NOTES

TO BEAR A CROSS: THE ESTABLISHMENT CLAUSE, HISTORIC PRESERVATION, AND EMINENT DOMAIN INTERSECT AT THE MT. SOLEDAD VETERANS MEMORIAL

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I. Introduction

High above San Diego, a solitary Latin cross casts its shadow over the picturesque coastline of Southern California. The cross, a towering icon of concrete and faith, is encircled by several massive walls of granite into which thousands of names are meticulously carved. These etchings celebrate the heroism of America’s greatest citizens, those who made a patriot’s ultimate sacrifice while serving their country on distant shores. Resting now beneath a cross erected in their honor, this army of fallen soldiers stands eternal guard atop Mt. Soledad Natural Park.

The Mt. Soledad cross has been the subject of a protracted legal battle for nearly twenty years. At the center of the dispute is whether such a recognized symbol of religion should be prominently displayed on publicly owned land. Supporters of the cross argue that any religious message conveyed by the display is secondary to its true purpose: the commemoration of war veterans. Its detractors cite the underinclusive and divisive effect of using a decidedly Christian symbol to memorialize soldiers who may be of differing faiths. In August of 2006, the U.S. Congress stepped squarely into the fray, taking the cross from the City of San Diego by eminent domain and declaring the display a National Memorial.

This Note addresses the federal government’s authority to acquire and recognize religious symbols as National Memorials and analyzes the intersection of Establishment Clause, historic preservation, and eminent domain doctrines. Section II recounts the factual and legal history of the Mt. Soledad cross. Section III distills the Supreme Court’s Establishment Clause jurisprudence in the area of religious displays on public land and comments on the impact of new Justices on the bench. Section IV summarizes federal case law involving Latin crosses and distinguishes Mt. Soledad from prior decisions. Section V describes the analogous treatment of historic religious properties under the National Historic Preservation Act. Section VI addresses the government’s authority to take property for the purpose of establishing a National Memorial and discusses the limited interactions among the Establishment Clause, historic preservation, and eminent domain. Section VII presents an analysis of these three doctrines and proposes a new standard for the treatment of memorial monuments akin to Mt. Soledad.
II. HISTORY OF THE MT. SOLEDAD CONTROVERSY

A. CROSS UPON A MOUNT

Mt. Soledad is a 170-acre parcel of public land located 822 feet above the La Jolla community of San Diego, California. A prominent landmark, the seaside hilltop was dedicated as “Mt. Soledad Natural Park” in 1916. The Mt. Soledad summit boasts awe-inspiring 360-degree views, glorious sunsets over the Pacific Ocean, and a 29-foot Latin cross made of reinforced concrete.

The current cross, which has stood for over fifty years, is the third to adorn Mt. Soledad since 1913. In 1952, a collection of war veterans from the La Jolla American Legion formed the Mt. Soledad Memorial Association (MSMA) for the purpose of erecting a durable, permanent cross that would double as a war memorial. After obtaining a permit from the San Diego City Council, the MSMA solicited private contributions and constructed the current incarnation of the cross without the aid of public funding. At a religious ceremony on Easter Sunday, 1954, the MSMA

1. See Paulson v. City of San Diego (Paulson III), 294 F.3d 1124, 1125 (9th Cir. 2002) (en banc).
3. Paulson III, 294 F.3d at 1125.
4. See Mount Soledad Memorial Association, About the Memorial, supra note 2. Including the base, the entire structure is forty-three feet tall. See Murphy v. Bilbray (Murphy I), 782 F. Supp. 1420, 1422 n.2 (S.D. Cal. 1991), aff’d sub nom Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993). Opponents of the display have taken advantage of this fact by representing that figure as the height of the cross itself. See, e.g., American Civil Liberties Union: The Mt. Soledad Latin Cross, http://www.aclu.org/religion/govtfunding/26524res20060824.html (last visited July 22, 2007). The cross is visible for several miles in every direction and can be seen from Interstate 5, a public freeway that passes less than a half-mile from Mt. Soledad. Murphy I, 782 F. Supp. at 1422 n.5.
5. See Paulson III, 294 F.3d at 1125. Local residents first erected a redwood crucifix on the site in 1913, only to see the display destroyed by vandals eleven years later. Id. In 1934, another private group replaced the cross with a sturdier, wood-over-stucco frame, which stood until vanquished by winds in 1952. Id.
6. See Mount Soledad Memorial Association, About the Memorial, supra note 2. There is dispute about the MSMA’s true objective in reestablishing the cross. See Murphy I, 782 F. Supp. at 1437. Correspondence between the City and the MSMA, together with newspaper accounts from 1954, indicate that the MSMA’s main intention was to replace the predecessor crosses, which had been used for annual Easter sunrise services. Id. In addition, the original bylaws of the MSMA “describe[d] its purpose as the promotion of community interest in the development of the public facilities of the Mt. Soledad Park area” and “[made] no reference to the commemoration of war dead.” Id. at 1438 (internal quotation marks omitted).
7. Murphy I, 782 F. Supp. at 1423 n.7. In addition to raising the private funds necessary for its construction, the MSMA has borne the cost and burden of maintaining the cross since its
“dedicated the cross as a tribute to veterans of World War I, World War II, and the Korean Conflict.”

Despite its designation as a war memorial, the cross was predominantly identified as the “Soledad Easter Cross” or simply the “Easter Cross” on various maps, travel guides, phone books, and even government directories between 1954 and 1989. In addition, apart from the annual sunrise Easter services held by the MSMA at the site, no ceremonies or remembrances were held on any Memorial or Veterans Day, or any day other than Easter, during that span. Also missing was any plaque or marker on or near the cross dedicating the symbol to the commemoration of fallen soldiers. These facts have prompted a long-running inquiry into whether the Mt. Soledad cross is properly characterized as a memorial at all.

B. Court Challenges

The year 1989 is far from an arbitrary date in the Mt. Soledad controversy. In May of that year, self-professed atheist Philip Paulson brought suit to challenge the continuing presence of the cross on public land. Paulson, a San Diego resident and Vietnam veteran, alleged that he was “deeply offended” by the purported use of a cross as a war memorial. Claiming that the presence of such a sectarian symbol on public land violated both the California and U.S. Constitutions, Paulson sought to have the cross removed via permanent injunction.

In Murphy v. Bilbray (Murphy I), the district court considered Mt. Soledad’s fate along with that of two other publicly displayed crosses:

8. Paulson III, 294 F.3d at 1125. Every spring since the 1954 dedication ceremony, the MSMA has obtained a City permit to host an Easter service at the memorial. Id.
11. Id.
14. Id. As Paulson’s attorney, James McElroy, put it: “It’s not an obelisk or just a flag. It’s a Latin cross, the most powerful symbol of one religion in the world, and it’s standing in the middle of a public park like a giant neon ad for that religion.” Allison Hoffman, A Symbol of Christianity—or of Fallen Soldiers?, GLOBE & MAIL (Toronto), July 25, 2006, at A3.
16. Id. at 1422.
the Mt. Helix cross of La Mesa\textsuperscript{17} and the official insignia of the City of La Mesa.\textsuperscript{18} After determining that the plaintiffs had standing, the court addressed the constitutionality of each display under the California Constitution’s No Preference Clause.\textsuperscript{19} Synthesizing circuit court precedent that addressed the constitutionality of religious symbols on public property, the court concluded that “a government body is conducting itself unconstitutionally whenever it so much as appears to be preferring one religion over another or others.”\textsuperscript{20}

Finding the Mt. Soledad cross to be a “powerful sectarian symbol,” the court concluded that the cross’s “commanding presence” on public parkland violated the California Constitution.\textsuperscript{21} The court was particularly concerned with the paucity of evidence identifying the cross as a bona fide war memorial.\textsuperscript{22} Noticeably perturbed by the MSMA’s post-hoc efforts to

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  \item 17.  \textit{Id.} The Mt. Helix Latin cross, also constructed of concrete, was thirty-six feet tall and had stood since 1925 in a nature park owned by San Diego County. \textit{Id.} at 1422 nn.2, 3, 6.
  \item 18.  \textit{Id.} at 1422. The insignia bore a depiction of the Mt. Helix cross. \textit{Id.} at 1424.
  \item 19.  \textit{Id.} at 1426-27. Citing Ninth Circuit precedent, the court addressed only the state constitutional issues because “‘federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law.’” \textit{Id.} at 1426 (quoting Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985)). California’s No Preference Clause, which is derived from the first sentence of article I, section 4 of the California Constitution, provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” \textit{Id.} at 1427 (quoting CAL. CONST. art. I, § 4). The \textit{Murphy I} court stated that “[t]he Ninth Circuit’s construction of the No Preference Clause subjects public entities to a demanding standard of constitutional compliance.” \textit{Id.} at 1429.
  \item 20.  \textit{Id.} at 1428. The court noted that “although no single circumstance may act as a litmus test for assessing the appearance of preference in a government display, . . . certain circumstances are highly probative.” \textit{Id.} Those circumstances include the following: (1) the religious significance of the challenged display; (2) the size and visibility of the display; (3) whether the display includes any comparable items from other religions; and (4) the historical background of the display. \textit{Id.} at 1428-29. Because the court found that “the challenged practices in all three cases violate California’s No Preference Clause, it [was] unnecessary to engage in further analysis under . . . the . . . United States Constitution[ ].” \textit{Id.} at 1427.
  \item 21.  \textit{Id.} at 1436. Judge Gordon Thompson, Jr., who authored the opinion, noted that the cross’s placement at the summit of Mt. Soledad rendered it the focal point of the public park, “so much so that it may be said, as between the Latin cross and the park, it is not clear which is meant to adorn which.” \textit{Id.} As further proof of its sectarian nature, the court noted the absence of any comparable religious symbols of other religions. \textit{Id.}
  \item 22.  \textit{Id.} at 1437. In the months after Paulson filed his suit, the MSMA began to hold Prisoner of War/Missing-In-Action ceremonies at the cross. \textit{Id.} at 1423 n.11. In addition, the MSMA began to make myriad changes to the grounds surrounding the cross in an effort to clearly delineate the symbol as a memorial. See Hoffman, supra note 14. On November 11, 1989, a small plaque was installed at the base of the cross, renaming the display as the Mt. Soledad Memorial Cross. See Wikipedia.org. Image: Mt. Soledad Plaque, http://en.wikipedia.org/wiki/Image:Mt.Soledad_Plaque.jpg (last visited July 22, 2007). The plaque reads, in part: “MT. SOLEDAD VETERANS MEMORIAL CROSS. DEDICATED IN 1954, AS A TRIBUTE TO ALL BRANCHES OF THE ARMED FORCES OF U.S.A. SERVICEMEN AND WOMEN.” \textit{Id.}
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evince a commemorative purpose, the court concluded that the cross’s identification as a memorial was mere pretext. The court therefore ordered that the cross be removed from the mountaintop within three months of its decision.

