced it.²⁰⁰ This second order was much like the first: again, it did not mention Islam, although this time it did list the six affected nations—shortened now as Iraq was moved out of the list as a “special case.”²⁰¹ The requirement that religious refugees come from a religious minority disappeared, and the only mentions of religion at all occurred in a section insisting that the order’s predecessor had not been “motivated by animus toward any religion.”²⁰²

As the Justice Department defended the second executive order against a series of attacks, it demonstrated that it had fully committed to a regime of false facts. Government briefs insisted the order created only a “temporary pause,” not a ban, and that it had nothing whatsoever to do with religion.²⁰³ Unfortunately for the Solicitor General, President Trump was less committed to these false facts than the attorneys probably would have liked. While the attorneys insisted on separating the campaign’s anti-Islamic promise and the executive order, the president and his senior staff served as a sort of Greek chorus, denying the statements made by the Muses of the Justice Department.²⁰⁴

For the courts, this was too much. Long-established precedents in the area of racial discrimination in the Equal Protection context allowed courts to look to extra-legal statements and contemporaneous events to determine the true purpose behind seemingly neutral government actions.²⁰⁵ It was too easy for such courts to listen to the words of the chorus centered on President Trump and to be unwilling to accept the false facts elegantly offered by his counsel.

That series of events was disturbing. For it illustrated that a less impulsive

199. *Id.* at 1168 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)).

200. Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter Exec. Order No. 13780].

201. *Id.* at 13,211–12.

202. *Id.* at 13,210.

203. Petition for Writ of Certiorari at 13, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16-1436), 2017 WL 2391562 (arguing that the Order “applies to certain nationals of the designated countries without regard to religion”).

204. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 559 (D. Md. 2017) (quoting Senior Policy Advisor Stephen Miller as noting that the distinction between the first and second Orders were “mostly minor technical differences”). The President was even more explicit at a rally, telling the crowd “[t]his is watered-down version of the first one. This is a watered-down version And let me tell you something, I think we ought to go back to the first one and go all the way (through the legal system), which is wanted I wanted to do in the first place.” Jacob Pramuk, *Trump may have just dealt a blow to his own executive order*, CNBC (Mar. 15, 2017, 9:47 PM), <https://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html> [<https://perma.cc/9FBR-SAUG>].

205. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

and more-skillful presentation might have succeeded in effectuating precisely the same ban. There is not that great a distance between accepting a bare cross, with no sign as a symbol of World War I but not Christianity, and accepting a ban on members of majority faiths from seven Islamic-majority countries as an action with no relation to religion.

C. How the War Is Fought: Using False Facts to Create Mysterious Purposes

There have been many areas where the government has spoken in a religious voice. In some, government actors seem to be deliberately learning from the Muses: presenting false versions of the facts to reach the result—a declaration of constitutionality—they desire. One such area is the teaching in public schools about the origin and development of life. Many scholars have recounted the contours of the century-long battle: from state laws that banned the teaching of evolution,²⁰⁶ to a Supreme Court decision that prohibited those laws,²⁰⁷ to another Supreme Court decision that invalidated a statute requiring equal time for “creation science,”²⁰⁸ to an ongoing fight over “intelligent design.” While there are scholars who have defended intelligent design,²⁰⁹ and others who have opposed it,²¹⁰ it has been almost a decade since Professor Ravitch demonstrated conclusively that Intelligent Design is less a scientific theory or methodology.²¹¹ As Ravitch showed, biologists seeking to explain the development of complex life did not conduct the development of Intelligent Design; rather it arose from the work of “philosophers, law professors and social scientists.”²¹² Their role was critical, as they assembled the necessary language to transform the old project—teaching religious creationism in public schools—into the new project.²¹³ This

206. *Scopes v. State*, 289 S.W. 363, 367 (1927) (“We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship.”).

207. *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (“No suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.”).

208. *See Edwards v. Aguillard*, 482 U.S. 578 (1987).

209. *See, e.g.,* Jana R. McCreary, *This Is the Trap the Courts Built: Dealing with the Entanglement of Religion and the Origin of Life in American Public Schools*, 37 SW. U. L. REV. 1 (2008).

210. *See, e.g.,* Peter Irons, *Darwin, Dogma, and Definitions: A Reply to Professor McCreary*, 37 SW. U. L. REV. 69 (2008).

211. Frank S. Ravitch, *Playing the Proof Game: Intelligent Design and the Law*, 113 PENN ST. L. REV. 841 (2009).

212. *Id.* at 853.

213. *Id.* at 852 (“Early ID supporters read the language in Edwards and other cases and realized that they had to take God out of their theory in order to get it into public schools and into scientific discourse more generally. They also realized that they would need to do work that could, at least plausibly, be called science and that they would need to gain acceptance for this work in

explains why Ravitch characterized Intelligent Design as a “marketing strategy,”²¹⁴ designed to secure legal acceptance of government-religious speech.²¹⁵ His characterization is evidenced by the words of many Intelligent Design proponents, who deploy Muse-like false facts in support of their legal mission.²¹⁶

Another use of false facts to defend a legal conclusion happened in Kentucky in the decade following the September 11th attacks. In 2002, the Kentucky General Assembly restructured The Statewide Emergency Management Programs.²¹⁷ In so doing, it began with a series of findings, concluding that government could not provide security alone, that citizen vigilance was critical, and that “[t]he safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God.”²¹⁸ To ensure that the employees of the office, as well as vigilant citizens, knew about the conclusions of the legislature, a

the public’s eye.”)

214. *Id.*

215. *Id.*

216. Professor McCreary claimed, for example, that “[e]volution, in explaining the origin of life, promotes the atheistic viewpoint.” Jana R. McCreary, *Focusing Too Much on the Forest Might Hide the Evolving Trees: A Response to Professor Irons*, 37 SW. U. L. REV. 83, 87 (2008). Of course, to do so, she had to simply ignore the vast community that subscribes to theistic evolution. See Ravitch, *supra* note 211, at 843. But by doing so, she could shift the ground of defense for this religious speech by the government to a demand for neutrality, in the tradition of *Everson*: “[E]volution, as the explanation of the origin of life, is not religiously neutral; it promotes the concept of the nonexistence of a higher power. Accordingly, we can either say nothing about it in a public school system as an explanation of the origin of life, or we can share all theories equally.” McCreary, *supra* 216, at 91. Indeed, because she concedes that “government cannot prefer one religious view over another,” she must expound the extraordinary claim that “none of this asserts that to believe in the intelligent design concept - that some higher power exists that guided the origin of life - one must believe in the Christian God. The higher power could be one person’s ‘Mother Nature’ and another’s multiple gods and still another’s one god.” *Id.* at 94. Needless to say, there is no evidence presented of Mother Nature cultists or polytheists being part of the movement driving ID. Similar claims abound in the pro-ID literature. See, e.g., David K. DeWolf et al., *Intelligent Design Will Survive Kitzmiller v. Dover*, 68 MONT. L. REV. 7, 29 (2007) (noting that “ID merely seeks to infer ‘intelligent causes’ and is compatible with a wide variety of religious viewpoints, including pantheism and agnosticism”). Some ID proponents eschew Professor McCreary’s claim that evolution is inherently atheistic, arguing instead that it is compatible with some versions of religion and thus teaching evolution violates neutrality by favoring *those* faiths. See, e.g., Casey Luskin, *Zeal for Darwin’s House Consumes Them: How Supporters of Evolution Encourage Violations of the Establishment Clause*, 3 LIBERTY U. L. REV. 403, 464 (2009) (“Textbooks and other teaching activities that imply ‘a god of design and purpose is not necessary,’ or that praise the Pope’s acceptance of evolution . . . would cause students who accept ID or creationism to feel like political outsiders, while causing students who hold theistic evolutionary viewpoints to feel like insiders.”).

