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GOVERNMENT-SPONSORED RELIGIOUS DISPLAYS: TRANSPARENT RATIONALIZATIONS AND EXPEDIENT POST-MODERNISM

Douglas Laycock[†]

The founding generation said that government is not a competent judge of religious truth,¹ and for half a century now, the Supreme Court has applied that principle to government speech. Government is not supposed to take positions, pro or con, on truth claims about religion. Government must resist its recurring temptation to proclaim that Christianity is true.

This rule has always encountered vigorous resistance in some parts of the country and vigorous dissent on the Court. There may be five votes to overrule the whole line of cases restricting passive religious displays. But Justices do not always resort to overruling; they have other ways of dealing with their least favorite cases.² They may restrict or eliminate standing.³ Or they may simply manipulate the findings of fact so that they never find the rule to have been violated.

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¹ See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63–72 (1947) (Appendix to opinion of Rutledge, J., dissenting) (arguing that to treat the “Civil Magistrate [as] a competent Judge of Religious truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world”).

² See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 5 (2010) (“[W]hat disturbs critics [of stealth overruling] is the disingenuous treatment of precedents in a manner that obscures fundamental change in the law.”).

³ See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (holding that standing to challenge expenditures of government funds for religious purposes does not extend to tax credits); *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (holding that standing to challenge expenditures of government funds for religious purposes does not extend to discretionary expenditures by executive branch).

This paper examines recent developments in the strategy of manipulating or recharacterizing the facts. In a sense, this paper is an exercise in belaboring the obvious. When Justices and government lawyers defend government-sponsored religious displays by claiming that the display is really secular, the argument is often rather conclusory. But the response is often even more conclusory. “Just look at it. See! It’s religious.” I will spell out in more detail why these messages can only be understood as religious, and then address the Court’s latest theory for avoiding that obvious conclusion.

I. NATIVITY SCENES

Once the rule emerged that government is not to take positions on religious questions, government lawyers began to argue that religious statements and symbols also have secular meanings, and that, of course, the sponsoring government unit intended only the secular meaning. There is much sham litigation of this sort, and sometimes the Court goes along.

Consider the Christian nativity scene, or crèche. It is so familiar, and so much a part of a holiday that has been used and abused for many other purposes, that many Americans probably never think about what it actually depicts. But Christians of moderate or greater seriousness do think about it, and non-Christians who care about government neutrality also think about it. The nativity scene is at the very least a depiction of a man, a woman, shepherds, and richly dressed men with crowns kneeling in worshipful postures and attitudes around a baby.

Of course we all know who these figures are supposed to be. The baby, often depicted with a halo, is the central figure in the Christian story. But suppose we pretend that we do not know who these figures are supposed to be. Is there any other way to interpret this display?

The figures are worshiping the baby because, according to Christian belief, the baby is the Son of God—actually himself also God—incarnated in human form. Is any other interpretation possible? Well, those who worship the baby could be engaged in idolatry. Or they could be worshiping a false god. Non-Christians, who do not believe that the baby is God or that he represents God, may think that the figures must necessarily be doing one or both of these. But no government that puts up a nativity scene is endorsing the worship of idols or false gods. That would be political suicide. It is socially acceptable to depict the adults in the nativity scene as worshiping the baby because—and only because—the baby is understood to be God.

The nativity scene thus necessarily depicts the first of the two miracles at the heart of Christianity. The nativity scene depicts the incarnation of God in human form—or as much Christian literature refers to it, the Incarnation with a capital I.⁴ Not everyone who casually views or passes by a nativity scene thinks of this miracle, but without the Incarnation, the nativity scene becomes either a meaningless arrangement of figures engaged in some unidentifiable activity (which no one believes), or it becomes a depiction of false worship—a depiction that would horrify its sponsors. If you think about it even a little bit seriously, the nativity scene can only represent the Christian belief in the Incarnation.

Of course this is not what the Supreme Court or the government said when the first nativity scene reached the Court, in *Lynch v. Donnelly*.⁵ The opinion did seem to concede “the religious nature of the crèche.”⁶ But then it made two moves that recur in these cases. First, the Court said the District Court “erred by focusing almost exclusively on the crèche.”⁷ It was a mistake to focus on the intensely religious display that was the matter in controversy; courts should instead consider only some larger unit that includes the intensely religious display, and consider the larger unit as a whole.⁸ I call this the larger-unit argument. When the crèche is viewed in its larger context, the Court said, there is “insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message.”⁹ We can all agree that it was not surreptitious or subtle. It was open and obvious.

And it was certainly purposeful; the city did not put up the crèche by accident. But the Court said it was not a purposeful “effort to express some kind of . . . particular religious message.”¹⁰ This is the second frequent move: they put it up, but they didn’t mean it. I call this the didn’t-mean-it argument. Even if they portrayed the miracle of the Incarnation (although the Court never alludes to anything so explicit), they didn’t mean that anyone should take it literally as the

⁴ See, e.g., CATECHISM OF THE CATHOLIC CHURCH 130 § 464 (Doubleday ed., 1997 ed.) (“The unique and altogether singular event of the Incarnation does not mean that Jesus Christ is . . . a confused mixture of the divine and the human. He became truly man while remaining truly God.”).

⁵ 465 U.S. 668 (1984).

⁶ *Id.* at 680.

⁷ *Id.*

⁸ See *id.* (arguing that the crèche should be “viewed in the proper context of the Christmas Holiday season”).

⁹ *Id.*

¹⁰ *Id.*

miracle of the Incarnation. Rather, “[t]he crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”¹¹

This last sentence is utterly inscrutable. Is the “event” the same as the “origins”—the adults worshiping the baby? Or is the “event” the modern celebration of Christmas, with the adults worshiping the baby as the “origins” of that event? And however that may be, in what sense are these “origins” historical? What is depicted is either miraculous or mythical—either it really was the miracle Christians believe it to have been, or it never happened, which is what the great majority of the world’s population believes. If it never happened, then it is not historical. When the Court describes the event as historical, it asserts the truth of at least this part of the Christian story.

Assuming the event did happen, it seems rather odd to describe a miraculous event as merely historical. But of course Christians who fully believe in the miracle believe that it actually happened and that it happened in historic time. So from a Christian perspective, the event is historical as well as miraculous. The reason it seems odd for the Court to describe the event as historical is that it is historical only if you believe in the miracle. It is very troubling for the Court to announce that a miraculous claim of one religion is true, especially when that religion makes exclusive claims to truth, with the unavoidable implication that all other religions are false. Yet that is what the Court did in *Lynch*. In the course of trying to minimize the religious significance of the crèche, the Court affirmed its belief in the miracle.

II. THE PLEDGE OF ALLEGIANCE

I have elaborated the religious significance of the Pledge of Allegiance elsewhere,¹² so a summary will suffice here. The Pledge includes a succinct affirmation of faith. In public schools, we ask each child to personally acknowledge the existence of a monotheistic God who is somehow over an entire nation: “I pledge allegiance to . . . one nation under God”¹³

Yet the government briefs defending the Pledge denied that it had any religious meaning. The United States argued that the Pledge “is

¹¹ *Id.*

¹² See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 223–29 (2004).

¹³ 4 U.S.C. § 4 (2006) (emphasis added).

not a religious exercise at all”¹⁴ Rather, the meaning is merely historical and demographic:

[T]he reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution’s protection of individual rights and autonomy reflects those religious convictions, and that the Nation continues as a matter of demographic and cultural fact to be “a religious people whose institutions presuppose a Supreme Being.”¹⁵

Here, the government applies the didn’t-mean-it argument to text and not just to nonverbal symbols. Chief Justice Rehnquist accepted these claims,¹⁶ but they do not bear examination. That most of the Founders believed in God, and that most Americans today believe in God, are historic and demographic facts. The rest of the government’s allegedly “undeniable . . . facts”¹⁷ are denied by nonbelievers, who of course do not believe that either individual rights or a republican form of government reflects, presupposes, or depends on the existence of God. No doubt many believers also doubt or deny these claims about our political institutions.

But more important here, none of these alleged facts is asserted or implied in the Pledge. It is not difficult to communicate the difference between what I personally believe and what I recognize that others believe, and the Pledge is a statement of the former. It is a personal pledge, an affirmation of what “I” pledge myself to. There is no reference to the Founders or to the majority of Americans or to any other third party, but only to the first person singular—only to what each person saying the Pledge believes.

Secular reinterpretations of religious symbols and affirmations, as in the government’s novel interpretation of the Pledge, have a cost to the religious supporters of government exercises of religion. The government officials and their lawyers who make such arguments, and the judges who accept them, desecralize sacred texts and symbols. But these actors seem to assume that few Americans will

¹⁴ Brief for the United States as Respondent Supporting Petitioners 45, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2003 WL 23051994 [hereinafter *Newdow Brief for United States*].

¹⁵ *Id.* at 32–33 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

¹⁶ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring in the judgment) (“The phrase ‘under God’ is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: ‘From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.’”).

¹⁷ *Newdow Brief for United States*, *supra* note 14, at 32.

take note of their arguments and that no one will take them seriously. The religious references will retain their obvious religious meanings outside the courtroom even if government lawyers and the Court solemnly deny those meanings inside the courtroom.

This assumption is always at least implicit; in the Pledge case, it became explicit. At the same time that the President's Solicitor General was denying the religious meaning of the Pledge, the President himself was affirming it. His letter responding to citizens who wrote about the Pledge embraced and even inflated the religious meaning:

As citizens recite the Pledge of Allegiance, we help define our Nation. In one sentence, we affirm our form of government, our belief in human dignity, our unity as a people, and our reliance on God. . . .

When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.¹⁸

In the President's view, the Pledge of Allegiance is not just an affirmation of faith; it is also a prayer. I would not go so far; the implication of prayer is not compelled by the syntax, logic, or context of the Pledge. But the President's account comes much closer to the truth than the Solicitor General's account. The President's account went to voters, conveying the Administration's actual position. The Solicitor General's account was meant only for the Justices.

The Solicitor General also offered the larger-unit argument: the Pledge as a whole is patriotic, not religious, and therefore, the religious content should be ignored.¹⁹ Chief Justice Rehnquist accepted this argument too.²⁰ This reasoning is even worse here than it was in the nativity scene cases. The conjunction of religious and patriotic propositions makes the request for a religious affirmation worse, not better.

¹⁸ Letter from George W. Bush, President of the United States, to Mitsuo Murashige, President, Hawaii State Federation of Honpa Hongawanji Lay Associations (Nov. 13, 2002) *reprinted in* Brief of Americans United for Separation of Church and State et al. as Amicus Curiae in Support of Affirmance 30, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2004 WL 298118. See Laycock, *supra* note 12, at 225 n.454 for the explanation of how we can infer that this was a widely distributed form letter.

¹⁹ See *Newdow* Brief for United States, *supra* note 14, at 39–40. (“In divorcing the phrase ‘under God’ from its larger context, the court of appeals ‘plainly erred.’”).

²⁰ See *Newdow*, 542 U.S. at 31 (Rehnquist, C.J., concurring in the judgment) (“Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one . . .”).

