

PASSIVE OBSERVERS, PASSIVE DISPLAYS, AND THE
ESTABLISHMENT CLAUSE

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This Article examines jurisprudence surrounding state action, and when that action does and does not violate the Establishment Clause. Division within the Court regarding what constitutes a “passive” state practice has complicated Establishment Clause analyses for lower courts, as evidenced by the chaotic case law on the issue. Because the Court has advanced very little clear guidance on Establishment Clause standards, lower courts issue widely varying opinions and reasoning on the matter, as explored by this Article.

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I. INTRODUCTION

A number of factors are thought relevant when deciding whether a particular state practice implicating religion violates constitutional guarantees such as, for example, the age of the individuals who will be exposed to the practice and whether the practice at issue requires participation. Additional factors include whether the state is seen as endorsing religion or whether the practice is coercive or proselytizing. All of these factors are sensibly considered. What the current jurisprudence does not make clear, however, is whether the passive nature of a practice is an additional factor to be considered or whether,

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instead, describing a practice as “passive” is simply a way of indicating that the practice does not violate constitutional guarantees.

Regrettably, there is a marked lack of agreement in the case law both with respect to what counts as a passive display and what role that factor should play in the constitutional analysis. Members of the Court sometimes make offhand comments about such displays that, if adopted, would significantly change current Establishment Clause¹ jurisprudence. However, these comments often remain undiscussed, leaving open whether these views will someday radically reshape the jurisprudence.

This Article discusses whether or in what respect current Establishment Clause jurisprudence takes into account the passive nature of a particular state practice when determining whether constitutional guarantees have been violated. While members of the Court sometimes imply that this is an important consideration, they can agree neither about which displays are passive nor about what role that factor should play in the analysis. Until members of the Court can offer a plausible explanation of what counts as a passive display and why such a determination even matters, the current chaotic jurisprudence will become even worse and an even greater number of lower courts will decide similar cases in very different ways.

II. PASSIVE DISPLAYS AND PASSIVE OBSERVERS

While quite willing to describe various religious objects on state grounds as mere passive displays, courts have been much less willing to define the term or even to list the indicia by which to determine whether a display is passive. That may be due, in part, to the way that members of the Court have employed the term in the case law, sometimes using it to make a point of contrast indicating that the practice at issue is not “merely” a passive display, while at other times using it as a descriptor indicating that the display at issue is innocuous and thus obviously does not offend constitutional guarantees. But neither way of employing the term gives much guidance to those courts seeking to determine whether a particular state practice is in accord with constitutional guarantees or even whether describing a display as “passive” is simply to use a conclusory term indicating that the practice at issue is not constitutionally offensive.

A. *Prescribing Orthodoxy*

One of the first cases to help inform our understanding of the conditions under which a passive display might violate constitutional guarantees is *West Virginia State Board of Education v. Barnette*,² in which

¹ U.S. CONST. amend 1 (“Congress shall make no law respecting an establishment of religion . . .”).

² 319 U.S. 624 (1943).

West Virginia's salute-the-flag requirement³ was challenged as a violation of constitutional guarantees. Students were required to give a stiff-arm salute⁴ while saying, "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."⁵

Students who failed to take part could be expelled.⁶ Because an expelled student would be "unlawfully absent,"⁷ such a student would be subject to a delinquency proceeding⁸ and possible commitment to a reformatory,⁹ while the student's parents would be liable to prosecution and subject to fine or imprisonment.¹⁰

The Jehovah's Witnesses challenging the West Virginia requirement interpreted the Biblical proscription against making graven images quite literally—they considered the flag an image for purposes of that command,¹¹ and believed that they were precluded by their religious beliefs from saluting it. At issue in *Barnette* was not the passive display of the flag but what the students were being forced to do, namely, positively affirm something that might be contrary to faith.¹²

The *Barnette* Court noted that it was unclear whether the "regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning."¹³ In either case, the state requirement could not be justified. The focus of the Court was not on the object that was being saluted but on the individual who was being coerced into doing something (saying the Pledge) that should not have been required. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

³ *Id.* at 626.

⁴ *Id.* at 628.

⁵ *Id.* at 628–29.

⁶ *Id.* at 629.

⁷ *Id.* (quoting W. VA. CODE § 1851 (1941) (current version at W. VA. CODE ANN. § 18-8-8 (LexisNexis 2008))).

⁸ *Id.*

⁹ *Id.* at 630.

¹⁰ *Id.* at 629.

¹¹ *Id.* "Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it." *Id.*

¹² *Id.* at 631 ("[W]e are dealing with a compulsion of students to declare a belief.").

¹³ *Id.* at 633.

confess by word or act their faith therein.”¹⁴ Here, the student was being asked to affirmatively express by word something that contradicted sincerely held religious beliefs.

Suppose, however, that we modify *Barnette* so that the students are not required to say anything when saluting the flag. Even so, the students would still be doing something that might be religiously prohibited if, for example, the physical act of performing the salute were likened to an expression of subservience analogous to bowing. Forcing the student to so act would still be unconstitutional insofar as she was being forced to make a confession contrary to faith.

Where the student is not asked to affirm something expressly but, instead, to make a salute, the flag display itself becomes important. But for the presence of the flag, the forced salute might be thought to have a much different meaning. For example, were that same movement part of an exercise in a physical education class where no flag was nearby, the compelled movement would not implicate the same constitutional concerns, because it would not carry the same symbolism.

Suppose that the *Barnette* example is modified yet again. There is no compelled movement or affirmation, but merely a flag displayed in the room. This would be constitutionally unproblematic, since there would be no colorable claim of a violation of constitutional guarantees posed by such a display of a United States flag. However, there might be two very different analyses of why such a flag display would be constitutional. One analysis might focus on the content of the display, since it might well be thought perfectly permissible to display an American flag in an American school, although other flags, for example, a Confederate flag, would be more questionable.¹⁵

A different analysis might focus on the passive nature of the display, and whether something that is passive would be prescribing “what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁶ It might be thought, for example, that passive displays do not *do* anything—because they are inert, they are incapable of prescribing.¹⁷

¹⁴ *Id.* at 642.

¹⁵ *But see* NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (upholding the state’s display of the Confederate flag on the capitol dome). The Eleventh Circuit commented, “It is unfortunate that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population, but that is a political matter which is not within our province to decide.” *Id.* at 1566.

¹⁶ *Barnette*, 319 U.S. at 642. The Eleventh Circuit did not view the flying of the Confederate flag on the capitol dome as violating the proscription against establishing orthodoxy. *Hunt*, 891 F.2d at 1565–66.

¹⁷ *Cf.* notes 224–26 and accompanying text *infra* (noting Justice Scalia’s rejection of the idea that passive objects proselytize or coerce).

B. Observing Nonsectarian Prayers

For many individuals, the recitation of the Pledge of Allegiance does not implicate religious matters—indeed, at the time *Barnette* was decided, the words “under God” were not even included.¹⁸ However, religious matters were more obviously implicated where students were asked to recite a nonsectarian prayer at the start of each day.

In *Engel v. Vitale*,¹⁹ the Court examined a New York State requirement that the following prayer be recited to begin each day: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”²⁰ In this case, however, students were not required to participate—they could instead be excused from the room during the prayer’s recitation or stay in the room and remain silent.²¹

Consider the child who remains in the room but does not participate. She might be likened to an observer, although what she observes should not be thought a passive display, at least in the sense that the other children would be doing something—participating—rather than remaining motionless like a painting.²² Further, although the kind of coercion that had been implicated in *Barnette* was not implicated here, the child might nonetheless have felt some pressure to participate. The Court struck down the practice at issue in *Engel* for two distinct reasons: (1) the state itself was establishing religious beliefs,²³ and (2) nondenominational character of the prayer notwithstanding,²⁴ some individuals nonetheless found that it contradicted their religious beliefs²⁵ and might well have felt coerced to participate.²⁶

Lest one think that the Court was implying that a showing of indirect coercion was required in order for the practice at issue to be found

¹⁸ For a description of the legal history of the Pledge of Allegiance, see generally Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement and the Marsh Wild Card*, 40 IND. L. REV. 529 (2007).

¹⁹ 370 U.S. 421 (1962).

²⁰ *Id.* at 422.

²¹ *Id.* at 430.

²² *Cf. Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 816 (Cal. 1991) (en banc) (“[G]overnment-sponsored group religious exercises are active and participatory; for example, those attending the ceremony may be asked to ‘stand and join in prayer.’ Such practices cannot be equated with the passive display of religious objects.”).

²³ *Engel*, 370 U.S. at 430 (“New York’s state prayer program officially establishes the religious beliefs embodied in the Regents’ prayer.”).

²⁴ *Id.*

²⁵ *Id.* at 423 (“[T]he parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children.”).

²⁶ *Id.* at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”).

unconstitutional, the Court noted that “the purposes underlying the Establishment Clause go much further than that,”²⁷ i.e., do more than merely prevent religious minorities from being indirectly coerced, because the Clause’s “first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”²⁸ The Court explained that Establishment Clause guarantees mean at the very least that the government is not to “compose official prayers for any group of the American people to recite as part of a religious program carried on by government.”²⁹ By suggesting that the Constitution precluded state officials from composing such prayers *whether or not non-adherents were required to say them or even be present while they were recited*, the Court made clear that coercion was not a necessary predicate for a practice to be struck down on Establishment Clause grounds.