In response, the San Diego City Council voted to authorize the sale of a fifteen-by-fifteen foot parcel of land beneath the cross to the MSMA. Because the San Diego City Charter required the sale of parkland to be authorized by a two-thirds vote of the electorate, the Council put the issue before the citizens via a special ballot. On June 2, 1992, San Diegans passed Proposition F by a resounding 76.77% to 23.23% margin.

While the land transfer was progressing, the City appealed the 1991 injunction. In Ellis v. City of La Mesa, the Ninth Circuit affirmed the district court’s order. The court stressed that “[a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” Again declining to address the constitutionality of such symbols under the federal

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23. See Murphy I, 782 F. Supp. at 1437-38. William Kellogg, president of the MSMA, admitted, “We put up a flag and the memorial walls so that we could satisfy the court’s concern that a visitor from Kansas could tell it was a war memorial and not the Christian church promoting religion.” Hoffman, supra note 14.

24. Murphy I, 782 F. Supp. at 1438. The court also ordered the crosses removed from Mt. Helix and the La Mesa insignia. Id.

25. Ellis v. City of La Mesa, 990 F.2d 1518, 1528 (9th Cir. 1993). The district court’s decision was handed down on December 3, 1991. See Murphy I, 782 F. Supp. at 1420. The vote authorizing the sale took place on February 24, 1992 and thus occurred within Judge Thompson’s three-month window. See Ellis, 990 F.2d at 1528.

26. Murphy v. Bilbray (Murphy II), No. 90-134 GT, 89-820 GT, 1997 WL 754604, at *8 (S.D. Cal. Sept. 18, 1997). “Section 55 of the [San Diego City] Charter allows for the sale of dedicated park land provided that such change is either first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such a purpose.” Id. (internal quotation marks omitted).

27. Matthew T. Hall, Mount Soledad Cross Must Get Two-Thirds of Vote to Remain, SAN DIEGO UNION-TRIB., July 22, 2005, at A1. The measure, entitled Proposition F, asked:

Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to maintain the property as an historic war memorial, and the transfer of the same parcel by the City of San Diego to a private non-profit corporation for not less than fair market value be ratified?

Murphy II, 1997 WL 754604, at *8. The City Council and representatives of the mayor’s office distributed a pamphlet in support of Proposition F, explaining that the purpose of the measure was to “SAVE THE CROSS.” Paulson v. City of San Diego (Paulson III), 294 F.3d 1124, 1126 (9th Cir. 2002) (en banc).

28. Hall, supra note 27.

29. Ellis, 990 F.2d at 1520.

30. Id. at 1529. The appeal was decided on March 23, 1993. Id. at 1518.

31. Id. at 1527.
Establishment Clause, the court held that “the mere designation of a display as a ‘war memorial’ is not enough to satisfy the more separationist No Preference Clause of the California constitution.”

The City’s subsequent petition for writ of certiorari was denied. Having exhausted its judicial remedies, the City completed the sale of the cross to the MSMA in October of 1994.

Paulson immediately filed a motion to enforce the original injunction, claiming that a transfer of the cross from public to private ownership failed to cure its underlying constitutional defects. Before reaching that ultimate issue, Judge Thompson, author of the Murphy I opinion, addressed whether the method of sale satisfied the California constitution. Reiterating that the No Preference Clause forbade government aid to religion in any form, with no de minimus exception, the court placed the City’s intent under a microscope. Because the primary purpose of the sale was to “save” the cross, as indicated in the wording of the proposition itself, the court found that the City had shown preference to Christianity over other religions. Further, the court took issue with the lack of other bidders for the cross, concluding that the exclusion of other potential purchasers from the authorized sale was preferential to Christianity. As a parting shot, the court noted that the sale of a 222-square-foot parcel resting prominently atop a mountain of municipal parkland was insufficient to avoid the appearance of governmental involvement with the

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32. Id. at 1528 (emphasis added).
34. Murphy v. Bilbray (Murphy II), No. 90-134 GT, 89-820 GT, 1997 WL 754604, at *7 (S.D. Cal. Sept. 18, 1997). The impending land sale was addressed briefly by the Ninth Circuit in Ellis. See Ellis, 990 F.2d at 1528-29. Despite Paulson’s contention that authorizing such a transfer constituted an illegal and bad faith circumvention of the district court’s injunction, the Ellis court declined to resolve the question. Id. at 1529. The court found that the potential conveyance was an issue concerning compliance with the original injunction and was therefore best left for the district court. Id.
36. Id. at *9-11. The court also considered the legality of the transfer under both the San Diego City Council Policy and the City Charter. Id. at *7-8. The court determined that under Council Policy 700-10, the City was authorized to “conduct a negotiated sale with a qualified nonprofit organization, which may be religious in nature.” Id. In addition, the court found that the City Charter permitted sale of parkland when ratified by a two-thirds vote of the electorate. Id. at *8; see also supra note 26. The court therefore declared that the sale complied with the governing ordinances. Murphy II, 1997 WL 754604, at *8.
37. See Murphy II, 1997 WL 754604, at *10.
38. Id.; see supra note 27. The court reiterated its observation from Murphy I that the cross was “‘a powerful sectarian symbol’” of the Christian faith. Murphy II, 1997 WL 754604, at *10 (quoting Murphy v. Bilbray (Murphy I), 782 F. Supp. 1420, 1436 (S.D. Cal. 1991)).
symbol. Thus, the court concluded that both the method of sale and the amount of land sold failed to cure the cross’s constitutional defects.

The City responded in 1998 by conducting a well-publicized open sale of .509 acres (approximately 22,172 square feet) of Mt. Soledad Natural Park to the highest bidder. As a condition of the purchase, the buyer was required to use the property for the purpose of maintaining a war memorial. Despite this use restriction, the invitation for purchase expressly stated that the winning bidder need not retain the cross—a wholly secular memorial could be erected in its stead. The City received serious proposals from the following groups: the Horizon Christian Fellowship, the National League for the Separation of Church and State, Saint Vincent De Paul Management, the Freedom From Religion Foundation, and the MSMA. The MSMA won the bid by offering top dollar, submitting a...
detailed proposal for the expansion and maintenance of a war memorial, and showing significant experience in maintaining such a display. 46

Paulson once again challenged the transfer in district court. 47 This time, Judge Thompson found the open sale constitutional and mooted the original injunction on the grounds that San Diego had divested itself of any appearance of religious preference. 48 The Ninth Circuit initially affirmed, 49 going so far as to vindicate the transfer under the federal Establishment Clause as well. 50 But before the City could celebrate its victory, the court granted Paulson’s petition for rehearing en banc, reversed course, and overturned the district court. 51 Despite the appearance of a fair sale, the court found that the City’s use restriction provided aid to religion in violation of the No Aid provision of the California Constitution. 52 In a

46. Id. at 893. According to the city’s invitation, purchase proposals were evaluated on the basis of bid price, financial capability, expertise regarding maintenance of a memorial, and the plan for creation or maintenance of a memorial submitted by prospective bidders. Paulson III, 294 F.3d at 1127. The invitation did not, however, define how each factor would be weighed, or explain the criteria by which the City would assess each memorial plan. Paulson III, 294 F.3d at 1127.

47. Paulson II, 262 F.3d at 890.

48. Id. Judge Thompson’s order, which was dated February 2, 2000, denied Paulson’s motion to enforce the injunction but came with one condition: that the City, the MSMA, or both make a showing within sixty days that any and all utilities and maintenance for the private portion of the park (the parcel transferred) were the sole responsibility of the MSMA. Order By Judge Gordon Thompson Jr. Denying as Moot Plaintiffs’ Motion to Enforce the Injunction, Murphy v. Bilbray (Murphy II), No. 90-134 GT, 89-820 GT (S.D. Cal. Feb. 3, 2000), 1997 WL 754604. This condition was satisfied by the MSMA on March 31, 2000. Final Report by Defendant Mt. Soledad Memorial, Murphy II, No. 90-134 GT, 89-820 GT (S.D. Cal. Mar. 31, 2000). Soon afterwards, the MSMA began construction of its proposed memorial at the site. See Kimberly Edds, In Calif., Cross Site Stirs Discord, WASH. POST, Dec. 6, 2004, at A19 (noting that “[w]hile the legality of the 1998 sale to the memorial association was being challenged, the association made $900,000 worth of improvements to the property” (emphasis added)). The memorial currently consists of six concentric walls, which will ultimately hold 3,200 granite plaques, purchased by donors and engraved with the names and photos of veterans. Mount Soledad Memorial Association, About the Memorial, supra note 2. A large American flag is displayed at the base of the circles, and twenty-three bollards displayed in various areas around the site indicate its status as private property. Id.

49. Paulson II, 262 F.3d at 896.

50. Id. at 894. The court concluded that upon “completion of the valid sale, the land became private property to which [the] Lemon [test] does not apply.” Id. As long as the demarcation between private and public property was clearly defined, the court saw no issue with the cross’s presence inside otherwise city-owned parkland. Id. at 895; see also supra note 48.

51. Paulson III, 294 F.3d at 1133-34.

52. Id. at 1133. Article XVI, section 5 of California’s Constitution (the “No Aid provision”) reads, in pertinent part:

Neither the Legislature, nor any county, city and county . . . or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . . nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . . .
counterintuitive analysis, the court noted that requiring potential buyers to maintain a war memorial atop Mt. Soledad had the effect of favoring those groups who would choose to maintain the cross. The cross was, the court reasoned, a pre-existing memorial symbol, meaning that purchasers who wished to keep it could bid higher without the concern of being “saddled with the costs of removing the cross and of constructing an alternative memorial.”

The City and the MSMA sought certiorari in the U.S. Supreme Court, claiming that the Ninth Circuit had improperly abrogated their federal constitutional rights by the application of California’s No Aid provision. The petition was swiftly denied. Sensing inevitable defeat, the City and the MSMA entered into settlement talks with Paulson at the request of the court. After extensive negotiations, the parties reached a tentative agreement under which the cross would be moved 1,000 yards to the nearby Mount Soledad Presbyterian Church. In addition, the MSMA would be granted an interest in maintaining the war memorial, and the cross would be replaced with a secular symbol designed to honor
veterans.60

On July 27, 2004, the settlement was presented to the San Diego City Council, which declined to accept the terms.61 Much to the chagrin of the MSMA, who supported settlement and relocation, the Council presented voters with another land transfer ballot measure, Proposition K.62 At the request of the City, the district court subsequently declared the prior sale void ab initio.63

C. Federal Intervention

San Diego voters, likely torn by conflicting loyalties,64 dealt Proposition K65 a resounding defeat in November of 2004.66 Almost

60. See Huard, supra note 59.
62. Id.; see also Hall, supra note 27. The brainchild of City Attorney Casey Gwinn, Proposition K asked the voters to authorize the City Council to sell a portion of Mt. Soledad Natural Park to the highest bidder. See Hall, supra note 61. Though the measure itself was similar to Proposition F, only one condition would accompany a winning bid: any buyer other than the MSMA would accept the property subject to that group’s long-term lease to display and maintain its memorial. The buyer’s discretion regarding the cross, however, was unrestricted. The cross could be destroyed, retained, or relocated. In addition, Gwinn envisioned that ballot arguments in favor of Proposition K, unlike those for Proposition F, would avoid any language connecting the measure with the City’s desire to “save the cross.” See Hall, supra note 61. Gwinn’s proposal apparently arose from his concerns that any settlement agreement would not hold up in court. See Hall, supra note 59. Despite its decision to attempt another property transfer, the Council voted to accept the settlement agreement with Paulson in the event that Proposition K failed. See Hall, supra note 61.

