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Civic Religion and Shifting Trajectories in Context of Religious Symbols, Practices, and Prayer

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I. Introduction

When one thinks of the relationship between religion and the United States government, immediately coming to mind is typically the age-old adage that has been popularized in our society and paraphrased from the words of Thomas Jefferson: separation of church and state. It is easy to assume that this would mean government is to have no interaction at all with religion, and that religious exercise should be left to the people that comprise this nation. After all, the First Amendment of the United States Constitution does forbid government from making laws which concern the establishment of religion and from prohibiting the free exercise of religious beliefs.[1] But does the Constitution really require, in the words of Thomas Jefferson, the building of "a wall of separation between church and state,"[2] or can there exist some sort of relationship between government and religious practice that does not violate one of the country's original and most fundamental laws?

One category of thought that may fall within the latter supposition is the concept of "civil" or "civic" religion. Scholar John A. Coleman describes civic religion as "a special case of the religious symbol system, designed to perform a differentiated function which is the unique province of neither church nor state. It is a set of symbolic forms and acts which relate man as citizen and his society in world history to the ultimate conditions of his existence."[3] It is essentially

[1] U.S. CONST. amend. I, cl. 1-2.
[2] January 1, 1802, letter by Thomas Jefferson addressed to the Danbury Baptist Association (in Connecticut)
[3] John A. Coleman, *Civil Religion*, 31 SOCIOLOGICAL ANALYSIS 67–77, 69 (1970).

the theory that there exists a distinct religious "flavor," if you will, embedded in American culture and government. It is the idea that there is a certain level of harmony between government and religion. It is also the notion that some sort of religious practice is allowable by the Constitution and the Judiciary even in contexts where there is some governmental involvement, be it through specific acts, practices, or functions. And some examples of civic religion can be visualized in occurrences that many would see in everyday life, such as "In God We Trust" on our currency and Christmas decorations seen while walking through town during the holiday season.

Another scholarly article by Ronald C. Wimberley and James A. Christenson adds to this understanding by positing that civil religion operates in its own form of limbo, and stating "because civil religion is considered to be neither a sectarian religion nor a formal part of American government, and because civil religion appears to have no companion organization exclusively on its own, civil religion would appear outside the domain of conflict with the principle of church-state or religion-government separation."[4] While the thesis may be true, two issues can be found within such a statement. The first is whether certain religious entanglements by government that have civic meaning are actually without conflict with respect to the First Amendment's protections. The second is whether these entanglements have formed its own domain free from the limitations of the Constitution.

With respect to the first issue, nothing is free from conflict. As will be seen in the following discussion, the Supreme Court has heard and contemplated a number of issues regarding religious entanglements that have civic meaning. The second issue with Wimberley and Christenson's statement, however, is more complex. Have these occurrences, which involve religious entanglement and civic meaning, had their own little bubble of protection carved out by the

[4] Ronald C. Wimberley & James A. Christenson, *Civil Religion and Church and State*, 21 THE SOCIOLOGICAL QUARTERLY 35–40, 39 (1980).

Judiciary through Constitutional interpretation? The answer to this question, generally, is yes, but this area outside of conflict with the Constitution has its own bounds. The Court has been tolerant of government entanglements that have civic meaning, but only when other justifications exist for those entanglements. An effigy of tablets inscribed with the Ten Commandments can stand on the grounds of the National Mall if it is depicted within a display of the foundations of American government and its laws. To the contrary, the same tablets would not have the Court's support if found hanging alone, lacking external context, on the wall of a public classroom.

The focus of this paper will be partly to show the extent of the Supreme Court's tolerance of these government entanglements that have civic meaning. Without doubt, the Court has allowed many practices to continue despite their connections, both intimate and remote, with religion. But another focal point of the paper will be to shine a light on the trajectories that certain practices with civic meaning have taken and may take in consideration of (and at times despite) the opinions of the Court. Some practices have waned, some have lost their religious significance, some are now seen in different light, some continue on as strong as ever. Particular attention will be paid to three distinct lines of cases by the Court: Sunday Blue Laws, religious symbols on public land, and prayer in government settings.

II. The Movement from Religious to Secular and Civic Meaning: Sunday Closing Laws and Religious Symbols

Sunday Closing Laws and religious symbols on public land do not have a great deal in common. One is a law historically put into place to free up time for worship and devotion to God in the Christian tradition. The other may be a depiction of religious text, a figure of import to a particular sect, or a token of celebration during a set time of year. Nonetheless, they find likeness

in one significant respect: they stem from overtly religious underpinnings but have evolved to take on newer secularized values and, in some instances, have lost their divine connotations altogether.

These practices have not only taken on new understandings that are secular in nature but have also begun to decline in the frequency of their use. Also, some practices that have previously been allowed, by their very nature would not be allowable today, owing to the fact that they have not yet lost their religious nature. The following sections will delve into both Sunday Closing Laws and religious symbols on public land, their history with and treatment by the Supreme Court, and the direction in which these practices appear to be trending.

A. Sunday Blue Laws have Secular Benefits to Society

The Supreme Court, in its definitive decisions in the early 1960s, has determined that Sunday Blue Laws, despite their initially religious motivations and in some instances still potentially aiding religious practice, do not violate the Establishment Clause due to the secular benefits that the laws may also serve.