The requirement that the state refrain from conducting prayers in schools was not understood to be manifesting “hostility toward religion or toward prayer,”³⁰ but merely recognizing that Church and State have different duties and functions. “[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”³¹ Thus, the *Engel* Court was not somehow seeking to denigrate religion but, instead, was seeking to assure that the state would not usurp others’ roles with respect to the teaching of religious beliefs and practices.

C. *Recitation of Prayers Not Composed by the State*

At least one issue raised in *Engel* was the degree to which the practice was unconstitutional because a state actor had composed the prayer. At issue in *School District of Abington Township v. Schempp*³² was a requirement that the Bible be read at the beginning of each day. However, this statute did not authorize the state to compose the prayer. On the contrary, at least ten verses were to be read from the Holy Bible without comment.³³ Students, rather than the state, would choose the Bible from which to read.³⁴ After the Bible passage was read, the Lord’s Prayer would be recited over the intercom with students in the classroom standing and

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 425.

³⁰ *Id.* at 434. *But cf.* Douglas G. Smith, *The Constitutionality of Religious Symbolism after McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 94 (2007) (“[A] constitutional rule that prohibited the display of items that have religious significance would manifest a profound hostility to religion . . .”).

³¹ *Engel*, 370 U.S. at 435.

³² 374 U.S. 203 (1963).

³³ *Id.* at 205.

³⁴ *Id.* at 207.

repeating the prayer.³⁵ As had been true in *Engel*, students had the option either of excusing themselves from the classroom or of remaining in the classroom without participating.³⁶

The *Schempp* Court struck down the practice at issue, because of the exercise's "religious character."³⁷ The claim that the Bible was being used for "nonreligious moral inspiration"³⁸ was rejected, at least in part, because the state's permitting students to be excused from the exercises suggested that the state, itself, appreciated the "pervading religious character of the ceremony."³⁹ By striking down the practice, the Court made clear that it was false to think that the only constitutional vice in *Engel* was that the state had composed the prayer itself. Indeed, Justice Brennan implied that the practices at issue in *Schempp* were more serious violations of the First Amendment, because the nature of the prayers was more sectarian.⁴⁰ Basically, once the religious character of the exercises was demonstrated, it was clear that "the exercises and the law requiring them are in violation of the Establishment Clause."⁴¹

The *Schempp* Court considered and rejected the contention that its holding the practice at issue in violation of Establishment Clause guarantees "collides with the majority's right to free exercise of religion."⁴² While the Free Exercise Clause prohibits the state from denying anyone free exercise rights, that clause has "never meant that a majority could use the machinery of the State to practice its beliefs."⁴³ On the contrary, the Constitution requires the state to be "firmly committed to a position of neutrality"⁴⁴ on religious matters, which means not only that the state is precluded from composing prayers but also that the state should not be conducting a school program where it promotes the utterance of prayers written by others.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 224.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.* at 267 (Brennan J., concurring) ("Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, I would suppose that, if anything, the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious.").

⁴¹ *Id.* at 223.

⁴² *Id.* at 226.

⁴³ *Id.*

⁴⁴ *Id.*

D. Doing, Not Doing, and Constitutional Guarantees

In *Wooley v. Maynard*,⁴⁵ the Court examined the constitutionality of two New Hampshire statutes: one required that “noncommercial vehicles bear license plates embossed with the state motto, ‘Live Free or Die,’”⁴⁶ and the other made it a misdemeanor “knowingly [to obscure] . . . the figures or letters on any number plate.”⁴⁷ The latter had been interpreted by the New Hampshire Supreme Court to include obscuring of the state motto.⁴⁸

The Maynards considered the state motto repugnant to their faith,⁴⁹ and objected to being required to “disseminate this message by displaying it on their automobiles.”⁵⁰ They began covering up the motto.⁵¹

Maynard was charged with and convicted of violating the law.⁵² Eventually, “the Maynards sought both declaratory and injunctive relief against enforcement of the . . . statutes.”⁵³ The Court framed the question as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public,”⁵⁴ holding that the state could not,⁵⁵ and suggesting that New Hampshire law “in effect requires that appellees use their private property as a ‘mobile billboard’ for the state’s ideological message—or suffer a penalty.”⁵⁶

The *Maynard* Court compared what was before it to what had been at issue in *Barnette*, recognizing that “[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the *passive* act of carrying the state motto on a license plate.”⁵⁷ Nonetheless, the Court believed this a difference in degree rather than in kind,⁵⁸ concluding that “where the State’s interest is to disseminate an

⁴⁵ 430 U.S. 705 (1977).

⁴⁶ *Id.* at 707.

⁴⁷ *Id.* (quoting N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975) (current version at N.H. REV. STAT. ANN. § 261:176 (Supp. 2009))).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 708.

⁵² *Id.* (“Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of § 262:27-c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was ‘continued for sentence’ so that Maynard received no punishment in addition to the 15 days.”).

⁵³ *Id.* at 711.

⁵⁴ *Id.* at 713.

⁵⁵ *Id.*

⁵⁶ *Id.* at 715.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* (“[T]he difference is essentially one of degree.”).

ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."⁵⁹ Here, the Court downplayed the importance of the distinction between passive and active, although then-Justice Rehnquist emphasized its importance in his dissent.⁶⁰

A separate question was whether anyone would attribute to the Maynards the political view espoused on their license plate.⁶¹ Basically, Justice Rehnquist suggested that the views exhibited on the license plate were much more likely to be attributed to the state than to the Maynards. Finally, because the Maynards were free to display a statement that they disapproved of or disagreed with the motto on their car, it was not clear that they were being forced to affirm anything.⁶² Indeed, Justice Rehnquist asked rhetorically whether an individual who used United States currency could be assumed to be affirming "In God We Trust."⁶³ Believing the answer obvious, he suggested that similarly there would be "no affirmation of belief involved in the display" at issue before the Court.⁶⁴ Because the Maynards were simply passively carrying the message of the state, and no one would reasonably attribute the view to them, he argued that the requirement was not constitutionally infirm.

E. On Passive Observers and Passive Displays

Barnette and *Maynard* involved compelled affirmations, and *Engel* and *Schempp* involved prayers in school. Neither involved whether a school could simply display a religious symbol in school, an issue that was raised in *Stone v. Graham*.⁶⁵

Stone involved a Kentucky statute that required public schools to post the Ten Commandments.⁶⁶ The Court noted that it had adopted the

⁵⁹ *Id.* at 717.

⁶⁰ *Id.* at 720 (Rehnquist, J., dissenting) (noting that the State had not "forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that *all* noncommercial automobiles bear license tags with the state motto, 'Live Free or Die.' Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes." (footnote omitted)).

⁶¹ *Id.* at 721 (Rehnquist, J., dissenting) (asking rhetorically whether the Maynards "in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views").

⁶² *Id.* at 722 (Rehnquist, J., dissenting) ("Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto.").

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 449 U.S. 39 (1980).

⁶⁶ *Id.* at 39.

three-part *Lemon* test to determine whether a state statute violated Establishment Clause guarantees.⁶⁷ The three prongs are:

1. the statute must have a secular purpose,
2. the statute's "principal or primary effect must . . . neither advance[] nor inhibit[] religion,"
3. "the statute must not foster 'an excessive government entanglement with religion.'"⁶⁸

If a statute violates any of these prongs, it will be struck down as a violation of Establishment Clause guarantees.⁶⁹

The Court focused on the first prong. Noting that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature,"⁷⁰ the Court concluded that the state had "no secular legislative purpose"⁷¹ in enacting this requirement and that the law was therefore unconstitutional.⁷² Of course, the state did not say that it had no secular purpose. On the contrary, at the bottom of each display was a notation, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."⁷³

Avowed secular purpose notwithstanding, the Court noted that the Ten Commandments are "a sacred text in the Jewish and Christian faiths"⁷⁴ and explained that "no legislative recitation of a supposed secular purpose can blind [the Court] to that fact."⁷⁵ Yet, this did not mean that the Ten Commandments had no place in the schools. Rather, the difficulty was that the Ten Commandments had not been integrated properly into the curriculum. For example, the Bible might be included in an "appropriate study of history, civilization, ethics, comparative religion, or the like."⁷⁶

The *Stone* Court did not confine its analysis to the purpose behind the law, but also spoke to the likely effects of posting the Ten Commandments. The Court foresaw that schoolchildren might be induced to "read, meditate upon, perhaps to venerate and obey, the Commandments."⁷⁷ While believing that this would be a salutary effect,

⁶⁷ *Id.* at 40.

⁶⁸ *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

⁶⁹ *Id.* at 40–41.

⁷⁰ *Id.* at 41.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (quoting KY. REV. STAT. ANN. § 158.178 (LexisNexis 2009)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 42 (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963)).

