THE ENDORSEMENT TEST AND EQUAL STATUS

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I. INTRODUCTION

Since its inception, jurists and legal scholars have hotly contested the utility and fairness of the endorsement test. For its detractors, the endorsement test is unanchored in the constitutional text, devoid of limitations on the exercise of judicial power, and accordingly produces misguided outcomes.[2] In contrast, its remaining adherents think the endorsement test expresses the basic democratic value of equality, and therefore find it worthy of preservation. As Justice O'Connor writes in *Lynch v. Donnelly*:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community . . . . Endorsement 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. Disapproval sends the opposite message.[3]

This paper is an attempt to reinvigorate the endorsement test by more concisely articulating the relationship between endorsing and equality. As the endorsement test is presently conceived and employed, however, this relationship is oblique at best. In order to foreground equality, then, the endorsement test requires significant modification, which I propose in Section III. The primary purpose of these modifications is to assign to the norm of equal status the central role in Establishment Clause jurisprudence, particularly in those cases conventionally dubbed "display cases."

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2. *See, e.g.*, Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., dissenting) ("the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us").

3. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

As far as I can tell, this is a new approach to religion clause jurisprudence. To test the modified endorsement test, I tease out its implications by applying it to several cases and scenarios. This paper, then, is an exercise in normative jurisprudence.

For reasons of brevity, there are several things which this paper does not attempt. First, the modified endorsement test is designed to be applied only to "display cases." In such cases, the state has elected to display a religious symbol on state owned property. Typical symbols include the cross, the crèche, the Christmas tree, the menorah, and the Decalogue.[4] Typical venues for the display of these symbols include courthouses, legislative buildings, schools, and parks.[5] These are cases in which, through the monumental display of a religious symbol, the state is "speaking." Other issues implicating either the Establishment Clause or Free Exercise Clause, wherein the state is doing something other than "speaking," ought to be adjudicated under a different doctrinal standard. They should, perhaps, also be adjudicated in reference to norms other than equality, such as liberty of conscience, although I think it would be a mistake to exclude equal status from these cases. This paper remains agnostic on these other questions and confines itself to the endorsement test, a state's monumental displays, and the norm of equality.

Second, this paper also assumes there exists sufficient legal doctrine for distinguishing between those private speech acts which take place on governmental property and a state's own monumental communicative acts.[6] The analyses presented here

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4. *See, e.g.,* Salazar v. Buono, 130 S.Ct. 1803 (2010) (cross); Van Orden v. Perry, 545 U.S. 677 (2005) (Decalogue); *Allegheny*, 492 U.S. 573 (1989) (menorah, Christmas tree, and a crèche); Am. Civil Liberties Union of Ill. v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986); *Lynch*, 465 U.S. 668 (1984) (crèche).

5. *See, e.g.,* Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (courthouse); Am. Civil Liberties Union of Tenn. v. Rutherford Cnty., 209 F.Supp.2d 799 (M.D. Tenn. 2002) (county commission building); Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) (lawn outside municipal building); Stone v. Graham, 449 U.S. 39 (1980) (school house).

6. *See, e.g.,* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) for an example of this problem. As a means of evading the establishment clause, proponents of posting at times have intentionally obfuscated the possessor of the monument as a means for keeping the monument on the public property. The Supreme Court has not yet given clear guidance on the issue, but some circuit courts have developed doctrine which would allow them to distinguish between genuine speech acts and a state's speech acts. *See, e.g.*, Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008).

are applicable only to a state's monumental communicative acts and not to private speech acts, no matter where located. Take, for instance, a legislator who proposes and supports legislation because he believes "it will hasten the coming of Christ." We may suppose this is a "religious" purpose which would render the supported legislation unconstitutional under the current Establishment Clause doctrine. In contrast, on the account I am proposing, such a statement would not render the proposed legislation a possible object of judicial scrutiny. The legislation might still run afoul of constitutional principles, including the Establishment and Free Exercise clauses, but not because of the "religious" purpose which motivated the sponsoring legislator.

Third, while I believe the inclusion of the norm of equal status in religion clause jurisprudence can indeed be justified by an originalist inquiry, at least to the same extent as any other founding norm, I am not concerned to do so here. If one finds the norm of equal status attractive, one can then set about on the originalist inquiry *post facto*, as is usually the case. Likewise, while I also believe the norm of equal status plays an important part in democratic theory and could potentially be legitimated by showing how it coheres amongst a cluster of other democratic norms that animate the "spirit" of the constitution, I am again not concerned to do so here. This paper is not a totalizing theory of religion and democratic equality as embodied in the Constitution. Instead, I am here interested in pragmatic proof: were we to allow the norm of equal status to motivate "display cases" adjudication, what sort of results would be produced?

However, while the present analysis is confined to the courts and constitutional adjudication, I do not think that the principles articulated here are limited to these contexts. Indeed, it seems to me that the norm of equal status is insufficiently discussed in the context of church-state relations (and maybe in general), and should be a more salient element of the public conversation. Hence, even if one thinks that the federal courts have no business adjudicating church-state relations (à la Justice Thomas[7]), the norm, I think, may yet retain its interests. Limiting my discussion of the norm of equal status to the context of adjudication is strategic: it greatly simplifies the inquiry while offering one pathway

7. *Van Orden*, 545 U.S. at 692 (2005) (Thomas, J., concurring) (indicating that the Establishment Clause should not be incorporated).

through which the norm might be integrated into the larger political discourse.[8]

In what follows, I first introduce the norm of equal status by comparing it with other norms which religion clause theorists often take as salient (Sec. II). I then introduce the modification to the endorsement test, showing in the process how the endorsement test, as presently conceived, fails to foreground the norm of equal status (Sec. III). Finally, I apply the modified endorsement test to several common display case scenarios (Sec. IV). In the conclusion, I say a few things about the superiority of the modified endorsement test (Sec. V).