Sunday Blue Laws or Sunday Closing Laws, generally speaking, are pieces of state legislation that prohibit labor, commercial activities, recreational activities, and the purchase of certain consumer goods on Sundays. Examples of this type of law would be New Jersey's forbiddance of the sale of automobiles on Sundays or Bergen County, New Jersey's restriction on the sale of clothing and electronics on Sundays. While the purposes for the continued use of these laws are not clear from the outset, the history and initial intention of these laws has been elaborated upon the Supreme Court in *McGowan v. Maryland*.[5] The Court, in its decision, expresses that the origins of Sunday Blue Laws in the United States can be traced back to legislation established in

[5] *McGowan v. Maryland*, 366 U.S. 420 (1961).

England with the intent of aiding the established church in the nation.[6] These restrictions imposed by the British were then brought over to the New World not long after settlement began.[7] Beginning in 1650, laws prohibiting sport, labor, unnecessary travel, and the sale of alcohol, as well as enforcing mandatory church attendance were implemented in the Plymouth Colony.[8] These laws were designed with the intention of freeing Sunday, which is the Sabbath Day for most Christian denominations, from other forms of activity so it can be dedicated as a day of worship.

Despite the clearly religious motivations for the implementation of these Sunday Laws and belief by some that this practice violated the theory of church-state separation, the Supreme Court, in 1961, decided to take on the *McGowan* case to clarify their understanding of the issue. *McGowan* centers around a challenge by seven employees of an Anne Arundel County, Maryland department store after they were charged with violating a Maryland statute that proscribed the Sunday sale of any products other that certain perishable foods, tobacco, gasoline, medicine, and newspaper.[9] The appellants argued that the laws violated the Establishment Clause of the First Amendment because the point of the legislation was to enforce stoppage of labor in an effort to encourage church attendance, since Sunday is the day of worship for many Christians.[10]

The Court, choosing not to follow the argument posited by the appellants, upheld the constitutionality of Maryland's Sunday laws and provided two central justifications for doing so.[11] The most compelling justification hypothesized by the Court is that these laws have slowly begun

[6] *Id.* at 433.
[7] *Id.*
[8] *Id.*
[9] The employees in the case were charged because they had sold a three-ring loose-leaf binder, floor wax, a stapler and staples, and a toy submarine. The Court notes that a number of sports (such as football, baseball, golf, hockey, and soccer) and recreational activities (including hunting and fishing) were also prohibited on Sundays by other Maryland statutes. *Id.* at 422-24.
[10] *Id.* at 431.
[11] *Id.* at 453.

to lose their religious meaning and have taken on more secular considerations.[12] A secular purpose to justify a legislature's implementation of Sunday Laws, in the eyes of the Court, would be that Sunday should be a day of rest, one that would allow people to recover from the past week's work and prepare for the next, as well as being a common day on which family, friends, and relatives can spend time together, take in entertainment, and go out to dinner.[13] After all, state governments have the authority to regulate the "improvement of the health, safety, recreation, and general well-being of its citizens."[14] The Court subsequently argues that "to say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[15] It seems that the Court is choosing to favor the public benefits potentially associated with these enactments instead of lingering on the fact that the basis for these laws had been to promote religious practice. The argument is still compelling to this day, because in the trials and pace of modern society, it is often times difficult to slow down and have a day to rest and relax. Limited activity, with the exception of entertainment, can be beneficial to one's mental and emotional health, as well as their relationships with others.

A second justification provided by the Court in *McGowan* is that "the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[16] Illustrations of the Court's point can be found in American criminal law. Murder, theft, prostitution, fraud, and polygamy are all criminal offenses in many or all states and the federal government. These unlawful acts are also

[12] *Id.* at 434.
[13] *Id.* at 434, 450-52.
[14] *Id.* at 444-45.
[15] *Id.*
[16] *Id.* at 442.

morally reprehensible under the beliefs of many religious groups, such as various denominations of Christianity, Judaism, and Islamic faith. The Court is correct in contending that these laws outlawing illicit conduct should not be invalidated merely because they align with religious tenets or may have originated in what some would deem sacred texts. To do so, we would have to invalidate many a law that have a foundation in the common law, since much of the law in this country has its foundation in English common law; England is a country itself which has an established church and religious motivations were prevalent in the creation of parts of its legal doctrine (as evidenced by the early history of Sunday laws).

Gallagher v. Crown Kosher Super Market, Inc., another decision handed down by the Supreme Court in the same year, followed the decision in *McGowan v. Maryland*.[17] The case in *Gallagher* centers around a corporation owned by members of Orthodox Jewish faith that sells kosher meats and food products mostly to Orthodox Jewish customers.[18] Under tenets of the Orthodox Jewish faith, the Sabbath is from Friday at sundown to Saturday at sundown and members of the faith are not allowed to perform commercial activity during that time.[19] Due to this closure, Crown Kosher chose to open its doors for business on Sundays, which brought in a third of its weekly earnings, against a Massachusetts Sunday Blue Law that forbids the doing of any business or work on Sundays.[20] The store owners challenged the law on various grounds, including an argument that the law violated the Establishment Clause.[21] Although the fact patterns of this case and the *McGowan* case may seem similar from the outset, the two differ in the fact that the Massachusetts law in this case makes use of much more Christian language than that of the

[17] *Gallagher v. Crown Kosher Super Mkt., Inc.*, 366 U.S. 617, 630 (1961).
[18] *Id.* at 618.
[19] *Id.* at 619.
[20] *Id.*
[21] *Id.* at 624.