⁷⁷ *Id.*

the Court rejected that this was a permissible state objective.⁷⁸ Further, the Court denied that the posting was immunized from constitutional scrutiny because it was financed privately rather than publicly, since “the mere posting of the copies under the auspices of the legislature provides the ‘official support of the State . . . Government’ that the Establishment Clause prohibits.”⁷⁹ Finally, the Court denied that there was any constitutional significance in the fact that this involved a mere posting of a display rather than a recitation of a prayer by the students.⁸⁰

Stone suggests that posting the Ten Commandments in schools violated Establishment Clause guarantees for two distinct reasons: (1) the motivation behind such a display cannot plausibly be thought to be secular, and (2) the effect of such a posting would be to promote religion. Regrettably, the *Stone* majority did not discuss whether a purpose behind posting the Ten Commandments could be secular, even if the preeminent motivation behind such a posting would be religious. As then-Justice Rehnquist noted in his dissent, a secular purpose had been articulated by the legislature and confirmed by the trial court.⁸¹ Of course, even if Justice Rehnquist were correct that there had been a secular purpose behind the statute, it still might have been true that the *predominant* purpose behind its adoption would have been religious. In that event, the Court would have had to decide whether a statute would violate the *Lemon* test if the motivation behind its adoption was predominantly but not wholly religious.⁸²

Perhaps the *Stone* Court rejected the trial court finding that a secular purpose had motivated the legislature,⁸³ because the Court wanted to make the case as stark as possible to justify its holding that the display

⁷⁸ *Id.* (“However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”).

⁷⁹ *Id.* (quoting *Schempp*, 374 U.S. at 222; *Engel*, 370 U.S. at 431).

⁸⁰ *Id.* (“Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for ‘it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.’”) (quoting *Schempp*, 374 U.S. at 225).

⁸¹ *Id.* at 43 (Rehnquist, J., dissenting).

⁸² Compare *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (suggesting that a statute would fail the *Lemon* purpose prong only if it “was motivated wholly by religious considerations”) with *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (“A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.”).

⁸³ See *Stone v. Graham* 599 S.W.2d 157, 157 (Ky. 1980) (“I agree with the trial judge of the Franklin Circuit Court when, in upholding the constitutionality of KRS § 158.178, he wrote: ‘[T]he fact that the Ten Commandments spring from a religious well does not in itself forever divorce their use for a secular purpose. We can think of no good reason why all or any part of the Bible may not be used for other than religious purposes, for secular purposes, for historical and literary purposes.’” (alterations in original)), *rev’d* 449 U.S. 39 (1980).

could not withstand constitutional scrutiny. Yet, such a strategy carries its own dangers, as was illustrated in *Lynch v. Donnelly*.⁸⁴

At issue in *Lynch* was the constitutionality of the inclusion of a crèche in a city-owned holiday display including among other things a Santa Claus House, reindeer pulling a sleigh, a Christmas tree, carolers, a clown, an elephant, a bear, colored lights, and a large banner proclaiming “SEASONS GREETINGS.”⁸⁵ The trial court found that the city’s purpose in including the crèche was to promote religion.

Numerous factors led the court to reach that conclusion, for example, the Mayor had testified that not having the crèche included in the display would “take Christ out of Christmas.”⁸⁶ The district court considered the city’s claim that the crèche symbolizes the “nonsectarian ethical aspirations of peace and goodwill,”⁸⁷ but reasoned that even were this an “independent secular meaning,”⁸⁸ that meaning would be “subordinate to, and indeed flow[] from the [crèche’s] fundamentally religious significance.”⁸⁹ While the Mayor had claimed that the motivations for including the crèche were “both economic and cultural or traditional,”⁹⁰ the court noted that local businessmen had testified that the inclusion of the crèche did not add anything to enhance the display’s commercial attractiveness.⁹¹

The court next considered the culture and traditions argument. The city had argued that inclusion of the crèche in the display merely “acknowledges” the holiday’s religious heritage.⁹² However, the “line between ‘acknowledgment’ and ‘promotion’ is a fine one,”⁹³ especially when the government is acknowledging majority religious beliefs or practices. For example, it might be argued that the school day is permissibly started with a prayer, because such a practice merely involves the recognition that many people begin their day that way,⁹⁴ although *Engel* and *Schempp* suggest that such a practice violates constitutional

⁸⁴ 465 U.S. 668 (1984).

⁸⁵ *Id.* at 671.

⁸⁶ *Donnelly v. Lynch*, 525 F. Supp. 1150, 1173 (D.R.I. 1981), *rev’d*, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁸⁷ *Id.* at 1167.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1170.

⁹¹ *Id.* *But see* *Paul v. Dade County*, 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (“The evidence reflects that this cross, together with other lights and decorations, was originally placed on the courthouse of Dade County, Florida at the request of members of the Miami Chamber of Commerce around 1955. This was done in order to help decorate the streets of Miami and attract holiday shoppers to the downtown area, rather than to establish or create a religious symbol, or to promote or establish a religion.”).

⁹² *Donnelly*, 525 F. Supp. at 1170.

⁹³ *Id.* at 1171.

⁹⁴ *Id.*

guarantees.⁹⁵ Or, it might be argued that the school day is permissibly begun with readings from the Bible as an acknowledgment of its role in the religious heritage of the Nation,⁹⁶ although *Schempp* counsels otherwise.⁹⁷ The court concluded that “Pawtucket’s use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys [and] nothing in the record undermines the reasonableness of drawing that inference here.”⁹⁸

The district court pointed to some of the city’s actions and non-actions as support for the conclusion that the city had acted with a religious purpose. For example, after having already distinguished between secular and religious aspects of Christmas,⁹⁹ the court noted that the city had done nothing to distance itself from its being perceived as endorsing the religious message conveyed by a Christmas display that included a crèche.¹⁰⁰ That was especially problematic, given that Pawtucket only included within its official ceremonies and displays the heritage and traditions of the Christian majority.¹⁰¹ Finally, the court found that the city had adopted the majority view that “it is a ‘good thing’ to have a creche in a Christmas display, . . . because it is a good thing to ‘keep Christ in Christmas.’”¹⁰² But the city cannot join in the fight to keep Christ in Christmas without endorsing and helping to promulgate particular religious beliefs.¹⁰³ The state neutrality required in *Schempp*¹⁰⁴ does not permit the state to promote one religion over others.

After concluding that the *Lemon* purpose prong had not been met, the *Donnelly* district court also discussed the passive nature of the display at issue. The court cautioned that use of the term “passive” can be misleading, as if the government must be active in some way to “shape public values and perceptions.”¹⁰⁵ But it is simply mistaken to view passive displays as inert and non-affecting, because passive displays can themselves help shape values. Further, the term “passive” may be

⁹⁵ See *supra* notes 19–44 and accompanying text (discussing *Engel* and *Schempp*).

⁹⁶ *Donnelly*, 525 F. Supp. at 1171.

⁹⁷ See *supra* notes 32–44 and accompanying text (discussing *Schempp*).

⁹⁸ *Donnelly*, 525 F. Supp. at 1172.

⁹⁹ See *id.* at 1171 (“Santa Claus and Christmas trees have outgrown their religious beginnings and today are part of a nontheological ethos that can perhaps accurately be described as the ‘American’ celebration of Christmas. In contrast, the nativity scene remains firmly tied to its religious origins and continues to express a fundamentally theological message about the nature of the child whose birth is there depicted. It represents the way *Christians* celebrate Christmas.”).

¹⁰⁰ *Id.* at 1172.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1173 (quoting Mayor’s Testimony).

¹⁰³ *Id.* at 1173–74.

¹⁰⁴ See note 44 and accompanying text *supra* (noting *Schempp*’s requirement that the state maintain religious neutrality).

¹⁰⁵ *Donnelly*, 525 F. Supp. at 1175.

inaccurate in yet another respect, since the inclusion of a religious symbol involves an “active and deliberate incursion by government into the sphere of religion.”¹⁰⁶ Such a deliberate incursion into the religious sphere must at the very least be counteracted by an active disavowal that the symbol had been chosen because of its religious message.¹⁰⁷

When reversing the district court, the United States Supreme Court announced that it would evaluate the display in light of *Lemon*,¹⁰⁸ although the Court expressed its “unwillingness to be confined to any single test or criterion in this sensitive area.”¹⁰⁹ After noting that the *Stone* Court had struck down a state statute requiring that the Ten Commandments be displayed in the schools,¹¹⁰ the *Lynch* Court announced that the relevant jurisprudence required invalidation in light of the *Lemon* purpose prong only when the statute or practice at issue was “motivated wholly by religious considerations.”¹¹¹ Of course, the *Stone* Court had never said that the *Lemon* purpose prong would require the invalidation of a practice *only* if it could be shown that a practice was wholly motivated by religious considerations and, indeed, one might wonder how the Court could find as a matter of law that a practice was not motivated at all by secular concerns. For example, suppose that members of the Kentucky Legislature had believed that posting the Ten Commandments on schoolhouse walls might induce some children to behave better in school and thereby learn more.¹¹² The desire to enhance the setting in which children are learning would be a secular motivation and, one would infer from *Lynch*, should have been enough to save the Ten Commandment display at issue in *Stone* from constitutional invalidation.

The city of Pawtucket had argued in *Lynch* that it had sponsored the display “to celebrate the Holiday and to depict the origins of that Holiday.”¹¹³ The Court announced that these are “legitimate secular purposes.”¹¹⁴ Certainly, depicting the origins of a holiday *might* serve a

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (“If the effect of this endorsement is to be avoided, government must not merely be silent about the symbol. Rather, government must take affirmative steps to demonstrate that it has not chosen the symbol because it approves what the symbol represents.”).

¹⁰⁸ *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 680.

