Public Display of the Ten Commandments and Other Religious Symbols

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Summary

Over the past few decades, the U.S. Supreme Court has issued several decisions regarding public displays of religious symbols. Although a few of these cases have involved temporary religious holiday displays, the more recent cases have involved permanent monuments of religious symbols, specifically the Ten Commandments. In 1980, the Supreme Court held in *Stone v. Graham* that a Kentucky statute requiring the posting of a copy of the Ten Commandments on the wall of each public school classroom in the state had no secular legislative purpose and was therefore unconstitutional. The Court did not address the constitutionality of public displays of the Ten Commandments again until 2005. In *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*, the Court reached differing conclusions regarding displays of the Ten Commandments in different contexts.

This report analyzes the Court's holdings in *Stone*, *McCreary*, and *Van Orden*, and the distinctions the Court made in reaching the divergent decisions. It also briefly addresses other relevant cases in which the Court evaluated constitutional issues related to religious displays on public property, including holiday displays. Finally, the report discusses related Court decisions regarding other types of public displays, including *Pleasant Grove City, Utah v. Summum* and *Salazar v. Buono*.

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Public displays of religious symbols, including Ten Commandments monuments, are subject to review under the Establishment Clause of the First Amendment of the U.S. Constitution. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[1] When a religious symbol is displayed on government property, it might be construed as a governmental act establishing a religion reflected by that symbol.

The primary test courts use to evaluate claims under the Establishment Clause is known as the *Lemon* test. Under this test, public displays (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not lead to excessive entanglement with religion.[2] Each of these requirements is necessary for a public display of a religious symbol to be upheld as constitutional. Under this test, if a display fails one of the elements but meets the other two, it will nonetheless be struck down as unconstitutional.

The U.S. Supreme Court traditionally has evaluated the constitutionality of public display of the religious symbols by applying the *Lemon* test, but the applicability has been questioned in some of the cases. The Court has been split in the most recent cases involving public displays of the Ten Commandments, using different standards for the review of the displays under the Establishment Clause. This report analyzes the Court's holdings in the Ten Commandments cases and the distinctions the Court made in reaching divergent decisions. It also briefly addresses other relevant cases in which the Court evaluated constitutional issues related to religious displays on public property, including holiday displays. Finally, the report discusses related Court decisions regarding public displays, including *Pleasant Grove City, Utah v. Summum* and *Salazar v. Buono*.

Public Displays of the Ten Commandments

In 1980, the Supreme Court first addressed the constitutionality of public displays of the Ten Commandments. In 2005, the Supreme Court issued two decisions involving public displays of the Ten Commandments. Rather than issuing a brightline rule regarding the constitutionality of the displays, the Court considered each of the displays in 2005 separately and reached different conclusions under their Establishment Clause analysis in each case.

Stone v. Graham

In *Stone v. Graham*, the Court struck down a Kentucky statute requiring the posting of a privately funded copy of the Ten Commandments on the wall of each public school classroom in the state.[3] The Court determined that the statute had no secular purpose, failing the *Lemon* test's first prong, and therefore was unconstitutional. Kentucky argued that the statute served a secular legislative purpose because the Commandments displays included the following 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."[4] The Court, however, found that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls

[1] U.S. Const. amend. I.

[2] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[3] 449 U.S. 39 (1980).

[4] *Id.* at 41. *See also* Ky. Rev. Stat. § 158.178 (1980).

was plainly religious" and the display served no educational function.[5] The Court held that an "'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment."[6]

In *Stone*, the source of the funding did not affect the constitutionality of the statute. Although the displays were funded by voluntary private contributions, the Court held that "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."[7]

McCreary County v. American Civil Liberties Union of Kentucky[8]

In 1999, two counties in Kentucky posted large displays of the Ten Commandments, including a citation to the Book of Exodus, in their courthouses. The displays were placed in public areas, "readily visible" to those who used the courthouse.[9] Soon after the displays were posted, the ACLU of Kentucky sued the counties in federal district court for an injunction against maintaining the displays, alleging a violation of the Establishment Clause. While the court considered the requested injunction, the counties expanded the display to show that the Commandments were Kentucky's "precedent legal code," and included eight other documents, each having its own religious reference.[10] The counties stated several grounds for their position, including a declaration that the "Founding Fathers had an explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."[11] Although the district court ordered that the Commandments be removed immediately and that no county official "erect or cause to be erected similar displays,"[12] the counties erected a third display. This final display in each courthouse included nine documents of similar size to each other, and was titled "The Foundations of American Law and Government Display."[13]

When the case came before the U.S. Supreme Court, the Court emphasized the importance of neutrality in considering issues under the Establishment Clause, noting that "the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[14] The Court explained that the Establishment Clause's core value of neutrality is violated by government actions that have "the ostensible and predominant purpose of advancing

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[5] *Id.*

[6] *Id.*

[7] *Id.* at 42.