The concern of the MSMA, of course, was that Proposition K failed to ensure the safety of the cross, while a settlement would put the cross in hands that would preserve the symbol. See Edds, supra note 48. MSMA’s President, William Kellogg, described Proposition K as “fraught with problems.” See Hall, supra note 61. As one veteran succinctly put it: “You want us to roll the dice . . . . We have a solution in hand. Everybody agrees to it. What is the problem?” See Hall, supra note 61.

63. SD Mount Soledad, CITY NEWS SERVICE, Oct. 13, 2004. As a result of the sale being void, San Diego was once again the owner of the cross and could thus convey good title if authorized by a two-thirds majority vote on Proposition K. Id. The ruling also meant that the City still violated the original 1991 injunction and needed to move the cross one way or the other. Edds, supra note 48.
64. See Edds, supra note 48. “The [MSMA], worried the proposition could result in the cross and the memorial being destroyed, campaigned against the ballot measure.” Id.
65. The full text of Proposition K read as follows:

Shall the City be authorized to remove from dedicated park status and sell to the highest bidder a portion of Mount Soledad Natural Park, subject to a lease to the Mount Soledad Memorial Association to preserve and maintain the existing granite walls and plaques, and to transfer ownership of the cross to the new buyer who will determine whether to maintain, relocate, or remove the cross or to
immediately, a local lawyer affiliated with the faith-based Thomas More Law Center contacted U.S. Representatives Duncan Hunter (R-CA) and Randy “Duke” Cunningham (R-CA), both San Diego-area congressmen, about the possibility of converting Mt. Soledad into a national memorial. The proposal called for the federal government to accept a future grant of a portion of Mt. Soledad from the City, declare the site a National Veterans Memorial, and envelop it within the National Park Service. Representative Hunter, Chairman of the House Armed Services Committee at the time, slipped a rider to this effect into a voluminous spending bill at the end of 2004. The bill was signed into law by President Bush on December 8, 2004, and the path was cleared for the Mt. Soledad cross to become federal property.

Somewhat surprisingly, the City Council voted to decline the federal government’s offer to transfer the cross in March 2005. In response, local citizens formed “San Diegans for the Mount Soledad National War Memorial” and conducted a petition drive imploring the Council to reverse its decision. On May 15, 2005, the Council reconsidered and rescinded its previous order, voting instead to put a third ballot measure before the
citizens to determine popular support for the transfer of Mt. Soledad to the federal government. On July 26, 2005, during a special election to replace the outgoing mayor, voters passed Proposition A by a 76% to 24% margin.

Paulson challenged the constitutionality of the ballot measure in California Superior Court. On October 7, 2005, the court declared that Proposition A violated the California Constitution as an unlawful transfer intended to save a purely religious symbol. Citing “the consistent, repeated, and numerous references to saving the cross as the basis for deciding whether to donate the memorial to the United States,” the court found that “one conclusion is inescapable: this transfer is again an unconstitutional preference of the Christian religion to the exclusion of other religions and non-religious beliefs in violation of the No Preference Clause of the California Constitution.”

On May 3, 2006, Judge Thompson ordered the cross removed from Mt. Soledad within ninety days, after which the City would be fined $5,000 a day. City representatives acted quickly to capitalize on the ninety-day window; San Diego Mayor Jerry Sanders and Representative Hunter wrote separately to the President, seeking federal intervention in the matter. Representative Hunter, along with fellow San Diegans Representative Brian Bilbray and Representative Darrell Issa, introduced H.R. 5683 in the


74. Smartvoter.org, Proposition A: Mount Soledad Natural Park, http://www.smartvoter.org/2005/07/26/ca/sd/prop/A (last visited July 22, 2007). This refutes the theory that the result of Proposition K was proof that voters had no sympathy for saving the cross.


76. Id. at 35.

77. Id. at 28. The court noted that the petition circulated by the San Diegans for the Mt. Soledad Veterans Memorial read, in pertinent part: “You can save the Mt. Soledad cross! The City Council . . . is now planning to tear down the cross. Your signature on this referendum will allow the voters to decide whether to transfer the land and the cross to the federal government as a national war memorial.” Id. at 25. Further, the court found that “the City’s attempt to go so far as to transfer away valuable land for no compensation for the purpose of saving the cross is also an unconstitutional aid to the Christian religion in violation of the California Constitution.” Id. at 28.


79. Jennifer Vigil & Greg Moran, President’s Aid Sought in Battle to Save Cross; Hunter Wants the Site Declared National Park, SAN DIEGO UNION-TRIB., May 12, 2006, at A1. Both letters are available online at the Thomas More Law Center’s website. See Letter from Jerry Sanders, Mayor of San Diego, to George W. Bush, President of the United States (May 11, 2006), http://thomasmore.org/pdfs/soledad_sandersletter.PDF; Letter from Duncan Hunter, Member of Congress, to George W. Bush, President of the United States (May 10, 2006), http://thomasmore.org/pdfs/soledad_hunterletter.pdf.
House and pressed its consideration. The proposed bill was presented as an action “[t]o preserve the Mt. Soledad Veterans Memorial in San Diego, California, by providing for the immediate acquisition of the memorial by the United States.”

In the meantime, the City Council voted to appeal Judge Thompson’s latest ruling. Cross supporters were dealt a blow, however, when the City’s request to stay the daily penalty pending an appeal was denied by the Ninth Circuit. Just as heavy fines appeared inevitable, Justice Kennedy, in his capacity as Circuit Justice for the Ninth Circuit, granted an emergency stay until all outstanding appeals had been settled. Two weeks later, spurred on by vocal support from the White House, the House passed H.R. 5683 by an overwhelming 349 to 74 tally. On August 1, 2006, the Senate followed suit, approving the measure through unanimous consent.

80. This resolution was introduced in the House on June 26, 2006. H.R. Res. 5683, 109th Cong. (2006).
81. Id.
83. Soto & Gustafson, supra note 78.
84. San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson, 126 S. Ct. 2856, 2856-58 (2006). In the brief opinion accompanying the temporary stay order, Justice Kennedy spoke to the likelihood of the Supreme Court’s ultimate involvement in the Mt. Soledad controversy: “Although the Court denied certiorari in this litigation at earlier stages, Congress’ evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court’s order.” Id. at 2858.
85. In a Statement of Administrative Policy dated July 19, 2006 (the day of the House vote on H.R. 5683), the White House declared:

The Administration strongly supports passage of H.R. 5683 to protect the Mount Soledad Veterans Memorial in San Diego. In the face of legal action threatening the continued existence of the current Memorial, the people of San Diego have clearly expressed their desire to keep the Mt. Soledad Veterans Memorial in its present form. Judicial activism should not stand in the way of the people, and the Administration commends Rep. Hunter for his efforts in introducing this bill. The bill would preserve the Mount Soledad Memorial by vesting title to the Memorial in the Federal government and providing that it be administered by the Secretary of Defense. The Administration supports the important goal of preserving the integrity of war memorials.

86. 152 CONG. REC. H5433-01, H5434 (2006).
Paulson sought an injunction to preclude President Bush from signing the bill but was denied by the district court, which noted that it could not rule on the constitutionality of a transfer that had yet to occur.\(^\text{88}\) Free from judicial roadblocks, the President’s signature transformed H.R. 5683 into Public Law 109-272 on August 14, 2006.\(^\text{89}\) The Act called for acquisition of the Mt. Soledad Veterans Memorial “[t]o effectuate the purpose of” Representative Hunter’s 2004 bill and called for the payment of just compensation to any owner of property taken.\(^\text{90}\) As before, the Act allowed the MSMA to continue to maintain the property.\(^\text{91}\) On August 24, 2006 the American Civil Liberties Union (ACLU) filed suit on behalf of the Jewish War Veterans of the United States, alleging that federal ownership of a religious display violated the Establishment Clause of the U.S. Constitution.\(^\text{92}\)

III. SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.”\(^\text{93}\) Since the Supreme Court first erected its infamous “wall of separation” between church and state in 1947,\(^\text{94}\) its decisions interpreting the

90. Section 2(a)-(b), 120 Stat. at 770-71.
91. See id. § 2(c). The cabinet group tasked with management of the memorial did change, however, from the Department of the Interior to the Department of Defense. See id.
92. Greg Moran, Jewish Veterans, Local ACLU Latest to Sue Over Cross, SAN DIEGO UNION-TRIB., Aug. 25, 2006, at A1. After the transfer was complete, the Fourth District Court of Appeals overturned the ruling of the Superior Court and declared Proposition A to be constitutional. Greg Moran, Appeals Court: Soledad Cross Measure Constitutional, SAN DIEGO UNION-TRIB., Nov. 30, 2006, at A1. The district court found that the measure was “religiously neutral” and that the citizens’ passage of the measure did not amount to an “establishment of any religion.” Id. The court did not address whether the presence of the cross on federal land violated the Establishment Clause. See id.
93. U.S. CONST. amend. I.
94. See Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). The “wall of separation” language is attributed to President Thomas Jefferson. Id. In a letter to a committee of the Danbury Baptist Association (of Danbury, Connecticut) in 1802, Jefferson wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.” Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, Committee Members, Danbury Baptist Association (Jan. 1, 1802), available at www.loc.gov/loc/lcib/9806/danpre.html; see also Reynolds v. United States, 98 U.S. 145, 164 (1878). “Although Everson was not the first Supreme Court opinion to cite Thomas Jefferson’s
Establishment Clause have been unpredictable at best. This inconsistency has prompted the application of several tests to gauge the constitutionality of governmental entanglement with religion, all of which have garnered varying degrees of support. Each additional Supreme Court decision adds another layer of complexity, further increasing the frustration of lower courts charged with applying Establishment Clause doctrine. Further, each new case “presents the very real possibility that the Court might totally abandon its previous efforts and start over.”

Perhaps nowhere has the case law been more dissonant than the treatment of religious displays on publicly owned land. The Court, despite several bites at the apple, has consistently shied away from announcing a definitive standard for lower courts to employ. When
provided a recent opportunity to clarify its message in McCreary County v. ACLU\textsuperscript{101} and Van Orden v. Perry\textsuperscript{102}, the Court punted in favor of a fact-specific, ad hoc analysis.\textsuperscript{103} These two ostensibly incongruous decisions indicate a pervasive lack of direction in the area of religious displays as the Court struggles to strike a delicate balance between government neutrality and religious accommodation.\textsuperscript{104}

A. The Lemon Test

From 1971 until the mid-1980s, the Court used the “Lemon test” to interpret the constitutionality of religious displays.\textsuperscript{105} Originating in Lemon v. Kurtzman,\textsuperscript{106} the three-prong test provides that government activity will be unconstitutional unless (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive governmental entanglement with religion.\textsuperscript{107} The Court has applied Lemon to every subsequent Establishment Clause challenge save one, regardless of the government activity at issue.\textsuperscript{108} Lemon therefore

\textsuperscript{101} 545 U.S. 844 (2005).

