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## History's Speech Acts

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# History’s Speech Acts

B. Jessie Hill\*

*ABSTRACT: This Essay considers the historic relationship between symbolic public expressions of racial and religious identity—in particular, Confederate symbols and Christian religious displays. These displays sometimes comprise shared symbology, and the adoption of this symbology overlaps at distinct moments in U.S. history in which Confederate and Christian symbolism converged to express messages of combined religious and racial superiority. This Essay argues that these forms of expression can best be understood as “speech acts” that seek to construct a particular social reality, often in defiance of political and social fact. They thus not only express but also enact social hierarchies. It further argues that the Supreme Court’s most recent opinions dealing with the constitutionality of religious displays continue this social and political project of constructing a white Christian identity.*

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## INTRODUCTION

Symbols are powerful. They convey meaning in a uniquely concise and often compelling way, and in so doing, they persuasively assert particular truths about the world around us.<sup>1</sup> Moreover, they attract new meanings with almost magnetic force, allowing new words and ideas to attach to their malleable imagery over time.<sup>2</sup> But it is worth considering *which* truths they tell, and the impact of that telling. The controversy surrounding the display and removal of Confederate monuments<sup>3</sup> demonstrates the depth of feeling evoked by symbols, even when the material stakes are relatively low. In parallel fashion, battles have long raged over the legality and appropriateness of sectarian religious displays in public places.<sup>4</sup> The political tension over both sorts of displays thus belies the notion that the stakes of these disputes are “merely” symbolic and passive. Rather, both kinds of symbols are deeply entwined with notions of identity and social status, carrying profound real-world stakes.

There are two eras in American history in which Confederate symbolism and Christian symbolism simultaneously proliferated.<sup>5</sup> Not so coincidentally, these particularly significant moments for the adoption of religious and racist symbolism coincided with cultural and political dislocations in which white, Christian Americans appeared to be in danger of losing their dominance. The first period is the late nineteenth and early twentieth centuries, when America’s identity was challenged by an influx of immigration and the failed project of post–Civil War Reconstruction, which also coincided with the rise of Jim Crow.<sup>6</sup> The second is the decades after World War II, during which the civil rights movement and fears of communism again created perceived

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1. Cf. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1590 (2022) (noting that flags represent identities and possess “‘a condensed power’ to speak for the community” (quoting WHITNEY SMITH, *FLAGS THROUGH THE AGES AND ACROSS THE WORLD* 1–2, 32, 34 (1975))).

2. DAVID FONTANA, *THE SECRET LANGUAGE OF SYMBOLS: A VISUAL KEY TO SYMBOLS AND THEIR MEANINGS* 30 (2003).

3. See, e.g., Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html> [https://perma.cc/78KK-7H6C].

4. These battles have sometimes turned violent. See, e.g., *Doe v. Small*, 964 F.2d 611, 626 (7th Cir. 1992) (Cudahy, J., concurring) (“[T]he original plaintiff in this case, Richard Rohrer, was, in effect, ridden out of town on a rail for daring to complain about the City’s conduct. The present plaintiff has concealed her identity to avoid suffering the same treatment.” (citation omitted)); *Ahlquist v. City of Cranston ex rel. Strom*, 840 F. Supp. 2d 507, 514–16 (D.R.I. 2012); Memorandum in Support of Plaintiffs’ Motion for Leave to Proceed Using Pseudonyms at 4–6, *Doe v. Jackson City Sch. Dist.*, No. 13-cv-112 (S.D. Ohio Feb. 7, 2013), 2013 WL 9123171 (describing a history of threats to plaintiffs in Establishment Clause cases).

5. See *infra* Part I.

6. See *infra* notes 19–24 and accompanying text.

threats to white, Christian American identity.<sup>7</sup> In both of these eras, religious and racist symbolism became deeply intertwined, symbiotically reinforcing each other's meaning. The production and proliferation of Christian and Confederate symbolism acted as reactive counterweights to these social and cultural moments, attempting to narrate—but also create—a white, Christian racial and religious hierarchy.

This Essay focuses particularly on one specific, ubiquitous symbol—the cross—that has taken on interrelated racial and religious connotations at various times in U.S. history. As discussed below, the cross can carry both religious and racial meanings. When placed in certain contexts, it is a symbol of dominance and an act of racial and religious domination. This Essay argues that the cross's display in particular contexts not only conveys, but also attempts to assert and enact, the notion that the political community is a white and Christian one. In addition, this Essay also argues that the cross is often used to perform this work precisely when a threat is presented to that white, Christian identity. Finally, this Essay argues that the Supreme Court's recent jurisprudence dealing with challenges to religious symbolism under the Establishment Clause of the First Amendment continues and extends that project of racial and religious domination.

This Essay argues that symbolic displays of Christian symbols should be viewed as particular kinds of “speech acts” that work not only to express but to create and reinforce social hierarchies and exclusion, and thus that their impact has not been properly evaluated by courts. Constitutional doctrine should take account of the unique history of those symbolic displays that were created and adopted at particular historical moments. However, the Supreme Court has instead moved toward immunizing longstanding and historically familiar displays from constitutional challenge by insisting on their passivity, rather than recognizing the work that they perform in constructing community identity.<sup>8</sup> Moreover, by insisting that the Latin cross is a symbol that represents all U.S. soldiers who died in World War I,<sup>9</sup> the Court continues the work that the monuments began—asserting and enacting a white, Christian national identity.

This Essay proceeds as follows. Part I discusses the interrelationship of Confederate and Christian symbolism at two specific moments in American history. Part II then explains why religious displays and Confederate monuments are more than “merely” symbolic acts of expression but instead, actively work to construct a Christian and white national identity. Part III turns to doctrine, providing an overview of the Supreme Court's current approach to adjudicating the constitutionality of religious displays under the Establishment Clause and discussing how the existing doctrinal approach has failed to account for these symbols' unique performative force and social meaning. Moreover, it explains

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7. See *infra* notes 25–38 and accompanying text.

8. See *infra* Sections III.B–C.

9. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019).

how the Supreme Court's 2019 decision in *American Legion v. American Humanist Association*<sup>10</sup>—which has reconfigured the Establishment Clause doctrine pertaining to religious symbols—aggravates and recreates this problematic dynamic.

## I. HISTORY

Confederate symbolism bears a complicated relationship to the Christian cross. This historic relationship of Confederate and Christian symbolism is sometimes mentioned in passing in challenges to those symbols, but it rarely plays an important role in courts' legal analyses. As this Part explains, Confederate and Christian symbols are interrelated in two significant ways. First, the images themselves are often visually merged: Confederate symbolism incorporates the cross,<sup>11</sup> and the cross has been used by the Ku Klux Klan to represent white supremacist messages.<sup>12</sup> Second, the adoption of Confederate symbols and of certain public expressions of Christian belief are temporally related, reflecting flashpoints in American history when cultural disputes over race and religion were particularly intense. Yet, as discussed further in Part III, this interrelationship is rarely taken seriously in determining the meaning of such displays.