[8] 545 U.S. 844 (2005).

[9] *Id.* at 852.

[10] *Id.* at 853. The documents in the second displays included a passage of the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of the Bible," reading that "the Bible is the best gift God has ever given to man;" a proclamation by President Reagan marking 1983 as the year of the Bible; and the Mayflower Compact.

[11] *Id.* at 853.

[12] American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky, 96 F. Supp.2d 691, 703 (E.D. Ky. 2000).

[13] *McCreary*, 545 U.S. at 856. The final display included the Ten Commandments and eight other documents (the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice).

[14] *Id.* at 860.

religion."[15] The facts of *McCreary* raised questions of the relevance of the purpose prong of the *Lemon* test. The Court recognized that the purpose of a government action, though rarely dispositive, serves an important function.[16] According to the Court, favoring one religion, or favoring religion generally, contradicts the understanding "that liberty and social stability demand a religious tolerance that respects the religious views of all citizens."[17] The Court also recognized that purpose is a valid consideration when determining the constitutionality of a statute, citing numerous instances apart from Establishment Clause cases in which the Court looked to the purpose of an action when evaluating its constitutionality.[18]

The Court further explained that while a governmental entity's stated purpose is generally given deference, the *Lemon* test requires that "the secular purpose be genuine, not a sham, and not merely secondary to a religious objective."[19] The specific actions that the counties had taken in this case led the Court to conclude that the counties acted with an unconstitutional purpose. According to the Court, the first display "lacked even *Stone*'s implausible disclaimer that the Commandments were set out to show their effect on the civil law."[20] Furthermore, the Court noted, the county executive's pastor "testified to the certainty of the existence of God" at the ceremony for posting the Commandments, which could reasonably lead observers to think that the counties were emphasizing the religious value of the display.[21] Regarding the second display, the Court looked to the resolutions adopted to modify the displays, which expressed support for other public displays of the Commandments and cited a specific Christian reference used by the state legislature.[22] The Court determined that the counties sought to highlight primarily religious texts and that their actions constituted "an indisputable, and undisputed, showing of an impermissible purpose."[23] Although the counties attempted to demonstrate a valid secular purpose by creating a third display allegedly intended to educate the public on significant documents in American legal history, the Court found that there was no clear theme that overcame the apparent religious objectives the counties held in developing the displays.[24] As a result, according to the Court, a reasonable observer "would probably suspect that the counties were simply reaching for a way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."[25]

Van Orden v. Perry[26]

In 1961, a monolith of the Ten Commandments was erected by the Fraternal Order of the Eagles on the grounds of the Texas State Capitol. The display was included among 17 monuments and 21 historical markers displayed in the 22 acres surrounding the Texas State Capitol,

[15] *Id.*

[16] *Id.* at 859.

[17] *Id.* at 860 (internal quotation omitted).

[18] *Id.* at 861.

[19] *Id.* at 864.

[20] *Id.* at 869.

[21] *Id.*

[22] *Id.* at 869-70.

[23] *Id.* at 870.

[24] *Id.* at 871.

[25] *Id.* at 873.

[26] 545 U.S. 677 (2005).

"commemorating the 'people, ideals, and events that compose Texan identity."[27] The Eagles paid the cost of erecting the monument, the location of which was determined by the state based on the recommendation of the state organization responsible for maintaining the Capitol grounds. In 2001, Thomas Van Orden, a frequent visitor to the Capitol grounds since 1995, sued state officials, claiming that the display violated the Establishment Clause.

In deciding *Van Orden*, the Court did not use the test set forth in *Lemon*, but rather analyzed the placement of the monument based on the nature of the monument itself and the history of the nation.[28] The Court cited numerous examples in which all three branches of government officially acknowledged the role of religion in American life, and specifically noted that the Court had recognized the role of God in American heritage in previous decisions.[29] For instance, in *Marsh v. Chambers*, the Court held that the Establishment Clause permits a state legislature to open its daily session with a prayer by a chaplain paid by the state.[30] The Court also noted cases in which the Court upheld laws originating from one of the Ten Commandments, for example, *McGowan v. Maryland*, which upheld a law prohibiting the sale of merchandise on Sunday.[31]

With respect to the specific display of the Ten Commandments, the Court found that "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America," and cited numerous government buildings where the Commandments can be found.[32] Despite the focus on the historical significance of the Commandments, the Court acknowledged that they were at their inception and remain inherently religious. However, the Court noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[33]