Maryland law in *McGowan*. The provisions challenged by the store owners are included under a chapter of the statute titled "Observance of the Lord's Day."[22] Additionally, the provisions underwent a number of revisions after they were enacted, initially using terms such as "Sabbath", "Lord's Day", "dishonour of God", and "Grief of the Spirits of God's People."[23] Later, the provisions were reworded, leaving only references to "the Lord's Day" as well as taking into account the welfare and relaxation of the community.[24]

Undeterred by the plentiful use of Christian verbiage even in the latest edition of the provision, the Court in *Gallagher* still chose to adhere to the precedent set in *McGowan*.[25] It found that although some provisions still contained references to religion, the statutes "have been divorced from the religious orientation of their predecessors."[26] According to Chief Justice Warren, the language in question is simply a relic of the older versions of the statutes and the current scheme provides "an atmosphere of recreation rather than religion," owing to the fact that the current version provides exemptions for sports and recreation.[27]

Furthermore, the case of *Two Guys from Harrison-Allentown v. McGinley,* continues the trend set by *McGowan*.[28] In this case, a large Pennsylvania discount department store's employees were cited multiple times for violating a section of the Pennsylvania Penal Code, which forbids employment, business, and sport on Sundays.[29] The section of the code had been recently amended to contain exemptions for "wholesome recreation."[30] The Appellant had sought an injunction in an attempt to prevent the District Attorney from enforcing the Sunday Closing Law, arguing that

[22] *Id.* at 619.
[23] *Id.* at 625-26.
[24] *Id*.
[25] *Id.* at 626.
[26] *Id.*
[27] *Id.* at 626-27.
[28] Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).
[29] *Id.* at 585.
[30] The case itself also lists a number of activities that were included in the definition of wholesome recreation. *Id.*

it is a law respecting the establishment of religion because it honors the doctrine of Christian religious groups in forcing abstinence from work, it commemorates the Resurrection, and encourages Christian worship.[31]

The *Two Guys* Court acknowledged that a connection undoubtedly existed between the original Pennsylvania Sunday Closing statutes and religion, and also recognized that the current laws contained indications of religious influence, yet chose to go in the same direction as the other two Sunday Blue Law cases, ultimately upholding the validity of the laws.[32] Part of its reason follows the above cases, but it also focuses on the amendments made to the statutes.[33] The Court found that the addition of healthful and recreational exercises to the list of allowable Sunday activities shows that the Sunday Closing statutes are no longer there to promote religious practice.[34] The inclusion of such activities is not consistent with aiding church attendance, as the appellant suggested was the reason for the laws, but may even be seen as inconsistent, in that people have the option to pursue endeavors other than participating in religious exercise.[35]

In viewing these three cases on Sunday Blue Laws, it is clear that the Supreme Court is extremely willing to look past the obviously religious origins of this type of law, instead aiming its attention at the secular and civic benefits to be gained from such laws. To the Court, simply having a historically religious origin, using religious verbiage, or desiring to achieve a moral end that mirrors that of some or all religious groups is not enough to reach unconstitutionality. The Court is not willing to deter action where religion had plainly figured in legislative decision-making (albeit having played its part in the past) if that action is far removed from such religious

[31] *Id.* at 586, 592.
[32] *Id.* at 592-595.
[33] *Id.* at 595.
[34] *Id.*
[35] *Id.*

motivations and such legislation can provide notable benefits to society that are not attributable to religion in and of themselves.

B. Religious Displays on Public Property can be Contextualized as Having Separate Secular Meaning

Context must be in full focus when looking at the constitutionality of religious displays located on public land. As long as the displays have a secular purpose to their existence on public land or are accompanied by other religious and secular symbols, the symbols themselves are permitted under the Supreme Court's interpretation of the First Amendment.

Religious displays are symbols or objects that have meaning in one or many religious belief systems. These symbols vary widely, from a cross to a menorah to a nativity scene to the Ten Commandments. They can come in the form of decorations, memorials, and statues, among others. Considering the restrictions on government imposed by the Establishment Clause, one would not think to find these symbols on public land. Yet, by taking a drive through town during the holiday season, it is not uncommon to find decorations with initially religious connotations all over the place, including ones put up by the local municipality. If you walk into a Courthouse, you may find homages to all that influenced this nation and its laws, including ones with religious roots. However, these practices have not gone without challenge.

The Supreme Court's first major case on the issue of religious displays on public land occurred in *Lynch v. Donnelly*. The dispute in the *Lynch* case began with an annual Christmas display in the city of Pawtucket, Rhode Island.[36] The display was put up in cooperation between the city and a local merchant's association and was set up in a park (owned by a non-profit

[36] *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

organization) located in the middle of the city's shopping district.[37] The display included Santa's house and sleigh, decorative candy canes, a Christmas tree, figures of carolers, cutouts of other characters, lighting, and a large banner with the message "Seasons Greetings."[38] Also included in the display was a creche consisting of the traditional Christian figures: Jesus, Mary, Joseph, shepherds, kings, angels, and animals.[39] Pawtucket residents and the American Civil Liberties Union brought suit in federal court over inclusion of the creche, alleging a violation of the Establishment Clause.[40]