In the Christmas and Hanukkah cases, the Court viewed the display of secular and religious symbols as creating a sort of forum, in which government could be taken to send multiple messages. The religious and secular messages were not so much combined as presented in the alternative. The reindeer and talking wishing well in *Lynch* did not secularize the nativity scene; rather, they communicated another view of Christmas. The Christmas tree in *County of Allegheny v. ACLU*²¹ neither secularized nor Christianized the menorah; together, the tree and the menorah communicated symbols of two holidays, two faiths, and a message of religious pluralism. The Court held that, taken as a whole, these mixed messages did not endorse the religious meaning of either Christmas or Hanukkah. Or at least, this is the most generous interpretation of why the Court upheld the crèche in *Lynch*, where it was accompanied by Santa Claus, reindeer, candy canes, and a talking wishing well,²² and struck down the crèche in *Allegheny*, where the crèche stood alone.²³

I set aside here the question whether the government should communicate any view, religious or secular, about a profoundly religious holiday, or whether any symbol of such a holiday can be viewed as secular. Even accepting the Court's analysis of Christmas at full value, the Pledge is very different. In the Pledge, the religious and secular messages are inextricably combined, with the religious message squarely in the middle of a single sentence with the patriotic message. Asking students to affirm both messages neither neutralizes the religious affirmation nor offers an alternative. Instead, it casts doubt on the patriotism and political allegiance of those who cannot in good faith affirm the religious portion of the message. What kind of citizen cannot recite in good faith the full pledge of allegiance to the nation?

Moreover, this merger of political and religious affirmations evades a well-settled distinction as to remedy. When government requires or asks for a political or patriotic recital, the remedy for

²¹ 492 U.S. 573 (1989).

²² *Lynch*, 465 U.S. at 671 (describing the display).

²³ See *Cnty. of Allegheny*, 492 U.S. at 598 ("Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message."). As to the menorah, see *id.* at 616 (opinion of Blackmun, J.) ("[T]he combined display of the tree, the sign, and the menorah . . . simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."); *id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment) (concluding that the city "intended to convey a message of pluralism and freedom of belief during the holiday season"). The passages from Justice Blackmun, and from the opinion of the Court (also by Justice Blackmun), make desecralization explicit: religious displays are constitutionally permitted if government "detracts from" the religious message, and Christmas and Chanukah are part of the secular "winter-holiday season."

dissenters is exemption.²⁴ But when government asks for prayers or a religious recital, exemption is not a sufficient remedy; government is forbidden to ask.²⁵ The reason for this distinction is that government can attempt to lead public opinion on political and patriotic matters, but not on religious matters.²⁶ That distinction is eviscerated if government can insert prayers or religious affirmations into political and patriotic affirmations and characterize the resulting whole as political or patriotic.

III. THE TEN COMMANDMENTS

A. *The Supreme Court*

The opinions upholding the Texas Ten Commandments monument in *Van Orden v. Perry*²⁷ were not as bad as most on the question considered here. Both Chief Justice Rehnquist for the plurality, and Justice Breyer for the fifth vote, acknowledged that the Commandments were religious. “Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain.”²⁸ “On the one hand, the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing, the Deity.”²⁹ The Justices in the majority were not explicit about that religious content; one cannot learn what the monument actually said from either of these opinions, or from either opinion below.³⁰ For that, you have to go to the dissent.³¹

The content of the display was profoundly religious. The displayed text stated:

²⁴ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 642 (1943) (affirming a judgment with respect to the (then entirely secular) Pledge of Allegiance, “restrain[ing] enforcement as to the plaintiffs and those of that class”).

²⁵ See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (invalidating school-sponsored prayer and holding it irrelevant that students had the option not to join in the prayer).

²⁶ See *Lee v. Weisman*, 505 U.S. 577, 591–92 (1992) (explaining that government can participate in political debates but generally cannot participate in religious debates).

²⁷ 545 U.S. 677 (2005).

²⁸ *Id.* at 690 (plurality opinion).

²⁹ *Id.* at 700–01 (Breyer, J., concurring in the judgment).

³⁰ See *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *aff’d*, 545 U.S. 677 (2005); *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002), *aff’d*, 351 F.3d 173 (5th Cir. 2003), *aff’d*, 545 U.S. 677 (2005).

³¹ See *Van Orden*, 545 U.S. at 707 (Stevens, J., dissenting) (reprinting the full text of the monument).

the Ten Commandments
I AM the LORD thy God.

Thou shalt have no other gods before me.
 Thou shalt not make to thyself any graven images.
 Thou shalt not take the Name of the Lord thy God in vain.
 Remember the Sabbath day, to keep it holy.
 Honor thy father and thy mother that thy days may be long
 upon the land which the Lord thy God giveth thee.
 Thou shalt not kill.
 Thou shalt not commit adultery.
 Thou shalt not steal.
 Thou shalt not bear false witness against thy neighbor.
 That shalt not covet thy neighbor's house.
 Thou shalt not covet thy neighbor's wife, nor his manservant,
 nor his maidservant, nor his cattle, nor anything that is thy
 neighbors [sic].³²

The first two lines are centered and in larger type, approximately as shown here. The second line with its first person pronoun (and also the first person pronoun in the first sentence of what is here presented as the First Commandment) make clear that this is supposed to be God speaking. The monument explicitly presents the Commandments as Christians and Jews have always understood them—as the direct Word of God.

The first two Commandments in this numbering system³³ are exclusively about the believer's relationship with God. This is equally true of the Third Commandment in this numbering system: there may be a secular norm of weekly rest and relaxation, or of giving workers a day off, but there can be no secular equivalent to an obligation to keep a day "holy." "Holy" is an inherently religious concept. And

³² *Id.* at 707; *see also id.* at 736 (Appendix to opinion of Stevens, J., dissenting) (fold-out color photograph of the monument). The text in this photograph is more easily read in the United States Reports or on the Supreme Court's website (<http://www.supremecourt.gov/opinions/04pdf/03-1500.pdf>) than in Lexis or Westlaw.

³³ There are multiple versions of the Commandments—different texts, different translations, and different numbering systems—and these differences have theological significance. *See generally* Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORD. L. REV.* 1477, 1481–1500 (2005). In most Protestant traditions, but not in Lutheranism, the Commandment against graven images is listed separately as the Second Commandment. *Id.* at 1487. I have listed and numbered the Commandments as they appear on the monument at issue in *Van Orden*, which is substantially identical to many other monuments donated by the Fraternal Order of Eagles. *See Van Orden*, 545 U.S. at 713 (Stevens, J., dissenting) (noting that the monument "was only one of over a hundred largely identical monoliths"). The idea for the Eagles' Ten Commandments monuments originated in Minnesota, *id.*, where Lutheranism is probably the largest denomination. But I have not been able to determine whether the Eagles' text was negotiated in Minnesota.

while there should be a secular norm of honoring one's parents, there can be no secular equivalent to the promise of longevity attached to the performance of that Commandment, or to the Jewish belief that God promised the land of Israel to the Jews.

Some of the remaining Commandments have clear secular equivalents. But even "Thou shalt not kill" is not a mere statement of secular ethics or modern criminal law; it is presented here as a direct command from God. And the *religious* meaning of these Commandments may correspond only approximately to the *legal* meaning of modern prohibitions.

At least the Supreme Court acknowledged that this text was religious. Chief Justice Rehnquist for the plurality contented himself with listing other public depictions of the Ten Commandments and other religious statements by American political figures and then concluding that the Commandments had not just a religious meaning, but also "an undeniable historical meaning, as the foregoing examples demonstrate."³⁴ To say that the Commandments are "historical" is to repeat the fallacy of *Lynch v. Donnelly*. A miracle—God's appearance on a mountaintop to carve laws in stone—is "historical" only if it really happened. Whether it really happened is a matter of faith.

Perhaps Chief Justice Rehnquist meant only that the *depictions* of the Commandments in public places were historical—that the Commandments had historically been used to symbolize laws and law giving. There is force to that, but to stop there is to ignore enormous differences of degree. As the dissenters explained in some detail, Chief Justice Rehnquist's examples depict Moses and the Ten Commandments as part of a diverse array of other figures from various religious and secular traditions.³⁵ Putting Moses and the Ten Commandments in a display of lawgivers with Hammurabi, Confucius, Draco, Lycurgus, and Mohammed³⁶ no more endorses the

³⁴ *Van Orden*, 545 U.S. at 690 (plurality opinion).

³⁵ *See id.* at 740–41 & n.4 (Souter, J., dissenting) (discussing why the "monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them"); *see also id.* at 712 (Stevens, J., dissenting) ("Surely, the mere compilation of religious symbols, none of which includes the full text of the Commandments and all of which are exhibited in different settings, has only marginal relevance to the question presented in this case.").

³⁶ This describes the frieze of the Supreme Court. *See* Office of the Curator, Supreme Court of the United States, *Courtroom Friezes: North and South Walls*, www.supremecourt.gov/about/north&southwalls.pdf (last updated May 8, 2003) (describing the various figures depicted in the friezes); Office of the Curator, Supreme Court of the United States, *The East Pediment*, www.supremecourt.gov/about/eastpediment.pdf (last updated May 22, 2003) (quoting the East Pediment's sculptor Hermon A. MacNeil's statement that "Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment").

Commandments than it endorses Draco and his draconian penalties for the smallest offenses. A rule excluding the Ten Commandments from such an array would be a rule discriminating against Judaism and Christianity instead of a rule preventing the government from promoting Judaism or Christianity.

Moreover, most of Chief Justice Rehnquist's examples are only symbolic representations—two tablets, or a man in robes with tablets, with no legible English writing. The bit of Hebrew visible on the frieze in the Supreme Court's chamber is from the Commandments against killing and stealing, without mention of God or duties to God.³⁷ Such symbolic allusions to a religious teaching may be unconstitutional if not part of any larger secular message, or they may be viewed as *de minimis*, but either way, the constitutional problem they present is quite modest compared to the freestanding display of sacred text at issue in *Van Orden*.

Justice Breyer, for the fifth vote, agreed that much of the text was religious, but he argued that the text was not dispositive. The case depended on “how the text is *used*,” and that required consideration of “the context of the display.”³⁸ He thought the display “communicates not simply a religious message, but a secular message as well.”³⁹ He apparently thought that the secular message addressed “proper standards of social conduct.”⁴⁰ This is an unstated application of the larger-unit theory: at least the first three Commandments are about one's relationship to God, and are not, under any interpretation, about proper standards of social conduct. But those Commandments, and the claimed source of these Commandments, can apparently be disregarded if they are part of a larger unit that does include “proper standards of social conduct.”

Justice Breyer went on to persuade himself not just that this display has a secular component, but that its purpose and effect are “*primarily* nonreligious.”⁴¹ The monument was donated by a secular organization (the Fraternal Order of Eagles) interested in combating juvenile delinquency.⁴² This may suggest an emphasis on the rules of social conduct, but it also suggests an emphasis on the divine origin of those rules. Why should juvenile delinquents take these Commandments any more seriously than they took what their parents told them, or their probation officers, or the judges in juvenile court?

³⁷ See *Van Orden*, 545 U.S. at 740 (Souter, J., dissenting).

