THE VIRTUE OF TRUE MEANING AND THE TYRANNY OF THE FEW:

A REMONSTRANCE AGAINST POLITICALLY UNACCOUNTABLE JUDICIAL POLICYMAKING

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ABSTRACT

The American Constitution protects unalienable liberty and provides the political structure necessary for functional representative governance. In this article, we explore how an unelected judiciary furthers democratic values when it honestly interprets a Constitutional provision to discern its truthful meaning. We then show how judges threaten the constitutional order when they engage in politically unaccountable creation of new meaning. Here we explain, by analysing constitutional challenges to Christian displays, how malleable judicial interpretation destroys constitutional structures and safeguards.

I. FIRST CONSIDERATIONS

For the people of the United States, the Constitution is not just a set of guidelines. It is the framework on which they constructed their government and their legal system. Enumerating and dividing powers, it provides the political structure necessary for a functional republic with representative governance. Expressly limiting the exercise of such power, it protects unalienable liberty of the people.

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The words of the Constitution both create the Supreme Court's authority and give it definition. Highly qualified draftsmen crafted those words quite clearly to express a simple meaning. Faithful adherence to those words serve as the touchstone for measuring the fulfillment of the Court's sacred duty. Every Justice taking the oath of office swears to uphold the Constitution as written, not as he or she prefers it be written. Honestly discerning and applying the truthful meaning that the Drafters embodied in the Constitution's language *then*, should be the Court's high calling.

Recently, in *American Legion v American Humanist Association*, humanists challenged the presence of a cross displayed in the State of Maryland. The humanists contended the cross violated the Establishment Clause. Thus, in resolving this dispute, the Establishment Clause served as the applicable constitutional Rule of Law. You might think, therefore, that a court resolving this dispute should care what the words in the Establishment Clause actually mean. They did not do so, either at the U.S. Court of Appeals where they struck down the display, or at the U.S. Supreme Court, where they upheld it.[1]

In this article we explore how the judiciary furthers democratic values of representative governance when it honestly interprets a provision to discern its truthful meaning. We also show how a judiciary threatens the constitutional order when it fails to do so. We illustrate by analyzing the Court's religious display cases like *American Legion*. Each of these cases provided an opportunity for a court to say what the applicable constitutional Rule of law means, or to instead say something else. A significant subset of the Court's Establishment Clause jurisprudence, all raise important questions as to whether a court acts outside its constitutional authority when it exercises will instead of judgment. As nations increasingly abandon originalism and honest interpretation to reach truthful meaning, [2] serious implications exist for the future of constitutional representative governance under the Rule of Law.

[1] *American Legion v American Humanist Association* No. 17-1717 Slip Op (2019)
[2] See James Allan, 'Australian Originalism without a Bill of Rights: Going Down the Drain with a Different Spin' (2014) 6 *The Western Australian Jurist* 1-2

II. THE PROPER ROLE OF THE JUDICIARY WITHIN THE CONSTITUTIONAL REPUBLIC

The American judiciary holds a special role in the constitutional order. As Judge Robert Bork observed,

> The judiciary's great office is to preserve the constitutional design. It does this not only by confining Congress and the President to the powers granted them by the Constitution and seeing that the powers granted are not used to invade the freedoms guaranteed by the Bill of rights, but also, and equally important, by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.[3]

Thus, the structure and words of the American Constitution contemplate a judicial branch with no power to make or enforce laws. Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party . . .[4]

No enumerated judicial power exists for the judiciary to amend the Constitution. It is undisputed that

> [t]he Federal Government 'is acknowledged by all, to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.' The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.[5]

During the ratification process of the Constitution, Alexander Hamilton saw no threat to representative governance from the judiciary – as long as it stayed in its own lane:

> … the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; *I mean so long as the judiciary remains truly distinct from both the legislature and the Executive*.[6]

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[3] Robert Bork, The Tempting of America (Touchstone, 1990) 65.
[4] U.S. Constitution, Art III, ss 1 and 2.
[5] *Nat'l Fed'n of Indep Bus v Sebelius,* 132 S Ct 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v Maryland*, 17 US 316, 404-405 (1819)); US Const art I, s 8, cls 5, 7, 12; *Gibbons v Ogden*, 9 US (1 Wheat.), 194-95 (1824).
[6] Alexander Hamilton, 'The Judiciary Department,' *The Independent Journal*, (New York City, 1788) [8], <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78>

Thus, in deference to the people's prerogative, judges must respect the Constitution and laws enacted pursuant to it. Only then is power conditional on the favor of the people, and only then is the law and the Constitution shaped by the people's collective will. It is then, and only then, that the republic is an entity of the people, true to its name.[7]

The Constitution, therefore, assumes a jurisprudence obligating the judiciary to honestly interpret constitutional and statutory provisions according to their true meaning. By doing so, the judiciary may discern whether legislative and executive actions: 1) fall within the authority delegated by the people in the constitution, or 2) infringe on liberty guaranteed to the people by the constitution.

Alexander Hamilton articulated this understanding in the Federalist Papers:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
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> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[8]

Thus, the judiciary must never usurp the people's prerogative when interpreting constitutional and statutory provisions. Republican principles require unelected judges to merely articulate the true meaning of constitutional and statutory provisions when deciding cases and controversies. When it goes further, making meaning malleable, a republic cannot function as a republic. It becomes something else entirely.

