2008

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Recommended Citation

Ira C. Lupu & Robert W. Tuttle, The Cross at College: Accommodation and Acknowledgment of Religion at Public Universities, 16 Wm. & Mary Bill Rts. J. 939 (2008).

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Forthcoming in Volume 16, William and Mary Bill of Rights Journal (2008)

Part I: Introduction

In October 2006, President Gene Nichol of the College of William & Mary ordered a change in the practice of displaying a cross in the college's Wren Chapel.[2] Since the late 1930s, when Bruton Parish Church donated the cross to the college, the cross normally had been

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[2] Andrew Petkofsky, W & M president reiterates reasons for cross removal, Richmond Times Dispatch, Nov. 17, 2006, at B-1. Email from President Nichol to Students of William & Mary, Oct. 27, 2006 (copy on file with authors and law review); message from President Nichol to William & Mary Board of Visitors, Nov. 16, 2006, *available at* http://www.wm.edu/news/index.php?id=7026.

displayed on the chapel's altar and removed only for secular events or non-Christian worship.[3] The brass cross stands 18 inches tall and is inscribed "IHS," which represents the name "Jesus Christ."[4] Nichol concluded that permanent display of the cross on the altar treated non-Christian members of the college community as outsiders.[5] He directed that the cross should be removed from the display in the chapel except during "appropriate religious services."[6]

On campus and beyond, the decision sparked an intense controversy.[7] Opponents charged that the decision reflected hypersensitivity to those who were allegedly offended by the

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[3] Vince Haley, Save the Wren Chapel: An astounding bit of blabber from the president of William and Mary, National Review Online (Nov. 17, 2006), *available at* http://article.nationalreview.com/?q=NTk3Njc2MWM5OWNjZmY3MmNjYzUzMGJiNjZlZWFiY2E=; Susan Godson, History of the Wren Cross (Nov. 11, 2006) (copy on file with authors and law review).

[4] See picture of cross, *available at* http://www.flathatnews.com/news/102/nichol-defends-cross-removal-at-bov-meeting

[5] Nichol, Message to Board of Visitors, *supra* note 2. See also Gene R. Nichol, Balancing tradition and inclusion: Behind W&M's cross controversy, The Virginian-Pilot (Norfolk, Va.), Dec. 24, 2006, at J1; Petkofsky, *supra* note 2.

[6] Nichol, Message to Board of Visitors, *supra* note 2.

[7] Fredrick Kunkle, Upset About Cross's Removal, William and Mary Alumni Mount Online Protest, The Washington Post, Dec. 26, 2006, at B1; Shawn Day, Wren cross feud waged on Web, Daily Press (Newport News, VA), June 21, 2007.

display, and effectively sacrificed the tradition of the college to "political correctness."[8] Some claimed that Nichol's decision represented hostility to Christianity, or even to religion in general, by attempting to erase the chapel's spiritual heritage.[9] Alumni of the college drafted and circulated a petition – which eventually gathered well over ten thousand signatures – asking that the decision be reversed.[10] Several opponents publicly asked for Nichol's resignation, and one

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[8] George Harris, The Bishop, the Statesman, and the Wren Cross: a lesson in American secularism, 67:4 The Humanist 37 (July 1, 2007) (describing arguments of opponents of President Nichol's decision); Natasha Altamirano, Bow to diversity leaves altar empty; William & Mary removes cross from 'equally open' Wren Chapel, The Washington Times, Jan. 29, 2007, at A1; Wren Cross: Compromise Is Not Enough, The Regent's Voice, Jan. 13, 2007, *available at* http://regentsvoice.blogspot.com/2007/01/wren-cross-compromise-is-not-enough.html.

[9] Haley, *supra* note 3; Will Coggin, Does President Nichol's Agenda Call for Secularizing College? Richmond Times Dispatch, Dec. 18, 2006, at A-9; Matthew D. Staver, Cross of William and Mary, campusreportonline.net (Dec. 5, 2006), *available at* http://www.campusreportonline.net/main/articles.php?id=1372; see also letter from Erik W. Stanley, Liberty Counsel, to Gene Nichol, College of William & Mary (Dec. 1, 2006), *available at* http://lc.org/attachments/ltr_wm_mary_cross_120106.pdf (arguing that removal of cross from altar of Wren Chapel reflects hostility to Christianity).

[10] Fredrick Kunkle, Cross Returns to Chapel – But Not on the Altar, The Washington Post, Mar. 7, 2007, at B6 (17,000 signatures on petition). The petition was located on a website that has since been discontinued, www.savethewrencross.org. An archived copy of the petition may be found online at

donor revoked a large pledge to the college.[11] An outraged alumnus even filed a lawsuit challenging the removal of the cross.[12]

In response to this outpouring of criticism, Nichol appointed a Committee on Religion at a Public University to study the questions raised by the ongoing controversy over the chapel.[13]

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http://web.archive.org/web/20070702051241/www.savethewrencross.org/petition.php; Kunkle, *supra* note 7.

[11] Andrew Petkofsky, W & M donor cancels pledge, cites Wren cross; Loss of $10 million donation sets back college fundraising campaign, Richmond Times Dispatch, Mar. 1, 2007, at A1; W&M takes comments on Nichol's performance, Richmond Times Dispatch, Sept. 9, 2007, at B8. Opponents of Nichol have a website, on which they argue for his removal. See ShouldNicholBeRenewed.org. See also Karla Bruno, Request to BOV - William and Mary deserves better, April 11, 2007, *available at* http://savethewrencross.blogspot.com/2007/04/request-to-bov-let-gene-nichol.html

[12] Leach v. Nichol, 2007 U.S. Dist. LEXIS 38763 (E.D. Va., May 29, 2007), *affirmed*, 2007 U.S. App. LEXIS 27857 (4th Cir., Dec. 3, 2007). Carol Scott, W & M grad sues for cross' permanent return: A scholar said a First Amendment lawsuit against the College of William and Mary would be frivolous, Daily Press (Newport News, Va.), Feb. 13, 2007; Shawn Day, Judge dismisses Wren Cross lawsuit, Daily Press (Newport News, Va.), June 20, 2007.

[13] Bill Geroux, W&M will revisit debate on cross: Nichol wants group to explore role of religion in public universities, Richmond Times-Dispatch, January 26, 2007. Details about the William and Mary Committee on Religion at a Public University are available online, at http://www.wm.edu/committee_on_religion/

The committee, comprised of faculty, students, and alumni of the college, eventually recommended a compromise solution. The cross would be returned to permanent display in the chapel, but the cross would not be placed on the chapel altar except on Sundays or during Christian worship services.[14] At all other times, the cross would be located in a glass case and accompanied by a plaque describing the historical significance of the chapel and cross. Nichol and the school's Board of Visitors embraced the compromise, and many opponents seemed to accept the resolution.[15] The now-encased cross is located toward the front of the chapel, against the side wall and just outside the chancel rail. In this location, the cross is barely visible to those who enter through the chapel's narthex, although it can be easily seen from the front of the nave.[16]

The controversy over the Wren Chapel cross provides an especially useful prism for

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[14] Joint Statement of the Board of Visitors and the President, Mar. 6, 2007, *available at* http://www.wm.edu/committee_on_religion/statements/bovpresmar6.php

[15] Id.; Kunkle, *supra* note 7; Andrew Petkofsky, W&M to return cross to chapel: Panel's compromise restores Wren cross, welcomes other religious objects for display, Richmond Times-Dispatch, Mar. 7, 2007; Natasha Altamirano, Return of cross quiets debate at William & Mary, The Washington Times, Mar. 8, 2007, at B1; Statement by Save the Wren Cross Website, *available at* http://web.archive.org/web/20070702051010/www.savethewrencross.org/stwcstatement.php.

[16] Bill Geroux, Wren Cross is returned to William and Mary chapel: In a compromise, it's now in a display case bearing a plaque, Richmond Times-Dispatch, Aug. 4, 2007. The narthex is the entrance area furthest from the altar; the nave is the section in which the congregation sits.

exploring three facets of contemporary Establishment Clause law, all of which figured prominently in the arguments about removal of the cross. After a brief sketch in Part II of relevant portions of the College's history, including its transition from a private college to a state institution, we turn to the three facets of Establishment Clause jurisprudence illuminated by the dispute. Part III addresses the foundational question of that jurisprudence – against what type of injury or injuries does the Establishment Clause protect? President Nichol defended his decision in terms of concern for those who might feel excluded by display of the cross. Opponents argued that such feelings of exclusion are not the kind of injuries that deserve attention or redress. Because students could have the cross removed for particular events, and the university never required any student to use the chapel, display of the cross injured no one.

These rival positions on injury closely track the two dominant positions in the contemporary law of the Establishment Clause law. These competing positions were on display most recently and importantly in *Hein v. Freedom from Religion Foundation*,[17] the Supreme Court's decision limiting taxpayer standing to bring suit under the clause. As the Wren Chapel controversy amply illustrates, the emphasis on individualized injury in Establishment Clause discourse seriously misconstrues key elements of the clause's history, doctrine, and normative focus. Although the clause has a role to play in protecting individual religious liberty, it has an equally or more important role as a structural limitation on government jurisdiction over religion, including the authority to promote religion.

[17] 127 S.Ct. 2553 (2007). For our analysis of *Hein*, see Ira C. Lupu and Robert W. Tuttle, Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2007 B.Y.U. L. Rev. ____ (forthcoming).

The remainder of the paper explores how that structural limitation should be applied in the context of the display of the Wren Chapel cross. In Part IV, we assess the first of the two theories that might support at least some version of the continued display of the Wren Chapel cross. Drawing on a rich and complex theme in Establishment Clause jurisprudence, opponents of the President's decision asserted that public display of the cross did not favor Christianity, but simply "accommodated" the religious needs of Christian students. This assertion highlights uncertainties about how Establishment Clause standards should be applied to public universities, and in particular to chapel and chaplaincy programs in those institutions. In some settings, such as healthcare facilities and the military, government enjoys constitutional discretion to facilitate private religious experience. But that discretion is bounded. Government conduct that purports to accommodate religion nonetheless may violate the Establishment Clause if such facilitation affirmatively promotes the practice of one or more faiths, or imposes unnecessary burdens on those who do not participate in the accommodated religious activity. Viewed in light of the Supreme Court's criteria for assessing permissible accommodations of religion, the university's support for the chapel itself is defensible, but the traditional Wren Chapel cross display on the chapel's altar would be open to serious challenge. As we explain in this Part, display of the Wren Chapel cross on the altar as a default position – in that place unless special reason exists to temporarily displace it – confers a special privilege on one faith and does not alleviate a discernible religious burden on Christian students. The theory of religious accommodation thus does not support opponents of the President's decision.

In Part V, we turn to the second theory that might support continued display of the cross – the claim that government may "acknowledge" religion without running afoul of the

Establishment Clause. The claim invokes the Supreme Court's opinions on public display of religious images and messages, under which the Court has approved religious messages within holiday displays and other monuments as long as such messages reflect governmental "acknowledgment of our religious heritage,"[18] rather than positive endorsement of the religious content of the messages. Those who opposed the change asserted that the cross's prior location on the chapel's altar acknowledged the role of Christianity, and especially the Anglican tradition, in the history of the college.

As we explain in this Part, the claim of acknowledgment typically encompasses a variety of distinct, though rarely separated, elements. The idea of acknowledgment can be disentangled into three discrete strands – historical accuracy, reverence, and cultural recognition. Until quite recently, the Supreme Court's opinions had not called attention to the multiplicity of meanings inherent in the concept of acknowledgment, but Justice Scalia's dissent in *ACLU of Kentucky v. McCreary County*[19] has now brought this ambiguity to the forefront of debates over the Establishment Clause. The Wren Chapel cross controversy provides a particularly useful setting for exploring and clarifying distinctions among the strands. We argue that the concept of acknowledgment as historical accuracy poses relatively few problems under the Establishment Clause, but the Wren Chapel cross, when placed upon the altar, has little claim to historical provenance within the chapel. The concept of acknowledgment as reverence could provide a sufficient basis for permanent placement of the cross on the Wren Chapel altar, but this interpretation of "acknowledgment" has little support in present Establishment Clause doctrine,

[18] Lynch v. Donnelly, 465 U.S. 668, 677 (1984).

[19] 545 U.S. 844, 855-912 (2005) (Scalia, J., dissenting).

and even the most ambitious account of reverential acknowledgment would not permit display of a specific tradition's sacred symbol. Therefore, acknowledgment as reverence provides supporters of that placement with no basis for their position. Finally, acknowledgment as cultural recognition provides a slightly more plausible explanation for continued display of the Wren Chapel cross, but this version of acknowledgment demands a plausible secular justification for display of religious images, and we do not believe such a justification can be given for permanent display of the cross on the Wren Chapel altar.

Ultimately, we argue that the compromise agreement reached by the President, Board of Visitors, and Committee on Religion is more than simply a pragmatic settlement of a contentious question. This agreement manifests the concept of acknowledgment as historical accuracy, while simultaneously attesting to the Establishment Clause's limits on government promotion of a particular faith.

Part II: Background – Religion and the Role of the State in the College of William & Mary

The controversy over the Wren Chapel cross reflects a serious debate over the present role of religion in a public university. The College of William and Mary's 1693 charter,[20] however, suggested no uncertainty about the importance of religion in that institution's founding. The charter, granted by King William III and Queen Mary II of England, identified three

[20] The Charter of the College of William and Mary, in The History of the College of William and Mary From Its Foundation, 1660, to 1874 (Richmond, Va.: J.W. Randolph & English, 1874), 3-16.

purposes for the college.[21] First, it would supply ministers to the Church of England in Virginia. Second, it would provide a place "that the youth may be piously educated in good letters and manners." Third, it would spread the Gospel among the "Western Indians."[22]

The 1693 charter is illuminating for many reasons, but especially because it so clearly demonstrates the union of religion and government after the Glorious Revolution.[23] In the charter's provisions, the crown asserted responsibility over the religious education and spiritual welfare of its citizens, as well as the spread of Christianity to nonbelievers. The concern for "propagation of the gospel" pervades the charter, and appears in virtually every discussion of the

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[21] Id. at par. 1. See also Wilford Kale, Hark Upon the Gale: An Illustrated History of the College of William and Mary (Norfolk, Va.: The Donning Co., 1985), 17.

[22] Charter, *supra* note 20, at par. 2.

[23] See generally Hugh Trevor-Roper, Toleration and Religion after 1688, in From Persecution to Toleration, ed. O. Grell, J. Israel, and N. Tyacke (Oxford, 1991); Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 B.Y.U. L. Rev. 1385, 1412-14 (the Church of England during the reign of William and Mary); Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. and Mary L. Rev. 2105, 2160-61 (2003); Joel A. Nichols, Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia, 80 N.Y.U. L. Rev. 1693, 1707-08 (2005); Laura Zwicker, Note: The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined, 66 Ind. L.J. 773,773-783 (1991).

content of instruction at the college.[24]

Moreover, the charter promised substantial royal subsidies for the college. In addition to a direct payment for the construction of the college,[25] the charter assigned to the college revenues from a portion of the tax on tobacco exports from Virginia and Maryland,[26] as well as rents from certain royal lands.[27] The charter also conferred on the college the office of royal surveyor in Virginia, which carried the right to collect fees from those – including, in 1747, George Washington – it licensed to conduct surveys in the colony.[28]

Finally, the unity of church and state are most fully expressed in the charter's provisions for governance of the college. The document granted authority over the school to an independent body,[29] originally functioning as trustees and later as a corporate board, which was

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[24] Charter, *supra* note 20; see especially preamble & par. 1. On the College of William & Mary and the Anglican establishment, see George M. Marsden, The Soul of the American University: From Protestant Establishment to Established Nonbelief (New York: Oxford University Press, 1994), at 54.

[25] Id. at par. 14.

[26] Id. at par. 15.

[27] Id. at par. 17.

[28] Id. at par. 16. On Washington's licensing by the college, see Kale, *supra* note 21, at 44.

[29] The charter granted the original powers to trustees who held property for the college until the college was sufficiently well established to possess a separate legal identity. At that point, in 1729, the trustees transferred ownership of the property to the college, and a board of

empowered to make regulations for the school, provided such regulations did not conflict with the laws of the realm, "or to the canons and constitutions of the church of England, by law established."[30] The initial trustees were elected by Virginia's general assembly, and included the Lieutenant Governor of the colony, Francis Nicholson, and James Blair, the Bishop of London's representative ("commissary") in Virginia.[31] In addition to the authority granted to the visitors,

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visitors was elected to exercise governance in the name of the college. See The Transfer of the College of William and Mary, in The History of the College of William and Mary From Its Foundation, 1660, to 1874 (Richmond, Va.: J.W. Randolph & English, 1874), 17-33 (formal document transferring control of the college from the trustees to a board of visitors); Parke Rouse, Jr., A House for a President: 250 Years on the Campus of the College of William and Mary (Richmond, Va.: The Dietz Press, 1983), 12. The board of visitors, as specified in the charter, functioned as a self-perpetuating body until the college became a state institution in 1907, at which point the Governor of Virginia received authority to name visitors. Rouse, 154-55.

