

NOTE

COURTS MISTAKENLY CROSS-OUT MEMORIALS: WHY THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY ROADSIDE CROSSES

I. INTRODUCTION

Mollie Mishoe lost her husband in a fatal car accident on August 3, 2007, a few months before their fiftieth wedding anniversary.¹ For Mollie and her children, the grieving process included erecting two roadside crosses at the site of the accident, to memorialize their beloved husband and father, Bill Mishoe.² This location was the last spot Bill was alive, and the cross memorial is a place the family goes to remember and feel close to him again.³ The Mishoes have become spiritually connected to the site of the accident, and to the cross memorial they have placed there.⁴ This is the place where they can still feel Bill's presence—a place where they can heal.⁵ For them, this memorial has become “sacred[,] but not necessarily religious.”⁶

The Mishoes have maintained this memorial for three and a half years, “trim[ming] the weeds around the crosses, and chang[ing] out the wreath and flowers on them.”⁷ In February 2011, the Mishoes learned

1. See Teresa Stepzinski, *Georgia DOT Says Roadside Memorials to Accident Victims Must Go*, FLA. TIMES UNION (Feb. 10, 2011, 11:21 AM), <http://jacksonville.com/news/crime/2011-02-10/story/georgia-dot-says-roadside-memorials-accident-victims-must-go>.

2. *Id.*

3. *Id.*; see also Ian Urbina, *As Roadside Memorials Multiply, a Second Look*, N.Y. TIMES, Feb. 6, 2006, at A1 (explaining that a mother visits her daughter's roadside memorial weekly because it “is where [her] . . . spirit was last”).

4. See JoAnne Klimovich Harrop, *Roadside shrines help loved ones deal with tragedy*, PITTSBURGH TRIB.-REV. (July 4, 2010), http://www.pittsburghlive.com/x/valleyindependent/news/s_688762.html.

5. See *id.*; Stepzinski, *supra* note 1.

6. See Sylvia Grider, *It's Futile to Ban Them*, Comment to *Should Roadside Memorials Be Banned?*, ROOM FOR DEBATE (July 12, 2009, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>.

7. Stepzinski, *supra* note 1.

that their cross memorial is in danger of being removed.⁸ The Georgia Department of Transportation plans to remove all current roadside memorials, and replace them with a temporary oval sign that will remain standing for one year.⁹ In an instant, the Mishoes will lose that sacred place where they go to grieve the loss of their loved one.¹⁰

Many families all over the world face the same problem. These families erect a cross in memory of a deceased loved one, and upon visiting it one day, learn that the government or another private party has dismantled it. In the United States, roadside cross memorials usually face removal by the government because they are deemed to violate the First Amendment of the U.S. Constitution.¹¹ Even though these crosses are created and maintained by a private party, not by the government, they are removed because some believe their existence is a sign that the federal government is endorsing the Christian religion.¹²

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion."¹³ This rule, known as the Establishment Clause, causes much confusion when applied to religious symbols erected on public property.¹⁴ The U.S. Supreme Court has issued a definitive ruling that any monument erected on public land constitutes government speech, even if there is private funding for the monument.¹⁵ This subjects all privately donated monuments erected on public land to scrutiny under the Establishment Clause.¹⁶

The courts have had a difficult time articulating when a religious symbol erected on public land violates the Establishment Clause.¹⁷ This is because Establishment Clause jurisprudence is controlled by the slightest differences in each case, leading to a fact-specific inquiry.¹⁸ This has resulted in the use of a variety of tests in evaluating Establishment Clause challenges, yet the U.S. Supreme Court has never

8. *Id.*

9. *Id.*

10. *See id.*

11. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1164 (10th Cir. 2010).

12. *See id.* at 1160.

13. U.S. CONST. amend. I.

14. *See, e.g.*, LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 146-47, 220 (Univ. N.C. Press, 2d ed., rev. 1994) (1986) (stating that the Framers had different views of the meaning of the Establishment Clause and the court has been inconsistent in its interpretation).

15. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1138 (2009).

16. *Id.*

17. *See* LEVY, *supra* note 14, at 220-21.

18. *See Murray v. City of Austin*, 947 F.2d 147, 156 (5th Cir. 1991).

held one of these tests to be the definitive rule of law.¹⁹ In a recent case, *American Atheists, Inc. v. Duncan*,²⁰ the Tenth Circuit held that crosses erected along a highway in memory of fallen highway patrol officers violated the Establishment Clause because a reasonable observer could view these crosses as endorsing the Christian religion.²¹ Even though Establishment Clause jurisprudence is inconsistent, this Note examines why crosses, when used specifically as roadside memorials, do not violate the Establishment Clause.

Part II of this Note provides a brief overview of the history of the Establishment Clause, highlighting why it is difficult for the courts to interpret this rule. Part III examines the tests applied in previous Establishment Clause cases. Part IV discusses the overall approach the courts have taken towards public displays of crosses in general. Part V discusses why crosses, when used as roadside memorials, do not violate the Establishment Clause. Part VI proposes the adoption of a bright line test that crosses, only when used as roadside memorials, do not violate the Establishment Clause.

II. THE AMBIGUITY OF THE ESTABLISHMENT CLAUSE

The courts have struggled with how to interpret the Establishment Clause.²² This is because the language of the First Amendment is broad and the Framers of the Constitution “never stated in a clear and unanimous voice their precise intention behind” it.²³ The legislative history surrounding this rule is scarce and does not explain the Framers’ purpose behind the existence of this rule.²⁴ Most of the recorded debates that occurred during the drafting of the Establishment Clause state that different people had different intentions for this rule; there was no unity behind what goal this rule was intended to accomplish.²⁵

The House had a special committee that analyzed the proposed amendments to the Constitution.²⁶ The report this committee submitted to the House suggested that the original language of the Establishment

19. See LEVY, *supra* note 14, at 221-22 (finding that the court has been “erratic and unprincipled in its decisions” and uses many different tests to analyze Establishment Clause violations).

20. 616 F.3d 1145 (10th Cir. 2010).

21. *Id.* at 1160.

22. See LEVY, *supra* note 14, at 220.

23. See PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS’ TORTUOUS TREATMENT OF RELIGION* 88 (2006).

24. See LEVY, *supra* note 14, at 96, 105.

25. See GARRY, *supra* note 23, at 88; LEVY, *supra* note 14, at 96-99.

26. LEVY, *supra* note 14, at 96.

Clause be redrafted.²⁷ The amendment proposed by James Madison to this committee first stated “nor shall any national religion be established.”²⁸ The committee suggested the removal of the word “national,” but failed to provide an explanation for this change.²⁹ Furthermore, to add to the confusion surrounding this rule, the debate of the House on the amendment took only one day,³⁰ and “[a]mbiguity, brevity, and imprecision . . . characterize the comments of the few members who spoke.”³¹

The only slight piece of insight into whether the interpretation of the Establishment Clause should be narrow or broad are the events that took place during the drafting of the amendment.³² The Senate drafted a narrower version that would only forbid the establishment of a single national church.³³ However, the House rejected this version, favoring the broadly constructed current version.³⁴ To persuade the House to compromise with it on the wording of several other amendments, the Senate agreed to the broader formulation.³⁵ While this piece of history may provide a look into the thoughts of the Framers in enacting the Establishment Clause, it does not provide us with clear evidence that the intent was for a broad interpretation.³⁶ All that can be inferred from this information is that the House rejected a very narrow interpretation of this Clause and that the Senate acquiesced to the demand in exchange for getting its way in regard to other amendments.³⁷ This ambiguity in the formation of the Establishment Clause leads to much confusion in Establishment Clause jurisprudence.³⁸

III. TESTS USED FOR ESTABLISHMENT CLAUSE CHALLENGES

The U.S. Supreme Court has decided a multitude of cases concerning challenges to the Establishment Clause. The Court has utilized various tests in analyzing these challenges.³⁹ However, it has never declared any of these to be the definitive test that would govern

27. *Id.*

28. *Id.* at 94-95.

29. *Id.* at 96.

30. See 1 ANNALS OF CONG. 757-59 (1789) (Joseph Gales ed., 1834).

31. LEVY, *supra* note 14, at 99.

32. See *id.* at 102-04.

33. See *id.* at 102-03.

34. See *id.* at 103-04.

35. See S. Journal, 1st Cong., 1st Sess. 87 (1789); LEVY, *supra* note 14, at 104.

36. See LEVY, *supra* note 14, at 105.

37. See *id.* at 104.

38. See *id.* at 105.

39. See *id.* at 220-21.

every Establishment Clause challenge.⁴⁰ The following is a description of some of the tests the Court has applied.

A. *The Lemon Test*

In *Lemon v. Kurtzman*,⁴¹ the U.S. Supreme Court examined statutes enacted in Pennsylvania and Rhode Island that allowed these states to provide aid to nonpublic schools, the majority of which were Catholic schools.⁴² In deciding this challenge to the Establishment Clause, the Court laid out a test to be used for claims of Establishment Clause violations involving statutes.⁴³ The statute at issue “must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and third, it] must not foster ‘an excessive government entanglement with religion.’”⁴⁴ This test grew out of the theory that “the establishment clause [sic] existed to create a secular state and that under the First Amendment nonreligion was just as important as religion.”⁴⁵ While this may have been the first attempt at defining a controlling test for determining Establishment Clause violations, the Court has never held it to be the decisive test for all Establishment Clause cases.⁴⁶ Rather, these factors are seen by the Court as “no more than helpful signposts.”⁴⁷

40. See, e.g., William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000) (“There is no underlying theory of religious freedom that has captured a majority of the Court, and the Court’s commitment to its announced doctrines is tenuous at best.”).