\textsuperscript{102} 545 U.S. 677 (2005).


\textsuperscript{104} See Robert A. Sedler, Understanding the Establishment Clause: The Perspective of Constitutional Litigation, 43 WAYNE L. REV. 1317, 1337-40 (1997). The effect of Everson was to promote the idea that “the Establishment Clause commands complete official neutrality towards religion.” Id. at 1338-39. However, this is not a universal view; “accomodationist” Justices such as Justice Scalia and Justice Thomas have flatly rejected the principle of complete government neutrality. Id. at 1337; see, e.g., McCreary County, 545 U.S. at 889-90 (Scalia, J., dissenting).


\textsuperscript{106} 403 U.S. 602 (1971).

\textsuperscript{107} Id. at 612-13. The importance of the entanglement prong has been subsequently diluted by Agostini v. Felton, 521 U.S. 203 (1997), in which the Court stated, “Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two.” Id. at 233 (citations omitted). The common view is that Agostini has effectively reduced Lemon to a two-prong test. See, e.g., Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 566 (2006) [hereinafter Alito Confirmation Hearing] (testimony of Samuel A. Alito, Jr., Judge, U.S. Court of Appeals for the Third Circuit) (noting that the Lemon test “now has two parts”).

\textsuperscript{108} See Sedler, supra note 104, at 1343 n.108. The sole exception is Marsh v. Chambers, 463 U.S. 783 (1983). Marsh is an oft-overlooked but critical decision in the Court’s Establishment Clause doctrine; one that could easily be interpreted as creating another standard entirely: a “history and tradition test.” See Gavrich, supra note 103, at 441. Marsh represents a great departure from the remainder of Establishment Clause jurisprudence due to its reliance on the importance of religion in the American tradition and its interpretation of the Framers’ intent. See Marsh, 463 U.S.
serves as a point of departure for every Establishment Clause analysis, including the evaluation of religious displays.\textsuperscript{109}

\textit{Lemon}’s significance, however, stretches far beyond its operational principles. The decision signified a marked shift in judicial attitude towards the role of government in religion.\textsuperscript{110} Where the Court previously sought to protect religion from judicial “hostility,”\textsuperscript{111} \textit{Lemon} gave rise to the theory that “the establishment clause existed to create a secular state and that under the First Amendment nonreligion was just as important as religion.”\textsuperscript{112} This separationist approach imposed strict barriers in all areas where government and religion might intersect.\textsuperscript{113}

B. The Endorsement Test

The “endorsement test” announced in \textit{Lynch v. Donnelly}\textsuperscript{114} began the slow movement back to a more permissive interpretation of the

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\begin{quote}
We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
\end{quote}


\textsuperscript{111} See, \textit{e.g.}, \textit{Sch. Dist. of Abington Twp. v. Schempp}, 374 U.S. 203, 225 (1963) (indicating that the First Amendment prohibits judicial “hostility” towards religion).

\textsuperscript{112} \textit{GARRY}, supra note 94, at 52.

\textsuperscript{113} Id.

Establishment Clause. In *Lynch*, the Court held that Pawtucket, Rhode Island’s display of a nativity scene did not have the effect of advancing religion. Chief Justice Burger applied the *Lemon* test, centering his analysis on the secular purpose of the display. A plurality of the Court joined in his reasoning; Justice O’Connor, ever the swing vote, approved of the result but proposed a new standard in a separate concurrence.

Justice O’Connor’s endorsement test declares a display unconstitutional if a reasonable observer would perceive it to evoke a message of governmental endorsement of religion. The underlying principle is that “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” The endorsement test thus effectively collapses the first two prongs of the *Lemon* test into a fact-specific inquiry where the perception of a “reasonable observer” is paramount.

Over the course of several Establishment Clause cases, and prior to Justice O’Connor’s retirement and Chief Justice Rehnquist’s death, the endorsement test received widespread approval on the Court. Justice

115. See *Garry*, supra note 94, at 68. For example, the Court noted that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” *Lynch*, 465 U.S. at 674. This acknowledgment almost certainly would not have been made by the Court in the years between *Lemon* and *Marsh*.


117. *Id.* at 681.

118. *Id.* at 688 (O’Connor, J., concurring). This standard is known as the “endorsement test.” See *id.* at 690.

119. *Id.*

120. *Id.* at 688.


Kennedy, however, has proved its fiercest opponent, arguing that the standard is both improperly hostile to religious accommodation and fraught with uncertainty. Because a reasonable observer standard is inherently subjective, the endorsement test requires courts to delve into the context of the religious display in excruciating detail, resulting in what Justice Kennedy has called a “jurisprudence of minutia.” This has resulted in numerous cases being decided based on counterintuitive pronouncements that the religious displays are, due to context and specific facts, essentially secular in nature. Notwithstanding these criticisms of the standard and the Court’s own proposed alternatives, the endorsement test (prior to Van Orden and McCreary County) served as the preeminent test for determining whether the government was unconstitutionally sponsoring a religious display since its announcement in Lynch.

123. See Budd, supra note 99, at 202. Justice Kennedy did not criticize without a solution—he proposed a broad policy of religious accommodation through application of the more permissive “coercion” test. Allegheny, 492 U.S. at 659-61 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy argued that the Court’s prior standards, including the endorsement test, “reflect[ed] an unjustified hostility toward religion.” Id. at 655. The coercion test, which prohibits government activity that “compel[s] men to worship God in any manner contrary to their conscience,” id. at 660 (citing McGowan v. Maryland, 366 U.S. 420, 441 (1961) (quoting 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1834))), represents a more narrow interpretation of the Establishment Clause than its predecessors, see David S. Hill, Note, City of Edmond v. Robinson: The Coercion-Standing Test – A New Approach to Religious Symbols Under the Establishment Clause?, 2000 UTAH L. REV. 643, 651. Under the coercion test, governmental action is constitutional unless it has the effect of coercing individuals to support or participate in any religion, or gives a direct benefit to religion to a degree that such benefit “establishes a [state] religion or religious faith, or tends to do so.” Allegheny, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (quoting Lynch, 465 U.S. at 678). This interpretation allows for “[g]overnment policies of accommodation, acknowledgment, and support for religion,” id. at 657, which might be vilified under the endorsement test but fall short of coercing an individual to partake in religious practice, see Hill, supra, at 651. Justice Kennedy seemed to distinguish temporary displays (such as the crèche in question) from the “permanent” or “year-round” display of religious symbols on public land. Allegheny, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). In Lee v. Weisman, 505 U.S. 577 (1992), the Court applied Justice Kennedy’s coercion test in the context of school prayer without specifically rejecting either the Lemon or endorsement tests. Id. at 586-87; see also Feldman, supra note 105, at 3.

124. GARRY, supra note 94, at 59 (quoting Allegheny, 492 U.S. at 674 (Kennedy, J., concurring in part and dissenting in part)).

125. See GEDICKS, supra note 95, at 63.

126. See GARRY, supra note 94, at 57 (“In cases like . . . Lynch v. Donnelly, the Court began using the endorsement test to decide establishment clause issues. Subsequently, this test has become the Supreme Court’s preeminent means for analyzing the constitutionality of religious symbols . . . .” (footnote omitted); Budd, supra note 99, at 188 (“[T]he endorsement test indisputably governs the constitutionality of symbolic religious expression on public land.”).
C. Recent Supreme Court Developments

In 2005, the Court had a golden opportunity to discard the patchwork past of Establishment Clause doctrine and to adopt a unitary approach for addressing the constitutionality of religious displays. Perhaps predictably, the Court handed down contrary rulings in two separate cases with strikingly similar facts, leaving the waters even muddier than before. This failure to adopt a specific standard (along with new Supreme Court membership, as discussed below) portends that the Mt. Soledad controversy will appear on the High Court’s docket when the recent round of appeals has run its course.

1. McCreary County v. ACLU

In *McCreary County v. ACLU*, the Court addressed *Lemon’s* continuing validity in the area of public religious symbols. The issue was whether two Kentucky counties violated the Establishment Clause by prominently displaying the King James version of the Ten Commandments in their courthouses. The historic texts were installed in 1999, with one county commemorating the event in a decidedly religious ceremony. The Court took issue with both the lack of any secularizing thematic presentation and the abbreviated existence of the displays.

Justice Souter, writing for the *McCreary County* majority, refused to abandon the *Lemon* test. Instead, as the dissent pointed out, Souter’s opinion stressed the manifest importance of the purpose prong and interpreted that prong to require “that the secular purpose [of the display] ‘predominate’ over any purpose to advance religion.” To analyze whether the government action met this elevated standard, the Court reviewed the legislatures’ stated intentions in installing the sacred texts and rejected the counties’ claims that a newly announced secular purpose (namely, that the Ten Commandments symbolized the historical evolution of civil law) could cure a previous sectarian purpose (the record indicated that prior versions of the display made numerous references to God and focused on religious passages rather than the Commandments’ “secular” influence).

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128. *Id.* at 859-61.
129. *Id.* at 850-51.
130. *Id.* at 851. The Pulaski County display was hung in a ceremony in which the county Judge-Executive and his pastor commented on the propriety of the text as “a creed of ethics.” *Id.*
131. *Id.* at 868-69.
132. *Id.* at 861-62.
133. *Id.* at 901 (Scalia, J., dissenting).
134. *Id.* at 868-74 (majority opinion). However, the Court did not go so far as to hold that “past actions [of government can] forever taint any effort . . . to deal with the [religious] subject
Within his analysis, Justice Souter announced a return to the concept of religious neutrality, which prevents the government from elevating religion over nonreligion or taking sides on contested religious issues. Justice Souter identified the Ten Commandments as one such issue and declared that the counties’ failure to promote a demonstrably secular theme evinced governmental support of a sectarian monument. Justice Scalia authored a ferocious dissent that refuted any constitutional requirement of neutrality, citing the Framers’ intent to allow tributes to God and religion. The majority’s “manipulation” of the Lemon test, Justice Scalia opined, effectively “ratchet[ed] up the Court’s hostility to religion” to arguably its highest level since Marsh and Lynch.