¹¹² *Cf. Lawrence v. Buchmueller*, 243 N.Y.S.2d 87, 89 (N.Y. Sup. Ct. 1963) (“For school boards and school teachers to attempt a fostering of moral qualities in the children of the State without a recognition of the possibility, at least, that God is the fountainhead from which moral principles spring would have one of two consequences, either a stultification of their attempt to foster intellectual qualities in the children of the State or advocacy of a pragmatic morality in their attempt to foster moral qualities in the children of the State.”).

¹¹³ *Lynch*, 465 U.S. at 681.

¹¹⁴ *Id.*

secular instructive function, although those origins might also be depicted to promote a particular religion. But if celebration of the holiday and depicting its origins must count as secular for *Lemon* purposes, then it is hard to imagine that any holiday display would not involve some secular purpose, which means that the *Lemon* purpose prong is very forgiving indeed and cannot be used to invalidate any holiday display. The *Lynch* district court had been willing to accept that there might have been some secular motivation behind the display, although it had found that the religious motivation predominated.

The *Lynch* Court noted that there are many motives and purposes behind government action in a pluralistic society like ours.¹¹⁵ That point is well-taken. Yet, that is precisely why it makes no sense for the *Lemon* purpose prong merely to require that the government not act wholly out of a religious purpose, since such an understanding of the prong simply guts it.

The *Lynch* Court did not dispute the trial court finding that inclusion of the crèche benefitted religion. However, the Court reasoned that the relevant test was whether there was “a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.”¹¹⁶ But this changed the effect prong of the *Lemon* test. The question had been whether the primary effect was to promote (or undermine) religion, but now the Court had shifted the focus to how much aid was provided.

Suppose, for example, that the primary effect of a particular state practice is to promote religion, but that relatively few people are affected because the practice occurs in an out-of-the-way place. If it can be shown that religion is aided more by erecting a crèche among other symbols in a major metropolitan area than it is aided by erecting a cross standing alone in a relatively deserted area, then the *Lynch* analysis implies that the *Lemon* effect prong is not violated by government sponsorship of a cross in a deserted area, even if there is a caption accompanying the cross proclaiming the truth of Christianity.¹¹⁷

While the *Lynch* Court did not even mention the passive nature of the display in its analysis, that factor played a significant role in Justice Kennedy’s concurrence and dissent in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.¹¹⁸ At issue in *Allegheny* were two different displays during the Christmas season: a crèche was displayed in the county

¹¹⁵ *Id.* at 680.

¹¹⁶ *Id.* at 682.

¹¹⁷ *Cf. Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring) (“If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge.”).

¹¹⁸ 492 U.S. 573 (1989).

courthouse,¹¹⁹ while the City-County Building contained a Christmas tree, a menorah, and a sign entitled “Salute to Liberty.”¹²⁰

The *Allegheny* Court adopted the “endorsement test” to determine whether the displays at issue passed constitutional muster.¹²¹ The Court struck down the display involving the crèche¹²² after having noted that “nothing in the context of the display detracts from the crèche’s religious message.”¹²³ In contrast, the Court upheld the display involving the Christmas tree, menorah, and sign,¹²⁴ believing that this was best interpreted as a celebration of the “winter-holiday season, which has attained a secular status in our society.”¹²⁵ Numerous lower courts have decided whether religious displays violated Establishment Clause guarantees in light of the endorsement test.¹²⁶

Justice Kennedy suggested in his *Allegheny* concurrence and dissent that there was little danger of establishment where the government’s action was passive and symbolic,¹²⁷ because “the risk of infringement of

¹¹⁹ *Id.* at 579.

¹²⁰ *Id.* at 581–82.

¹²¹ *Id.* at 597 (“[O]ur present task is to determine whether the display of the crèche and the menorah, in their respective ‘particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.”).

¹²² *Id.* at 621 (“The display of the crèche in the county courthouse has this unconstitutional effect.”).

¹²³ *Id.* at 598.

¹²⁴ *Id.* at 621 (“The display of the menorah in front of the City-County Building . . . does not have this [unconstitutional] effect, given its ‘particular physical setting.’”).

¹²⁵ *Id.* at 616.

¹²⁶ *See, e.g.,* Kaplan v. City of Burlington, 891 F.2d 1024, 1028 (2d Cir. 1989) (“As we see it, *Allegheny* teaches that the display of a menorah on government property in this case conveys a message of government endorsement of religion in violation of the Establishment Clause.”); ACLU of Ky. v. Wilkinson, 895 F.2d 1098, 1105 (6th Cir. 1990) (“Here the Commonwealth’s disclaimer of any religious endorsement is not presented in the ‘small print’ mentioned in *Stone v. Graham*, moreover, but in letters readable from a moving automobile.”); Smith v. County of Albemarle, 895 F.2d 953, 959 (4th Cir. 1990) (“As the display unmistakably conveyed an ‘endorsement,’ it also unmistakably violated *Lemon*, therefore justifying some restriction on an otherwise available public forum.”); Doe v. Small, 964 F.2d 611, 619 (7th Cir. 1992) (“Moreover, the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.”) (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)); Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (“Thus, we rule in favor of Grand Rapids and Chabad House, because we hold that truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.”); Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383, 1385 (11th Cir. 1993) (“Although the state has a compelling interest in avoiding violations of the Establishment Clause, granting the group’s request to maintain its display in the public forum at hand will not convey the message that the state is endorsing, and thus establishing, the group’s religion.”).

¹²⁷ *See County of Allegheny*, 492 U.S. at 662 (Kennedy J, concurring in the judgment in part and dissenting in part) (“[W]here the government’s act of recognition or

religious liberty by passive or symbolic accommodation is minimal”¹²⁸ as long as no coercion is present. He did offer an example that would violate constitutional guarantees—“the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”¹²⁹ Interestingly, he referred to three cases that he thought relevant to his point:¹³⁰ *Lowe v. City of Eugene*,¹³¹ *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*,¹³² and *Friedman v. Board of County Commissioners*.¹³³ After referring to these cases, he noted cryptically, “Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion.”¹³⁴

I. Lowe

Lowe involved the constitutionality of erecting a cross in a public park. The Oregon Supreme Court explained that a very visible display of a cross on publicly owned and maintained property “necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol.”¹³⁵ Yet, it was not entirely clear what Justice Kennedy had in mind when citing to this case, especially when one considers that the Oregon Supreme Court seemed to be employing a kind of endorsement test, which was the test that Justice Kennedy was criticizing in his concurring and dissenting opinion.

Justice Kennedy’s citing of this case was confusing and counterproductive for other reasons as well, although some background is required to see why this choice was not particularly felicitous. It had been argued at trial in *Lowe* that the business community supported the display of the cross to “enhance the commercial exploitation of the principal Christian holidays: Christmas and Easter”¹³⁶ and, further, evidence had been offered to support that contention.¹³⁷ The Oregon Supreme Court noted, however, that a majority of the community members “apparently viewed the display with approval because it reinforced their religious preference.”¹³⁸ The court concluded that

accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment.”).

¹²⁸ *Id.* at 662.

¹²⁹ *Id.* at 661.

¹³⁰ *Id.*

¹³¹ 463 P.2d 360 (Or. 1969) (en banc).

¹³² 698 F.2d 1098 (11th Cir. 1983).

¹³³ 781 F.2d 777 (10th Cir. 1985).

¹³⁴ *County of Allegheny*, 492 U.S. at 661 (Kennedy J., concurring in the judgment in part and dissenting in part).

¹³⁵ *Lowe*, 463 P.2d at 363.

¹³⁶ *Id.* at 362.

¹³⁷ *Id.*

¹³⁸ *Id.*

because the commercial angle was developed as a litigation strategy,¹³⁹ the actual purpose was to satisfy the religious desires of the majority of the citizens,¹⁴⁰ which was exactly what the Constitution's religious guarantees were designed to prevent.¹⁴¹

An additional argument had been offered, namely, that because the park was a "War Memorial Park,"¹⁴² the display of the cross was appropriate even if it would not have been appropriate in a different public setting.¹⁴³ However, the Oregon Supreme Court reasoned that the city council's never having approved the war memorial concept¹⁴⁴ supported the conclusion that the war memorial and commercial purposes claims were "developed and embellished in response to this litigation."¹⁴⁵ Because the display was in fact motivated by religious considerations, the court ordered that it be dismantled.¹⁴⁶

Justice Kennedy failed to mention that *Lowe* did not end the controversy with respect to whether the cross would have to be removed from the park. The cross was never removed, notwithstanding the Oregon Supreme Court having found that maintenance of that cross violated constitutional guarantees.¹⁴⁷

After the *Lowe* decision was issued, a charter amendment was approved by Eugene voters accepting the cross as a memorial or monument to United States war veterans.¹⁴⁸ Further, there were other changes as well—before, the cross would only be lit on Christmas and Easter, but it would now also be lit on some secular holidays.¹⁴⁹

¹³⁹ *Id.* ("A majority of this court was of the opinion in October, and remains of the opinion now, that the allegedly commercial purposes behind the erection of the cross were, like the war-memorial argument, largely afterthoughts which were developed and embellished in response to this litigation.").

¹⁴⁰ *Id.* ("The principal purpose which motivated the city council was its desire to conform to the desires of a majority of the citizens of the community, who conscientiously believed that their preferred religious symbol was entitled to preferential public display simply because the majority wished it so.").