II. EQUAL STATUS CONTRASTED WITH OTHER RELIGION CLAUSE NORMS

Religion clause theorists are typically interested in a fairly circumscribed set of norms: religious liberty or the liberty of conscience,[9] coercion,[10] and the transference of tax monies to religious institutions.[11] Implicit behind these norms, I think, is that individuals ought to have autonomy over their own religious beliefs. It is supposed that in comparison to other beliefs, religious beliefs are especially important. They deal with the "ultimate" things of this life, and the next. Therefore, any state interference with these beliefs is especially obnoxious. These scholars worry about what we might call the "conversion effects" of a state's church-state policy or practice – the degree to which a state practice is likely to convert an individual to those beliefs manifested in the practice. From this point of view, it is pretty easy to conclude that most state displays of religious symbols do not in fact have any conversion effects sufficient to render them unconstitutional.[12]

Most religion clause theorists are also constitutional scholars, so when they do consider equality as a possible norm, they con-

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8. I discuss this briefly in the conclusion, *infra* Section V.

9. *See e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995).

10. *See e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT (2005).

11. *Id.*

12. CHOPER, *supra* note 9, at 141, takes this point of view, but, like many scholars, thinks that this presumption is overridden in the classroom, where the youngsters' consciences are particularly tender and susceptible to absorbing non-autonomous beliefs.

ceive of equality in terms of equal protection.[13] However, in this body of theory, equal protection is usually conceived of in terms of equal *treatment* rather than equal *status*. It seems to me important to distinguish the two.

Under the norm of equal *treatment*, it is wrong (unconstitutional, unjust, etc.) for the government to pass legislation which favors or disadvantages one sub-group of the polity. For instance, a law which required men and women to pay different tax rates, *ceteris paribus*, would violate the norm of equal treatment.[14] Similarly, challenges to affirmative action programs proceed under claims of unequal treatment, on the theory that affirmative action programs benefit one sub-group of the political community. In contrast, the norm of equal status is not concerned *per se* with how a state's policies treat a particular sub-group of the polity. Instead, it is concerned with preserving the equal status of those members within the larger political community. By the norm of equal status, a state's policy, practice, or constitution is unjust when it diminishes the social or political status of certain individuals within the political community. When the norm of equal status is violated, an individual's capacity to participate in the political community is diminished. One's status could be so diminished on the basis of any number of now familiar features – race, ethnicity, gender, and religion, for instance. The disenfranchisement of women would violate the norm of equal status because it diminishes their capacity to participate in the political community by refusing them the right to vote and the power to hold office.[15]

In the context of the Establishment and Free Exercise clauses, the norm of equal status is violated when a state's policy, practice, or constitution disables one's ability to participate in the public

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13. *See, e.g.*, KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2008).

14. The "*ceteris paribus*" is the difficult part. *See, e.g.,* City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978) (city required female employees to make larger pension contributions based on mortality tables which indicated that women lived longer than men and would therefore rely upon their pensions for more years. The Court held this to be a violation of Title VII).

15. One way to conceptualize the difference between these two types of equality is with reference to the difference between "primary" rules and "constitutive" rules. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1997). When the norm of equal treatment is violated, a primary rule favors one group over another. In contrast, when the norm of equal status is violated, a constitutive rule assigns an inferior status to some member or sub-group of the political community. Included in these constitutive rules are rules about who counts as a citizen and what it means to be a citizen. The norm of equal status is violated when one class is taken to be inferior citizens. *Id.*

realm because of one's religious beliefs or affiliations. Religious oaths of office, for instance, are a straightforward violation of the norm of equal status, as they disable certain citizens from fully participating in the political process.[16] The problem here is not so much that the state "treats" those who refuse to take the oath differently, but that it assigns them an inferior political status, which in turn, disables their ability to participate in the political community. Nor is the worry here about conversion effects and the autonomy of belief. Religious oaths of office might have some conversion effects (Joe the Atheist really wants to be a politician, so he converts to Christianity so he can take the oath), but the conversion effects are incidental to the real worry here, which is equal status.

Violations of equal status need not be based upon explicitly announced laws. State practices can also violate the norm of equal status, and monumental displays, as I detail below, are one type of state practice that implicates the norm of equal status.

III. MODIFIED ENDORSEMENT TEST

The appropriate goal of the endorsement test, *ex hypothesis*, should be to allow judges to discern monumental displays which violate the norm of equal status. Whether any particular display does violate equal status is an empirical question, however, and what is needed is an endorsement test that provides the decision makers (in our case, judges) with the analytic tools which will allow them to do this effectively. As presently conceptualized and employed, I think the endorsement test fails in its promise in two ways. First, it foregrounds the wrong sorts of norms and values[17] and, second, it misunderstands the iconography of religious displays.[18] After discussing these failings, I suggest responsive modifications.