### A. CHRISTIANITY AND CONFEDERACY: OVERLAPPING CHRONOLOGY AND SYMBOLOGY

The most obvious example of the visual interrelationship of Christian and Confederate imagery is the Confederate flag. The Confederate flag (technically known as the Confederate Battle Flag)<sup>13</sup> incorporates the so-called St. Andrew's Cross—an "X" shape that resembles a cross turned on its side.<sup>14</sup> The St. Andrew's Cross purportedly represents the martyring of St. Andrew, who was said to have been crucified on a cross turned sideways.<sup>15</sup> The St. Andrew's cross became

10. See generally *Am. Legion*, 139 S. Ct. at 2067 (holding that the display of a Latin cross monument does not violate the Establishment Clause).

11. See *infra* text accompanying notes 14–16.

12. See *infra* text accompanying notes 17–18.

13. The Confederacy's official flag was not the one popularly associated with the Confederacy, which is the Confederate Battle Flag. The Confederacy's official flag did not contain a cross but was similar enough to the Union flag that soldiers could confuse the two in the heat of battle—hence the need for a separate and visually distinct battle flag. See, e.g., Erin Blakemore, *How the Confederate Battle Flag Became an Enduring Symbol of Racism*, NAT'L GEOGRAPHIC (Jan. 12, 2021), <https://www.nationalgeographic.com/history/article/how-confederate-battle-flag-became-symbol-racism> [<https://perma.cc/SP86-4KNR>].

14. JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA'S MOST EMBATTLED EMBLEM 5–6 (2005).

15. See, e.g., *Briggs v. Mississippi*, 331 F.3d 499, 504–05 (5th Cir. 2003). Interestingly, an early proponent of incorporating the St. Andrew's cross in the Confederate flag favored that symbol because it would not be as likely to provoke religious objections, "because it did not stand out so conspicuously as if the cross had been placed upright . . ." John M. Coski, *The Confederate Battle Flag in Historical Perspective*, in CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH 89, 90

so entwined in the Southern consciousness and identity after its initial use as a Confederate Battle Flag that it was sometimes referred to simply as the "Southern cross"—thus linking Southern and Christian identity.<sup>16</sup>

Likewise, the Ku Klux Klan adopted a white Latin cross (i.e., a cross with a longer vertical arm) as one of its primary symbols. As Justice Thomas pointed out in his concurrence in *Capitol Square Review & Advisory Board v. Pinette*, the Klan had occasionally drawn on the religious meaning of the cross, and in that particular case, wished to erect the cross both because a cross formed a part of the Confederate flag and because part of the Klan's agenda was to establish a Christian nation.<sup>17</sup> Indeed, the Klan of the 1920s, too, was motivated by a mixture of religious and racial bias, asserting the superiority of particular strands of white Protestant Christianity in the face of an America that was increasingly ethnically and religiously diverse due to decades of robust immigration.<sup>18</sup>

The timing of the proliferation of both Christian and Confederate symbolism is also significant. There are two particularly important points along the timeline of American history during which Confederate and Christian symbolism gained particular prominence in public spaces. The first is during the late nineteenth and early twentieth centuries (from approximately 1900 until the early 1920s), when the largest number of Confederate monuments were erected.<sup>19</sup> This period saw widespread terrorism against Black Americans, after they had enjoyed a brief moment of political and economic power during Reconstruction, as well as the rise of the Ku Klux Klan and the rise of Jim Crow segregation and disenfranchisement of Black people, primarily in

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(J. Michael Martinez, William D. Richardson & Ron McNinch-Su eds., 2000) (emphasis omitted) (quoting letter from William Porcher Miles to G.T. Beauregard (Aug. 27, 1861)).

16. Coski, *supra* note 15, at 97.

17. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770–72 (1995) (Thomas, J., concurring); see also Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 842–43 (2020) (noting the United States's "long history" of combining white racial and Christian religious identity).

18. See, e.g., Gustaf Forsell, *Blood, Cross and Flag: The Influence of Race on Ku Klux Klan Theology in the 1920s*, 21 POL., RELIGION & IDEOLOGY 269, 272–76 (2020). Of course, the Christianity at issue is not an ecumenical one; Catholics, who also embrace the symbol of the Latin cross, were an object of the Klan's hatred. See, e.g., Martin J. Scott, *Catholics and the Ku Klux Klan*, 223 N. AM. REV. 268, 268 (1926) ("Among the elements of our population which [the Ku Klux Klan] opposes are the members of the Catholic Church. It is affirmed that Catholics do not amalgamate with the rest of the people, that their system of parochial schools makes them a people apart, and that they are really not American because they owe allegiance to a foreign power, the Pope of Rome."). Yet, this narrowly Protestant meaning of the cross seems to have become subsumed in its more generic representation of Christianity.

19. S. POVERTY L. CTR., WHOSE HERITAGE? PUBLIC SYMBOLS OF THE CONFEDERACY 14–15 (2016), [https://splcenter.org/sites/default/files/com\\_whose\\_heritage.pdf](https://splcenter.org/sites/default/files/com_whose_heritage.pdf) [<https://perma.cc/2JNT-N3NJ>]; *AHA Statement on Confederate Monuments* (August 2017), AM. HIST. ASS'N (Aug. 28, 2017), <http://www.historians.org/news-and-advocacy/aha-advocacy/aha-statement-on-confederate-monuments#:~:text=To%20remove%20such%20monuments%20is,appropriate%20commemoration%20of%20those%20events.> [<https://perma.cc/AK8B-345A>].

the South.<sup>20</sup> In addition, it was a period in which America was becoming increasingly diverse—ethnically, religiously, and politically—due to a tremendous rise in immigration. This increase was accompanied by growing anti-immigrant sentiment, which ultimately resulted in the national quotas of the Immigration Act of 1924.<sup>21</sup> This period also encompassed the First World War, and, shortly thereafter, the creation of numerous memorials to the war dead, approximately forty of which include Latin crosses.<sup>22</sup> This was also the era of the first Red Scare, which combined fear of immigrants, Jews, and Communists, since these categories were closely associated in public discourse.<sup>23</sup> Interestingly, the association between the Confederacy and the cross, as an explicitly Christian symbol, seems to have first developed during this period, well after secession and the Civil War; the Confederacy had initially sought to avoid incorporating a cross into its flag in order not to appear to exclude non-Christians from the political community.<sup>24</sup>

A second era of adopting both Christian and Confederate symbolism occurred in the post–World War II era. A second smaller burst of Confederate monument-building occurred in the period from the mid-1950s to the late 1960s.<sup>25</sup> As one author explains, “white Southerners rediscovered” the Confederate flag after World War II.<sup>26</sup> The Eleventh Circuit Court of Appeals recounts in *Coleman v. Miller* how in 1956, Georgia adopted a new state flag that incorporated the St. Andrew’s Cross from the Confederate Battle Flag, as part of the state legislature’s “resistance package” to school desegregation.<sup>27</sup> Similarly, the Alabama state capitol did not fly the Confederate flag until 1963,

20. See HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 14–16 (2002); Eric Foner, *Why Reconstruction Matters*, N.Y. TIMES (Mar. 28, 2015), <https://www.nytimes.com/2015/03/29/opinion/sunday/why-reconstruction-matters.html> [<https://perma.cc/RJ7L-5KY3>].

21. See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 266–67 (2002) (discussing anti-immigrant sentiments and the potential causes); *id.* at 323–24 (discussing the Johnson-Reed Immigration Act of 1924 and its nativist immigration quotas).

22. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2111 (2019) (Ginsburg, J., dissenting). “In the late nineteenth and early twentieth centuries, the use of crosses to honor the contributions of American servicemen and to memorialize the dead became increasingly widespread.” Brief for Petitioner Maryland-National Capital Park and Planning Commission at 47, *Am. Legion*, 139 S. Ct. 2067 (No. 18-18), 2018 WL 6706089, at \*47.

23. See ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 11–15 (1955); HENRY FELIX SREBRNIK, DREAMS OF NATIONHOOD: AMERICAN JEWISH COMMUNISTS AND THE SOVIET BIROBIDZHAN PROJECT, 1924-1951, at 1–2 (2010).

24. Mary Anne Case, *Who Conquers with This Sign? The Significance of the Secularization of the Bladensburg Cross*, 26 ROGER WILLIAMS U. L. REV. 336, 366–67 (2021).

25. S. POVERTY L. CTR., *supra* note 19, at 15.

26. J. Michael Martinez, *The Georgia Confederate Flag Dispute*, 92 GA. HIST. Q. 200, 201 (2008).

27. *Coleman v. Miller*, 117 F.3d 527, 528–29 (11th Cir. 1997). Notably, in 2003, after significant controversy, the State of Georgia adopted a new flag design, which no longer incorporates the St. Andrew’s cross. Edwin L. Jackson, *State Flags of Georgia*, NEW GA. ENCYCLOPEDIA (July 15, 2020), <https://www.georgiaencyclopedia.org/articles/government-politics/state-flags-of-georgia> [<https://perma.cc/VE63-5WMK>].

when then–Attorney General Robert F. Kennedy was traveling to Alabama to meet with Governor George Wallace regarding desegregation.<sup>28</sup> Going slightly further back, historian John Coski notes that the 1940s saw “the first documented use of the [Confederate Battle] flag in the rituals of the Ku Klux Klan.”<sup>29</sup>

A similar movement toward Christian expressions took hold in the same period. In the wake of *Brown v. Board of Education*,<sup>30</sup> Christian academies were founded and grew, many in response to the requirement of public school desegregation.<sup>31</sup> Around the same time, the words “In God We Trust” were officially adopted as the U.S. motto in the 1950s, and the Pledge of Allegiance was amended to include the words “under God,” during that same period of intense religious and patriotic sentiment.<sup>32</sup> Indeed, although the requirement to include the motto “In God We Trust” on U.S. coinage dates back to 1908, it was often disregarded during the first part of the twentieth century.<sup>33</sup> Finally, the immediate postwar era saw the proliferation of Ten Commandments monuments throughout the country, which were conceived by the Fraternal Order of Eagles as a measure to reduce “juvenile delinquency.”<sup>34</sup>

Once again, it is likely no coincidence that this period of monument building occurred during the immediate post–World War II era, which was also a period of growing Black empowerment in the United States and during which the civil rights movement was seeded.<sup>35</sup> Indeed, Coski describes how the Confederate flag, as both a racist and a religious symbol, enjoyed a revival at the Democratic convention of 1948: “Senator Lister Hill paraphrased William Jennings Bryan’s powerful 1896 ‘Cross of Gold’ speech, warning his fellow Democrats from the North, West, and East not to ‘crucify the South on the cross of civil rights.’”<sup>36</sup> While the first-ever cross burning by the Ku Klux Klan

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28. JAMES W. LOEWEN, *LIES ACROSS AMERICA: WHAT OUR HISTORIC SITES GET WRONG* 39 (2d ed. 2019).

29. COSKI, *supra* note 14, at 136.

30. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding state laws that require or allow racial segregation of children in public schools unconstitutional).

31. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 333 (2001).

32. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 708 (2010); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 786; ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 570–71 (2d ed. 1964).

33. Case, *supra* note 24, at 375–78.

34. This timing propitiously coincided with the release of Cecil B. DeMille’s blockbuster film *The Ten Commandments*, which provided a robust source of funds for the Fraternal Order of Eagles’s project. This history is recounted in many places; for one recounting, see *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2083 (2019).

35. See, e.g., Earl Lewis, *More Than Race Relations: A. Philip Randolph and the African American Search for Empowerment*, 19 REVS. AM. HIST. 277, 279–80 (1991) (reviewing PAULA F. PFEFFER, A. PHILIP RANDOLPH: PIONEER OF THE CIVIL RIGHTS MOVEMENT (1990)) (describing civil rights activism in the 1940s and 1950s).

36. COSKI, *supra* note 14, at 99.



was believed to be in 1915, after the lynching of the Jewish businessman Leo Frank,<sup>37</sup> a second major spate of cross burnings occurred in the 1940s, and in the wake of *Brown* in the 1950s.<sup>38</sup> Thus, these same two eras in U.S. history corresponded to the Klan's widespread use of the cross symbol to represent both religious and racial hatred and intolerance.

B. *THE FUNCTIONS OF CHRISTIAN AND CONFEDERATE SYMBOLS*

Though conclusions about causality are difficult to draw with respect to historical events, one inference from the close interrelationship of religious and racial messages, as well as the timing of their public expression, is that these symbols function to state claims about, and stake claims to, the community's identity. Speech act theory, discussed in the next Part, further supports this hypothesis. Such claims appear to gain special importance during periods of pitched political and cultural strife, when that identity seems to be particularly up for grabs.

In like fashion, Professor Mary Ann Case has argued that:

[F]rom the moment of its rise to prominence as a Christian symbol, the cross was infused with exactly the problematic combination of meanings attributed to it in [*American Legion v. American Humanist Association*]*—not simply a symbol of spiritual redemption through divine sacrifice, the cross was also inextricably linked to earthly battles, military valor, and state power.*<sup>39</sup>

Case also noted the tendency of Christian rulers “to ride into battle wearing chain mail every link of which was stamped ‘God is with us, no one can overcome us.’”<sup>40</sup> However, Case points out, the actual New Testament verse that this inscription was quoting “began with the all-important word ‘If.’”<sup>41</sup> The inscription thus “elid[ed] an important distinction between claiming that we are fighting for God (as, for example, civil rights campaigners and anti-abortion activists often have done) and claiming that God is fighting for us (a claim more closely associated with religious nationalism).”<sup>42</sup> In other words, the cross was adopted in military conflicts in order to suggest that God was on the side of those who displayed it, as well as to manifest victory by asserting that the battle was already over. It is perhaps not a stretch to suggest that it plays a similar role in the culture wars.

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37. *Virginia v. Black*, 538 U.S. 343, 354 (2003) (citing WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 144 (1987)). For a recounted history of cross burnings by the Ku Klux Klan, see *id.* at 352–57.

38. *Id.* at 354–56.

39. Case, *supra* note 24, at 354.

40. *Id.* at 374 (quoting METRO. MUSEUM OF ART, *TREASURES FROM THE KREMLIN* 184 (Polly Cone ed., 1979)).

41. *Id.* (quoting *Romans* 8:31 (King James)).

42. *Id.*

As discussed below, the Supreme Court's approach to historical context under the Establishment Clause does not make room for a nuanced analysis of the way in which this particular set of symbols functioned both to describe and instill racial and religious superiority for white Christians. In fact, the Court continues this cultural and political work by naming the cross a symbol of American identity while erasing conflicting histories and symbols and glossing over its problematic religious and racial connotations.