Hamilton explains why malleable judicial policymaking improperly conflicts with the Constitution's design for republican governance:

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[7] See the Oxford, *Republic* (2019) Lexico https://www.lexico.com/en/definition/republic. Republic comes from the Latin words, res meaning 'entity' and publicus, meaning 'of the people'

[8] Hamilton, above n 6. [12-13]

> … It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.[9]

The American people, through elected representatives, hold ultimate power of the state. If personal preferences of politically unaccountable judges supplant policies of the people's representatives, government ceases to represent the people. To be sure, a privileged few benefit. As Philip B. Kurland observes: 'Both the earlier courts and the present ones are acting on behalf of a particular clientele, largely self-selected by the judges.'[10]

As early as 1823, Thomas Jefferson similarly observed the threat to republican governance from judicial activism deeming meaning malleable:

> Their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working it's change by construction, before any one has perceived that this invisible and helpless worm has been busily employed in consuming it's substance.[11]

A. *Deliberately Usurping Constitutional Amending Processes Undermines Republican Governance and the Rule of Law.*

Judicially amending the meaning of the words in the Constitution bypasses constitutionally required political processes that specifically require involvement of politically-accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .[12]

[9] Hamilton, above n 6 [16] (emphasis in original).
[10] Philip B Kurland, 'Government by Judiciary' (1979) 2 *UALR Law Journal* 307, 316.
[11] Letter from Thomas Jefferson to Adamantios Coray, 31 October 1823. [7] https://founders.archives.gov/documents/Jefferson/98-01-02-3837
[12] U.S. Constitution, Art. V

Likewise, judicially amending the meaning of the words in a federal statute bypasses constitutionally required processes that specifically require involvement of a politically-accountable Congress and President.

Article I of the Constitution, expressly provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. *** Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it . . . .[13]

Thus, although the judicial branch may hold the power to honestly say what the provisions of the Constitution or a statute truthfully mean, that power does not extend to amending or evolving the meaning of these provisions. The Constitution delegates that power to Congress and the President. Judicially changing the meaning of a constitutional provision or statute usurps the people's authority contrary to these provisions. An unelected judiciary ought not improperly usurp the people's prerogative.

B. *The Principle of Judicial Independence and How its Abuse Threatens the Judiciary's Institutional Legitimacy*

The Constitution expressly delegates specific lawmaking powers to the Congress and specific enforcement powers to the President. These enumerated powers provide legitimacy when Congress or the President act pursuant to such powers while carrying out their respective constitutional roles. Unlike these enumerated legislative and executive powers, the Constitution's delegation of the Judicial Power includes no specific enumerated powers to the judiciary to carry out its constitutional role of resolving disputes. Nonetheless, the people entrust the nation's judiciary to independently resolve disputes arising under the Constitution and laws of the United States. This trust exists only because the people continue to perceive the exercise of judicial power as legitimate. The judiciary's duty to apply the Rule of Law, as expressed by the people's representatives, preserves this legitimacy. To facilitate this calling, Article III inoculates the judiciary against political interference from

[13] U.S. Constitution, Art 1, ss 1, 7

the Congress and President by giving lifetime tenure to federal judges. Federal Judges hold lifetime appointments so that they may apply existing law to resolve disputes without fear of political consequences.[14]

With constitutionally instituted independence comes responsibility. The principle of independence only preserves institutional legitimacy of the judiciary if a judge exercises judgment based on what the constitutional provision or statute says, not based on what the judge wills it to say.

A politically active judiciary can jurisprudentially engineer a judicial coup if it is willing to weaponise its independence. Judges weaponise their constitutionally proscribed independence by arming malleable constitutional interpretation to usurp power reserved by the Constitution to the Congress and the President. So armed, an unelected judiciary operates in the shadows. Stealthily legislating from the bench, it maintains the illusion of legitimacy, while at the same time evading accountability. Rather than letting the true meaning of the Constitution's words guide their decisions, judges take it upon themselves to decide what they prefer the Constitution should say. Corrupting the constitutionally approved independence designed to guard against political influence, an imperial judiciary reigns at the cost of its own institutional legitimacy. When politically unaccountable judges amend policy promulgated by the people's representatives, it is not surprising when the people reject it as illegitimate.

In opposing ratification of the Constitution, the anti-federalists foresaw the threat to representative governance from an unchecked independent judiciary:

> The supreme court under this constitution would be exalted above all other power in the government, and subject to no control. The business of this paper will be to illustrate this, and to show the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible….
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> …[the authors of the constitution] have made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[15]

[14] See generally, U.S. Constitution, Art I, II, and III

[15] Brutus,'The Power of the Judiciary', *The New-York Journal*, New York City, 20 March 1788, <http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/78.htm>.

Thomas Jefferson, on the other side of the debate, nonetheless likewise understood how an independent judiciary could lead to an abuse of power:

> The constitution… is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.[16]

Jefferson's and the Anti-Federalist's concern over an independent judiciary undercutting its own institutional legitimacy continues to hold merit. The judiciary holds a solemn duty to uphold the Rule of Law. This duty requires it to resist the temptation to use its independence to impose its will over that of the people.

C. *The Predictability Problem of Judicially Active Malleable Interpretation*

Predictability in the law is a vital component of good governance under the Rule of Law. Consistent judicial decisions, grounded in honest interpretation, give government officials notice of what is prohibited. When it comes to judicial review of government action and constitutional provisions, consistent decisions provide predictability for officials seeking to act in accordance with constitutional standards. Judicially active malleable interpretation undermines predictability because its subjectivist nature inevitably produces inconsistent judicial precedents. Inconsistency is certain because judges, using malleable interpretation, make personal subjective assessments, rather than looking to the true meaning of the provision or the content of the government action itself. Inconsistent judicial precedents lead to unpredictability in the law, providing no beneficial guidance for government officials trying to act constitutionally.

D. *The Tyranny Problem of Judicially Active Malleable Interpretation*

The jurisprudential ammunition judges use when weaponising their independence is malleable constitutional interpretation. Here, proponents of evolving judicial preferences claim that through amending from the bench, judges can bestow new meanings and even new rights and understandings for the people. It stands to reason, though, that a

[16] 'Letter from Thomas Jefferson to Spenser Roane', 6 September 1819, <https://founders.archives.gov/documents/Jefferson/98-01-02-0734>.

democratically unaccountable judiciary capable of giving rights and understandings is equally efficient at taking them away. Although it is possible to imagine how this capability to quickly change the Constitution might be used for good, a stable, constant Constitution can do much more to protect liberty than any individual judge, even if that judge holds good intentions.