³⁸ *Id.* at 701 (Breyer, J., concurring in the judgment).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 703 (emphasis added).

⁴² *Id.* at 701.

The only answer is that these Commandments claim to come directly from God. Not only is it hard to think of any other reason, but this is the reason the Eagles emphasized when they explained to local chapters how to persuade local clergy and local officials to support the program of erecting Ten Commandments monuments. They said there could be no better youth guidance program “than the laws handed down by God Himself,” and that “[t]he erection of these monoliths is to inspire all who pause to view them, with a renewed respect for the law of God”⁴³

The hoped-for consequence of a reduction in juvenile delinquency could come about only if juvenile delinquents *believe* the message of the Commandments and act on it. Fighting juvenile delinquency is of course a secular purpose, but the proposed means—encouraging juveniles to believe a religious teaching—is a religious purpose that requires an endorsement of that religious teaching as an essential step. If government could encourage religion whenever it hoped that more widespread religious faith would lead to secular benefits, it could justify any degree of establishment of religion it chose to pursue.

The argument that encouraging belief in the Commandments might reduce juvenile delinquency is just a special case of the last major argument for established churches in the founding era: that promoting religious faith would tend to produce a more moral and law-abiding citizenry.⁴⁴ The Founders rejected that argument not on the ground that it was false, but on the ground that it was insufficient to justify establishment. Opponents of establishment did not deny that religion is conducive to morality, but they believed that government support for religion was both unnecessary and counterproductive to genuine religious faith.⁴⁵ We know, with far more than the usual degree of clarity in historical arguments, that the founders rejected the promotion of good behavior as a justification for establishment. We know they rejected the arguments for establishment because they abolished all the formal state establishments and passed the federal Establishment Clause to prevent a federal establishment.

The argument about juvenile delinquency probably does not deserve to be taken even this seriously. What became the Eagles’ Ten Commandments monuments originated with a Minnesota juvenile court judge who wanted to post paper copies of the Ten

⁴³ *Id.* at 714–15 (Stevens, J., dissenting) (quoting *Anderson v. Salt Lake City Corp.*, 348 F. Supp. 1170, 1171–72 (D. Utah 1972), *rev’d on other grounds*, 475 F.2d 29 (10th Cir. 1973)).

⁴⁴ *See, e.g.*, *Barnes v. Inhabitants of First Parish in Falmouth*, 6 Mass. (5 Tyng) 401, 406–08 (1810) (justifying the Massachusetts establishment on the ground that it would make for a more moral and socially compliant citizenry).

⁴⁵ *See, e.g.*, Madison, *supra* note 1, at ¶¶ 6–8.

Commandments in courtrooms where delinquents might see them and perhaps come to obey them.⁴⁶ It is a long evolution, decisively influenced by Cecil B. DeMille,⁴⁷ from that original idea of paper copies in courtrooms to granite monuments in city parks and on the grounds of state capitols. The capitol grounds are not where anyone would sensibly put a message intended to reach juvenile delinquents, who are hardly known for their interest in touring civic sites. The original focus on juvenile delinquents is an interesting bit of history, but it had become essentially irrelevant to the actual monument at issue.

Justice Breyer also found secular significance in the monument's setting, which he thought was not conducive to prayer or meditation.⁴⁸ But he thought the setting and the other monuments on the capitol grounds conveyed a moral and historic message to visitors and the State's intention that the moral message in the Ten Commandments predominate over the religious message.⁴⁹ I consider the other monuments below, in connection with the court of appeals' opinion, but it takes considerable imagination to find much commonality between the Ten Commandments and all the other monuments on the grounds of the Texas capitol.

Finally, Justice Breyer thought it significant that the monument had stood for forty years (from 1961 to 2001) before anyone filed a lawsuit.⁵⁰ 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, is a potential way to solve the political problem presented by these cases without saying foolish things about the secular purpose and effect of displaying religious texts and symbols. But Justice Breyer did not content himself with a mere time bar; he tried to give a reason. And the reason was extraordinarily naïve.

He said, "I am not aware of any evidence suggesting that [the lack of earlier lawsuits] was due to a climate of intimidation."⁵¹ Consequently, the lack of earlier lawsuits must mean that nearly everyone interpreted the monument in secular rather than religious

⁴⁶ See *Van Orden*, 545 U.S. at 713–14 (Stevens, J., dissenting) (reviewing the origin of this and similar monuments around the country).

⁴⁷ DeMille thought that installing Ten Commandments monuments around the country would help promote his blockbuster movie, *The Ten Commandments*. He "teamed up" with the Eagles during the filming. See *id.* at 713.

⁴⁸ See *id.* at 702 (Breyer, J., concurring in the judgment) ("The physical setting of the monument, moreover, suggests little or nothing of the sacred.").

⁴⁹ *Id.*

⁵⁰ See *id.* at 702–03.

⁵¹ *Id.* at 702.

terms.⁵² If the presence or absence of intimidation mattered, he should have suggested a remand for trial of that issue, because no one had had any reason to introduce such evidence at the original trial. But if we are going to try to infer the reason why no one sued for forty years, the assumption that everyone saw the monument as secular would be far down the list of possible reasons.

It is far more plausible to infer, especially in a southern city, that everyone saw the message as religious and that nearly everyone approved, and that many members of the minority who might have complained never visited the capitol and didn't even know the monument existed.

It is far more plausible to infer that those who knew and might have complained saw little hope of success in filing a lawsuit until at least 1980, when *Stone v. Graham*⁵³ struck down displays of the Ten Commandments in Kentucky classrooms.⁵⁴ And sensible lawyers might have quite plausibly viewed *Stone* as a school case, which is how the Court distinguished it in *Van Orden*.⁵⁵ After *Stone*, the Court did not strike down another government-sponsored religious display until *County of Allegheny v. ACLU*⁵⁶ in 1989.

And finally, it is far more plausible to infer that anyone who knew about the display, objected to it, and thought he could win a lawsuit might have been intimidated, or at least might have thought it was just not worth the cost in hassle and social disapproval to pursue a lawsuit that would produce intense political resistance and no monetary recovery. Justice Breyer was on the Court when it decided *Santa Fe Independent School District v. Doe*,⁵⁷ the football-prayer case, where the district judge allowed plaintiffs to litigate anonymously and had to make sweeping threats of contempt sanctions to protect them from intimidation and harassment.⁵⁸ Breyer knew that history, or at least he once had known it. He had no way to know that some people did guess the plaintiffs' identity, that the plaintiffs received death threats, and that someone killed their dog.⁵⁹ Santa Fe has been the scene of a remarkable variety of attacks on religious and ethnic minorities over

⁵² *Id.* at 703 (arguing that the 40-year absence of legal challenges suggests that the public has considered "the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage").

⁵³ 449 U.S. 39 (1980) (per curiam).

⁵⁴ *Id.* at 42–43.

⁵⁵ See *Van Orden*, 545 U.S. at 690–91 (plurality opinion); *id.* at 703 (Breyer, J., concurring in the judgment).

⁵⁶ 492 U.S. 573 (1989).

⁵⁷ 530 U.S. 290 (2000).

⁵⁸ *Id.* at 294–95 & n.1.

⁵⁹ I know these things only because I represented the plaintiffs in the Supreme Court.

the years.⁶⁰ In a case from Little Axe, Oklahoma, involving religious meetings in a public school, plaintiffs were harassed and their house was burned to the ground.⁶¹

Of course Austin is not Santa Fe or Little Axe. Austin is a university town, a far more cosmopolitan city than any small town, a mix of southern and western with many northern immigrants, and a politically blue oasis in a deeply red state.⁶² But southern social conservatives are amply represented in and around Austin. Many of them are mild-mannered and tolerant, and some of them—not so much. The city is home to a deeply conservative governor and state legislature. These things are all still true today, but Austin was a much more conservative place for much of Justice Breyer’s forty-year period than it is today. The generation of massive resistance retained substantial power and influence into the 1980s. Even the university would have been hostile for much of this period; it had an intensely adversarial relationship with left-leaning faculty until Frank Erwin retired from the Board of Regents in 1975.⁶³

In 2004, when I was approached about doing the cert petition in *Van Orden*, I declined. I was not afraid of retaliation against me, but I was afraid of retaliation against the University I had served for 23 years at that point. Perhaps I was too cautious. I had represented plaintiffs in other unpopular cases in Texas,⁶⁴ and I did an amicus brief in *Van Orden*.⁶⁵ And while I got the occasional hate mail and hate call, I never got much. But *Van Orden* just seemed too close—it is only four blocks from the edge of campus to the edge of the capitol complex, and the defendant was the governor instead of a city or a local school board—and the role of the lawyer for the party is much

⁶⁰ See Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL’Y 29, 38–41 (2009).

⁶¹ See *Bell v. Little Axe Indep. Sch. Dist.* No. 70, 766 F.2d 1391, 1397 (10th Cir. 1985) (describing the harassment the Bells endured and noting that a suspicious fire destroyed their home).

⁶² One illustration: The same-sex marriage amendment passed with 76% of the vote statewide, and it passed by big margins in 253 out of 254 counties. In Travis County, which is dominated by Austin, it was defeated by 60% to 40%. See Office of the Secretary of State, *2005 Constitutional Amendment Election*, <http://elections.sos.state.tx.us/elchist.exe> (listing county-by-county returns) (last visited Apr. 6, 2011).

⁶³ See Mitchell Lerner, *Erwin, Frank Craig, Jr.*, TEX. STATE HISTORICAL ASSOC., <http://www.tshaonline.org/handbook/online/articles/fer08> (last visited Mar. 10, 2011), for a brief biography of Erwin.

⁶⁴ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at high school football games); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (expansion of church in historic district). *Boerne* aroused intense emotions only in the local community; *Santa Fe* aroused intense emotions in much of the state.

⁶⁵ Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), 2004 WL 2899175.

higher profile than the role of a lawyer for an amicus. And if we had won, all hell would have broken loose. The real risk of retaliation is not when you file the lawsuit, but if and when you win it. The same prospect of political reaction that may have pressured Justice Breyer not to provide the fifth vote for removing the monument pressured me not to take the case. I would have loved to do that case, but I thought I had a conflicting fiduciary duty. The bottom line is that I was intimidated, though only indirectly.

If I had not worked for the University, I would have happily taken the case in the Supreme Court. But suppose a potential client had walked into my private law office at any time during Justice Breyer's forty-year period and said she wanted to initiate this case in the trial court. Before agreeing to go forward, I would have had a serious conversation with that potential client about what she was willing to endure. Are you willing to become a household name, vilified in the press and in the letters-to-the-editor column (or in later years, on talk radio and the Internet)? Are you willing to have other kids call your children names, and maybe worse? Are you willing to lose some friendships? Will you stick it out if some of the people in your church turn their back on you? If we start this case, are you willing to put up with whatever happens and see it through? Because I can't responsibly start this case without you having some idea of what you're probably getting into. And I don't want to start this case and have you walk out on it half way through. That is a conversation that good lawyers have with clients initiating fiercely unpopular litigation, and it is a conversation that would certainly have been appropriate for a client who wanted to challenge the Ten Commandments monument in Austin.