2. Van Orden v. Perry

McCreary County appeared to signify Lemon’s reemergence as the predominant constitutional test for permanent religious displays on public land. However, in VanOrden v. Perry, an opinion released the same day, the Court obviated Lemon to uphold a Ten Commandments display comprised of seventeen monuments and twenty-one historical markers. The exhibit, which was erected on the grounds of the Texas State Capitol in 1961, commemorated the “people, ideals, and events that compose Texan identity.” Writing for the plurality, Chief Justice Rehnquist sought to avoid hostile treatment of religion while still maintaining a separation of church and state. To accomplish this, the Chief Justice declared the Lemon test inapplicable for evaluation of “the sort of passive monument that Texas ha[d] erected on its Capitol grounds.”

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<td>Id. at 874-76.</td>
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<td>Id. at 868, 870, 881.</td>
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<td>Id. at 885-90 (Scalia, J., dissenting).</td>
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<td>Id. at 900.</td>
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<td>Id. at 681, 685-86.</td>
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<td>Id. at 681-82 (quoting H. Con. Res. 38, 77th Leg., Reg. Sess. (Tex. 2001)).</td>
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<td>Id. at 683-84.</td>
<td>The Chief Justice summarized the dilemma thusly: Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.</td>
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Once freed from *Lemon*, Chief Justice Rehnquist’s analysis focused on both the historical nature of the Texas monuments and the U.S. government’s history of acknowledging religion.\textsuperscript{144} Despite the prominence of a religious monument, the Court found the overall display to be a valid governmental action because its prevailing theme was secular.\textsuperscript{145} Justice Breyer, representing the swing vote, agreed that *Lemon* was inapplicable and, applying a “legal judgment” approach rather than any particular Establishment Clause test, also found the Texas Capitol display constitutional.\textsuperscript{146}

\subsection*{D. Back to the Future?}

In deciding *Van Orden* on the grounds of history and tradition, the Court effectively secularized a religious monument.\textsuperscript{147} Furthermore, the Court provided no guidance about what makes a particular display “passive” and therefore impervious to the *Lemon* test.\textsuperscript{148} The Court’s rejection of *Lemon* thus seems arbitrary, especially given the lack of any guarantee by the Court that all “passive” displays will receive similar treatment.\textsuperscript{149} Moreover, because *McCreary County* reestablished *Lemon* as presumptively valid, *Van Orden*’s fact-specific passivity approach leaves unanswered the questions of when *Lemon* will apply and what facts are necessary to circumvent it.\textsuperscript{150}

In the wake of *Van Orden* and *McCreary County*, one must question whether the endorsement test remains the prevailing standard for analyzing religious displays generally and Latin crosses in particular. This question is especially intriguing given Justice Kennedy’s suggestion in *Allegheny*
that permanent religious displays are more susceptible to Establishment Clause challenges than seasonal exhibits such as crèches or menorahs. 151 Prior to Van Orden and McCreary County, the Court had never directly addressed such a permanent display. When the opportunity arose, the Court avoided endorsement altogether, defeating one display with a more restrictive standard 152 and upholding another display by using an entirely new and amorphous criterion. 153 As a result, there is little to no guidance as to which direction the Court might take to address a Latin cross, 154 which is certainly a permanent fixture but is far less amenable to secularization than the Ten Commandments. 155


152. See McCreary County v. ACLU, 545 U.S. 844, 861-64, 881 (2005) (using Lemon’s more stringent purpose test to uphold an injunction against a religious display). Does this suggest that when permanent displays exist, they are subject to a higher standard than temporary displays, which have traditionally been analyzed under the endorsement test? Cf. Allegheny, 492 U.S. at 578-79, 592-93 (applying the endorsement test to two recurring holiday displays); Lynch v. Donnelly, 465 U.S. 668, 670-71, 680-85 (1984) (applying the endorsement test to an annual Nativity Scene). Similarly, does this suggest that the endorsement test is the applicable standard for temporary displays but not permanent ones?

153. See Van Orden v. Perry, 543 U.S. 677, 681, 686-91 (2005) (disregarding the purpose test and secularizing the “passive” monument in order to avoid the Establishment Clause). Does this suggest that if displays, regardless of their permanence, are capable of being secularized either via their own history or their surroundings, they are not subject to the Establishment Clause at all?

154. The Court has, once before, addressed the presence of a Latin cross on public land. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758-59 (1995). In Pinette, the Ku Klux Klan sought a permit to display a cross in the Columbus, Ohio, statehouse plaza. Id. at 757-58. The Capitol Square Advisory Board denied the petition on Establishment Clause grounds. Id. at 758-59. The district court issued an injunction ordering that the permit be granted, holding that denial of the Klan’s display violated the group’s right to religious expression in a traditional public forum. Id. at 759. Justice Scalia, writing for the majority, ultimately upheld the injunction. Id. at 770. In Part IV of the opinion, Justice Scalia (joined only by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas) addressed the question of government endorsement, dismissing the idea that a reasonable observer might attribute private religious expression to a government acting neutrally. Id. at 757, 763-69. All prior Establishment Clause challenges applying the endorsement test, Justice Scalia noted, involved either a display by the government itself (such as Lynch) or government action that had the effect of discriminating in favor of a private religious display (such as Allegheny). Id. at 764-65. That the cross was erected close to the city’s symbols of government was unimportant where any mistaken belief that the private speech was endorsed by the city was not “fostered or encouraged” by the government itself. Id. at 766.

155. See, e.g., Budd, supra note 99, at 205-06.

Whether one accepts [that certain displays can be characterized as secular in order to avoid the Establishment Clause prohibition], the argument is necessarily inapplicable to government’s display of an intrinsically sectarian religious symbol such as a cross, crucifix, or Star of David. However broadly or narrowly the courts may construe the religious character of a crèche or a monument to the Ten Commandments, the irreducibly religious import of certain symbols—and the
E. Changes on the High Court

While the present landscape of Establishment Clause doctrine might be hazy, recent changes in Supreme Court membership could herald a return to clarity. The recent additions of Chief Justice Roberts and Justice Alito to the bench are widely expected to establish a conservative majority, shifting the Court’s balance of power for decades to come. The confirmation of Justice Alito is arguably the more influential of the two because his judicial philosophy, especially regarding church-state issues, appears less moderate than Justice O’Connor, the “centrist swing voter” he replaces. To determine how the new Justices will impact Establishment Clause doctrine, a review of their past jurisprudence is helpful.

In the three Third Circuit cases regarding the Establishment Clause in which then-Judge Alito authored or joined in an opinion, he sided with the religious group or its advocate each time. In ACLU v. Schundler, Justice Alito wrote for a majority that upheld the display of a crèche and menorah in a city hall plaza, citing Lynch and Allegheny as precedent. Significant, he rejected the notion that the display’s validity was the product of its secularization by other non-religious symbols, such as Frosty the Snowman and Santa Claus. Justice Alito opined that “[d]emystification, desanctification, and deconsecration suggest a process of profanation, something that the Establishment Clause neither demands nor tolerates.”

resulting infirmity of their permanent display on public land—is not in meaningful dispute.

Budd, supra note 99, at 206 (footnotes omitted).

156. David D. Kirkpatrick, Alito Sworn In as Justice After Senate Gives Approval, N.Y. TIMES, Feb. 1, 2006, at A21. “The youngest members of the court [sic] are all conservatives: Chief Justice Roberts [51], Justice Alito [55] and Justice Thomas, 57. The oldest and most likely to leave the court [sic] next are liberals: Justice Ruth Bader Ginsburg, 72, and Justice John Paul Stevens, 85.” Id.


159. 168 F.3d 92 (3d Cir. 1999).

160. Id. at 94-95. The opinion analyzed both Lynch and Allegheny, the Court’s two prior holiday display cases, and concluded that at a minimum, the display must meet Justice Kennedy’s coercion test, as well as Justice O’Connor’s requirement that a reasonable observer would appreciate that the combined display was an effort to acknowledge cultural diversity. Id. at 99-103.

161. Id. at 94, 98.

162. Id. at 98-99.
When asked in his confirmation hearings whether religious displays on public land were generally permissible, Justice Alito deferred, noting that in the area of the Establishment Clause, the Court “ha[d] drawn some fairly fine lines.” He later noted that “the absence of . . . some sort of theory that draws distinctions that don’t turn on these very fine lines” was something that “bothered” him about the Court’s jurisprudence in this area. When asked which Establishment Clause tests should be applied in particular instances, Justice Alito placed religious displays in the purview of the endorsement test.

While Chief Justice Roberts has authored no relevant case law addressing the Establishment Clause, several writings provide insight into his stance. In an amicus brief for Board of Education of the Westside Community Schools v. Mergens, the Chief Justice criticized Lemon as applicable only in the “context in which it was spawned—financial aid to highly sectarian institutions.” He further noted that “[e]xperience has demonstrated that rigid application of formulaic tests cannot satisfactorily resolve the delicate issues raised by the Establishment Clause.” Similarly, in an amicus brief prepared for Lee v. Weisman, the Chief Justice disputed Lemon’s applicability to the issue of school prayer and argued for application of a coercion standard. When questioned about his disapproval of Lemon, Chief Justice Roberts noted that the standard’s sensitivity to factual nuances is both its greatest benefit and greatest weakness. A more adequate standard, according to the Chief Justice, would better reflect the “animating principle of the Framers . . . that no one should be denied rights of full citizenship because of their religious belief or their lack of religious belief.”

While searching for an overriding judicial philosophy in lower court opinions and confirmation transcripts is akin to reading tea leaves, it is

163. Alito Confirmation Hearing, supra note 107, at 466 (testimony of Samuel A. Alito, Jr., Judge, U.S. Court of Appeals for the Third Circuit).
164. Id.
165. Id. The Lemon test, Justice Alito noted, has normally been applied to issues of funding.
168. Id. at 42-43.
172. Id.
apparent that neither Justice has an overwhelming affinity for the Lemon test. In addition, a mutual frustration that Establishment Clause doctrine has devolved into a “jurisprudence of minutia” is evident. Given that both Justices seek a more definitive standard for the Establishment Clause that more closely defines the Framers’ intent, Mt. Soledad will likely have great appeal for the reformulated Supreme Court.

IV. LATIN CROSS JURISPRUDENCE

A. Supreme and Federal Court Jurisprudence

Perhaps the most relevant language the Court has uttered on the subject of Latin crosses comes from Justice Kennedy’s Allegheny dissent, in which he opined: “I doubt not . . . that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . . [S]uch an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” Justice Kennedy suggested that such a display would constitute a “[s]ymbolic recognition or accommodation of religious faith,” and as such, would rise to the level of indirect coercion.

The federal circuits, on the other hand, have frequently considered governmental sponsorship of Latin crosses on public land. In the great majority of federal decisions, displays of crosses on public land have been declared unconstitutional. In addition, the decisions have consistently
found the cross to be a sectarian symbol that communicates the message of governmental support for Christianity. However, several state courts have found publicly displayed crosses constitutional, and even the federal circuits have recognized at least two potential exceptions that might validate a cross’s presence.

The first recognized exception, originally announced by the Supreme Court in Pinette, is the government’s creation of a traditional public forum where private individuals are permitted to erect religious displays. Tempering this immunity, however, is Justice Scalia’s contention in dicta that “giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.” Because the Court has never addressed the government’s purposeful acquisition of land bearing a pre-existing religious symbol, it is unclear whether such action constitutes a grant of preferential access. Regardless, Mt. Soledad is unlikely to fall under this exception because it does not stand within a traditional public forum.