The Supreme Court in this case decided in favor of allowing the creche as constitutional.[41] The central reason behind this decision was context, because if focus is only put on the religious aspects of any activity then everything would be invalidated under the Establishment Clause.[42] The Court, in this case, found validity in the context surrounding the creche by viewing it in the context of the holiday season.[43] The Court notes that Christmas is a "historical religious event long celebrated in the Western World" and that the creche itself is simply a representation of that event.[44] Additionally, Christmas has been recognized as a national holiday.[45] Chief Justice Burger writes in the majority opinion, "display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as

[37] *Id.* Although the display in this case was not actually on publicly owned land, the fact that it is owned by the municipality and the municipality bears the costs of putting up and dismantling the display allows the Court's arguments to fit within this category of discussion.
[38] *Id.*
[39] *Id.* Creches are also known as nativity scenes. The two terms will be used interchangeably. The creche in this case had been included in the display for over 40 years and was owned by the city for the last 10 years. The City of Pawtucket purchased the nativity scene for $1365 and spent $20 each year to erect and dismantle it.
[40] *Id.*
[41] *Id.* at 687.
[42] *Id.* at 679-80.
[43] *Id.* at 679.
[44] *Id.* at 680. The Court later points out that the holiday has been recognized for over 20 centuries in the Western World and has been recognized by all three branches of federal government for over 2 centuries. *Id.* at 686.
[45] *Id.* at 680.

'Christ's Mass.'"[46] The creche is only a passive reminder of the origins of Christmas.[47] Even other displays that have been deemed by the Court as purely secular representations of Christmas, such as the Christmas tree, would lead one to recall the true nature of the holiday.[48]

The Court also asks that the creche be viewed in context with other lines of cases, specifically making mention of Sunday Blue Laws. The Court argues that to assume a creche advances religion in violation of the Constitution would require viewing it as more of an endorsement of religion than Sunday Closing Laws which also have purely religious origins.[49]

To add to its view that context should be given to religious displays, the Court also makes an argument that what should also be looked to is the purpose of the displays. According to the Court, "[it] has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."[50] The Court finds in *Lynch* that the City's purpose of sponsoring the display to celebrate the holiday and depict its origins are valid secular reasons for erecting the display.[51]

Cases concerning nativity scenes are not the only ones heard by the Supreme Court in the realm of religious figures on public land. The Court has also heard two potential entanglements via use of the Ten Commandments, both decided on the same day. The first of these cases was *Van Orden v. Perry*. In this case, a monument inscribed with the Ten Commandments was placed on the grounds of the Texas State Capitol.[52] The figure itself was on a 22-acre plot of land that contained 17 monuments and 21 other historical markers, all of which were of objects and concepts

[46] *Id.* at 683.
[47] *Id.* at 685.
[48] *Id.*
[49] *Id.* at 681-82.
[50] *Id.* at 680.
[51] *Id.* at 681.
[52] *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

that helped to form the Texan identity.[53] The display not only included the two tablets that contained the Ten Commandments, which was questioned in the case, but also an eagle holding an American flag, an eye inside of a pyramid, two Stars of David, and two Greek letters that represented Christ.[54]

The Court decided that although the monument displaying the Ten Commandments had religious significance, it had "undeniable historical meaning" as well.[55] The text is religious, but it was also an important influence in the State's legal and political history.[56] To help illustrate the importance of the text, not just in Texas but for the nation as a whole, the Court laid out numerous examples of passive monuments. Inside the Supreme Court building, and among other lawgivers, a statue of Moses has stood holding two tablets inscribed with portions of the Ten Commandments; representations of the Commandments are the North and South Gates of the Courtroom; a statue of Moses sits in the Library of Congress' Jefferson Building; a medallion with the Commandments is on the floor of the National Archives; a statue with the tablets can be found in the Department of Justice; Moses is also depicted in the Chamber for the United States House of Representatives.[57] These examples serve to show the enormous relevance that some religious figures hold with respect to the nation's history and laws. Ultimately, the Court found that the Ten Commandments depicted in the monument at the Texas Capitol did not rise to a level of religious entanglement to violate the spirit of the First Amendment.[58]

Just as influential was Justice Breyer's concurring opinion in *Van Orden*. Justice Breyer stressed that religious symbols must be viewed in context, not just in isolation, to establish their

[53] *Id.*
[54] *Id.*
[55] *Id.* at 690.
[56] *Id.* at 691-92.
[57] *Id.* at 688-89.
[58] *Id.* at 691-92.

larger purpose.[59] He stressed that the display should be viewed as a whole and that the purpose behind its construction should be taken into consideration.[60] In this particular instance, the monument was given to the State by the Fraternal Order of Eagles to "highlight the Commandments' role in shaping civic morality as part of the organization's efforts to combat juvenile delinquency."[61] Additionally, he states the monument's location amongst other monuments suggests that nothing of a religious nature was meant by its being included.[62] All monuments were on the grounds to "illustrate the ideals of those who settled in Texas and of those who have lived there since that time."[63] Lastly, for Justice Breyer, the context of the monument having stood for 40 years without issue was also determinative.[64] That span of time, and the 6 years that the petitioner regularly walked past the figure, would suggest that few people would have inferred the exhibit to be a government effort to advance or compel the practice of one particular religion.[65]

In contrast to both the majority and Justice Breyer's opinions in *Van Orden*, *McCreary County v. American Civil Liberties Union* struck down the use of the Ten Commandments.[66] The Court made this determination by once again looking to the purpose of the displays.[67] The displays in question were copies of the King James Version of the Ten Commandments.[68] In McCreary County, the text was ordered to be posted in a high traffic area of the courthouse; in Pulaski County the text was unveiled in a ceremony that was presided over by a pastor and included the county