Although the Court's holding might appear to conflict with *Stone*, the Court distinguished *Van Orden* from *Stone* based on the difference between religious displays in a classroom context and the "more passive" display of the Commandments at issue on the grounds of the Texas State Capitol.[34] The Court stated that while it had been "particularly vigilant" in Establishment Clause cases set in schools, there was never any indication that *Stone*'s holding would extend to a legislative chamber or to capitol grounds.[35] Because the Texas monument lacked the particular concerns raised by displays in school settings and because Van Orden had walked past the monument for a number of years before bringing the lawsuit, the Court determined that the *Van Orden* display was different from the texts that confronted elementary school students every day in *Stone*.[36] The Court held that the monument in question had a "dual significance, partaking of

[27] *Id.* at 681.

[28] *Id.* at 686.

[29] *Id.* at 686-88.

[30] 463 U.S. 783 (1983).

[31] 366 U.S. 420 (1961).

[32] *Van Orden*, 545 U.S. 688-89 (citing acknowledgments of the Ten Commandments in the U.S. Supreme Court building, the Library of Congress, the National Archives, the Department of Justice, the Ronald Reagan Building, both the Court of Appeals and the District Court for the District of Columbia, and the Chamber of the United States House of Representatives).

[33] *Id.* at 690.

[34] *Id.* at 690-91.

[35] *Id.*

[36] *Id.* at 691.

both religion and government," and therefore its inclusion among the monuments on the capitol grounds did not violate the Establishment Clause.[37]

Analysis of First Amendment Requirements for Public Displays of Religious Symbols

The 2005 cases decided by the Court concerning the public display of the Ten Commandments reached divergent conclusions regarding the displays and used different tests to reach those conclusions. While the Court did not use these cases to create a bright-line test for determining whether such displays violate the Establishment Clause, the decisions can be reconciled by studying the specific facts presented in each case. The displays at issue in *McCreary* were created and erected by county officials and placed in prominent locations at the counties' main government buildings. The counties' actions in promoting and justifying the display were viewed by the Court as having religious motivations and implicating government endorsement of a religious message. On the other hand, the display at issue in *Van Orden* was characterized by the Court several times in its decision as "passive" and placed in a location where a reasonable observer likely would not infer government endorsement, as it was placed among dozens of other monuments and markers. The fact that the Texas state legislature played no role in creating or erecting the monument in the *Van Orden* case also alleviated the appearance of governmental endorsement of a religious message.

What remains unclear from these decisions is the status of the *Lemon* test in the Court's Establishment Clause jurisprudence. The majority opinion in *McCreary* relied on the test, but applied a modified version of the test that evaluates whether the purpose and effects prongs of the original *Lemon* test amount to an endorsement of religion.[38] The Court reached its decision in *Van Orden* without a consensus in its reasoning, but the plurality opinion did not use the *Lemon* test, noting other decisions where the Court used the factors set forth in *Lemon* as "helpful signposts" without relying on the three-part test for its analysis.[39]

The divergent decisions were reached as a result of a split Court, and raise the question of what approach the Court will take in future cases of such displays.[40] Although these cases did not use a consistent standard for analysis, *McCreary* and *Van Orden* might not be as divergent from Establishment Clause jurisprudence as one might expect. Justice Breyer, who provided the deciding vote in both cases, explained his understanding that the Establishment Clause requires the government to "avoid excessive interference with, or promotion of, religion," but "does not compel the government to purge from the public sphere all that in any way partakes of the religious."[41] This rationale echoed the Court's previous holdings in challenges to public displays of religious symbols. Generally, the Court has upheld public displays of religious symbols where the display is set in diversified context.[42] *McCreary* and *Van Orden* appear to fit this analysis, as

[37] *Id.* at 692.

[38] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[39] *Van Orden*, 545 U.S. at 685.

[40] With the exception of Justice Breyer, the Justices in the majority in one case dissented in the other. Since 2005, four of the Justices participating in the Ten Commandments cases, two on each side of the cases, have left the Court.

[41] *Id.* at 699 (Breyer, J., concurring).

[42] *See* County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

the display upheld in *Van Orden* was set in a historical secular context, while the display struck down in *McCreary* indicated a predominantly religious message.

Related Challenges of Public Displays of Other Religious Symbols

Displays of the Ten Commandments have been the most frequent type of display to be challenged. However, public displays of other religious symbols have also been challenged under the Establishment Clause.