¹⁴¹ *Id.* at 362–63 ("Such a response to majority religious pressure is, of course, exactly what specific guarantees of rights in the state and federal constitutions were designed to prevent.").

¹⁴² *Id.* at 362.

¹⁴³ *Id.* ("[T]he public park atop Skinner's Butte in Eugene is a 'War Memorial Park' and therefore is a fit site for a lighted cross regardless of reasons which might militate against such a display on other types of public lands or buildings.").

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 364 (denying rehearing of decision that cross must be removed). The court noted that "the enlistment of the hand of government to erect the religious emblem . . . offends the constitutions." *Id.*

¹⁴⁷ *See Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 340 (Or. 1976) (en banc).

¹⁴⁸ *Id.* (footnote omitted).

¹⁴⁹ *Id.* at 344 ("Instead of being displayed by being lighted only during the 'religious festivals' of Christmas and Easter, as under the original proposal in 1964, that 1970 charter amendment provided that the cross be lighted 'on appropriate days

*Eugene Sand & Gravel, Inc. v. City of Eugene*¹⁵⁰ addressed whether the cross must be removed, given the changes that had occurred since *Lowe* was issued. To determine whether the display was constitutionally permissible, the *Eugene Sand* court first sought to determine whether such a memorial display would have passed muster had it been planned as a commemoration of soldiers' sacrifices from the very beginning.¹⁵¹ The court noted eight other cases in which such a display had been found constitutional,¹⁵² and held that the display of a cross under these circumstances would not violate constitutional guarantees.¹⁵³

The court appreciated that both before and after the charter amendment many regarded the cross as an "essentially religious symbol,"¹⁵⁴ and that the display of the cross was considered by some Christians and non-Christians alike as "offensive."¹⁵⁵ The court suggested, however, that these reactions were beside the point—the important issue was whether the display of the cross had "a primary effect that neither advances nor inhibits religion."¹⁵⁶ In part because of the way that other courts had handled war memorials, the *Eugene Sand* court held that the primary effect of this particular display did not offend constitutional guarantees.¹⁵⁷

or seasons which fittingly represent the patriotic . . . sacrifice of war veterans,' including the national holidays of Memorial Day, Independence Day, Veteran's Day, Thanksgiving and the Christmas season.").

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 344–45 ("Before considering the question whether a display of this cross on public property under these 'changed circumstances' would satisfy the three-fold test of 'purpose,' 'primary effect' and 'entanglement' we believe that the problem as thus presented is placed in better perspective by first considering, based upon decisions by other courts involving displays of religious symbols on public property, what the holding of this court would be in the event that there had been no cross prior to the 1970 charter amendment and in the event that a new cross were proposed, constructed, maintained and displayed in Eugene, or in any other city, under these 'circumstances,' as they existed at the time of the trial of this case.").

¹⁵² *Id.* at 345 ("In some eight other cases involving the display of 'religious symbols' on public property, the courts, both state and federal, have held such displays to be constitutionally permissible, at least under facts similar to those presented by the 'changed circumstances' in this case and in several instances under far weaker facts.").

¹⁵³ *Id.* at 346 ("Upon application to the present 'circumstances' of the test of 'purpose,' 'primary effect,' and 'entanglement' as stated by the Supreme Court of the United States, we believe it to be clear that the display of a large cross in a public park as a veteran's war memorial under such circumstances does not violate constitutional requirements despite the fact that it is admittedly a religious symbol." (footnote omitted)).

¹⁵⁴ *Id.* at 347.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ("[T]he display of this cross in a city park as a war memorial under these circumstances does not have a 'primary effect' which either 'advances' or 'inhibits' religion.").

That did not end the inquiry, however, because the court still had to address whether the purpose behind the display could pass constitutional muster. The court quickly dispensed with the claim that the purpose behind maintaining the cross required that the display be held unconstitutional, reasoning that such an historical pedigree argument would prove too much—"it would mean that the passive display on public property of any religious symbol would be unconstitutional, so as to require its removal," if the purpose behind its creation had not passed constitutional muster.¹⁵⁸ The court believed that such a rule would be too restrictive, because "such a 'history' would forever foreclose" that display,¹⁵⁹ even if an identical display created for a secular purpose would survive constitutional review.

Yet, the court failed to consider the implications of its dismissal of the pedigree argument, since a refusal to consider the purpose behind a display might make it relatively easy for a state entity to immunize a display whose creation and maintenance had been entirely religiously motivated. For example, a town might erect a religious display precisely because it wished to promote a particular religious view. However, on advice of counsel (either before or after someone had threatened to take legal action to have the display removed), the city might decide to affix some explanatory statement designed to secularize the motivation, e.g., by making the observation that as a historical matter state laws were based in part on religious laws¹⁶⁰ or, perhaps, that the Founders recognized the influence of religion on human affairs.¹⁶¹ To refuse to consider the pedigree of a display and, instead, to hold that the purpose prong is not violated as long as there could be some secular purpose behind a display is to dilute if not destroy the *Lemon* purpose prong.¹⁶²

That the purpose behind the adoption of a practice can and should be considered does not mean that a practice can never be adopted once

¹⁵⁸ *Id.* at 348.

¹⁵⁹ *Id.*

¹⁶⁰ *Cf. McCreary County v. ACLU of Ky.*, 545 U.S. 844, 852–53 (2005) ("Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are 'the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded.');" *see also id.* at 869 ("This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt.").

¹⁶¹ *Cf. Perry v. Sch. Dist. No. 81*, 344 P.2d 1036, 1043 (Wash. 1959) (en banc) ("[T]he framers were men of deep religious beliefs and convictions, recognizing a profound reverence for religion and its influence in all human affairs essential to the well-being of the community.").

¹⁶² *Cf. McCreary County*, 545 U.S. at 863–64 ("The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances.").

it has been “tainted” by religious motivation.¹⁶³ For example, in *McGowan v. Maryland*,¹⁶⁴ the Court recognized that the “original laws which dealt with Sunday labor were motivated by religious forces,”¹⁶⁵ but reasoned that the modern justification for Sunday closing laws was secular rather than religious and thus that such laws did not violate Establishment Clause guarantees, religious pedigree notwithstanding.¹⁶⁶

It is simply unclear what to make of *Lowe* and *Eugene Sand*. In *Lowe*, the Oregon Supreme Court had suggested that neither the United States nor the Oregon Constitution permitted the majority to erect a display to reinforce their religious preferences. However, the *Eugene Sand* court upheld the constitutionality of the very monument that the *Lowe* court had struck down, largely because of a referendum passed by *Eugene* voters designating the monument as a war memorial, notwithstanding that this referendum had occurred after the *Lowe* court had already characterized the war memorial issue as an afterthought.¹⁶⁷ It is somewhat difficult to understand why a ratification of an afterthought by the majority of voters would allay the Oregon Supreme Court’s worries that the majority was imposing its will on religious minorities, and Justice Kennedy’s having cited to this case does not inspire confidence in the usefulness of the test that he is proposing.

2. Rabun County

At issue in *Rabun County* was an illuminated Latin cross on a very tall structure in a state park.¹⁶⁸ When seeking approval for the erection of the cross from the Georgia Department of Natural Resources, the local Chamber of Commerce explained that it would take full responsibility for funding and maintaining the cross and that the Chamber hoped to have the cross ready for dedication on Easter Sunday.¹⁶⁹ After the ACLU objected to placing the cross on state property, the Department

¹⁶³ See *id.* at 873–74 (“In holding the preliminary injunction adequately supported by evidence that the Counties’ purpose had not changed at the third stage, we do not decide that the Counties’ past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.”).

¹⁶⁴ 366 U.S. 420 (1961).

¹⁶⁵ *Id.* at 431.

¹⁶⁶ See *id.* at 444 (“In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.”).

¹⁶⁷ *Lowe*, 463 P.2d at 362.

¹⁶⁸ *ACLU of Ga. v. Rabun County Chamber of Commerce Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983) (discussing “an illuminated latin cross on a 85 foot structure in Black Rock Mountain State Park”).

¹⁶⁹ *Id.*

suggested that the cross be designed as a memorial for deceased persons, although a resolution to that effect was never officially adopted.¹⁷⁰

The district court found that the cross is a “universally recognized” Christian symbol.¹⁷¹ Further, there was testimony that the illuminated cross was so bright that it provided almost enough light to read at night at nearby campgrounds,¹⁷² which meant that it would be almost impossible to miss. There was additional testimony that the cross created a religious aura in those campgrounds.¹⁷³ The Eleventh Circuit found that maintaining the cross in the park violated Establishment Clause guarantees,¹⁷⁴ refusing to reverse the district court’s finding that the display was motivated by a religious purpose.¹⁷⁵ The circuit court noted that even had the district court accepted that the cross had been erected to promote tourism, “this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause.”¹⁷⁶ The Eleventh Circuit noted *Eugene Sand* with disapproval,¹⁷⁷ implying that the Oregon Supreme Court had wrongly decided the purpose prong analysis.¹⁷⁸

3. Friedman

Justice Kennedy referred to yet another case in his *Allegheny* concurrence and dissent, namely, *Friedman v. Board of County Commissioners*.¹⁷⁹ At issue was a county seal that had language in Spanish arching over a Latin cross that translated as “With This We Conquer” or “With This We Overcome.”¹⁸⁰ The Tenth Circuit explained that some uses of such a seal would not offend constitutional guarantees, especially if the cross was not readily discernible.¹⁸¹ However, there were other uses that more clearly violated First Amendment guarantees, for example,

¹⁷⁰ *Id.* at 1101–02 (“Shortly thereafter, the Chamber and the Department received objections from the ACLU of Georgia to the placement of the cross on state property. At the Department’s suggestion, a proposed resolution designating the cross as a memorial for deceased persons was drafted, although never passed.”) (footnote omitted).