In the actual case, the plaintiff was a homeless ex-lawyer—a plaintiff with little left to lose—and the place where he slept was a fiercely guarded secret. Justice Breyer's supposition that intimidation never deterred anyone from challenging the Texas Ten Commandments' monument was simply wishful thinking. But this wishful thinking appears to have been his primary basis for inferring that the monument's meaning was predominantly secular and that it was perceived as such.⁶⁶

⁶⁶ See *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring in the judgment):

[A] further factor is determinative here. . . . [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals . . . are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any

B. *The Court of Appeals*

The Fifth Circuit's opinion in *Van Orden*⁶⁷ is of course superseded now. But it is still worth examining, in part because it is even less plausible than the Supreme Court's opinions, and in part because there is so little overlap between the reasons the two courts offered for finding the monument primarily secular. Yet both sets of reasons are based largely on characterizing the monument. This suggests that the judges saw in the monument what they wanted or needed to see more than what was there.

The Fifth Circuit found a secular purpose "to recognize and commend a private organization [the Fraternal Order of Eagles] for its efforts to reduce juvenile delinquency."⁶⁸ But the Fifth Circuit did *not* find that the monument had an effect that achieved this purpose, and no one on the Supreme Court mentioned a purpose or effect of honoring the Eagles, perhaps for the very good reason that the monument says nothing about this purpose. The monument says that the Eagles "presented" the monument, but it does not mention their work on juvenile delinquency, and it says nothing about the State's opinion of the Eagles. A 1961 legislative resolution, wholly invisible to reasonable observers and forgotten by everyone until discovered in the research for this case, commends the Eagles for their work on juvenile delinquency and grants permission to erect the monument.⁶⁹ But even this resolution does not say that a purpose of *the monument* was to honor the Eagles; the commendation seems to be a legislative side comment. And no matter how much it wanted to honor the Eagles, the legislature would not have accepted the monument if it had not approved of what the monument said. The purpose and effect of proclaiming the Ten Commandments clearly dominated any purpose to honor the Eagles.

The court of appeals' discussion of secular effect largely tracked the State's brief, which offered a pastiche of disparate and unrelated elements. The Ten Commandments monument is one of seventeen

"religious practic[e]," or to "work deterrence" of any "religious belief."

Id. (third and fourth alterations in original) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

⁶⁷ *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *aff'd*, 545 U.S. 677 (2004).

⁶⁸ *Id.* at 178 (quoting and adopting the finding of the district court).

⁶⁹ See S. Con. Res. 16 (Tex. 1961), *reprinted* in Joint Appendix 97, Ex. 1, *Van Orden v. Perry*, 545 U.S. 677 (2005), No. 03-1500, 2004 WL 3174744 (resolving that "the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency").

monuments on the capitol grounds.⁷⁰ Each monument is freestanding, spread out over twenty-two acres of grounds,⁷¹ and the Ten Commandments monument is isolated from the others.⁷² The monument has no visual relationship with any other monument; when a person views the Ten Commandments monument, it is impossible to see what any other monument portrays. This fact substantially attenuates Justice Breyer's claim, and the Fifth Circuit's claim, that the other monuments somehow modify the reasonably perceived meaning of the Ten Commandments monument.

Nor is there any subject matter relationship between the Ten Commandments and any of the other monuments. Here are the monuments as listed in Chief Justice Rehnquist's opinion:

Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Women, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.⁷³

The first thing that comes to my mind is the old Sesame Street song: "One of these things is not like the others. One of these things just doesn't belong." More than half the monuments honor military units or larger groups of veterans, and a World War II Memorial has been added since the Court decided *Van Orden*.⁷⁴ All but two honor classes of people—soldiers, peace officers, volunteer firefighters, pioneer women, children. All but one is entirely secular. (There is one implicit pair of contrasting ideas, probably not intended as such: six

⁷⁰ See *Van Orden*, 351 F.3d at 181 n.20.

⁷¹ See *id.* at 175 (describing the capitol grounds).

⁷² See *Van Orden v. Perry*, 545 U.S. 677, 706 (2005) (Appendices A and B to opinion of Breyer, J., concurring in the judgment) (photograph showing the area around the Ten Commandments monument and the *Capitol Monument Guide*, which is a map showing the approximate location of each monument). In the United States Reports and on the Supreme Court's website (<http://www.supremecourt.gov/opinions/04pdf/03-1500.pdf>), the map is easily readable, the photograph is clear, and the Ten Commandments monument is marked with a red arrow.

⁷³ *Van Orden*, 545 U.S. at 681 n.1 (plurality opinion). The *Capitol Monument Guide* lists the Spanish-American War monument as The Hiker and the Texas National Guard as the 36th Infantry. *Id.* at 706 (Appendix B to opinion of Breyer, J., concurring in the judgment). Those disparities in names are explained in the description of individual monuments in *Online Gallery: Monuments Guide*, TEX. STATE PRESERVATION BD., <http://www.tspb.state.tx.us/spb/gallery/MonuList/MonuList.htm> (last visited Mar. 10, 2011) [hereinafter *Monuments Guide*].

⁷⁴ See *Monuments Guide*, *supra* note 73 (describing the World War II Memorial as erected in 2007).

of the military groups honored fought for the United States, and three fought against it.⁷⁵)

The only monuments explicitly honoring ideas are the Ten Commandments monument and a miniature replica of the Statue of Liberty. The Ten Commandments cannot be viewed as one idea in a forum of related and contrasting ideas; no other monument honors, explains, questions, or disputes any belief about religion. There is no effort to explain any alleged relationship between the Ten Commandments and the other monuments, and I at least do not find any such claim plausible. Justice Breyer found a theme of history and morality;⁷⁶ the Fifth Circuit found a theme of “people, ideals, and events that compose Texan identity.”⁷⁷ Chief Justice Rehnquist also quotes this passage about Texan identity in the plurality opinion.⁷⁸ If these are sufficient themes, then the state can add religious displays most anywhere. If most of a state’s population is Christian, then any Christian display can be said to help illustrate the population’s identity.

Justice Breyer’s perceived themes of history and morality might at least be interpreted to require that religious displays explicitly mention morality, thus excluding purely theological displays like nativity scenes and crosses—or maybe not. None of the other monuments offer any explicit moral teaching, but Breyer apparently interpreted them as manifesting a moral message, perhaps through example.

No one assembled these monuments pursuant to a theme; the legislature accepted whatever people chose to donate over the years, as long as the donation was politically popular.⁷⁹ Justice Souter is surely right that

17 monuments with no common appearance, history, or esthetic rule scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms and without any dawning sense

⁷⁵ In addition to Confederate Soldiers, Hood’s Brigade and Terry’s Texas Rangers honor Confederate units. *Id.*

⁷⁶ See *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment) (“[T]he context suggests that the State intended the display’s moral message—an illustrative message reflecting the historical ‘ideals’ of Texans—to predominate.”).

⁷⁷ *Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003), *aff’d*, 545 U.S. 677 (2004) (quoting H. Con. Res. 38, 77th Legis. (Tex. 2001)).

⁷⁸ *Van Orden*, 545 U.S. at 681 (plurality opinion).

⁷⁹ It is a criminal offense, an impeachable offense, and a ground for discharge of a state employee, to erect a monument on the capitol grounds without the express consent of the legislature. TEX. GOV’T CODE ANN. § 2165.255 (West 2008). The capitol grounds are emphatically not a forum.

that some purpose held the miscellany together more coherently than fortuity and the edge of the grass.⁸⁰

Justice Souter's view is how the State itself presents the monuments, even in the wake of this litigation. The State's self-guided tour of the capitol grounds lists the monuments one by one and in geographic groupings.⁸¹ At no point does it suggest either the theme the Fifth Circuit perceived, the theme Justice Breyer perceived, or any other theme.⁸²

In addition to the seventeen (now eighteen) freestanding monuments, there are a variety of portraits, plaques, symbols, and historical displays inside the capitol itself. One of these is a display of six national symbols on the floor of the rotunda, commemorating Six Flags Over Texas, the popular slogan for the history of six independent nations ruling Texas in turn: France, Spain, Mexico, the Republic of Texas, the United States, and the Confederate States (at least de facto).⁸³ The Seal of Mexico, which is the Mexican component of this display, includes symbols from Aztec mythology. The State actually claimed that the Seal of Mexico was an alternate religious display, an Aztec counterpoint to the Ten Commandments, and the Fifth Circuit seemed to acquiesce.⁸⁴

Far from providing context to the Ten Commandments, the Six Flags display illustrates the sort of open and obvious secular meaning that should be required to negate the apparent endorsement inherent in a government display of religious content. It takes no long and attenuated explanation to point out the secular content of the Six Flags display. The Seal of Mexico is naturally integrated, without the need for any conceptual gerrymander or strained explanations. The Six Flags theme is explicit, not implicit; the names of the six nations

⁸⁰ *Van Orden*, 545 U.S. at 742–43 (Souter, J., dissenting).

⁸¹ *The Texas Capitol Grounds: A Self-Guided Tour*, TEX. STATE PRESERVATION BD. 2–3, (1999), available at www.tspb.state.tx.us/spb/plan/images/groundswalkingtour_text.pdf (last visited Mar. 10, 2011).

⁸² See *id.* (discussing the historical development of the grounds and the location of the monuments, but not suggesting any relationship among the monuments).

⁸³ For a photograph of this display, see *Online Gallery: Significant Spaces*, TEX. STATE PRESERVATION BD., http://www.tspb.state.tx.us/SPB/gallery/SigSpace/rot_sm.htm. (last visited Mar. 10, 2011). The general design of the display is visible, but much of the detail, including the Seal of Mexico, is not discernable.

⁸⁴ See *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (“There is a Six Flags Over Texas display on the floor of the Capitol Rotunda featuring the Mexican Eagle and serpent—which as visitors will learn, is a symbol of Aztec prophecy—together with the Confederate Seal containing the inscription ‘Deo Vindice’ (God will judge).”); *id.* at 180 (“The State points to the replica of the Seal of Mexico displayed on the tour path of the Capitol, reminding that it ‘acknowledges the mystical traditions of the indigenous people of the Southwest, who were displaced by a religious Catholic regime for some 300 years.’”).

are spelled out in large letters in the display. A symbol of Mexico is essential to the six-nations message of the overall display. The Seal is a legitimate symbol of Mexico, the recurring circles of the display better lend themselves to seals than to flags, and in any event, the same symbols from Aztec mythology appear on the Mexican flag, so displaying the actual flag would not change anything. The religious content in the Mexican seal is naturally absorbed into the explicit secular message of the Six Flags display.

The Six Flags display explicitly endorses the truth of the historic claim that six nations have ruled Texas, and implicitly endorses the claim that this history is a unique and romantic fact about Texas, deserving of commemoration at the heart of the capitol. But it does not endorse every matter incidentally necessary to presentation of the Six Flags message. The display implies no necessary view about any of the six nations or their chosen symbols. It displays the Bourbon flag of the *ancien régime*, the French flag that actually flew over Texas, and not the tricolor of the French Republics, but no one thinks the State is endorsing monarchy or a restoration of the Bourbons. Even if the religious content of the Mexican seal were more easily recognized as religious, and even if it were a symbol of a living faith and not an historic reference to a religion long abandoned, its inclusion in the Six Flags display would imply nothing about the State's views of the religion. Needless to say, no Supreme Court Justice adopted the Aztec-religion argument.