## II. MEANING

My earlier writing on religious symbolism draws heavily on a branch of linguistic philosophy known as "speech act theory."<sup>43</sup> This Part begins by summarizing that theory briefly, to the extent it is relevant to understanding the force and meaning of Christian and Confederate symbols. This Part then applies speech act theory in light of the historical interrelationship between the cross and white supremacist symbolism, as well as the historical context in which those symbols became prominent.

Speech act theory gives rise to a fundamental insight about the function of language—namely, that it has an active component, referred to as "performative" or "illocutionary" force.<sup>44</sup> For purposes of understanding the impact and meaning of religious and political symbols, speech act theory supports the intuitive sense that such messages have real-world effects. Even when a symbol or utterance appears to do nothing more than describe or depict events, it is also *performing the act* of asserting the truthfulness of that depiction. Indeed, while monuments and other symbolic displays are often described as "passive" memorials that simply describe or acknowledge past events, they are in fact performing speech acts: They "also help to construct the reality that they describe or purport to describe," in that they "tend to reinforce those truths or realities by presenting them as fact rather than as one contested viewpoint among many."<sup>45</sup> Or, as Professor Sanford Levinson argues in his book-length essay, *Written in Stone*, "monuments are quintessentially 'about time' and who shall control the meaning assigned to Proustian moments of past time."<sup>46</sup> Moreover, because they speak in the disembodied, sovereign voice of the state, government-

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43. See generally, e.g., Hill, *supra* note 32 (applying speech act theory to analyze ceremonial deism); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005) [hereinafter Hill, *Putting Religious Symbolism in Context*] (applying speech act theory to analyze the endorsement test).

44. See, e.g., J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 149 (J.O. Urmson ed., 1962). See generally John R. Searle, *Austin on Locutionary and Illocutionary Acts*, 77 PHIL. REV. 405 (1968) (exploring the notion of illocutionary acts).

45. See Hill, *supra* note 32, at 735.

46. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 31 (1998).

sponsored symbols have a uniquely powerful ability not just to describe a past event but, in so doing, to construct a current truth.<sup>47</sup>

The temporal dimension of monuments—their endurance over time, through changing political and social contexts—adds another layer of complexity to their performative force. Although the same symbol can gain new meaning through repetition or use in different contexts, the symbol's many existing meanings also persist. Some new meanings and usages can be understood only in light of prior meanings and usages of an expression or symbol. In fact, Justice Alito gives an example of this process in *American Legion*, stating that the 2019 fire that severely damaged the Notre Dame cathedral in Paris “provides a striking example” of how a symbol can come to carry secular meanings.<sup>48</sup> Justice Alito explained that while “the French Republic rigorously enforces a secular public square, the cathedral remains a symbol of national importance to the religious and nonreligious alike”<sup>49</sup>; indeed, President Macron stated that it is “[t]he place where we survived epidemics, wars, [and] liberation.”<sup>50</sup> What Justice Alito ignores, of course, is that, this central symbolic role would not be possible for Notre Dame if Notre Dame were not a Roman Catholic house of worship, and if the official religion of France had not once been Roman Catholicism. It is for these reasons, too, that Notre Dame was desecrated and its statues symbolically decapitated during the French Revolution; it was precisely the church's unity with the monarchy, represented by Notre Dame itself, that provoked such anger and presumably placed Notre Dame at the center of France's “wars” and “liberation.”<sup>51</sup> In other words, it's not about the gargoyles: The secular symbolism of Notre Dame as the heart of French national identity would be incoherent without an understanding of the cathedral's connection to the Catholic Church, and the

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47. Cf. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 16 (1997) (“[T]he ‘speech’ of the state often takes a sovereign form, whereby the speaking of declarations are, often literally, ‘acts’ of law.”). Scholars have also noted the considerable social capital represented by the ability of a person or group to cause the erection of a monument: “Public monuments do not arise as if by natural law to celebrate the deserving”; rather, “they are built by people with sufficient power to marshal (or impose) public consent for their erection.” Thus, “monument[s] represent[] a kind of collective recognition—in short, legitimacy—for the memory deposited there.” LEVINSON, *supra* note 46, at 63 (quoting Kirk Savage, *The Politics of Memory: Black Emancipation and the Civil War Monument*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 127, 135–36 (John R. Gillis ed., 1994)).

48. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2084 (2019).

49. *Id.* (footnote omitted).

50. *Id.* (quoting Lori Hinnant, Samuel Petrequin & Elaine Ganley, *Fire Ravages Soaring Notre Dame Cathedral, Paris Left Aghast*, AP NEWS (Apr. 15, 2019), <https://apnews.com/article/fires-ap-top-news-paris-international-news-victor-hugo-7538fdb8fc8b476b8c442foc2ac52115> [<https://perma.cc/S4PW-YYSH>]).

51. Erin Blakemore, *The Notre-Dame Cathedral Was Nearly Destroyed by French Revolutionary Mobs*, HISTORY (Apr. 15, 2019), <https://www.history.com/news/notre-dame-fire-french-revolution> [<https://perma.cc/AU8N-YN5F>]; see also *Am. Legion*, 139 S. Ct. at 2085 n.24 (discussing the French Revolution's attempt to “dechristianize”).

Catholic Church's connection to state power. Thus, while a symbol may break with its prior contexts and prior usages by being used in new ways and new contexts, it is also true that each time it is used, it invokes its past usages and reconsolidates them, reminding the observer of its historical meanings.<sup>52</sup> As they endure through changing contexts, the meaning of historical monuments is thus simultaneously vulnerable and persistent.

The proliferation and enthusiastic adoption of Christian and Confederate symbols at particular moments in U.S. history may be understood in light of speech act theory. Such expressions are never merely backward-looking; they always also perform an act *in the present*. In assigning meaning to past events, those symbols also have the effect of asserting certain identities and realities. A Latin cross built to memorialize World War I standing on public land in the twenty-first century not only recalls the losses of American lives in a century-old war; in "express[ing] the community's grief at the loss of the young men who perished," it redefines that community by asserting a deep relationship between Christianity and community membership.<sup>53</sup>

For this reason, it is particularly unsurprising that many Confederate monuments and public religious expressions have coincided with moments of doubt about American identity: Monuments are most needed to do the performative work of asserting a white Christian national identity precisely when that identity is threatened.<sup>54</sup> Moreover, they are most effective when they are presented as representing an authoritative consensus in their depiction of a past event: Think of Justice Alito's continual evocation of the "row after row of plain white crosses marking the overseas graves"<sup>55</sup> of Americans in *American Legion*, together with his reliance on the apparent ubiquity of crosses—the religious symbol of the majority religion in the United States—as a basis for the unproblematic identification of the Latin cross with *all* war dead.<sup>56</sup> The

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52. Cf. BUTLER, *supra* note 47, at 3 (describing the "condensed historicity" of ritual, in that "it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of utterance").

53. *Am. Legion*, 139 S. Ct. at 2074. See generally Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821 (2014) (applying cognitive neuroscience to dispute the notion that religious symbols are merely "passive").