41. 403 U.S. 602 (1971).

42. *Id.* at 607-10.

43. See *id.* at 612-13.

44. *Id.* (citation omitted).

45. GARRY, *supra* note 23, at 52.

46. The Court has often looked to other tests to aid in deciding if a violation of the Establishment Clause exists. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (declining to use the *Lemon* test because looking at the history of the monument would be more helpful in that situation); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (choosing to use a Neutrality test as opposed to the *Lemon* test in determining if aid to nonpublic schools violated the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983) (finding it was constitutional to allow a chaplain to open legislative sessions with a prayer despite the fact that the Court of Appeals determined that this action would be unconstitutional if evaluated under *Lemon*).

47. *Van Orden*, 545 U.S. at 686 (citation omitted) (stating that the *Lemon* test is not helpful enough in analyzing Establishment Clause cases).

B. Justice O'Connor's "Endorsement Test"

In *Lynch v. Donnelly*,⁴⁸ the Court examined a Christmas display composed of not only various secular items but also a crèche.⁴⁹ In her concurrence, Justice O'Connor expanded the meaning of the *Lemon* test into what is now known as the Endorsement test.⁵⁰ She suggested that in using the purpose and effect prongs, the Court must look at the message the government intends to communicate as well as the message actually communicated.⁵¹ This dual examination is critical because the message perceived by the audience is not always the intended message.⁵² Thus, the "proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion[,]""⁵³ in addition to whether any "[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."⁵⁴

Justice O'Connor stated in her *Lynch* concurrence that the Court must concentrate on the objective message perceived by the community.⁵⁵ However, at that time, she did not discuss how to judge this perceived message, leaving only a vague description of the Endorsement test that required analyzing how the community, the possible outsiders, would view the action at issue.⁵⁶

In *Wallace v. Jaffree*,⁵⁷ Justice O'Connor expanded this notion, stating that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."⁵⁸ Facing criticism over what amount of knowledge a reasonable observer should have regarding the display, this concept has evolved, and the display is now analyzed from the viewpoint of a "reasonable, informed observer."⁵⁹

48. 465 U.S. 668 (1984).

49. *Id.* at 671. A crèche is a nativity scene usually composed of "the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals." *Id.*

50. *See id.* at 691 (O'Connor, J., concurring).

51. *Id.* at 690.

52. *See id.*

53. *Id.* at 691.

54. *Id.* at 688.

55. *See id.* at 690.

56. *See* Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 446 (2006).

57. 472 U.S. 38 (1985).

58. *Id.* at 76 (O'Connor, J., concurring).

59. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring).

The reasonable observer is not a bystander, casually passing by the display one day.⁶⁰ Rather, the reasonable observer is aware of the religious display's essential history, its context, and its location.⁶¹ The reasonable observer is also aware of who owns the land on which the display rests.⁶² This observer is a rational being who will consider his or her knowledge of the display before rendering a neutral decision on whether the display violates the Establishment Clause in the context in which it is being used.⁶³ The reason for this is that anyone could possibly perceive any display to endorse religion if he or she does not know the reason it was erected.⁶⁴ This would create a broad, overreaching analysis of the Establishment Clause and would "require [the] invalidation of a government practice merely because it in fact causes . . . advancement or inhibition of religion."⁶⁵ Requiring the reasonable observer to be informed to some extent strikes a balance between an interpretation of the Establishment Clause that is either too narrow or too broad.⁶⁶

There are, however, some pitfalls to the Endorsement test. The courts have had differing opinions with regard to religious displays, basing their decisions on factors such as the religious symbol's location⁶⁷ or whether it is surrounded by secular symbols.⁶⁸ Different facts result in different conclusions.⁶⁹ Furthermore, the Endorsement test

60. *See id.* at 780-81.

61. *Id.*

62. *See* *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004), *rev'd sub nom.* *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

63. *See Pinette*, 515 U.S. at 779-81.

64. *See id.* at 780.

65. *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring).

66. *See Pinette*, 515 U.S. at 780.

67. *See* *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 n.13 (10th Cir. 2010) (suggesting that the endorsement of Christianity is even stronger because two of the crosses at issue were located immediately outside the Highway Patrol office); *see also* *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (stating that "the display's placement on the capitol grounds . . . suggest that the State itself intended the . . . nonreligious aspects of the tablets' message to predominate"); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 599-600 (1989) (finding that because the crèche at issue sat on the grand staircase of the courthouse, "[n]o viewer could reasonably think that it occupies th[e] location without the support and approval of the government").

68. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (finding that a crèche included in a Christmas display did not have a primary message of endorsing Christianity because it was surrounded by other secular symbols); *see also Van Orden*, 545 U.S. at 702 (suggesting that because the Ten Commandments monument at issue was surrounded by other monuments and historical markers, it primarily conveyed a secular message); *Duncan*, 616 F.3d at 1159-60 (concluding that the crosses at issue conveyed a primarily sectarian message because there were no "contextual or historical elements that served to secularize the message conveyed by such a display").

69. *See* Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 848 (2007).

depends on the reasonable observer,⁷⁰ who could fluctuate between two extremes when looking at the perceived message.⁷¹ The observer can either be too sensitive in believing that the display endorses religion, or overly insensitive in not seeing the potential conveyance of a government message endorsing religion.⁷² Since the Endorsement test does not give guidance on which perception should be afforded more weight, the jurisprudence under this rule is “fraught with futility.”⁷³

C. *The Neutrality Test*

The U.S. Supreme Court has sometimes utilized the Neutrality test to analyze various Establishment Clause challenges.⁷⁴ In *Zelman v. Simmons-Harris*,⁷⁵ the Court held that a government program providing direct tuition aid to families did not violate the Establishment Clause, despite the fact that the aid went almost entirely to parochial schools and not one public school elected to partake in the program.⁷⁶ In articulating its decision,⁷⁷ the Court regarded neutrality as the key aspect of this program.⁷⁷ It stated that a program is neutral and does not violate the Establishment Clause if it “provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.”⁷⁸ In *McCreary County v. ACLU*,⁷⁹ the companion case to *Van Orden v. Perry*,⁸⁰ the Court extended the neutrality principle to a public display case.⁸¹ The Court reiterated the importance of the *Lemon* purpose prong and treated the hallmark question of Establishment Clause inquiries as whether the government is remaining neutral between different religious systems, as well as between religion and nonreligion.⁸²

70. *Pinette*, 515 U.S. at 773.

71. *See Van Orden*, 545 U.S. at 696-97 (Thomas, J., concurring) (reflecting the two opposite viewpoints when it comes to Establishment Clause challenges).

72. *See id.*

73. *Id.* at 697.

74. *See, e.g., McCreary Cnty. v. ACLU*, 545 U.S. 844, 874-76 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Mitchell v. Helms*, 530 U.S. 793, 809, 829 (2000).

75. 536 U.S. 639 (2002).

76. *Id.* at 645, 647, 662-63.

77. *Id.* at 662.

78. *Id.* at 652.

79. 545 U.S. 844 (2005).

80. 545 U.S. 677 (2005).

81. *See McCreary Cnty.*, 545 U.S. at 881.

82. *See id.* at 871, 873, 875-76, 881.

D. The Coercion Test

In his concurrence in *Van Orden*, Justice Thomas suggested that adopting a Coercion test for Establishment Clause inquiries would evince some sort of consistency in Establishment Clause jurisprudence.⁸³ The Court does not have to judge the religiousness of the symbol, but rather only has to look at whether it forces a person to engage in religious behavior.⁸⁴ The hallmark of this test is whether there exists “actual legal coercion.”⁸⁵ This legal coercion involves “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”⁸⁶ If the monument is passive, not mandating a person to observe a specific religion, or for that matter, even to look at it, there is no coercion.⁸⁷ If a person can simply choose to turn his or her back and walk away from the symbol, it does not violate the Establishment Clause.⁸⁸

Justice Thomas advocated this test because it does not detract from the religious significance of these symbols.⁸⁹ It allows the display to retain its significance but also allows it to remain standing as long as the public is not forced to worship a specific religion.⁹⁰ Additionally, this test prevents a broad interpretation of the Establishment Clause, under which all religious symbols are invalidated merely because an overly-sensitive person may be uncomfortable with a public display of a religious symbol.⁹¹ Under the Coercion test, a religious symbol is invalid only if it exerts the type of coercion that interferes with “religious liberty.”⁹²

83. See *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). This concept was first defined in *Lee v. Weisman*, in which the Court found that Rhode Island’s “practice of including invocations and benedictions in public school graduations violated the Establishment Clause.” 505 U.S. 577, 584, 599 (1992). The Court stated that this practice was coercive, even though the student had the option to not attend the graduation ceremony, because graduation is an important right of passage that most students would not want to miss. *Id.* at 595.