The Fifth Circuit also gave some weight to the State's argument that the state agency responsible for the capitol grounds employs museum curators to care for the capitol's historic artifacts and its art collection, so the grounds must be a museum.⁸⁵ This argument did not recur in the Supreme Court opinions either. These curators did not design the Ten Commandments monument, did not determine its content, and in fact have almost nothing to do with it. Apparently the only decisions the curators have ever made concerning the monument were to reinstall it and turn it around after construction of the capitol extension in 1993.⁸⁶ A professional curator who designs a display with an explicit secular message can lend credibility to the claim that religious material was reasonably necessary to the secular message. But in *Van Orden*, the curators had no influence on the message of the Ten Commandments monument.

After these various diversions, the Fifth Circuit at last concluded that the secular effect of the Ten Commandments monument is based

⁸⁵ *Id.* at 180–81.

⁸⁶ *See id.* at 181.

on the role of the Ten Commandments in the development of the “laws of this country.”⁸⁷ The monument’s location “on the direct line between” the capitol and the Supreme Court building was supposed to indicate the Commandments’ legal significance.⁸⁸

There were multiple problems with this alleged secular effect—many good reasons why this argument did not reappear in the Supreme Court opinions. But the most fundamental problem is that even if this message about legal development were discernable, it would at most be a subtly implied and undeveloped message. It would be overwhelmed by the clear and explicit message of the displayed text of the Ten Commandments. Such a subtle and implicit secular message cannot negate clear and explicit endorsement of a religious message. When courts entertain claims that such subtle and implicit alternate messages negate an explicit and obvious religious message, they invite sham defenses and make every case litigable.

In fact, the message about legal development is not discernable at all. Nothing in the monument’s text alludes to either the alleged legal significance of the Commandments or to the alleged significance of the monument’s location. It is prominently located, very close to the capitol, and within the broad, irregularly shaped space that can be described as between the capitol and the Supreme Court. But there is no visible geometric relationship with architectural or symbolic significance. The “direct line” between the capitol and the Supreme Court exists only in imagination. On the ground, a direct line from the north door of the capitol to the east door of the Supreme Court building would run diagonally, cutting through hedges and intersecting all the actual streets and sidewalks at odd angles.⁸⁹

Even if there were an explicit statement that the Ten Commandments were significant in the development of American law, that conclusory, overbroad, and contentious statement would not negate the endorsement of the Commandments themselves, as the Supreme Court correctly held in *Stone v. Graham*.⁹⁰ There are multiple reasons for the Court’s conclusory assessment of the matter

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Van Orden v. Perry*, 545 U.S. 677, 706 (2004) (Appendices A and B to opinion of Breyer, J., concurring in the judgment) (including a photograph of the Ten Commandments Monument and the area around it (Appendix A) and a map of the monuments on the capitol grounds (Appendix B)).

⁹⁰ 449 U.S. 39, 41 (1980) (per curiam) (holding that displaying the Ten Commandments in public-school classrooms is unconstitutional, notwithstanding a notation on each display claiming that the Ten Commandments had been adopted “as the fundamental legal code of Western Civilization and the Common Law of the United States” (quoting 1978 Ky. Acts. Ch. 436 § 1) (effective June 17, 1978) (internal quotation marks omitted)).

in *Stone*: space, prominence, context, and inaccuracy all contributed to the clear impression that the display of the Ten Commandments in *Stone* was a display of the Commandments, with a comment about the development of law. It was not a display about the development of law, with the Commandments as an illustration.

In *Stone*, the Commandments were far more prominent than the explanation about legal development, which appeared at the bottom in small print. In *Van Orden*, there was not even a conclusory statement about legal development; the monument did not mention legal development. Nothing on, with, or near the Commandments suggests a display on the development of American law.

Finally, the claim that the display of the Commandments is about the development of American law is belied by its inaccuracy. This requires further elaboration. To say that the Ten Commandments exercised “extraordinary influence” on American law⁹¹ is to wrap a kernel of truth in such a vast overstatement as to demonstrate that the statement can only be a pretext to justify displaying the Commandments. What is plausibly true is that three of the Ten Commandments are an early example of prohibitions on homicide, theft, and false witness (now embodied in the law of perjury and defamation), and that the Commandments have been more visible than other ancient sources because they are part of the sacred text of the dominant religious tradition in Western culture. To claim any more than that is to rewrite history.

Widely accepted religious teachings provide moral support for corresponding legal prohibitions. But that is a religious effect of the Commandments, akin to the argument that a religious people will be better and more law-abiding citizens. It is not an argument that any existing legal rules are derived from the Commandments.

American law does not trace in any significant way to the Ten Commandments. Paul Finkelman reached this conclusion by examining the sources Americans have cited in the development of American law; we did not cite the Ten Commandments.⁹² I approached the question somewhat differently, asking when and where the prohibitions contained in the Commandments entered the law. Penalties for murder, theft, perjury, and defamation tend to appear early in the development of all legal systems, including those of ancient civilizations with no reliance on the Jewish scriptures.⁹³

⁹¹ See *Van Orden*, 351 F.3d at 181.

⁹² See Finkelman, *supra* note 33, at 1500–16.

⁹³ See generally RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* (2002) (examining the law and legal institutions of ancient Mesopotamia, Egypt, Greece, and Rome); see also *id.* at 60–65, 68, 77 (describing homicide, theft, false witness, perjury, and defamation in ancient

The American states inherited prohibitions on murder, theft, perjury, and defamation from English law. Such rules appear in the earliest surviving sources of English law, the “dooms” of seventh-century Anglo-Saxon kings.⁹⁴ These dooms compiled pre-existing customs; the substance of these laws existed among the Germanic tribes before they were written down and before the Anglo-Saxons were Christianized.⁹⁵ The American law of murder, theft, perjury, and defamation thus traces back through centuries of English law to the barbarian laws of non-Christian Germanic tribes—and this line of development is far more direct than any development from the Ten Commandments. The comprehensive standard sources—Holdsworth, Plucknett, and Pollock & Maitland—have no index entries for the Ten Commandments, and in extensive reading on early English law in those sources, I have encountered not a single mention of the Ten Commandments.

Of course, the Christianization of England contributed ideas that influenced law. But these ideas were nothing so basic as the points of overlap between secular law and the Ten Commandments. Holdsworth emphasizes the church’s contribution of more advanced legal ideas derived from secular Roman law, not from religious faith.⁹⁶ The idea of writing down tribal laws and customs was itself one of these Roman ideas; thus the dooms first appear after

Mesopotamia); *id.* at 134–35, 165–69, 172–73 (describing perjury, theft, homicide, and defamation in ancient Egypt); *id.* at 216–17, 243–48, 254–55 (describing perjury, homicide, theft, and defamation offenses in ancient Athens); *id.* at 299, 334–37, 345–46, 347 (describing perjury, homicide, theft, and elements of defamation in pre-Christian Roman law).

⁹⁴ See SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 1–10 (1937) (Carl Stephenson & Frederick George Marcham, eds.) (reprinting excerpts from the dooms). There are many provisions penalizing homicide and theft; for perjury and defamation, *see id.* at 5 (Dooms of Hlothaere and Eadric & 11). For analysis, see 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 52–53, 55–56 (2d ed. 1968) (describing the Anglo-Saxon law of homicide and theft); 2 *id.* at 537 (describing the Anglo-Saxon law of defamation); 1 *id.* at 39–40 (describing heavy reliance on oaths in Anglo-Saxon law); 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (4th ed. 1936) (describing the Anglo-Saxon penalties for false accusations); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 483 (5th ed. 1956) (describing the Anglo-Saxon law of slander).

⁹⁵ See 2 HOLDSWORTH, *supra* note 94, at 19 (stating that Anglo-Saxon codes, which is what he calls the dooms, “enacted the customary law of the tribe”); 1 POLLOCK & MAITLAND, *supra* note 94, at 44 (“[I]n its general features, Anglo-Saxon law is not only archaic, but offers an especially pure type of Germanic archaism.”). This Anglo-Saxon base persisted in English law after the Conquest. Pollock & Maitland conclude that “our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system.” *Id.* at c.

⁹⁶ See 2 HOLDSWORTH, *supra* note 94, at 21–25.

conversion to Christianity.⁹⁷ Plucknett attributes to the influence of Christianity and its Jewish inheritance the concept of individual responsibility, holding individuals rather than families responsible for wrongdoing.⁹⁸ But the basic ideas that it was wrong to kill, steal, or bear false witness were part of Anglo-Saxon law long before the Anglo-Saxons learned of the Ten Commandments.

The Commandment forbidding adultery corresponds to legal rules that survive in American law only vestigially. Adultery is a ground for divorce that is rarely used in the age of no-fault divorce, and in a few states, it is still a crime, frequently committed but never prosecuted. Many Americans believe adultery to be immoral and destructive, but few Americans want any serious effort to criminally prosecute adulterers. The Commandment against adultery has thus become a religious and moral obligation with little remaining relationship to law. And at any rate, adultery too was prohibited in many early legal systems unrelated to the Ten Commandments, including that of the Anglo-Saxons.⁹⁹

The Commandments against coveting, and the Commandment to honor one's father and mother, are religious and moral obligations that have never been legal obligations in Anglo-American law. A cynic might conclude that our national economic policy is based on encouraging people to covet what their neighbors have and to run out and buy something like it—or better. The remaining Commandments, and the promise of divine reward for honoring one's father and mother, could not constitutionally be part of American law. These are purely religious teachings, concerning each person's relationship to God.

In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments. Why would a state pick out this single text, with at best a loose and ill-fitting relationship to the law, to illustrate the development of American law? Of course it would not. Governments display this text for its religious significance, not for its legal significance.

By attributing to the Commandments a legal significance they do not have, the state inflates the importance of the Commandments to citizens who do not believe in either Christianity or Judaism. And by emphasizing this false source of significance, the state necessarily

⁹⁷ See 1 POLLOCK & MAITLAND, *supra* note 94, at 11–12.

⁹⁸ See PLUCKNETT, *supra* note 94, at 8–9.

⁹⁹ See 2 POLLOCK & MAITLAND, *supra* note 94, at 392–93, 543–44 & n.1; 2 HOLDSWORTH, *supra* note 94, at 90.

distorts and conceals the Commandments' true significance in the faiths that hold them sacred.

No justice appeared to credit the sources-of-American-law argument in *Van Orden*, but the dissenters gave it some credence in the companion case, *McCreary County v. ACLU*.¹⁰⁰ McCreary County had displayed the Commandments with a miscellany of other legal, historic, or patriotic documents—Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the Preamble to the Kentucky Constitution, and a picture of Lady Justice—and labeled the whole array “The Foundations of American Law and Government Display.”¹⁰¹ The topic announced in that label is clearly secular, and the county insisted that the Ten Commandments were just an integral part of this secular display. The majority found this display lacking in any “clear theme,” and the choices for inclusion “odd,” “puzzl[ing],” and pretextual.¹⁰² The Constitution does not require that government-sponsored secular displays make any sense, but when a religious display is surrounded by a secular display that was hastily thrown together, fails to cohere, and asserts legal or historical claims that make little or no sense, the incoherence or inaccuracy of the secular content supports an inference that no one took the secular content seriously and that it is just a pretext for the religious display.