[30] Charter, *supra* note 20, at par. 9.

[31] Blair and Nicholson were the most important figures in establishment of the college. James D. Kornwolf, "So Good a Design" The Colonial Campus of the College of William and Mary" Its History, Background, and Legacy (Williamsburg, Va.: The College of William and Mary, 1989), 13-22. As commissary, Blair was the most powerful ecclesiastical official in the colony because the Church of England did not have a bishop serving in the colony – indeed, no bishop served anywhere in North America. Instead, the parishes in the colonies came under the jurisdiction of the Bishop of London. Kale, *supra* note 21, at 21-22.

the charter gave the college's president and faculty a specifically political right – the power to select a representative in the general assembly.[32]

Blair, a Scots-born clergyman then serving in Henrico parish, was named the first president of the college, "during his natural life," as well as first rector (or chair) of the trustees.[33] He served as president for fifty years, until his death in 1743. Blair, like six presidents who would follow him, also held the rectorate of Bruton Parish Church during his tenure in office, and continued his position as commissary of the Bishop of London.[34] In addition, Blair, followed by four of his pre-Revolutionary successors as president, served on the Governor's Council, which combined judicial, administrative, and legislative functions within the colony.[35]

Work on the college's main building, now called the Sir Christopher Wren Building, commenced soon after the charter was granted, although it was not ready for use until 1700. An early 18th-century source attributed the building to the famous architect Sir Christopher Wren,[36] and although the evidence for the attribution is scant, arguments for Wren's involvement in the

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[32] Charter, *supra* note 20, at par. 18.

[33] Charter, *supra* note 20, at par. 3.

[34] Three of Blair's five successors before the American Revolution also held the position of commissary (William Dawson, Thomas Dawson, and John Camm). Rouse, *supra* note 29, at 21-73. See also Harold Wickliffe Rose, The Colonial Houses of Worship in America: Built in the English Colonies Before the Republic, 1607-1789, and Still Standing (New York: Hastings House, 1963), 15-16 (on the role of commissary); 455 (on college presidents at Bruton Parish).

[35] Id.

[36] Kornwolf, *supra* note 31, at 44-45.

design are at least plausible.[37] The college was originally planned as a quadrangle, but a shortage of funds limited construction to only two sides, the east range – the main classroom and residence quarters – and the north wing, which contained the Great Hall.[38]

In 1699, the Virginia General Assembly solidified William & Mary's union between church and state when it decided to relocate the colonial capital from Jamestown to the new site of the college, previously called Middle Plantation but now renamed Williamsburg.[39] Loss of the previous capitol building to fire prompted the decision, and from 1700-1705 the general assembly met in the Great Hall of the college while a new capitol was under construction.[40] The legislature would return to the college from 1747-1753, while the new capitol was rebuilt after another fire.[41]

Although King William and Queen Mary granted the charter in 1693, and a grammar school began operation soon thereafter, the college did not hire any professors until twenty years later.[42] This delay was caused at least in part by a 1705 fire that destroyed the college building.[43]

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[37] Id. at 29-35, 44-49; Kale, *supra* note 21, at 27-28.

[38] The south wing, containing the chapel, was completed in 1732; the west range was never completed. Kale, *supra* note 21, at 29, 41; Kornwolf, *supra* note 31, at 36-56; Rouse, *supra* note 29, at 10, 12-13.

[39] Kale, *supra* note 21, at 29.

[40] Id. at 31.

[41] Id. at 44.

[42] Lyon C. Tyler, Early Courses and Professors at William and Mary College, Address to the Phi Beta Kappa Society, William and Mary College, Williamsburg, Va. (Dec. 5, 1904), at 1.

Reconstruction did not begin in earnest until 1710 and was not completed until 1716.[44] By the 1720s, however, the college had gained sufficient momentum that President Blair arranged for construction of the college's south wing, which contained the chapel.[45] The building was completed and the chapel consecrated in 1732.[46]

Between the 1720s and the 1770s, the college maintained its close bond with the Church of England. As required by the college's regulations, all presidents of the college during this period were ordained clergy of the Church of England, and most faculty were as well.[47] Bishops of London served as chancellors of the school.[48] The divinity school operated during this period, although it apparently failed to generate a significant number of new clergy for the church;

See also Kale, *supra* note 21, at 35.

[43] Kale, *supra* note 21, at 31, Kornwolf, *supra* note 31, at 43-44. See also Historical Sketch of the College of William and Mary in Virginia, in The History of the College of William and Mary From Its Foundation, 1660, to 1874 (Richmond, Va.: J.W. Randolph & English, 1874), 34-69, at 40.

[44] Kale, *supra* note 21, at 35. An Indian school also operated at college after 1712. Id. at 37-39. Like the divinity school, enrollment in the Indian school appears not to have matched expectations.

[45] Id. at 41; Rouse, *supra* note 29, at 12.

[46] Kale, *supra* note 21, at 41; Historical Sketch, *supra* note 43, at 41, 43; Rouse, *supra* note 29, at 12.

[47] Kale, *supra* note 21, at 41.

[48] Rouse, *supra* note 29, at 225 (Appendix I, listing chancellors of the college).

records indicate that fewer than forty graduates of the divinity school received ordination.[49]

The American Revolution brought dramatic changes to the college because both England and the Anglican Church withdrew support. The crown ended its substantial funding of the college, leaving the school with only the rent from relatively unproductive land, along with the office of surveyor, which the college seems to have retained well into the 19th century.[50] Once among the wealthiest of institutions in the colonies, the college was reduced to an annual budget of around a tenth of its former income.[51] The new government of Virginia provided little help, and its decision in 1780 to move the state capital to Richmond left Williamsburg as something of a backwater.[52] Hopes for state assistance dimmed even further when, in 1786, Virginia enacted the Statute for Religious Freedom, which prohibited all use of tax funds to subsidize religion.[53]

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[49] Id. at 34-35.

[50] Historical Sketch, *supra* note 43, at 46-47; Kale, *supra* note 21, at 57-60; Rouse, *supra* note 29, at 77-85. On extension of the surveyor's office after the Revolution and disestablishment, see The Rev. John Bracken v. The Visitors of Williams & Mary College, 3 Call. 573, 593 (1790) (discussion of surveyor's office in John Marshall's argument for the college, appearing before the Virginia Supreme Court of Appeals, in lawsuit concerning the powers of the college).

[51] Rouse, *supra* note 29, at 79-80.

[52] Kale, *supra* note 21, at 60.

[53] The circumstances that led to this enactment are described in detail in the various opinions in Everson v. Bd. of Educ., 330 U.S. 1 (1947). For additional detail on the effects of disestablishment on the Anglican Church in Virginia, see generally David L. Holmes, The

Support from the church waned as well, in large part because of the end of royal support for the established church in Virginia. In 1779, facing a continuing loss of revenue, Thomas Jefferson – governor of Virginia, member of the board of visitors, and former student at the college – proposed a radical revision of the college's curriculum, which the visitors and faculty largely accepted.[54] The reform abolished the divinity school, and replaced those professorships with ones in law and medicine. But the visitors rejected Jefferson's proposal to make the college a state institution.[55] The course in medicine did not last long, although the lectures in law provided a financial mainstay for the institution until the Civil War.

The college retained its close ties with the Episcopal Church – the new name for the Anglican church in the American republic – but that church was hardly thriving in the years following the revolution.[56] Even before the war, Anglicanism had been overshadowed by the

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Decline and Revival of the Church of Virginia, in Up from Independence: The Episcopal Church in Virginia, ed. The Interdiocesan Bicentennial Committee of the Virginias (1976), 45-109.

[54] Marsden, *supra* note 24, at 70; Tyler, *supra* note 42, at 6-8. See also David L. Holmes, The Faiths of the Founding Fathers (New York: Oxford University Press, 2006), at 85; Kale, *supra* note 21, at 57-59; Rouse, *supra* note 29, at 77-79.

[55] Kale, *supra* note 21, at 59.

[56] See Edward Lewis Goodwin, The Colonial Church in Virginia: With Biographical Sketches of the First Six Bishops of the Diocese of Virginia (Milwaukee: Morehouse Publishing, 1927), at 141-44; Mark A. Noll, America's God: From Jonathan Edwards to Abraham Lincoln (New York: Oxford University Press, 2002), at 120-22 (on Anglicanism in America after the Revolution). See generally Holmes, *supra* note 53.

rapid growth of Evangelical movements, such as the Baptists and Methodists, following the First Great Awakening.[57] As patriotic fervor grew, support for the royal church withered even more. Few clergy could be gathered for meetings of the newly-organized Episcopal Diocese of Virginia, though in 1790 they managed to elect Virginia's first bishop, and chose the Rev. James Madison, president of the College of William & Mary since 1777 and second-cousin of the more famous Virginian.[58] For the next twenty years, Madison held both the college presidency and the office of bishop.

Although Madison was highly regarded, neither institution thrived during the period. At Madison's death in 1812, the college had only forty-four students, compared to three times that number a half-century earlier.[59] Just over a decade later, that number had dropped by another half, down to twenty-one students in the college, and prospects for improvement looked bleak.[60] Having failed to transform William & Mary into a secular state university, Jefferson founded a new University of Virginia in Charlottesville (1825).[61] Other religious denominations were also

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[57] Noll, *supra* note 56, at 120-22.

[58] Goodwin, *supra* note 56, at 141-44; Journal of the Convention of the Protestant Episcopal Church in the Diocese of Virginia (Richmond, 1845), at 13-17 (Report of Bishop William Meade, describing early history of diocese and service by James Madison as bishop); Rouse, *supra* note 29, at 92.

[59] Kale, *supra* note 21, at 69.

[60] Rouse, *supra* note 29, at 99.

[61] Holmes, *supra* note 54, at 85; Kale, *supra* note 70-71; Marsden, *supra* note 24, at 70; Rouse, *supra* note 29 at 98-100.

establishing colleges in Virginia during this period, including the Presbyterians (Hampden-Sydney, 1783), Baptists (University of Richmond, 1830), and Methodists (Randolph Macon, 1830), further reducing the potential student pool for William & Mary.[62]

Notwithstanding this competition, enrollment at the college rebounded during the 1830s, owing at least in part to the improving fortunes of the Episcopal Diocese in Virginia and the leadership of Adam Empie, a renowned preacher who became college president in 1827, and served until 1836.[63] Empie restored the chapel and revived the practice of daily prayer before classes.[64] During and after Empie's service, the college enjoyed a period of relative prosperity, but sharp disagreements between the faculty and visitors in the mid-1840s led to suspension of classes for the 1848-49 academic year, and the removal of all but one of the college faculty.[65] The college reopened under the leadership of another prominent Episcopalian cleric, John Johns, who was then serving as assistant to the Virginia bishop, and would later become the fourth bishop of the Virginia diocese.[66] Johns and his successor, Benjamin Ewell, managed to recruit a new faculty and return enrollment to sustainable levels during the 1850s, but the college suffered another serious blow in 1859, when the main building burned down.[67]

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[62] Marsden, *supra* note 24, at 70; Rouse, *supra* note 29, at 100.

[63] Kale, *supra* note 21, at 74-76.

[64] Rouse, *supra* note 29, at 102.

[65] Id. at 114.

[66] Kale, *supra* note 21, at 77-81.

[67] Historical Sketch, *supra* note 43, at 54-56; Kale, *supra* note 21, at 82-85; Rouse, *supra* note 29, at 121-22.

A new building, in an Italianate style quite different from the original, was quickly erected.[68] The college had scarcely resumed classes in 1860, however, before they were suspended in 1861 at the commencement of the Civil War, which brought more hardship to the college. In 1862, Union forces occupying the town burned the newly-constructed college building, and it was not rebuilt until 1869.[69] The college attempted to resume classes in the fall of 1865, but the lack of a college building, coupled with perilous economic conditions in the post-war South, led to another suspension of classes. Although the school reopened in 1869, it continued to struggle with low enrollment, and suspended classes again in the fall of 1881, when it had only a dozen students.[70] The school remained closed until 1888.

The post-war years also brought about a subtle shift in the college's relationship with the Episcopal Church. After Bishop Johns, no cleric held the college presidency and few ordained clergy served as professors, especially after the college's reopening in 1888. Indeed, one exception illustrates the shift. In 1892, the college hired Charles Edward Bishop to teach Greek and French.[71] Bishop was a Presbyterian minister and had been educated at European universities. Those two aspects of his biography reflect parallels between William & Mary and other Protestant colleges during the late 19th century. The model of scientific and objective higher education drawn from European models permeated many institutions of higher education

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[68] Historical Sketch, *supra* note 43, at 56-57; Kale, *supra* note 21, at 83-85 (including sketches of the 1859 building); Rouse, *supra* note 29, at 122.

[69] Kale, *supra* note 21, at 85-89.

[70] Id. at 89; Rouse, *supra* note 29, at 138-43.

[71] Rouse, *supra* note 29, at 145.

during the period.[72] That model was hostile to more traditional or evangelical expression of religious piety, but was compatible with the newly emergent liberal Protestant faith, which emphasized its non-denominational character.[73] A Presbyterian minister teaching at an Episcopalian school would have seemed commonplace in this culture of non-denominational Protestantism.

An excerpt from the college's rules, taken from around 1875, provides the best description of the school's embrace of an inclusive Protestant faith. The rules required students to attend daily prayers in the chapel, and church on Sundays.[74] But the rules allowed students to select the particular church they would attend.

> All students are expected to attend church on Sunday morning. They may indulge their religious preferences by choosing between the churches of the different religious denominations in Williamsburg; which preference shall be made known at the time of matriculation.[75]

By around 1900, even the daily chapel prayers had taken on a non-denominational cast, as clergy from the churches in town were invited to lead on a rotating basis.[76]

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[72] Marsden, *supra* note 24, at 101-22.

[73] Id. at 167-80.

[74] Extracts from the Laws of the College of William and Mary, in The History of the College of William and Mary From Its Foundation, 1660, to 1874 (Richmond, Va.: J.W. Randolph & English, 1874), 174-83, at 178-79.

[75] Id.

[76] W.A.R. Goodwin, "A Note-Book of Memories," quoted in Parke Rouse, Jr., Cows on

In 1888, the college reopened with a new source of funding and a new governance structure.[77] After several failed attempts, proponents of the institution secured partial state funding as a teacher's college, and these funds gave the governor the right to appoint ten members of a new twenty-one member board of visitors. The funds gave new life to the college, but the board soon divided between the newly-appointed state representatives and the successors of the charter board, with each fighting for control over the college's direction.[78] The conflict was finally resolved in 1906 when the state accepted full control over the institution. All of its assets were transferred to the state, and the governor was granted power to appoint the new board of visitors.[79]

Nevertheless the college's relationship with the Episcopal Church, and especially with Bruton Parish Church, did not end when the state assumed control of the institution.[80] W.A.R. Goodwin, a former rector of Bruton Parish, proved to be one of the most influential figures in the development of the college. While at Bruton Parish from 1903-09, Goodwin raised funds for and supervised the restoration of that church, a project that formed only part of his overall vision

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the Campus: Williamsburg in Bygone Days (Richmond: The Dietz Press, 1973), at 119.

[77] Kale, *supra* note 21, at 98; Rouse, *supra* note 29, at 142-44.

[78] Kale, *supra* note 21, at 98.

[79] Id.; Rouse, *supra* note 29, at 154-55.

[80] The rector of Bruton Parish was a particularly vocal opponent of the state takeover of William & Mary, and his opposition created significant conflict between the college and the church, and even within the vestry of the church. Rouse, *supra* note 29, at 152-54.

for restoring Williamsburg and the college.[81] After serving a parish in New York, Goodwin returned to Williamsburg in 1923, lured by President J.A.C. Chandler, who offered Goodwin a teaching position at the college (in biblical literature and religious education), as well as a chance to raise funds for the restoration and expansion of the college.[82] Within a few years, Goodwin had convinced John D. Rockefeller, Jr., to finance the restoration of the college's original buildings. Full restoration of the main building, renamed the Sir Christopher Wren Building, was completed in 1931, and returned the structure as close as possible to a mid-18th century appearance.[83] Rockefeller's involvement with Goodwin and the college projects ultimately led to his decision to underwrite much of the restoration of Colonial Williamsburg, and thus created the setting upon which the college draws for much of its character.

The architects of the 1931 restoration gave the interior of the college chapel an appearance consistent with mid-18th century Anglican parishes, except that the pews were arranged perpendicular to the altar (as a choir, facing across the central aisle), in the manner of English college chapels.[84] The chancel is surrounded by a simple altar rail, within which is

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[81] Id. at 180-81.

[82] Id. at 181-82.

[83] Id. at 183. See also Kornwolf, *supra* note 31, at 60-65 (including floor plans showing difference before and after 1932 restoration of chapel).