84. See *Van Orden*, 545 U.S. at 697.

85. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring).

86. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

87. See *Van Orden*, 545 U.S. at 694.

88. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989).

89. See *Van Orden*, 545 U.S. 577 at 694-96 (discussing that in order to have these symbols pass constitutional muster, most people attempt to declare these essentially religious symbols as not having religious significance).

90. See *id.* at 697.

91. See Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 63 (2006) (suggesting that it is “better to abandon the charade that everyone’s discomfort can be avoided”).

92. *Id.* at 61-62.

E. *Van Orden v. Perry: History and Nature of the Monument Test*

The U.S. Supreme Court stated in its plurality opinion in *Van Orden* that some of the most recent Establishment Clause cases do not apply the *Lemon* test because it is not useful as a definitive test that can be applied in every instance.⁹³ Rather, the Court concluded that the more helpful approach for a “passive monument”⁹⁴ would be to analyze the “nature of the monument and . . . [the] Nation’s history.”⁹⁵ In doing so, the Court must look to both the past and present, deciding whether a religiously significant monument has a place in the history of our nation.⁹⁶ As long as the monument is passive⁹⁷ and does not have a “plainly religious purpose,” it should not be removed.⁹⁸ The underlying reasoning for this is that both God and religion have played a significant role in our Nation’s history, and the Court does not want to “evinced a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”⁹⁹ However, the Court must be cautious in using this test to ensure that, in welcoming religion, the government does not subsequently force religion upon those who do not believe in it.¹⁰⁰

F. *Summary of the Court’s Approach*

Overall, the U.S. Supreme Court has had an inconsistent approach to past Establishment Clause cases.¹⁰¹ This is evidenced by the fact that the Court used two different controlling tests for *Van Orden* and *McCreary*, which were companion cases decided on the same day.¹⁰² Of the many tests the Court has articulated, it has not established one as the controlling test.¹⁰³ “Every new case accepted for argument presents the very real possibility that the Court might totally abandon its previous

93. See *Van Orden*, 545 U.S. at 686 (majority opinion).

94. *Id.*

95. *Id.*

96. See *id.* at 683.

97. See *id.* at 690-91 (suggesting that a “Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom” violated the Establishment Clause because it “confronted elementary school students every day,” but the Ten Commandments monument at issue in that case did not because the public could avoid it).

98. *Id.* at 690.

99. *Id.* at 684, 687.

100. See *id.* at 683.

101. See *id.* at 694 (Thomas, J., concurring); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring); GARRY, *supra* note 23, at 54.

102. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005) (Neutrality test); *Van Orden*, 545 U.S. 677, 686 (majority opinion) (History and Nature of the Monument test).

103. See, e.g., Marshall, *supra* note 40, at 194.

efforts and start over.”¹⁰⁴ As a result, one can only speculate as to whether the court will find that the display at issue violates the Establishment Clause, especially since it is equally unclear which test will be used to evaluate the alleged violation.¹⁰⁵

IV. THE COURT’S OVERALL APPROACH TOWARDS CROSSES

With no definitive rule in place, the lower courts have had an inconsistent approach towards Establishment Clause violations involving crosses.¹⁰⁶ However, despite this inconsistency, these courts have provided some structure. Several key principles demonstrating when crosses do and do not violate the Establishment Clause have emerged from the various cases that have been decided by the federal courts and the United States Supreme Court.¹⁰⁷

A. *Examples of When Crosses Have Violated the Establishment Clause*

The federal courts have heard many Establishment Clause cases involving crosses.¹⁰⁸ Quite often, the courts hold that the cross at issue violates the Establishment Clause.¹⁰⁹ A clear violation has been found in four situations.¹¹⁰ Two such situations are when the cross is the main feature of the display without any surrounding elements and when the cross is erected with a primarily religious purpose.¹¹¹ Crosses also violate the Establishment Clause when the government plays a major

104. *Id.*

105. See LEVY, *supra* note 14, at 221 (“The Court has reaped the scorn of a confused and aroused public because it has been erratic and unprincipled in its decisions.”).

106. See *id.* at 220.

107. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (suggesting that as long as both religious and nonreligious groups have access to erect displays in the public area, the cross should not violate the Establishment Clause); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) (finding that crosses that do not have a clear secular purpose violate the Establishment Clause); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976) (finding that crosses that are sponsored by a secular organization do not violate the Establishment Clause).

108. Marques, *supra* note 69, at 855 (suggesting that federal courts frequently encounter these types of cases).

109. *Id.*

110. See *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010) (finding that a cross memorial violates the Establishment Clause when it is standing alone and not part of a display and surrounded by other symbols); *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004), *rev’d sub nom. Salazar v. Buono*, 130 S. Ct. 1803 (2010) (finding that a cross is a violation when the government is highly involved in maintaining it); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (finding a violation solely because the cross is a prominent symbol of Christianity); *Rabun Cnty. Chamber of Commerce*, 698 F.2d at 1111 (finding that a cross violates the Establishment Clause when it is erected with a religious purpose).

111. See *Duncan*, 616 F.3d at 1160; *Rabun Cnty. Chamber of Commerce*, 698 F.2d at 1111.

part in the creation of the cross display, going to great lengths not only to erect it, but also to prevent its removal.¹¹² Lastly, in some cases, the courts have found a violation simply because the display is a cross and crosses are the preeminent symbol of Christianity.¹¹³

The first situation in which the courts have found a violation of the Establishment Clause is if a cross is erected as the main feature of the display and is devoid of any secular or diverse religious content.¹¹⁴ In *Duncan*, the Tenth Circuit found that if a cross stands alone, with no secular elements, there is nothing to detract from the religious message.¹¹⁵ Furthermore, in *Carpenter v. City & County of San Francisco*,¹¹⁶ the Ninth Circuit found that when a cross is the only religious symbol erected, it becomes a prominent display of Christianity, conveying and endorsing a religious message.¹¹⁷ The Ninth Circuit analyzed the cross display for a violation of the “No Preference” Clause of the California Constitution, which uses the exact language of the Establishment Clause.¹¹⁸ The court found that the cross at issue violated the “No Preference” Clause because it stood alone and there were no other religious displays that would help detract from the religious significance of the cross.¹¹⁹ The Ninth Circuit found it irrelevant that the cross had been on display since 1934.¹²⁰ The fact that a cross may stand uncontested for a long period of time does not eliminate the religiousness of a symbol standing alone.¹²¹ Historical meaning is not automatically imposed based on the passage of time.¹²² According to this court, there has to be something more that occurs, such as the naming of the cross as a “historical landmark[,]” in order for it to take on a historical meaning separate from its religious meaning.¹²³

Where, in erecting a cross, the government has a clear religious purpose, the courts have found a violation of the Establishment

112. See *Norton*, 371 F.3d at 550.

113. See *Separation of Church & State Comm.*, 93 F.3d at 620.

114. See *Duncan*, 616 F.3d at 1160; *Carpenter v. City & Cnty. of S.F.*, 93 F.3d 627, 629-30 (9th Cir. 1996) (analysis under the California constitution’s “No Preference” Clause).

115. *Duncan*, 616 F.3d at 1160.

116. 93 F.3d 627 (9th Cir. 1996).

117. See *id.* at 630.

118. *Id.* at 628. Since the “No Preference” Clause of the California constitution uses the exact language of the Establishment Clause, the facts of this case are useful in the current analysis of the Establishment Clause. See CAL. CONST. art. I, § 4.

119. *Carpenter*, 93 F.3d at 630, 632.

120. *Id.* at 629, 631.

121. See *id.* at 631.

122. See *id.*

123. See *id.* at 631-32.

Clause.¹²⁴ In that situation, the government is taking a side and promoting not only that specific religion, but also religion over nonreligion.¹²⁵ Thus, the government no longer maintains a neutral position towards religion.¹²⁶ For example, in *ACLU v. Rabun County Chamber of Commerce*,¹²⁷ the Eleventh Circuit found that the cross at issue had a religious purpose not only because crosses are a symbol of Christianity, but also because the cross was set to be completed in time for a dedication at the Easter religious services.¹²⁸ This cross clearly was to be used for religious services, rendering its purpose essentially religious.¹²⁹

Furthermore, the court in *Rabun County Chamber of Commerce* stated that even if a secular purpose had existed, the cross would still violate the Establishment Clause because “a government may not ‘employ religious means to reach a secular goal unless secular means are wholly unavailing.’”¹³⁰ Thus, according to the Eleventh Circuit, if there is a secular means of achieving a certain goal, it must be utilized instead of the religious means.¹³¹ The stronger the connection to religion, the more a court will be inclined to find a violation of the Establishment Clause, even if a secular purpose can be articulated.¹³²

Some courts have also found that crosses violate the Establishment Clause if the government is highly involved in the creation of the cross and tries to protect it from removal.¹³³ In *Buono v. Norton*,¹³⁴ the Court of Appeals for the Ninth Circuit found that a Latin cross erected in the Mojave Desert violated the Establishment Clause because the government went to great lengths to prevent its removal.¹³⁵ Thus, a reasonable observer, aware of the history of this specific cross, would view it as an endorsement of Christianity.¹³⁶ The Ninth Circuit did not

124. See *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983).

125. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875 (2005).