¹⁷¹ *Id.* at 1103.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1111.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 1110 n.23.

¹⁷⁸ *See id.* (“[T]he correctness of the decision approving these secular purposes is questionable.”).

¹⁷⁹ 781 F.2d 777 (10th Cir. 1985).

¹⁸⁰ *Id.* at 779.

¹⁸¹ *Id.* at 781 (“Some uses of the seal at issue in the case before us might not give an appearance or imprimatur of impermissible joint church-state authority. Use similar to a notary seal on county documents or a one-color depiction in which the seal and especially the cross are not easily discernible might not pass the threshold.”).

when the seal was prominently displayed on law enforcement cars.¹⁸² The court reasoned that use of the motto on such vehicles might reasonably be regarded as “promoting the religion the cross represents,”¹⁸³ and worried that someone approached by officers who had been traveling in a car with such a seal might “reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God.”¹⁸⁴ The court further worried that a non-Christian might question whether such officers would provide fair treatment,¹⁸⁵ or might infer that secular benefits might accrue were that person to become a Christian.¹⁸⁶

All of the cases cited by Justice Kennedy struck down displays on Establishment Clause grounds. At least one question is what to make of Justice Kennedy’s having cited *Lowe*, *Rabun*, and *Friedman*, but not *Eugene Sand*. *Lowe* and *Eugene Sand* involved the very same monument and both had occurred prior to *Rabun*. Perhaps this was an oversight. Or, perhaps, Justice Kennedy wanted to suggest that in his view some displays still might be found unconstitutional, and *Eugene Sand* would have made clear how easy it might be to circumvent the constitutional protections Justice Kennedy was describing.

All of these cases were decided in light of the *Lemon* test,¹⁸⁷ and they all involved permanent displays with some variation on the kind of lighting presented. *Lowe* involved special lighting during religious holidays, whereas *Eugene Sand* included the lighting during secular holidays as well. The cross at issue in *Rabun County* was lit year-round.¹⁸⁸

¹⁸² *Id.*

¹⁸³ *Id.* at 782.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁸⁸ *ACLU of Ga. v. Rabun County Chamber of Commerce Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983) (“The structure remained lighted, alternatively in the shape of a Christmas tree or a cross, for a number of years.”). *See also id.* at 1103–04 (“The cross is situated on public land to which all residents of Georgia have a right of access. Substantial evidence supports the district court’s finding that the latin cross is a universally recognized symbol of Christianity. Moreover, the record contains the uncontroverted testimony of a witness that the cross, when illuminated, floods two of the campgrounds with a light almost bright enough to enable one to read at night. Other witnesses testified to the religious aura created in the camping area by the illuminated cross. Plaintiff Guerrero testified that the ACLU received complaints about the cross. Each of the individual plaintiffs testified unequivocally at trial that they would not use Black Rock Mountain State Park so long as the cross remained there. More particularly, two of the individual plaintiffs testified that they were campers. Prior to this litigation, plaintiff Karnan had camped at Red Top Mountain State Park, a state park in Georgia, and at federal parkland near the Black Rock Mountain State Park in northern Georgia. Plaintiff Guerrero testified that he is a regular camper and camps approximately three to four times each year. Plaintiffs Guerrero and Karnan further testified that they would not camp in Black Rock Mountain State Park because of the cross.” (footnote omitted)).

Given that the permanent cross was upheld in *Eugene Sand*, there was yet another reason that it would have been inopportune to cite, since Justice Kennedy had been proposing that a year-round religious display might well not pass constitutional muster.

Eugene Sand raises yet another issue. One of the differences between the practice at issue in *Lowe* and the practice at issue in *Eugene Sand* was that the cross in the latter was lit at secular and religious times, while the cross at issue in *Lowe* was lit only at religious times. Yet, some might view a cross lit at Christmas and Easter as an acknowledgment of those holidays, but view a cross lit at those times *plus* other non-religious times as more of an endorsement by the state, since it could not be said that the latter practice was simply a recognition that some within the community were celebrating certain holidays.

Of course, the cross at issue in *Eugene Sand* was lit during secular holidays commemorating those who had died at war,¹⁸⁹ and thus it might be argued that the lighting practices at issue in *Eugene Sand* were still secular. However, were the display really meant to commemorate the sacrifices made by those who died at war, one might wonder why only one religious symbol was used.

Justice Kennedy failed to explain why a year-long display would involve an obvious effort to proselytize but a display for a shorter period would not,¹⁹⁰ and *Eugene Sand* raises the possibility that a year-long display would be upheld as long as the special lighting does not only occur on religious holidays but at other times too. In any event, Justice Blackmun pressed Justice Kennedy on his distinguishing between year-long displays and those that were maintained for only part of the year. "But, for Justice Kennedy, would it be enough of a preference for Christianity if that city each year displayed a crèche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)?"¹⁹¹

Justice Kennedy partially addressed this by suggesting that,

if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain.¹⁹²

¹⁸⁹ See *supra* notes 148–49.

¹⁹⁰ See Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 496 (1994) ("Justice Kennedy does not explain why the permanent cross he describes should be considered ipso facto coercive.").

¹⁹¹ See *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 607 (1989) (emphasis omitted).

¹⁹² *Id.* at 664–65 n.3 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Of course, the question remains whether displays during the Christmas season and Lent would be constitutionally suspect. Justice Kennedy implied that it was permissible for a crèche to be displayed on public property during the Christmas season, because “the relevant context is not the items in the display itself but the season as a whole.”¹⁹³ Presumably the same might be said for the display of a cross during Lent. After all, Justice Kennedy noted, “Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”¹⁹⁴

Ironically, the monument at issue in *Lowe* was held unconstitutional, at least in part, because it was only lit during the Christmas and Easter holidays, a practice that Justice Kennedy implied would not be particularly worrisome. But this makes matters even more confusing, because it suggests that one of opinions Justice Kennedy cited with approval was based on an analysis with which he expressly disagrees.

Regrettably, Justice Kennedy offered too little in his *Allegheny* concurrence and dissent for a coherent position to be inferred. He had an opportunity to flesh out his position in *Lee v. Weisman*.¹⁹⁵

F. *Passive Observers Revisited*

The non-coercion posed by the display in *Allegheny* might be contrasted with the allegedly coercive activity at issue in *Lee*. There, a student attending her junior high school graduation was in the uncomfortable position of being present while prayers with which she did not agree were recited.¹⁹⁶

¹⁹³ *Id.* at 666 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁹⁴ *Id.* at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part). *But cf.* *ACLU of Ga. v. Rabun County Chamber of Commerce Inc.*, 698 F.2d 1098, 1105 (11th Cir. 1983) (“Government counsel put it at argument that if the plaintiffs didn’t like to look at the crèche, they could avoid walking near the Ellipse while it was occupied by the crèche.”) (quoting *Allen v. Hickie*, 424 F.2d 944, 947 (D.C. Cir. 1970)).

¹⁹⁵ 505 U.S. 577 (1992).

¹⁹⁶ *See id.* at 581. The objected prayers appeared as follows:

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

Regrettably, the Court's characterization of the case made it somewhat difficult to decide what was doing the work for constitutional purposes to make this practice constitutionally offensive. For example, the Court explained:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.¹⁹⁷

This analysis might be broken down into several parts. For example, it presumably would be enough to establish that constitutional guarantees were violated to note that state officials directed the performance of a formal religious exercise.¹⁹⁸ An additional difficulty is posed insofar as students are required to attend the exercise,¹⁹⁹ and yet another constitutional difficulty is posed by the student being required to participate.²⁰⁰

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN.

Id. at 581–82 (internal quotation marks omitted).

¹⁹⁷ *Id.* at 586.

¹⁹⁸ *See id.* at 604 (Blackmun, J., concurring) (“But it is not enough that the government restrain from compelling religious practices: It must not engage in them either.”).

¹⁹⁹ *See id.* at 588–89 (“The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.”).

²⁰⁰ *Id.* at 598 (“The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance *and participation* in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.” (emphasis added)).