[84] Kornwolf, *supra* note 31, at 64. Compare the present interior of the chapel with its Victorian appearance, which may be seen in Kale, *supra* note 21, at 95. The college has a video of the chapel interior, available at: http://www.wm.edu/about/wren/wrenchapel/htmls/virtualtour.html.

located the wooden communion table. The chapel, paneled in dark wood, is adorned with plaques commemorating those who are buried under the chapel, along with the royal coat of arms (of Georgian vintage).[85]

Sometime between 1938 and 1940, Bruton Parish donated its altar cross to the Wren Chapel, because the parish received a new altar cross after undergoing substantial renovations.[86] The cross donated by Bruton Parish had originally been given to the church in 1907, after the Goodwin-led restoration, in memory of John and Sara Ann Millington.[87] John Millington had been a professor of chemistry and engineering at the college during the 1830s, as well as a vestryman at Bruton Parish. From the time that it was donated by Bruton Parish until the fall of 2006, the Wren Chapel cross remained on the chapel altar, except when the chapel was used for secular events, non-Christian religious services, or when those who used the chapel specifically requested its removal.[88]

To summarize – the College of William & Mary has over its history metamorphosed from a royal institution, chartered by the British crown, to a private institution under the control of the Episcopal Diocese of Virginia, to an institution wholly owned and operated by the state of Virginia since early in the 20th century. The College chapel has existed since the school's royal

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[85] Vernon Purdue Davis and James Scott Rawlings, The Colonial Churches of Virginia, Maryland, and North Carolina: Their Interiors and Worship (Richmond: The Dietz Press, 1988), at 60.

[86] Godson, *supra* note 3.

[87] Id.

[88] See *supra* note 3 and accompanying text.

phase, but was restored in the 20th century – after the onset of full state control – in an architectural style consistent with 18th century Anglican churches. Soon after that restoration, Bruton Parish transferred the cross to the college for use in that chapel. To complete the relevant chronology, the Supreme Court – a decade after that transfer – ruled that the Establishment Clause of the First Amendment was incorporated into the Fourteenth Amendment and therefore applied to the states.[89]

III. The Establishment Clause and Constitutional Injury

In a message explaining the decision to remove the Wren Chapel cross, President Nichol wrote that permanent display of the cross treated non-Christian students as outsiders in the college community.[90] Such treatment, he argued, was inconsistent with the school's commitment to diversity and its identity as a public institution.[91] Opponents criticized the decision as political correctness run amok. The college had no obligation, they argued, to protect the sensibilities of those who might be offended by seeing a cross displayed in a chapel, especially because no one was required to attend events in the chapel, and the cross could be removed on request for specific events.[92]

The dispute between supporters and opponents of Nichol's decision masks a deeper conceptual agreement between the parties about the purpose of the prohibition on government

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[89] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[90] Nichol, Message to Board of Visitors, *supra* note 2.

[91] Id.

[92] See *supra* notes 8-9 and accompanying text.

establishment of religion. Both sides focus on individual injury as the harm against which the prohibition is directed, although the sides have very different ideas about what injuries are cognizable.

The focus on harm or injury to individuals is understandable, but is underinclusive to the point of being misleading as a normative account of the Establishment Clause. The concern about personal injuries is primarily an artifact of Article III,[93] which requires the presence of a live "case" or "controversy" as a predicate of adjudication in the federal courts.[94] Under the Court's long-standing jurisprudence of Article III, a plaintiff must have suffered a personal injury, caused by a violation of the law and redressable by judicial remedy, in order to invoke the jurisdiction of the federal courts.[95] The Supreme Court's most recent encounter with the Clause, in *Hein v. Freedom from Religion Foundation, Inc.*,[96] in which the Court rejected the asserted standing of federal taxpayers to complain of executive expenditures in support of the President's Faith-Based and Community Initiative, has served to reinforce this injury-driven view of the Establishment Clause.

By focusing on the Establishment Clause as a protection for individuals, however, participants in the Wren Chapel cross controversy overlooked a fundamental aspect of the clause

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[93] U.S. Constitution, Article III.

[94] Id., Article III, sec. 2.

[95] See, e.g., Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553, 2562 (2007), *quoting* Allen v. Wright, 468 U.S. 737, 751 (1984).

[96] 127 S. Ct. 2553 (2007).

– its character as a jurisdictional limitation on the authority of government over religion,[97] a limitation that exists whether or not anyone is personally injured within the meaning of Article III by a particular transgression. The parties are hardly alone in this oversight, but a better appreciation of the Establishment Clause as a jurisdictional limitation on government would bring much-needed clarity.

President Nichol's defense of his decision to remove the Wren Chapel cross consistently, although implicitly, invoked an understanding of Establishment Clause jurisprudence first articulated by Justice O'Connor (who, by coincidence, serves as Chancellor of William & Mary). In a message to the Board of Visitors, Nichols said:

> [T]he display of a Christian cross -- the most potent symbol of my own religion in the heart of our most important building -- sends an unmistakable message that the chapel belongs more fully to some of us than to others. That there are, at the college, insiders and outsiders. Those for whom our most revered place is meant to be keenly welcoming, and those for whom presence is only tolerated.
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> . . .

[97] We first suggested this jurisdictional conception of the Clause in Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 83-84 (2002). We say more about this conception in Part V, below, where we discuss governmental acknowledgment of religion. For a related conception of the Clause as a structural (rather than individual-oriented) limitation on government , see Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (1998).

That distinction, I believe to be contrary to the best values of the college.[98]

This description of the injury caused by display of the cross closely tracks O'Connor's definition of government messages that represent unconstitutional endorsements of religion. Concurring in *Lynch v. Donnelly*, O'Connor wrote:

> 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.[99]

The government engages in impermissible endorsement, Justice O'Connor explained, if it intends to communicate a message of religious inclusion or exclusion, or if a reasonable observer would understand the message as one of religious inclusion or exclusion, whether or not the

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[98] Nichol, Message to Board of Visitors, *supra* note 2. See also Petkofsky, *supra* note 2. President Nichol elaborated on this theme, using the same language of "insiders" and "outsiders," in his December 20, 2006, email to students and faculty of the college, *available at* http://www.wm.edu/news/?id=7102. It is no surprise that Nichol, a federal courts scholar who wrote extensively on the question of standing to sue in the federal courts, would frame his defense in the language of injury to individual students. See, e.g., Gene R. Nichol, Rethinking Standing, 72 Calif. L. Rev. 68 (1984); Gene R. Nichol, Injury and the Disintegration of Article III, 74 Calif. L. Rev. 1915 (1986); Gene R. Nichol, Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141 (1993).

[99] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

government intended that meaning.[100]

Justice O'Connor's endorsement-based theory can be understood in a number of ways, but one recent and prominent elaboration of the approach suggests that it protects individuals against the experience of official disparagement based on religion.[101] According to this view, the importance of religious belief for individual identity makes people especially vulnerable to such disparagement.[102] A message of religious disparagement is thus similar to one of racial disparagement; both imply the subordination and exclusion of the demeaned individual or group.[103]

Those who opposed the decision to remove the cross disputed Nichol's claim that its permanent display caused cognizable injury to non-Christians. If offense to someone's personal religious sensibilities is the measure of a particular symbol's unlawfulness, critics argued, any public religious display, however innocuous, is subject to challenge and removal. A number of

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[100] Lynch, 465 U.S. at 690 (O'Connor, J., concurring); see also County of Allegheny v. ACLU, 492 U.S. 573, 624-632 (1989) (O'Connor, J., concurring); McCreary County v. ACLU of Kentucky, 545 U.S. 844, 883-884 (2005)(O'Connor, J., concurring).

[101] Christopher L. Eisgruber and Lawrence G. Sager *, Religious Freedom and the Constitution* (Harvard University Press, 2007), at 124-28. We review the Eisgruber and Sager book and comment on their anti-disparagement principle in Ira C. Lupu & Robert W. Tuttle, The Limits of Equal Liberty as a Theory of Religious Freedom, 85 Texas L. Rev. 1247, 1252-59 (2007).

[102] Eisgruber and Sager, supra note 12, at 126-128.

[103] Id. at 127-28.

critics asked why the altar, or even the Wren Chapel itself, should not also be removed, as either might generate offense to the non-religious. The endorsement test, wrote Newt Gingrich and Christopher Levenick, "leads to the rule of the perpetually aggrieved, a tyranny of the easily offended."[104]

Instead of highlighting a hypothetical person's experience of offense, Nichol's opponents claimed, scrutiny of religious displays should focus on the actual experience of compulsion or exclusion. No one had complained of being barred from using the chapel or required to attend a function at which the cross was present.[105] Under this theory of harm, the absence of proof of such coercion – or even the realistic threat that coercion might be exercised in the future – meant that Nichol lacked a good reason for ordering removal of the cross.

Like Nichol, those who opposed removal of the cross invoked a theory of the Establishment Clause that has a respectable pedigree. Dissenting in part in *County of Allegheny v. ACLU*, Justice Kennedy argued that personal compulsion is a necessary element of government establishment of religion.[106] Such coercion may take a variety of forms, including

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[104] Newt Gingrich and Christopher Levenick, Laus Deo: Crossing the Line at William & Mary, National Review Online, Jan. 31, 2007, *available at* http://article.nationalreview.com/?q=OWNkZWJlYThlZGMzMzRhZTQwNDYwMGQ1ZGQyODJmNDg.

[105] Haley, *supra* note XX; Meredith Henne, William & Mary's Chapel at a Crossroad, First Things: On the Square, Feb. 28, 2007, *available at* http://www.firstthings.com/onthesquare/?p=647.

[106] County of Allegheny v. ACLU, 492 U.S. 573, 659-62 (1989) (Kennedy, J., dissenting

compelled religious observance, state sponsorship of religious observances in public schools, taxation for the support of religious ministries, or "governmental exhortation to religiosity that amounts in fact to proselytizing."[107] If coercion is not present, however, government displays of religion pose a significantly diminished risk of harm to Establishment Clause values. "This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment."[108] Under this theory, permanent display of the Wren Chapel cross would cause no material harm because the display is merely "passive and symbolic" rather than coercive.

A still narrower theory of the relevant constitutional injury focuses on the concept of legal coercion, which has been at the center of the view of the Establishment Clause advanced by Justices Scalia and Thomas. Dissenting in *Lee v. Weisman,*[109] which held government sponsored prayers at middle school commencement to be unconstitutional, Justice Scalia insisted that coercion backed by legal penalty was a necessary element of a violation of the Clause.[110]

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in part). For a scholar's presentation of this coercion-based view of the Clause, see Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).

[107] Id. at 659-60 (Kennedy, J., dissenting in part). Justice Kennedy expanded further on his theory of coercion as an element of Establishment Clause violations in his opinion for the Court in Lee v. Weisman, 505 U.S. 577, 590-94 (1992).

[108] County of Allegheny, 492 U.S. at 662 (Kennedy, J., dissenting in part).

[109] 505 U.S. 577 (1992).

[110] Id. at 640-44 (Scalia, J., dissenting, joined by Thomas, J.).

Because Ms. Weisman and the other students were under no such coercive threat – no legal consequence would befall them if they refused to attend graduation or refused to stand during recitation of the prayer – Justice Scalia concluded that the government's role in sponsoring the recitation of the prayer did not run afoul of the Establishment Clause.[111]

The deeper, jurisprudential debate over the meaning of injury under the Establishment Clause has taken on a special importance in the wake of the Supreme Court's decision in *Hein v. Freedom from Religion Foundation*.[112] *Hein* involved an Establishment Clause challenge to conferences promoting the Faith-Based and Community Initiative (FBCI), held by the White House Office of Faith-Based and Community Initiatives and several executive branch agencies.[113] The plaintiffs alleged that the conferences violated the Establishment Clause by endorsing and promoting religion.[114] The government moved to dismiss the complaint, arguing that the plaintiffs lacked standing to bring the lawsuit. Citing *Flast v. Cohen*,[115] the plaintiffs asserted that they were injured as taxpayers because the conferences were funded with revenues

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[111] Id. at 631-46.

[112] 127 S.Ct. 2553 (2007). For our analysis of *Hein*, see Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2007 B.Y.U. L. Rev. ____ (No. 6, forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022398.

[113] 127 S.Ct. at 2559.

[114] Id. at 2760-61.

[115] 392 U.S. 83 (1968).

generated by taxation.[116] Although taxpayers as such normally do not have standing to challenge the constitutionality of government expenditures,[117] *Flast* created an exception for suits brought under the Establishment Clause.[118] The government argued that the court should limit application of *Flast* to expenditures that have been specifically authorized by Congress, and the FBCI conferences lacked such authorization.[119] Instead, they were financed out of general appropriations to the White House and agencies.

The district court agreed with the government, and dismissed the complaint for lack of standing.[120] On appeal, the Seventh Circuit reversed, ruling that the plaintiffs did have standing

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[116] 127 S. Ct. at 2565.

[117] Frothingham v. Mellon, 262 U.S. 447 (1923) (Federal taxpayers lack standing to complain of illegal expenditures); Daimler Chrysler Corp. v. Cuno, 126 S.Ct. 1854 (2006) (applying similar rule in federal courts for state and local taxpayers).

[118] 392 U.S. at 102-04.

[119] Brief for the Petitioners Jay Hein et al., in Hein v. Freedom from Religion Foundation, Inc., U.S. Supreme Court Docket No. No. 06-157, at 26-38.

[120] The Memorandum and Order of Dismissal, dated 11/15/04, is unreported, but is mentioned in a subsequent installment of the litigation, Freedom from Religion Foundation, Inc. v. Towey, 2005 U.S. Dist LEXIS 39444, at *1-*2 (WD Wisc., 1/11/05). We discuss the dismissal order in a Legal Update on the website of the Roundtable on Religion and Social Policy, *available at* http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=31.

under *Flast*.[121] The Supreme Court granted *certiorari*, and a sharply divided Court reversed the Seventh Circuit, reinstating the district court's dismissal of the complaint for lack of standing.[122]

No opinion commanded a majority of the Court in *Hein.* Although the various opinions of the Justices principally focus on the meaning and continued viability of *Flast*, the deeper disagreement among the contending positions arises from rival concepts of injury under the Establishment Clause. The three justices who joined Justice Alito's plurality opinion, announcing the Court's judgment, declined to overrule *Flast*, although their opinion hardly provided a ringing endorsement of taxpayer standing in Establishment Clause cases.[123] The plurality said that resolution of the dispute in *Hein* did not require the Court to reconsider *Flast*, because the earlier case considered only the injury to taxpayers from specific legislative appropriations for religion, and the plaintiffs in *Hein* were not injured by congressional action.[124] *Flast*, the plurality concluded, did not compel recognition of taxpayer injury from discretionary expenditures by executive branch agencies.[125] Of the five justices in the majority, only two

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[121] 433 F.3d 989 (7th Cir. 2006).

[122] 127 S. Ct. at 2572.

[123] Id. at 2553-72 (Alito, J., joined by Roberts, C.J. and Kennedy, J.). Alito's opinion for the plurality expressed doubt about the correctness of *Flast*, id., but refused to overrule it. Id. at 2571-72. Kennedy's separate concurrence signaled his commitment to taxpayer standing under *Flast*, id. at 2572, but agreed with the plurality opinion that *Flast* does not apply when the Executive Branch exercises discretion to aid religion.

[124] Id. at 2571-72.

[125] Id. at 2566.

(Scalia and Thomas) thought *Flast* should be overruled because a taxpayer does not suffer distinct individual injury when public funds are used for religious purposes, regardless of which branch has authorized the expenditures.[126]

The four justices in dissent rejected the distinction drawn by the plurality, and argued that taxpayers suffered the same injury from specific congressional appropriations as from discretionary expenditures by the executive.[127] *Flast*, the dissent asserted, recognized the unique character of injury suffered by the consciences of taxpayers who are compelled to provide funds used by the government to support religion.[128] That injury is the same whether it is inflicted by legislators or executive branch officials, so taxpayers should have standing to sue without regard to the branch of government primarily responsible for the challenged expenditure.[129]

Hein addressed injury to taxpayers, but the Court's restrictive interpretation of the relationship between Article III and the Establishment Clause suggests similar limitations might apply to other types of Establishment Clause injury, particularly the harm asserted by those who observe government religious displays. One month after the Court decided *Hein*, the Fifth Circuit, acting en banc, ruled that a plaintiff had failed to offer sufficient proof of his standing to challenge the constitutionality of officially-sponsored prayers at school board meetings. In *Doe v. Tangipahoa Parish School District*,[130] the full Fifth Circuit vacated a decision of a panel of the

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[126] 127 S.Ct. at 2573-84 (Scalia, J., joined by Thomas, J., concurring in the judgment).

[127] Id. at 2584-2588 (Souter, J., joined by Breyer, Ginsburg, and Stevens, JJ., dissenting).

[128] Id. at 2585-86.

[129] Id. at 2584-86.