Despite all this, the dissenters appeared to credit the Foundations of American Law theme.¹⁰³ Why in *McCreary County* but not in *Van Orden*? Perhaps because in *Van Orden*, Texas did not even bother with the pretext. The display itself said nothing to connect the Ten Commandments to the development of American law, and apparently, no justice was willing to say that the Commandments inherently presented that unstated and implausible theme.

C. *Summing Up*

In the view of various judges, a freestanding display of the text of the Ten Commandments is predominantly secular either because the Commandments were made part of a theme of history and morality, or because they were made part of a theme of Texan identity, or

¹⁰⁰ 545 U.S. 844 (2005).

¹⁰¹ *Id.* at 856.

¹⁰² *Id.* at 872–73 (“If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of the courthouses constitutionally required to embody religious neutrality.”).

¹⁰³ *See id.* at 903–06 (Scalia, J., dissenting) (“the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system.”).

because they have an historical meaning, or because they have a museum curator, or because they show the development of American law, or because together with a display on Aztec mythology they comprise a display on comparative religion. Reasonable people can disagree about whether some of these diverse and inconsistent arguments would have at least a bit of plausibility in isolation. But none of these proposed meanings can begin to compete with the open and obvious religious meaning of sacred text presented as the voice of God speaking directly to the reader. If no one were desperately trying to rationalize governmental display of the Ten Commandments, no one would entertain the notion that they are somehow predominantly secular.

IV. THE CROSS

One might think that surely everyone agrees that the Christian cross is religious. But one would be wrong. Government lawyers have repeatedly argued that the cross can have a predominantly secular meaning, and sometimes judges seem to take them seriously.

The Supreme Court has not yet squarely addressed this issue. *Salazar v Buono*¹⁰⁴ involved a freestanding cross in the Mojave National Preserve in California. But the Ninth Circuit had held that the cross was unconstitutional, in a judgment that was not appealed.¹⁰⁵ So the constitutionality of the cross on government property was res judicata in *Buono*.¹⁰⁶ The issue presented was whether the government's efforts to privatize the cross were a sufficient remedy for the adjudicated constitutional violation, or in the Court's somewhat different formulation, whether those efforts should be enjoined.¹⁰⁷

Litigators try to make good impressions even on issues that are not presented, and the government's brief repeatedly implied that maybe the cross wasn't unconstitutional after all. Thus, the government said that many people view the cross "as a symbol of the sacrifices of fallen soldiers," contrasting this characterization with plaintiff's view that the cross is "a religious symbol."¹⁰⁸ The government compared the cross to the Ten Commandments display in *Van Orden* and claimed that the cross "communicates a secular message."¹⁰⁹ The

¹⁰⁴ 130 S. Ct. 1803 (2010).

¹⁰⁵ *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

¹⁰⁶ *Buono*, 130 S. Ct. at 1815 (plurality opinion).

¹⁰⁷ *Id.* at 1811.

¹⁰⁸ Brief for the Petitioners 28, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 1526915.

¹⁰⁹ *Id.* at 29.

government even claimed that the cross has “a *predominantly* secular message.”¹¹⁰ The government contrasted the cross with the “patently religious” object of the ordinance in *McCreary County*, implying that the government’s purpose in preferentially permitting erection of a Christian cross was somehow *not* patently religious.¹¹¹

Justice Kennedy for the plurality acknowledged that the cross is “certainly a Christian symbol.”¹¹² He even quoted his earlier statement, dissenting in a nativity scene case, that the Establishment Clause “forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.”¹¹³ But he appeared to think that the clause may not forbid the government to permit the permanent erection of a large Latin cross if those who erect the cross say that it is a memorial to veterans. He said that “the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”¹¹⁴ “[T]he District Court concentrated solely on the religious aspects of the cross, divorced from its background and context.”¹¹⁵

This appears to be a new extension of the larger-unit argument. In the nativity scene cases, the larger-unit argument at least required that there actually be a larger unit—some secular content in addition to the nativity scene itself. This is the difference between *Lynch v. Donnelly*,¹¹⁶ with its nativity scene, reindeer, and candy canes, and *County of Allegheny v. ACLU*,¹¹⁷ where the nativity scene stood alone. In the Pledge of Allegiance case,¹¹⁸ there was secular text in addition to “under God,” and in the case upholding a Ten Commandments monument,¹¹⁹ there were the Commandments with secular equivalents (no killing, stealing, or bearing false witness). But in *Buono*, there was just a freestanding cross. There had once been a small sign describing it as a memorial to veterans, but that sign had disappeared.¹²⁰ The sign had never been visible from the road, which is the point from which the great majority of people view the cross.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at 36.

¹¹² *Buono*, 130 S. Ct. at 1816.

¹¹³ *Id.* (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part)).

¹¹⁴ *Id.* at 1816–17.

¹¹⁵ *Id.* at 1820.

¹¹⁶ 465 U.S. 668 (1984). For further analysis, see *supra* notes 5–10, and accompanying text.

¹¹⁷ 492 U.S. 573 (1989). For further analysis, see *supra* notes 21–23, and accompanying text.

¹¹⁸ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

¹¹⁹ See *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹²⁰ *Buono*, 130 S. Ct. at 1812.

So the religious symbol might not even need to be part of a larger display. To justify disregarding the religious content, it might be enough that the religious symbol has some allegedly secular secondary meaning. If the cross is used to honor fallen soldiers, its religious meaning may be subsumed.

These claims cannot withstand analysis. There is no ambiguity about the primary meaning of a Christian cross. The cross is *the* central symbol of *the* central theological claim of Christianity: that the son of God died on the cross to redeem the sins of humankind, that he rose from the dead, and that those who believe in him will also rise from the dead and have eternal life. This is the second of the two miracles around which Christianity is organized. And while there could be no death and resurrection without the Incarnation, there could be no salvation and eternal life in the Christian story without the cross and resurrection. Christmas leads toward Easter, not the other way around. There is no doubt that the resurrection is the more important of the two miracles to the Christian story.

All the secondary meanings to which the cross has been put are derived from, and dependent on, this primary meaning. The secondary meanings would make no sense without the 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. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross.

The cross should be a much easier case than the Ten Commandments. The Ten Commandments are a sacred text, but as Justice Breyer emphasized, this text contains prohibitions on murder, theft, perjury, and defamation—secular wrongs that are prohibited in the legal code of every civilization. But the Christian cross has no meaning not derived from its primary religious meaning.

The conservative justices who most strongly defend government sponsorship of religion have said on two occasions that this support must be interfaith. It must be confined to what the three Abrahamic faiths have in common;¹²¹ it must exclude “details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”¹²²

¹²¹ See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting) (acknowledging that government cannot favor one religion over another, but arguing that with respect to government speech, this principal protects only Christians, Muslims, and Jews, or perhaps only monotheists).

¹²² *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

The cross fails each of these proposed tests. It is unique to Christianity and not common to the three Abrahamic religions, let alone all monotheistic religions. Its power as a symbol, and the story it symbolizes, are entirely dependent on the divinity of Jesus. The divinity of Jesus is an explicit, central, and essential element of the Christian story of the cross. The promise of resurrection and eternal life is what makes the cross a symbol that honors deceased Christian soldiers, and that promise necessarily depends on the divinity of Jesus. But even Justice Scalia has said that “our constitutional tradition” has “ruled out of order” such sectarian endorsements of religion.¹²³

Or maybe not, when necessary to uphold a symbol that cannot rationally be characterized as interfaith. At the oral argument in *Buono*, Justice Scalia said he assumed the cross “is erected in honor of all the war dead. It’s the—the cross is the—is the most common symbol of—of—of the resting place of the dead.”¹²⁴ He thought it “outrageous” to believe that the cross honors only the Christian war dead,¹²⁵ and he ridiculed the possibility of erecting symbols of multiple faiths to honor the dead.¹²⁶

These are comments that 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.

The cross and its story are not merely neutral or irrelevant to non-Christians; they are profoundly negative. To Christians, the story of the cross offers an extraordinary promise: Christians will be “saved” through the cross,¹²⁷ resurrected from the dead, and eternally rewarded. But to non-Christians, the cross offers an equally extraordinary threat. According to the central Christian claim that is symbolized by the cross, non-Christians are outside the saving grace of the cross and will be eternally damned.

The promise to Christians is capsulized in a Bible verse much publicized by evangelical Christians: “For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.”¹²⁸ The negative pregnant

¹²³ *Id.*

¹²⁴ Transcript of Oral Argument 38-39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 3197881.

¹²⁵ *Id.* at 39.

¹²⁶ *Id.* (“[W]hat would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Muslim half moon and star?”).

¹²⁷ See *John* 3:17 (King James) (“For God sent not his Son into the world to condemn the world; but that the world through him might be saved.”).

¹²⁸ *Id.* 3:16.

in this promise is made explicit two verses later (and in many other New Testament passages): “He that believeth on him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God.”¹²⁹

The threat of the cross is inseparable from the use of the cross to honor the Christian dead. The cross is an appropriate symbol for Christian dead because it promises resurrection and eternal life. But that promise is only to some, and it is paired with a threat of condemnation to all others. Christians have disagreed over the centuries about how this sorting process works—predestination, a “personal decision” for Jesus, faithful and sincere performance of sacramental obligations, and other theories—but those disagreements do not affect the central point. On any version of Christian theology, some humans get the promise, and other humans get the threat. To note these things about the meaning of the cross is not to attack Christianity, but to take it seriously.

Non-Christians do not fear the threat of the cross, because they do not believe the Christian story. But that does not justify government promotion of the principal symbol of both the promise and the threat. A government-sponsored cross inherently takes sides between competing claims to religious truth. It says that Christian teachings about the afterlife are true, and that the teachings of other faiths are therefore, necessarily, false. It says that Christian soldiers will be eternally rewarded, and that other soldiers, who also gave their lives for the country, will be eternally damned.

No doubt many Americans look at the cross without thinking about all these things. It is common to think of the simplest meaning of a word or symbol without thinking of how that meaning came to be or why that meaning makes sense. Many Christians believe that the offer of the cross is open to all humans even if many decline to accept it. And many American Christians are rather nominal Christians who do not take Christian teaching very seriously, think about it very deeply, or even know much about it.¹³⁰

But none of that should be taken to change the meaning of a symbol that literally makes no sense apart from the theological claims from which the meaning is derived. The cross was not arbitrarily

¹²⁹ *Id.* 3:18; see, e.g., *Mark* 16:16 (“[H]e that believeth not shall be damned.”); *John* 3:36 (“[H]e that believeth not the Son shall not see life; but the wrath of God abideth on him.”); *id.* 14:6 (“I am the way the truth and the Life; no man cometh unto the father, but by me.”).