217. See KY. REV. STAT. ANN. § 39A.285 (West 2002).

218. *Id.*

subsequent provision provided that the executive director of the Kentucky Office of Homeland Security shall:

Publicize the findings of the General Assembly stressing the dependence on Almighty God as being vital to the security of the Commonwealth by including the provisions of KRS 39A.285(3) in its agency training and educational materials. The executive director shall also be responsible for prominently displaying a permanent plaque at the entrance to the state's Emergency Operations Center stating the text of KRS 39A.285(3)[.]²¹⁹

A group of individuals led by Michael Christerson, as well as American Atheists, Inc., filed suit.²²⁰ The trial court held the American Atheists, Inc. had no standing, but otherwise granted the plaintiffs' requested relief.²²¹ The trial court held that the legislature's decision to confirm the Commonwealth's dependence on God on every piece of training literature "created an official government position on God," had been enacted primarily for a religious purpose, and thus failed the *Lemon* test.²²²

A divided Kentucky Court of Appeals reversed, finding that Kentucky's action was no more troubling than Ohio's motto: "With God, All Things Are Possible."²²³ It characterized the action of the General Assembly as providing only "lip service to a commonly held belief in the puissance of God."²²⁴ It claimed this fit well within the Supreme Court's view of the Establishment Clause, because "[i]n *Van Orden*, the Court noted that '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.'"²²⁵ Of course, there *was* no majority opinion in *Van Orden*, and no conclusion can be drawn about the Texas Ten Commandments monument without considering Justice Breyer's words.²²⁶ His defense of the monument, contained in a concurrence only in the result, relied heavily on factors such as the placement of the monument to determine that "the State itself intended the . . . nonreligious aspects of the tablets' message to predominate."²²⁷ This fact, plus the weight Justice Breyer famously put on the forty years that elapsed between installation and legal challenge,²²⁸ made *Van Orden* a highly inappropriate justification for allowing the Kentucky Office of Homeland Security to announce suddenly their reliance on divine support.

219. KY. REV. STAT. ANN. § 39G.010(2)(a) (West 2013).

220. Ky. Office of Homeland Sec. v. Christerson, 371 S.W.3d 754, 756 (Ky. Ct. App. 2011).

221. *Id.* at 756-57.

222. *See id.* at 758.

223. *Id.*

224. *Id.* at 759.

225. *Id.* at 757-58.

226. Chief Justice Rehnquist authored a four-justice plurality, and Justice Breyer concurred only in the result. *See Van Orden v. Perry*, 545 U.S. 677 (2005).

227. *Id.* at 701 (Breyer, J., concurring in judgment).

228. *Id.* at 702 ("[A] further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged . . .").

Even aside from the legal objection based on *Van Orden's* misuse, the Kentucky Court of Appeals' decision is troubling. Like legal defenders of Intelligent Design, the majority in *Christerson* downplayed the religious significance of the government proclamations: they were no more than a motto, they were mere "lip service."²²⁹ That characterization belies the way the General Assembly treated the matter.

For the legislators did not mean merely to provide lip service to the divine power of a non-specific faith. Instead, they sought to announce, with government speech, their view of our constitutional structure. An amicus brief filed by virtual all the members of the Kentucky House offered the following explanation of their views:

There is a foundation of American law and civil government; an official Canon, which includes at least four separate decisions of the United States supreme [sic] Court. Each of these holdings confirms that the United States is in law, fact, and history and should thus properly be termed officially, a "Christian Nation" since the foundation of our laws upon principles of the Ten Commandments and the Old and New Testaments.²³⁰

Only by willfully looking past the declaration of 96 out of 100 state representatives that they actively sought to establish the propriety of recognizing the United States as a Christian Nation could the Kentucky Court of Appeals find that a step toward that end did not violate the Establishment Clause. The court accepted a version of the facts rejected by the very actors whose legislation it was considering.

There are other settings that have not yet been subject to the tempering fire of litigation, where the purposes are even more awkward. In at least two states, the legislature has allowed public schools to begin the teaching day with a recitation of the "traditional Lord's prayer."²³¹ In response to the obvious

229. *Christerson*, 371 S.W.3d at 759.

230. Brief of Amicus Curiae Ninety-Six Kentucky State Representatives at 18, *Office of Homeland Sec. v. Christerson*, 371 S.W.3d 754 (Ky. Ct. App. 2011) (No. 2009-CA-1650). Taking a slightly different approach, 35 of Kentucky's 38 State Senators joined a brief arguing that the law at issue was not an establishment of religion any more than the Ohio motto was. See Brief of Amicus Curiae Thirty-Five Kentucky State Senators at 9, *Christerson*, 371 S.W.3d 754 (No. 2009-CA-1650). Perhaps unwilling to cede all opportunities for advocacy of a broader agenda, the legal team representing the Senators, which included former Alabama Supreme Court Justice Roy Moore, encouraged the appellate court to decide the case based on "the text of the First Amendment, not judicially-fabricated tests." *Id.* at 1.

231. N.H. REV. STAT. ANN. § 194:15-a (2018); KY. REV. STAT. ANN. § 158.175 (West 2018). In New Hampshire, the State Senate requested the New Hampshire Supreme Court to opine on the constitutionality of the proposed statute before enacting it. The justices, applying *Lemon*, opined that the law would violate the Establishment Clause, although an amendment substituting a moment of silence would not. Opinion of the Justices, 113 N.H. 297, 300-01 (1973). The legislature passed it anyway, and it remains the (unchallenged) law of the Granite State. Kentucky followed suit by

objection that the “traditional Lord’s prayer” is a specific manifestation of Christianity,²³² the Kentucky legislature attempted to add context: “Pupils shall be reminded that this Lord’s prayer is the prayer our pilgrim fathers recited when they came to this country in their search for freedom.”²³³ This would seem to be beside the point: the Lord’s Prayer may be “traditional,” but it is certainly religious.²³⁴ Thus, the classrooms would be replicating the religious experience of settlers who predated the Establishment Clause: this is far more a religious exercise than a historical one, especially if it is repeated each day. Furthermore, even this is a false fact, at least if the Kentucky legislators meant “pilgrims” to refer to the separatists who landed in Plymouth, Massachusetts, in 1620. Their faith required extemporaneousness, and rejected the rote pronouncements of the Church of England. To the extent they used the “traditional Lord’s prayer,” it was as a model for their own devotionals, not a script to be intoned in a group.²³⁵

The *Lemon* test would ask a court to determine whether any of this legislation had a secular purpose. A common-sense glance would suggest the answer is no. The clearest answer to a question of why God is invoked to protect a state agency, why children should be taught inherently non-testable religious theories in a science class, or a school day should begin with prayer first uttered at the foundation of a religion two millennia ago, is that the religious sensibilities of the body politic would thereby benefit.