126. See *id.*

127. 698 F.2d 1098 (11th Cir. 1983).

128. *Id.* at 1110-11.

129. See *id.* at 1111.

130. *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schemp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

131. See *id.*

132. See *id.* (finding that even though there was secular purpose, using religious means to achieve that purpose strengthened the message of endorsement).

133. See *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004), *rev'd sub nom. Salazar v. Buono*, 130 S. Ct. 1803 (2010).

134. 371 F.3d 543 (9th Cir. 2004), *rev'd sub nom. Salazar v. Buono*, 130 S. Ct. 1803 (2010).

135. See *id.* at 544, 550.

136. See *id.* at 550 (citation omitted).

find the fact that the cross was erected in the desert, a remote location, to be determinative.¹³⁷ Even though the cross was not erected near any governmental structures, the religiousness of the symbol was not minimized.¹³⁸ While it is important to note that the U.S. Supreme Court reversed this decision in *Salazar v. Buono*,¹³⁹ the Court's opinion in *Salazar* focused solely on the validity of a land transfer statute, and not whether the cross could be perceived as an endorsement of Christianity.¹⁴⁰ Thus, the Ninth Circuit's argument is still a valid viewpoint regarding how crosses can violate the Establishment Clause and is relevant to this overall discussion.¹⁴¹

Lastly, cross displays have violated the Establishment Clause in some instances solely because the cross is a prominent symbol of Christianity.¹⁴² In *Separation of Church & State Committee v. City of Eugene*,¹⁴³ the Court of Appeals for the Ninth Circuit found that a fifty-foot Latin cross violated the Establishment Clause because the Latin cross is a symbol of Christianity and could be recognized as government endorsement of Christianity.¹⁴⁴ Similarly, the Ninth Circuit took the same position in its decision in *Norton*. The court found that the cross display violated the Establishment Clause because it would convey an endorsement of religion to the reasonable observer precisely because the cross is a Christian symbol.¹⁴⁵

137. *Id.* at 549.

138. *Id.*

139. 130 S. Ct. 1803 (2010).

140. *See The Supreme Court, 2009 Term — Leading Cases*, 124 HARV. L. REV. 179, 219-22 (2010). After a permanent injunction enjoining the display of the cross was affirmed in *Norton*, Congress passed a defense appropriations bill that would transfer the ownership of the land the cross was mounted on to the Veterans of Foreign Wars. *Id.* at 221. Thus, the cross would no longer stand on public land, as an endorsement of the Christian religion. *See id.* The Court's opinion in *Salazar* analyzed the land transfer, holding that a prior injunction enjoining the land transfer statute be reversed. *Id.* at 222. The Court focused its analysis on why the land transfer should be valid, and even suggested that the cross would no longer be subject to the Endorsement test now that the land was owned by a private entity. *Id.* at 222-23.

141. *See id.* at 222 (stating that the Court in *Salazar* focused its attention on the validity of a land transfer statute).

142. *See Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996).

143. 93 F.3d 617 (9th Cir. 1996).

144. *See id.* at 618, 620.

145. *See Buono v. Norton*, 371 F.3d 543, 545, 550 (9th Cir. 2004), *rev'd sub nom. Salazar v. Buono*, 130 S. Ct. 1803 (2010) (citation omitted).

B. Examples of When Crosses Have Not Violated the Establishment Clause

In cases where no violation was found, the courts have been cautious in their approach, upholding crosses as permissible under the Establishment Clause only under certain limited circumstances.¹⁴⁶ Crosses do not violate the Establishment Clause in three situations.¹⁴⁷ Crosses have been permitted to remain standing if they have an unequivocal secular purpose, such as to memorialize the deceased, or if they are sponsored or funded by a secular organization.¹⁴⁸ Additionally, cross displays do not violate the Establishment Clause if all religions have equal access to the area in which the display is mounted.¹⁴⁹

Crosses that have a clear secular purpose do not violate the Establishment Clause.¹⁵⁰ Such a purpose detracts from the religious message of the display, leading the reasonable observer to believe the cross is not endorsing the Christian religion.¹⁵¹ For example, in *Eugene Sand & Gravel, Inc. v. City of Eugene*,¹⁵² the Supreme Court of Oregon set aside a decree it had previously issued holding that a large cross in a municipal park violated the Establishment Clause.¹⁵³ That court concluded that, due to changed circumstances, the cross no longer violated the Establishment Clause when evaluated under the *Lemon* test.¹⁵⁴ The court found that the cross now had a secular purpose because the voters of the city passed a charter amendment making the cross a memorial to U.S. war veterans.¹⁵⁵ A public ceremony officially dedicated the cross to these veterans,¹⁵⁶ and the citizens now accept this cross as a permanent war memorial.¹⁵⁷ Thus, it has a clear secular

146. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (finding the cross did not violate the Establishment Clause because the area in which it was erected was accessible for all); *Paul v. Dade Cnty.*, 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (suggesting that crosses that have a clear secular purpose should be allowed to remain standing); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976) (finding that a cross funded by a secular organization did not violate the Establishment Clause).

147. See *Pinette*, 515 U.S. at 763; *Paul*, 202 So. 2d at 835; *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

148. See *Paul*, 202 So. 2d at 835; *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

149. See *Pinette*, 515 U.S. at 763.

150. See *Eugene Sand & Gravel, Inc.*, 558 P.2d at 346.

151. See *id.*

152. 558 P.2d 338 (Or. 1976).

153. See *id.* at 349.

154. See *id.*

155. See *id.* at 340, 347.

156. See *id.*

157. See *id.*

purpose, and no longer conveys the message of religious endorsement that it previously had.¹⁵⁸

Similarly, in *Paul v. Dade County*,¹⁵⁹ the Court of Appeals for the Third District of Florida found that a string of lights in the shape of a cross placed on the Dade County Courthouse did not violate the Establishment Clause.¹⁶⁰ In this instance, the cross did not violate the Establishment Clause because it was not initially erected with the purpose of advancing religion.¹⁶¹ The string of lights in the shape of a cross was erected to decorate the streets for Christmas, intending to bring more shoppers into the area.¹⁶² The court focused on the fact that the cross display did not “promote the participation by anyone in the affairs of any religious organizations or sect.”¹⁶³

Furthermore, cross displays do not violate the Establishment Clause when they are funded and maintained by a secular organization, keeping the government from being directly involved.¹⁶⁴ In *Eugene Sand & Gravel, Inc.*, the court noted that a key fact in its determination was that the city was not involved in the planning or organization of the display of the cross.¹⁶⁵ The court explained that the secular message conveyed by the cross is strengthened by the fact that the display was sponsored by a secular organization.¹⁶⁶ These facts kept the cross at issue from becoming unnecessarily intertwined with the government, thus preventing it from endorsing the Christian religion.¹⁶⁷ Likewise, the *Paul* Court found it important that absolutely no public funds were used, or would be used in the future, to maintain the cross erected on the Dade County Courthouse.¹⁶⁸ The court argued that, by allowing private persons to fund and maintain a cross with a clear secular purpose, the government was not using its own power to organize and manage this

158. *See id.* at 349.

159. 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).

160. *Id.* at 835.

161. *See id.*

162. *Id.*

163. *Id.*

164. *See Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976); *see also Paul*, 202 So. 2d at 835.

165. 558 P.2d at 347.

166. *See id.*

167. *Id.*

168. *See Paul*, 202 So. 2d at 835. *Cf. Eugene Sand & Gravel, Inc.*, 558 P.2d at 347 (stating that the excessive entanglement “requirement is not violated by the fact of payment by the government for maintenance of the display of a religious ‘symbol,’ although the requirement is violated if the government participates in an active manner in the planning and organization of activities which involve such a display”).

cross.¹⁶⁹ Thus, there could be no conclusion that the State was endorsing the Christian religion because it was not using its money “to support, aid, maintain[,] or establish any religion or religious edifices.”¹⁷⁰

If the public place in which the cross is erected permits a variety of groups to use the space, the cross does not violate the Establishment Clause.¹⁷¹ In *Capitol Square Review & Advisory Board v. Pinette*,¹⁷² the Supreme Court held that a cross erected by the Ku Klux Klan in a public plaza next to the statehouse did not violate the Establishment Clause.¹⁷³ Neutrality was the touchstone of the Court’s inquiry.¹⁷⁴ The Court focused on the fact that in the past other religions had been permitted to erect displays of their choosing in the public plaza.¹⁷⁵ While the Court viewed this as a public forum for private expression in which the Free Speech Clause would govern, it still analyzed this cross under the Establishment Clause.¹⁷⁶ The determinative factor in *Pinette* was that all private groups were granted the same access to the park for the purpose of erecting a display.¹⁷⁷ The application process was equal for each private group seeking to use that space.¹⁷⁸ The Court found that the government does not endorse religion by permitting its access to a forum to which all other nonreligious displays have access.¹⁷⁹ It further stated that in the current Establishment Clause precedent, the Court has never held it unconstitutional to enact policies that may have an incidental effect of benefiting religion, as long as those policies are neutral to the population as a whole.¹⁸⁰ Thus, there is no Establishment Clause violation as long as equal access to the public space is granted to all.¹⁸¹

V. CROSSES USED AS ROADSIDE MEMORIALS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

In the most recent court case involving crosses erected as roadside memorials, the Court of Appeals for the Tenth Circuit held that the

169. *See Paul*, 202 So. 2d 833 at 835.