A. Equality and the Religious/Secular Distinction

The chief problem with the current endorsement test is that it makes the distinction between the "secular" and the "religious" the

16. *See, e.g.*, Torasco v. Watkins, 367 U.S. 488 (1961) (finding that Maryland's constitution, which required an officeholder to affirm the existence of God, violated the Establishment Clause). Article Six of the Federal Constitution prohibits any requirement for a religious oath for federal office.

17. *See infra* Section III.a.

18. *See infra* Section III.b.

keystone of legal analysis.[19] If the purpose or effect of the challenged state practice is to endorse the "religious" over the "secular," then a court is to deem the practice unconstitutional. Amongst other problems,[20] foregrounding the distinction between the religious and the secular manifests the norm of equal status obliquely at best, and at worst, distracts from the power of this norm. Consider, for instance, what might be constitutionally troublesome about displaying a cross at the entrance to a county courthouse. Employing the endorsement test as presently conceived might lead a judge to conclude that the display had a religious purpose and/or effect. Suppose the county commission which required its erection intended to convert people to Christianity and that the reviewing court finds that the cross' presence does in fact do so. Its presentment at the courthouse would then be unconstitutional. However, surely these conversion effects are a minor worry. The real worry is that the cross' presentment at the courthouse door announces to the polity that only Christians are competent to use the courts and denies that competency to others. If this is an "effect" then it is a political one, not a religious one, and it is the politics with which the endorsement test ought to be concerned.

B. Cultural Scripts

A second problem with the endorsement test is its misconceptualization of the iconography of monumental displays. Present constitutional language indicates that courts are to consider monumental displays as speech acts undertaken by the state. The speech act has some "content" which is transmitted to and ab-

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19. To the degree that the *Lemon* test relies upon the same distinction, I think it is subject to the same critique. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971).

20. This has led to a number of bizarre conundrums. In particular, *who* is this audience? If the audience is the litigant themselves, then the lawsuit is *res ipsa loquitor* of alienation and therefore unconstitutionality. Hence, jurists introduce the "ideal" citizen observer whose ideal reactions to gazing upon the monumental display provide the lynchpin for determining the purpose and effect of the display. The introduction of this objective observer begins with Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("[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 of prayer in public schools.") A superior doctrine would eliminate this ideal observer from the constitutional analysis. It is another benefit of the modified endorsement test that it does this.

sorbed by the audience.[21] If either the purpose of the transmission or the effect of its absorption is "religious" then the display is unconstitutional. This is an infelicitous conceptualization of what is happening with iconic displays.

In contrast, Nicolas Howe has persuasively argued that a state's monumental displays are not merely speech acts, but also "a distinctive mode of social performance."[22] As such, monumental displays (religious or otherwise) perform cultural scripts, constitute the meaning of the civic space they inhabit, and implicate the meaning of citizenship.

Monumental displays, Howe perspicuously observes, have a scene (the landscape; e.g., the courthouse lawn), require an audience (the citizen observer) and place various intellectual and emotional demands on that audience. A state's monuments, then, are analogous to stage players, acting as an intermediary between the script and the audience. Rather than perform the text of a written script, however, they articulate a cultural script into a physical object and the physical object, rather than the actor, assigns meaning to the civic space and places demands upon its audience.

The overt political and public nature of monuments has important implications for the cultural meaning of citizenship. Howe writes, "[a]t issue [in legal conflicts over the constitutionality of a particular display] is not only the legally recognized meaning of the religious symbols, but the cultural status of the 'citizen observer,' his or her competency to appear in public and participate in civil life. Law shows people how they should feel when they cast their gaze on a particular place and, perhaps more important, whether (and how) they should act on such feelings."[23]

Hence, monumental displays play an important part in the formation of an observer's cultural and political identity: "National identities are fashioned and sustained through the collective veneration of sacred places and holy objects. Monuments and memorials . . . are the most obvious and ubiquitous means by which the nation-state signifies itself in the landscape. By arousing feelings of metaphysical belonging and focusing them on a symbol of historical and geographic subjectivity, they give concrete form to collec-

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21. Again, Justice O'Connor's langue of "sending" a "message" frames the discourse of later jurists. *See Lynch,* 465 U.S. at 688 (1984).

22. Nicolas Howe, *Thou Shalt Not Misinterpret: Landscape as Legal Performance*, 98 ANNALS ASS'N AM. GEOGRAPHERS 435, 436 (2008).

23. *Id*. at 437.

tive memory."[24] The experience and observation of these monuments is one important way that we are taught what it means to be a citizen. They provide a forum for the habituation of members of the political community to the customary norms and emotions of "good" citizens.

Hence, just as with other forms of performance, a successful monumental performance "needs heroes and villains, those who embody exemplary virtues and vices. To *feel* the wrong way about a sacred landscape is one such vice."[25] Therefore, "to be deemed an 'insider' of any place – but especially the overtly theatrical places of public memory – one must know how to feel, how to display those feeling in words and gestures, and how to put those displays in proper sequence. Conversely, one must know how *not* to feel and how *not* to act. Insiders display feelings that are 'natural,' 'reasonable,' and 'appropriate.' Outsiders do not."[26] A state's monumental displays teach their audience how Americans feel. It teaches them what citizens ought to venerate and what they ought to despise. The Lincoln Memorial, for instance, teaches its visitors nothing about either American history or President Lincoln; rather, it teaches them to despise slavery and to venerate sacrifice in the name of liberty. Simultaneously, in performing cultural narratives about the meaning of citizenship, monuments reinforce, recreate, and sometimes interpret those cultural narratives, which are often contested. Again, the Lincoln Memorial reinforces and perpetuates one particular cultural conception of liberty (opposite of slavery) against revival conceptions of liberty.