Of course, this is precisely the forbidden answer. It may, as logic suggests, represent reality. But it may not, as the *Lemon* test demands, be uttered aloud as a negotiating position. Therefore, official-legislative histories must be established which will imply neither a solely religious purpose nor—in case any courts still wishing to use an endorsement test—that the action will in any way make people’s religious affiliations relevant to their standing in the political community. Thus, Holy Warriors claim it is the “purpose” of teaching Intelligent Design to offer “a scientific theory that differs from Darwin’s view, and is

adding a nearly identical provision a generation later, in 1996.

232. The “Lord’s Prayer,” or *Pater Noster*, is found in two slightly different versions in the Christian Bible, and constitute the directive of Jesus Christ to his followers about how they should pray. See *Matthew* 6:5-14 and *Luke* 11:2-4. Quoting the second-century Christian scholar Tertullian, the Catechism of the Catholic Church calls the Lord’s Prayer “truly the summary of the whole Gospel.” CATECHISM OF THE CATHOLIC CHURCH, Pt. 4, Sect. 2, Art. I, available at http://www.vatican.va/archive/ENG0015/_P9W.HTM [<https://perma.cc/PE79-2ET3>]. And, of course, the Supreme Court has already rejected the use of this prayer as a way for public schools to train their charges. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205-06 (1963).

233. KY. REV. STAT. ANN. § 158.175.

234. *Schempp*, 374 U.S. at 266-67 (Brennan, J., concurring) (“I would suppose that, if anything, the Lord’s Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious” than the “rather bland Regents’ Prayer” the Court struck down in *Engel v. Vitale*.)

235. See JAMES P. MOORE, JR., ONE NATION UNDER GOD: THE HISTORY OF PRAYER IN AMERICA 17 (2005).

endorsed by a growing number of credible scientists.”²³⁶ Kentucky defended its statutory requirement that its Homeland Security Department display a plaque insisting that security “cannot be achieved apart from reliance upon Almighty God”²³⁷ by noting it had a secular purpose of “protecting the Commonwealth from all major hazards.”²³⁸ Remarkably, the same legislature had decided, when it was in their *Lemon*-based interest to do so, that the justification for authorizing public schools to conduct recitations of the “traditional” Lord’s Prayer was “the freedom of religion symbolized by the recitation of the Lord’s Prayer.”²³⁹ Of course, if the actual motivation behind the government action was the promotion of a popular religion, one would expect to see government officials saying quite different things about these same actions when they sought the approval of the voting public. Indeed, that has been a common practice, whatever the developers of the legal strategies may have wished.²⁴⁰

The great insight of the legal-realism movement was that factors other than abstract logic played a role in legal interpretation.²⁴¹ Whether or not one subscribes to the more extreme forms of legal realism as a matter of judicial decisions,²⁴² it is certainly a tool for understanding advocacy. Clients, participants in an ongoing battle over the nature and extent of governmental-religious behavior, are driven by their own non-analytical motivations. Advocates, whether they represent Fervent Separationists or Holy Warriors, will thus construct facts and apply tests in ways that seek their desired results. These constructed facts do nothing to decrease religion-based political divisiveness. There are times when “everyone knows” what is really happening.²⁴³ A legislator’s vote for a complex appropriations bill may not really capture the legislator’s intent on any particular

236. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 730 (M.D. Pa. 2005) (quoting a newsletter sent by the school board to every residence in the district).

237. *Ky. Office of Homeland Sec. v. Christerson*, 371 S.W.3d 754, 756 (Ky. Ct. App. 2011).

238. Brief in Opposition at 10, *Am. Atheists, Inc. v. Ky. Office of Homeland Sec.*, 2013 WL 503398 (2013) (No. 12-613).

239. KY. STAT. ANN. § 158.175(1) (West 2018); *see also* N.H. REV. STAT. ANN. § 194:15-a (2018) (using similar language, but limiting the authorization to public elementary schools).

240. *See, e.g., Kitzmiller*, 400 F. Supp.2d at 728 (“[T]he Dover School Board advocated for the curriculum change and disclaimer in expressly religious terms . . .”).

241. Karl N. Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (listing as a common “point of departure” for those practicing legal realism a “distrust of traditional rules (on the descriptive side)” accompanied by “a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions”) (emphasis in original).

242. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 955 (1987) (“The ‘ruleskepticism’ of some Realists denied that in any case ‘doubtful enough to make litigation respectable,’ prevailing legal doctrine compelled an answer.”).

243. This formulation is rare, but not unheard of, in the law. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (“Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”).

item of spending. But that same person's vote to install or remove a religious monument, or inaugurate some other form of government-religious speech, may capture the legislator's heart's desire.

D. The War Continues: Legislative Prayer

The battle has continued in the area of legislative prayer. Fervent Separationists continue to battle against local practices that they fear are theocratic; Holy Warriors continue to seek affirmations of faith in government communication. It is worth recalling at this point that even the opening prayer of the Town of Greece was not, in fact, a practice of accumulated age. The town, established in 1822,²⁴⁴ only changed its practice from an opening moment of silence to an opening prayer in 1999.²⁴⁵

Two recent cases that divided circuits illustrate the persistent danger of false facts and the nature of the holy war. In North Carolina, a group of citizens challenged the practice of a county board offering prayers before public meetings.²⁴⁶ Meanwhile, in Michigan, a self-proclaimed Pagan named Peter Carl Bormuth began a pro se battle against another county board for a seemingly similar practice.²⁴⁷ The *en banc* Fourth Circuit found the former conduct unconstitutional, but the *en banc* Sixth Circuit had no objection to the latter.²⁴⁸ Both battles clearly stemmed from the chaos that was the *Town of Greece* decision, but the difference in the results offers a troubling sign about the reality of these conflicts. It may also suggest that yet another possible intervention by the Supreme Court may be in the future.

In both cases, the facial similarity to Greece, New York ended at the identity of the prayer leader. For both Rowan County, North Carolina, and Jackson County, Michigan, opted to have their elected officials lead the prayers, rather than hiring a permanent chaplain like *Marsh* or seeking community volunteers like *Town of Greece*.²⁴⁹ The prayers were overwhelmingly—possibly completely—Christian in nature.²⁵⁰ Both asked members of the public to stand, bow their heads, or both.²⁵¹ Neither county allowed anyone other than the elected officials to offer prayers, and both followed the prayers with a recitation of the

244. *Visitors*, TOWN OF GREECE, <https://www.greeceny.gov/visitors> [<https://perma.cc/5SWV-MFYQ>] (last visited May 25, 2018) (“Its name was chosen because of the current wave of sympathy toward the Greeks who were then fighting for independence from Turkish rule.”).

245. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014).

246. *Lund v. Rowan Cty.*, 863 F.3d 268, 271-72 (4th Cir. 2017).

247. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498-99 (6th Cir. 2017).

248. *Lund*, 863 F.3d at 272; *Bormuth*, 870 F.3d at 498.

249. *Lund*, 863 F.3d at 272; *Bormuth*, 870 F.3d at 498.

250. *Lund*, 863 F.3d at 273 (“97% of the Board’s prayers mentioned ‘Jesus,’ ‘Christ,’ or the ‘Savior.’”); *Bormuth*, 863 F.3d at 498, 509 (acknowledging that the prayers are “generally Christian in tone,” and rejecting, on legal grounds, Bormuth’s argument that “[b]ecause each Commissioner is Christian . . . , every prayer offered has been Christian”).