The Constitution, to the extent its true meaning is upheld, provides the political structure necessary for a functional representative governance, while protecting unalienable liberty. Malleable judicial interpretation enabling politically unaccountable creation of new meaning, destroys these constitutional structures and safeguards. Indeed, judicially changing the Constitution's meaning to what contemporary unelected judges desire it to mean is the first step on the path to tyranny. That path to tyranny is littered with anti-Christian sentiment and disregard for the Rule of Law.[17]

III. AN ILLUSTRATION: ESTABLISHMENT CLAUSE CHALLENGES TO CHRISTIAN DISPLAYS

We find a diabolical example of judicial activism in the Court's resolution of Establishment Clause challenges. Here, in various contexts, an active judiciary changed the meaning of the Clause to effectively exclude government policies and actions motivated by Christian purpose. To illustrate the extent of Court's malleable 'interpretation', we review its cases involving religious displays. Given our thesis in this article, we begin our analysis with an honest interpretation of the true meaning of the words in the Establishment Clause.

A. *An Honest Interpretation of the True Meaning of the Establishment Clause*

As written by its authors, the relevant portion of the First Amendment to the United States Constitution states: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'[18] What do these words mean?

[17] For example, *Dred Scott v Sanford,* 60 US (19 How.) 393 (1857) deemed some human life unworthy of constitutional protection based on the colour of one's skin. *Buck v Bell,* 274 US 200 (1927) deemed others unworthy to procreate new human life. *Roe v Wade*, 410 US 113 (1973) and its progenitor precedents, deemed some unborn children unworthy of constitutional protection based on their age, while creating a new constitutional right of personal autonomy protecting physician-assisted killing of human life. *Obergefell v Hodges* 135 S Ct 2584 (2015) further evolved it to eradicate the sacred meaning of marriage as a union between a man and a woman.

[18] U.S. Constitution, Amend. I.

1. *History as a Tool for Knowing the True Meaning of a Constitutional Provision*

To correctly understand the true meaning of a constitutional provision, one must understand its historical context. For example, the Supreme Court recognized in *Marsh v. Chambers* that 'historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied....'[19] Thereafter, the Court in *Greece v. Galloway*, noted that

> Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. [T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.[20]

'[H]istorical practices and understandings' enable a Court to honestly determine the true meaning of the words in the Establishment Clause, as declared by those who drafted the words.[21] We ought to, therefore, look to history to help determine the true meaning of the Establishment Clause as understood by those who drafted it. Historical discernment especially matters here. In the early American context, people understood Religious Establishments to mean something very specific. This meaning is knowable because, as understood at the time the states ratified the First Amendment, the true meaning of religious establishment had experiential context.

2. *The Historically True Meaning of the Establishment Clause*

'Ordinarily, a word's usage accords with its dictionary definition.'[22] To find the historically true meaning of the words in the Establishment Clause, it makes sense to begin here.

a. Congress shall make no Law

Webster's 1828 American Dictionary of the English Language defined *Congress* as

[19] *Marsh v. Chambers*, 463 US 783, 790 (1983)
[20] *Greece v. Galloway*, 134 S Ct 1811, 1819 (2014) (internal quotes and cites omitted)
[21] *Lee v Weisman*, 505 US 577, 631 (Scalia J, joined by three other justices) (1992)
[22] *Yates v US*, 135 S Ct 1074, 1082 (2015)

> [t]he assembly of senators and representatives of the several states of North America, according to the present constitution, or political compact, by which they are united in a federal republic; the legislature of the United States, consisting of two houses, a senate and a house of representatives.[23]

The word *law* meant '[a] rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions . . . .'[24]

Thus, when the drafters wrote that *Congress shall pass no law*, it is undisputed they meant the Clause to apply to *legislation* enacted by the *federal* legislative branch. Historian David Barton explains:

> The prominent characteristic of the emerging national government both during and after the American Revolution . . . was the strong zeal of each State not only to protect its own powers and rights but also to prevent the national government from usurping its powers . . . . Antifederalists warned that unless specific amendments were made to the Constitution to limit the Federal powers, the Federal government must first envelop and then annul the rights of States—and individuals . . . . The individual State conventions which convened to ratify the new federal Constitution resounded loudly with the Anti-Federal arguments. The Constitution thus received only marginal approval in several states, and North Carolina even refused to ratify unless clear restraints were placed on the power of the federal government . . . . Subsequently, George Washington, in his Inaugural Address, 'urged Congress to consider how the Constitution might be amended.' Congress did so, and the result was ... proposed amendments specifying exactly what the ***federal*** government, and ***only*** the federal government, could not do.[25]

Thomas Jefferson certainly understood the Clause applied only to the Federal government:

> ...the first ten amendments were enacted solely to limit the jurisdiction of the federal government. Furthermore, it was acknowledged that the States had the legitimate power to prescribe State religious establishments. Therefore, the sole purpose of the First Amendment was to prevent the federal government from usurping the specific state power.[26]

Likewise, Justice Joseph Story recognized, '…the whole power over the subject of religion is left exclusively to the State governments to be acted upon according to their own sense of justice and the State Constitution.'[27]

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[23] Noah Webster, *American Dictionary Of The English Language* (1828), http://websterdictionary1828.com/Dictionary/Law, last accessed on 14 November 2019.
[24] Ibid.
[25] David Barton, *Original Intent: The Courts, the Constitution, and Religion* (Wallbuilder Press, 2000) 17-18.
[26] Ibid, 27 quoting Thomas Jefferson
[27] Ibid, 25 quoting Justice Joseph Story, *Commentaries on the Constitution* [1878].