According to this analysis, a state's monumental displays implicate the norm of equal status because they perform identity creating and re-enforcing cultural scripts that designate what makes one an authentic member of the political community. One's authentic membership in the political community is signified by having the "appropriate" emotive reaction to the monumental landscape (e.g., one does not giggle at the Lincoln Memorial). Hence, it is not incidental that in legal confrontations over a state's display of a religious symbol, each side of the conflict "must accuse the other of acting beyond the democratic pale, of being guided by illicit, uncivil passions."[27] Whether a state's monumental display of a religious symbol is constitutional is the overt reason for the legal

24. *Id.*
25. *Id.* at 439.
26. *Id.*
27. *Id.*

conflict, but not its cause. According to Howe, confrontations over a state's display of a religious symbol are really about what it means to be an authentic member of the political community.[28]

C. Modifications to the Endorsement Test

The modified endorsement test will do two things: first, it will mute the religion/secular distinction while foregrounding the norm of equal status; second, it will accept that monumental displays participate in the configuration of the social meaning of a civic space.

To begin, the modified endorsement test repurposes some free speech jurisprudence: the first thing a court should do in applying the endorsement test is perform a "forum analysis." In this instance, the judicial inquiry should be about the social and political meanings of the forum in which the religious symbol is displayed. If the forum is an egalitarian one, then courts should be more inclined to find a display unconstitutional. With this analysis in hand, courts should then determine whether or not the presentment of the religious symbol enacts an inegalitarian culture script. If it does, then courts should again be more likely to find the display unconstitutional.

1. Forum Analysis

The first step of the modified endorsement test is for a court to determine the social and political meaning(s) of the location of the state's contested monumental display. The jurisprudence aims to preserve the capacity of individuals to participate in the political community. Hence, when the space of the monumental display is "close" to the exercise of political power, either physically or symbolically, a judge should be more inclined to find the display unconstitutional. Likewise, when the display is "close" to a place where the subjectivity of citizenship is constituted, a judge should be more inclined to find the display unconstitutional.

This determination is empirical and therefore place specific. However, it does seem possible to articulate some generalities about the types of civic places that are popular sites to display monuments. State monumental displays of religious symbols tend to occur at four types of locations: courthouses, legislative build-

28. Ross Astoria, *Why Do Citizens Litigate over the Ten Commandments: A Case Study from Tennessee*, Vol. 30, No. 4 QUINNIPIAC L. REV., 691 (2012).

ings (i.e., state capitols and county commissions), parks, and schools.[29] The legal discourse on monumental displays is also permeated with the idea of the museum, where it is supposed that the presentment of a religious symbol is innocuous.[30] It is therefore often used as either analogy or foil for these other civic spaces where religious symbols are displayed.[31] Further, one typical defense of a state's presentation of a religious symbol is that the symbol is a part of a secular war memorial. To illustrate forum analysis, I will say a few things about each of these types of places.

i. War Memorials

War memorials are an example of a monumental display which may be physically distant from the seat of political power but symbolically close to the meaning of citizenship. In the typical case, a cross has been planted on a patch of public ground (often for reasons lost to the fog of time) and once challenged in court presented, *post facto*, as being dedicated to the war dead.[32] Since war memorials have a "secular" purpose and effect (so the argument goes), the presentment of the religious symbol is constitutionally permissible.[33]

If one focuses on the religious purpose and effect of the cross, then these can indeed be difficult cases to decide, for the conversion effects of the monument (usually a cross) are difficult to discern, if there are any at all. Are people made more Christian because of the presence of the cross? Are they more likely to go to church because of the presence of the cross? Did the municipality, in erecting the cross, mean to re-enforce Christian beliefs and increase church attendance? God knows, but the judge can only speculate. In contrast, a forum analysis that prioritizes equal status and scrutinizes cultural scripts leads to an easy outcome.

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29. *See id.*

30. As Justice O'Connor writes, "[a]lthough the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692.

31. *Id.*

32. *See e.g.*, *Salazar,* 130 S.Ct. at 1803; Eugene Sand & Gravel v. Eugene, 558 P.2d 338 (1976).

33. For a detailed narrative of such a case *see* PETER H. IRONS, GOD ON TRIAL: LANDMARK CASES FROM AMERICA'S RELIGIOUS BATTLEFIELDS (2007).

War memorials venerate one of the highest expressions of citizenship, the sacrificing of one's life for the sake of the political community. While possibly physically distanced from the seat of political power, they are close to the formation of the subjectivity of citizenship. Therefore, presenting a cross, but no symbols from other faith traditions, says something rather worrisome about what it means to be a citizen of the United States. It says only Christians sacrificed themselves for their country and conceals the sacrifices made by individuals of other faith traditions. This further implies that these others have enjoyed the benefits of the polity without sacrifice. Their costless benefit marks them as less committed to the polity and, hence, less competent to participate in the political community. The cultural script perpetuated by religious displays that are presented as war memorials is potentially repugnant to the norm of equal status.