Religious Symbols Included in Public Holiday Displays

In the 1980s, the Court decided two cases involving religious symbols on public property that were included in Christmas holiday displays. Like the *McCreary* and *Van Orden* decisions, the Court decided the constitutionality of the inclusion of a creche in two separate holiday displays with varying results. The Court's decisions relied on the setting of each display, particularly whether the display emphasized the religious nature of the symbol or the secular purpose of its inclusion.

In *Lynch v. Donnelly*, the Court held that the inclusion of a creche in a city's Christmas display did not violate the Establishment Clause.[43] Applying the *Lemon* test, the Court reasoned that the creche had a legitimate secular purpose in recognizing "the historical origins of this traditional event long recognized as a National Holiday."[44] The display did not advance religion, according to the Court, because the benefit to religion was "indirect, remote, and incidental."[45] The Court also found that there was no entanglement, and therefore, the creche was a constitutional display under the Establishment Clause.

In *Allegheny County v. Greater Pittsburgh ACLU*, the Court held that the display of a creche at a county courthouse violated the Establishment Clause.[46] Unlike *Lynch*, the creche was the sole element of the display inside the courthouse and included a sign that indicated that it was donated by a religious group and displayed a related religious message. Because the display did not include anything to "detract from the creche's religious message" and the overall effect of the display was the endorsement of the religious message, the Court held that the display was unconstitutional.[47] The case also addressed the inclusion of a menorah in a separate display outside a government building. The menorah was not held to be a violation of the Establishment Clause because it was placed with a Christmas tree and a sign saluting liberty. The inclusion of the religious symbol with other symbols, according to several Justices, indicated the celebration of a holiday season that had "attained a secular status" and illustrated a "message of pluralism."[48]

[43] 465 U.S. 668 (1984).

[44] *Id.* at 680.

[45] *Id.* at 683.

[46] 492 U.S. 573 (1989).

[47] *Id.* at 598-600.

[48] *Id.* at 616, 635.

Seven Aphorisms: *Pleasant Grove City, Utah v. Summum*

In February 2009, the Court issued a decision in *Pleasant Grove City, Utah v. Summum*,[49] which addressed First Amendment issues regarding monuments displayed in a public park. Summum, a religious group, challenged the city's refusal to include a monument of the Seven Aphorisms for display in a public park that currently includes various monuments, including the Ten Commandments. The case was brought before the Court on free speech grounds, rather than under the religion clauses of the First Amendment. Summum claimed that the city violated the Free Speech Clause because it had accepted a Ten Commandments display, but refused to display Summum's Seven Aphorisms display.[50] The case did not challenge the constitutional validity of the Ten Commandments display under the Establishment Clause.

The Court held that privately donated monuments displayed in the city's public park were a form of government speech, not the speech of the respective private donors. As government speech, the monuments are not subject to limitations imposed by the Free Speech Clause, but are subject to other restraints imposed by law, such as the Establishment Clause.[51] Because the Court has held the park's monuments to be government speech, rather than the private speech of the individuals or entities that donated them, the constitutionality of the display of the Ten Commandments may be challenged under the Establishment Clause. Thus, a future case may challenge Pleasant Grove's Ten Commandments display as an improper government action establishing religion.

Latin Crosses as War Memorials

In recent years, the public debate over the display of religious symbols on public grounds has involved Latin crosses that have been designated as war memorials.[52] One of the prominent controversies has involved a cross placed in the Mojave National Preserve that became the subject of lengthy litigation, ultimately decided by the U.S. Supreme Court.

In *Salazar v. Buono*, the Court considered a case involving the display of a cross that stands less than eight feet tall on the Mojave National Preserve in California, which is managed by the National Park Service (NPS).[53] The cross display had been erected by the Veterans of Foreign Wars (VFW) as a memorial to fallen service members in 1934.[54] NPS denied a request to erect a Buddhist shrine near the cross in 1999, leading to controversial debate over whether the cross is constitutional under the Establishment Clause. After NPS indicated that the cross would be removed to avoid constitutional problems, Congress passed legislation that prohibited the use of

[49] 129 S. Ct. 1125 (2009).

[50] The Free Speech Clause of the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I.

[51] *Summum*, 129 S. Ct. at 1131 ("This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.").

[52] Legislation has been introduced in the 112th Congress that would authorize religious symbols to be included in military memorials. *See* H.R. 290, 112th Cong. (2011). Because the litigation discussed in this report has included *constitutional* challenges that cannot be superseded by statutory provisions, a congressional authorization likely would not affect the outcome of future litigation.

[53] 130 S. Ct. 1803 (2010).