251. *Lund*, 863 F.3d at 272; *Bormuth*, 870 F.3d at 498.

Pledge of Allegiance.²⁵²

In rejecting Rowan County's practice, the Fourth Circuit focused on the traditional constitutional goal of religious neutrality.²⁵³ The dissent, on the other hand, found the county's practices to be factually indistinguishable from those at issue in *Town of Greece*.²⁵⁴ Thus, both sides of the dispute deployed the Supreme Court's opinion for their own purposes. The majority relied on the sweeping legal principles and the inaccurate portrayal of the facts in the case to find the North Carolina county was proceeding in a very different way from the town in New York. The dissenters looked at the record's facts and found little relevant difference.

The sides were reversed, but the game was the same in the Sixth Circuit. There, the court focused on the neutrality of the system and the fact that each commissioner constructed an invocation based only "on the dictates of his own conscience."²⁵⁵ For the majority, it was important that there was no official-government policy or oversight; each commissioner could say whatever he or she chose, and the fact that the prayers were Christian was merely coincidental.²⁵⁶ The court noted that even if the prayers seemed overtly Christian, they fell "within the religious idiom accepted by our Founders."²⁵⁷ By focusing on this history, the majority found the Jackson County practice well within the limits of *Marsh* and *Town of Greece*. In response, the dissent focused precisely on the uniformity of belief,²⁵⁸ arguing it violated the broader language of neutrality in *Town of*

252. *Lund*, 863 F.3d at 272; *Bormuth*, 870 F.3d at 498.

253. *Lund*, 863 F.3d at 275 ("[T]he Framers sought to prevent government from choosing sides on matters of faith and to protect religious minorities from exclusion or punishment at the hands of the state."). See *id.* at 292 (Motz, J., concurring) ("[T]he Court concluded that no other features of the town's rotating system of volunteer chaplains, all recruited in a non-discriminatory manner from local congregations, advanced one religion to the exclusion of others.").

254. *Id.* at 316 (Agee, J., dissenting) ("[T]he prayers actually offered in *Marsh* and *Town of Greece* contained the same sort of pleas to the Christian God and to Jesus Christ, the same recognition of a Christian tenet of salvation and dependence on God's favor, and the same generalized exhortations to obedience to Christian teachings as those prayers singled out for concern by the majority.").

255. *Bormuth*, 870 F.3d at 498.

256. *Id.* (noting that "each elected Jackson County Commissioner, regardless of his religion (or lack thereof), is afforded an opportunity to open a session").

257. *Id.* at 512. This sort of analysis, of course, takes no account of the fact that every significant player in the early Republic was at least nominally Christian; the United States did not have its first Jewish members of the House and Senate until more than fifty years had passed. See, e.g., *David Levy Yulee*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/david-levy-yulee> [<https://perma.cc/EKW4-ANKJ>] (last visited May 25, 2018); *Lewis Charles Levin*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/lewis-charles-levin> [<https://perma.cc/B5J7-M36J>] (last visited May 25, 2018).

258. *Bormuth*, 870 F.3d at 529 (citing district court's finding that the invocations were "exclusively Christian").

Greece.²⁵⁹

In both cases, combatants in this battle deployed arguments gleaned from the Supreme Court's futile attempts to bring resolution to the holy war. In each case, though, a more troubling reality played out in the communities involved, one only partially apparent in the legal cases. In Rowan County, North Carolina, the religious war was overtly taken to the ballot box. When the local chapter of the American Civil Liberties Union informed the board of their concerns with sectarian prayer, members of the board announced their defiance and promised to continue the government's Christian speech.²⁶⁰ After the initiation of the lawsuit, the next elections saw two incumbents favor continuing the Christian prayer and two challengers opposing it; both incumbents won.²⁶¹ The specter that minority religions can only have equality once they achieve electoral superiority is precisely the concern with leaving such matters to the ballot box that animated what is, in my view, the most important footnote in U.S. Supreme Court history.²⁶² The court's majority expressed the fear that not being a Christian in Rowan County would be a "tacit political debit, which in turn deters those of minority faiths from seeking office."²⁶³

A similar dynamic was at work in Jackson County, Michigan. There the court's majority took solace in the electoral possibilities for religious minorities, because although the court purported not to know the religions of the board, "we do know that Commissioners of different faiths, or no faith, may be elected."²⁶⁴ This optimistic view of electoral reality was denied by an extensive amount of video evidence.²⁶⁵ The Jackson County board posted recordings of their meetings on YouTube, and as the dissent noted, those videos paint a different picture.²⁶⁶ The videos show a board specifically rejecting the *Greece*, New York approach of allowing non-board members to give invocations, because people might get online ordinations and then "we are going to create a lot of problems here when certain people come up . . . and say things that [people are] not going to like."²⁶⁷ In an even more dramatic demonstration of the invocation's real purpose, the videos reveal that the board used prayers to open every meeting except one: the

259. *Id.* at 526 ("Town of Greece demands that courts distinguish solemn, respectful practices from practices that 'denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.')" (citation omitted).

260. *Lund v. Rowan Cty.*, 863 F.3d 268, 273 (2017) ("[A]sking for guidance for my decisions from Jesus," one commissioner explained, "is the best I, and Rowan County, can ever hope for.").

261. *Id.* at 282.

262. *United States v. Carolene Products*, 304 U.S. 144, 153-54 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon . . .").

263. *Lund*, 863 F.3d at 282.

264. *Bormuth*, 870 F.3d at 513.

265. *See id.* at 529-32 (Moore, J., dissenting).

266. *See generally id.* (discussing YouTube postings).

267. *Id.* at 538 (Moore, J., dissenting).

one that was held without any member of the public being present.²⁶⁸ One could discount the troubling evidence of the videos because of the other important dispute between the majority and the dissent: whether the court even had authority to hear them, or whether they were not properly part of the record.²⁶⁹ One might hope that if the court had evidence before it showing that the government adopted a specific policy precisely to keep from having to hear non-Christian invocations, they would not have found it constitutionally permitted.²⁷⁰ Any such solace is denied by a chilling footnote in which the majority announces that if the court had considered the videos their decision would have been the same.²⁷¹

The linkage between religious and political standing in the community against which Justice O'Connor had warned seems to have been deliberately pursued in both counties in the way in which they structured their opening ceremonies. By immediately following the prayer, where people were asked to stand, with the Pledge of Allegiance, where they also stood, the boards and the spectators could immediately discover who was physically unable to stand and who did not stand for the prayer because they objected on religious grounds. The reaction of the board and the public to Peter Carl Bormuth illustrates the political weakness of a member of a minority faith in such a setting.²⁷²

E. The War Continues: Monuments

One might have thought that direct Supreme Court consideration of monumental-religious speech would end at least that particular battle. The 2004 term ought to have been a watershed in this story. By taking two displays of the Ten Commandments under consideration,²⁷³ the Court might well have hoped to come to some resolution intelligible enough to be deployed by lower courts and followed by political branches. Indeed, the cases looked teed-up for any number of possible resolutions: the Kentucky display was new and inside a court house,²⁷⁴ the Texas display was much older and outdoors, in a park-like setting near the capital.²⁷⁵ The Kentucky display had been the subject of changes and amendments throughout its brief but dramatic life,²⁷⁶ while the Texas monument had been

268. *Id.* at 530.