170. *Id.*

171. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

172. 515 U.S. 753 (1995).

173. *Id.* at 757-58, 770.

174. *See id.* at 763-66.

175. *See id.* at 758, 763.

176. *See id.* at 759-61.

177. *See id.* at 763.

178. *Id.*

179. *Id.* at 763-64.

180. *See id.* at 764.

181. *Id.* at 770.

memorial at issue violated the Establishment Clause.¹⁸² In *American Atheists, Inc. v. Duncan*,¹⁸³ the court found that crosses erected as roadside memorials for fallen highway patrol officers violated the Establishment Clause.¹⁸⁴ The Utah Highway Patrol Association (“UHPA”), a non-profit organization, wanted to memorialize officers who had passed away while on duty for the Utah Highway Patrol (“UHP”).¹⁸⁵ After much thought, the UHPA felt the best way to achieve this purpose was to erect “twelve-foot high crosses . . . [which contained] [t]he fallen trooper’s name, rank, and badge number . . . [as well as] the UHP’s official ‘beehive’ symbol[,] . . . the year the trooper died[,] and a small plaque containing a picture of the trooper and some biographical information.”¹⁸⁶ The UHPA stated that these memorials were to serve as a reminder that an officer gave his life while on duty trying to keep the public safe, to praise the officer, and to encourage the public to continue driving safely while on the highway.¹⁸⁷ The UHPA felt that the easiest and quickest way to convey these messages to the public driving past the memorials at high speeds on the highway was by erecting crosses.¹⁸⁸ The UHPA even obtained permission from the officers’ families to use a cross as the prominent symbol of the memorial.¹⁸⁹ After mounting the first cross in 1998 on private property, the UHPA sought and was granted permission by the State of Utah to assemble more crosses on public property.¹⁹⁰ In total, the UHPA mounted thirteen crosses, some located on private land and others on public land.¹⁹¹ The crosses were funded privately and maintained by the UHPA.¹⁹²

The American Atheists organization brought suit against the state employees who approved the mounting of the crosses on public land, alleging that the crosses violated the Establishment Clause.¹⁹³ The Tenth Circuit analyzed these crosses under the *Lemon* test and found that there was indeed a violation of the Establishment Clause.¹⁹⁴ While there was a secular purpose in erecting the crosses, the Court found that they had the

182. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1164 (10th Cir. 2010).

183. 616 F.3d 1145 (10th Cir. 2010).

184. *Id.* at 1150.

185. *Id.*

186. *Id.* at 1150-51.

187. *Id.* at 1150.

188. *Id.* at 1150-51.

189. *Id.* at 1151.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1151-52.

194. *Id.* at 1156-61, 1164.

primary effect of supporting Christianity.¹⁹⁵ A cross is the predominant symbol of Christianity and “can only be allowed if [its] context or history avoid the conveyance of a message of governmental endorsement of religion.”¹⁹⁶ The *Duncan* Court found that in the context in which these cross memorials were used, there was the clear message of endorsement.¹⁹⁷ The crosses stood alone, with no other displays to help secularize them.¹⁹⁸ The UHPA mounted the majority of the crosses on public land, and they bore the UHP’s insignia.¹⁹⁹ Moreover, other symbols were available to memorialize the officers instead of a cross.²⁰⁰ The court found that all of these factors could lead a reasonable observer to believe that the state was endorsing Christianity.²⁰¹

The Tenth Circuit in *Duncan* interpreted the Establishment Clause too narrowly.²⁰² Crosses, when used as roadside memorials, should not violate the Establishment Clause.²⁰³ Crosses that are used in this context satisfy the criteria of each of the tests the U.S. Supreme Court has proposed in approaching Establishment Clause challenges.²⁰⁴

A. *Roadside Crosses Satisfy the Three Prongs of the Lemon Test*

Crosses as roadside memorials do not violate the Establishment Clause when evaluated under the *Lemon* test.²⁰⁵ First, there is a secular purpose in erecting these crosses because they are used to portray a symbol of death.²⁰⁶ Therefore, they do not stand for the alternative

195. *Id.* at 1157, 1161.

196. *Id.* at 1160.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See id.* at 1161 (stating that “the military provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers”).

201. *Id.* at 1150.

202. *See Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

203. *Id.*

204. *See supra* Part III.A (discussing the *Lemon* test). *See generally Salazar*, 130 S. Ct. at 1818 (suggesting that a cross on the side of a highway memorializing a highway trooper does not need to be viewed as government support of religion).

205. *See generally Salazar*, 130 S. Ct. at 1820 (stating that the primary effect is that of a memorial because the cross is not just a symbol of Christianity, it is also a symbol of death); *Duncan*, 616 F.3d at 1157-58 (suggesting that as long as the cross has the purpose of being a memorial, it satisfies the first prong of the *Lemon* test); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976) (finding that a cross that is created and maintained by a private party does not violate the third prong of the *Lemon* test).

206. *See* Matthew Carberry, Comment to *Cross Memorials on Government Land*, THE VOLOKH CONSPIRACY (Apr. 23, 2010, 4:38 PM), <http://volokh.com/2010/04/23/cross-memorials-on-government-land/> (suggesting that if the primary purpose of the cross is to be a memorial, then the shape of the cross should be secondary).

symbol of Christianity.²⁰⁷ Crosses, when used as roadside memorials, are genuine expressions of grief by the deceased's loved ones, and serve the purpose of helping them navigate through the grieving process.²⁰⁸ In *Duncan*, the Tenth Circuit found it straightforward that as long as the crosses were erected with the purpose of memorializing the deceased, a secular purpose can be found.²⁰⁹ Thus, when a cross is erected as a roadside memorial, its primary purpose is secular in that it serves as a memorial; it is not primarily erected in order to advance the Christian religion.²¹⁰ When the cross has this unequivocal secular purpose, just as a roadside cross does, some lower courts have found that the government cannot be viewed as allowing the cross to remain standing with the purpose of promoting a religion.²¹¹

Second, given that crosses are widely used in the context of roadside memorials, the primary effect is not the endorsement of religion.²¹² The results of a survey mailed to the Director of Transport in each of the fifty states²¹³ showed that "the cross is a dominant feature of most roadside memorials" and "is typically *the* memorial when a religious symbol is displayed."²¹⁴ Additionally, to highlight how widespread this practice is, one business, called "Roadside Memorials," sold several hundred crosses to be used as roadside memorials.²¹⁵ While it is true that crosses are widely used because the majority of people who construct roadside memorials are Christian, it has been found that these crosses are rarely erected as an expression of religion.²¹⁶ Many have articulated that they chose the cross because of a cultural custom of using crosses to honor the dead.²¹⁷ Thus, this widespread use can be attributed to the fact that crosses have become "a cross-cultural symbol of death."²¹⁸ This cultural custom creates a primary effect of memorializing the dead.²¹⁹

207. *See id.*

208. *See* Melissa Villanueva, "Resting Places" *Documentary clip 1*, YOUTUBE (May 22, 2009), <http://www.youtube.com/watch?v=Kmy8zfkHAY>.

209. *See Duncan*, 616 F.3d at 1157.

210. *See id.*

211. *See* Paul v. Dade Cnty., 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 346 (Or. 1976).

212. *See* George E. Dickinson & Heath C. Hoffmann, *Roadside Memorial Policies in the United States*, 15 MORTALITY 154, 164 (2010).

213. *Id.* at 157.

214. *Id.* at 164.

215. Urbina, *supra* note 3 at A19.

216. *See* Dickinson & Hoffmann, *supra* note 212, at 164.

217. *Id.*

218. *Id.*

219. *See id.*

The fact that the cross is not a universal symbol of death for all religious and nonreligious people, but is a Christian symbol of death, does not diminish the primary effect of memorializing the deceased.²²⁰ There is no question that a cross is the paramount symbol of Christianity and is used primarily by Christians as a memorial.²²¹ This leaves the possibility that the memorial could be perceived as a governmental endorsement of Christianity.²²² However, in the plurality opinion in *Salazar*, Justice Kennedy stated that even though the cross is a symbol of Christianity, it is not merely just that.²²³ The cross “is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.”²²⁴ In his concurrence, Justice Alito even suggested that the removal of the cross at issue in the case would be viewed by many as disrespectful towards the soldiers whom the cross memorialized.²²⁵ The cross itself is a public act of grieving and serves as a “physical marker of memory.”²²⁶ The fact that the cross is so widely used as a memorial and is known as a symbol marking the memory of those who have passed, ensures that the primary message conveyed to the observer is that a person has passed away.²²⁷ Its effect is that it honors the deceased, not that the government is endorsing the Christian religion.²²⁸

Finally, excessive entanglement with the government does not exist because the private party, not the government, maintains how the cross will be displayed.²²⁹ In *Lemon*, the Supreme Court stated that in looking at the entanglement prong, the court must scrutinize “the resulting relationship between the government and the religious authority.”²³⁰ In *Eugene Sand & Gravel, Inc.*, the Oregon Supreme Court stated that

220. *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010).