[59] *Id.* at 701, 703.
[60] *Id.* at 701.
[61] *Id.*
[62] *Id.* at 702.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005).
[67] *Id.* at 851.
[68] *Id.*

Judge-Executive telling a story of an astronaut that went into space and became convinced there was a "Divine God."[69] After the ACLU filed suit against the counties in federal court, both counties modified their displays to include 8 other documents either religious in theme or taken as an excerpt to highlight religious elements.[70] When injunctions were entered by the District Court, both counties altered their displays again, this time removing the other religious texts and adding ones such as the Declaration of Independence, the Bill of Rights, and Magna Carta, among others.[71] The Counties' argued the Ten Commandments were part of a display on the foundation of American law and government.[72]

The Supreme Court in *McCreary County* made a very important point in determining that the displays were unconstitutional: in order for constitutionality to exist, the stated secular purpose of the displays must be genuine and the government's principal objective.[73] The majority opinion states "it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[74] The Court felt that in the given sets of facts, with the Counties initially showing religious intent and displaying a religious object by itself only later adding more secular documents after the display came under fire, the Commandments were posted not with the aim of showing its influence of secular law, but to show its religious statement.[75]

One further display that came to be reviewed by the Supreme Court was a memorial of a Cross. In the case of *American Legion v. American Humanist Association*, the American Humanist Association filed suit in District Court over the Bladensburg Peace Cross, alleging that the cross

[69] *Id.*
[70] *Id.* at 852-54.
[71] *Id.* at 855-56.
[72] *Id.* at 856-57.
[73] *Id.* at 864.
[74] *Id.*
[75] *Id.* at 869-70.

being on public land was a violation of the Establishment Clause.[76] Planning for the construction of the Cross began after residents of the Maryland County where it is located formed a committee to build a war memorial for the soldiers who lost their lives during the First World War.[77] The cross was chosen as the symbol portrayed in the monument because it had become an essential symbol of the war.[78] As the Court explains, "after the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home."[79]

The focus of the Court, in a majority opinion written by Justice Alito, was centered around the difficulty associated with identifying the original purpose of some monuments, symbols, or practices that have ceremonial, commemorative, or celebratory purposes and the consideration that these objects and exercises can take on additional secular purposes over time.[80] No one knows if the dominant motivation for the inclusion of a cross in many World War I memorials was due to its status as a symbol of the war and this far removed from the erections of these memorials, it would be almost impossible to do so.[81] But one thing that may be determined is objects with religious meaning can take on new secular meanings over time.[82] In the instance of the Cross, the object itself went from being strictly a religious mark associated with the Holy Trinity and the sacrifice of Jesus Christ in the Christian world to being a representation of the sacrifice of those that fought for the nation. Later, the memorials containing those crosses took on even further meaning. Those locations became places where communities could gather to commemorate and

[76] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2069 (2019).
[77] *Id.* at 2068.
[78] *Id.*
[79] *Id.* at 2074. The Cross was built in 1925 and had remained in the location for 89 years until the suit was filed.
[80] *Id.* at 2081-83.
[81] *Id.* at 2085.
[82] *Id.* 2082-83.

honor all of the soldiers who have fallen and continue to fall in the line of duty.[83] Justice Alito also stressed the similarities between the situation of the Cross and the Ten Commandments in *Van Orden* and *McCreary*.[84] He reiterates: "For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. They have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent public buildings in our Nation's capital."[85]

Looking at these four cases, it is apparent the Supreme Court is tolerant of religious symbols on public land so long as the symbols can be understood to have taken on new meanings or roles that are more secular in nature.[86] Religious symbols are also tolerated when they are used to commemorate historic events or national holidays and do not have the primary purpose of advancing religion.[87] In the instances noted, religious symbols were not used to favor or advance religion, but as an acknowledgement of holidays, our nation's roots, and the sacrifice of our fallen soldiers. These symbols have taken on civic meaning, and the Court, cognizant that they have meaning other than the purely religious, has been permissive toward the continuance of these practices.

C. Despite Supreme Court Tolerance, These Practices Will Continue to Decline

[83] *Id.* at 2090.
[84] *Id.* at 2082-83.
[85] *Id*. at 2083.
[86] *See* Deborah K. Hepler, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J.L. & PUB. POL'Y 93, 108-09 (1996) (analyzing *Lynch v. Donnelly*, among other cases, for its involvement in judicial recognition of civil religion).
[87] *See* Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. LAW & POL. 93 (2007) (discussing the reasoning implemented by the Supreme Court in both the Van Orden and McCreary cases, how these decisions have been implemented in subsequent lower Court opinions, and the future of their treatment).

The discussion above indicates that the Supreme Court is willing to allow Sunday Blue Laws if they possess secular, civic benefits to the public. Sunday Laws are beneficial in that they allow relief from the stresses of everyday life. They allow people to focus on spending time with family, getting a chance to rest from work, and taking time to participate in activities for which there may otherwise be little time. Especially in the modern day, when the day-to-day can move at such a fast pace, these laws allow for a much-needed time out.