Some courts have validated the constitutionality of war memorials on the supposition that these war memorials are analogous to the placement of religious symbols on the headstones of deceased soldiers. Both war memorials and the headstones, the reasoning is, have the same non-existent religious purposes and effects. Both then, are constitutional.[34]

A focus on equal status easily allows the jurist to distinguish the two cases. A cross or other religious symbol on the headstone announces the religious affiliations of a single citizen, not the entire community. A headstone with a religious symbol, then, does not manifest a *cultural* script at all, but is reflective of the identity of the individual citizen-soldier. Religious symbols displayed on individual headstones, then, do not perpetuate inegalitarian culture scripts and are easily found constitutional under the modified endorsement test, all other things being equal.

ii. Courts

Courts, at least as presently conceived, are sites of political and social neutrality. It is supposed that our tribunals act upon individuals as *sui juris* citizens, irrespective of the litigant's wealth, age, color, gender, sexual orientation, religion, and ethnicity. Only what the litigant has done is of concern; what and who one is, according to this vision of law, is a matter of indifference to the courts.

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34. *See, e.g.*, *Eugene*, 558 P.2d at 338.

The law/politics distinction motivates this conceit of neutrality. By this distinction it is supposed that politics is the forum for the expression of idiomatic and self-interested policy preferences. In politics it is usually considered appropriate that policy outcomes reflect asymmetries in power. In contrast, the court is supposed to be free of idiomatic preferences and impartial to the power differentials of the litigants before it. Courts and judges are the impartial agents of the law rather than idiomatic and interested partisans.

However descriptively inaccurate and normatively misleading this conceit may be, there seems to be little doubt that it is ours. So long as we retain this conceit, the courts and the buildings they inhabit must be considered a forum of strong equality, neutrality, and impartiality. The display of religious symbols in this forum, then, ought to be extremely suspect.

iii. State Capitols and Other Legislative Assemblies

State capitols, county commissions, and city halls are other popular sites for the display of monuments. These are sites of legislation, where all competent members of the political community might gather for the passage of laws. They are thus physically close to the exercise of political power. They also, however, seem to be recognized sites for the expression of idiomatic points of view, for the advancement of one's own interests, and are thought legitimately to reflect asymmetries in power. They are thus strong "free speech" zones. Again, it might be preferable to abandon this conceit – we might, for instance, wish to reaffirm a commitment to legislation aimed at the common good, rather than legislation which conforms to the power of vested interests – but until we do, it seems that sites of legislation ought to receive a mid-level classification in the system of forum analysis.

Part of the analytic difficulty posed by monumental displays on capitol grounds, as opposed to actually in the building, is that the civic meaning of those grounds is itself contested. Is the capitol ground a part of the "seat of power" or is it just another park? Consider, for instance, the *Van Orden* case, where the Texas legislature (by means which are less than clear) had allowed the Fraternal Order of Eagles to permanently erect a Ten Commandments monument on the Capitol lawn.[35] As Howe shows in his discussion

35. *Van Orden*, 545 U.S. at 677.

of this case, the litigants are not merely contesting over the constitutionality of the Decalogue display, but the social meaning of the Capitol lawn – is it the site of political power or simply a park that happens to be close to the Capitol building?[36] Unsurprisingly, the plaintiff in *Van Orden* argued that it was indeed a site of political power while the defendants argued it was just another "marketplace" of ideas wherein "all voices" could speak.[37] In this case, I am inclined to resolve the question in favor of understanding the lawn of the Texas Capitol as being close to the exercise of political power since few park-like activities take place there (i.e., there are neither picnic tables nor picnickers) and the only voices "speaking" are the state's other monumental displays.

iv. Parks

Parks tend to be both symbolically and physically distanced from the seat of political power. They are places of recreation and while we should desire that all citizens (and others too) feel comfortable, safe, and happy in such places, political equality in these forums seems to be little at stake, at least in comparison to the other forums we have analyzed. Of course, this is not invariantly true and the exceptions might overwhelm the rule. Exclusion from public parks, for instance, was an important part of Southern Apartheid, and national parks play an important part in the construction of the subjectivity of citizenship, projecting an image of the ideal citizen in the development of the country. This is especially the case when a particular park provides a forum for the remembrance of American history and identity, and therefore enacts a cultural script which implicates notions of equality.

Hence, there are many circumstances where parks can become intimately linked with the exercise of political power and the definition of citizenship. There is a national park at Jamestown, for instance, and this site is closely linked in the popular imagination with the founding of a new nation (albeit not so much so as Plymouth). To the degree that a conception of citizenship appropriates the past as ideological support, this seems to draw the Jamestown Park symbolically closer to the meaning of citizenship. The cross there on display, although announcing itself to have been donated by a private organization, ought therefore to generate the suspi-

36. *See* Howe, *supra* note 22.
37. *Id.* at 445-51.

cion that it enacts a cultural script which implicates questions of equal status.

In other instances, the city park might be physically close either to a courthouse or a legislative building. Since both of these are sites of state power, the park might become a forum where the court ought to perform a heightened review. Even when physically distant from a site of state power, parks might be symbolically associated with that power as when, for instance, a crèche is stored in one of the city's buildings and ceremonially transported to the city park every year.[38] Again, if the park is the frequent (or only) site of local political rallies, this might draw the park symbolically closer to the exercise of political power, even if there are no governmental buildings physically near the park.

v. Schools

Public schools are not often physically close to the buildings in which political power is exercised, but they are an undisputed site of subjectivity formation. Schools are, at least presently, the site of two things that determine one's competence in the political community. First, it is in schools that we are given those experiences and teachings which, to a large degree, determine our future possibilities as both private individuals and public citizens. Equal status requires that nothing about schools should debilitate those chances, or mark off some pupils as inferior because of their religious beliefs or affiliations (or any other reason).