221. *See Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010).

222. *See id.*; *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (stating that “[t]here is no question that the Latin cross is a symbol of Christianity” and it “may reasonably be perceived as governmental endorsement of Christianity”).

223. *Salazar*, 130 S. Ct. 1820.

224. *Id.*

225. *See id.* at 1822-23 (Alito, J., concurring).

226. *See Rosa-Linda Fregoso, Professor & Chair, Latin Am. & Latino Studies Univ. of Cal., Santa Cruz, Keynote Address at Berkeley Journal of Gender, Law & Justice Symposium: Gender & Migration: We Want Them Alive!: The Culture and Politics of Human Rights* (Nov. 18, 2005), in 22 *BERKELEY J. GENDER L. & JUST.* 367, 374 (2007).

227. *See Salazar*, 130 S. Ct. at 1820 (majority opinion); *see also Dickinson & Hoffmann, supra* note 212, at 164.

228. *See Salazar*, 130 S. Ct. at 1820.

229. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976).

230. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

excessive entanglement exists when the government is actively involved in “the planning or organization of any activities which involve the display.”²³¹ In that instance, the court even went so far as to conclude that the entanglement prong is not violated even if the government pays for the maintenance of the cross.²³² As the government intertwines itself with the cross, it runs the risk of creating the image of endorsement that the lower courts shy away from.²³³ In the case of a roadside memorial, however, the private party who wants to memorialize its loved one erects the cross memorial and maintains it.²³⁴ This private party may be a secular organization or an individual.²³⁵ No matter which it is, the courts have authorized these groups to maintain a cross memorial because it does not result in a relationship of entanglement between the government and the religious symbol.²³⁶

B. Roadside Crosses Do Not Convey A Message of Endorsement to A Reasonable Informed Observer

Crosses as roadside memorials do not violate the Establishment Clause when evaluated under the Endorsement test.²³⁷ The reasonable observer is required to have knowledge of the important background history of the symbol at issue.²³⁸ A reasonable observer in this context would know that the main reason for the use of a cross is not for the endorsement or disapproval of a specific religion.²³⁹ Rather, the cross is erected in order to memorialize a life that is now lost.²⁴⁰ This practice of erecting a cross at the site of a highway death originated from the

231. *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

232. *See id.*

233. *See id.*

234. *See* Andrew O'Connor, *Roadside crosses a stark reminder*, ABC NEWS, <http://www.abc.net.au/news/stories/2010/08/12/2980974.htm> (stating that it is usually the family and friends of the deceased person who erect these memorials) (last updated Aug. 12, 2010).

235. *See, e.g.*, *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1150 (10th Cir. 2010) (stating that a secular organization erected the crosses at issue); Stepzinski, *supra* note 1 (stating that the daughter of the deceased erected a cross that will be removed in the future by the Georgia Department of Transportation).

236. *See Eugene Sand & Gravel, Inc.*, 558 P.2d at 347 (finding no entanglement when private party maintained the cross and organized activities involving it).

237. *See supra* Part III.B (discussing the Endorsement test). *See also* Chris Travers, Comment to *Cross Memorials on Government Land*, THE VOLOKH CONSPIRACY (Apr. 23, 2010, 5:26 PM), <http://volokh.com/2010/04/23/cross-memorials-on-government-land/> (suggesting that the message conveyed to observers of cross memorials is to remember those who have died).

238. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring).

239. *See* Dickinson & Hoffmann, *supra* note 212, at 164.

240. *See id.* at 162.

Hispanic culture in the Southwest.²⁴¹ In New Mexico, when a person passed away, the funeral procession would carry the coffin while walking to the burial site.²⁴² Every time a break was taken, a memorial would be erected in the spot where the people carrying the coffin stopped to rest.²⁴³ These memorials were usually two branches in the form of a cross and were called Descansos.²⁴⁴ As cars became more widely used, and the rate of fatal car accidents grew, this practice spread to the highways and the crosses were mounted at the scene of deadly accidents.²⁴⁵ A reasonable observer who is aware of this backdrop would understand that the use of roadside memorials is a practice with deep historical roots, and is in no way intended to serve as an endorsement of the Christian religion.²⁴⁶

Furthermore, the reasonable observer would know that crosses are often used as memorials.²⁴⁷ Private parties erect crosses as roadside memorials to honor those who have passed away.²⁴⁸ The message conveyed by these crosses is “remember th[o]se who have died” instead of remember the Christian religion.²⁴⁹ Thus, the message perceived by the reasonable observer would be one of death and memory instead of religious endorsement.²⁵⁰ Additionally, a reasonable observer may also view these crosses as a reminder of the great possibility for danger while driving.²⁵¹ These roadside crosses raise recognition among the public of how common fatal car accidents are.²⁵² Therefore, a reasonable observer will also be reminded of “humanity and mortality,” rather than feel alienated by the government for its religious preference.²⁵³

In *Duncan*, the Court of Appeals for the Tenth Circuit found that the crosses at issue violated the Establishment Clause because they stood alone with no other secular symbols, were adorned with a government

241. See RUDOLFO ANAYA ET AL., *DESCANSOS: AN INTERRUPTED JOURNEY* 14 (1995).

242. *Id.*

243. *Id.* at 15.

244. *Id.* at 18.

245. *Id.* at 28.

246. See generally *id.* (explaining the deep history behind roadside cross memorials).

247. See Dickinson & Hoffmann, *supra* note 212, at 164.

248. See *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010).

249. Travers, *supra* note 237.

250. See *id.*

251. See Suzie Whitman, Opinion, *Roadside remembrance*, DALLAS MORNING NEWS (Oct. 9, 2010, 2:46 AM), http://www.dallasnews.com/sharedcontent/dws/dn/opinion/localvoices/stories/DN-whitman_09edi.ART.State.Edition1.33c7abd.html.

252. See *id.*

253. Lisa, Comment to *Should Roadside Memorials Be Banned?*, ROOM FOR DEBATE (July 12, 2009, 10:05 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>.

emblem, and were large in size.²⁵⁴ The court stated that these factors could convey a message of endorsement of the Christian religion to a reasonable observer.²⁵⁵ While the courts have been more inclined to find a violation when the cross display lacks any secular elements, this does not rule out crosses used as roadside memorials.²⁵⁶ When a cross is erected as a roadside memorial, it has the secular purpose of conveying the message of memory.²⁵⁷ There does not need to be anything else present to secularize it because, in this special context, the cross itself is functioning in a secular capacity.²⁵⁸ It no longer becomes a symbol of Christianity, but a symbol of death and respect for the deceased person it honors.²⁵⁹

When the government puts its own emblem on the cross, a perceived connection of the government to the cross is more likely to surface.²⁶⁰ A reasonable observer might be more inclined to view it as a government endorsement of the Christian religion, fearing that Christians will receive preferential treatment from the government.²⁶¹ However, the reasonable observer, who is the guiding measure for the Endorsement test analysis, is supposed to have knowledge of the history of the memorial.²⁶² An observer of a cross memorial that bears a government symbol would be conscious of the fact that the cross is memorializing a deceased public officer.²⁶³ If the reasonable observer considers this fact, he or she would know that the government emblem is featured on the cross to promote awareness that an officer passed away while protecting the public.²⁶⁴ The cross then becomes a tribute to those who give their lives to protect others, and the reasonable observer would be less prone to believe that the cross is endorsing the Christian religion.²⁶⁵

254. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010).

255. *Id.* at 1160.

256. *See id.* at 1162.

257. *See* Stepzinski, *supra* note 1.

258. *See* Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010).

259. *See id.*; Judith, Comment to *Should Roadside Memorials Be Banned?*, ROOM FOR DEBATE (July 12, 2009, 9:43 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>; Stepzinski, *supra* note 1.

260. *See Duncan*, 616 F.3d at 1160.

261. *See id.*

262. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

263. Travers, *supra* note 237 (stating that the message perceived by a cross should be to remember the deceased).

264. *See Pinette*, 515 U.S. at 780-81 (suggesting that the reasonable observer considers all of the history as well as the context of the cross display).

265. *See* Travers, *supra* note 237; *see also* Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010).