[130] 494 F.3d 494 (5th Cir. 2007) (en banc).

court,[131] which had recognized the plaintiff's standing to sue based on his allegation that he had attended the meetings and hadr been offended by prayers offered at them. The school board had not challenged the plaintiff's standing, and the district court had not addressed the issue, but the appellate court panel determined that the board had impliedly admitted the plaintiff's attendance and injury.[132] By a vote of eight to seven, however, the full Fifth Circuit held that an implied admission by the defendant is insufficient to establish standing; the court remanded the case with instructions to dismiss.[133]

Concurring in the en banc ruling,[134] Judge DeMoss would have gone even further, and rejected observer standing regardless of the proof offered by plaintiff that he had attended meetings and been offended by board-sponsored sectarian prayers. Citing *Hein*, DeMoss argued that mere exposure to a government-sponsored religious message inflicts no more particularized injury on the observer than does compulsion of a taxpayer for support of religion.[135] Because the plaintiff voluntarily attended the school board meetings, DeMoss reasoned, plaintiffs has "established only a general grievance indistinguishable from the one that any other non-attendee citizen could have."[136]

However explicable the focus on individual injury may be for purposes of satisfying the

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[131] 473 F.3d 188 (5th Cir. 2006).

[132] 473 F.3d at 194-96.

[133] 494 F.3d at 499.

[134] Id. at 499-501 (DeMoss, J., concurring).

[135] Id. at 500.

[136] Id.

requirements of Article III, such a focus unfortunately diverts attention away from debate about the substantive meaning and scope of the Establishment Clause. Those who advocate a narrower concept of injury under the Establishment Clause typically do so in order to advance a narrower reading of the clause itself; likewise, those who propose a broader understanding of injury do so to promote a broader reach of the clause. When the debate focuses on individual injury, however, the disputants can do little more than assert that religious conscience is or is not peculiarly vulnerable to harm by government promotion or support of religion. One side argues that people should be protected from exposure to religiously offensive acts or messages of the government, while the other argues that people should only be protected against governmental coercion in religious matters.

Neither argument, however, directly engages the normative content of the Establishment Clause, independent of Article III concerns. Proponents of more robust protection for religious conscience need to explain how that quality of mind differs from non-religious conscience, and why the government is specially limited in conduct that may affect religious sensibilities.[137] Those who believe coercion is a necessary element of an Establishment Clause violation need to

[137] See generally Frederick Mark Gedicks, An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions, 20 U. Ark. Little Rock L.J. 555 (1998) (challenging the distinction between religion-based and morally-based arguments for exemptions from general laws); William P. Marshall, What is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Non-Religion in First Amendment Jurisprudence, 75 Ind. L.J. 193 (2000); Andrew Koppelman, Is It Fair to Give Religion Special Treatment, 2006 U.Ill. L. Rev. 571.

explain why their position does not render the clause redundant, because virtually all governmental acts of religious coercion would also violate the Free Exercise rights of those coerced.[138]

Both sides have plausible responses to these questions, and these responses open the possibility of more fruitful debate about the meaning and application of the clause. Some have based their arguments about the distinctive quality of religious experience on the heightened risk of conflict over religious differences,[139] others on the danger of religious discrimination posed when government becomes involved in religious matters,[140] others on the transcendent character of religious obligations,[141] and still others from a more general concern with nurturing an environment in which religion can flourish.[142]

In our own work, we have discussed and critiqued these views, and offered our own

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[138] See Lee v. Weisman, 505 U.S. 577, 621 (1992) (Souter, J., joined by Stevens & O'Conor, JJ., dissenting).

[139] Justice Breyer has been a leader in the campaign to make "divisiveness" a touchstone of Establishment Clause adjudication. See Van Orden v. Perry , 545 U.S. 677, 702-05 (2005) (Breyer, J., concurring in the judgment); Zelman v. Simmons-Harris, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting). For a critique of the anti-divisiveness view, see Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1666 (2006).

[140] See Eisgruber & Sager, Religious Freedom, note xx supra, at 51-67.

[141] See, e.g., Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1.

[142] See, e.g., David Saperstein, Public Accountability and Faith-Based Organizations: A Problem Best Avoided, 116 Harv. L. Rev. 1353, 1365-69 (2003).

approach to the central question. We have argued that Establishment Clause jurisprudence should proceed from an understanding of the state as an institution with limited jurisdiction.[143] That limitation arises from the idea of liberal government as secular or temporal – concerned exclusively with matters of this age, and not with care for the spiritual welfare of its citizens.

This theory of the limitation has much in common with the idea of the constitutional right of privacy. The zone of privacy and the zone of spirituality both mark out a domain from which state supervision is excluded. Under this jurisdictional approach, government violates the Establishment Clause when it asserts competence to proclaim the truth value of religious messages, to resolve disputed religious questions, or to subsidize religious activities.

Nevertheless, the jurisdictional limitation does not map neatly on to the Jeffersonian "wall of separation" between church and state.[144] Civil government and religious institutions share many areas of mutual temporal concern, including education and social welfare, and may cooperate in addressing those concerns without unduly involving the state in religious activity. This jurisdictional approach to Establishment Clause theory also recognizes circumstances under which government may finance religious organizations or communicate messages that have religious content.

The Wren Chapel cross controversy provides an especially illuminating context for exploring such circumstances. The dispute over personal injury to those offended has tended to

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[143] Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 83-92 (2002).

[144] See Reynolds v. United States, 98 U.S. 145, 164 (1878) (citing letter from President Jefferson to the Danbury Baptist Association).

obscure deeper questions about the extent to which government may accommodate the religious practices of college students, or acknowledge the religious history of the college and religious beliefs of those in the college community. It is those questions – raised at William & Mary entirely outside the constraining context of Article III, requirements of personal injury, and the specialized rules of federal court adjudication – which President Nichol and his critics have been implicitly addressing in the controversy over the Wren Chapel cross.

We believe that the conversation about the Wren Chapel cross can be enriched considerably by turning away from this narrow focus on injury, and widening the discourse to include more comprehensive theories of the Establishment Clause. In the remainder of this article, we explore some of those theories and their implications for the controversy at the College of William & Mary.

IV. Accommodation of Religion in Public Higher Education

Some who objected to removal of the Wren Chapel cross argued that the decision injured the religious welfare of Christian students by stripping the chapel of its spiritual identity.[145] This

[145] See Leach v. Nichol, 2007 U.S. Dist. LEXIS 38763 (E.D. Va., May 29, 2007), *affirmed*, 2007 U.S. App. LEXIS 27857 (4th Cir., Dec. 3, 2007); Matthew D. Staver, Cross of William and Mary, campusreportonline.net (Dec. 5, 2006), *available at* http://www.campusreportonline.net/main/articles.php?id=1372. Both Leach and Staver claimed that removal of the cross injures the religious liberty of Christians; the same claim has been raised in connection with removal of a cross from permanent display in a Veterans Affairs hospital chapel in North Carolina. Laura Arenschield, Lawyer takes on VA chapel neutrality,

argument rests on the unstated premise that the college is justified in setting apart space – in a publicly owned facility – for religious activity. Identifying the source of that justification, at least in constitutional terms, is something of a challenge. Other state-sponsored chapels and chaplaincy programs offer the most useful analogies. The military, prisons, and government healthcare facilities have long supported chaplaincies, and those contexts have given rise to some relevant Establishment Clause law.[146] But the presence of chapels and chaplaincies in higher education has received surprisingly scant legal attention.[147]

The Fayetteville Observer, Nov. 29, 2007.

[146] Katcoff v. Marsh, 755 F.2d 223 (2nd Cir. 1985) (rejecting Establishment Clause challenge to Army chaplaincy); Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988) (rejecting Establishment Clause challenge to hospital chaplaincy program); Malyon v. Pierce County, 131 Wn.2d 779, 935 P.2d 1272 (1997) (holding that chaplain of sheriff's department did not violate federal or state prohibitions on aid to religion); Freedom from Religion Foundation v. Nicholson, 469 F.Supp.2d 609 (W.D. Wis. 2007) (dismissing Establishment Clause challenge to chaplaincy program in Veterans Affairs healthcare system). We offer a general framework for analysis of government-sponsored chaplaincies in Ira C. Lupu and Robert W. Tuttle, Instruments of Accommodation: the Military Chaplaincy and the Constitution, 110 W. Va. L. Rev. 89 (2007).

[147] We are indebted to a paper on this subject written by Andrea Goplerud, Who Frowned on Chaplaincy Programs?: Some Thoughts on the Constitutionality of Public University Chaplaincy Programs, unpublished manuscript (on file with the law review and the authors). The issue arose in 2007 when Iowa State University football coach Gene Chizik announced plans

At the time William & Mary became a state institution in 1907, most public universities had chapels, and many required students to attend daily services.[148] The content of chapel services reflected the non-denominational Protestant "establishment" that had prevailed at most universities since the mid-nineteenth century.[149] For a variety of reasons – most unrelated to the law – mandatory chapel attendance policies were in steep decline by the 1920s and seem to have

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to hire a chaplain for the school's football team. The university's athletics advised against creation of a chaplaincy, and recommended creation of a "Life Skills Assistant" that would not be exclusively focused on provision of religious counseling or support. Athletics Council recommendation, Iowa State University News Service, June 26, 2007; Howard M. Friedman, Iowa State Coach Wants Football Team Chaplain; Faculty Object, ReligionClause Blog, May 25, 2007, *available at* http://religionclause.blogspot.com/2007/05/iowa-state-coach-wants-football-team.html.

[148] The College Year-Book and Athletic Record For the Academic Year 1896-97, ed. and compiled by Edwin Emerson, Jr. (New York: Stone & Kimball, 1896) (alphabetical listing of all institutions of higher education, with description of chapel attendance policies for most institutions. See, e.g., description of William & Mary, with indication that school had mandatory chapel attendance policy, 422). See also Goplerud, *supra* note XX, at 2-3; Seymour A. Smith, Religious Cooperation in State Universities: an Historical Sketch 3 (1957).

[149] See, e.g., D.G. Hart, The University Gets Religion: Religious Studies in American Higher Education (Baltimore: Johns Hopkins University, 1999), at 30-45 (on Protestant establishment in late-19th century university); Marsden, *supra* note XX, at 152 (content of chapel services at Johns Hopkins).

disappeared by the early 1940s.[150] Voluntary chapel programs continued, some led by chaplains employed by the university, and others by volunteers or campus ministers paid by religious organizations.[151]

In the years following the Second World War, developments in Establishment Clause law did have a significant impact on the policies of public universities toward religion. In 1947, the Supreme Court first applied the clause to the states in *Everson v. Board of Education*,[152] but the most important developments followed in 1962 and 1963, when the Court struck down prayer and bible reading in public schools. Although those decisions, *Engel v. Vitale*[153] and *School District of Abington Township v. Schempp*,[154] involved primary and secondary education, public university administrators understood that the decisions had significance for their institutions.[155] This was principally true with respect to the place of religion in the curriculum, and involved debates about the composition of religious studies departments and the content of courses taught by such departments.[156] The Court's mandated "separation of church and state" spelled the end of the last vestiges of religious establishment in public universities. Religion faculties composed

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[150] Marsden, *supra* note XX, at 344-45.

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[152] 330 U.S. 1 (1947).

[153] 370 U.S. 421 (1962).

[154] 374 U.S. 203 (1963).

[155] Leslie Griffin, "We do not preach. We teach." Religion Professors and the First Amendment, 19 Quinnipiac L. Rev. 1, 6-10, 20-28 (2000); Hart, *supra* note XX, at 203-08.

[156] Hart, *supra* note XX, at 208-22.

of Protestant seminary graduates – teaching liberal Protestant interpretation of scripture, history, and doctrine – gradually gave way in public institutions to a more pluralistic and detached study of world religions.[157]

During the 1960s and 1970s, the separationist impulse also seems to have brought about, or at least coincided with, a change in public university attitudes toward religion on campus. In addition to the termination of most paid state university chaplaincies,[158] victims of budgetary and constitutional concerns, this period also witnessed adoption of a surprisingly radical response to constitutional principles of separationism. Some state university administrators believed that the Court's Establishment Clause rulings required the schools to ban student religious groups from all use of public facilities, even if the facilities were available for use by non-religious student groups. The provision of campus facilities for use by religious groups, these administrators asserted, represented impermissible public subsidy for religion.[159]

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[157] Id. at 223-34

[158] Goplerud, *supra* note XX, at 5; Robert L. Johnson, Ministry in Secular Colleges and Universities, in the Church's Ministry in Higher Education 219 (John H. Westerhoff ed., 1978). *See generally*, George William Jones, The Public University and Religious Practice: an Inquiry into University Provision for Campus Religious Life (Muncie, Ind: Ball State University, 1973).

[159] *See* Widmar v. Vincent, 454 U.S. 263, 265 & n.3 (1981) (regulations of university that barred use of campus facilities "for purposes of religious worship or religious teaching by either student or nonstudent groups"). Widmar v. Vincent, Brief Amicus Curiae of Center for Constitutional Studies,1980 U.S. Briefs 689, 1981 U.S. S.Ct. Briefs LEXIS 891, *19-*26 (survey of campus ministers at public institutions of higher education, concerning exclusion of religious

In *Widmar v. Vincent*,[160] a religious student group at the University of Missouri-Kansas City (UMKC) challenged such a policy, claiming that exclusion of the group from campus facilities violated the students' rights under the Free Exercise and Free Speech Clauses. UMKC argued that the policy was required by the Establishment Clause, but the Supreme Court disagreed. By an 8-1 vote, the Court held that UMKC's policy was unconstitutional because the prohibition on religious use, including worship, amounted to content-based regulation of speech.[161] In making university facilities available for general use by student groups, the Court reasoned, UMKC created a public forum for student groups, and thus could not discriminate in granting access to the forum based on the content of groups' speech. Religious student groups were entitled to use the facilities on an equal basis with non-religious student groups.[162]

The Court rejected UMKC's Establishment Clause defense, holding that the grant of equal access to a religious group does not make the university responsible for the religious content of the group's message.[163] Because UMKC permitted any student group to use the facilities, and there was no reason to believe that only religious groups would take advantage of that opportunity, the Court said that the university's policy did not represent improper aid to

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ministries from campus facilities).

[160] 454 U.S. 263 (1981).

[161] Id. at 277.

[162] Id. at 273-75. See also Keegan v. Univ. of Delaware, 349 A.2d 14, 16-19 (Del. 1975) (exclusion of student religious groups from use of campus facilities violated both the Establishment Clause and Free Exercise Clause).

[163] Widmar, 454 U.S. at 274.

religion. Instead, equal access to campus facilities more closely resembles other benefits, such as police or fire protection, generally distributed to all persons and groups in a community.[164]

Just over a decade later, the Court extended the principles of *Widmar* to another case involving religious activities at state universities. In *Rosenberger v. Rector and Visitors of the University of Virginia*,[165] a religious student group sued when the University of Virginia (UVA) rejected the group's request for a subsidy that UVA provided to other eligible student groups. The subsidy, which was derived from mandatory student activity fees, financed printing costs for student group publications. A Christian student organization, Wide Awake, sought the printing subsidy for its magazine, and UVA denied the request because of the organization's religious character and the religious content of the magazine.[166]

The group sued, alleging that UVA's denial of the printing subsidy violated their rights under the Free Speech, Free Exercise, and Equal Protection Clauses. Citing *Widmar*, Wide Awake claimed that the printing subsidy constituted a limited public forum, and, by excluding religious groups, UVA had imposed an impermissible content-based restriction on access to that forum.[167] UVA asserted that the Establishment Clause prohibited the university from subsidizing the costs of printing a religious publication,[168] and the Fourth Circuit agreed. But the

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[164] Id.

[165] 515 U.S. 819 (1995).

[166] Id. at 825-27.

[167] Id. at 827-28.

[168] Although the Supreme Court granted *certiorari* on the question of whether the Establishment Clause required the exclusion of religious groups from the printing subsidy, UVA

Supreme Court reversed, with a 5-4 majority ruling that availability of the printing subsidy was indistinguishable from the access to physical facilities of the school at issue in *Widmar*.[169]

Taken together, *Widmar* and *Rosenberger* define the equality-based minimum that public universities must provide for student religious life. To the extent that resources and opportunities are available for non-religious student groups and activities, the same must be available for relevantly similar religious student groups and activities. Thus, if student groups are generally eligible to reserve classrooms, use university photocopiers or distribution networks, or receive reimbursement for costs of bringing speakers to campus, then the religious character of some student groups should not disqualify them from receiving such benefits.[170] *Widmar* and *Rosenberger* thus establish equality as the floor: student religious activity on campus must not be disfavored as compared to relevantly similar non-religious student activity.

The controversy over the Wren Chapel cross, however, does not have the same

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did not aggressively advance that justification before the Court, and instead focused its argument on the need for governmental discretion in spending, and the collateral implications of a ruling in favor of Wide Awake. Id. at 833-38. UVA lost in *Rosenberger*, but the Court's subsequent decision in *Locke v. Davey*, 540 U.S. 712 (2004), suggests that the Court was mindful of the concerns raised by the university in *Rosenberger*.

[169] *Rosenberger*, 515 U.S. at 833.