Similarly, the Court is willing to allow religious displays when their primary purpose is not one of advancement of religion. During the holiday season, many decorations go up across the nation. All are rooted in a holiday season which itself is religious in nature and adhered to by many a denomination. Monuments have historically been placed because of their importance to the nation and its heritage, despite being sacred to many of faith.

Yet, based on what has been posited by the Court and by trends in our society, it appears that these practices will decline. Sunday Closing Laws over the years have been repealed all across the country and very few remain.[88] Those that have survived are mostly restrictions and limitations on the Sunday sale and distribution of alcohol.[89] While this is not a result of First Amendment interpretation by the Court, quite the opposite, it continues to happen. Part of this may be due to residents of various jurisdictions wanting more freedom in how they choose to spend their time. It may also be caused by the ineffectiveness of such legislation. In the alternative, there may be jurisdictions that did not want those laws in their books because of their initial ties to religion and felt it better to rid themselves of such entanglement. Whatever the case, Sunday Closing Laws are in decline.

[88] *Blue Laws in the United States*, WIKIPEDIA (Last Updated Nov. 6, 2019, 12:20 PM), https://en.wikipedia.org/wiki/Blue_laws_in_the_United_States.
[89] *Id*.

Some religious symbols on public land may suffer a similar fate, however a differentiation must be made between religious symbols that are used to commemorate holidays or the holiday season and other symbols located on public grounds. Holiday decorations during the season would seem likely to continue. As noted above, Christmas trees, candy canes, colorful lighting, gingerbread men, depictions of Santa Claus and many others are all seen by the Court as being secular in nature. Even the Christmas tree over time has come to be seen as symbolic of the season of giving and less as image born out of the Christian tradition. The use of creches and menorahs and other more overtly religious symbols may still be allowed given the context surrounding their use (and their constitutionality must be determined on a case-by-case basis).

The opposite would appear to be the case with other symbols on public grounds. The focus of the Court on these symbols has typically been one of history and tradition. The Bladensburg Cross was allowed because its history suggested that it was built when the cross was a strong image associated with the War. That monument and the others above have stood for long periods of time, decades at the least. But what history and tradition would a new monument have? Justice Breyer says as much in his concurrence in the *American Legion* case, stating: "The Court appropriately 'looks to history for guidance,' but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community. A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach."[90] This is particularly persuasive. How would the Court view a new erection of a cross for fallen servicemen and women as compared to the one that has stood for a century? How would it view a new erection of the tablets containing the Ten Commandments as opposed to the one that had stood for half a century? How would it view a different religious text that does not have the

[90] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. at 2115.

same historical importance in the foundation of this nation as do the Commandments? It seems highly unlikely that new monuments with religious depictions would continue to be erected given the Court's continued focus on the nation's history and tradition.

III. The Continuation of Inherently Religious Practice: Legislative Prayer

The Supreme Court has been willing to allow the practice of performing prayers and invocations to commence federal, state, and local legislative sessions by reason of its status as a traditional exercise dating back to the time of the Founding Fathers and its secular purpose of setting lawmakers in the right frame of mind at the outset of their undertakings.

What has commonly become referred to as legislative prayer is a convention adhered to by many legislatures at all levels of this country's federalist government, most notably the United States Congress.[91] It customarily involves the invitation by the legislature of a priest, rabbi, imam, or other religious figure to speak ahead of a legislative session and ordinarily includes a varying degree of religious rhetoric, which can either be sectarian or nonsectarian. While this practice has occurred since the foundation of this nation and continues to occur, seemingly unscathed, to this day, there have been challenges that have put to question the constitutionality of the routine.

The first notable remonstrance of legislative prayer came in the form of *Marsh v. Chambers*.[92] The matter arose when a member of the Nebraska Legislature brought an action in the United States District Court for the District of Nebraska claiming that the practice by the Nebraska Legislature went against the protection afforded by the Establishment Clause and

[91] *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) ("When Marsh was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent.").
[92] *Marsh v. Chambers*, 463 U.S. 783 (1983).

seeking to enjoin enforcement of the practice.[93] The legislature had begun each of its official sessions with a prayer performed by a chaplain who was chosen twice annually via approval from one of the legislature's councils.[94] Notwithstanding the continuous necessity for approval, the same Presbyterian minister had been appointed as chaplain since 1965 (with the case only being heard in 1983) and was paid for his services at a sum of approximately $320 per month for each month that the legislature was in session, with the money coming from public funds.[95] The District Court held that the prayers themselves did not violate the First Amendment but that the act of paying for the prayers with public funds did constitute a violation.[96] On appeal, the Court of Appeals for the Eight Circuit took the analysis a step further and ruled that even the act of having a chaplain perform prayers to commence legislative sessions was, in and of itself, a violation.[97]

The Supreme Court reversed, however, finding the practice completely within the limits of the Establishment Clause.[98] In the opinion of the Court, the facts that the one clergyman from a single religious denomination was used, that he was being paid with public expenses, and that the prayers followed the Judeo-Christian tradition were not enough to invalidate the practice.[99]

The Court's primary explanation for the constitutionality of the practice was the history and tradition associated with it.[100] First, the Court remarks that at all three levels at which the case was heard, including the United States Supreme Court, each of the proceedings began with an

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[93] *Id.* at 785.
[94] *Id.* at 784.
[95] *Id.* at 785.
[96] *Id.*
[97] *Id.* at 786. The Appellate Court used the *Lemon* Test and determined that the practice breached all three elements: "the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement."
[98] *Id.* at 793.
[99] *Id.*
[100] *Id.* at 786. Note that the Court completely throws away use of the *Lemon* Test, opposing the manner in which the Appellate Court had reach its conclusion.