To be sure, in *Everson v Board of Education*, the Court held that the 14th amendment incorporated the Establishment Clause as applicable to the states.[28] This case judicially assumed the Establishment Clause applied to the actions of state governments. The problem with this assumption though is that the Establishment Clause expressly limits the exercise of *Federal* power by prohibiting the establishment of a national church. When ratified, it eliminated no state religious establishments, leaving such power with the individual states. As Justice Thomas explains:

> The text and history of this Clause suggest that [the Establishment Clause] should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to 'law[s]' enacted by a legislature. . . . [T]he Establishment Clause resists incorporation against the States. In *Everson*, the Court 'casually' incorporated the Clause .... The Court apparently did not consider that an incorporated Establishment Clause would prohibit exactly what the text of the Clause seeks to protect: state establishments of religion.[29]

While the States retained power to prescribe State religious establishments, today all 50 states proscribe them.[30]

b. Respecting an Establishment

Webster's 1828 American Dictionary of the English Language defined *respecting* as

[28] *Everson v Board of Education* 330 US 1 (1947)

[29] *American Legion v American Humanist Association*, (Thomas, J) No. 17-1717 Slip Op at 1 (internal citations and quotes deleted) (2019); See *Town of Greece v Galloway*, 572 U S 565, 604–607 (opinion concurring in part and concurring in judgment) (2014); *Elk Grove Unified School Dist. v Newdow*, 542 US 1, 49–51 (2004) (opinion concurring in judgment); *Van Orden v Perry*, 545 US 677, 692–693 (2005) (concurring opinion); *Zelman v Simmons-Harris*, 536 US 639, 677–680 (2002); *Everson v Board of Ed. of Ewing*, 330 US 1, 15 (1947)

[30] See Alabama Constitution, Art. I, § 3; Alaska Constitution, Art. I, § 4; Arizona Constitution, Art. II, § 12; Arkansas Constitution, Art. II, §§ 24–25; California Constitution, Art. I, § 4; Colorado Constitution, Art. II, § 4; Connecticut Constitution, Art. I, § 3; id. art. VII; Delaware Constitution, Art. I, § 1; Florida Constitution, Art. I, § 3; Georgia Constitution, Art. I, § 1, paras. 3, 4; id. art. I, § 2, para. 7; Hawaii Constitution, Art. I, § 4; Idaho Constitution, Art. I, § 4; Illinois Constitution, Art. I, § 3; Indiana Constitution, Art. I, § 4; Iowa Constitution, Art. I, § 3; Kansas Constitution. Bill of Rights, § 7; Kentucky Constitution. Bill of Rights, § 5; Louisiana Constitution, Art. I, § 8; Maine Constitution, Art. I, § 3; Maryland Constitution, Declaration of Rights, Art. XXXVI; Massachusetts Constitution, Art. of Amend. XI; Michigan Constitution, Art. I, § 4; Minnesota Constitution, Art. I, § 16; Mississippi Constitution, Art. III, § 18; Missouri Constitution, Art. I, § 5; Montana Constitution, Art. II, § 5; Nebraska Constitution, Art. I, § 4; Nevada Constitution, Art. I, § 4; New Hampshire Constitution, Pt. 1, Art. VI; New Jersey Constitution, Art. I, § 4; New Mexico Constitution, Art. II, § 11; New York Constitution, Art. I, § 3; North Carolina Constitution, Art. I, § 13; North Dakota Constitution, Art. I, § 3; Ohio Constitution, Art. I, § 7; Oklahoma Constitution, Art. I, § 2; id. Art. II, § 5; Oregon Constitution, Art. I, §§ 3, 5; Philadelphia Constitution, Art. I, § 3; Rhode Island Constitution, Art. I, § 3; South Carolina Constitution, Art. I, § 2; South Dakota. Constitution, Art. VI, § 3; Tennessee Constitution, Art. I, § 3; Texas Constitution, Art. I, §§ 6–7; Utah Constitution, Art. I, § 4; Vermont Constitution, Ch. 1, Art. III; Virginia Constitution, Art. I, § 16; West Virginia Constitution, Art. III, § 15; Wisconsin Constitution, Art. I, § 18; Wyoming Constitution, Arti. I, §§ 18–19.

'[r]egarding; having regard to; relating to,'[31] and *establishment* as '[t]he act of establishing, founding, ratifying or ordaining.'[32] Justice Scalia delineated the historical experience of the Framers concerning religious establishments:

> ... a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.[33]

As Justice Thomas notes: 'The Framers understood an establishment 'necessarily [to] involve actual legal coercion. … [G]overnment practices that have nothing to do with creating or maintaining … coercive state establishments do not implicate the Establishment Clause.'[34]

3. *The Virtue of True Meaning and the Establishment Clause*

Thus, the Establishment Clause says that government must not shackle the consciences of the people, for whose sake it exists, through a national religious government. Such an honest interpretation of the true meaning of this Clause upholds Rule of Law, respects the people's prerogative, preserves institutional legitimacy, and comports with the proper role of the judiciary.

When one applies the true meaning of the words as drafted by those who wrote the Establishment Clause, a reviewing judge ought to accommodate a religious display on a government property.[35] First, a display is not a *law* enacted by the United States *Congress.* Furthermore, a display is not a religious *establishment* because it coerces no one by force of law or penalty to practice one religion to the exclusion of all others. Moreover, if the display

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[31] Webster, above n 23.
[32] Ibid.
[33] *Lee v Weisman*, 505 US 577, 640-41 (1992) (Scalia, J, dissenting) (internal citations omitted) Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.
[34] *Elk Grove Unified School Dist. v Newdow*, 542 U S 1, 52–53 (Thomas, J., concurring in judgment) (internal quotations omitted) (2004)
[35] See *Allegheny v ACLU*, 492 US 573, 657-659 (Kennedy, J., joined by Rehnquist, Scalia, and White, J., dissenting) (1989) (stating, 'Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage . . . . Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society' [internal citation omitted])

at issue involves action by one of the states, the establishment proscription arguably does not even apply.

B. *The Tyranny of the Few: Judicial Activism and the Establishment Clause*

Unfortunately, the U.S. Supreme Court's 'religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions.'[36] The observation here comes from Justice Scalia writing of *Lemon v. Kurtzman,*[37] where the Court judicially ignored the true meaning of the Establishment Clause.

Lemon's judicial policymaking, never overruled by the Supreme Court, frequently receives 'well-earned criticism.'[38] Applied in various contexts, an activist judiciary thereafter regularly required government action to have a secular purpose and to not even symbolically endorse religion.[39] Although often ostensibly couching its analysis in terms of neutrality, court decisions in this area frequently prohibited religiously informed purposes while allowing secularly informed ones.[40] Instead of looking to the true meaning of the word *establishment*, all these cases used a malleable interpretative analysis to apply a judicially manufactured meaning of its own creation.