[170] For a recent application of *Widmar* and *Rosenberger*, *see* Roman Catholic Foundation, Univ. of Wisc. - Madison v. Walsh, 2008 U.S. Dist. LEXIS 4137 (W.D. Wisc., January 17, 2008) (holding that state university could not withhold student activity funds from Roman Catholic student group).

constitutional character as the issues presented in *Widmar* and *Rosenberger*. President Nichol's decision to move the cross did not involve exclusion of religious groups from campus or the denial of equal benefits to religious student organizations. Instead, the controversy implicated what may be thought of as the ceiling – the upper constitutional limit – of public university support for student religious life. At what point would such support constitute an impermissible establishment of religion?

The answer to that question can be found in the idea of religious accommodation, which has been a feature of Establishment Clause jurisprudence since the Court's decision in *Zorach v. Clauson.*[171] *Zorach* involved a New York program under which parents could arrange to have

[171] 343 U.S. 306 (1952). We provide a more detailed analysis of the doctrinal history of the idea of accommodation in Lupu & Tuttle, Instruments of Accommodation, supra note XX, at 101-16. For other academic commentary on accommodation of religion, see Kent Greenawalt, Establishment Clause Limits on Free Exercise Accommodations, 110 W. Va. L. Rev. 343 (2007); Carl H. Esbeck, When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis, 110 W. Va. L. Rev. 359 (2007); Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793 (2006); Lisa Schultz Bressman, Accommodation and Equal Liberty, 42 Wm. & Mary L. Rev. 1007 (2001); Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685 (1992); Steven G. Gey, Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75 (1990); Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1.

their children released from public school in order to attend religious instruction during the school day.[172] The students who did not attend religious classes remained at school for that period. The plaintiffs challenged the program as a violation of the Establishment Clause, arguing that the program impermissibly involved public schools – and the power of compulsory education – in the enterprise of religious instruction.[173] In an opinion written by Justice Douglas, a 6-3 majority ruled that the program did not violate the Establishment Clause. Under the released-time program, the Court held, "the public schools do no more than accommodate their schedules to a program of outside religious instruction."[174] The public schools did not require students to attend, supervise the teachers, determine the content of instruction, or even provide the facilities.[175] The accommodation, the Court reasoned, merely responded to the request of parents by opening space in the school day for voluntary religious education.[176]

In dissent, Justices Black, Frankfurter, and Jackson identified concerns that would eventually become central to the concept of accommodation. The dissenters argued that normal school hours left plenty of time for religious instruction, so parents had little need for the

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[172] Id. at 308-14.

[173] Id. at 309-10.

[174] Id. at 314.

[175] Id. at 313-15. Because the instruction occurred away from school property, the program differed from a scheme of religious instruction in public schools that the Court had held unconstitutional in *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[176] *Zorach*, 343 U.S. at 311-13.

accommodation.[177] Moreover, they highlighted the program's impact on non-participating students, who were required to remain at school during the period of religious instruction.[178] These features, they claimed, strongly suggested that the program promoted religious education – and penalized those who declined to participate – rather than relieving any discernible burden on religious exercise.[179]

The seeds of the accommodation doctrine planted in the *Zorach* dissents germinated in a series of cases decided during the mid-1980s – *Wallace v. Jaffree*,[180] *Estate of Thornton v. Caldor*,[181] *Corp. of the Presiding Bishop v. Amos*,[182] and *Texas Monthly v. Bullock*.[183] *Wallace*

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[177] Id. at 323 (Frankfurter, J., dissenting); id. at 324 (Jackson, J., dissenting).

[178] Id. at 321 (Frankfurter, J., dissenting).

[179] Id. at 318 (Black, J., dissenting). Justice Brennan's concurrence in *Schempp* expanded on the ideas advanced in the *Zorach* dissenting opinions. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 294-305 (1963) (Brennan, J., concurring). Supporters of bible reading in public schools had argued that the practice accommodated the religious preferences of many parents, but Brennan argued that the practice could not be justified as an accommodation. Id. at 294-96 (Brennan, J., concurring). Public schooling did not impede students' access to religious experience, and moreover, the alleged accommodation was provided to all students, not just to those who specifically requested the experience. Id. at 297-99 (Brennan, J., concurring).

[180] 472 U.S. 38 (1985).

[181] 472 U.S. 703 (1985).

[182] 483 U.S. 327 (1987).

[183] 489 U.S. 1 (1989).

involved a challenge to an Alabama statute that provided for a moment of silence "for meditation or voluntary prayer" at the beginning of the public school day.[184] In *Caldor*, employers challenged a Connecticut statute that required them to accommodate employees' requests for Sabbath observance.[185] In *Amos*, the Court considered an amendment to federal civil rights law that exempted religious organizations from prohibitions on religion-based employment discrimination.[186] *Texas Monthly* involved a challenge to the exemption of religious publications from a state sales tax imposed on other publications.[187]

Although the cases arose in quite varied factual contexts, a single thread runs through the decisions. In all of them, the plaintiffs alleged that the government had violated the Establishment Clause, and the government defended by arguing that the challenged practice was a permissible accommodation of religion. The Court's holdings in these cases, amplified in two additional decisions over the last twenty years,[188] generate four consistent criteria for determining whether an accommodation violates the Establishment Clause.[189] First, the accommodation must relieve a government-imposed burden on religious exercise. Second, no

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[184] Wallace, 472 U.S. at 40 n.1 (citing Alabama Code § 16-1-20.1 (Supp. 1984)).

[185] Caldor, 472 U.S. 703, 707-08 (1985).

[186] Amos, 483 U.S. 327, 336-38 (1987).

[187] Texas Monthly, 489 U.S. 1, 5 (1989).

[188] Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Cutter v. Wilkinson, 544 U.S. 709 (2005).

[189] We elaborate on these cases and criteria in Lupu & Tuttle, Instruments of Accommodation, supra note XX, at 101-16.

one may be compelled to participate in the accommodated religious activity, and the content of that activity must be determined by private actors, not by government agents. Third, the accommodation must be available on an equal basis to all faiths. And fourth, the accommodation must not impose significant hardships on third parties. We provide a brief description of each criterion, and then suggest how it might be applied to both the Wren Chapel and cross.

1. Response to burden on religion

The first criterion provides the distinguishing characteristic of religious accommodations – the state acts to relieve a burden on religion caused by official policies or practices. But if no such burden exists, then the accommodation is unwarranted.[190] In both *Texas Monthly* and *Wallace*, the Court used this criterion to strike down the purported accommodation. The Court held that the sales tax at issue in *Texas Monthly* did not impose a burden peculiar to religion; religious publications subjected to the tax would have been burdened in exactly the same manner as non-religious publications.[191] Thus, the Court held, exemption of religious publications conferred on them an impermissible benefit. In *Wallace*, the Court found that public school students were not materially burdened in their opportunity to exercise silent prayer, because a previous moment-of-silence statute (which did not specifically mention prayer) already set aside the time for meditation at the beginning of school.[192]

In contrast, the Court upheld the accommodation in *Amos* because it found that religious

[190] Lee v. Weisman, 505 U.S. 577, 625-30 (1992) (Souter, J., concurring).

[191] Texas Monthly, 489 U.S. at 17-25.

[192] Wallace, 472 U.S. at 58-60.

employers were especially burdened by the statutory prohibition on religious discrimination, even though the prior version of the civil rights act exempted some positions from coverage.[193] Religious organizations, the Court declared, had a unique interest in preferring employees of their own faith, and the previous exemption allowed the organizations to exercise that preference only with respect to positions that involved religious duties.[194] Although the Court expressed the view that the original, narrower, exemption may have been sufficient to avoid a violation of such employers' Free Exercise rights, the Establishment Clause did not forbid the government to extend broader protection than the constitution's minimum requirement.[195] Indeed, the Court found, application of the earlier exemption had chilled religious organizations' exercise of the protection, because it had required them to anticipate which positions would be treated as sufficiently religious to be exempted from anti-discrimination law and had led to litigation over the exemption's boundaries.[196] The broader exemption, the Court concluded, was appropriately responsive to this burden on religious exercise.

At first glance, the Wren Chapel and cross appear to be significantly different from the accommodations challenged in *Wallace*, *Caldor*, *Amos*, and *Texas Monthly*. *Amos* and *Texas Monthly* addressed negative accommodations – that is, the government merely declined to extend a particular regulation to the protected religious practice.[197] Even *Wallace* and *Caldor* would

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[193] Amos, 483 U.S. at 335-37.

[194] Id. at 335-36.

[195] Id. at 336-37.

[196] Id.

[197] Amos, 483 U.S. at 329 (exemption from Title VII of the Civil Rights Act, 42 U.S.C. §

have required only limited government interaction with the accommodation. The moment-of-silence provision needed only the teacher to announce the meditation period, while the protection for Sabbath observance in *Caldor* depended on private employers' compliance with the statutory mandate, enforced only upon complaint by particular employees.[198] The Wren Chapel and cross, however, involve affirmative acts in support of religion, and thus have more in common with the religious accommodations found in the military, prisons, and government healthcare facilities. In such settings, the government finances religious ministries – including clergy salaries, places of worship, religious instruction, and pastoral care – for the sake of those under the care or control of the institution.[199]

Nevertheless, these affirmative accommodations can be measured against the same standard as regulatory exemptions – is the government's assistance to religion responsive to a government-imposed burden? Prison chaplaincy programs easily meet that test because incarceration isolates prisoners from their religious communities, and the government's control over the movement, assembly, visitation, and activity of prisoners can severely limit prisoners' opportunity to practice their faith.[200] Those who serve in the military suffer similar burdens on

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2000e-1); Texas Monthly, 489 U.S. at 5 (exemption from Texas state sales tax, Tex. Tax Code Ann. § 151.312 (1982)).

[198] Wallace, 472 U.S. 38, 40; Caldor, 472 U.S. 703, 706-08.

[199] See, e.g., Katcoff v. Marsh, 755 F.2d 223 (2nd Cir. 1985); Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988).

[200] Abington v. Schempp, 374 U.S. 203, 297-98 (1963) (Brennan, J., concurring) (prison and military chaplains are permissible accommodations of religion); Montano v. Hedgepeth, 120

their exercise of religion, along with personal and familial stresses that are unique to the demands of military life.[201] Thus, the military chaplaincy also meets the standard of responsiveness to a government-imposed burden. Hospital in-patients may be similarly deprived of ordinary access to religious experience, at a time when patients may be especially in need of religious counseling or comfort.[202]

Public higher education lacks most of the characteristics that justify accommodations in the military, prisons, and healthcare facilities. College students are not physically confined by the government, typically have access to faith communities outside the college, and are free to gather on or off campus for religious purposes. The college imposes no direct obstacle to students' exercise of religion.[203] This suggests, at minimum, that public universities will be more limited than the military, prisons, or hospitals in their legal authority to provide affirmative religious services for students. For example, public universities would find it difficult to justify

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F.3d 844, 850 n.10 (8th Cir. 1997); Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977).

[201] Katcoff v. Marsh, 755 F.2d 223, 234-35 (2nd Cir. 1985); Lupu & Tuttle, Instruments of Accommodation, *supra* note XX, at 118-20.

[202] Freedom from Religion Foundation v. Nicholson, 469 F.Supp.2d 609 (W.D.Wis.2007). Our analysis of this decision is available online at: http://www.religionandsocialpolicy.org/legal/legalupdatedisplay.cfm?id=55.

[203] Widmar v. Vincent 454 U.S. 263, 288-89 (1981) (White, J., dissenting) (arguing that university students suffered no burden on religion, even by exclusion from use of campus facilities). On campus religious life more generally, *see* John Schmalzbauer, Campus Ministry: A Statistical Portrait, *available at* http://religion.ssrc.org/reforum/Schmalzbauer.pdf.

employment of full-time chaplains.[204] Unlike the military and prisons, colleges do not have the concerns about security that justify restriction of access to service members and inmates, and thus do not have the same need for a cadre of screened and trained ministers who can be trusted in especially sensitive or dangerous areas. Nor do colleges share healthcare facilities' need to fully integrate pastoral care into the institutions' respective services.

Even if the circumstances of college life are insufficient to warrant a full-time chaplaincy program, student experience may present a more subtle and indirect burden on the full realization of student religious choices, and this burden should justify some degree of religious accommodation. Many universities attempt to create a comprehensive community for students, one that stretches beyond the basics of education, shelter and food. To enhance students' experience of college life, schools provide opportunities for entertainment, arts, athletics,

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[204] The controversy over the proposed hiring of a chaplain for the Iowa State University football team, described in note XX, *supra*, offers a useful illustration. Because the coach first proposed the position in the context of a meeting of the Fellowship of Christian Athletes, critics were concerned that the purpose of such a chaplaincy had more to do with promotion of a particular religious view than a genuine attempt to facilitate student religious choices, which would be the sole constitutional justification for chaplaincy in such a context. ISU faculty opposes chaplain, Omaha World-Herald (Nebraska), May 26, 2007, at 2C. See also Pastor named to ISU football 'life skills' position, Sioux City Journal, July 26, 2007, *available at* http://www.siouxcityjournal.com/articles/2007/07/26/news/latest_news/fdac39adc2e1a8ef862573240044f747.txt.

socializing, and even self-governance. Most universities also provide healthcare, counseling, and police protection. Considered separately, those services or activities are unremarkable; but taken together, they present a self-sufficient community. Omission of religious interests from that community would impose a modest obstacle to student religious experience, if only in the requirement that students exit from the community constituted by the college in order to participate in religious life.[205]

To address that obstacle, public universities should be permitted to accommodate student religious needs by facilitating opportunities for worship or other religious experience. Many universities do this through a campus religious life coordinator, who typically screens and registers religious groups that want to work with students, supports such groups with administrative resources (photocopying, scheduling rooms, etc.), and helps the groups to publicize their campus activities.[206] The coordinator's position fits comfortably within the standards for religious accommodation because it responds directly to students' interest in finding a place for religious life within the school's comprehensive community.

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[205] George W. Jones, Knowing the Legal and Political Opportunities, in Religion on Campus 38 (John Butler, ed., 1989), *quoted in* Goplerud, *supra* note , at 13.

[206] Goplerud, *supra* note, at 7-8 (describing religious activities office at the University of Maryland). See also description of religious activities at Kansas State University, *available at* http://consider.k-state.edu/clubs/religion.htm; Constitution of the Campus Ministry Association of the University of Georgia, Article 6 (1997) (role of university Coordinator of Religious Affairs), *available at* http://www.uga.edu/cma/shared/files/Constitution.pdf.

Colleges can justify maintenance of a designated chapel in much the same way that they can justify the religious coordinator's position. The chapel offers a physical locus for religious life within the campus community. It provides a place for campus religious groups to worship, equipped with commonly-used resources (such as a piano or organ), as well as a place set apart for private meditation. And the chapel does so in the context of a campus that is typically filled with structures that serve the widest range of other student needs, as described above. The constitutional questions about public university chapels thus should not focus on the existence of such facilities, but rather – as we discuss below – on the configuration and policies for their use.

Of course, the dispute at William & Mary involved not the general availability of a chapel, but the display of a specific religious symbol within a particular chapel. Compared with provision of a chapel or religious life coordinator, permanent display of a particular faith's religious symbol might not appear to be elicited by any burden whatsoever on student religious exercise. If students in fact desire to worship in a faith-specific environment, provision of the necessary artifacts of that environment may be responsive to circumstances of relative isolation and physical convenience. Accordingly, temporary provision of religious materials and symbols such as icons and other items used in worship may be constitutionally appropriate.[207] Permanent display of the cross or any other symbol of a specific faith, however, is quite vulnerable on the second and third criteria, analyzed below, concerning religious equality and government

[207] For example, prayer rugs, prayer shawls, candles, candle holders, a crucifix, or a Star of David might be brought out for faith group worship – when such materials respond to specific religious need – but would otherwise need to be stored.

selection of religious content.

2. Voluntary participation, private religious content

The second criterion serves as a corollary of the initial requirement of government responsiveness to private religious need. Government may fairly be said to have accommodated religion only if participation in the resulting religious activity is voluntary, and the content of that activity is selected by the participants rather than the government. Conversely, if the government mandates participation or determines the content of the religious activity, the activity takes on the character of government promotion, rather than facilitation, of religious experience. The concept of accommodation has long emphasized this distinction between promoting state religion and facilitating private religious experience. Concurring in *Abington Township v. Schempp*, Justice Brennan argued that the practice of daily prayer and Bible reading in public schools could not be defended as an accommodation because the students did not elect to attend the classes or choose the religious experience they would receive.[208] And in *Wallace v. Jaffree*, Justice O'Connor said that the challenged moment-of-silence provision was not an accommodation, because the legislation at issue attempted to specify prayer as a government-approved way for students to use the time, as compared to an earlier and still-valid statute that simply created a time for students to use as they saw fit.[209] By urging students to pray, the state moved from accommodating to promoting religion.

Mandatory chapel attendance policies at a public university would fail under this second

[208] 374 U.S. 203, 299-300 (Brennan, J., concurring).

[209] 472 U.S. 38, 67-79 (O'Connor, J., concurring).

criterion, as would any other required program of religious instruction or observance.[210] But public universities are very unlikely to return to compulsory religious activity, so the more relevant part of the second criterion is the requirement that the content of accommodated religious activity must be privately chosen. In other words, the government may provide the opportunity for religious experience, but it may not decide how that opportunity will be used. That choice belongs to the accommodation's beneficiaries.