54. Cf. LOEWEN, *supra* note 28, at 36 (describing the spate of monument-building in the late nineteenth century as "a way to continue the Civil War by other means"); Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 83–84 (2021) (noting the historical connection between Confederate monument-building and threats to white supremacy).

55. *Am. Legion*, 139 S. Ct. at 2074.

56. *Id.* at 2076–77. As Judith Butler points out, the speech act succeeds "to the extent that it draws on and covers over the constitutive conventions by which it is mobilized"—that is, to the extent that it suppresses or renders invisible the sociohistorical context or contexts that give it its force. BUTLER, *supra* note 47, at 51 (emphasis omitted); see also Savage, *supra* note 47, at 143 ("Inasmuch as the monuments make credible particular collectivities, they must erase others; or more precisely, they erase the very possibility of rival collectivities."). Interestingly, Professor Reva Siegel casts Justice Alito's opinion in *Dobbs v. Jackson Women's Health Organization* in a similar light,

visual plethora of crosses invoked by Alito certainly demonstrates the sheer numerical dominance of Christianity as the religion of those who fought in World War I, but it does not prove its universality. Indeed, the Supreme Court's very decision to treat the Latin cross as a largely secular symbol likewise forcefully asserts the unity of Christian and American identity, while simultaneously erasing other religious identities and denying that such a move has taken place.<sup>57</sup> The cross has simply merged with the backdrop of American history and culture, the Court seems to say, without recognizing that this merger aggravates rather than alleviates the Establishment Clause difficulty.

### III. DOCTRINE

This Part briefly describes the evolution of the Supreme Court's Establishment Clause jurisprudence with respect to displays of religious symbolism and other public religious expressions, with a particular emphasis on the Court's recent turn to history as a doctrinal tool. While the Supreme Court has long suggested the importance of history in Establishment Clause cases, the 2021 Term saw a more exclusive focus on history—in the Establishment Clause context among others—than in the past.<sup>58</sup> Yet the actual historical methodology employed by the Court to determine the constitutionality of religious expressions remains obscure. This Part argues that the performative force of cross displays, informed by their history, should be taken into account in determining whether its use is exclusionary in nature. It also argues that the Supreme Court, in insisting on the inclusive and anodyne nature of the cross, is replicating the work of the cross itself, by using seemingly descriptive language to both assert and instantiate American identity as a Christian one.

#### A. A BRIEF OVERVIEW OF THE SUPREME COURT'S RELIGIOUS SYMBOLISM JURISPRUDENCE

The U.S. Supreme Court's legal odyssey concerning religious displays began in 1980 with a brief, *per curiam* opinion striking down a Kentucky statute

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noting that the turn to history functions as a false veneer of constraint on judges imposing their own values in adjudication, while in fact enabling and entrenching the judge's values:

A judge's turn to the historical record can just as easily disguise judicial discretion as constrain it. The originalist judge may employ the historical record covertly to express values that the originalist judge does not wish to acknowledge as his own.

In these circumstances, originalism is a practice of living constitutionalism that is not forthright about its values, aims, and commitments. This mode of reasoning is an antidemocratic mode of constitutional interpretation, not because it appeals to the past, but because it refuses to own its own values as it is doing so.

Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1183 (2023).

57. *Am. Legion*, 139 S. Ct. at 2074–75.

58. Other important cases from the 2021 Term in which the Court embraced a primarily historical methodology include *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127–28 (2022), and *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2246–47 (2022).

requiring a copy of the Ten Commandments to be posted in every public school classroom in the state.<sup>59</sup> The prescribed copy of the Decalogue itself proclaimed that the Commandments were intended to reflect their “secular” dimension “as the fundamental legal code of Western Civilization and the Common Law of the United States.”<sup>60</sup> But the Court rejected this claimed purpose, finding that the content of the Commandments was largely religious, that the purpose for requiring their posting was religious rather than secular, and therefore that it violated the First Amendment’s prohibition on establishing religion.<sup>61</sup> Thus, beginning with its earliest case, the Court considered both the literal content of the display and what “function” it was performing—seen here as reaching beyond that of mere secular education.<sup>62</sup>

Four years later in *Lynch v. Donnelly*, the Supreme Court confronted a challenge to a Christmas display erected by the City of Pawtucket, Rhode Island.<sup>63</sup> The Court decided, five to four, that the display, which consisted of a nativity scene surrounded by various secular elements such as “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads ‘SEASONS GREETINGS,’” was constitutional.<sup>64</sup> The majority opinion drew on the nation’s long history of acknowledging religious belief, such as through national prayer days, the National Motto, the words “under God” in the Pledge of Allegiance, and publicly subsidized congressional chaplains.<sup>65</sup> It also relied upon the physical and social context of the display, which the Court understood to have a secularizing effect on the central religious display (which was, of course, a visual commemoration of the birth of Jesus).<sup>66</sup> The Court said that “the context of the Christmas season” and the surrounding secular elements in the display meant that the display was intended to do, and in fact did, nothing more than “celebrate the Holiday and . . . depict the origins of that Holiday.”<sup>67</sup> The Court thus considered the “social meaning”—that is, both the meaning and force or function (“depict[ing],” “celebrat[ing]”) that observers in a community would ascribe to the symbols—in determining the

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59. *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (per curiam). Three Justices disagreed with the majority’s decision to give the case summary treatment, however. *Id.* at 43; *id.* at 47 (Rehnquist, J., dissenting).

60. *Id.* at 41 (majority opinion) (quoting KY. REV. STAT. ANN. § 158.178 (West 1978)).

61. *Id.* at 41–43. And indeed, the notion that the Ten Commandments are the foundation of the U.S. common law is almost entirely without historical basis. See Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1514–16 (2005).

62. *Stone*, 449 U.S. at 42.

63. See generally *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding the city’s Christmas display did not violate the Establishment Clause).

64. *Id.* at 671.

65. *Id.* at 674–78.

66. See *id.* at 679–85.

67. *Id.* at 679, 681.

display's constitutionality.<sup>68</sup> And in an influential concurrence, Justice O'Connor suggested that the question whether the government has performed the linguistic act of "endorsement" of religion—as opposed to mere "acknowledgement"—should be at the center of the Court's analysis in such cases.<sup>69</sup>

Subsequent cases applied a similar analysis, though over time, the Court's emphasis vacillated between the social meaning of the displays and their historical pedigree. In a series of cases decided between 1989 and the early 2000s, it seemed that a fragile majority of the justices agreed that the key question was whether the displays "endorsed" religion.<sup>70</sup> This approach to the constitutionality of religious symbolism and other public displays of religiosity, derived from Justice O'Connor's concurrence in *Lynch*, was referred to as the "endorsement test."<sup>71</sup> But the Court's embrace of the endorsement test was never robust and, as noted below, did not last long. Indeed, by 2005, the Supreme Court had appeared to abandon that test in upholding a Ten Commandments monument erected in a public park and surrounded by secular monuments. In *Van Orden v. Perry*, the plurality opinion declined to apply any particular doctrinal test, validating the display in part because of its "passive" nature.<sup>72</sup>

### B. THE TURN TO HISTORY

At the time the Supreme Court faced the so-called Bladensburg cross case, *American Legion*, in 2019, the case law was genuinely muddled. Most of its decisions involving public displays of religiosity had not garnered a majority of the Court, and lower courts were applying a mishmash of doctrinal tests including "endorsement," the *Lemon* test (derived from the 1971 case *Lemon v. Kurtzman*),<sup>73</sup> "history and tradition," and a "coercion" test.<sup>74</sup> Sometimes the

68. See *id.* at 681; see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (defining "social meaning" as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context"). The Court did not use the term "social meaning" in *Lynch*.