City & County of San Diego (Carpenter II), 93 F.3d 627, 632 (9th Cir. 1996) (finding that the cross violated the California Constitution and thus not reaching the claim under the U.S. Constitution); Friedman v. Bd. of County Comm’rs, 781 F.2d 777, 778 (10th Cir. 1985) (en banc); ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098, 1111 (11th Cir. 1983); ACLU v. Eckels, 589 F. Supp. 222, 241 (S.D. Tex. 1984).

180. See, e.g., Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 619 (9th Cir. 1996); ACLU v. City of St. Charles, 794 F.2d 265, 271 (7th Cir. 1986). In City of St. Charles, Judge Posner posited that “[w]hen prominently displayed on [public property] that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but also sectarian.” City of St. Charles, 794 F.2d at 271; see also Jewish War Veterans, 695 F. Supp. at 12-13 (“Running through the decisions of all the federal courts . . . is a single thread: that the Latin cross . . . is a readily identifiable symbol of Christianity.” (footnote omitted)).

181. Jewish War Veterans, 695 F. Supp. at 13 n.6 (citing Meyer v. Oklahoma City, 496 P.2d 789, 792-93 (Okla. 1972) (upholding a cross erected on fairgrounds on the grounds that the commercial atmosphere “obscures whatever suggestions may emanate from its silent form”)); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 346 (Or. 1976) (finding a cross displayed in a public park to be constitutional “despite the fact that it is admittedly a religious symbol”); Paul v. Dade County, 202 So. 2d 833, 835 (Fla. 3d DCA 1967) (declaring simply that the facts did “not indicate that this temporary string of lights forming a cross was used to support, aid, maintain or establish any religion or religious edifices”).

182. See Budd, supra note 99, at 207.

183. See id. at 210.

184. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (emphasis added). This language comes from Part IV of Pinette, which was not supported by a majority of the Court. See supra note 154.

185. See Pinette, 515 U.S. at 761. The Court noted that:

[Speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the state. The right
Secondly, sectarian symbols that have become linked to independent historical events may survive an Establishment Clause attack. This second exception was specifically reserved by the Ninth Circuit in *Ellis*, which noted that “[e]ven a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events.” By way of example, a historic crucifix displayed within a government-owned California mission is unlikely to implicate the Establishment Clause because of the “cultural, ethnic, and political history” associated with California missionaries.

Despite this measure of historical reverence, courts have frequently rejected the proposition that such displays are constitutional on the basis of longevity alone. In *Carpenter v. City and County of San Francisco (Carpenter I)*, the City argued that a cross displayed on public property was predominately secular in effect because it was initially dedicated by President Roosevelt and had since been recognized as a cultural landmark. The Seventh Circuit, commenting in a separate case, disagreed: “The [Carpenter I district court’s] decision that local and cultural landmark status gave secular effect to the cross . . . smacks of bootstrapping . . . . [L]andmark status seems to have been achieved, in large part, by virtue of the duration of the display—the longer the violation, the less violative it becomes.” This reasoning dovetails with Justice O’Connor’s proclamation in *Allegheny* that religious displays cannot “survive Establishment Clause scrutiny simply by virtue of their historical longevity alone.”

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Id. (citations omitted).

186. See Budd, supra note 99, at 207.
187. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993). This language comes, ironically, from the first Ninth Circuit opinion upholding Judge Thompson’s injunction in the Mt. Soledad controversy. See id. at 1520.
188. Budd, supra note 99, at 208; see also Stacey L. Mahaney, Comment, *The California Missions Preservation Act: Safeguarding Our History or Subsidizing Religion?*, 55 Am. U. L. Rev. 1523, 1554 (2006); infra Part V.
189. See Budd, supra note 99, at 208.
191. Id. at 340, 349-50. The City prevailed in district court. Id. at 352.
192. *Gonzales v. N. Twp.*, 4 F.3d 1412, 1422 (7th Cir. 1993) (emphasis added). On appeal to the Ninth Circuit, the cross in *Carpenter I* was declared unconstitutional. *Carpenter v. City & County of San Francisco (Carpenter II)*, 93 F.3d 627, 632 (9th Cir. 1996). The court determined that “there is nothing about FDR’s transcontinental contact that converts the Cross into an historical relic.” *Carpenter II*, 93 F.3d at 631.
Similarly, the federal courts have been largely unmoved by the argument that designation as a war memorial serves to secularize a Latin cross.\textsuperscript{194} The prevailing determination has been that the attempt to characterize an otherwise religious symbol as a monument to veterans is mere pretext for an improper sectarian purpose.\textsuperscript{195} Even in the absence of pretext, federal courts have remained skeptical, as evidenced by the D.C. District’s observation that “the needless use of means that are inherently religious [where secular ones will do] makes a message of endorsement likely if not unavoidable . . . . The use of a cross as a memorial to fallen or missing servicemen is a use of what to some is a religious symbol where a nonreligious one likely would have done as well.”\textsuperscript{196}

\textbf{B. Jewish War Veterans and Buono}  

Two particular federal decisions, \textit{Jewish War Veterans v. United States}\textsuperscript{197} and \textit{Buono v. Norton (Buono II)}\textsuperscript{198} have peculiar applicability to the Mt. Soledad controversy. In both cases, a Latin cross, which doubled as a war memorial, was prominently displayed on federal, rather than state, land.\textsuperscript{199} In both cases, the courts declared that the displays violated the federal, rather than the state, Constitution.\textsuperscript{200} As might be expected, the courts used disparate tests to reach the same result.\textsuperscript{201}

In \textit{Jewish War Veterans}, the D.C. District Court ordered the removal of a lighted cross from a Marine Corps base in Hawaii.\textsuperscript{202} According to a Marine Corps Commandant, the Marines had erected the cross as “a nonsectarian symbol of our national resolve to obtain a full accounting of American servicemen still missing or unaccounted for in Southeast Asia.”\textsuperscript{203} Applying the \textit{Lemon} test rather than any of its progeny, the court

\begin{itemize}
\item \textsuperscript{195} See Budd, \textit{supra} note 99, at 206-07. This was the case with Mt. Soledad in \textit{Murphy I}. See \textit{supra} note 23 and accompanying text.
\item \textsuperscript{196} \textit{Jewish War Veterans}, 695 F. Supp. at 14; see also \textit{Eckels}, 589 F. Supp. at 235 (“[E]ven if one strains to view the symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county.”).
\item \textsuperscript{197} 695 F. Supp. 3 (D.D.C. 1988).
\item \textsuperscript{198} 371 F.3d 543 (9th Cir. 2004).
\item \textsuperscript{199} \textit{Id.} at 544; \textit{Jewish War Veterans}, 695 F. Supp. at 4.
\item \textsuperscript{200} \textit{Buono II}, 371 F.3d at 550; \textit{Jewish War Veterans}, 695 F. Supp. at 14-15.
\item \textsuperscript{201} \textit{Buono II}, 371 F.3d at 548 (utilizing a hybrid test consisting of the effects prong of \textit{Lemon} and the endorsement test); \textit{Jewish War Veterans}, 695 F. Supp. at 12-15 (using \textit{Lemon’s} three-prong test).
\item \textsuperscript{202} \textit{Jewish War Veterans}, 695 F. Supp. at 4, 15.
\item \textsuperscript{203} \textit{Id.} at 12 (internal quotation marks omitted). It should be noted that the cross (which was originally erected in 1966, then reconstructed in 1983 after being destroyed by fire) was erected using public funds. \textit{Id.} at 5-6. “The Marines spent $13,000 in public funds to rebuild the cross . . . .”
\end{itemize}
found that the cross violated both the secular effect and excessive entanglement prongs despite its valid secular purpose. The court was unimpressed that the cross had served as a war memorial since its inception, concluding that “[t]he principal symbol of Christianity, this nation’s dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message.” The court did not go so far as to declare the public display of a Latin cross unconstitutional per se but was “constrained to find its use inappropriate in this case.”

_Buono II_ is even more directly on point and, being a Ninth Circuit opinion, is binding precedent that will undoubtedly determine the outcome of Mt. Soledad’s future litigation within that Circuit. In _Buono II_, the court noted that its decision was “squarely controlled” by _Separation of Church & State Committee v. City of Eugene_, a 1996 decision disparaging a Latin cross that citizens of Eugene, Oregon, had designated as a war memorial. Using the Ninth Circuit rule enunciated in _Separation of Church & State Committee_, the _Buono II_ court applied both the secular effect prong of the _Lemon_ test and the endorsement test to the eight-foot-tall Sunrise Rock cross. Unconvinced that the remoteness and size of the display had any bearing on the perception of a reasonable observer, the court held that “even assuming that the government has a clearly secular purpose in maintaining display of the cross as a war memorial, the . . . cross violates the Establishment Clause.” In a later proceeding, the government’s attempt to transfer property bearing the cross from the Department of the Interior to the Department of Defense (in exchange for a privately owned five-acre parcel elsewhere in the Mojave Deser...
C. A Cross of a Different Color

The Mt. Soledad cross does not fit either of the recognized exceptions for Latin crosses; it is not located in a traditional public forum and has no historical significance apart from its longevity. It is a war memorial that features a sectarian symbol when another symbol would do. Further, there is some question whether its designation as a memorial is legitimate or merely government pretext.

Despite this damning record, Mt. Soledad is factually distinguishable from prior Latin cross and Establishment Clause cases, including both Buono II and Jewish War Veterans. Unlike the cross at issue in Jewish War Veterans, public funds were not used to erect Mt. Soledad’s cross. In addition, the federal government has designated Mt. Soledad a National Memorial, which is unique among each display discussed above save for the Buono II Sunrise Rock cross. Perhaps most importantly, the Mt. Soledad cross is the only display originally erected on state land and then transferred to federal ownership, despite the display’s religious adornment, through the affirmative action of Congress. This combination of idiosyncrasies is what truly sets Mt. Soledad apart.

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[T]he issue here is not whether the display of the Latin cross on federal land violates the Establishment Clause. Both this court and the Ninth Circuit answered that question in the affirmative. Rather, the issue is whether the land transfer directed by Section 8121 violates the permanent injunction or is itself an unconstitutional violation of the First Amendment Establishment Clause.

Id. at 1178 (citations omitted). The court found that the transfer violated the permanent injunction because it failed to cure the underlying constitutional defect. Id. In a footnote to its holding, the court said, “Since the court has found that the proposed transfer is an unlawful attempt to evade the permanent injunction, it need not consider Plaintiff's other contention that the land transfer itself is an independent violation of the Establishment Clause.” Id. at 1182 n.8.