¹³⁰ See Pew Forum on Religion & Public Life, *U.S. Religious Knowledge Survey* (Sept. 28, 2010), <http://www.pewforum.org/Other-Beliefs-and-Practices/U-S-Religious-Knowledge-Survey.aspx> (finding that Americans on average could correctly answer about half of a series of multiple choice questions about religion—questions that for the most part were not difficult or esoteric).

assigned to honor the dead; if that were all, a division sign would work as well as a modified plus sign. The cross honors the dead because of—and only because of—the promise of the resurrection. It makes no sense otherwise. And the promise of the resurrection is also a threat of damnation to those who do not believe the promise.

If, as I believe and the Ninth Circuit held, the cross in the Mojave National Preserve is unconstitutional, it does not follow that every cross on government property is unconstitutional. Many of these crosses are constitutionally unobjectionable, even praiseworthy—not because they are somehow secular, but because they are predominantly private speech. The crosses on the headstones, and the crosses used as headstones, on military graves in government cemeteries, are chosen by individual veterans or their families, and the government offers a wide range of symbols for use by veterans of other faiths.¹³¹ These privately selected religious symbols on individual graves are best understood as the private speech of each veteran.

One important function of religion is to address the inevitability of death, and a cemetery is an appropriate place to express the religious faiths of those buried there. Without some such ability to express their faith, many Americans would find government cemeteries unusable. The objection is not to religious symbols in cemeteries, but to the inequality of singling out only Christians for collective memorialization.

Whether in such a cemetery, with individual religious markers for veterans of different faiths, there can also be a large, dominant cross in honor of Christian veterans collectively is a harder question. Such crosses exist in government cemeteries, although they are not common.¹³² A cross is an appropriate part of a cemetery with large numbers of Christian burials, and if the government is to run cemeteries, it can build crosses. But such a freestanding cross for Christian veterans collectively should be accompanied by prominent collective monuments for adherents of other faiths. If government is to erect collective religious symbols in cemeteries, it must treat all faiths—and the lack of faith—with equal concern and respect.

The site of the cross at issue in *Buono* is not a cemetery, there are no individual headstones with symbols of many faiths, and the

¹³¹ See *Salazar v. Buono*, 130 S. Ct. 1803, 1823 n.9 (2010) (Alito, J., concurring in part and concurring in the judgment) (noting that veterans and their families may choose from thirty-nine types of headstones).

¹³² See *Trunk v. City of San Diego*, 629 F.3d 1099, 1111–16 (9th Cir. 2011) (surveying American military cemeteries' grave markers and concluding that "the cross is not commonly used as a symbol to commemorate veterans and fallen soldiers in the United States").

government refused to permit the symbols of any faith other than Christianity.¹³³ What stands at that site is a large, permanent, and freestanding cross, isolated from the symbol of any other faith and from any secular symbol.¹³⁴ There is no way that display can be understood as a neutral recognition of veterans of all faiths. Rather, for government to sponsor such a cross is for government to promote the Christian story of the cross.

Other cross cases are on their way to the Court. In *American Atheists, Inc. v. Duncan*,¹³⁵ the Tenth Circuit struck down a program of large crosses placed near highways to memorialize state troopers killed in the line of duty. These crosses are twelve-feet tall, much larger than the small privately placed crosses often seen at the site of fatal accidents, and they have a large copy of the insignia of the highway patrol (12 x 16 inches) where the vertical and horizontal members of the cross intersect.¹³⁶ These crosses are indisputably religious symbols, and their use to memorialize deceased troopers is derivative of their religious meaning. An interesting wrinkle, in my view legally irrelevant, is that the Mormon majority in Utah does not use the cross as a significant religious symbol.¹³⁷ Mormons of course believe the central Christian story and believe in the resurrection,¹³⁸ but they view the cross as a symbol of Jesus' suffering and death rather than as a symbol of the resurrection.¹³⁹

The difficult issue in *American Atheists* is whether the religious message inherent in these crosses should be attributed to the individual troopers and their families, to the state, or to both. The Utah Highway Patrol Association, which erects these crosses in state rights-of-way with the state's permission, says it would use a different symbol for any trooper whose family requested a different symbol.¹⁴⁰ But the defendant state officials—whether out of intransigent intolerance or to create a test case is unclear—say that they would not grant permission for any other symbol.¹⁴¹ That open discrimination

¹³³ *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

¹³⁴ *Id.* (describing the site).

¹³⁵ 616 F.3d 1145 (10th Cir. 2010), *modified on reh'g and reh'g en banc denied*, 2010 WL 5151630 (10th Cir. Dec. 20, 2010).

¹³⁶ *Id.* at 1150.

¹³⁷ *See id.* at 1157.

¹³⁸ *See* RICHARD LYMAN BUSHMAN, *MORMONISM: A VERY SHORT INTRODUCTION* 3 (2008).

¹³⁹ Gordon B. Hinckley, *The Symbol of Christ*, *NEW ERA* 4 (Apr. 1990), available at <http://lds.org/new-era/1990/04/the-symbol-of-christ?lang=eng> (“But for us, the cross is the symbol of the dying Christ, while our message is a declaration of the living Christ.”).

¹⁴⁰ *Am. Atheists*, 616 F.3d at 1151.

¹⁴¹ *Id.* at 1151 n.2.

between faiths should be clearly unconstitutional. But it is hard to be confident that the Court would say so. The Tenth Circuit was also troubled by the large size, both of the crosses and the state insignia on the crosses,¹⁴² which could reasonably be viewed as the state going out of its way to associate itself with the religious symbol (even if all discrimination were eliminated).

In *Trunk v. City of San Diego*,¹⁴³ the Ninth Circuit held that a large freestanding cross at the top of Mount Soledad in La Jolla is unconstitutional. This cross was erected in 1954, replacing earlier crosses dating back to 1913.¹⁴⁴ The cross was not presented as a war memorial until after litigation began,¹⁴⁵ and the cross towers over the much smaller objects that have been added to honor individual veterans and military units.¹⁴⁶ This cross is clearly a religious symbol, and in my judgment, it is clearly unconstitutional. But the plurality in *Buono* gave great weight to the political problems caused by removing a longstanding cross, and we may expect those justices to be troubled by removing this cross too. It would be far better if they would just say that and stop, rather than absurdly claiming that the cross has a predominantly secular meaning.

V. THE TURN TO POST MODERNISM

The Court carried the assault on meaning to a whole new level in Justice Alito's opinion for the Court in *Pleasant Grove City v. Sumnum*.¹⁴⁷ The Court said that monuments often have many meanings, not just one; they can be interpreted "in a variety of ways."¹⁴⁸ There is something to this, especially when the monument is nonverbal, cryptic, or conspicuously ambiguous. It is also a point easily exaggerated, as the Court's examples illustrate. "[W]hat is 'the message' of the 'large bronze statue displaying the word 'peace' in many world languages' that is displayed in Fayetteville, Arkansas?"¹⁴⁹ There is simply no ambiguity there. The dominant message is "peace," and any other message is distinctly secondary.

What about a statue of Pancho Villa, donated by the government of Mexico to the City of Tucson? Was Villa a revolutionary leader

¹⁴² *Id.* at 1160–62.

¹⁴³ 629 F.3d 1099 (9th Cir. 2011).

¹⁴⁴ *Id.* at 1102–03.

¹⁴⁵ *Id.* at 1119.

¹⁴⁶ *Id.* at 1123.

¹⁴⁷ 129 S. Ct. 1125 (2009).

¹⁴⁸ *Id.* at 1135.

¹⁴⁹ *Id.*

and advocate for the poor, or a violent bandit?¹⁵⁰ Unless there is an epitaph or a biographical inscription, the statue doesn't say. The statue is nonverbal. But the statue unambiguously honors Pancho Villa, and absent some disclaimer, it is an unavoidable inference that those who erect and maintain such a statute think him deserving of the honor. That implies a favorable view of Villa, with details left unspecified.

The Court notes that the Statue of Liberty was originally perceived as a monument to Franco-American friendship, and only later came to be viewed as a welcoming beacon to immigrants.¹⁵¹ This example works a little better, but it depends both on the statue's original lack of text and on a culture clash rather like that involved in the Mexican and American views of Pancho Villa. The symbolism intended by the French was never accepted in the United States,¹⁵² which had considerable difficulty raising money to pay for the pedestal on which the statute stands.¹⁵³ It was inevitable that Americans would impose their own meaning on the statue. The beacon-to-immigrants meaning emerged quickly; the famous Emma Lazarus poem was written in 1883, well before the statue was unveiled in October 1886.¹⁵⁴ The immigration meaning was locked in when the poem was added to the pedestal in 1903.¹⁵⁵ This story has not just a shift from one culture to another, but also a substantial addition of text to the display.¹⁵⁶

¹⁵⁰ *Id.* at 1135–36.

¹⁵¹ *Id.* at 1136–37 (“The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries.”).

¹⁵² See MARVIN TRACHTENBERG, *THE STATUE OF LIBERTY* 181 (1976) (“the colossus was motivated by a unique set of political and cultural conditions in the ascendant French Third Republic. But there was no historical reason—beyond some vague Centennial sentiment—why a reciprocal spirit should have possessed the Americans . . .”); *id.* at 186 (For the Americans, there was no profit in maintaining the symbolism of international revolution (even on the intended moderate terms of the ‘conservative [French] republicans’). Few among the American public wished to be reminded of the frailty of the thirteen colonies in 1776, and how they had welcomed aid from a mighty nation that had since grown soft. And certainly whatever was sensed of the imperialist French undertones of the statue was felt as abhorrent.”).

¹⁵³ Congress refused to appropriate money, the governor of New York vetoed a state appropriation, and “the public was as ungenerous as its elected representatives.” *Id.* at 179. Successful fundraising eventually required an intensive publicity campaign organized by Joseph Pulitzer, who published the name of every donor in the *New York World*. *Id.* at 183–84.

¹⁵⁴ *Id.* at 187 (date of poem); *id.* at 21 (date of unveiling).

¹⁵⁵ *Id.* at 187.

¹⁵⁶ Welcome to immigrants is the theme of the entire poem, and not just its most famous lines:

Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand

The Pancho Villa and Statue of Liberty examples do illustrate the Court's most immediate claim—that the donor and recipient of a donated monument may attach different meanings to it. But even that point is illustrated only in the narrow circumstances of a monument without words and donated from one nation to another that spoke a different language and had a very different culture.

The Court's final example was the John Lennon memorial in Central Park, at the center of which is the single word, "Imagine."¹⁵⁷ The Court says that some may imagine the songs Lennon would have written if he had lived; "[o]thers may think of the lyrics of the Lennon song that *obviously* inspired the mosaic and may 'imagine' a world without religion, countries, possessions, greed, or hunger."¹⁵⁸ The Court's "obviously" may have been a slip of the word processor, but it is entirely accurate; it is indeed obvious what inspired this part of the memorial. Like the Ten Commandments displays with tablets and a couple of words, but without a full text, this memorial alludes to the text but does not present the text. The text itself, imagining what a better world this would be if there were no religion and no belief in heaven or hell,¹⁵⁹ is not one that any government in the United States could constitutionally endorse. The dominant meaning of the John Lennon memorial is to honor John Lennon; the means chosen are inappropriate and constitutionally dubious. Whether it should be upheld depends on whether the courts ultimately uphold similar allusions to pro-religious texts.