Regrettably, it is simply unclear which if any of these elements was thought by the Court to be dispositive. Because the Court did not make that clear, it might be tempting to distinguish *Lee* from other future cases by simply distinguishing on the facts in some way. For example, suppose that there was a government-orchestrated prayer at a school function and students were required to attend but not required to participate.²⁰¹ Or, suppose that this was a government-orchestrated prayer, but the students were not required to attend, much less participate.²⁰² Or, suppose that a prayer was offered, but that the prayer was not government-orchestrated.²⁰³

Lee provides little help. Some of the earlier cases suggest that any of these would be constitutionally offensive, assuming that it is not constitutionally significant that the prayer is offered at a graduation rather than during the school day.²⁰⁴ Thus, *Engel* suggests that the state's composing the prayer is enough to make the practice constitutionally offensive.²⁰⁵ *Schempp* suggests that the Constitution is offended if the state promotes a program wherein a prayer is used, even if the state had no hand in composing the prayer.²⁰⁶ However, as Justice Scalia has pointed out, legal sanctions might be imposed for the failure to attend school, whereas such sanctions would not be imposed for the failure to attend a graduation.²⁰⁷

Justice Scalia's point, while true, does not capture the spirit of *Engel* and *Schempp*. In those cases, unlike *Barnette*,²⁰⁸ the alternative for the student was simply to leave the class or, perhaps, to remain in the class but not participate in the prayer.²⁰⁹ Nonetheless, despite the absence of a legal sanction coercing compliance, the practices at issue in *Engel* and *Schempp* were struck down. That said, however, even if Justice Scalia's

²⁰¹ Cf. *id.* at 638 (Scalia, J., dissenting) ("But let us assume the very worst, that the nonparticipating graduate is 'subtly coerced' . . . to stand! Even that half of the disjunctive does not remotely establish a 'participation' (or an 'appearance of participation') in a religious exercise.").

²⁰² *But see* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 211–12 (1963) (noting that children would be excused from the religious exercise upon the request of the parent).

²⁰³ *See Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.").

²⁰⁴ *But see id.* at 643 (Scalia, J., dissenting) (noting that "school prayer occurs within a framework in which legal coercion to attend school (*i.e.*, coercion under threat of penalty) provides the ultimate backdrop").

²⁰⁵ *See supra* note 29 and accompanying text.

²⁰⁶ *See supra* notes 32–44 and accompanying text.

²⁰⁷ *See Lee*, 505 U.S. at 640 (Scalia, J. dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*").

²⁰⁸ *See supra* notes 6–10 and accompanying text.

²⁰⁹ *See supra* notes 20 and 35 and accompanying text.

coercion position does not capture the Court's jurisprudence in this area, policies mandating school prayer at the beginning of the school day might be distinguished from policies involving prayer at graduations in other ways. For example, it might be argued that the latter involve a *de minimis* burden.²¹⁰

Two different issues are running through these cases: (1) whether the state activity/display is active or passive, and (2) whether the individual subjected to the activity/display is active or passive. Insofar as "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"²¹¹ the focus presumably should be on those applying the subtle coercive pressure; it should be of less interest whether the individual subjected to the pressure is doing something or, instead, is passively being subjected to that pressure. But if that is the proper focus, the *Lee* Court's discussion of the "participation" of the student was misleading and likely to result in confusion in the case law.

The *Lee* Court made clear that mere discomfort for those objecting to the message at issue would not suffice to establish a constitutional violation, explaining, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."²¹² Regrettably, by suggesting that a practice is not unconstitutional merely because one or a few find it offensive, the Court fails to make clear whether the relevant issue is how many find the practice offensive or whether, instead, the point is that offense *per se* is not the relevant criterion. Further, if the point is that offense alone does not suffice, the Court fails to explain what does.

The *Lee* Court noted that there was "public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction,"²¹³ construing this standing not merely as respectful silence but, instead, as perceived if not actual participation in the exercise.²¹⁴ Thus, on the Court's view, the practice at issue involved forced²¹⁵ religious activity,²¹⁶ although the

²¹⁰ See *Lee*, 505 U.S. at 646 (Scalia, J., dissenting) (suggesting that *Lee* "spare[s] the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation"). But see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring in the judgment) ("There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.").

²¹¹ *Lee*, 505 U.S. at 592.

²¹² *Id.* at 597.

²¹³ *Id.* at 593.

²¹⁴ See *id.* at 588 ("[T]he student had no real alternative which would have allowed her to avoid the fact or appearance of participation.").

²¹⁵ *Id.* at 595 ("And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.").

practice at issue might also have been characterized not as coercing someone to participate in a religious exercise but, instead, merely as coercing someone to stand.²¹⁷ But this means that something might readily be construed as paradigmatically active (forced participation comparable to what was at issue in *Barnette*) or paradigmatically passive (mere standing, or, perhaps, sitting in respectful silence²¹⁸), depending upon who is offering the description. That this can be done as a rhetorical matter is neither noteworthy nor surprising, as long as that rhetorical choice does not itself have constitutional import. However, the ease with which this can be done is quite alarming if the word choice can determine whether a practice passes constitutional muster.

The slipperiness of the active/passive distinction as it is being employed in the case law is emphasized when one considers two recent cases before the Court involving religious displays. In *McCreary County v. ACLU of Kentucky*,²¹⁹ the Court considered the constitutionality of Ten Commandments courthouse displays.²²⁰ The Court decided the case by looking at the purpose behind the displays as manifested by the history behind them,²²¹ noting, “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”²²² Indeed, the *McCreary County* Court suggested that it was not necessary for a display to have been wholly motivated by religious considerations for the purpose prong to have been violated—“in those unusual cases where the claim was an apparent sham, *or the secular purpose secondary*, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.”²²³ Thus, according to the *McCreary County* Court, the *Lemon* purpose prong will not be satisfied just because the state has some secular purpose in erecting or maintaining a religious display.

²¹⁶ *Id.* at 593 (“What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.”).

²¹⁷ *See id.* at 638 (Scalia, J., dissenting) (“But let us assume the very worst, that the nonparticipating graduate is ‘subtly coerced’ . . . to stand! Even that half of the disjunctive does not remotely establish a ‘participation’ (or an “appearance of participation”) in a religious exercise.”).

²¹⁸ *Cf. id.* at 637 (Scalia, J., dissenting) (“The Court’s notion that a student who simply *sits* in ‘respectful silence’ during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.”).

²¹⁹ 545 U.S. 844 (2005).

²²⁰ *Id.* at 850 (“Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses.”).

²²¹ *See id.* at 859 (discussing “the history of religious government action like the progression of exhibits in this case”).

²²² *Id.* at 860.

²²³ *Id.* at 865 (emphasis added).

Justice Scalia discussed the “*passive* display of the Ten Commandments”²²⁴ in his *McCreary County* dissent, arguing that such displays, even if unaccompanied by anything else, are neither coercive nor proselytizing.²²⁵ He claimed that what Justice Kennedy had said about the crèche in his *Allegheny* concurrence and dissent was equally applicable here:

No one was compelled to observe or participate in any religious ceremony or activity. . . . [The Ten Commandments] are purely passive symbols of [the religious foundation for many of our laws and governmental institutions]. Passersby who disagree with the message conveyed by th[e] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.²²⁶

Yet, arguably, Justice Scalia’s analysis of Justice Kennedy’s *Allegheny* concurrence and dissent shows why Kennedy’s view was at variance with the then-prevailing jurisprudence. For example, the same arguments might have been offered to show why *Stone* was wrongly decided. Ten Commandments posted in a school do not *do* anything and students who disagree with their message can ignore them or turn their backs.²²⁷

Justice Scalia has made clear that he has a pretty forgiving standard with respect to what would constitute prohibited proselytizing, since he believes that the interests of religious minorities in not feeling excluded must give way to the “interest of the overwhelming majority of believers in being able to give God thanks and supplication *as a people*.”²²⁸ But if that is true, then the state can sponsor particular, religion-specific prayers of thanksgiving without worrying that Establishment Clause guarantees might be implicated.

Justice Scalia offered an observation in his *McCreary County* dissent that might be of comfort to some, namely, that the Ten Commandments “are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another.”²²⁹ While his point about the Ten Commandments in particular might be accurate, it is not at all clear that his understanding of the Establishment Clause would preclude the state’s engaging in such

²²⁴ *Id.* at 909 (Scalia, J., dissenting) (emphasis added).

²²⁵ *See id.* at 908–09 (Scalia, J., dissenting).

²²⁶ *Id.* at 909 (Scalia, J., dissenting) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy J., concurring in the result in part and dissenting in part) (alterations in original)).

²²⁷ *Cf. Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (“[T]he Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life.”).

²²⁸ *McCreary County*, 545 U.S. at 900 (Scalia, J., dissenting).

²²⁹ *Id.* at 909 (Scalia, J., dissenting).

favoritism.²³⁰ As Justice Stevens has pointed out, “the history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism.”²³¹ Even if the majority’s wish to offer thanks and supplication as a people was expressed in a prayer that included content clearly preferring one religion over others, Justice Scalia has offered no reason to think that such a practice would offend constitutional guarantees.²³²

In considering the constitutionality of a Ten Commandments display near the Texas Capitol building in *Van Orden v. Perry*,²³³ the Court commented early in the opinion that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”²³⁴ This point seemed clear enough—*Lemon* is not appropriately used to determine the constitutionality of passive displays, e.g., of the Ten Commandments. However, it was anything but clear, because *McCreary County* and *Van Orden* were issued on the very same day,²³⁵ and the Ten Commandments display in *McCreary County* was struck down as a violation of the *Lemon* purpose prong.²³⁶

The *McCreary County* Court implied that *Lemon* is an accepted part of Establishment Clause jurisprudence, noting, “Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has ‘a secular legislative purpose’ has been a common, albeit seldom dispositive, element of our cases.”²³⁷ The Court then made clear that when the *Lemon* purpose prong is violated, the practice is unconstitutional and no more analysis needs be offered.²³⁸ But if *Van*

²³⁰ See *id.* at 879–80 (“Today’s dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty.”).