The size of the cross also plays a role in whether a reasonable observer is likely to view the memorial as a government endorsement of Christianity.²⁶⁶ The bigger the cross, the more likely a reasonable observer will feel the government is favoring the Christian religion.²⁶⁷ A large cross, however, would not necessarily lead to the conclusion that a cross, used as a roadside memorial, automatically violates the Establishment Clause.²⁶⁸ A reasonable observer would be aware of the fact that the cross may be large because the private party who erected it wanted to ensure others would see it.²⁶⁹ When a party erects a cross as a memorial, it does not only serve as a place for loved ones of the deceased to go to for help in their grieving process.²⁷⁰ It is also a way for those loved ones to make the public aware of their loss, sending their message that someone significant passed away.²⁷¹ Therefore, a “reasonable, informed observer[,]”²⁷² aware of this message, would not believe that the cross is endorsing the Christian religion.²⁷³

Some argue that “cemeteries [are] for mourning and reflection. Highways belong to the [p]ublic.”²⁷⁴ Thus, these memorials are not necessary to aid in the grieving process, and the potential for endorsement outweighs the benefit that loved ones receive from erecting these crosses as memorials.²⁷⁵ However, while cemeteries may provide an outlet for grieving family members, the roadside memorial is a personalized spot that they can go to in order to remember their loved one.²⁷⁶ As one mother stated about the roadside memorial for her twenty-one-year-old daughter, “[e]very week I would go and place fresh flowers there and sit, cry, scream, vent, whatever I needed to do at the time[.]”²⁷⁷ These memorials help the deceased’s loved ones to grieve

266. See *Duncan*, 616 F.3d at 1162.

267. See *id.*

268. See generally *Pinette*, 515 U.S. at 780-81 (stating that the reasonable observer is aware of the reason for the existence of the cross); Whitman, *supra* note 251 (explaining that families erect roadside memorials so that they can convey an important message of safety to drivers on the highway).

269. See *Pinette*, 515 U.S. at 780-81.

270. See Stepzinski, *supra* note 1; Whitman, *supra* note 251.

271. See Stepzinski, *supra* note 1.

272. *Pinette*, 515 U.S. at 773.

273. See *id.* at 779-80.

274. Bohica, Comment to *How should states handle roadside memorials?*, CRIME SCENE KC (June 4, 2010, 1:09 PM), http://blogs.kansascity.com/crime_scene/2010/06/how-should-states-handle-roadside-memorials.html.

275. See *id.* (suggesting that roadside memorials do not help in the grieving process and are just a nuisance since cemeteries provide a place to mourn).

276. See Stepzinski, *supra* note 1.

277. *Id.*

and heal from their loss.²⁷⁸ They are the last spot that the deceased was alive, and are places where those who are left behind can go to feel close to them again.²⁷⁹ Additionally, in some cases, the family may live far from the cemetery where the deceased is buried.²⁸⁰ This makes it difficult for the family and friends to visit the deceased when they feel the need to.²⁸¹ Sometimes, the roadside memorial is all that the family has left to help remember its loved one.²⁸² These roadside memorials play a special part in the grieving process that a cemetery may not be able to do.²⁸³ The reasonable observer, considering the healing power of these memorials, would therefore believe that they are not meant to endorse the Christian religion.²⁸⁴

*C. The Practice of Erecting Roadside Cross Memorials is Neutral
Towards All Religions*

Crosses as roadside memorials also do not violate the Establishment Clause when evaluated under the *McCreary* Neutrality test.²⁸⁵ The government does not favor one side over another when allowing a private party to erect a cross as a roadside memorial.²⁸⁶ As long as the government does not initiate the creation of the memorial, determine its religious content, or later control it in any way, it remains neutral toward the display.²⁸⁷ In allowing the memorial to be erected, the government assists the deceased's family and friends in their grieving process.²⁸⁸ It is a result of the family and friends' own independent

278. See Harrop, *supra* note 4; O'Connor, *supra* note 234.

279. See Harrop, *supra* note 4.

280. See *id.*

281. See *id.*

282. See *id.*

283. See *id.*

284. See *generally id.* (reiterating how these memorials help the families to feel better and heal).

285. See *supra* Part III.C (discussing the *McCreary* Neutrality test). See *generally* Dave, Comment to *Cross Memorials on Government Land*, THE VOLOKH CONSPIRACY (Apr. 24, 2010, 7:39 AM), <http://volokh.com/2010/04/23/cross-memorials-on-government-land/> (stating that government does not prefer one religion over another in allowing roadside cross memorials to be erected). Harrop, *supra* note 4 (suggesting that family and friends erect cross memorials on their own initiative and the government remains neutral in allowing them to do so).

286. See Dave, *supra* note 285.

287. See *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976) (suggesting that the government did not become entangled with the cross at issue because it was not involved in the creation or maintenance of the memorial; thus, the government remained neutral towards the display).

288. See Harrop, *supra* note 4.

choice that they take advantage of this assistance and erect a cross to memorialize their loved one.²⁸⁹

Furthermore, the Supreme Court has stated that cross displays do not violate the Establishment Clause when the public space allows various groups to erect a display of their choosing.²⁹⁰ When the government allows alternative symbols—even alternative religious symbols—to be erected along the public roads, it remains neutral to the entire population.²⁹¹ The government neither limits which groups are allowed to erect roadside memorials, nor does it only allow religious symbols over non-religious ones.²⁹² The cross is not the only symbol allowed, and therefore, a variety of symbols, whether secular or religious, is used in memorializing the deceased.²⁹³ There is no preference for one type of memorial over another—all are allowed. Thus, the government remains neutral when allowing loved ones to erect a memorial cross.²⁹⁴

D. Roadside Cross Memorials Do Not Coerce the Public to Observe the Christian Religion

Moreover, crosses as roadside memorials do not violate the Coercion test as articulated by Justice Thomas.²⁹⁵ The government is not forcing anyone to accept a religion, believe in that specific religion, or even expend money on it.²⁹⁶ A cross memorial is different from a law passed with the intent of obligating the public to do something affirmative.²⁹⁷ A passive symbol does not impose a duty on the public to

289. *See id.* (suggesting that roadside memorials are usually put up by the friends and family independently of the government); Stepzinski, *supra* note 1.

290. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-65 (1995).

291. *See id.* at 763-64; *see also* Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 70-71 (2010) (stating that allowing a variety of religious monuments to be erected reflects the tolerance of all religions and does not violate the Establishment Clause).

292. *See* Urbina, *supra* note 3, at A19 (stating that there is “no federal law governing the placement of” roadside memorials).

293. *See* Harrop, *supra* note 4 (describing different symbols that are used).

294. *See id.*; *see also* Gordon Dickson, *Despite Utah ruling, Texas roadside memorial crosses are still legal*, STAR-TELEGRAM (Aug. 20, 2010), <http://www.star-telegram.com/2010/08/20/2416463/despite-utah-ruling-texas-roadside.html> (suggesting that allowing any religion to erect a memorial for a loved one does not violate the Constitution).

295. *See supra* Part III.D (discussing Justice Thomas’s Coercion test). *See generally* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring) (suggesting that passive displays can easily be ignored and walked away from); Dave, *supra* note 285 (stating that cross memorials do not impose any obligations on the general public).

296. *See* Dave, *supra* note 285.

297. *See id.*

observe the Christian religion.²⁹⁸ Furthermore, “[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”²⁹⁹ While the observer may be a “‘captive’ audience,” finding it hard to avoid looking at the cross memorial,³⁰⁰ the government does not seek to force the public to observe these memorials.³⁰¹ If the driver so chooses, he or she can ignore the cross memorial’s presence, without governmental or legal consequences.³⁰² Roadside cross memorials do not compel the public to adhere to specific principles or even to acknowledge its presence on the side of the road; therefore, there is no coercion on the part of the government.³⁰³

E. Roadside Crosses Have a Deep Secular History

Lastly, crosses as roadside memorials do not violate the Establishment Clause when evaluated under the *Van Orden* History and Nature of the Monument test.³⁰⁴ The history of how roadside cross memorials originated from the Descansos shows that there is a nonreligious foundation for why these memorials exist today.³⁰⁵ This secular history weakens the religious message conveyed by cross memorials.³⁰⁶ Crosses used as roadside memorials also have a secular nature because the deceased’s family and friends erect them with the purpose of memorializing a loved one who has passed away.³⁰⁷ They are genuine expressions of grief, erected as part of the grieving process.³⁰⁸ A private party is the one to initiate the creation and assembly of the display—the government merely gives it permission to erect the display in order to help them in the grieving process.³⁰⁹

298. *See id.*

299. *Cnty. of Allegheny*, 492 U.S. at 664.

300. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”).

301. *See Cnty. of Allegheny*, 492 U.S. at 664.

302. *See Dave*, *supra* note 285.

303. *See id.*

304. *See supra* Part.III.E (discussing the Court’s approach in *Van Orden*). *See generally* Harrop, *supra* note 4 (stating that the nature of cross memorials is to aid in the grieving process); ANAYA ET AL., *supra* note 241 (explaining the history behind cross roadside memorials).

305. *See ANAYA ET AL.*, *supra* note 241, at 28-31, 34-35.

306. *See Van Orden v. Perry*, 545 U.S. 677, 690 (2005).

307. *See, e.g.*, Harrop, *supra* note 4; Stepzinski, *supra* note 1.

308. *See Villanueva*, *supra* note 208.

309. *See Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1151 (10th Cir. 2010) (finding that the private party, and not the government, initiated the creation of these crosses).