invocation stating: "God save the United States and this Honorable Court."[101] Next, the Court observes that on the 22nd of September in 1789, just three days before the Bill of Rights was written, Congress had enacted legislation that authorized the appointment of paid chaplains to provide prayer at the inception of Congressional sessions.[102] The Court does note that "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees" and that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it", but urges that, in the context of legislative prayer, more is at play here than historical patterns and two centuries of national practice cannot just be cast aside.[103]

The Supreme Court's insight provides useful context to the issue at hand. It would make little sense for Congress to have intended for the practice of legislative prayer to be a violation of the protections afforded by the Constitution just days after taking the effort to legalize the practice. The complete backtracking on legislation has never been done in such an expedited fashion and with such vast repercussions as would be the case if Congress had intended to change its mind after three days (and using a Constitutional Amendment, of all things).

However, the Court's analysis of the issue did not stop at whether the use and payment of a chaplain in the performance of legislative prayer is constitutional. It also took up the concern of whether a chaplain's long tenure would show preference to a particular set of religious views.[104] Yet, instead of agreeing with the appellate court that such a long tenure advances the beliefs of a particular church, the Court posits that the minister was reappointed because of his qualities as a

[101] *Id.*
[102] *Id.* at 788.
[103] *Id.* at 790.
[104] *Id.* at 793.

person and the quality of his performance.[105] Chief Justice Burger, writing the opinion for the majority, states: "Absent proof that the chaplain's reappointment stemmed from an impermissible motive, [the Court concludes] that his long tenure does not in itself conflict with the Establishment Clause."[106]

In addition, the Court addressed the content of legislative prayers.[107] It points out that as long as the opportunity for prayer is not exploited, used to proselytize, or advance or disparage any one particular set of religious beliefs, the contents of the prayers themselves are of no concern to judges.[108]

Although the *Marsh* case may seem to settle the dispute over whether prayer is allowable in government settings, the Supreme Court recently took up another case to further clarify the issue and to address the conclusions reached in *Marsh*. In *Town of Greece v. Galloway*, the Court saw another case that involved legislative prayer, though this case focused on the practices of a town council rather than a state legislature.[109] The town of Greece, New York began to perform legislative prayer in 1999 after a newly appointed town supervisor wanted to replicate the practice he had found meaningful during his time in the county's legislature.[110] The method for choosing which chaplain would deliver the invocation was much less structured than the one performed by the Nebraska legislature in Marsh.[111] A town employee would simply call the local congregations listed in a directory until an available chaplain was found and, later, a list was formed of those chaplains who had agreed to return in the future.[112] Nearly all of the congregations in town were

[105] *Id.*
[106] *Id.* at 793-94.
[107] *Id.* at 794-95.
[108] *Id.*
[109] *Town of Greece v. Galloway*, 572 U.S. at 569-70.
[110] *Id.* at 570.
[111] *Id.* at 571.
[112] *Id.*

Christian and all of the ministers who agreed to perform the prayers were also.[113] Two residents later voiced their concerns that the prayers consistently relied on Christian themes to the exclusion of others who did not share those same beliefs.[114] To alleviate these concerns, the town invited a Jewish person and the leader of the local Baha'i temple to deliver prayers as well as accepting a request to perform an invocation by a Wiccan priestess who had read press reports about the prayer controversy.[115] Despite this effort, the two resident brought suit over the issue, alleging that the Establishment Clause was violated due the preference of Christians over those of other beliefs and for sponsoring sectarian prayer.[116]

The Supreme Court, in its decision, returns to the history of the practice as discussed in *Marsh*. The Court adds to what was established in *Marsh* by stating that the Framers considered legislative prayer as a subtle acknowledgement of religion's continued role in society and that it posed no threat to establishment because lawmakers were not compelled to attend the prayers.[117]

The Court also addressed a misconception that the prayers themselves must be nonsectarian in order to conform with the constraints of the First Amendment. It asserts that "an insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases" since the drafters of the First Amendment would have been acclimated to legislative prayers that featured explicitly religious themes.[118] Also pointed out is the fact that *Marsh* never turned on neutrality of its content, with the Court saying that the fact "a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing

[113] *Id.*
[114] *Id.* at 572.
[115] *Id.*
[116] *Id.* In the District Court for the Western District of New York, the practice was upheld because no impermissible preference for Christianity was found and the court followed the reasoning from *Marsh*. The Court of Appeals for the Second Circuit reversed, holding that, when viewed by a reasonable observer, some aspects of the program imparted that the town was endorsing Christianity. *Id.* at 573-74.
[117] *Id.* at 576.
[118] *Id.* at 578.

reference to religious doctrines, does not remove it from that tradition."[119] In actuality, the only mention by the *Marsh* Court of the content itself was done to warn that such prayer must not be used to proselytize.[120] To end this discussion, the Court flips the argument for the nonsectarian standard on its head, hypothesizing that the standard would require government involvement in religious affairs to a much larger extent than just having chaplains come with their own prayers because it would require legislatures and courts to act as "supervisors and censors of religious speech."[121]