69. *Lynch*, 465 U.S. at 691–94 (O'Connor, J., concurring).

70. See *County of Allegheny v. ACLU*, 492 U.S. 573, 600–02, 619 (1989); *id.* at 636 (O'Connor, J., concurring); *id.* at 655 (Kennedy, J., concurring); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (applying the endorsement test to student-led prayer at a public high school football game).

71. See, e.g., *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309–10 (applying the endorsement test to student-led prayer at a public high school football game).

72. See *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005). Justice Breyer's concurrence, which supplied the necessary fifth vote, "also declined to apply the endorsement test, but" applied its functional equivalent "in order to determine whether a religious or secular message was conveyed" by the symbol. Hill, *Putting Religious Symbolism in Context*, *supra* note 43, at 501–02.

73. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that a law violates the Establishment Clause if it is religious in purpose or effect, or if it creates excessive entanglement between religion and government).

74. See, e.g., *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092–93 (2019) (Kavanaugh, J., concurring) (describing the various approaches the Supreme Court has taken in Establishment Clause cases); David W. Cook, Comment, *The Un-Established Establishment Clause: A Circumstantial*

Court attempted to discern a symbol's meaning, whereas in other cases it simply looked to see if history provided examples of similar religious acknowledgements, and whether the symbols were sufficiently "passive" and longstanding.<sup>75</sup> Yet, the Court once again failed to regularize the approach to such displays under the Establishment Clause.<sup>76</sup> A seven-justice majority agreed that the display at issue—a thirty-two-foot-tall Latin cross commemorating World War I dead, erected in 1925 and maintained on public property in the middle of a busy highway—was constitutional.<sup>77</sup> But no clear rule emerged, other than a "presumption" that longstanding "religiously expressive monuments, symbols, and practices" are constitutional.<sup>78</sup> The Court added that its approach "focuses on the particular issue at hand and looks to history for guidance."<sup>79</sup>

Moreover, while acknowledging that the Latin cross is "a preeminent Christian symbol,"<sup>80</sup> the Court also claimed that "there are instances in which its message is now almost entirely secular," such as when it is used by insurance and medical companies in their logos, presumably to signify healing.<sup>81</sup> Indeed, after noting that "not all . . . communities" embraced the cross as a symbol of those who died in World War I, and that the soldiers' graves might be "marked by white crosses *or* Stars of David," Justice Alito then elided that non-Christian symbol in the very next sentence, stating, "[t]he solemn image of endless rows of white crosses became inextricably linked with and symbolic of the ultimate

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*Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 75 (2004) ("Lacking clear direction, the lower courts commonly apply all the tests the Court has used.").

75. See *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring) ("[E]ach category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation."); Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 332–34 (2007) (describing the Court's more relaxed approach for "'passive' religious display[s]").

76. For an excellent overview of the case and its implications, see generally Carl H. Esbeck, *The World War I Memorial Cross Case: U.S. Supreme Court Takes a New Approach with the Establishment Clause*, 63 J. CHURCH & STATE 109 (2021).

77. *Am. Legion*, 139 S. Ct. at 2074, 2077.

78. *Id.* at 2085.

79. *Id.* at 2087.

80. *Id.* at 2074. Note as well that the cross is associated with Christianity not just because it represents the crucifixion of Jesus of Nazareth, but also because the X (cross) shape is identical to the Greek letter *chi*, which is the first letter of the word *Christos*, or Christ, in Greek. It often appears in combination with the second Greek letter, *rho*, in which case it is known as the "chi-rho monogram." See Peter E. Lewis, *The Origin of the Chi-Rho Monogram as a Christian Symbol*, 14 J. NUMISMATIC ASS'N AUSTL. INC. 19, 20–21 (2003).

81. *Am. Legion*, 139 S. Ct. at 2074–75. The cross is used as a symbol of healing, likely because Christ has been characterized as a (physical and spiritual) healer. See, e.g., AMANDA PORTERFIELD, *HEALING IN THE HISTORY OF CHRISTIANITY* 21–22 (2005).



price paid by 116,000 soldiers.”<sup>82</sup> It is not clear how Alito made this leap from acknowledging alternate religious symbolism used to commemorate non-Christian dead to asserting that the cross nonetheless represents *all* of the Americans who died in the war. He simply suppressed or ignored the existence of non-Christian war dead through bare assertion, relying on the performative legal force of his language to make it so.

In sidelining the obvious Christian meaning of the cross, the Court’s opinion in *American Legion* recalls the earlier plurality opinion of Justice Kennedy in *Salazar v. Buono*, in which the Court declined to require the dismantling of an enormous Latin cross placed on federal land in the middle of the Mojave Desert as a World War I memorial, after the plot of land holding the cross was transferred to a private party.<sup>83</sup> In remanding to the lower court for further findings, Justice Kennedy suggested, without deciding, that the cross was not a purely sectarian symbol but could also carry secular meanings, particularly when it was used to memorialize the war dead.<sup>84</sup>

Prefiguring his majority opinion in *American Legion*, Justice Alito wrote in concurrence in *Buono* that the Court did not need to remand for further proceedings after the land transfer, because no Establishment Clause violation was present in any case.<sup>85</sup> “The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock,” Justice Alito noted.<sup>86</sup>

But . . . the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.<sup>87</sup>

In other words, the cross’s association with war made it a secular rather than a sectarian symbol. Yet, arguably, this association with state authority and national

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82. *Id.* at 2085 (emphasis added).

83. *Salazar v. Buono*, 559 U.S. 700, 721–22 (2010) (plurality opinion).

84. Justice Kennedy explained:

[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

*Id.* at 721.

85. *Id.* at 723 (Alito, J., concurring).

86. *Id.* at 725 (citing *Buono v. Norton*, 371 F.3d 543, 548 (9th Cir. 2004)).

87. *Id.*

identity makes the cross's display more problematic rather than less.<sup>88</sup> Moreover, Justice Alito expressed concern that removing the cross due to Establishment Clause concerns might be "viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor."<sup>89</sup>

A final development in the Court's jurisprudence involving public religious expression and the role of history occurred in the 2021 Term with *Kennedy v. Bremerton School District*.<sup>90</sup> Although not involving a longstanding monument or other symbolic display, *Kennedy* can be viewed as a logical extension of the Court's direction in challenges to government-sponsored Christian expression. The plaintiff in *Kennedy* had sued over his alleged termination from a public high school coaching position because of his decision to pray publicly and visibly immediately after the games.<sup>91</sup> While the case primarily raised free speech and free exercise issues, the Court found that it was also required to address whether acquiescing in Kennedy's conduct would constitute an Establishment Clause violation on the part of the school district; if it did, the school district had argued, that concern would be sufficiently compelling to overcome Kennedy's free speech claims.<sup>92</sup> Avoiding this apparent clash of rights, the Court rejected the argument that the Establishment Clause would be violated in this scenario.<sup>93</sup> In part, this is because "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"<sup>94</sup> The application of this historical approach in Kennedy's case was left entirely unexplained, however, and it appears to refer only to a generalized recognition that there exists a tradition of public acknowledgement of religion in the United States.