269. Compare *id.* at 500 (majority opinion), with *id.* at 529-30 (Moore, J., dissenting).

270. See *id.* at 544 (Moore, J., dissenting) (“[T]he Jackson County Board of Commissioners affirmatively excluded non-Christian prayer givers, and did so in an effort to control the content of prayers.”).

271. *Id.* at 501 n.2 (majority opinion).

272. *Id.* at 518 (finding that members of the board turning their backs on Bormuth while he spoke was a reaction to his antagonism toward them and not his religious beliefs).

273. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

274. *McCreary*, 545 U.S. at 851.

275. *Van Orden*, 545 U.S. at 681-82.

276. See *McCreary*, 545 U.S. at 851-58.

legally uninteresting for decades.²⁷⁷

Because the Court fractured²⁷⁸ and neither effective majority was willing to accept the other's characterization of the Constitution requirements at issue,²⁷⁹ no intelligible principle emerged. Instead, Holy Warriors and Fervent Separationists gained a fresh set of opinions to deploy. For example, many communities have sought to install large, outdoor monuments to the Ten Commandments.²⁸⁰ In doing so, they have sought the protection of the opinions in *Van Orden* that saved Austin's monument. The five-justice majority allowing it to stand, though, only existed because of the Justice Breyer's concurrence in the judgment,²⁸¹ an opinion that focused on the age and banal history of the monument in question. When installing a new monument, especially over the opposition of dedicated separationists, such factors would cut against the monument's constitutionality. Thus, advocates for new monuments simply focus on other parts of the opinions, and even go so far as to emphasize "facts" that seem to vary from reality.

What is perhaps even more surprising—Austin's monument remained, after all—is the number of communities that have sought to erect indoor displays of the Ten Commandments the Court rejected in *McCreary County*. Because the majority opinion focused on the complex history spanning the displays before the county had settled on the "Foundations of American Law and Government"²⁸² collection, other governmental bodies have simply jumped to the third display. Statutes authorizing these displays proudly declare their purpose to be historical and educational.²⁸³ Some then simply declare as a matter of law the contentious proposition that the Ten Commandments are a fundamental part of the American

277. *Van Orden*, 545 U.S. at 682.

278. *Van Orden v. Perry*, 545 U.S. 677 (2005), consisted of a plurality opinion, two concurrences, a concurrence in the judgment, and three dissents. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), contained a majority opinion, a concurrence, and a dissent.

279. It is not vain to hope the Supreme Court will operate this way. With the same members, the Court decided the two University of Michigan cases in the 2002 term by doing precisely this. Although only Justice O'Connor was fully in the majority of both opinions, the case rejecting the affirmative-action program of the undergraduate college specifically recognized the holding of the case involving the law school. *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (rejecting the argument that diversity in higher education could not constitute a compelling interest for Equal Protection analysis because "for the reasons set forth today in *Grutter v. Bollinger*, the Court has rejected these arguments") (citation omitted).

280. See *infra* Part IV.B.

281. See *infra* Part IV.A.

282. I admit to having no evidence for this, but I have always suspected that the display was named in error. Shifting the words to "Foundations of Law and American Government," after all, yields the uplifting acronym FLAG.

283. See, e.g., GA. CODE ANN. § 20-3-41.3 (West 2018) (citing "a need to educate and inform the public about the history and background of American law" and maintaining that "public buildings of this state are an ideal forum in which to display educational and informational material"); S.C. CODE ANN. § 10-1-168 (2018).

legal tradition.²⁸⁴ Courts have given this technique their stamp of approval.²⁸⁵

But the battle has not been one-sided, as the separationists have continued to file suit. Indeed, there have been challenges to outdoor constructions virtually indistinguishable from the *Van Orden* monument.²⁸⁶ Although no explosive demolitions have yet been ordered for such monuments, courts have ordered some monuments moved.²⁸⁷ With the increased religious divisiveness in the area as well as with litigation expenses, communities are paying the price for the unclear Supreme Court doctrine.²⁸⁸

F. Consequences of the War in a Nation with a Diverse Population

A response to the use of false facts might still be a sigh of satisfaction. Objections to the metaphorical wall between church and state have the best of pedigrees.²⁸⁹ If strict separation was never a desired outcome, what gives the unelected judiciary the authority to limit the peoples' desire to have their representatives speak in the terms of faith? How is an inherently secular government better for the United States than one that reflects the wishes of the voters?

This idea triggered Justice O'Connor's powerful warning offered in one of her last opinions before retirement. Reviewing this argument, she noted that "we do not count heads before enforcing the First Amendment."²⁹⁰ She also examined the world stage, noting the prevalence and intensity of faith-based struggle in nations where governments wielded religious power, and rhetorically asked those who wished more government-religious speech to answer the question: "Why would we trade a system that has served us so well for one that has served others

284. GA. CODE ANN. § 20-3-41.3 ("The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.").

285. *See, e.g., Am. Civil Liberties Union of Ky. v. Mercer Cty.*, 432 F.3d 624, 631 (6th Cir. 2005).

286. *See, e.g., Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014).

287. *See, e.g., Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016), *cert. denied*, 2017 WL 2972650 (U.S. Oct. 16, 2017) (No. 17-60). A local newspaper reported the city would have to work with the owner of the monument to relocate it. Hannah Grover, *U.S. Supreme Court declines Ten Commandments case*, FARMINGTON DAILY TIMES (Oct. 16, 2017, 11:46 AM), <http://www.daily-times.com/story/news/local/bloomfield/2017/10/16/u-s-supreme-court-declines-bloomfield-ten-commandments-case/768088001/> [<https://perma.cc/RP67-ZNY8>].

288. *See, e.g., Bill Estep, Pulaski pays \$230,000 in Fees in 10 Commandments case*, LEXINGTON HERALD LEADER (Sep. 10, 2011, 3:52 AM), <http://www.kentucky.com/news/local/crime/article44125044.html> [<https://perma.cc/AH2V-ZGAN>] (noting the county had to take out a loan to pay the ACLU's legal fees).

289. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging.").

290. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005).

so poorly?”²⁹¹

The notion that the erection of a monument could cause the U.S. to undergo the kind of violence seen in places like Iraq and the Philippines seems far-fetched.²⁹² It is nonetheless true that even in the United States, real political hostility has arisen from religious controversies.²⁹³ Any increasing intensification of political tension over religion is insoluble as faith matters cannot be resolved through voting. An election can determine the tax rate for the support of libraries or the availability of medical marijuana, but an election can never determine which religion is “right” for a state or community. There is no reason for nonbelievers to accept such an outcome as legitimate.

The inevitable result of such votes for monuments or prayers, then, is to install the area’s majority faith without doing anything to convince members of minority faiths—or those with no faith at all—that they are included. The common-sense observation that the majority will protect its own faith practices accounts for the fact that the baseline setting of rules will incorporate the practices of the majority faith.²⁹⁴ This unintentional ignoring of minority religions has long been true,²⁹⁵ but the potential for harm has become more acute as the number of faiths and the increase in atheism have combined to make America

291. *Id.* at 882.