The distinction between facilitating and promoting faith applies readily to the role of coordinator for religious life. As long as the coordinator acts as a liaison between students and religious groups, offering each the opportunity to make contact with the other, then the university is fairly deemed to be accommodating students' faith experience. If, however, the coordinator were to steer students toward a particular group, then the university would be asserting an interest in the content of students' religious experience – an interest that is fundamentally incompatible with the idea of accommodation.

Chapels offer a more difficult setting in which to frame the distinction between

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[210] Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (compulsory chapel attendance policy at military academies violates the Establishment Clause); Mellon v. Bunting, 327 F.3d 355 (4th Cir. 2003) (Virginia Military Institute practice of prayer before meal, at which attendance is required, violates the Establishment Clause). See also Lee v. Weisman, 505 U.S. 577, 586-598 (1992) (students are effectively compelled to attend public school graduation ceremonies, so officially sponsored prayer at those ceremonies violates the Establishment Clause).

accommodation and promotion of religion. Unlike a moment of silence, which can be filled with each student's thoughts of any kind, a designated chapel will ordinarily represent someone's substantive idea of space that is appropriate for religious experience. For example, the configuration of the Wren Chapel reflects the ideas of 17th century Anglicans about scripture and sacrament, minister and congregation.[211] Of course, universities may choose to provide separate chapels for all major faith groups, so each can worship in a setting that embodies its tradition.[212] But scarcity of resources and other problems of administration point to the option of one, all-inclusive chapel. If a school, like William & Mary, has only one chapel, must its architecture be stripped of all marks that connect it to a particular religious tradition?

The restriction on government-supplied religious content does not require such drastic measures. Instead, the relevant question is whether the chapel's configuration limits its use to that of a particular faith, or whether the architecture and furnishings are capable of being used by all faiths. We recognize that, for reasons of belief, some faith groups might not worship in

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[211] Davis and Rawlings, *supra* note XX, at 12-19; Henne, *supra* note XX; Upton, *supra* note XX, at 47-55.

[212] The military academies have multiple chapels, but very few other schools have more than a single facility. See State University Survey, conducted by savethewrencross.org (copy on file with authors and law review). For military academy chapels, see http://www.usafa.af.mil/superintendent/pa/factsheets/chapel.htm (Air Force Academy); http://www.usma.edu/Chaplain/chapels.htm (West Point); http://www.usna.edu/Chaplains/services.htm (Naval Academy).

facilities used at other times by other religious communities. But a particular faith tradition's need to worship in space used only by that group does not undermine the formal openness of the chapel's worship space for use by all faiths. The needs of that faith tradition, not the design of the chapel or restrictions imposed by the government, would be the cause of that group's inability to use the chapel.

The Wren Chapel provides an especially good illustration of this point. The front of the chapel includes an altar, pulpit, lectern, and chancel rail.[213] For those versed in church history and architecture, the arrangement and decoration of these fixtures express a particularly Protestant era of Anglicanism.[214] The wooden table – not a traditional altar – highlights the significance of Eucharist as a communal meal rather than a repetition of Christ's sacrifice.[215] The low chancel rail, compared to a medieval rood screen, dramatically reduces the distance between the congregation and minister.[216] The placement of pulpit and lectern signifies the relative importance of scripture and preaching, and reduces the emphasis on liturgy.[217] As others have observed, these architectural emphases carry an implicit historical and theological message of anti-Catholicism, rejecting the Roman church's teachings on the priesthood, the sacraments,

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[213] See *supra* note XX.

[214] Henne, *supra* note XX; Upton, *supra* note XX, at 9-10, 47-56.

[215] Davis and Rawlings, *supra* note XX, at 12-150.9; Upton, *supra* note XX, at

[216] Upton, *supra* note XX, at 47-48.

[217] Id. at 48-50.

and the means of salvation.[218]

That rich theological and architectural significance, however, does not mean that the government has impermissibly provided the religious content of an accommodation. First, as we develop in the next part, the configuration of the Wren Chapel can be traced to a source other than the government's desire to promote a particular faith tradition.[219] The configuration is based on the 18th century origin of the Wren Chapel, which links the chapel to other historic re-creations within the Wren Building and in the adjacent Colonial Williamsburg, all of which attempt to replicate mid-18th century appearance.[220] Second, and more important for the current inquiry, the configuration of the Wren Chapel does not superimpose the content or experience of Christian worship on others who use the facility. Instead, the fixtures are capable of use for virtually any religious content. The texts of any tradition can be read from the lectern or pulpit, and the religious objects of any faith can be placed on the altar-table. We do not imply here that the physical trappings of Protestant worship represent a religious norm – even the 'lowest common denominator' among Christians, as many 19th century liberal Protestants asserted.

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[218] Henne, *supra* note XX.

[219] See notes *infra* notes XX-XX and accompanying text.

[220] Kornwolf, *supra* note XX, at 60-65 (on decisions made in restoration of the Wren Building); Kale, *supra* note XX, at 124-26 (on colonial restoration). See generally, Parke Rouse, Jr., When Williamsburg Woke Up: Dr. Goodwin, Mr. Rockefeller, and the Restoration (Williamsburg, Va.: The Virginia Gazette, n.d.) (restoration of city and college to appearance in colonial period).

Rather, our claim is only that the chapel can serve as a multi-faith accommodation of student (rather than government) choice of religious conduct. The space, although rich in theological meaning, does not express a unique fitness for Christian worship.

But permanent display of the cross on the altar of the Wren Chapel is an entirely different matter. Unlike the chapel's communion table or the pulpit, permanent display of the cross on the altar cannot readily be harmonized with non-Christian use of the space. The right of students to request removal of the cross does not ameliorate the problem, because the defect rests in the government's decision about the content of the accommodation, not in the voluntary choice of individuals to participate in the accommodation.[221] By selecting Christianity as the default faith of the chapel, the college departed from the role as facilitator of student religious experience, and undertook responsibility for determining the presumptive content of that experience.

Imagine, for an analogical example, that all students entering the school were assumed to be Episcopalian unless they specifically informed the religious life coordinator that they had a different religious preference. The coordinator then invited all students – except those who

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[221] Although related, the requirements of voluntariness and privately-selected content are independently necessary conditions. In *Schempp*, for example, a student could opt out of participation in the religious exercises, but that right to object did not save the constitutionality of the practice. Schempp, 374 U.S. 203, 208 (1963). And in *Wallace*, no student was required to pray or otherwise use the moment of silence for religious activity, but the Court nonetheless held the provision unconstitutional because the state was promoting religious experience. Wallace, 472 U.S. 38, 57 n.45 (1985).

specified otherwise – to Episcopalian events, and arranged for Episcopalian campus ministers to have access to all non-objecting students. Such a practice obviously violates the requirement of religious neutrality, discussed below, but it also violates the government's obligation not to choose the religious content of an accommodation. By so choosing, the government asserts its jurisdictional competence over the life of faith, and such an assertion represents a core violation of the Establishment Clause, whether or not any student suffers a personal injury within the meaning of Article III.

The story would be considerably more complicated if the cross had been a permanent architectural feature of the chapel, affixed to or carved in a wall, or portrayed in a stained-glass window. If so, the college would have had plausible reasons for declining to remove the religious symbol between Christian worship services,[222] although a sanctuary that is pervasively

[222] A decision not to remove a permanently affixed symbol would reasonably be explained – and understood – as a desire not to damage or destroy an existing structure. In contrast, a decision not to remove an entirely portable item carries no such implications. See Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (removal of longstanding large granite monument of Ten Commandments from state house grounds is likely to be perceived as governmental hostility to religion, and also to promote religious conflict). But see Gingrich and Leftwich, *supra* note XX (arguing that decision on Wren Chapel cross should have avoided the conflict generated even by removal of the portable cross; application of Establishment Clause should emphasize avoidance of conflict with settled practices).

decorated with images of a particular faith may ultimately prove unsuitable as a multi-faith chapel. But because the Wren Chapel cross was easily moved from the altar, a decision not to withdraw the symbol from that place of prominence would make the government responsible for selecting that symbol as the present-day default religious orientation of the chapel.

3. Religious neutrality

To survive constitutional scrutiny, an accommodation must be formally available to all faiths. This requirement of religious equality embodies the core of most contemporary Establishment Clause theories.[223] Nearly all treat neutrality as a necessary feature, and some regard equal treatment of faiths as sufficient to comply with the demands of the clause. Most of the Court's accommodation decisions identify neutrality as an element of the constitutional analysis, but the question of equality proved central in *Board of Education of Kiryas Joel v. Grumet*.[224] In *Kiryas Joel*, the Court struck down a special school district that the State of New York had created for the Village of Kiryas Joel, which is comprised almost entirely of members of the Satmar Hasidic religious community.[225] The Court held that creation of the school district

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[223] For discussion of various theories that embody some concept of neutrality, see Douglas Laycock, Substantive Neutrality Revisited, 110 W.Va. L. Rev. 51 (2007).

[224] 512 U.S. 687 (1994).

[225] Id. at 696. For criticism of the Court's opinion in Kiryas Joel, see Thomas C. Berg, Slouching Toward Secularism: A Comment on Kiryas Joel School District v. Grumet, 44 Emory L.J. 433 (1995); Abner Greene, Kiryas Joel and Two Mistakes About Equality, 96 Colum. L. Rev. 1 (1996).

violated the Establishment Clause because the benefit of such a district was not generally available to other religious groups, and the needs of the Satmar Hasidim could have been met without recourse to the special preference.[226]

Religious accommodations in a public university should satisfy the requirement of neutrality as long as the school grants access and distributes resources according to non-discriminatory criteria. For example, allocation of worship space and time should be based upon criteria that permit all groups to compete equally for advantageous slots, although the relative size of groups and intra-faith heterogeneity may be legitimate considerations.[227] If the religious life coordinator serves as a gatekeeper, any decisions should be based on clear and published policies applicable to all faiths (and biased against none), explaining the basis for any adverse action, and providing a reasonable opportunity to appeal.

The requirement of religious neutrality also applies to the configuration of chapels. Regulations governing the use and appearance of military chapels reflect this obligation. The rules provide that:

> (1) All distinctive faith groups represented in the command may use these facilities on a space available basis.
> . . .
> (4) The chapel environment will be religiously neutral when the facility is not being used for scheduled worship.
> (5) Chapels must be available to people of all faith groups for meditation and

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[226] Id. at 702-07.

[227] For example, a school need not have an equal number of hours available for Christians, Jews, and Muslims, if there are a dozen Christian groups on campus and only one or two of the other faiths.

prayer when formal religious services are not scheduled.[228]

As we discussed in the previous section, configuration of a chapel is likely to reflect culture-bound assumptions about religious experience. Even something as seemingly innocuous as the permanent installation of pews embodies such an assumption, as illustrated by the fact that some faith traditions do not use seating during worship.[229] Although the government should take such considerations into account in constructing new worship facilities, the failure to do so in the past does not mean that the government has violated the requirement of neutrality. As long as the worship space is available for use by all faiths, the government will have met its obligation. But availability demands more than mere eligibility; it means that a faith group may use the chapel without having the religious messages of another tradition superimposed on their own worship. At a minimum, this means that the government must remove or provide some way of covering any faith-specific symbols or messages during worship by other faith traditions.

Seen in this light, the Wren Chapel generally satisfies the standard of neutrality. Although the architecture and fixtures belong to a particular religious tradition, and manifest theological commitments of that tradition, such manifestations do not materially impede other groups' use of the space. The table and lectern are equally available for use, without regard to the worship materials or religious texts placed on them. Indeed, even the chapel's consecration

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[228] U.S. Dep't of Army, Reg. 165-1, Religious Activities: Chaplain Activities in the United States Army (Mar. 25, 2004), para. 13-3.c. Similar regulations govern chapels in the other military services and at Department of Veterans Affairs healthcare facilities.

[229] The most notable example is Islam; mosques do not have seating in the worship space.

as an Anglican place of worship does not deprive other faiths of their equal opportunity to use the space. Any faith tradition could similarly conduct a ritual to sanctify the space for its own worship. Any attempt to block such rituals in the name of protecting a prior faith's consecration would violate the requirement of neutrality.[230]

Under this criterion, permanent display of the cross on the Wren Chapel altar fails the standard of neutrality for a religious accommodation. In the context of a chapel actively used by a variety of faiths, permanent display of the cross suggests that Christianity is the favored or even official religion, while other faiths are merely tolerated. Toleration, however, is fundamentally different from accommodation. In a regime of toleration, the government supports a particular faith and permits other faiths to worship freely. In a regime of accommodation, the government provides equal support for the free religious exercise of all its citizens, and remains indifferent to the content, success, or historic position of any particular faith.

4. Burdens on third parties

The final criterion requires attention to any hardship an accommodation might impose on third parties, although it is unlikely to be a significant element in consideration of public universities' support for student religious experience. The Court invoked this criterion in *Caldor* when it struck down a rule that protected employees' Sabbath observance;[231] the Court held that

[230] No religious community is entitled to a privileged position in state-controlled space based on some theory of prior – perhaps adverse – possession.

[231] 472 U.S. 703 (1985).

the rule extended the protection without appropriately considering the costs that employers and fellow employees would be required to bear in order to provide for such observance.[232] In *Cutter v. Wilkinson*,[233] the Court returned to this theme when it held that the Religious Land Use and Institutionalized Persons Act (RLUIPA) should be interpreted to provide adequate protection for the security interests of prison guards and fellow inmates.[234]

The religious accommodations at issue on public university campuses do not pose the serious risk of hardship or personal injury at issue in *Caldor* and *Cutter*. Indeed, if an accommodation is implemented consistently with the first three criteria, it would be hard to imagine anyone experiencing a burden that would be reasonably attributable to the accommodation. The accommodation merely creates an equal opportunity for voluntary religious experience within the campus community. Those who do not want to participate in the offered religious experience are free to exercise that choice, without any pressure from school officials. Those who want to participate in the activity have an equal right to use resources that the school makes available for that purposes.

V. Acknowledgment of Religion

Contemporary Establishment Clause doctrine offers a second path for attempting to justify permanent display of the Wren Chapel cross – the idea that the government does not

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[232] Id. at 709-11.

[233] 544 U.S. 709 (2005).

[234] Id. at 722-26.

violate the clause when it merely "acknowledges" religion. Although justices and commentators have often used the terms "accommodation" and "acknowledgment" interchangeably,[235] the two refer to quite distinct practices and distinct theories of justification. The government accommodates religion when it removes an identifiable, government-imposed burden in order to facilitate someone's religious exercise. Acknowledgment of religion has a less definite source and limit, but it generally involves an official practice or message that has religious content and serves a public purpose.[236]

The idea of acknowledgment has been an important theme in Establishment Clause

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[235] Van Orden v. Perry, 545 U.S. 677, 684 (2005); Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); Allegheny County v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Lynch v. Donnelly, 465 U.S. 668, 673-75 (1984); ACLU v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1495 (3rd Cir. 1996) (Mansmann, J., dissenting). Many commentators follow courts' use of the terms as interchangeable. See, e.g., Christopher B. Harwood, Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU, 71 Mo. L. Rev. 317, 340-41 (2006); Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 Ohio St. L.J. 491, 603 (2004).

[236] For a thorough and recent account and analysis of the standards governing the expression of religious messages by the state, see Daniel O. Conkle, 110 W.Va. L. Rev. 315 (2007).

jurisprudence since the early 1980s, when the Court relied on the idea in deciding two cases involving religious expression by the government, *Marsh v. Chambers*[237] and *Lynch v. Donnelly*.[238] In *Marsh*, the Court rejected an Establishment Clause challenge to the practice of state-sponsored prayer in the Nebraska legislature,[239] and in *Lynch*, the Court rejected a challenge to the city of Pawtucket's Christmas display.[240] Chief Justice Burger wrote the majority opinions in both cases, and he used a similar argument to uphold both practices. Burger reasoned that the history of the Establishment Clause does not support a strict separation of church and state.[241] Instead, he asserted, that history reflects a pattern of official recognition of religion's significance, manifest in prayers before official events, presidential proclamations of thanksgiving, official observance of holidays that are religiously significant, public display of religious art, and references to religious ideas on the currency, in the national motto, and in the Pledge of Allegiance.[242] He summarized the argument in the claim that "[th]ere is an unbroken

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[237] 463 U.S. 783, 792 (1983). A number of justices had earlier advanced the idea that government should be permitted to recognize the importance of religion; see Douglas's opinion for the Court in *Zorach*, 343 U.S. 306, 313-14 (1952), as well as in Justice Reed's dissent in *Illinois ex. rel. McCollum,* 333 U.S. 203, 244 (1948).

[238] 465 U.S. 668, 674-77 (1984).

[239] Marsh, 463 U.S. 783 (1983).

[240] Lynch, 465 U.S. 668 (1984).

[241] Marsh, 463 U.S. at 786-90; Lynch, 465 U.S. at 672-78.