Second, schools are one place where we develop attitudes and habits about what is normal and what is not. In schools, one of the few places where we are required to gather together in an involuntary association, social inequalities are reified and transmuted into political and economic inequalities. In schools, students should be habituated to religious differences in a manner which conforms to the dictates of equal status. Nothing about schools should suggest that anyone is any less a citizen than anyone else.

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38. Something like this happened in *Lynch*, although one will have to read the lower court's opinion to discover this fact. *See* Donnelly v. Lynch, 525 F.Supp. 1150, 1156 (D.R.I. 1981) ("[w]hen the Hodgson Park display is opened, ceremonies at the Park are held in conjunction with those at City Hall, 300 feet away. Santa arrives at the Park in a City fire truck. He and the Mayor throw a switch, illuminating the lights at the Park and City Hall. Santa then goes to his House in the Park and distributes candy to the children. The 'talking' wishing well also begins operation. The sound system that broadcasts Christmas carols through the Park is the same one used at City Hall").

Schools, therefore, are forums of equality and any posting of a religious symbol should generate a great deal of judicial suspicion.

vi. Museums

An analysis of the meaning of civic space also allows us to see why jurists often present the museum as a forum where the display of religious symbols is innocuous. In such instances, the stated purpose is education or enlightenment, a "secular" rather than a "religious" purpose, and the museum setting somehow cancels the religious effect that the display might have. The museum, say some, embodies the difference between using a word and mentioning that word: when in a museum a religious work has scare quotes about it and the museum's communicative act is in some way ironic.[39] Although the modified endorsement test reaches a similar conclusion, it does so for different reasons.

To the extent that the display of religious works and symbols in a museum appears to be innocuous, it is less because the museum setting vitiates the religious message and more because the museum is a place both physically and symbolically distanced from the exercise of political power and the construction of the subjectivity of citizenship. A Caravaggio might be better viewed in its native habitat, but even when in a museum, it is more likely to induce a conversion experience than is, say, a kitsch display of the Decalogue at some remote county of Wisconsin. A forum analysis which foregrounds equal status, however, leads to the opposite conclusion: the state's display of a Caravaggio in a museum has few implications for the meaning of citizenship while the Decalogue display has many. It is the "distance" of the museum from the seat of political power and subjectivity formation which drives the intuition that the display of religious works in museums is constitutionally innocent. It is not always true, however, that museums are distanced from the seat of political power or subjectivity formation. Some museums are close, both physically and symbolically, to the exercise of political power, and when this is so, courts should give extra attention to religious works displayed in those museums.

39. See GREENAWALT, *supra* note 13.

2. Inegalitarian Social Scripts

Instead of trying to divine the purpose and effect of a monumental display, a jurist should identify the content of the cultural script enacted by that display. Instead of asking whether the display is religious or secular, jurists should ask whether any of the themes of that cultural script debilitate the quality of anyone's citizenship because of their religious beliefs or affiliations.

As a part of this analysis, a jurist will need to inquire into the meaning of the symbol from the point of view of the faith tradition of which it is a part. The point of doing this is not to identify whether the symbol is "religious," but rather to determine if a monumental display manifests themes of inequality. This is the most "radical" aspect of my proposed modifications, as it contradicts the oft-stated prohibition on courts opining on the truth of religious dogma.[40] It is not as radical as it might seem, however, because when read carefully, courts already do express opinions on these matters, just not explicitly.[41] However, it is radical in that it would require courts (and the litigants) to delve deeper into the meaning of religious symbols they are attacking or supporting, and to explicitly reach conclusions as to the implications of that doctrine for political equality. Some will find this inquiry a dangerous exercise of judicial power. Others, myself included, might think it would be an excellent way to force courts and, more importantly, litigants to think more strenuously about the meaning of their own religious beliefs and their relationship to political equality.

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40. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) ("[i]t is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs").

41. Judge Posner provides a nice example. *See City of St. Charles*, 794 F.2d at 265 (finding that the City of St. Charles places a Latin Cross of Christmas lights on its firehouse during the Christmas season). His inquiry turns to whether the cross is a Christmas symbol, so that its presence might be harmonious with the recognition of Christmas as a public holiday. Following the district court, he concludes that it is not. "The district judge found . . . that the cross is not a traditional Christmas symbol. None of the books we have been able to find on the history of Christmas lists "cross" as an index entry. . . . The cross was a device for inflicting a slow and painful death on traitors, pirates, and other serious miscreants. The device that the Romans used to execute Christ, it became the symbol of death, resurrection, and salvation, not of birth—of Easter not of Christmas." *Id.* This verbiage, I take it, attempts to understand the meaning of the symbol from within the tradition of which it is a part, not to merely take it as "secular" or "religious."

I will illustrate by employing this analysis to a real world case, comparing the outcomes and reasoning of the two modes of analysis.