292. *See, e.g.*, Rod Nordland & Suadad Al-Salhy, *In Iraq’s Sectarian Violence, a Show of Each Side’s Worst*, N.Y. TIMES (June 23, 2014), <https://www.nytimes.com/2014/06/24/world/middleeast/in-iraqs-sectarian-violence-a-show-of-each-sides-worst.html> [<https://perma.cc/98MY-YJ77>]; Oliver Holmes, *Philippine sectarian bloodshed unites Muslims and Christians*, GUARDIAN (June 3, 2017, 6:00 AM), <https://www.theguardian.com/world/2017/jun/03/philippine-sectarian-bloodshed-unites-muslims-and-christians> [<https://perma.cc/SFV4-U7SQ>].

293. *See, e.g.*, Daniel Gordon, *Into the “Breyer” Patch: Religious Division and the Establishment Clause*, 4 RUTGERS J.L. & RELIGION 3 (2002).

294. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986). Captain Goldman, an Orthodox Jewish officer in the Air Force, was forbidden by military uniform regulations from wearing his yarmulke indoors. *Id.* The Court held that the Air Force had regulated even-handedly by drawing a line based on the visibility of religious items. *Id.* But as a dissent noted, mainstream Christianity did not require the wear of visible items of faith, which meant it had a built-in preference under the regulation. *Id.* at 521 (Brennan, J., dissenting) (noting that “under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths”). For a detailed look at the extraordinary story behind the case, “which differs in significant respects from the official version of both the facts of the case and the ensuing litigation,” see Samuel J. Levine, *Untold Stories of Goldman v. Weinberger: Religious Freedom Confronts Military Uniformity*, 66 A.F. L. REV. 205, 207 (2010).

295. *See, e.g.*, Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI-KENT L. REV. 775, 808 (2012) (noting some “latent majoritarian religious perspectives that continue to characterize the Supreme Court’s Establishment Clause jurisprudence”). For an example of the perspective Professor Levine warns of, see, e.g., *McGowan v. Maryland*, 366 U.S. 420, 422 (1961).

much more pluralistic than it was at the founding.

IV. A TRUE WAY OUT: STANDING

The overarching lesson of the integration of false facts into the many tests of the Establishment Clause is that no test will ever be advocate-proof. No test will be beyond manipulation by those seeking a particular result for committed clients. *Plessy*'s abhorrent "separate but equal" standard itself was one of the most vital tools in the dismantling of the enforced-segregation regime of Jim Crow that had been given the imprimatur of constitutionality by *Plessy*.²⁹⁶ Any new test for the Establishment Clause will merely become a tool for both sides in the ongoing holy war to further their own agenda.

If peace is truly desirable, the current solution is no solution. The Court's practice of revising facts merely provides ammunition for committed advocates struggling in an unwinnable conflict. The protracted struggle is itself a cause for alarm and a threat to the stability of the republic. This is no new observation: George Washington may have favored the idea of a tax to support churches in his native Virginia, but observed that the bill should not pass because the opposition to it would "rankle and perhaps convulse the State."²⁹⁷ Perhaps making things worse, some scholars have noted that the Supreme Court seems to be reducing the role of the Establishment Clause²⁹⁸ and then withdrawing from the field of battle.²⁹⁹ This is more troubling in this area than it would be in others, because of a quantifiably odd feature of lower courts and the religion clauses: the political nature of the decisions. In a thorough study of lower-court decisions, Professors Sisk and Heise found that identifying the political party of the president who appointed a particular judge is "quite valid in the study of Establishment Clause decisions in the lower federal courts, indeed more of a surrogate than a mere proxy."³⁰⁰ If the authors are right that the current doctrine leaves lower-court judges essentially unconstrained, and thus deciding cases on the basis of

296. See, e.g., Leland Ware & Melva Ware, *Plessy's Legacy: Desegregating the Eurocentric Curriculum*, 12 GA. ST. U. L. REV. 1151, 1154 (1996); Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 31, 36-40 (2004).

297. Joel H. Swift, *To Insure Domestic Tranquility: The Establishment Clause of the First Amendment*, 16 HOFSTRA L. REV. 473, 495 (1988).

298. A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 234 (2015) ("Where the Warren Court set out to build a strict wall of separation between church and state, the Rehnquist and Roberts Courts have begun steadily to dismantle that wall.").

299. Marc O. DeGirolami, *Constitutional Contraction: Religion and the Roberts Court*, 26 STAN. L. & POL'Y REV. 385, 388-89 (2015) (noting that the Roberts Court "has agreed to hear fewer constitutional challenges implicating the religion clauses than its predecessors: counting generously, it has heard seven such cases, while over a comparable period (1995-2005) the Rehnquist Court heard eleven cases bringing religion clause challenges and the Burger Court (1976-1986) heard a whopping twenty-seven cases").

300. Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1239 (2012).

“preexisting party-correlated attitude,”³⁰¹ what is necessary is greater doctrinal clarity, not less.³⁰²

Those who believe that faith-fueled conflict is bad need to seek ways to remove the tension. That can only be done once the war is recognized as inherently unwinnable. Once society decides that some members will never be happy with any separation between their faith and the government, and other members will be equally unsatisfied with any acknowledgement of the supernatural, recognition will come that the war must be ended.³⁰³ As Chief Justice Roberts noted in a different context, the best way to end something is to end it.³⁰⁴ Fortunately, a way exists within the structure of American law to significantly decrease, if not entirely end, the battles over government-religious speech: the standing doctrine.

Courts can—and have—used standing to call the whole thing off. There are already different rules for standing in different areas of law and different types of controversies. As Professor Richard H. Fallon, Jr., has eloquently demonstrated, standing’s fragmentation “nowhere manifests itself more visibly than in suits to enforce the Establishment Clause.”³⁰⁵ In these conflicts, and in these conflicts alone, the courts treat as actual injury the kind of psychic unhappiness that is used as a model for non-injury in other contexts.³⁰⁶

One possible remedy to the standing problem is simply to align it to the rest of constitutional law: without actual injury more severe than psychological discomfort, no plaintiff would have standing. Such an approach would achieve

301. *Id.* at 1240.

302. *Id.* at 1263 (noting that the Court has offered many tests in a way that “invites even the most conscientious of judges to draw deeply on personal reactions to religious symbols and political attitudes” and calling the whole area “an attractive nuisance for political judging”).

303. Many scholars have advocated solutions for peace, but there is little evidence that both sides will accept them. Professor Segall, for example, has suggested that moments of silence offer the same solemnizing benefit frequently offered as the non-religious purpose for prayer. *See* Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 737-39 (2009).

304. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

305. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1071 (2015).