From this complex body of cases, a few principles (but no clear rules) can be discerned. First, the Court has increasingly eschewed concerns about the apparently sectarian nature of religious displays or expressions and has instead looked toward historical pedigree, albeit in a largely undifferentiated way, with no clear methodology. The Court has similarly shifted from a focus on whether a display had secularizing elements to counteract its religious content—as in the nativity scene cases—to whether the religious expression was well-established in American history and tradition. In this approach, it drew on a line of cases recognizing the acceptability of legislative prayer at governmental

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88. See Case, *supra* note 24, at 354; see also Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1216 (2011) (discussing the claim that the Pledge of Allegiance, including the words "under God," is patriotic rather than religious and stating that "[t]he conjunction of religious and patriotic propositions makes the request for a religious affirmation worse, not better").

89. *Buono*, 559 U.S. at 726 (Alito, J., concurring).

90. See generally *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (holding a public employee's Free Exercise Clause and Free Speech Clause rights were violated by the school district suspending him for praying on the football field after games).

91. *Id.* at 2415–19.

92. *Id.* at 2426–27.

93. *Id.* at 2428–32.

94. *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

convenings, even when that prayer was sectarian, as long as it was not coercive.<sup>95</sup> However, the general proposition that public acknowledgements of religion were widespread and broadly acceptable throughout the nation's history appears to do most of the work in these cases. This general assumption appears to relieve the Justices of the need to conduct a careful or nuanced analysis of specific expressive practices and how they have been mobilized in particular cultural contexts. Finally, the Court has shown greater concern with the impact and social meaning of tearing down longstanding monuments than with the social meaning of keeping them in place, adopting a "presumption" that longstanding, "passive" religious expressions are constitutional.<sup>96</sup> The Court's approach thus suggests that while tearing down monuments is an act—one that can cause injury and harm—the monuments' expression is not.

### C. OPINIONS AS MONUMENTS

The Supreme Court's recent turn to history in evaluating the constitutionality of public displays of religiosity may be criticized on at least two separate grounds. First, the Court's approach to history is overly general and simplistic, ignoring the ways in which the cross's historic association with symbols of white supremacy and anti-immigrant sentiment have rendered it anything but an inclusive symbol of bravery and patriotism. This association with national identity aggravates rather than nullifies its message of Christian dominance. In suggesting that those fighting in a war on behalf of the United States are represented by a Christian symbol, it both erases the sacrifices of non-Christians and asserts an affiliation of Christianity with national identity that is essentially unexamined.<sup>97</sup>

This is not to say that the cross always or inevitably asserts a message of Christian dominance and white supremacy. Indeed, the goal of this Essay is not to argue that the Bladensburg cross, or any particular cross, has this effect.<sup>98</sup>

95. *Town of Greece*, 572 U.S. at 575–78; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

96. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2081–82 (2019) (adopting a presumption in favor of longstanding symbols); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (upholding a religious monument in part because of its "passive" nature).

97. For example, at the oral argument in *Salazar v. Buono*, Justice Scalia engaged in this exchange with counsel for the challenger of the cross:

JUSTICE SCALIA: [The cross is] erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the—the cross is the—is the most common symbol of—of—of the resting place of the dead, and it doesn't seem to me—what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: . . . The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

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

98. The American Humanist Association's Supreme Court brief might be read to suggest such a connection, however. See Brief for Respondents at 5–7, *Am. Legion v. Am. Humanist Ass'n*, 139

The argument of this Essay is instead that the Court's history of the cross is itself a narrow and exclusionary one; it highlights one preferred narrative of the cross's meaning and discards at least one other narrative that has the potential to explain the cross's ability to injure, exclude, and marginalize. The cross's reappearance in new contexts, while creating the possibility of new meanings,<sup>99</sup> also carries with it the historical context of its origins. Those origins involve assertions of racial and religious hierarchy, which do not completely disappear simply because the cross is used in a new physical setting.

This criticism of the Court's use of history leads to a second, perhaps more important, criticism of the Court's understanding of the impact of the cross today: that the Court itself reinforces the damaging, exclusionary force of the cross by denying its performative force as an exclusionary symbol and insisting on its secular, patriotic meaning. The Court would like to rip the cross from its historical context and attribute a new meaning based on new usages in new settings; but as noted above, this is not how symbols work.<sup>100</sup> Instead, each new contextualization has the potential to reinforce or weaken past meanings.

Arguably, the continuing existence of crosses that were erected as symbols of white Christian supremacy suggests the vulnerability of that supremacy. Their presence reminds viewers not only of their exclusionary and racist message, but also of the need to assert this message during times of threat to the identity of the United States as a white, Christian nation. They are, ironically, monuments to their own vulnerability, asserting and reinscribing Christian dominance precisely because it needs shoring up.<sup>101</sup> Yet, rather than dismantling those symbols,<sup>102</sup> the Supreme Court's opinions act as scaffolding around them, attempting once again to reassert the cross's status as a symbol of American identity, while suppressing the fact that this identity formation occurs at the cost of excluding religious minorities and reinforcing racial and ethnic hierarchies.

Justice Alito's insistence in both *Buono* and *American Legion* that the cross is a universal symbol of those who died in war functions as an attempt to assert the dominance of Christianity at a moment when its position in American society is uncertain. Indeed, polling has indicated a consistent and precipitous

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S. Ct. 2067 (2019) (Nos. 17-1717, 18-18), 2019 WL 338889, at \*5-7; *Am. Legion*, 139 S. Ct. at 2089 (complaining of the brief's "disparaging intimations").

99. See *Am. Legion*, 139 S. Ct. at 2084 ("[J]ust as the purpose for maintaining a monument, symbol, or practice may evolve, '[t]he "message" conveyed . . . may change over time.'" (second alteration in original) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 477 (2009))).

100. See *supra* text accompanying notes 48-52; cf. BUTLER, *supra* note 47, at 55-59 (discussing the Court's attempt to separate content from context in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which also dealt with cross burning).

101. See *supra* text accompanying notes 19-42.

102. The dismantling of some racist symbols—Confederate monuments—has begun in earnest. In 2020, 157 Confederate monuments were taken down, and in 2021, the figure was seventy-three. Giselle Rhoden & Dalila Paul, 73 *Confederate Monuments Were Removed or Renamed Last Year, Report Finds*, CNN (Feb. 3, 2022, 12:59 PM), [https://www.cnn.com/2022/02/02/us/confederate-monuments-removed-2021-whose-heritage/index.html# \[https://perma.cc/V2BW-6VVE\]](https://www.cnn.com/2022/02/02/us/confederate-monuments-removed-2021-whose-heritage/index.html# [https://perma.cc/V2BW-6VVE]).

fall in the percentage of Americans who identify as Christians—down to sixty-four percent in 2020, compared with ninety percent in 1972.<sup>103</sup> Justice Alito himself has publicly stated his view that Christians are persecuted in the United States.<sup>104</sup> The Supreme Court appears to be adopting this mantle of victimhood when it invokes, in somewhat overwrought terms, “[a] government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine” and notes that “[m]ilitantly secular regimes have carried out such projects in the past.”<sup>105</sup> Similarly, the United States is currently experiencing sharp cultural debates around race and identity. For example, 148 Confederate monuments were taken down between 2015 and early 2021, a majority of which were removed after the killing of George Floyd, an unarmed Black man, by police in 2020.<sup>106</sup> And while the Court’s approval of cross monuments in cases such as *American Legion* may not have overtly racial overtones, it is important to recall the ways in which the Christian cross represents a rejection and suppression of other religious identities often associated with non-whites or non-Europeans (such as Muslim, Hindu, and Jewish people).<sup>107</sup> The Supreme Court’s opinions affirming the constitutionality of cross displays by recreating and reinscribing them as universal symbols of national identity, in this context, thus functions to reassert the dominance of white, Christian identity at a moment when it is slipping away.