Sample Application of the Modified Endorsement Test: The Decalogue in Hamilton County, Tennessee

A week after the September 11th terror attacks, the commissioners of Hamilton County, Tennessee voted to post plaques of the Decalogue in three of the county's courthouses.[42] The ACLU of Tennessee challenged these displays. The federal district court, applying both the *Lemon* test and the endorsement test (which it apparently found to be more or less equivalent) determined that the displays were unconstitutional.[43] In deciphering the "purpose" of the posting, the district court first looked to the very character of the display, which is biblical (and "religious"). The court also observed that the Supreme Court had previously found the Decalogue to be a religious text (citing *Stone v. Graham* 449 U.S. 39, 41-41 (1980)). The court also relied upon the preamble to the legislation which required the posting[44] and a letter circulated by the bill's sponsor.[45] Together, these manifested a religious purpose.

The district court also concluded that nothing about the posting suggesting that the Decalogue was presented "as a part of an artistic display" (i.e., as in a museum) so that the "display has the effect, to a reasonable observer, of conveying a religious message."[46]

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42. See Astoria, *supra* note 28.

43. Am. Civil Liberties Union of Tenn. V. Hamilton Cnty., 202 F. Supp. 2d 757 (E.D. Tenn. 2002).

44. *Id.* at 763-64. The language the court relied upon was: "WHEREAS, our nation recognizes that all laws governing man's actions toward his fellowman [sic] are derived by the Ten Commandments as given by God to Moses ...." *Id.*

45. *Id*. at 764. The bill's "prime sponsor, Bill Hullander, wrote a personal letter to some, but not all, local clergy in which he generally urged that they promote putting up copies of the Ten Commandments in churches and homes. . . . While Mr. Hullander's letter was written after the Commission approved the Ten Commandments resolution, it nevertheless clearly demonstrates that his motivation . . . was a religious one." *Id.*

46. *Id*. at 765. "(holding "defendants contend that reasonable persons viewing these plaques would know that the Ten Commandments were not there for a religious purpose, but that they have played a role in the secular development of western law and culture. It may be true that the Ten Commandments have played such a secular role. However, the way that these plaques have been posted would not bring that to mind. Each plaque is posted separately and apart from

Employing the modified endorsement test, a district court would also rule the displays unconstitutional, but for entirely different reasons.

A court would first perform a forum analysis. In Hamilton County, the Decalogue plaques were displayed in three of the county's courthouses, which are forums of strong equality because under the current convention they are neutral forums. The architecture and décor of each of the three Hamilton County courthouses confirms these generalities. There are no other monumental displays. Nothing else about the forum suggests that it is either a museum or a marketplace of ideas in which the Decalogue is merely one more viewpoint among peers. Except for the Decalogue, the architecture and decor suggest that nothing occurs in the courthouse but the efficient, neutral, and just enforcement of the law.

A review of the debates shows that the cultural script enacted by these displays is an American jeremiad.[47] The theme of the jeremiad is that Christians are good American citizens and that when these good citizens were in charge, the nation was moral and strong. On the other hand, non-Christians who do not follow the Decalogue tend towards criminality and sexual-licentiousness.[48] This script strongly implicates the meaning and subjectivity of citizenship, degrading the citizenship of non-Christians to a secondary status.[49]

The Decalogue itself, when situated within the tradition of which it is a part of, is a symbol of separation and inequality. Although some elements of the second pentad are capable of being represented as universal ("thou shall not steal"), the discriminatory tendencies of the first pentad cannot be concealed. The first pentad establishes positions of apostasy and orthodoxy and sets the standard for who is and who is not a respectable member of the political community.[50]

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any other wall adornments. They are clearly labeled as being the 'Ten Commandments.' They display the full (albeit edited) text of those Commandments, and if anyone doubts that they have religious significance, the Commandments are framed in the shape of what one would recognize as a stone tablet, and the plaques reference the Bible").

47. *See* ANDREW MURPHY, PRODIGAL NATION: MORAL DECLINE AND DIVINE PUNISHMENT FROM NEW ENGLAND TO 9/11 (2009); *See also* ASTORIA, *supra* note 28.

48. *See* Astoria, supra note 28.

49. *Id*.

50. DAVID NOEL FREEDMAN, THE NINE COMMANDMENTS: UNCOVERING A HIDDEN PATTERN OF CRIME AND PUNISHMENT IN THE HEBREW BIBLE (2000).

As for its position within Holy Scripture, the Decalogue, along with other Old Testament law, is concerned with the social and political differentiation of the people of Israel from the "pagans" amongst whom they were living.[51] It should also be remembered that some of the harshest punishment described in scripture are for violations of the Commandments. For instance, after the worshiping of the Golden Calf, Moses gathers to himself the other members of Levites, his own tribe, and "he said to them 'Put every man his sword on his thigh, and cross over and back from gate to gate in the camp, and each man kill his brother and each man his fellow and each man his kin.' And the Levites did according to the word of Moses, and about three thousand men of the people fell on that day."[52] For thieving and coveting, Achan, along with his sons, daughters, oxen, asses, sheep, and "all that he had" was brought up the Valley of Achor, where "all Israel stoned him with stones; they burned them with fire, and stoned them with stones."[53] It will not be of any additional comfort to know that Achan was found guilty by the procedure of cleromancy, the casting of lots as a means of divination (although he seems to have confessed after the lots pointed his way).[54]

Finally, posting the Decalogue requires settling upon an enumeration of its Commandments, and this is to take the side of either the Jews, the Protestants, or the Catholics. A court, then, might go so far as to see in this settling of the enumeration a miniature re-enactment of the bloody theological disputes of the sixteenth and seventeenth centuries. Along the same lines, it should also be remembered that the display of the Decalogue is a part of Protestantism's anti-Catholic iconoclasticism.[55] Its mere presences, irrespective of the enumeration, re-enacts the Protestant effort to remove the idols.