214. See supra note 203.

215. It is tempting to note the differences between the two displays, namely the fact that Mt. Soledad includes rows of plaques and conducts memorial services, see supra note 48, while Sunshine Rock displays only a single plaque, see Buono II, 371 F.3d at 548. This would not be a fair representation of the argument, however, because the majority of Mt. Soledad’s displays were erected after the cross was initially challenged in district court. See supra note 48.

216. See infra Part VII.

217. See infra Part VI (addressing the issue of federal ownership at length).
V. Historic Preservation of Religious Properties

Both the courts and the federal legislature have, on occasion, recognized and protected the historical significance of religious properties listed on the National Register of Historic Places. To qualify for National Register designation, a religious property must derive its “primary significance from architectural or artistic distinction or historical importance.” In 1992, the National Historic Preservation Act was amended to authorize federal historic preservation grants to religious properties listed on the National Register, “provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant.” The amendment was a drastic reversal of prior federal administrative policy, which had flatly prohibited preservation grants to religious sites for decades.

Despite this express authority, existing Establishment Clause doctrine prevented the executive branch from providing grants to religious properties. In 1995, the Department of Justice (DOJ) prepared a memorandum opinion for the Department of the Interior that concluded that “historic preservation grants to churches and other pervasively sectarian institutions” were likely to contravene then-existing Establishment Clause precedent. The DOJ rejected the suggestion that preservation of certain “secular elements” of otherwise religious properties, such as the roof of a historic church, could constitute valid government assistance. In support of its argument, the DOJ quoted a 1992 Washington Supreme Court opinion for the proposition that the “church building itself is an expression of Christian belief and message

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219. Id.
225. DOJ MEMO, supra note 223 (emphasis added).
226. Id.
and . . . conveying religious beliefs is part of the building’s function.”

Though the DOJ’s memo noted that Supreme Court jurisprudence in the area of government aid to religious institutions was “still developing,” the DOJ found that its one steadfast rule prohibited the direct funding of churches and “pervasively sectarian institutions.”

In 2003, the DOJ reconsidered its position and reversed course entirely, concluding that the Constitution permits preservation grants to religious properties that constitute equal treatment rather than favoritism. Almost immediately thereafter, the Department of the Interior provided a grant to restore Boston’s Old North Church, site of the famous beacon lighting that sparked Paul Revere’s midnight ride. Secretary of the Interior Gail Norton opined that “[t]he new policy will bring balance to our historic preservation program and end a discriminatory double-standard that has been applied against religious properties . . . . All nationally significant historic structures - including those used for religious purposes - will now be eligible to receive funding . . . .”

As one commentator explained, “there’s nothing inherently wrong with [historic preservation grants to religious properties], just like there’s nothing wrong with a government-funded museum spending tax money on religious art, or with the government providing churches with police or fire protection. In each case, the government’s purpose is entirely secular, and the program treats the religious and the secular equally. Equal treatment is not establishment.”

One year after the Department of Interior’s policy change, Congress passed the California Missions Preservation Act, which authorized federal grants for preservation of the California missions and further elucidated a marked shift in attitude towards historic religious properties. Nineteen of the twenty-one missions scheduled to receive federal grant money

227. Id. (quoting First Covenant Church v. City of Seattle, 840 P.2d 174, 182 (Wash. 1992) (en banc)) (internal quotation marks omitted).

228. Id.

229. See Sproule, supra note 224, at 172.


231. Id. (internal quotation marks omitted).


233. California Missions Preservation Act, Pub. L. No. 108-420, 118 Stat. 2372 (2004). The Americans United for Separation of Church and State sued to block the grants two days after the Act was passed. See Mahaney, supra note 188, at 1524. The suit was subsequently dropped because no funding has yet been appropriated to the missions but will certainly be reinstated when grants are made. See id.
within the next five years are currently owned by the Catholic Church, operate as active parishes, and hold regular religious services. The Act’s unanimous passage was telling because Congress, perhaps emboldened by the Supreme Court decision in Zelman v. Simmons-Harris, appeared to voice its preference for a more permissive interpretation of the Establishment Clause.

Like the California missions, Mt. Soledad is a religious relic with independent historical significance. Unlike the missions, however, the cross’s presence serves only to memorialize the dead, not to operate as a site of worship. The federal government’s willingness to provide direct funding to buildings that are under church ownership and that are still in use for religious services is arguably much closer to the establishment of religion than the display of a solitary cross. Therefore, it is significant that the past decade has shown a striking bipartisan trend towards acknowledgement of religion’s role in our national history. Although Mt. Soledad has not been placed on the National Register, it compares favorably by analogy as a religious symbol with historical and secular significance; a symbol whose “federal grant” has been its designation as a National Memorial.

VI. EMINENT DOMAIN AND THE ESTABLISHMENT CLAUSE

The federal government’s authority to condemn land for the purpose of creating a national monument or memorial is statutorily prescribed. Title 16, § 431 of the United States Code provides: “The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks . . . When such objects are . . . held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government . . . ” Likewise, under the Takings Clause, the condemnation of land for memorial purposes has long been recognized as

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235. 536 U.S. 639 (2002). In Zelman, the Court upheld a government-funded school voucher program that allowed students to attend the school of their choice, whether religious or secular. Id. at 652-53.


237. Id.

238. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
a valid public use. See, e.g., United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680-81 (1896) (upholding the taking of portions of the Gettysburg battlefield via eminent domain). In Gettysburg Electric, the Court held that “there can be no well-founded doubt” that “the government has the constitutional power to condemn the land for the proposed use,” which was the study, preservation, and demarcation of the historic battlefields. Id. at 679-81.

240. 545 U.S. 469 (2005). In Kelo, the City of New London sought to take private property and transfer it to a private developer to improve the economic condition of the municipality. Id. at 472-75. The Court upheld this use of eminent domain despite the fact that the development plan called for transfer of the taken property to private individuals for development. Id. at 477-84.

241. In its powerful opinion in Gettysburg Electric, the Court opined that “[a]ny act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by congress, must be valid.” Gettysburg Electric, 160 U.S. at 681.

242. Most often, these cases involve the applicability of preservation ordinances to religious properties (e.g., churches). See Richard F. Babcock & David A. Theriaque, Landmarks Preservation Ordinances: Are the Religion Clauses Violated by Their Application to Religious Properties?, 7 J. LAND USE & ENVT. L. 165, 165-66 (1992). This, of course, is inapposite to Mt. Soledad’s scenario, in which the federal government has been challenged for endorsing religion rather than burdening it. See supra Part II.

243. The normal connotation of “taking” in this context is the deprivation of private land by government condemnation. See, e.g., Kelo, 545 U.S. at 475. In the case of Mt. Soledad, the government is taking public, state-owned property, and the action is being contested not by the aggrieved landowner on the grounds that there has been a deprivation of property, but via a 1983 action on the grounds that it establishes a religion. See supra Part II.B.

244. One federal case that did invalidate a religious memorial on public land taken by eminent domain is Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983). In Birdine, the Georgia Department of Transportation (GDOT) discovered a cemetery in a parcel of land it had acquired as part of a highway expansion condemnation. Id. at 413. The superior court allowed the condemnation to continue but ordered GDOT to honor the dead by erecting a memorial monument in the graveyard. Id. GDOT proposed to include a statue of Jesus, which was to be paid for with government funds and maintained by GDOT, as part of the memorial. Id. at 414-15. The court stated that a “government may not employ religious means to reach a secular goal unless secular means are wholly unavailing.” Id. at 416 (quoting ACLU v. Rabun County Chamber of
what level of deference is afforded to the legislature’s determination that Mt. Soledad’s value as a war memorial outweighs its sectarian symbolism.\textsuperscript{245}

A recent state court decision, though not entirely on point, found a local government’s use of eminent domain violative of the Establishment Clause.\textsuperscript{246} In \textit{In re Redevelopment Authority}, the Pennsylvania Commonwealth Court applied the \textit{Lemon} test to determine that the seizure and subsequent transfer of private property to a religious group, Hope Partnership for Education,\textsuperscript{247} was an endorsement of religion.\textsuperscript{248} In September of 2002, Hope Partnership requested that the Philadelphia Redevelopment Authority acquire a parcel of land in a blighted neighborhood for the placement of a private school.\textsuperscript{249} The Authority subsequently seized the property and transferred it to the Hope Partnership for development, a “joint effort” that the majority felt “demonstrate[d] the entanglement between church and state.”\textsuperscript{250} The court based its decision squarely on Establishment Clause grounds but noted in the alternative that the transfer was improper because it benefited a private group rather than the public at large.\textsuperscript{251} An appeal has been granted by the Pennsylvania Supreme Court.\textsuperscript{252}
Despite its application of Establishment Clause principles, *In re Redevelopment Authority* is more illustrative of *Kelo*’s chilling effect on eminent domain than predictive of how a court might address the taking of a religious symbol. More likely, the *In re Redevelopment Authority* court used the church-state doctrine as a tactical weapon—a way to sidestep established takings doctrine (a political firestorm after *Kelo*) and still void an otherwise legitimate land transfer (thereby pacifying outraged private property activists). Alternatively, the case could be viewed as far more significant, standing for the principle that when the government takes property in a manner that aids religion, no measure of legislative deference is due.

But was religion truly aided? No evidence demonstrated that development of the school would promote religion; rather, the purpose of the project was to revitalize a poor neighborhood and serve its residents.\(^{253}\)

The court therefore looked past *Berman v. Parker*, which authorizes legislative takings where blight is present,\(^{254}\) and determined that transfer of the property to a religious group was unconstitutional even though the project itself was secular.\(^{255}\) This is notable because government takings based on blight have largely been upheld even when the existence of a legitimate public use is not immediately clear.\(^{256}\) The analogy is clear: courts have consistently allowed the legislature to identify blight, just as they have deferred to the legislature’s determination that a certain property or symbol has significance as a National Memorial.\(^{257}\) Does the interjection of the Establishment Clause void legislative deference in both areas?

### VII. Analysis

The Mt. Soledad controversy involves a permanent sectarian monument located on public land but maintained and financed entirely by a private secular organization.\(^{258}\) Congress’s acquisition of the cross, which removed both the MSMA and the City of San Diego from the equation, has elevated the cross debate to the federal arena.\(^{259}\) As a result, only two questions remain: Was the acquisition of the cross by the federal government an establishment of religion? And even if it were not, does the cross’s continuing presence on federal land violate the Establishment Clause?

\(^{253}\) See Scolforo, supra note 247. Sister Rose Martin, the executive director of the project, emphasized that the institution was not intended to be a Catholic school. *Id.*

\(^{254}\) Berman, 348 U.S. at 32-35.

\(^{255}\) *In re Redevel. Auth.*., 891 A.2d at 831.


\(^{257}\) See supra note 239 and accompanying text.

\(^{258}\) See supra Part II.A.