²³¹ See *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting).

²³² Cf. Gey, *supra* note 190, at 533 (“Justice Scalia’s ‘legal coercion’ standard is unpalatable even to many advocates of coercion theory, for the obvious reason that the ‘legal coercion’ standard in effect would convert the government into a subsidiary of the majority’s religious faith, which would seriously inhibit the religious liberty of everyone else in society.”).

²³³ 545 U.S. 677, 681 (2005) (“The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building.”).

²³⁴ *Id.* at 686.

²³⁵ *McCreary County* and *Van Orden* were both decided on June 27, 2005. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 844 (2005); *Van Orden v. Perry*, 545 U.S. 677, 677 (2005).

²³⁶ See *supra* notes 220–22 and accompanying text.

²³⁷ *McCreary County*, 545 U.S. at 859 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

²³⁸ *Id.* at 860 (noting that “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment

Orden is correct that *Lemon* is not the relevant test in Ten Commandments cases, then violation of the purpose prong may not only *not* be dispositive but may not even be relevant.

To make matters even more confusing, it was quite clear that the Justices deciding the implicated constitutional issues in *McCreary County* and *Van Orden* were familiar with both opinions, since the Justices would comment in one opinion about the perceived mistakes made by others in the other opinion.²³⁹ Thus, an explanation of the seemingly radically differing views in these opinions cannot plausibly be attributed to the Justices having overlooked or forgotten about what had been said in one or the other opinion.

When *Van Orden* suggests that the sort of passive monument at issue before the Court is not rightly evaluated in light of *Lemon*, one might well want to know in what respects the Texas monument is peculiarly passive that would not accurately have been said about the Kentucky courthouse displays. The *Van Orden* Court never addressed that, but instead distinguished the Texas display from the display at issue in *Stone* by claiming that the “placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day.”²⁴⁰ Of course, neither display *did* anything. Further, even if the focus is shifted from what the display does to what the state did, it is still unclear that *Stone* and *Van Orden* are distinguishable. As Justice Souter pointed out in his *Van Orden* dissent, “Placing a monument on the ground is not more ‘passive’ than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the state was putting the Commandments there to be seen, just as the monument’s inscription is there for those who walk by it.”²⁴¹ Justice Stevens expressly denied that the monument at issue in *Van Orden* could be “discounted as a *passive* acknowledgment of religion,”²⁴² since he viewed it as “an official state endorsement of the message that there is one, and only one, God.”²⁴³

The *Van Orden* Court distinguished *Stone* by noting that the Court has “been particularly vigilant in monitoring compliance with the

Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides”) (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)).

²³⁹ See, e.g., Justice Scalia’s *McCreary County* dissent in which he criticized the view offered by Justice Stevens in *Van Orden*. See *McCreary County*, 545 U.S. at 895–900 (Scalia, J., dissenting). See also Justice Stevens’s *Van Orden* dissent in which he criticized the view offered by Justice Scalia in *McCreary County*. See *Van Orden*, 545 U.S. at 724–29 (Stevens, J., dissenting).

²⁴⁰ *Van Orden*, 545 U.S. at 691.

²⁴¹ *Id.* at 745 (Souter, J., dissenting).

²⁴² *Id.* at 712 (Stevens, J., dissenting) (emphasis added).

²⁴³ *Id.* (Stevens, J., dissenting).

Establishment Clause in elementary and secondary schools.”²⁴⁴ That provides some explanation as to why the Ten Commandments display in the schools was struck down, although that way of distinguishing does not speak to whether the school display was less passive than the capitol display but, instead, focuses on a different factor, namely, the “impressionability of the young.”²⁴⁵ In any event, the *McCreary County* Court had struck down a passive Ten Commandments display in a non-school setting, citing *Lemon*, and had included no discussion of impressionable children.²⁴⁶

Like the *Van Orden* Court, the *McCreary County* Court also cited *Stone*. However, rather than imply that *Stone* should be understood to be limited to cases involving primary and secondary education,²⁴⁷ the *McCreary County* Court read noted *Stone*’s recognition that the “Commandments are an ‘instrument of religion’ and that . . . the display of their text [can] presumptively be understood as meant to advance religion.”²⁴⁸ But this is to understand *Stone* as primarily about cases involving religious symbols such as the Ten Commandments rather than as about religious displays in schools. The only respect in which *McCreary County* and *Van Orden* seemed to agree is that neither suggests that the proper understanding of *Stone* depends on the degree of passivity of the display itself.

To some extent, the discussion about the passive nature of a display does not involve what the display does but, rather, how people react to it. The *Van Orden* plurality noted that “Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit,”²⁴⁹ and Justice Breyer noted in his concurrence in the judgment that the “display has stood apparently uncontested for nearly two generations.”²⁵⁰ Because there had been no legal challenge to the display for 40 years,²⁵¹ Justice Breyer believed that it was relatively safe to infer that “few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect.”²⁵²

²⁴⁴ *Id.* at 691 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)).

²⁴⁵ *See id.* at 703 (Breyer, J., concurring in the judgment).

²⁴⁶ *Cf. McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873–75 (2005).

²⁴⁷ *See supra* note 244 and accompanying text.

²⁴⁸ *McCreary County*, 545 U.S. at 867.

²⁴⁹ *Van Orden*, 545 U.S. at 691.

²⁵⁰ *Id.* at 704 (Breyer, J., concurring in the judgment). Here, however, he was trying to show why the monument was not particularly divisive.

²⁵¹ *Id.* at 702 (Breyer, J., concurring in the judgment) (noting that “40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner)”).

²⁵² *Id.* (Breyer, J., concurring in the judgment.) *See also* Keith T. Peters, Note, *Small Town Establishment of Religion in* *ACLU of Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005); *Eagles Soaring in the Eighth Circuit*, 84 NEB. L. REV. 997, 1025–26 (2006) (“[A] display is passive if a citizen such as the petitioner in

Yet, this is an unusual way to determine whether there has been an Establishment Clause violation. For example, there was no discussion in *Lee* regarding how long the time-honored tradition of having benedictions at public school graduations had taken place prior to being challenged.²⁵³ Further, in any situation in which Establishment Clause guarantees might be implicated, there may be a host of reasons having to do with financial costs or fears of retribution that might deter individuals from challenging a practice that they indeed found detrimental.²⁵⁴

As a separate matter, it is not at all clear that Establishment Clause violations should be determined in light of how much harm the challenged practice or display has allegedly caused rather than whether harm has been caused or, perhaps, whether the state has endorsed one religion over another or religion over non-religion.²⁵⁵ Nor is it clear how one would go about measuring the quantum of harm caused by observing others recite a nondenominational prayer or, perhaps, by having a display of the Ten Commandments in school. While it is of course true that the amount of harm might as a practical matter affect whether a suit would be brought, that is a separate matter that does not speak to whether Establishment Clause guarantees have been violated but, instead, to whether the possible violation will be addressed in a court of law.

III. CONCLUSION

While members of the Court have sometimes noted in passing the active or passive quality of a state practice or display challenged as a violation of constitutional guarantees, they have been unwilling to explain either what counts as “passive” or what role that factor should play in the constitutional analysis. Their failure to offer such an account was not particularly worrying when it was suggested in *Maynard* and *Stone* that the passive versus active quality of a state practice or display was only

Van Orden, who disagrees so strongly with the monument that he sued to compel its removal, can walk by it for six years before filing suit.” (footnote omitted)).

²⁵³ See *Lee v. Weisman*, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting) (“In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”).

²⁵⁴ See Mark Strasser, *Thou Shalt Not?*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 439, 481 (2006) (“[I]t is hardly safe to infer that no one was religiously offended by the Ten Commandments merely because no one was willing to spend dollars, time, energy, and social standing to challenge them in court.”).

²⁵⁵ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

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a matter of degree and hence was not constitutionally significant.²⁵⁶ However, members of the Court have more recently suggested that the passive quality of a display is constitutionally significant without explaining how that passive quality is to be identified or what constitutional significance such a factor has.

Some members of the Court seem to suggest that the passive quality of a display can be determined by seeing how long a display has been maintained before being legally challenged. But this conflates a number of factors that should not be conflated, such as the legal and extralegal cost/benefit analyses associated with a decision about whether to litigate with whether a challenged practice in fact violates constitutional guarantees. That the same practice or display is described by some members as active and by other members as passive does not inspire confidence in the wisdom or coherence of investing constitutional significance in whether a practice or display is designated as passive. Indeed, the current jurisprudence almost invites courts to affix a label of choice to challenged practices and then decide relevantly similar cases differently.

Figuring out when Establishment Clause guarantees are violated is difficult enough without having in addition to contend with differing notions of what counts as passive and differing understandings of what constitutional criteria should be used when determining whether a passive practice or display violates constitutional guarantees. Members of the Court should either reach consensus about what counts as passive and what constitutional role such a finding should play or they should stop pretending that such a designation has constitutional weight. To do otherwise is to make a currently chaotic jurisprudence even more chaotic, and to assure that Establishment Clause guarantees will be applied even more inconsistently, which can only further undermine confidence in religious protections in particular and in the integrity and honesty of the Court more generally. Those are results that both the religious and the irreligious alike can agree are most unwelcome and should be avoided at great cost.

²⁵⁶ See *supra* notes 57–60 and 80 and accompanying text.