306. *Id.* at 1073-74 (noting that when facing challenges to Ten Commandments monuments or nativity displays “the Court has historically treated standing as largely unproblematic. More specifically, it proceeded directly to the merits, without pausing to conduct a standing inquiry”). Elsewhere, it is uncontroversial that psychological grievances simply do not constitute the kind of injury-in-fact necessary to convey standing. *See, e.g., Depuy, Inc., v. Zimmer Holdings, Inc.*, 384 F. Supp. 2d 1237, 1240 (N.D. Ill. 2005) (“[T]here is a sense in which I am ‘injured’ when I become upset by reading about the damage caused that fine old vineyard in Burgundy by a band of marauding teetotalers, yet that injury would not be an injury to the kind of personal interest that is necessary to support an invocation of the federal judicial power . . .”).

the long-running view of multiple administrations that one commentator described wryly as “the institutional interest of the United States in No One Ever Having Standing.”³⁰⁷ This would certainly bring consistency to the area, but it is not at all logically compelled.³⁰⁸ For although Justice Scalia might dismiss objections to symbols as no more than personal taste, those who study human understanding have found much more power in symbols. Professor Claudia Haupt noted that recent scientific studies using brain-monitoring equipment confirmed the much older observation that pictures speak more loudly than words.³⁰⁹ She concludes that “characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound.”³¹⁰

The elimination of the recognition of psychological harm would also constitute a complete and total victory for one group of combatants in this holy war. For with no courts to referee disputes over government-religious speech—and if no one has standing—the only check on increased government speech is the use of the vote. The inevitable result would be increasingly sectarian expression by the government.³¹¹ Although the United States has become more pluralistic in matters of religion, there is no question that we remain a predominantly Christian society, one in which almost all elected presidents have professed Christianity, only one has professed to Catholicism.³¹² Requiring actual injury to mean, in the case of a monument, what it means in most other contexts means a local majority could, with impunity, install a proclamation on the courthouse that reads: “We acknowledge the saving sacrifice of Jesus Christ on

307. John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 GREEN BAG 2D 429, 448 (2009).

308. For a defense of the concept that psychological injury, in the current era, can constitute real injury, see Seth F. Kreimer, “*Spooky Action at a Distance*”: *Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 787 (2016) (“Messages are received in common by all who encounter them, and the harm suffered becomes more and more ‘direct’ as the internet facilitates virtual presence.”).

309. Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 822, 848 (2014) (“[T]his fMRI research confirms earlier findings of traditional psychological research that pictures have a closer connection to emotion than words . . .”).

310. *Id.* at 822. No Fervent Separationist, Professor Haupt concludes that some religious symbols, such as crosses in buildings, flags, or coats of arms, nonetheless do not violate the Establishment Clause because they “have low communicative impact.” *Id.* at 869.

311. Remember that all but four of Kentucky’s state representatives wrote to a court their opinion that the United States should be recognized as a “Christian Nation.” *See supra* note 230 and accompanying text.

312. *See* David Masci, *Almost all U.S. presidents, including Trump, have been Christians*, PEW RES. CTR. (Jan. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/01/20/almost-all-presidents-have-been-christians/> [https://perma.cc/HEZ5-FDCS]. Many citizens apply a religious test in the voting booth. *See* Goldsmith & Dillon, *supra* note 62, at 450 (“According to Gallup polling data, 49% of respondents in 2011 would refuse to vote for their party’s nominee for president if that person were an atheist, making ‘atheist’ by far the most distrusted category.”).

the cross.”³¹³ Indeed, as Professor Lund has pointed out, leaving protection of religion to the vote is particularly dangerous because although America as a whole has become more diverse religiously, there is still a great deal of homogeneity of faith at the local level.³¹⁴ It takes a special amount of courage for a member of tiny minority to speak out against an overwhelming majority, even when the Constitution would protect them.³¹⁵

A. Justice Breyer’s Unaccepted Offer

An approach to seeking peace appeared in Justice Breyer’s concurrence in the judgment in *Van Orden*.³¹⁶ Careful to join none of the “*Lemon* is bad” language of the plurality, Justice Breyer focused instead on the need to prevent religious turmoil from worsening. His opinion therefore focused on the innocuous nature of the Austin monument: its passivity, context, and tepid community reaction for many years.³¹⁷ He noted that unlike the religious civil war playing out in the two Kentucky counties, the Texas monument had been ignored legally for four decades.³¹⁸

Both the majority and the dissent rejected this view as illogical. Some scholars have agreed that it is not sound, among them Professor Laycock, who characterized the reason given as “extraordinarily naïve.”³¹⁹ Of course, the critics are logically correct. As a test, allowing old things to remain and banning new things is indefensible as a matter of consistency. In the already-illogical area of standing, however, such a test would fit perfectly. Creating a rule that allowed plaintiffs standing to challenge new forms of government-religious speech and not old ones would allow the ACLU to challenge the FLAG displays in Kentucky but bar Thomas Van Orden from suing to remove the Texas monument.³²⁰ This simple standing rule would accomplish the same results as the collective nine opinions in the two 2005 Ten Commandments cases, without serving as litigation fodder for the continuing religious struggle.

313. *Town of Greece v Galloway*, 134 S. Ct. 1811, 1816 (2014) (quoting one of the prayers offered in the *Town of Greece* case).

314. Lund, *supra* note 151, at 49.

315. Laycock, *supra* note 80, at 1224 (noting that the anonymous plaintiffs in *Santa Fe v. Doe* were discovered, they received death threats, and their dog was killed). This can even affect attorneys; Professor Laycock continues by noting he wished to represent Van Orden while teaching at the University of Texas in Austin, but feared that the University would be harmed, and “[he] thought [he] had a conflicting fiduciary duty.” *Id.* at 1226.

316. *See Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in judgment).

317. *Id.* at 701-02.

318. *Id.* at 702-03.

319. Laycock, *supra* note 80, at 1223.

320. Indeed, Professor Laycock suggested that “a grandfather clause, or a rule of laches that applies to all potential plaintiffs as a class and does not start anew with each generation” would be a better way of solving the problem of displays of the sort at issue in *Van Orden*. *Id.*

B. The Tenth Circuit's Approach

Indeed, it is possible that some lower courts are adopting this approach surreptitiously as a means of resolving the matter. The Ten Commandments monument of Stigler, Oklahoma, may provide an example of this.³²¹ The monument is somewhat unusual in that it did not follow the aesthetic conventions of the Ten Commandments monuments placed around the nation by the Fraternal Order of the Eagles and at issue in *Van Orden*.³²² Like the Austin monument, though, the Stigler version was set amid other remembrances, including tributes to veterans of America's wars and a pair of benches dedicated to high-school graduating classes from the 1950s.³²³

The monument's story fits well within the understanding of the players in these dramas noted throughout this Article. The motive force was a Holy Warrior, a local part-time minister who felt a religious calling to erect the monuments on the courthouse lawn;³²⁴ the County Attorney, probably recognizing the potential danger of government-religious speech even before the two 2005 cases, noted that there might be "a few legal 'bumps'";³²⁵ the elected officials who approved the monument spoke of it, for a time, in distinctly religious terms;³²⁶ and a group of Fervent Separationists sued the County, demanding the monument's removal.³²⁷

After a two-day trial, and in an opinion of unquestionable literary merit and charm, the District Court rejected the demand.³²⁸ The Court, while focusing on superficial similarities of the Austin and Stigler monuments (such as being outside, being part of a collection of monuments, and having been donated by a private citizen), also made the astonishing conclusion that "the Commissioners' desire to accommodate Bush's display for its *historical* value was genuine."³²⁹ Indeed, the Court participated in the creation of false facts, praising the difficult-to-justify claim of two commissioners that the monument served to remind "the public of 'what we came here for,' *i.e.*, to escape governmental religious persecution."³³⁰ It did so while downplaying the testimony of one of the same

321. *See Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009).

322. The monument contained the Ten Commandments on one side and the Mayflower Compact on the other, perhaps attempting to protect the Commandments with a gloss of American history. The monument was also unusual in that it contained a misspelling; it announced that the Seventh Commandment prohibited "adultry." *Id.* at 789.

323. *Id.*

324. *Id.* at 790 (quoting the citizen behind the effort telling the board that "the Lord had burdened [his] heart").