[242] Lynch, 465 U.S. at 673-78.

history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[243]

During the past quarter-century, the idea of acknowledgment has remained a central theme in Establishment Clause jurisprudence, representing an alternative to separationist constraints on official expression of religion. In *County of Allegheny v. ACLU*, Justice Kennedy's partial dissent relied on the idea of acknowledgment to argue for the constitutionality of a creche display in the courthouse.[244] Dissenting in *Lee v. Weisman*[245] and *McCreary County v. ACLU of Kentucky*,[246] Justice Scalia also invoked the concept of acknowledgment. On both occasions, Scalia reasoned that the Establishment Clause should not bar public acknowledgment, through prayer or displays, of theistic beliefs because such beliefs were widely held among the founders, and are still broadly shared among the nation's citizens.[247]

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[243] Id. at 674. See also Marsh, 463 U.S. at 792 (acknowledgment of beliefs widely held).

[244] Allegheny County v. ACLU, 492 U.S. 573, 657-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)

[245] Lee v. Weisman, 505 U.S. 577, 644-46 (1992) (Scalia, J., dissenting).

[246] McCreary County v. ACLU of Kentucky, 545 U.S. 844, 893-900 (2005) (Scalia, J., dissenting).

[247] Lee v. Weisman, 505 U.S. 577, 644-46 (1992) (Scalia, J., dissenting); McCreary County v. ACLU of Kentucky, 545 U.S. 844, 893-900 (2005) (Scalia, J., dissenting). See also Newdow v. Elk Grove, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring) (phrase "under God" in Pledge of Allegiance is permissible "public recognition of our Nation's religious history and

As we argue in this Part, the idea of acknowledgment is complex and ambiguous, but the Wren Chapel cross offers an especially useful context for exploring the idea. Such an exploration is especially important because those who invoke the concept of acknowledgment are often unclear about its meaning or scope. Through this exploration, we identify three quite distinct understandings of religious acknowledgment – historical accuracy, reverence, and cultural recognition. We evaluate the constitutional premises underlying each concept of acknowledgment, and we suggest how each would apply to permanent display of the chapel cross.

1. Acknowledgment as historical accuracy

The first understanding of acknowledgment is the most restrictive and least controversial of the three. Acknowledgment as historical accuracy represents the modest assertion that the government may officially recognize the significance of religious groups, movements, and ideas as a part of our cultural and national history.[248] For example, the National Park Service, which

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character"; Van Orden, 545 U.S. 677, 687 (2005) (recognition and acknowledgment)

[248] Caroline Elizabeth Branch, Comment: Unexcused Absence: Why Public Schools in Religiously Plural Society must Save a Seat for Religion in the Curriculum, 56 Emory L.J. 1431, 1459-73 (2007) (discussing instruction about religion in public schools); Kent Greenawalt, Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design, 17 N.D. J. L. Ethics & Pub Pol'y 321, 332-34 (2003) (discussing relationship between religion and science instruction in public schools); Kent Greenawalt, Teaching About Religion in the Public Schools, 18 J. L. & Politics 329, 340-65 (2002) (discussing instruction about religion in public schools);

maintains the Mormon Pioneer National Historic Trail, may explain why the pioneers were emigrating.[249] Such acknowledgments of religion involve descriptive rather than normative claims about religion.

The sharpest illustration of this distinction arises in public schools, which are permitted by the Constitution to teach about religion but forbidden to engage in religious inculcation.[250] That distinction, however, sometimes proves elusive or difficult to administer. For example, when some school systems have attempted to implement programs of instruction about religious topics, the classes have been challenged over the content of the curriculum, based on allegations

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Jay D. Wexler, Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools, 56 Vand. L. Rev. 751, 776-84 (2003).

[249] http://www.nps.gov/mopi/. Subsidy for the historic preservation of religious structures raises the same question of religious acknowledgment as that raised by religion in national parks. See generally Ira C. Lupu and Robert W. Tuttle, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, 43 B.C. L. Rev. 1139 (2002).

[250] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment"). *See generally* Religion in the Public School Curriculum: Questions and Answers, in Finding Common Ground: A Guide to Religion in the Public Schools, *available at* http://www.freedomforum.org/publications/first/findingcommonground/B07.inPublicSchool.pdf

that the programs failed to maintain a consistently descriptive attitude toward the subject.[251] More frequently, however, the programs have been challenged over the implementation of the religion curriculum, as teachers redirected the courses to serve religious purposes.[252] Thus, even if it is uncontroversial as a matter of principle that government may acknowledge the historical significance of religion, implementation of the principle – especially in public primary and secondary schools – is likely to be more controversial because of the difficulty of controlling those who provide the lessons about religion's significance.

Even if government actors hew closely to the goal of religious description, issues may arise concerning the accuracy of the purported acknowledgment. The government does not establish religion when it offers a reasonable account of how religion affected past events. Of course, that argument invites a host of further questions. These include philosophical questions about what should count as truthful or reasonable accounts, as well as institutional concerns over

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[251] See, e.g., Doe v. Porter, 188 F. Supp. 2d 904 (E.D. Tenn. 2002) (Bible classes conducted in public schools violated the Establishment Clause because content of instruction was devotional); Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998) (Establishment Clause challenge to curriculum of Bible History courses in public schools).

[252] Crockett v. Sorenson, 568 F. Supp. 1422 (D. W.Va. 1983) (Bible education class in public schools violated the Establishment Clause because control over instruction was delegated to religious officials without adequate public supervision). See also Doe v. Porter, 188 F.Supp.2d at 913-14 (impermissible delegation to religious institution of public school instruction).

which agency of government gets the final say in what counts as reasonably accurate. Answers to these questions are closely related, because if one believes that historical accuracy is unattainable, then one is also likely to believe that democratic institutions should have the final word.[253] If, however, one believes that statements about history can be falsified, then one might also believe that courts should play a role in policing acknowledgments of religion.

For purposes of this paper, we assume that historical statements can be falsified, though we confess uncertainty about the extent to which courts should defer to arguable but unpersuasive historical claims.[254] Debates over display of the Ten Commandments offer a useful illustration. Proponents of such displays often argue that the displays acknowledge the

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[253] On a related question, *see* Edwards v. Aguillard, 482 U.S. 578, 611-36 (1987) (Scalia, J., dissenting) (arguing that statute requiring public school science curriculum to adopt "balanced treatment" of evolution and creation science does not violate Establishment Clause because the Court should defer to legislative judgments about academic content).

[254] Most recently, this question has arisen in connection with debates over the teaching of intelligent design in public schools. Proponents of intelligent design assert that the theory addresses scientific claims about weaknesses in Darwinian evolution, and thus should be permitted in the public school science curriculum. Opponents argue that the theory of intelligent design does not meet widely accepted criteria for science. Opponents have thus far prevailed in court. See Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D. Pa. 2005) (holding that inclusion of Intelligent Design theory in public school science curriculum violated the Establishment Clause because the theory is religious, not scientific, in character).

commandments' role as the historical foundations of the common law.[255] Many medieval and early modern legal writers made the same assertion, although very few contemporary legal historians would agree.[256] Modern scholarship generally locates the roots of the common law tradition in pre-Christian Anglo-Saxon sources.[257] The persistence of historical claims in the face of significant evidence to the contrary does suggest that the argument from history is a pretext for normative claims about the importance of respecting and obeying the commandments. As we discuss below, officials (and reviewing courts) often interweave descriptive acknowledgments of religion with normative religious claims; in such cases, unpersuasive descriptive assertions should be evaluated with a deeply skeptical eye.[258]

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[255] McCreary County v. ACLU of Kentucky, 545 U.S. 844, 856-58 (2005) (claim by government that Ten Commandments represent historical foundation for legal system). See also id. at 904-05, 910-12 (Scalia, J., dissenting) (accepting government claim about historical basis for display of the Ten Commandments).

[256] Van Orden v. Perry, Brief of Baptist Joint Committee, American Jewish Committee, American Jewish Congress, and The Interfaith Alliance Foundation, as Amici Curiae in Support of Respondents, 2003 U.S. Briefs 1500, at *20-*23; McCreary County v. ACLU of Kentucky, Brief Amicus Curiae Legal Historians and Law Scholars on Behalf of Respondents, 2003 U.S. Briefs 1693, at *6-*13. See also Steven K. Green, "Bad History": the Lure of History in Establishment Clause Adjudication, 81 Notre Dame L. Rev. 1717, 1746-47 (2006).

[257] Brief of Baptist Joint Committee, et al., *supra* note XX, at *20-*23.

[258] See *infra* notes XX-XX and accompanying text.

Opponents of President Nichol's decision to remove the Wren Chapel cross frequently invoked the argument that permanent display of the cross represented an acknowledgment of religion's historical role at the college.[259] The underlying basis for the claim is indisputable. As we described in Part II, the college was largely founded for religious purposes and maintained its identity as a church institution until at least the Civil War.[260] But the argument fails to specify or clarify the relationship between that history and permanent display of the cross on the chapel altar.

The problem is not the age of the cross, because both the chapel interior and cross date from roughly the same period, the 1930s. In the 1931 restoration of the Wren Building, however, the chapel's Victorian-era configuration was removed and replaced with the present reproduction of mid-18th century design of worship space.[261] The decision to replicate 18th century design was not accidential or arbitrary.[262] That era define the identities of both the

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[259] See, e.g., Linda Arey Skladany, Editorial – Cross Controversy Is Less About Religion Than History & Heritage, Richmond Times-Dispatch, Mar. 7, 2007, at A-15; J. Edward Grimsley, Editorial – What Would the Founders Think Today?, Richmond Times-Dispatch, Feb. 8, 2007, at A-13; Regent's Voice, *supra* note 8.

[260] See Part II, *supra.*

[261] Kornwolf, *supra* note XX, at 64.

[262] Henne argues that "restoring an institution or a building to *any given point* in its linear history is to accomplish 'historical accuracy,' as far as that moment in time is concerned. Therefore, the restoration reference point for a five-hundred-year-old building may rightly fall

College of William & Mary and the City of Williamsburg. Those identities find their distinctiveness, and help attract students and tourists, by emphasizing the links among the town, the college, and the nation's founding generation.[263]

In a representation of an 18th century chapel, however, the altar cross is glaringly anachronistic. Anglican churches of that era did not place crosses on the altar because they viewed such adornments as remnants of Roman Catholicism.[264] That belief continued well into

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within the past hundred years" (emphasis in original). Henne, *supra* note XX. The claim is true but highly misleading when applied in the context of the Wren Building and Chapel. A five-hundred-year-old building may be restored to a point representing only a century past, but no one can reasonably believe that the Wren Chapel was restored to its appearance in 1940, 1900, or any point subsequent to the 1859 fire that destroyed the colonial-era structure. If the chapel interior had been configured to represent a Victorian or Edwardian Anglican worship space, then display of the cross would have been historically appropriate. But the Wren Building and Chapel were restored to reflect the colonial era, so the altar cross is not part of an historically accurate display.

[263] Rouse, *supra* note XX, at 180-85. See also The Sir Christopher Wren Building, *available at* http://www.wm.edu/about/wren/index.php (describing building as "oldest academic building in continuous use in the United States"). The college's distinctiveness has long been based on its claim to antiquity. See, e.g., Lyon G. Tyler, A Few Facts from the Records of William and Mary College, in 4 Papers of the American Historical Association (New York: G.P. Putnam's Sons, 1890), at 129-41.

[264] Davis and Rawlings, *supra* note XX, at 238-43; Henne, *supra* note XX; Upton, *supra*

the 19th century, until the Oxford Movement led many Anglican congregations to adopt a more ornamented style of worship.[265] Instead of a cross, the altar of an 18th century Anglican church would have been adorned with a communion plate and cup, often made of silver or gold.[266]

The anachronism undermines the purported intent to acknowledge the school's religious origins. Because the cross display is not an accurate representation of 18th century worship space, the display communicates a different message – that the chapel is *now* a place set apart for Christian worship, rather than simply that it was originally constructed for that purpose. Other religiously distinctive symbols could have been justified as historical acknowledgments. For example, churches of the period often had an altarpiece inscribed with the Decalogue or, as noted above, displayed a communion plate and cup on the altar.[267] But the altar cross lacks any plausible connection to 18th century worship practice.

President Nichol did not defend his decision to remove the cross as a restoration of

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note XX, at 118-19, 126-27.

[265] John Edward Joyner III, The Architecture of Orthodox Anglicanism in the Antebellum South, dissertation, College of Architecture, GA Inst of Tech (Dec. 1998), at 1-6, 25. On the Oxford Movement, see generally Larry Crockett, The Oxford Movement and the 19th-Century Episcopal Church: Anglo-Catholic Ecclesiology and the American Experience, 1 Quoudlibet J. (Aug. 1999), *available at* http://www.quodlibet.net/crockett-oxford.shtml.

[266] Upton, *supra* note XX, at 152-55.

[267] Davis and Rawlings, *supra* note XX, at 21-24, 280; Upton, *supra* note XX, at 120-33, 147-53.

historic authenticity, and the defense seems only to have been identified by those responding to opponents of that decision.[268] But we are focused only on the legal reasons that would have allowed the college to leave the cross on permanent display, not the reasons for its removal from the altar. Permanent display of the cross lacks the historical accuracy required to be justified as an acknowledgment under this first definition of that term.

2. Acknowledgment as reverence

The second interpretation of religious acknowledgment is far more controversial than the first. The historical version of acknowledgment is descriptive, but acknowledgment as an expression of reverence is not only normative but performative. It represents an act of worship by the political community. The official act of acknowledgment is directed to God as a collective recognition of divinity. This understanding is categorically different from acknowledgment as a reflection of historical or cultural reference points. Those two focus attention on religion as a human phenomenon, either in the past or present. In stark contrast, acknowledgment as reverence constitutes participation in the intrinsically religious act of worship.[269]

This reverential conception of religious acknowledgment has surfaced only recently in

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[268] See Henne, *supra* note XX (argument about historical inaccuracy of cross display first raised by college professors Melvin Ely and Rhys Isaac, not by President Nichol).

[269] For an intriguing argument that government may promote or sponsor acts of reverence in times of crisis, see William P. Marshall, The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11 (2002).

contemporary Establishment Clause jurisprudence, and has not yet commanded a majority of the Court. Dissenting in *McCreary County v. ACLU of Kentucky*,[270] Justice Scalia wrote: "[h]istorical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[271] Concurring in *Van Orden v. Perry*,[272] he made the point even more explicitly. "There is nothing unconstitutional," Justice Scalia wrote, "in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."[273] For Scalia, the people collectively – acting through their agent, the government – may properly engage in worship of God.[274]

Scalia's argument in *McCreary County* and *Van Orden* only makes explicit what had long been an unstated implication of the term acknowledgment. Perhaps the earliest and best example of this can be found in Justice Douglas's opinion for the Court in *Zorach v. Clauson*,[275] where he wrote that "[w]e are a religious people whose institutions presuppose a Supreme

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[270] 545 U.S. 844 (2005).

[271] Id. at 894 (Scalia, J., dissenting) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[272] 545 U.S. 677, 692 (2005).

[273] Id. at 692 (Scalia, J., concurring).

[274] McCreary County, 545 U.S. at 899 (Scalia, J., dissenting).

[275] 343 U.S. 306 (1952).

Being."[276] Justice Douglas's assertion tracks Justice Scalia's claim about acknowledgment in three important respects. First, it links the people and government in a single religious identity. Second, it suggests – albeit much more ambiguously than Justice Scalia does – a particular religious attitude, which is implied by the term "presuppose." It is possible that Justice Douglas meant the term only as an historical claim about the importance of religion to the nation's founders, but his use of the present tense indicates that the presupposition is ongoing. In other words, the Supreme Being remains, in some sense, at the foundation of the nation's institutions. Third, Justice Douglas's statement identifies the object of that religious attitude in generically monotheistic but nondenominational language.

As sketched in Justice Scalia's *McCreary County* dissent and *Van Orden* concurrence, the idea of acknowledgment as reverence would permit official expressions of support for religion, public religious displays, and prayer before civic events.[277] Justice Scalia derived his understanding of permissible religious acknowledgment from a reading of Establishment Clause history,[278] and that history also provides the two limiting principles on his account of acknowledgment. Such acknowledgments, he asserted, violate the Establishment Clause only if individuals are compelled to participate in the communal religious activity,[279] or if the activity

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[276] Id. at 313.

[277] McCreary County, 545 U.S. at 885-911 (Scalia, J., dissenting); Van Orden, 545 U.S. at 692 (Scalia, J., concurring)

[278] McCreary County, 545 U.S. at 885-88 (Scalia, J., dissenting)

[279] Id. at 908-09.

involves religious claims that are narrower and more specific than the inclusive monotheism embraced by the founders.[280]

Justice Scalia's concept of acknowledgment has generated a vigorous reaction,[281] primarily because his interpretation jettisoned the obligation of religious neutrality, which has been the keystone of Establishment Clause jurisprudence since the Court's decision in *Board of Education v. Everson*[282] inaugurated the modern era of that jurisprudence. On Justice Scalia's reading, the government has no obligation to be neutral between religion and non-religion, or

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[280] Id. at 909.