[36] *Lee v Weisman,* 505 US 577, 644 (1992) (Scalia, J., joined by three other Justices, dissenting).
[37] *Lemon v. Kurtzman*, 403 US 602, 612-13 (1971). In *Lemon* the Court mandated that government action must satisfy three elements to comport with the Establishment Clause: First, the [government action] must have a secular [ ] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not foster an excessive government entanglement with religion. A number of justices address the second element by asking whether the government action *symbolically endorses religion*. Because of the malleable nature of the 'interpretation' though, no agreement existed, even among justices supporting the test, as to when a government action symbolically endorsed religion. Compare, *Wallace v Jaffree,* 472 US 38, 76 (1985) (O'connor J, concurring) and *Capitol Square Review and Advisory Bd. v Pinette,* 515 US 753, 773 (1995) (O'connor, J, concurring) with Ibid at 786 (Justice Souter); ibid at 799 (Justice Stevens)
[38] *Lee v Weisman,* 505 US 577, 644 (Scalia, J., joined by three other Justices, dissenting) (internal citations omitted) (1992).
[39] See e.g., *Wallace v Jaffree,* 472 US 38 (1985) (prohibiting moment of silence prior to starting school); *Santa Fe Indep. Sch. Dist. v Doe*, 530 US 290 (2000) (prohibiting prayer prior to football games); *Edwards v Aguillard,* 482 US 578, 583, 592 (1987) (holding education law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas); *Epperson v Arkansas,* 393 US 97 (1968) (striking down state law regulating the teaching of evolution).
[40] To be constitutionally 'neutral' government action must incongruously have a secular purpose and not even symbolically endorse religion. For a scholarly discussion of how the neutrality principles demean religion in the United States, see, William Wagner, 'The Jurisprudential Battle over the Character of a Nation' in Gabriël A. Moens, *The Jurisprudence of Liberty* (2nd ed., LexisNexis, 2010)

Under the guise of constitutional interpretation, *Lemon* and its secular progeny dishonestly ignored the true meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meaning of the word *establish*. They chose *establish* to express their intent. If they had meant 'endorse', or some other secular meaning there is no doubt they would have said so. They did not. The likely reason they did not is because they understood religion and morality as necessary for good governance. For example, early in the history of the American nation, the initial Congress reenacted the Northwest Ordinance. The Northwest Ordinance expressly affirmed '[r]eligion, morality, and knowledge' as 'being necessary to good government and the happiness of mankind....'[41]

Remarkably, when determining the constitutionality of a government action under this malleable jurisprudence, the content of the government action is irrelevant. Instead, a judge makes, for example, a subjective assessment as to whether the government actor or action had a secular purpose (*i.e.*, the judge may indulge in relatively unconstrained speculation regarding another government official's state of mind, and subjectively conclude whether the government actor or action had a secular purpose). If the judge feels there was not a secular motive, the judge holds the government action violates the Establishment Clause.

The Court's secular jurisprudential progeny effectively executed a spectacular judicial coup over representative governance by a Court imposing will instead judgment. Often invalidating policies and actions motivated by Christian viewpoints, these decisions oozed with anti-Christian sentiment. We turn now to a subset of these cases involving religious displays. In doing so, we illustrate how judicially active malleable interpretation diabolically threatens representative governance and the Rule of Law.

1. *Kicking Baby Jesus out of His Manger*

Christmas is the time of year that Christian citizens cerebrate one of the most significant events in all of human history, the birth of Jesus Christ. Every year though, like the ancient King Herod, someone tries to kill Baby Jesus sleeping in His manger. Seeking to ban God from the public square, lawyers annually allege the Nativity violates the Establishment

[41] *Northwest Ordinance*, 13 July 1787; National Archives Microfilm Publication M332, roll 9, <https://www.ourdocuments.gov/doc.php?flash=false&doc=8>

Clause. Using a malleable approach to 'interpreting' the Establishment Clause, the Supreme Court, like the Grinch, stole the meaning of Christmas.

For over 40 years the City of Pawtucket included a Nativity Scene as part of a Christmas display. The Nativity included Baby Jesus as well as 'Mary and Joseph, angels, shepherds, kings, and animals.'[42] Predictably, an anti-Christian advocacy group sued the city to ban the Nativity.[43]

When the case reached the Supreme Court, a majority of the Court rejected the group's contention that the government's display violated the Establishment Clause.[44] Due to the reasoning the Court used to reach its conclusion, however, the victory was a hollow one for those who care about representative governance and the Rule of Law. Despite the Court's acknowledgment of the profound religious heritage in American governance, the Court applied *Lemon,* holding that the Establishment Clause requires government action to have a secular purpose. The Court, instead of looking to the true meaning of the Establishment Clause, asked whether 'a secular purpose for Pawtucket's display of the [Nativity existed]?'[45]

Looking at the facts in the case, the majority of the Supreme Court in *Lynch* found the government's purpose sufficiently secular. The city's display integrated 'among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carollers, …, a clown, an elephant, a teddy bear, hundreds of coloured lights, a large banner that reads SEASONS GREETINGS, and the [Nativity] at issue…'[46] Apparently, if you sufficiently hide God behind enough other secular stuff, then the display as a whole becomes secular, especially if you characterize what you are celebrating merely as a secular holiday, which the Court did here. And these were the Justices upholding the government's placement of the Nativity.