\(^{259}\) See supra Part II.C.
The ultimate determination of Mt. Soledad’s constitutionality will likely turn not on whether its acquisition was an improper use of eminent domain power, but on whether that use of power was a pretextual conduit for the endorsement of religion. The Court will likely assess the constitutionality of this government action in one of four ways: (1) a fact-based “passivity” analysis (in the vein of McCreary County and Van Orden) of whether Mt. Soledad’s message is predominantly secular, rather than religious; (2) adoption of an existing Establishment Clause test for the analysis of permanent religious symbols; (3) introduction of a new standard promoting legislative deference where National Memorials and Monuments are involved; or (4) avoidance of the Establishment Clause altogether through application of federalism principles.

Dispensing with the last approach first, there is a very real possibility that the Court will decide the Mt. Soledad controversy on federalism grounds by skirting the Establishment Clause entirely. Using the rationale of City of Boerne v. Flores, the Court might find that Congress has improperly circumvented the First Amendment by passing legislation to “cure” a constitutional defect. Likewise, Congress’s decision to acquire Mt. Soledad might be interpreted as usurping California’s sovereignty on a state constitutional question. While this is certainly a viable scenario, any further discussion is beyond the scope of this Note, which assumes that certain factors (i.e., the changed membership of the Court) militate towards the Court addressing the Establishment Clause issue head-on.

Alternatively, the Court could choose to meander through factual and historical context in search of evidence that the Mt. Soledad cross is predominantly secular. Such a fact-based analysis, though clearly supported by precedent, would foster more of the same “jurisprudence of minutia” decried by Justice Kennedy. Further, the approach would result in inconsistency. For instance, in Buono II, the Ninth Circuit ignored the fact that the Sunrise Cross had stood for sixty years with no complaints. In Van Orden, however, the Ten Commandments’ forty-two-year presence on public land without complaint was significant to the Court’s conclusion of “passivity.” Given that both Chief Justice Roberts and Justice Alito have gone on record with their disdain for such fine factual distinctions,
the Court will likely avoid creating further contradictory precedent.

Rather than start anew, the Court could anoint an existing Establishment Clause test—whether it be Lemon, endorsement, or coercion—as the sole analytical tool for addressing permanent religious displays. Clarity and consistency in religious display doctrine will occur only if the test employed is recognized as a definitive and unitary standard. However, this is easier said than done. Would the Court apply endorsement, whose reliance on the reasonable observer makes it arguably as factually driven as the Van Orden–McCreary County approach? Or would it apply coercion, which seems ill-suited for religious display cases? Regardless of the test ultimately selected, the Court would still need to deal with Lemon, whose legacy will continue to linger until specifically disavowed.

The problem with both of the above approaches is their reliance on secularization of inherently religious symbolism. For example, the decisions in Van Orden and McCreary County turned on an analysis of the thematic representation of Ten Commandments displays. Because the monument in Van Orden was surrounded by other relics representing the history of law and justice, the Court found that the monument’s religious significance was tempered and subordinate to the secular message being conveyed. Such a conclusion, however, undermines the importance of religion in society and waters down the spiritual essence of the symbol in question. No measure of historical context can make a Latin cross secular; 2,000 years of religious association cannot be undone by the presence of granite plaques memorializing fallen soldiers.

It does not follow, however, that such a display necessarily violates the Establishment Clause. As demonstrated by preservation of the California missions, the Old North Church, and the Touro Synagogue, the federal government has begun to recognize the importance of respecting the historical significance of religion. Failure to do so results in bilateral condemnation: the faithful are compelled to assail government attempts to disavow their religion, a reaction that separationists sharply contest as the

267. See Gedicks, supra note 95, at 76.

268. It could be argued that the only true difference between Van Orden and McCreary County is the amount of time the displays had been present, though the Court emphasized the fact that the Kentucky display seemed to have been erected for the sole purpose of religious endorsement, while the Texas display was a thematic presentation of the history of law and order. See supra Part III.C. (discussing the Court’s analysis in McCreary County and Van Orden).


270. As Justice Alito suggested, this is profanation of a religious relic. See supra note 162 and accompanying text.

271. “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” Van Orden, 545 U.S. at 690.

272. See supra notes 229-35 and accompanying text (discussing federal grants to the Old North Church, the Touro Synagogue, and the California missions to support their preservation).
first step towards establishment of a theocracy. The reality is that in 1954, the perception of religion (and religious endorsement) in this country was vastly different than it is today. How else could the Court explain its proclamation in Zorach v. Clauson,273 an opinion written just two years before the Mt. Soledad cross was erected, that “[w]e are a religious people whose institutions presuppose a Supreme Being”274 Whether this is an accurate characterization of today’s citizenry, it is certainly illustrative of American society in 1954. Why, then, should a cross erected by a veterans’ association that presupposed a Supreme Being not be considered a historical relic of that era? Why is it necessary to denigrate the religious message to maintain a separation between church and state? Further, how does the use of a Latin cross in this context differ from its display in a California mission? The recent federal grants to the missions indicate that both Congress and the administrative branch perceive federal aid to historic religious sites as both worthy and constitutional, even if the properties are still operating as houses of worship. It could be argued that the Old North Church, the Touro Synagogue, and the Mt. Soledad cross all present religious symbolism in a historically significant manner. The only thing setting the latter apart, it seems, is the passage of time.

The Mt. Soledad cross is a religious symbol with both historical and sectarian significance the federal government has acquired for designation as a national memorial. Although the Sunrise Rock cross from Buono II275 was declared unconstitutional despite its similar pedigree as a federal war memorial, it does not follow that such a designation has no bearing on the Establishment Clause analysis. First, the Ninth Circuit decided Buono II prior to Van Orden, which specifically immunizes “passive” monuments, even those that contain religious symbolism, from the Lemon test.276 Given that the Court did not define “passive monuments,” it is certainly arguable that Mt. Soledad’s designation as a National Monument is conclusive evidence of passivity. Second, the Supreme Court’s membership has changed significantly since the apparent reemergence of Lemon in McCreary County.277 The new Court may choose to view Mt. Soledad through the lens of eminent domain, and thereby declare that the cross’ method of acquisition compels extensive legislative deference despite its inherent religious symbolism.

Thus, the Court should consider the creation of a standard that simultaneously respects the institution of religion and effectuates the

274. Id. at 313.
275. Buono’s Sunrise Cross was invalidated under Ninth Circuit precedent. Buono v. Norton (Buono II), 371 F.3d 543, 550 (9th Cir. 2004).
276. Van Orden, 545 U.S. at 686.
277. See supra Part III.E.
original intent of the Establishment Clause. If Chief Justice Roberts is correct that the primary concern of the Framers was to prevent denial of citizenship on the basis of religious beliefs or the lack thereof,\textsuperscript{278} the government’s authority to acknowledge religion without endorsing it is far more substantial than the Court has allowed. It would be unwise, of course, for the Court to move too sharply in the direction of accommodation in one fell swoop. Mt. Soledad’s unique posture, however, provides the perfect opportunity for a subtle yet powerful shift in the Court’s treatment of religion.

Government condemnation of private property is prohibited unless it is for a “public use.”\textsuperscript{279} Similarly, Congress may not pass laws that amount to an “establishment” of religion.\textsuperscript{280} Yet legislative determinations of what constitutes a proper “public use” have rarely been disturbed, even when the taken property has been transferred to private parties for sale\textsuperscript{281} or development.\textsuperscript{282} This raises interesting questions of constitutional construction: How can the Court be so deferential on takings questions while refusing to extend the same deference to the Establishment Clause? What exactly is the difference between allowing the legislature to determine “public use” and deferring to its interpretation of a religious symbol’s “secular effect”? There is, of course, one major distinction. One of these restraints on legislative action is constitutionally prescribed, and the other is a judicial interpretation that arguably contravenes the intent of the Framers. Shouldn’t the former be more restrictive than the latter?

This last question is even more perplexing when one considers that the Court has, on occasion, afforded legislative deference regarding religion on the basis of history and tradition.\textsuperscript{283} In upholding the custom of opening legislative sessions with prayer, Chief Justice Burger noted that the practice “ha[d] become part of the fabric of our society.”\textsuperscript{284} It made no difference that a clergyman of only one denomination had held the post of legislative chaplain for sixteen consecutive years.\textsuperscript{285} Similarly, it would make no difference whether the symbol atop Mt. Soledad was a Star of David; the use of religious symbols to memorialize the dead has long been a convention in American society. Christianity simply has the longest historical association with the United States, something that is reflected in

\begin{itemize}
  \item \textsuperscript{278} See supra note 172 and accompanying text.
  \item \textsuperscript{280} See supra note 93 and accompanying text.
  \item \textsuperscript{282} See Marsh v. Chambers, 463 U.S. 783, 791-92 (1983).
  \item \textsuperscript{283} Id. at 792.
  \item \textsuperscript{284} Id. at 793-94.
\end{itemize}
our monuments and creeds. Thus, the presence of its defining symbol on public land does not translate to governmental establishment of Christianity as a national religion, especially if the legislature does not so find.

Whether legislative prayer or a war memorial with religious symbolism is at issue, the result should be the same: when the legislature establishes the historical significance and utility of the practice or display, the Court should defer to Congress’s judgment. This would effectively leave Lemon’s second prong in the hands of Congress, much as the determination of a religious property’s historical significance rests with the Department of the Interior. When the legislature determines that the sectarian effect of a religious display is outweighed by its historical significance, and when this conclusion is not clearly erroneous, the Court should not substitute its own judgment. Thus, in addressing the Mt. Soledad issue, the Court should give substantial weight to Congress’s designation of Mt. Soledad as a National Memorial, an action that falls squarely within the ambit of legislative powers. The Court might consider the bright-line rule that when a religious display is recognized as a National Monument or Memorial, or is listed on the National Register, a rebuttable presumption of constitutionality results.

This bright-line rule would represent a narrow exception to existing Establishment Clause doctrine, one that allows for governmental recognition of religion’s historical significance without hampering the Court’s authority to invalidate any egregious legislative action. It would also bring the Establishment Clause in line with the Court’s treatment of “public use” under the Fifth Amendment. Because both restrictions involve the protection of individual constitutional rights, there is no reason to allow legislative discretion to one while denying such deference to the other.

VIII. Conclusion

The history of Mt. Soledad is a perfect microcosm of the Supreme Court’s Establishment Clause doctrine. The Latin cross, when erected, represented simply a recognition of religion’s influence on the lives and deaths of American soldiers. To remain standing under current law, however, the cross must be stripped of its religious significance and recast as a secular shrine of historical curiosity. Likewise, the Court, which once acknowledged the vital role of religion in our society, has since retreated from that stance and embraced a position of neutrality, one which allows the government to display only “passive” symbols.

287. *See supra* notes 225-26 and accompanying text.
With the instant issue, the reformulated Court is presented with a unique opportunity to rewrite history. In designating Mt. Soledad’s Latin cross as a national memorial, the legislature determined that a sectarian symbol transcends concerns about the establishment of religion. Congress’s use of eminent domain to acquire the monument has put the question of legislative deference in stark relief. By aligning Establishment Clause doctrine with that of eminent domain and historic preservation, the Court can emerge as a savior—both of the Mt. Soledad cross and the institution it represents.