An even more intriguing and original argument posited by Justice Kennedy, who wrote the opinion of the Court, is that the prayers themselves also add some sort of benefit to the lawmakers themselves. He writes that many "may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing" and also that "legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."[122] The prayers also connect the lawmakers to traditions going back to the foundation of the nation.[123]

By looking at these cases on legislative prayer, it certainly clear that the Supreme Court is willing to view prayer in a government setting as within the bounds of the First Amendment.[124] It does not matter if the same rabbi, priest, or imam performs the ceremonial practice for years or that they are paid with taxpayer money to do so. It is not critical that the content of their speech be nondenominational. To the Court, the history and tradition associated with the practice, the idea

[119] *Id.* at 580, 583.
[120] *Marsh*, 463 U.S. at 794-95.
[121] *Town of Greece*, 572 U.S. at 581.
[122] *Id.* at 575, 587.
[123] *Id.* at 588.
[124] This is a contrast to the Supreme Court's views on religious exercise in the context of public schools. In the school setting, the Court is much less receptive to allowing such religious exercise, owing to the fact that schools are occupied by children who may be more susceptible to subtle coercive forces than adult lawmakers. *See Lee v. Weisman*, 505 U.S. 577 (1992).

that the Framers had no intention of including it in their model of First Amendment protection, and that the practice may provide some benefit to lawmakers' state of mind all point to the conclusion that legislative prayer should be afforded distance from Constitutional restraint. In fact, the only limiting factor to legislative prayer is that it must not be used in a way that takes advantage of the tradition via proselytization or the true favoring/advancement of a specific set of religious beliefs to the detriment of others.

The preceding cases demonstrate that the Supreme Court offers protection to legislative prayer from Constitutional enforcement.[125] Weight is particularly given to the notion that the practice has gone as far back as the Continental Congress and the Framers of the Constitution. And this is the reason that the practice will continue. Over time, more and more jurisdictions began participating in the same tradition that has always taken place at the federal level in both Houses of Congress. The tradition will always be the same. The tradition will always have the same origin, with our Founding Fathers. Nothing about its prevalence and continued practice would suggest that it is declining or will decline in the future. In fact, as evidenced by the *Town of Greece* case, the practice may continue to expand.[126] Legislative bodies at the municipal level may want to follow in the footsteps of their State and federal counterparts.

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[125] *See* Deborah K. Hepler, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J.L. & PUB. POL'Y 93, 108-09 (1996) (analyzing *Marsh v. Chambers*, among other cases, for its involvement in judicial recognition of civil religion); Michael M. Maddigan, The Establishment Clause, Civil Religion, and the Public Church., 81 CALIF. L. REV. 293, 337-38 (1993) (concluding that the Supreme Court should have recognized that the Marsh prayers did not violate the First Amendment because they exemplify American civil religion); Zachary D. Smith, Commandments, Crosses, & Prayers: The Roberts Court's Approach to Public Religion, 2015 B.Y.U.L. REV. 845, 860-63 (2015) (discussing the *Town of Greece* case as it relates to civil religion).

[126] *See Bormuth v. Cty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (finding that legislator-led prayer at meetings for a county Board of Commissioners was consistent with *Marsh* and *Town of Greece* and noting that the practice of legislative prayer is a norm, being practiced consistently in most states). *See also Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017) (finding that legislative prayer that was performed by a county Board of Commissioners which was solely Christian, was exclusively performed by legislators, and involved numerous instances of proselytization and encouraged audience participation was unconstitutional, but acknowledging the history of the practice and that many state, county, and local governments have allowed the practice of legislative prayer, including instances of legislator-led prayer).

IV. Conclusion

Civic religion is the concept that there exists religious influence and origins that continue to be prevalent in American society and government. It is the idea that some level of the historical religious impact has been and continues to be acknowledged by the system that governs the nation. But such acknowledgement of religion by government would seem to fly in the face of one of the principal objectives of the Bill of Rights, the protection of religious freedom. Yet it does not. The Supreme Court, on numerous occasions, has reasoned that religious entanglements are permissible. This is because of their civic meaning. They are things that hold importance in our society beyond the purely religious. They show us the diversity of people's views, shine a light on the views of the country's founders, and inform us of the history associated with the nation. And this is why the Court has been tolerant is such entanglements.

Yet it seems that different practices that involve government interaction with religion have had and will continue to have differing trajectories and intensities. Sunday Blue Laws, despite being found constitutional on numerous occasions, are fading away. While not having the same religious connotations they once did, they also no longer have the same prevalence. Religious symbols on public land in the form of holiday decorations will indeed continue, but many of those decorations are ones that have lost their religious connection. And those that still have this connection must be qualified in context as part of larger displays or face being removed altogether. Religious symbols in the form of monuments face a much harder fate. It would appear that the erection of new monuments would fail to comport with the Court's long and hard look at the history and traditions of the nation and its relation to the symbol included in the monument. That would certainly be case for any monument that denotes anything outside of the Judeo-Christian tradition, for no other religion has had the same connection to the history of our government. In

contrast, history and tradition is precisely why legislative prayer continues and will continue to be a constant in legislative sessions. It is a practice that has been conducted for over two centuries and will seemingly go on for many more. Legislative prayer has the ability to go where religious symbols do not, it can adapt to diversity. We live in a society that is much more diverse that the one at the time of the Founders and legislative prayer can handle that diversity. An imam or rabbi or a Wiccan priestess or any other religious observer can preside over an invocation just as well as a Catholic priest.