To read the Establishment Clause as prohibiting crosses when used for the secular purpose of a roadside memorial is to read it too strictly.³¹⁰ While the government has to be careful not to endorse a specific religion, it still must make an effort to accommodate different religions.³¹¹ Sometimes the government cannot forbid religion from entering the public realm and it has to accommodate a certain religion in a reasonable manner.³¹² This is because religion is closely intertwined with the history of man, causing the two at some points to be almost indivisible.³¹³ If the courts followed a strict interpretation of the Establishment Clause, requiring any public display to be non-religious, there would be a total absence of religion in the public realm.³¹⁴ This is a principle that is actually inconsistent with the Constitution.³¹⁵ “The goal of avoiding governmental endorsement [of religion] does not require eradication of all religious symbols in the public realm The Constitution does not oblige [the] government to avoid any public acknowledgment of religion’s role in society.”³¹⁶ A policy limiting how people practice their religion is publicly undesirable.³¹⁷ Thus, the Establishment Clause does not require suppressing the practice of erecting crosses as roadside memorials.³¹⁸

VI. PROPOSED TEST FOR EVALUATING CROSSES USED AS ROADSIDE MEMORIALS

Crosses, erected as roadside memorials, generally do not violate the Establishment Clause.³¹⁹ However, there may be a few instances in

310. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (citation omitted) (stating that religion must be accommodated in the public realm in some instances).

311. *Id.* (citation omitted).

312. *Id.* (citation omitted); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (exempting Amish children from compulsory education past eighth grade because it did not coincide with their religious views); Walz v. Tax Comm’n, 397 U.S. 664, 680 (1970) (allowing churches to be tax exempt).

313. *See* Engel v. Vitale, 370 U.S. 421, 434 (1962).

314. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

315. *See* Lee v. Weisman, 505 U.S. 577, 598 (1992) (citation omitted).

316. Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010); *see also* Stone v. Graham, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting) (“The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.”).

317. *See* Salazar, 130 S. Ct. at 1818.

318. *See id.*; Lee, 505 U.S. at 598.

319. *See generally* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring) (stating that crosses do not coerce the public to follow the Christian religion); Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1157 (10th Cir. 2010) (finding that crosses erected as roadside memorials have a secular purpose); ANAYA ET AL., *supra* note 241 (finding a secular history behind crosses erected as roadside memorials).

which the message of death is weakened and the message of endorsement strengthened.³²⁰ To ensure that these situations do not arise, the test that should be applied to roadside memorials would permit the cross to stand as long as it is erected and maintained by a private party³²¹ and the government permits any type of religious or nonreligious displays to be erected as roadside memorials.³²² The reviewing court should consider these two factors together when analyzing an Establishment Clause claim. When considered together, these factors can help determine if a specific cross, erected as a roadside memorial, conveys a message of endorsement.³²³ The absence of one of these factors should not invalidate a roadside cross memorial, but the absence of both factors would tend to strengthen the message of endorsement, thus creating a violation of the Establishment Clause.

When a private party erects a cross in honor of a deceased loved one, the potential message of endorsement is minimized.³²⁴ The government is not involved in the creation or maintenance of the cross; thus, it is not endorsing the Christian religion.³²⁵ The government is merely allowing those who are mourning the loss of a loved one to do so in the way that will help them best.³²⁶ However, if the government were to take part in the maintenance of the cross, the message perceived could be that the government cares about the survival of the cross; thus, it is no longer remaining neutral towards the display.³²⁷ For this reason, the source of creation and maintenance of the cross memorial is a factor that must be considered.

In allowing memorials of any type, religious or nonreligious, the government remains neutral to all displays that are erected.³²⁸ The government cannot be seen as endorsing only the Christian religion if other religions are also permitted to erect their own memorials.³²⁹ If it were true that the government endorses the religion displayed in the memorial, the government would be seen as supporting all religions, even nonreligion, when various types of memorials are allowed.³³⁰ It could not be said that the government is establishing a religion if it

320. See, e.g., *Duncan*, 616 F.3d at 1160, 1162.

321. See *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976).

322. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-64 (1995).

323. See *id.*; *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

324. See *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

325. See *id.*

326. See Harrop, *supra* note 4.

327. See *Eugene Sand & Gravel, Inc.*, 558 P.2d at 347.

328. See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995).

329. See Griffin, *supra* note 291, at 70-71.

330. See *id.* at 71.

supports people of all religions as well as those who choose not to practice a religion.³³¹ As long as private parties may put up memorials reflecting whatever religious or secular elements they choose, the government cannot be said to endorse the Christian religion in particular when a cross is erected as a roadside memorial.³³²

Considering these factors would be the best approach for a court analyzing a roadside cross memorial. Crosses, used as roadside memorials, already have a secular history³³³ and purpose,³³⁴ and do not coerce the public to practice a specific religion.³³⁵ The issues that arise with respect to roadside cross memorials are whether the primary message conveyed is of endorsing religion,³³⁶ and whether the government is intertwining itself with religion or remaining neutral.³³⁷ The two-factor test suggested here addresses those issues and requires the removal of the cross only in the rare instance that the government is truly overly involved in the cross's maintenance or is favoring the Christian religion over other religions.³³⁸

This proposal strikes the best balance because it does not involve the "reasonable observer," who has the potential of being overly sensitive or insensitive when observing the cross memorial.³³⁹ Moreover, the Supreme Court in *Pleasant Grove City v. Summum*,³⁴⁰ stated that monuments do not usually convey one single message.³⁴¹ There are a variety of messages that could be perceived by different observers of the cross memorial.³⁴² The Endorsement test, however, "depends [upon] the existence of a discernible message."³⁴³ The proposed test does not depend on the existence of one concrete message; rather, it accepts a variety of messages and finds a violation of the Establishment Clause only when the two factors are absent. The analysis

331. See *supra* note 294 and accompanying text.

332. See *Pinette*, 515 U.S. at 763-64.

333. See *ANAYA ET AL.*, *supra* note 241.

334. See *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1157 (10th Cir. 2010).

335. See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring); *Dave*, *supra* note 285.

336. See *Duncan*, 616 F.3d at 1160.

337. See *Pinette*, 515 U.S. at 763-64.

338. See *supra* notes 321-22 and accompanying text.

339. See *supra* notes 70-72 and accompanying text.

340. 129 S. Ct. 1125 (2009).

341. See *id.* at 1135; see also Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280, 286 (2010), <http://www.law.northwestern.edu/journals/lawreview/colloquy/2010/5/LRColl2010n5Roy.pdf> (stating that displays do not have one recognizable meaning and can be interpreted differently by different people).

342. Roy, *supra* note 341, at 286.

343. *Id.* at 283.

does not depend on the existence of one concrete message; rather, it accepts the variety of messages, and finds a violation of the Establishment Clause only when the two factors are absent. It is only when these factors are absent that the cross would present a strong message of endorsement that stands out from any other, additional message.

Roadside cross memorials aid in the grieving process, and private parties should be allowed to memorialize their loved ones in the manner of their choosing.³⁴⁴ This test strikes a balance between respecting the grieving process and ensuring the public does not feel that the government is promoting the Christian religion. By allowing the display of various religious symbols, the government does not engage in the act of preferring one religion over another. Instead, by accepting all symbols, the government conveys acceptance of both religion and nonreligion alike.³⁴⁵

VII. CONCLUSION

The Supreme Court has had difficulty articulating when religious displays should and should not violate the Establishment Clause.³⁴⁶ Despite the confusion and inconsistency surrounding this rule, crosses, when used as roadside memorials, do not violate the Establishment Clause.³⁴⁷ These memorials are a public act of mourning; they are not erected to promote the Christian religion.³⁴⁸ Most often, it is the last place the deceased was alive, and is a place that the family can go to feel close to the deceased again.³⁴⁹ By allowing private parties to erect these memorials, the government does not endorse a specific religion.³⁵⁰ Rather, the government aids loved ones in their grieving process.³⁵¹ To take this outlet for expression away from these families would be a great injustice. Therefore, crosses, used as roadside memorials, should not violate the Establishment Clause as long as the cross is erected and

344. See Harrop, *supra* note 4; Stepzinski, *supra* note 1.

345. See Dickson, *supra* note 294.

346. See *supra* note 19 and accompanying text.

347. See Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010).

348. See Harrop, *supra* note 4; Stepzinski, *supra* note 1.

349. See *supra* notes 3-6 and accompanying text.

350. See Dave, *supra* note 285 (stating that the government does not prefer one religion over another by allowing crosses to stand as roadside memorials).

351. See Harrop, *supra* note 4; Stepzinski, *supra* note 1.

maintained by a private party and the government permits various types of religious or nonreligious displays to be erected as a roadside memorial.³⁵²

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352. *See supra* notes 321-22 and accompanying text.

* J.D. candidate, 2012; Hofstra University School of Law. This Note is dedicated to my entire family. Thank you for your constant love, support, and patience. I have had to miss many of our family gatherings over the past few years, but I am thankful for your undying interest in, and willingness to contribute to, my academic endeavors. I also want to extend a special thank you to Mike Sica for your unwavering support. You consistently encourage me to follow my dreams—for this I will always be grateful. I would like to thank Bethany Adler, Sarah Wieselthier, Simone Hicks, and Allana Grinshteyn for your meticulous editing and Danielle Nunziato, Laurel Harris, and Lauren Manning for your solid leadership and friendship throughout the past year. Lastly, I must express my sincerest gratitude to my faculty advisor, Robin Charlow. This Note would not have become the product it is without your guidance. Your attention to analytical details not only strengthened my Note, but also taught me how to argue like a true lawyer.