[281] See Frederick Mark Gedicks and Roger Hendrix, Uncivil Religion: Judeo-Christianity and the Ten Commandments, 110 W.Va. L. Rev. 275 (2007); Thomas Colby, A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100 Northwestern U. L. Rev. 1097 (2006). For a reply to Professor Colby, see Kyle Duncan, Written with the Finger of Antonin: Bringing the Decalogue Dissent Down from the Mountain, 2007 Utah L. Rev.287. For the record, we too reject the notion that the government may appropriately act in the mode of worship or veneration towards God. See Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 83-84 (2002) (the Constitution in general, and the Religion Clauses in particular, limit government to temporal concerns).

[282] 330 U.S. 1 (1947). For recent invocations of the principle that government must be neutral between religion and non-religion, see Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

even between monotheism and other religious traditions.[283] The requirement of official neutrality extends only to monotheist faiths.[284] Government must not endorse or denigrate any specific faith, but is otherwise free to support or engage in generically monotheist worship and religious expression.

This understanding of reverential acknowledgment, however, is unlikely to be helpful to those who support permanent display of the Wren Chapel cross. On a practical level, Justice Scalia's articulations of this idea in *McCreary County* and *Van Orden* were joined only by Justice Thomas and Chief Justice Rehnquist.[285] Justice Kennedy joined other parts of Justice Scalia's dissent in *McCreary County*, but not the portion containing the claims about the permissibility of government-sponsored worship.[286] Even if Chief Justice Roberts and Justice Alito eventually chose to adopt the idea of reverential acknowledgment, Justice Kennedy's opposition would prevent it from gaining a majority of the present Court.

More importantly, display of the cross does not fall within Scalia's definition of a permissible acknowledgment because it represents a set of quite distinctive claims about the person and work of God, rather than an inclusive recognition of the "Supreme Being." Even under Justice Scalia's expansive concept of reverential acknowledgment, official recognition of

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[283] McCreary County, 545 U.S. at 899-900 (Scalia, J., dissenting)

[284] Id. at 909.

[285] Id. at 885 (specifying that Chief Justice Rehnquist and Justice Thomas joined the entire dissent, but that Justice Kennedy joined only Parts II and III)..

[286] Id.

Christianity's distinctive symbol violates the Establishment Clause.

3. Acknowledgment as cultural recognition

The third potential understanding of acknowledgment is the most frequently used but also the most complicated, largely because of its inherent ambiguity. Under the concept of cultural recognition, the state may acknowledge the important role of religion within the social and political community. In contrast to the historical version, cultural acknowledgment focuses on the contemporary significance of religion. But the two versions are alike – and distinguishable from the reverential account – in that they are both intended to be descriptive. The government acknowledges religion, but does not itself engage in worship. The ambiguities of cultural recognition arise from the frequent difficulties of separating the descriptive act of acknowledgment from normative and reverential promotion by the government of religious experience.

Chief Justice Burger's opinion for the Court in *Lynch v. Donnelly*[287] represents the most prominent example of the cultural acknowledgment theory. The plaintiffs in *Lynch* challenged the inclusion of a creche in a city-sponsored Christmas display. They argued that the creche was a distinctly religious symbol, and the city's embrace of that symbol reflected impermissible government support for religion.[288] In rejecting the challenge, the Court pointed to the history of public recognition of religion,[289] and focused particularly on longstanding practices related to

[287] 465 U.S. 668 (1984).

[288] Id. at 670-72.

[289] Id. at 674-78.

religious holidays. For example, Presidents and Congress issue proclamations that commemorate religious holidays, government closes its offices and gives its workers paid vacations, and cities across the country erect displays to express public celebration of the holiday season.[290]

The Establishment Clause does not prohibit official recognition of religion as long as the act of recognition has a secular purpose, determined by each specific factual context.[291] In *Lynch*, the Court found such a purpose in the celebration of the Christmas holiday, which has taken on an independent secular significance and thus become part of the broader culture.[292] Within the broad context of a display celebrating this cultural holiday, the Court reasoned, the city should be able to include a reference to the religious roots of the holiday.[293]

The reasoning in *Lynch* is easily mistaken for the historical version of acknowledgment, or confused with the idea of accommodation, but it is a distinct approach. Under the historical version, constitutional validity of the message depends on its accuracy. Thus, a National Park Service plaque at Monticello could properly indicate that Thomas Jefferson donated funds to churches, but not that Jefferson held traditional Christian beliefs about Jesus Christ.[294] Under the idea of accommodation, particular government-imposed burdens on religious exercise give rise

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[290] Id. at 680-85.

[291] Id. at 680-81.

[292] Id. at 680-85.

[293] Id. at 685-86.

[294] Holmes, Faiths of the Founding Fathers, *supra* note XX, at 86-87.

to and justify the government's support for religious experience. Under the cultural version of acknowledgment, however, the government is neither bound by the requirement of historical accuracy nor limited to relief of government-imposed burdens. Cultural acknowledgments respond to the religious experiences and preferences of the populace, but response to popular demand alone cannot justify the acknowledgment. If demand were sufficient, the government would have virtually unlimited discretion to highlight and celebrate the religious beliefs of the majority or politically influential.

Thus, in *Lynch*, the Court held that acknowledgments of religion must further a secular purpose,[295] independent of the reinforcement or affirmation of popular religious beliefs, although the purpose of the acknowledgment need not be exclusively secular.[296] Celebration of the Christmas holiday, the Court reasoned, was a legitimate secular purpose because the holiday possesses cultural and commercial aspects that have significance independent of the Christian meaning or origins of the event.[297] Moreover, the Court permitted the city to include within its display a reference to the religious origins of the event. That reference – the creche – did not transform the entire display into a religious message. Instead, the creche recognized the contribution of religion to the overall cultural experience of the holiday.[298]

The idea of cultural acknowledgment in *Lynch* depends heavily on the logic developed

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[295] 465 U.S. at 680-81.

[296] Id. at 681, n.6.

[297] Id. at 680-85.

[298] Id. at 684-85.

earlier in *McGowan v. Maryland*,[299] in which the Court rejected an Establishment Clause challenge to a law that required most places of business to close on Sundays. The plaintiffs, who had been charged with selling goods on Sunday, argued that the law was unconstitutional because it was intended to encourage attendance at Christian churches.[300] Although such laws had religious origins, the Court reasoned that legislation requiring a uniform day of rest was justified by its beneficial effect on social welfare.[301] The choice of Sunday as the state's coordinated day of respite from business did not reflect a preference for Christianity, but a recognition of the practice already adopted by a majority of the state's citizens, including many non-Christians.[302] The Establishment Clause did not require the state to ignore existing and widespread social practices when selecting the weekly day of rest.[303] As in *Lynch*, the cultural acknowledgment of religion was justified by a secular purpose that had significance independent of and distinguishable from the religious content of the acknowledgment.[304]

Not all acts of alleged cultural recognition pass this test. In *County of Allegheny v.*

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[299] 366 U.S. 420 (1961).

[300] Id. at 431.

[301] Id. at 446-52.

[302] Id. at 451-52.

[303] Id. at 452.

[304] Similarly, approval of nonsectarian legislative prayer in Marsh v. Chambers, 463 U.S. 783 (1983), was premised on the secular purpose of solemnizing legislative proceedings, as well as the historically accurate acknowledgment of a longstanding practice of legislative prayer.

ACLU,[305] a splintered Supreme Court invalidated a display of a stand-alone Christmas creche on the landing of a prominent staircase in the County Courthouse, but upheld the display of a Christmas tree alongside a Chanukah menorah and peace sign outside the County municipal building. The display of the creche alone, the Court ruled, celebrated the religious meaning of the holiday and lacked connection to the day's secular significance.[306] In contrast, the combination of multiple holiday symbols with a peace sign in the outdoor display was sufficient for seven Justices to conclude that this arrangement recognized the cultural significance of the holiday season for many in the Pittsburgh area.[307]

Similarly, the Court's disposition of the *Ten Commandments Cases*,[308] decided in 2005, manifested precisely the same distinction between displays designed to recognize secular ideals or aspects of culture, and displays designed to promote religious principles. In *McCreary County v. ACLU of Kentucky*, a 5-4 majority parsed the history of the display of the Decalogue in the

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[305] 492 U.S. 573 (1989).

[306] Id. at 598-613 (Blackmun, J., for the Court); see also id. at 623-632 (O'Connor, J., joined by Brennan & Stevens, JJ., concurring).

[307] The outdoor display included a Christmas tree and a Chanukah menorah. The opinions upholding that display include the Court opinion, id. at 613-22; Justice O'Connor's concurring opinion, id. at 633-37; and Justice Kennedy's opinion, concurring in part and dissenting in part, id. at 655.

[308] McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

county courthouse and concluded that public officials had posted the document for the purpose of celebrating its religious content.[309] The majority saw the county officials' attempt to secularize the document, by surrounding it with other historical materials concerning the relation of religion to law, as a pretext,[310] rather than an authentic acknowledgment of the Ten Commandments' place in the secular culture.

On the same day, a different 5-4 alignment in the Supreme Court produced a decision in *Van Orden v. Perry*[311] upholding the display of the Ten Commandments on the Texas state capitol grounds. In *Van Orden*, the plurality opinion recognized that the monument had been accepted and prominently displayed by the state in reflection of the secular state purpose of fighting juvenile delinquency through moral education.[312] In addition to recognizing this secular purpose, Justice Breyer's decisive concurring opinion also emphasized the divisive quality of removing a longstanding monument, to which many people in the community are attached for cultural and religious reasons.[313]

However much one might question whether the factual differences between *McCreary County* and *Van Orden* support the difference in result, the *Ten Commandments* cases sharply reinforce the constitutional requirement that cultural acknowledgments of religious symbols or

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[309] McCreary County, 545 U.S. at 867-73.

[310] Id. at 873, n. 22 (distinguishing *McGowan*).

[311] 545 U.S. 677 (2005).

[312] Id. at 681-92.

[313] Id. at 698-704 (Breyer, J., concurring).

sentiments must credibly resonate with secular meaning and secular goals in order to satisfy the Constitution. Moreover, as we suggest below, the concern for divisiveness in the response to constitutionally questionable displays is a prominent aspect of the story at William & Mary.

The lower courts have proven capable of administering the distinctions demanded by the theory of cultural acknowledgment. In *Doe v. Village of Crestwood*,[314] for example, the Seventh Circuit held unconstitutional a city's practice of including Roman Catholic mass as part of its festivals celebrating Polish and Italian heritage. Contrasting the mass with the creche at issue in *Lynch*, the court found that celebration of the two cultures did not provide a sufficient secular justification for city sponsorship of the worship service.[315] Two features of the case distinguished it from *Lynch.* First, the mass involved an overt act of worship, rather than just a display of a religious symbol. Second, the mass lacked a significant secular connection with the festival.[316]

These two considerations are conceptually linked. A government-supported act of cultural acknowledgment that includes more explicit and robust religious activity, such as the worship service challenged in *Crestwood*, should have a more obvious and substantial secular justification than a passive display. In the absence of such a justification, the government's purported reasons for the acknowledgment may be, or are likely to appear to be, a pretext

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[314] 917 F.2d 1476 (7th Cir. 1990).

[315] Id. at 1479.

[316] Id. at 1478-80. The only link was language. The mass was said in the language of the culture being celebrated (either Italian or Polish). Id. at 1477.

designed to cover up a reverential acknowledgment.

During the controversy over the Wren Chapel cross, the idea of cultural acknowledgment surfaced through an argument offered to defend permanent display of the cross. Some opponents of the President's decision claimed that the pre-existing display of the cross commemorated the long relationship between the college and Bruton Parish Church.[317] This argument was buttressed by the fact that the cross was originally donated to the church in memory of a 19th century professor at William & Mary. At first glance, this claim resonates with the cultural acknowledgment approach of *McGowan* and *Lynch*. Under this theory of permissible acknowledgment, permanent display of the cross would be justified because it furthers the secular purpose of symbolizing and celebrating the school's substantial bonds with Bruton Parish, bonds that include the many college presidents who served as rectors of that congregation.

As was the case in *Village of Crestwood*, however, the argument falters at the connection between the precise details of the religious acknowledgment and its purported secular purpose. Permanent or default display of the cross on the chapel altar offered virtually no visual cues that the college intended the cross to convey a message about the school's links with Bruton Parish.

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[317] John Kennedy, Against William & Mary, American Conservative Union Foundation, *available at* http://www.acuf.org/issues/issue90/commentsmary.aspWren Cross - Point-by-Point Examination of Two Statements by President Gene Nichol, Save the Wren Cross Blog, December 19, 2006, *available at* http://savethewrencross.blogspot.com/2006/12/wren-cross-point-by-point-examination.html

Instead, the presentation indicated only that the chapel was presumptively a place of Christian worship.

Recognition of the historic and ongoing relationship between the College and Bruton Parish is a legitimate secular purpose, and the cross can be a constitutionally acceptable element in conveying that recognition. In order to serve as cultural or historical acknowledgment, however, the display must make the relationship between college and church more apparent, and less an afterthought to what seemed to be the reverential purpose of the display. The compromise placement of the cross, in an appropriately marked display case on the side wall of the chapel, is a far more defensible acknowledgment of history and culture than the unadorned placement on the altar. Moreover, leaving the cross within the chapel space, rather than relegating it to a back room, helps ameliorate the potential divisiveness that proved decisive for Justice Breyer (and thus to the outcome) in *Van Orden v. Perry*.[318]

Conclusion

The controversy over the presence and placement of the cross in the Wren Chapel is a matter of local and collegial interest, but it also represents a spectacularly teachable moment. As we hope this paper has demonstrated, resolution of the controversy implicates the deepest questions of Establishment Clause jurisprudence. These questions include the increasingly important relationship between concepts of justiciability and the substantive content of the Clause, in part because President Nichol framed his decision in terms of offense to those who have may been made to feel like religious outsiders by the default position of the cross on the

[318] Van Orden, 545 U.S. at 704 (Breyer, J., concurring).

chapel's altar table.

Even when current doctrinal concerns about "personal injury" and "endorsement" are pushed to one side, however, the presence of the cross in a prominent and highly visible location in the chapel of a public college invites attention to the limits of public agencies' authority to speak in a religious voice. If the Establishment Clause means anything, it prohibits the government from acting for the purposes of sponsorship and promotion of a particular faith tradition. Whenever an agency of the government speaks in ways that connote such sponsorship, it must offer some theory of justification independent of such an impermissible purpose. In the circumstances present at William & Mary, a reflexive sense of "once a Christian school, always a Christian school," simply will not suffice as a constitutionally adequate justification.

On the facts of the controversy at William & Mary, the only plausible candidates for a theory of justification are concepts of "accommodation" and "acknowledgment." The theory of accommodation, which requires a government-imposed burden on religious freedom as a trigger, can justify the provision of a college chapel, but it cannot justify a symbolic Christian characterization of the space as its default configuration. By the same token, because the absence or removal of that default configuration is no burden on religious liberty, the compromise position of moving the cross off to one side, and permitting its display on the altar only during Christian worship, cannot possibly be seen as producing any constitutional harm. When Christian students need the cross on the altar to focus their worship, they can move the cross to that place.

The theory of acknowledgment offers more possibilities to justify the prior placement of

the cross in the chapel, but none are sufficient. Historical accuracy is dissatisfied, not fulfilled, by placement of the cross on the altar table, where it would not have been in the 18th century. Reverential acknowledgment as a concept perhaps can do the trick, but such a concept has not yet become part of our law, and in any event has not been stretched this far even by its most avid judicial proponents. Indeed, reverential acknowledgment of a sectarian symbol seems to us synonymous with an establishment of religion.

What remains is the concept of cultural acknowledgment. This idea has roots in the case law, but its boundaries are amorphous and uncertain. Whatever those boundaries may be, the combination of a permanent default position at the center of the chapel's worship space, and the unambiguous religiosity of the cross in this setting, make the Wren Cross a poor candidate for the justification of cultural acknowledgment. Arguments based on culture seem a pretext for reverence when the relevant icon starkly transmits the message of Christian passion and promise, and the icon's cultural background remains hidden from view.

We have no doubt that President Nichol could have been more thorough in the reasoning that accompanied and followed his decision. If he had engaged in a more elaborate process of constitutional evaluation, we expect that he would have come to the same conclusion. At a public college, placement of a cross in such a position of spatial, ceremonial, and visual prominence, could not continue without putting the school in violation of the Constitution.

In contrast, placing the cross off to one side of the chapel, in a display case marked with a message about the role of this particular cross and of Bruton Parish in the chapel's history, seems to us to be a defensible act of both cultural and historical acknowledgment. This compromise solution, while perhaps not fully satisfactory to the more ardent advocates on either

side of the dispute, reflects appropriate sensitivity to the full panoply of constitutional, historical, educational, and institutional considerations. We hope that the rich insights that can be drawn from the struggle over the cross at college will endure long after adversarial tempers have cooled.