[54] *Id.*

federal funds to remove the cross[55] and passed additional legislation that designated the cross and adjoining land as a national memorial to World War I veterans.[56]

In 2001, a former employee of the preserve filed a lawsuit alleging that the cross display violated the Establishment Clause, particularly because the cross was displayed on public property on which displays of other religious symbols were not also permitted. The district court held the display on public land to be a violation of the Establishment Clause and issued an injunction that prohibited the government from permitting the display.[57] Congress subsequently enacted legislation directing the conveyance of approximately one acre of land on which the cross was displayed to the VFW.[58] In a second lawsuit challenging that land transfer, the U.S. Court of Appeals for the 9th Circuit held that the transfer of land did not cure the Establishment Clause violation and that the transfer could not "be validly executed without running afoul of the injunction."[59] The court reasoned that "carving out a tiny parcel of property in the midst of this vast Preserve ... will do nothing to minimize the impermissible governmental endorsement."[60]

The Supreme Court did not resolve the case on constitutional grounds, but instead remanded the case for reconsideration by the district court.[61] The Court's decision was fractured, with no majority of Justices agreeing on a rationale for the decision. In the plurality opinion announcing the Court's decision, Justice Kennedy explained that the case was "ill-suited for announcing categorical rules [and due to] the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance."[62] However, the plurality indicated that a proper analysis of the case should consider the purpose of the injunction and show deferential respect to Congress as a coordinate branch of government if there is no "clear showing of unconstitutionality."[63] Thus, although the decision provides some guidance to how the Court would analyze such a case, it provides little precedent for projecting future effects of challenges to religious symbols on public property.

A similar case, currently being litigated in the lower courts, involves a challenge to a 43-foot cross atop Mt. Soledad in California.[64] The current cross was placed on then-city owned property in 1954, although other versions of the cross have been located in the same place since 1913.[65] The federal government seized the land upon which the cross stands by eminent domain in 2006

[55] P.L. 106-554, § 133, 114 Stat. 2763.

[56] P.L. 107-117, § 8237(a), 115 Stat. 2278.

[57] 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

[58] P.L. 108-87, § 8121, 117 Stat. 1100.

[59] Buono v. Kempthorne (Salazar), 527 F.3d 758, 783 (9th Cir. 2008).

[60] *Id.* The 9th Circuit noted, but did not adopt, the U.S. Court of Appeals for the 7th Circuit's presumption in a previous case that transfer of land with a religious symbol was sufficient to avoid an Establishment Clause violation. Id. at 779, fn. 13. The 9th Circuit reasoned that *McCreary* and *Van Orden* indicated a need for fact-specific analysis of public displays of religious symbols rather than adoption of a presumption as the 7th Circuit did.

[61] Salazar v. Buono, 130 S. Ct. 1803 (2010).

[62] *Id.* at 1820.

[63] *Id.* ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality. The same respect requires that a congressional command be given effect unless no legal alternative exists. Even if, contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier finding of religious endorsement, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the land-transfer statute.").

[64] Jewish War Veterans v. City of San Diego, 2011 U.S. App. LEXIS 53 (9th Cir., filed January 4, 2011).

[65] *Id.* at 1-3.

"in order to preserve a historically significant war memorial."[66] In January 2011, the U.S. Court of Appeals for the Ninth Circuit held that the federal government's actions with regard to the Mt. Soledad cross may have had a secular purpose (that is, preserving a memorial for veterans of the nation's armed forces), but the effect of displaying the large Latin cross on public land indicated a religious message of endorsement of one religion and the exclusion of others.[67] The court evaluated the case under both the *Lemon* test (used in *McCreary*) and the principles provided by *Van Orden*, finding the cross unconstitutional in each examination. Specifically, the court explained that the cross symbolized Christianity exclusively, was rarely originally designated as a war memorial generally, and had a long religious history but scarce secular history.[68] The court repeatedly emphasized the significance of the setting of the cross within the memorial, noting that the cross was the central and dominant feature of the Mt. Soledad memorial and was the only element visible from many perspectives.[69] The court noted the guidance of the Supreme Court's *Buono* decision—that the context of the memorial was a critical element of analysis—and used the relative size and dominance of the cross as it currently stands as justification for finding a violation of the Establishment Clause.[70]

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[66] P.L. 109-272, § 2, 120 Stat. 772.

[67] *Jewish War Veterans*, 2011 U.S. App. LEXIS 53, at 75-77 ("By claiming to honor all service members with a symbol that is intrinsically connected to a particular religion, the government sends an implicit message 'to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'").

[68] *Id.* at 29-68.

[69] *Id.* at 71.

[70] *Id.* at fn. 18. *See also id.* at 77.