Four of the nine Justices in the *Lynch* case dissented, opining that the city's inclusion of the Nativity in its Christmas display violated the Establishment Clause because it lacked a

[42] *Lynch v. Donnelly,* 465 US 668, 671 (1984)
[43] Ibid, 671
[44] Ibid, 687
[45] Ibid, 681
[46] Ibid, 671

secular purpose.[47] The dissent further opined that inclusion of the Nativity in the display violated the Establishment Clause because it provided 'a significant symbolic benefit to religion.'[48]

In *Allegheny County v. Greater Pittsburgh ACLU*, the Supreme Court again faced the question of whether the government's placement of the Nativity in a public place violated the Establishment Clause.[49] This time the Supreme Court, again without honestly considering the true meaning of the Establishment Clause, held the government's placement of the Nativity violated the Clause. As in *Lynch*, the Court instead applied its judicially-manufactured test from *Lemon*.[50] Factually though, unlike the government's display in *Lynch*, '[n]o figures of Santa Clause or other decorations' were present.[51] Nothing was hiding God. Thus, a number of Justices concluded the Nativity violated the Establishment Clause because it had 'the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.' Other Justices opined that 'display of any object that retains a specifically Christian…meaning is incompatible [with the Establishment Clause].' In the end, a majority of the Court struck down the government's placement of the Nativity.[52]

2. *Smashing the 10 Commandments*

The Ten Commandments serve as one of the foundational influences in Western Civilization. First engraved by God on stone tablets, Moses introduced these fundamental principles to the world. Jesus thereafter affirmed he came not to abolish the law, but to fulfill it.[53] Telling his followers to Love God and to Love your neighbor as yourself, we are to treat others as we would have them treat us.[54] Like the display of Jesus' manger, displaying the Ten Commandments triggered Establishment Clause challenges.

[47] Ibid, 698-701 Brennan J, joined by Marshall, Blackmun, and Stevens JJ dissenting
[48] Ibid, 701
[49] *Allegheny County v Greater Pittsburgh ACLU*, 492 U.S. 573 (1989)
[50] Ibid, 592-602
[51] Ibid, 580-581
[52] Ibid
[53] Matthew 5:17
[54] Matthew 7:12 and 22:26-40

The State of Kentucky enacted a law requiring the posting of the Ten Commandments in every public schoolroom.[55] In *Stone v. Graham,* the Supreme Court held the statute violated the Establishment Clause.[56] Applying *Lemon,* the Court said the government action lacked a secular legislative purpose. According to the Court, in the public school context, the state mandate had an unconstitutional religious purpose.[57]

In *McCreary County v ACLU*, two state counties displayed the Ten Commandments 'on the walls of their courthouses.'[58] Activists sought an injunction, challenging the displays as violating the Establishment Clause. Before the federal trial court could rule, the government added other historical materials, and then argued the entire display held a secular purpose (i.e., education). Relying on *Lemon,* the federal trial court held the original display of the Ten Commandments 'lack[ed] any secular purpose' as it exhibited 'a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God.'[59] The federal trial court also held that the modified display likewise 'clearly lack[ed] a secular purpose.' The Federal trial court noted the government selected historical documents 'with specific references to Christianity.'[60] The Federal trial court therefore enjoined the counties from posting the Decalogue because the government lacked a secular purpose.[61]

The government filed a notice of appeal but voluntarily withdrew from the appeal, again modifying the display in an attempt to comply with *Lemon's* Establishment Clause jurisprudence. The modification this time included

> framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.[62]

The government attempted to show secular intent, entitling the exhibit as: 'The Foundations of American Law and Government Display' and by providing a summary of the legal and

[55] *Stone v. Graham,* 449 US 39 (per curiam) (1980)
[56] Ibid, 41
[57] Ibid, 41
[58] *McCreary County v ACLU*, 545 U.S. 844 Souter J, joined by Stevens, O'Conner, Ginsburg, and Breyer, JJ No. 03-1693 Slip Op at 1 (2005)
[59] Ibid at 5 quoting 96 F. Supp. 2d, at 686; 96 F. Supp. 2d, 698
[60] Ibid, 6 quoting, 96 F. Supp. 2d, at 687; 96 F. Supp. 2d, at 699
[61] Ibid, 6
[62] Ibid, 6-7

historical importance of each document.[63]

Activists asked the trial court to supplement its injunction to enjoin the modified display. The government's response attempted to explain that the government here intended to: 1) 'demonstrate that the Ten Commandments were part of the foundation of American Law and Government' and 2) 'to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.'[64]

Relying on *Stone,* the trial court rejected the government's response as 'a religious, rather than secular, purpose.'[65] According to the trial court, the history of the litigation belied the government's asserted educational purpose.[66]

The U.S. Court of Appeals for the Sixth Circuit affirmed the trial court's supplemental injunction.[67] The Supreme Court agreed to review the case.

The Supreme Court applied *Lemon,* finding no secular purpose and deeming the subsequent modifications a 'sham.' The Court began by noting that *Stone*

> recognized that the Commandments are an 'instrument of religion' and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion....[68]

Thus, the Court purported to look to the context of the display of the Ten Commandments in the case at bar.

> Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view. The display in *Stone* had no context that might have indicated an object beyond the religious character of the text, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the postings at issue in *Stone*.[69]

Instead of viewing the government's modifications as an effort to comply with *Lemon's* secular purpose requirement, the Court concluded the 'new statements of purpose were

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[63] Ibid, 7
[64] Ibid, 8 quoting 145 F. Supp. 2d, at 848 (internal quotation marks omitted).
[65] Ibid, 8 citing 145 F. Supp. 2d, at 849.
[66] Ibid, 8
[67] Ibid, 9
[68] Ibid, 19 citing *Stone* 449 U. S. at 41 n. 3 (internal quotation marks omitted).
[69] Ibid, 20-21

presented only as a litigating position....'[70] The Court held that *Lemon's* secular purpose requirement 'needs to be taken seriously under the Establishment Clause and needs to be understood in light of context....'[71] The Court then rejected as implausible the government's evidence supporting a secular purpose.[72]

On the same day the Supreme Court decided *McCreary*, it also decided another case involving the display of the Ten Commandments. In *Van Orden v. Perry*, activists contended the presence of the Ten Commandments by the Texas State Capitol violated the Establishment Clause.[73]

Commemorating the 'people, ideals, and events that compose Texan identity' thirty-eight monuments and historical markers stood on property around the capitol.[74] For forty years the display included a six foot tall monument of the Ten Commandments. Carved above the text, an eagle grasped the American Flag. Beneath the text, superimposed on two Stars of David, two Greek letters represented Christ (Chi and Rho). A message at the base of the monument stated: 'Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961.'[75] Activists contended the display violated the Establishment Clause because it lacked a sufficiently secular purpose. They therefore demanded its removal.[76]