This is merely a brief sketch of the argument. However, by observations such as these, a jurist would conclude that the Decalogue displays in the Hamilton County courthouses were unconsti-

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51. *Id*. For instance, it is likely that the prohibition on work on the Sabbath is a means to prevent the Israelites from mingling with the Canaanites at the market. DAVID AARON, ETCHED IN STONE: THE EMERGENCE OF THE TEN COMMANDMENTS (2006). For David Aaron, the Decalogue is a post-Babylonian artifact inserted into scripture to further separate the returned Israelites from those who had begun to live in Jerusalem. *Id.*

52. Exodus 32:27-29.

53. Joshua 7:16-26.

54. *See* FREEDMAN, *supra* note 50.

55. *See* AARON, *supra* note 51.

tutional. They are posted in a forum of neutrality, enact a highly inegalitarian script (the American jeremiad), and establish positions of apostasy and orthodoxy as a means to separate the good members of the political community from the bad members. The scripture describing this separation is enforced by the most sanguinary means. All combined, the Decalogue displays in Hamilton County attempt to structure (or restructure) an egalitarian civic space so as to make some members incompetent to enter that civic space. That is, these displays endorse the competency of one class of citizens over another; that competency is contingent upon their religious beliefs and affiliations, and these displays are therefore unconstitutional.

CONCLUSION

This paper has been a pragmatic study in relationship between display cases, the endorsement test, and the norm of equal status. I have suggested revisions to the endorsement test which would do two things: first, make equal status the central concept of any analysis of the constitutionality of display cases, while at the same time minimizing the saliency of the religious/secular distinction; and two, conceptualize a state's monumental displays as social performance, rather than merely as a speech act which transmits some content to the audience that absorbs that content. In applying the modified endorsement test to various possible cases, it seems that the results reached through that application are not so radically different from those reached by the current endorsement test. The reasoning which leads to those results, however, is vastly different. The relative attractiveness of the modified endorsement test will depend upon whether participants in this field of scholarship and practice find it congenial or not.

There are several things which can be said on behalf of this sort of reasoning, but I will develop two here. First, courts are, in fact, already making use of the norm of equal status, although not explicitly. Hence, my revision would only make explicit what is already implicit. For instance, in *Freedom from Religion Foundation v. Obama*[56] the court ruled the National Day of Prayer to be a violation of the Establishment Clause, reasoning that the legislative history supports the view that the purpose of the National Day of Prayer was to encourage all citizens to engage in prayer,

56. Freedom from Religion Foundation Inc. v. Obama, 705 F. Supp. 2d 1039 (W.D. Wisc. 2010), *rev'd* on standing grounds, 641 F.3d 803 (7th Cir. 2011).

and in particular the Judeo-Christian view of prayer. The problem with this, reasoned the court, was not with the conversion effects of such a practice, but the impact on equal status.

> If anything, [the legislative purposes] contribute to a sense of disparagement by associating communism with people who do not pray. A fair inference that may be drawn from these statements is that 'Americans' pray; if you do not believe in the power of prayer, you are not a true American. Identifying good citizenship with a particular religious belief is precisely the type of message prohibited by the Establishment Clause.[57]

Although the language here is couched in the vocabulary of the "old" endorsement test (e.g., "message"), it is easy enough to translate into that of the modified endorsement test: when the state encourages "Judeo-Christian" prayer (whatever this is) as a prophylactic against "communism" it associates good citizenship (not being communist) with praying. This enacts an inegalitarian cultural script that assigns a superior status to Christian citizens (or perhaps Judeo-Christian citizens) over and against non-Christian citizens.

Second, foregrounding the norm of equal status and incorporating it into Establishment Clause jurisprudence might have "trickle down" effects. Because of the centrality of the religion/secular distinction, the current endorsement test (along with the *Lemon* test) encourages conservatives to think of the Constitution, and the courts that enforce it, as being "against" religion. After all, the endorsement test does require the identification and removal of "religious" symbols. Because the modified endorsement test decentralizes the religious/secular distinction, courts will no longer have to remove symbols from state property because those symbols are religious. Retooling the endorsement test, then, will potentially alleviate the perception amongst religious conservatives that the federal courts are attacking them specifically.[58]

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57. *Id*. at 1054.

58. However, the evangelic idea that their religious values (which marks them as authentic Americans) are under siege from a secular Washington is one of the constitutive elements of their sub-community identity. *See* CHRISTIAN SMITH, AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING (1998). Altering this perception will likely require more than modifications to the jurisprudence, although my impression is that such modifications are probably a necessary condition.

Furthermore, the participants in this sort of litigation are often "cause" lawyers who are closely associated with political "thought-leaders."[59] Changing the nature of the discourse at the judicial level is an opportunity to change the way these thought-leaders (as well as their students and their clients) think about church-state relations. Introducing the concept of equal status to the jurisprudence offers the opportunity first to alter the legal discourse and then the public discourse surrounding church-state relations.

59. For example, the ACLU, the Freedom from Religion Foundation, the ACLJ, and The Foundation for Moral Law are all repeat players to church-state litigation.