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103. PEW RSCH. CTR., MODELING THE FUTURE OF RELIGION IN AMERICA 6–7 (2022), [https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/09/US-Religious-Projections\\_FOR-PRODUCTION-9.13.22.pdf](https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/09/US-Religious-Projections_FOR-PRODUCTION-9.13.22.pdf) [<https://perma.cc/7WV4-SW45>].

104. Matt Ford, *Samuel Alito Believes That Christians Are Oppressed in America*, NEW REPUBLIC (Aug. 2, 2022), <https://newrepublic.com/article/167266/samuel-alito-religious-freedom-doctrine> [<https://perma.cc/5AG5-DX2X>]; see also *Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society*, REV (Nov. 12, 2020), <https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society> [<https://perma.cc/Q7XV-YS34>] (quoting Justice Alito as describing the Little Sisters of the Poor, who have brought multiple lawsuits to assert their rights to religious freedom, as being “under unrelenting attack for the better part of a decade”).

105. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2084–85 (2019).

106. Rachel Treisman, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM), <https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remain> [<https://perma.cc/T53V-6V8N>] (“[Ninety-four] of the Confederate symbols removed in 2020 were monuments, compared to [fifty-four] monuments removed between 2015 and 2019.”); see also LOEWEN, *supra* note 28, at 50 (describing the campaign to remove Confederate statues in the wake of the Nazi march in Charlottesville, Virginia).

107. Moreover, the American Legion itself had famously engaged in a campaign to whitewash the teaching of American history in schools in the early twentieth century. As historian James Loewen recounts, the American Legion urged schools in 1925 to “inspire the children with patriotism” and emphasize only the positive. LOEWEN, *supra* note 28, at 8. This directive was motivated in large part by the concern that children’s history textbooks overemphasized slavery and other negative aspects of American history—a concern that was shared by the Ku Klux Klan. Adam Laats, *Conservatives Want to Control What Kids Learn, but It May Backfire*, WASH. POST (Feb. 7, 2023, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2023/02/07/desantis-history-education> [<https://perma.cc/V5EA-FF7U>].

The Supreme Court's shift from the endorsement test approach to a historical approach helps to cement this process. The endorsement test used the "reasonable observer" heuristic to determine how a member of the community might perceive the social meaning of a religious symbol, taking account of its history and physical context.<sup>108</sup> Although the reasonable observer was subject to mounds of criticism,<sup>109</sup> it had the virtue of opening a debate as to how best to identify social meaning and whose perspective should count. It laid bare the interpretive device.<sup>110</sup> The approach of cases like *American Legion* and *Kennedy*, by contrast, is anything but transparent. Its methodology is obscure.<sup>111</sup> And it invites the justices to speak in the seemingly objective, impersonal voice of history and historical sources—a voice that conceals the choices the justice made in terms of which narratives and which sources to rely upon and emphasize. The shift from the endorsement approach to the historical approach thus allows the Court to assert the meaning of the cross with greater authoritativeness, as it speaks in the disembodied and seemingly impartial voice of history itself.

### CONCLUSION

This Essay argues that religious symbols, such as the Latin cross war memorials discussed here, are anything but passive. Instead, they act to construct a religious and racial hierarchy by asserting a connection between political, racial, and religious identity in the disembodied, sovereign voice of the state. In doing so, they necessarily suppress counternarratives and conflicting identities, laying waste to the claims of other groups to recognition and inclusion in the history they memorialize. The Supreme Court's failure to recognize this reality is troubling enough. But even more troubling is the fact that the Supreme Court's most recent opinions on the constitutionality of religious displays perform much the same work as the monuments themselves. Those opinions both assert and attempt to reinforce a Christian national identity at a moment when that identity is perceived to be under attack. They are themselves monuments to Christian supremacy.

But what does all of this mean for the constitutionality of cross displays? After the Supreme Court's decision in *American Legion*, it is no longer

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108. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (describing the endorsement test's reasonable observer as being "aware of the history and context of the community and forum in which the religious display appears"). *But see* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1605 (2022) (Gorsuch, J., concurring) (criticizing the "reasonable observer" heuristic and assuming the reasonable observer must be ignorant of the historical and legal context of the display).

109. For a summary of some of the criticism, see, for example, B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1423–28 (2014).

110. *See id.* at 1453 ("Properly understood as a representation of how the act of interpretation occurs rather than as a hypothetical standpoint from which to judge a religious display, the reasonable observer becomes a helpful starting point for operationalizing the task of interpreting social meaning.").

111. *See supra* Section III.B.

entirely clear what sort of symbolic displays will be found to violate the Establishment Clause; however, it seems that a display indicating a political or symbolic alliance of the state with a particular sect may be found unconstitutional, as it would likely be showing intentional favoritism toward one religious group and disparagement of others.<sup>112</sup> The concern with favoritism and disparagement—perhaps the only elements of the once-ascendent endorsement test that remain a part of the Court’s constitutional methodology—suggests that equality still matters in these sorts of cases.<sup>113</sup> Indeed, some commentators have sought to extend the rule of governmental nonendorsement—i.e., nonfavoritism and nondisparagement—to contexts beyond religion, including race.<sup>114</sup> If the Supreme Court means what it says, it should be willing to recognize the religious and racial disparagement inherent in some monuments.

Of course, dismantling these symbols of white, Christian supremacy will not be easy. At a minimum, it will require abandoning the current doctrinal approach, which relies on a free-wheeling historical inquiry. It will also require recognition of how monuments function—that these government-sponsored messages do not merely *speak* but also *act* in constructing a community identity, and that their exclusionary meaning is not entirely nullified by changing political circumstances or historical context.

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112. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2088–89 (2019) (applying the “principles” of tolerance and nondisparagement of religions to uphold a massive, longstanding Latin cross display); *id.* at 2091 (Breyer, J., concurring) (“[T]he organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group . . .”). *See generally* Lisa Shaw Roy, *The Replacement Campaign: Monuments and Symbols*, 56 TULSA L. REV. 255, 268–72 (2021) (describing Establishment Clause doctrine after *American Legion*).

113. Professor Martha Nussbaum argues that the Court has applied an “equality/endorsement framework” in Establishment Clause and Free Exercise Clause cases dealing with school prayer and religious symbolism displays. *See* MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* 260–72 (2008); *see also* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 497 (2010) (noting the connection between equality and the endorsement test).

114. *See, e.g.*, Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 658–59 (2013).