325. *Id.*

326. *Id.* at 792. (quoting one commissioner as referring to the monument by saying "[t]he good Lord died for me. I can stand for him, and I'm going to . . . I'm a Christian and I believe in this. I think it's a benefit to the community").

327. *Id.*

328. *Green v. Board of County Comm'rs*, 450 F. Supp. 2d 1273, 1296-97 (E.D. Okla. 2006).

329. *Id.* at 1289 (emphasis added).

330. *Id.* at 1281. There is not a word in the Ten Commandments that speaks to a notion of

commissioners that he “does not believe in the separation of church and state.”³³¹

In reversing, the Tenth Circuit applied the test from *Lemon*, “with Justice O’Connor’s endorsement patina.”³³² The court emphasized the very evidence of government-religious behavior downplayed by the district court.³³³ Because the appellate court also emphasized the *current* nature of the conflict caused by the government’s behavior, it endeavored to remove the *current* source of conflict without providing incentives or tools to separationists to seek the removal of other, older monuments.³³⁴ The focus on the timing of the challenge, and the board’s response to it, suggests the possibility of using a parallel to the standing requirement to draw the line where Justice Breyer had hinted. Unfortunately, because the Tenth Circuit reached the importance of timing through endorsement, rather than directly as a part of the standing inquiry, it remains subject to the limitation of courts and justices that simply refuse to recognize the endorsement test, whether as an independent matter or as a gloss on *Lemon*.³³⁵

A second case, arising in Bloomfield, New Mexico, offered another example of the continuing war.³³⁶ The Circuit Court rejected the Ten Commandments monument recently placed on the lawn of city hall because the “apparent purpose and context of the Monument’s installation would give an objective observer the impression of official religious endorsement.”³³⁷ This was an unsurprising use of the *Lemon* test with the endorsement gloss. If anything was surprising about the

religious freedom. And although the journey of the Pilgrims has been an iconic shorthand for such freedom, the Compact itself pledges the parties to create “a civil body politic” “for the glory of God, and advancement of the Christian faith” and promises “all due submission and obedience” to the laws created for such purposes. *Id.* at 1278. It is difficult to find in those words a paean to religious freedom from government.

331. *Id.* at 1283 (crediting the commissioner’s subsequent explanation that he objected to court decisions that had made the doctrine more strict than necessary).

332. *Green*, 568 F.3d at 796.

333. *Id.* at 800-04 (emphasizing the small size of the community, in which observers can be expected to know of the overtly Christian pronouncements of the Board).

334. *See id.* at 806 (“[T]he sharp contrast between the timing of the legal challenges to the monument in *Van Orden* and the one in this case sheds significant light on whether the reasonable observer would have perceived the latter as having the effect of endorsing religion.”).

335. In an unrelated case, the Oklahoma Supreme Court demonstrated another method for seeking religious peace. In a challenge to a recently installed Ten Commandments monument on the state capitol grounds, the Court found the installation violated the Oklahoma Constitution’s prohibition on using public funds or property for the use, benefit, or support of any church or religion. *Prescott v. Okla. Capitol Pres. Comm’n*, 373 P.3d 1032, 1034 (Okla. 2015). Although the U.S. Supreme Court recently found that such state constitutional provisions may not be relied on to bar the provision of a generally available benefit because of religion, see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), that would certainly not limit a state’s ability to reject a single religious monument in a context in which no other religious monuments were present.

336. *See Felix v. City of Bloomfield*, 841 F.3d 848 (10th. Cir. 2016).

337. *Id.* at 857.

case, it was that Bloomfield, perhaps recognizing the peril of endorsing religion, sought to find safe harbor in the free speech of citizens. On the City Hall lawn near the new monument was placed a sign that included the observation:

The City has intentionally opened up the lawn around City Hall as a public forum where local citizens can display monuments that reflect the City's history of law and government . . . Any message contained on a monument does not *necessarily* reflect the opinions of the City, but are statements from private citizens.³³⁸

The court rejected this characterization by citing the Supreme Court's 2009 *Sumnum*³³⁹ decision for the proposition that "permanent monuments are government speech, regardless of whether a private party sponsored them."³⁴⁰ Apparently having read that case the same way that the Tenth Circuit would later, the leaders of Bloomfield revised their "public forum policy" of the City Hall lawn to remove the word "permanent," substituting a reapplication process every decade. This, too, the Court rejected:

It is no answer for Bloomfield to say that, under Forum Policy No. 2, the City makes donors reapply every ten years under threat of their monuments' removal. Any monument *can* be removed with a big enough construction crew. But Bloomfield has no plans to remove the Monument and imposes no limit on how many ten-year periods will be permitted.³⁴¹

Although the Circuit Court did not apply a timeliness element to the standing requirement for challenges to such monuments, it did note the importance of the rapid objection to the ultimate outcome. It evaluated *Van Orden* by focusing on Justice Breyer's critical vote, and acknowledged the weight he placed on the fact that the Austin monument had stood for a long time without objection.³⁴²

Holy Warriors erected the Stigler and Bloomfield monuments; Fervent Separationists immediately joined the battle to have them moved off government property. The Tenth Circuit's judicious resolutions of both stopped short of finding a timeliness requirement for standing, but the language of both opinions could easily be deployed in support of such an armistice in the holy war.³⁴³

338. *Id.* at 861 (emphasis in original).

339. *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009).

340. *Felix*, 841 F.3d at 855.

341. *Id.*

342. *Id.* at 859 ("The Supreme Court decided two separate Ten Commandments cases on the same day with different outcomes, and the 'determinative' factor for the different outcomes appeared to be litigation timing.").

343. But it must be noted that the Fourth Circuit overtly rejected such an approach last year. *See Am. Humanist Ass'n. v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017) (finding that a four-story Latin Cross on a public traffic island violated the Establishment Clause because its principal effect was the endorsement of Christianity). The court dismissed Justice Breyer's approach: "It is also true that the Cross has stood unchallenged for 90 years, which Appellees argue reinforces its secular effect. But that argument is too simplistic . . . Perhaps the

V. CONCLUSION

If the Supreme Court chose to adopt the rationale of the Tenth Circuit in an appropriate case, it would go a long way toward cooling the religious strife in the United States. Unfortunately, because several justices have offered consistent objections to the endorsement approach, that is not likely to occur. If, on the other hand, the Supreme Court overtly created timeliness as a principle of standing in Establishment Clause litigation, it would offer a similar solution. If all parties knew that no one could challenge old monuments, Fervent Separationists would launch fewer attacks. On the other hand, the easy availability of such challenges to new government-religious speech would decrease the Holy Warriors' incentive to further government pronouncements in matters of religion. Energetic combatants in culture wars could find non-spiritual areas to continue their struggle.

Whether or not the Supreme Court would ever be willing to translate Justice Breyer's ideas into an explicit doctrine of standing, it ought to do something. Although the modern political war of religion is not entirely of its creation, the Court's flexible, Muse-like approach to truth when recounting the facts of the cases before it has raised the intensity of the battles. That intensity benefits no one but the immediate combatants, and may do real harm to the lasting strength of the republic. The nine Muses who sit atop the federal judiciary know how to tell the truth. It is time for them to wish to do so.

longer a violation persists, the greater the affront to those offended." *Id.* at 208 (citation omitted). However, the timeliness test I propose adding to standing would have allowed the plaintiffs to object to the cross in this case as well, as the government had recently set aside \$100,000 to restore the cross. *See id.* at 211.