Both the federal trial and appellate courts applied *Lemon.* These courts said the display should stay because: 1) no improper religious endorsement existed; and 2) the government had a valid secular purpose (i.e., recognizing and commending the Eagles for their efforts to reduce juvenile delinquency).[77] When the case reached the Supreme Court, however, the majority found *Lemon's* test 'not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds'.[78] Rather than looking to the true meaning of the words of the Establishment Clause, though, the Court looked to the Roman god Janis:

[70] Ibid, 23
[71] Ibid, 26
[72] Ibid, 26
[73] *Van Orden v Perry*, 545 US 677, No. 17-1717 Slip Op (2005)
[74] Ibid, 1
[75] Ibid, 2
[76] Ibid, 2
[77] Ibid, 3
[78] Ibid, 6

> Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history.... The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state.[79]

Focusing on 'the nature of the monument' and 'our Nation's history' the Court held that the display of the 10 Commandments on the Texas Capitol had historical legal and political significance

> Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government.[80]

The Court viewed the display as both religious and historical. As part of the nation's heritage, therefore, the display, in the context here, did not violate the Establishment Clause. The Court subjectively distinguished *Stone* based upon the relative context:

> The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day.[81]

Note that the opinion of the Court did not use history to help it discern the true meaning of the Rule of Law at issue here (i.e., the Establishment Clause). Indeed, the Court never even inquired into the meaning of the words, historically or otherwise. Instead, the Court used history to find the display religiously passive enough, and therefore sufficiently secular, to withstand an Establishment Clause challenge.[82]

Justice Breyer concurred in the judgment of the court. Citing but purportedly not relying on *Lemon,* he found the context of the display sufficiently secular to survive an Establishment Clause challenge.[83] Other similar judicially active dissents reached the opposite conclusion. For example, Justice Stevens would have struck down the display because it endorsed 'the message that there is one, and only one, God.'[84]

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[79] Ibid, 3-4
[80] Ibid, 12
[81] Ibid., 12
[82] Ibid., 12
[83] *Van Orden v Perry,* 545 US 677, No. 17-1717 Breyer J concurring in the judgment Slip Op at 1-8 (2005)
[84] *Van Orden v Perry*, 545 US 677, No. 17-1717 Stevens J dissenting Slip Op at 7 (2005)

Thus, as in *Lynch*, the victory was hollow for those who care about representative governance and the Rule of Law.

With malleable interpretation in fashion, it is not surprising that Federal courts initially applied *Lemon's* 'secular purpose' and 'no symbolic endorsement' policies when faced with an Establishment Clause challenge to the display of a cross.

3. *Lift High the Cross – but only if it's an Old Rugged Cross*

The Christian Cross, often serving as a memorial to the fallen, holds deep meaning for Christian people. It is the symbol of the Good News of the Bible for all people:

> Being found in in appearance as a man, He humbled Himself by becoming obedient to the point of death, even death on a cross. For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life.[85]

Similar to displaying Jesus' manger or the Ten Commandments, public display of a Christian Cross often prompts an Establishment Clause challenge from anti-Christian activists. The Bladensburg World War I Memorial included a 40-foot-tall concrete Christian cross.[86] A plaque listing 49 names dedicated the monument to the 'Heroes of Prince George's County, Maryland Who Lost Their Lives in the Great War for the Liberty of the World.'[87]

Those challenging the war memorial cross said it violated the Establishment Clause.[88] The Federal trial court applied *Lemon* and considered Justice Breyer's *Van Orden* concurrence in ruling that the cross could stay because: 1) the government had a secular purpose (honoring WWI heroes) and 2) did not endorse religion.[89]

The U.S. Court of Appeals likewise applied *Lemon* and considered Justice Breyer's analysis in *Van Orden*. In a stunning illustration of the subjectivist nature of *Lemon*, though, the

[85] Philippians 2:8; John 3:16 (NKJV)
[86] *See generally*, Petitioner's Appendix 51a – 60a (*Am Humanist Assoc v. Maryland-Natl Capital Park and Planning Comm*, No. DKC 0550, Memorandum Op. (D.Md)).
[87] Ibid
[88] *American Legion v American Humanist Association* No. 17-1717 Slip Op at 1 (2019)
[89] Ibid, 10

appellate court concluded the cross must go. According to the appellate court, the government impermissibly endorsed Christianity.[90]

When the case reached the U.S. Supreme Court, the activists asked the Court to the uphold Fourth Circuit's application of *Lemon's* judge-made doctrine banning government actions that might symbolically endorse religion. Purportedly rejecting the invitation, the Supreme Court professedly chose to not formally apply *Lemon*.[91]

To be sure, the Court ruled the cross could stay. In a requiem for republican governance and the Rule of Law, though, its reasoning resembled something more akin to a statutory enactment evolving out of a legislative compromise, than a judicial ruling grounded in objectivist jurisprudence. Instead of using history to help determine the true meaning of the Establishment Clause, the Court looked to history to show, in context, that the cross was sufficiently emptied of its religiosity to survive an Establishment Clause challenge. According to the Court, '[t]he passage of time gives rise to a strong presumption of constitutionality' because the purpose of the display can evolve through history.[92]

> The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning.[93]

Instead of applying *Lemon*, the Court reflected on various considerations to conclude that 'retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.'[94] The Court, explained that something starting as an expression of faith could be transformed over time.[95] Concluding that the sacred purpose of the Bladensburg cross transformed over time, the Court said the cross could stay.

> ... no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here.
>
> In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic

[90] Ibid, 11
[91] Ibid, 15-16
[92] Ibid, 21
[93] Ibid, 2-3 (internal citation omitted)
[94] Ibid, 15-21
[95] Ibid, 4, 22

> intersection, and numerous additional monuments are located nearby.[96]

Again, note the Court's use of history here. Instead of using history to discern the truthful meaning of the Establishment Clause, the Court used history as a vehicle to transform the cross into something secular enough and sufficiently non endorsing to survive an Establishment Clause challenge.