The Court's musings about these disparate monuments were apparently intended to illustrate the claim, never quite explicitly stated, that the City could adopt a Ten Commandments monuments as government speech without adopting or endorsing the Ten Commandments that appeared on the face of the monument.¹⁶⁰ A Ten

Glows world-wide welcome; her mild eyes command
 The air-bridged harbor that twin cities frame.
 "Keep, ancient lands, your storied pomp!" cries she
 With silent lips. "Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tossed to me,
 I lift my lamp beside the golden door."

Emma Lazarus, *The New Colossus*, in 2 AMERICAN POETRY: THE NINETEENTH CENTURY 457–58 (John Hollander, ed., 1993).

¹⁵⁷ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135 (2009).

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *See id.* at 1135 n.2 (reprinting text of JOHN LENNON, IMAGINE (Apple Records 1971)).

¹⁶⁰ *See id.* at 1135 ("Respondent seems to think that a monument can convey only one 'message' . . . and that, if a government entity that accepts a monument for placement on its

Commandments monument can have many possible meanings, of which the actual Ten Commandments is only one.¹⁶¹ This from a Justice who said the same Term that the statutory meaning of a RICO “enterprise” is so clear that “there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”¹⁶² Of course, unlike the Court’s four examples of allegedly ambiguous monuments, both the RICO Act and the Ten Commandments monuments in *Van Orden*, *McCreary County*, and *Summum* use complete English sentences to convey their meaning. Some English sentences are ambiguous, but some are quite clear, or clear on one point even if ambiguous on some other point.

The opinion’s claims about the inherent ambiguity of monuments are in sharp tension with its more credible explanation of why monuments on government land are government speech:

Governments have long used monuments to speak to the public. . . . A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. . . .

It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.¹⁶³

Government would not use monuments to communicate if they did not actually communicate at least much of the time. If every monument were as indecipherable as the Court seems to think in part IV of its opinion, then the practice of erecting monuments to convey meanings, described in part III of the opinion, would be largely futile.

property does not formally embrace *that* message, then the government has not engaged in expressive conduct.”).

¹⁶¹ *See id.* (“Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”).

¹⁶² *Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009).

¹⁶³ *Summum*, 129 S. Ct. at 1132–33.

Part IV seems designed to increase the range of deniability for governments that sponsor religious monuments. Monuments mean lots of things, and just because this one is religious on its face does not mean that government endorses the religious meaning.

Summum was an implausible free speech claim, unanimously rejected. It was not an Establishment Clause case, and the Court's church-state separationists did not object to part IV of the opinion. That was probably a mistake. Justice Alito returned to the theme in his separate opinion in the cross case, *Salazar v. Buono*.¹⁶⁴ Citing *Summum* for the point that "'The meaning conveyed by a monument is generally not a simple one,' and a monument may be 'interpreted by different observers, in a variety of ways,'" Justice Alito said that observers had interpreted the cross in *Buono* "as conveying at least two significantly different messages."¹⁶⁵ No one else joined in this opinion.

No doubt an ambiguous text or symbol can be subject to more than one interpretation. But not every text is ambiguous. Surely the Court in *Summum* did not commit itself without dissent to a post-modernist world in which no text or symbol has any core meaning and any text can mean anything. When a symbol has a primary meaning so fundamental, so longstanding, and so universally known, as the Christian cross, government cannot display the symbol and plausibly disclaim the primary meaning. When the allegedly secular secondary meaning (honoring the war dead) is wholly derivative from the primary religious meaning (the promise of the resurrection), government cannot embrace the secondary meaning without embracing the primary meaning on which the secondary meaning depends. If government can sponsor a Christian cross and deny that it has done something that is first, foremost, and fundamentally religious, then words and symbols have no meaning, and the Court has consigned the Establishment Clause to the world of *Alice in Wonderland*.

If a Christian cross has sufficient secular meaning to fall outside the Establishment Clause, then so might a sectarian prayer. Some might interpret the prayer as a meditation, some as a prose poem, and still others as a metaphor, and some might view the prayer as "[r]eligious symbolism . . . with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges."¹⁶⁶ Especially if the prayer includes some

¹⁶⁴ 130 S. Ct. 1803 (2010).

¹⁶⁵ *Id.* at 1822 (Alito, J., concurring) (quoting *Summum*, 129 S. Ct. at 1135).

¹⁶⁶ *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J. dissenting).

secular message or request, there is no limit. Some observers will emphasize the secular request, and some might apply the larger-unit theory—if there is secular material in this prayer, then the whole unit can be labeled as secular. If the message of the cross is “predominantly secular,” why not “Jesus Christ save the United States and this Honorable Court”?¹⁶⁷ If government can use a single sacred symbol to honor the war dead, and a sacred text to encourage morality, why not religious exhortations more generally to encourage good behavior? The Court will disserve both religion and the Constitution if it eventually accepts the claim that even the most profoundly religious symbols have no core meaning and can be treated as secular.

VI. TAKING WORDS AND SYMBOLS AT FACE VALUE

The Court got it right in part III of its opinion in *Sumnum*.¹⁶⁸ Neither government nor private citizens very often erect signs they disagree with, and observers have no way to recognize the rare exceptions unless the disagreement is made clear.

This commonplace factual inference should support a legal presumption: government display of a sacred text presumptively endorses the religious message in that text, and the burden is on government to clearly rebut the presumption of endorsement with objective evidence at the site of the display, open and obvious to all observers, and sufficient to unambiguously control the dominant meaning of the display. The endorsement of the displayed text is open, obvious, and difficult to plausibly deny. The evidence that overcomes that apparent endorsement must therefore be equally open and obvious, and it must be strong enough to objectively outweigh the message of endorsement.

Displays of religious symbols may sometimes be more ambiguous than displays of religious texts, but well-known religious symbols have primary religious meanings that cannot plausibly be denied. Government must be taken to endorse the religious symbols it displays, and in the exceptional cases where that is not true, government must clearly say so, at the site of the display, and in terms that are open and obvious to all observers and strong enough to objectively negate the apparent endorsement.

¹⁶⁷ See Transcript of Oral Argument at 12, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), 1991 WL 636285 (where an unidentified Justice, who sounds very much like Justice Scalia, seems to think this would be constitutionally problematic).

¹⁶⁸ *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1132–34 (2009) (explaining that governments erect monuments to speak to the public).

The most common way in which a sacred text or symbol becomes part of a secular message is when it is an integral part of a larger and non-pretextual secular message or display. The incorporation of Aztec symbols on the Seal of Mexico into the Six Flags display in the Texas capitol is an example. But the point is not confined to dead religions.

Consider how the Ten Commandments would be presented in a secular museum display designed by a professional curator, or in a curricular unit designed by a professional teacher—assuming that neither was committed to evading the state's obligations under the Establishment Clause, and that neither was pressured by superiors demanding such evasion. In such a context, the Commandments would not be presented by themselves. They would be an integral part of some larger pattern, and the larger display or curricular unit would convey information in no way dependent on whether observers or students believed the Commandments. Such a display might survey ancient moral codes or lawgivers through history. It might be a comparative survey of the world's great religions. It might be part of a history of the Jewish people. It might be many things, but it would not be a bare display of the sacred text. Other texts or objects would be included, and there would be explicit explanations of the relationship among the various items included. There would be a coherent pattern to the combination, not dependent on the religious significance of the sacred text.

Neither lawyers nor expert witnesses would be needed to explain the secular point of such a display, because the whole display would be designed to convey its secular point. The secular point would be open and obvious, and the sacred text would be a natural component, necessary to the display.

Justice O'Connor once said that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."¹⁶⁹ This is no doubt true, but why? It is true because the museum context makes clear that the painting is there because of its value as art, not because of its religious message. This is clear because there are many other paintings, because all of them have substantial value as art, and usually, because not all of them are religious. But even in a museum devoted to a period when substantially all art was religious, the reasonable observer could see that selections were based on artistic value.

Similarly in the case of a display or curricular unit conveying secular information, the reasonable observer can see that the sacred

¹⁶⁹ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

text was selected because it is necessary to the secular message, or at least that it was highly relevant and naturally illustrative or supportive of the secular message. But when the sacred text is displayed by itself, the reasonable observer can see only the sacred text and the state's desire to promulgate it.

Where the state claims that it is really using the sacred text to promulgate some secular message, that secular message must be explicit, it must dominate any religious implications of the display, and the sacred text must be an integral component, clearly necessary or at least highly relevant, to the explicit secular message of the display. The government must carry the burden of rebutting the presumption that it endorses what it displays. It should be obvious that not every display that combines religious and secular elements will meet this standard. Such a display might simply endorse all its disparate elements, or it might be gerrymandered to include a marginally relevant sacred text, or its message might depend upon a claim about the truth of the sacred text. The proposed presumption would not make every case easy. But it would make many cases easy, on both sides of the line. By holding governmental units to an objective standard, much sham litigation would be avoided. Litigation of these cases would no longer be a wholly unstructured inquiry into the government's ad hoc rationalizations, and the courts would no longer invite governmental units to desacralize sacred texts or symbols.

VII. CONCLUSION

Even a Court composed of nine aggressive secular liberals would not order the demolition or sandblasting of every religious symbol on any government property in America. Some of these displays, such as "In God We Trust" carved across a building, may be de minimis to any foreseeable group of Justices.¹⁷⁰ Some, such as the frieze of lawgivers in the Supreme Court's chamber, are part of larger display with a clear secular theme. Some, such as the crosses and other religious symbols on gravestones in government cemeteries, are private speech. In some cases, such as a freestanding cross alleged to be a memorial to veterans, a more politically acceptable remedy might be to add additional symbols to make the memorial honor all veterans instead of only Christian veterans. If the Court is determined to permit some longstanding religious displays to remain just because they have been there a

¹⁷⁰ See Laycock, *supra* note 12, at 223–24, 231–38 (discussing efforts to define a de minimis exception).

long time, it would do better to announce a rule explicitly about time—a grandfather clause, a statute of limitations, or a laches bar—rather than absurdly trying to secularize symbols that are plainly religious.

The Court’s new majority may be edging towards a holding that government is free to promote Christianity as long as it does so noncoercively. Such a holding would be a tragic mistake in my view,¹⁷¹ but that’s a different paper. If the Court wants to let government promote a single faith, it should take on the burden of openly defending that position. It should not keep struggling to desacralize sacred texts and sacred symbols in opinions that nobody believes.

As the Court said in *Summum*, “It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.”¹⁷² Governments endorse and promote the texts, symbols, and depictions that they display. Sacred texts, sacred symbols, and depictions of miracles are religious. When government displays sacred texts, sacred symbols, or depictions of miracles, it is promoting the religious message inherent in the text, the symbol, or the alleged miracle. And nothing the Court says can change those facts.

¹⁷¹ See Douglas Laycock, *Reviews of a Lifetime*, 89 TEX. L. REV. 949, 955–64 (2011) (reviewing the arguments against allowing government to endorse religion).

¹⁷² *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009).