> ... we conclude that the Bladensburg Cross does not violate the Establishment Clause.
>
> ... the Bladensburg Cross carries special significance in commemorating World War I . . . That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.
>
> Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. . . It has become part of the community.[97]

While *American Legion's* judicially-active jurisprudence accommodated this particular cross, it only did so because in context its history emptied it of its religiosity, secularizing it through time. Indeed, nothing in the Court's ruling accommodates displaying a new religious monument.

Consequently, the anti-Christian sentiment here was more subtle, so subtle that religious freedom advocates naively celebrated. As they did in *Lynch* and *Van Orden*, Christian people overlooked the extra-constitutional judicial activism and celebrated a pyrrhic victory. Although allowing the cross at issue to stay, the decision provides little to stem the tide against the rise of anti-Christian sentiment in the West. For example, relying on *American Legion*, a city removed the word *Lord* from the 'Officers' Prayer' on a new monument placed in front of a police station.[98] Thus, after *American Legion*, malleable interpretation lives to express anti-Christian sentiment in other contexts on another day.[99]

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[96] Ibid, 22

[97] Ibid, 28-29

[98] See https://www.wsoctv.com/news/local/the-word-lord-stripped-from-monument-offering-prayer-for-officers/969222679.

[99] This reality belies the Court's professed assurance of religious accommodation in the *American Legion* case:

> [The Cross] has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions.' *American Legion* at 2, citing *Van Orden v Perry*, (2005) 545 US 677, 704 (Breyer J., concurring in judgment).

4. *Disquieting Commonalities in the Court's Religious Display Cases*

The judicially active malleable interpretation underlying the Court's religious display cases unconstitutionally empowers unelected judges to supplant a politically accountable system of governance with their own protean preferences. Such judicial activism exceeds the scope of the Judicial Power, bypasses constitutionally required processes for amending the Constitution, creates substantial unpredictability in the law, and undermines the Judiciary's institutional legitimacy.

In all of the religious display cases, the Court exceeded the scope of the Judicial Power stated in Article III of the Constitution. The Court's Establishment Clause decisions conspicuously failed to identify any legitimate source of constitutional authority for the judiciary to change the meaning of the Clause. The simple reason this is so is that no enumerated judicial power exists for the judiciary to amend the Constitution. Unambiguously, nothing in Article III empowers the Court to change or 'evolve' the Constitution.[100] Improperly promulgating political preferences of unelected judges, the malleable interpretation here ventures far beyond the scope of Article III. Amending the Establishment Clause, these cases rewrite 'Congress shall make no law respecting an establishment of religion' to instead require some subjectivist standard of secular sufficiency. All because a group of unelected Justices preferred it so.

In each case, the Court also bypassed the constitutionally required processes for amending the Constitution. By amending the meaning of the words in the Establishment Clause, the Judiciary skirted the constitutional processes that specifically require involvement by politically-accountable state legislatures.[101] Although the judicial branch may hold the power to say what the Establishment Clause means, that power does not include changing or evolving its meaning. Article V expressly gives that power to the politically accountable branches. Thus, when the Court's malleable interpretation changed the meaning of the Establishment Clause, it usurped the people's prerogative contrary to the express provisions

[100] See Part I above.
[101] See Part I A above.

in Article V. The Court, in the process, undermined republican governance and the Rule of Law.

The malleable interpretation in all these cases likewise undermines predictability, a vital component of the Rule of Law.[102] When it comes to judicial review of government action and the Establishment Clause, the subjectivist nature of the Court's decisions produces inconsistent judicial precedents. Indeed, a litigant's success in judge-shopping serves as the best indicator of whether a law survives under the Establishment Clause.

If malleable interpretation says displaying baby Jesus in a manger is both constitutional and unconstitutional; if malleable interpretation says displaying the Ten Commandments is both constitutional and unconstitutional, if malleable interpretation says displaying the Cross is both constitutional and unconstitutional, then no predictability exists for those seeking to conform their conduct to the law. It also reveals the absurdity of the approach and the potential for its abuse by a politically motivated judge or activist lawyer. Predictability in the law is a necessary component of good governance under the Rule of Law. Malleable interpretation replaces predictability in the law with the 'evolving' political preferences of unelected judges.

Moreover, the malleable interpretation underlying the Court's religious display decisions undermines the legitimacy of the judiciary. In all of these cases, the Court weaponised its constitutionally prescribed independence.[103] Whilst imposing new meaning on the Establishment Clause advances a judicially preferred social policy, it also destabilizes republican governance and makes a mockery of the Rule of Law.

5. *A Jurisprudential Solution to the Problem*

The enormous mistake in the Court's Establishment Clause jurisprudence rests in the truth that nothing in the Clause imposes limits on religious displays. Rather, the Clause limits the exercise of government lawmaking that establishes religious governance.

[102] See Part I C above.
[103] See Part I B and D above.

The Court could have reached a correct result in its religious display cases through honest application of the true meaning of the Establishment Clause. The American nation was founded with numerous religious symbols and survived over two centuries. Undeniably none of these symbols or practices are Federal laws establishing a national religion. If some see a creche, Decalogue, or Cross as an endorsement of the greatest sacrifice of love that stands at the center of human history, so be it. It establishes no religion, and neither the Founders of the American Nation nor the Framers of its Constitution would ever say that it did.

The Establishment Clause simply prohibits Congress from enacting laws 'respecting an establishment of religion.'[104] Religious displays and expressions do not violate the Establishment Clause because they are not federal laws regarding or relating to the act of establishing or founding of a religion or state church.

IV. CONCLUSION

Judges utilizing malleable interpretation wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. The Court's religious display decisions embed this tyrannical principle in American constitutional jurisprudence.

To restore representative governance, the Rule of Law, and legitimacy in judicial institutions, judges must honestly interpret constitutional provisions to find truthful meaning.

[104] U.S. Constitution, Amend. I.