The Cross at College: Accomodation and Acknowledgment of Religion at Public Universities

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THE CROSS AT COLLEGE: ACCOMMODATION AND ACKNOWLEDGMENT OF RELIGION AT PUBLIC UNIVERSITIES

Ira C. Lupu and Robert W. Tuttle

INTRODUCTION

In October 2006, President Gene Nichol of the College of William and Mary ordered a change in the practice of displaying a cross in the College's Wren Chapel. Since the late 1930s, when Bruton Parish Church donated the cross to the College of William and Mary (the College), the cross normally had been displayed on the chapel's altar and removed only for secular events or non-Christian worship. The brass cross stands eighteen inches tall and is inscribed "IHS," which represents the name "Jesus

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2 Vince Haley, Save the Wren Chapel: An Astounding Bit of Blabber from the President of William and Mary, NAT'L REV. ONLINE, Nov. 17, 2006, available at http://article.nationalreview.com/?q=NTk3Njc2MWM5OWNjZmY3MmNjYzUzMGJiNjZlZWFmY2E=; Letter from Susan Godson, Church Historian, Bruton Parish Church (Nov. 11, 2006) (on file with authors and William & Mary Bill of Rights Journal) (describing the history of the Wren Chapel cross).

Nichol concluded that the permanent display of the cross on the altar treated non-Christian members of the College community as outsiders. He directed that the cross should be removed from the display in the chapel except “during appropriate religious services.”

On campus and beyond, the decision sparked an intense controversy. Opponents charged that the decision reflected hypersensitivity to those who were allegedly offended by the display and effectively sacrificed the tradition of the College to “political correctness.” 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. Alumni of the College drafted and circulated a petition—which eventually gathered well over ten thousand signatures—asking that the decision be reversed. Several opponents publicly asked for Nichol’s resignation, and one donor

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4 SHORTER OXFORD ENGLISH DICTIONARY 1323 (6th ed. 2007).
5 See Nichol, Statement to the Board of Visitors, supra note 1; see also Gene R. Nichol, Balancing Tradition and Inclusion: Behind W&M’s Cross Controversy, VIRGINIAN-PILOT (Norfolk), Dec. 24, 2006, at J1 [hereinafter Nichol, Balancing Tradition]; Petkofsky, supra note 1, at B1.
6 Nichol, Balancing Tradition, supra note 5, at J1.
10 Fredrick Kunkle, Cross Returns to Chapel—But Not on the Altar, WASH. POST, Mar. 7, 2007, at B6 (stating that there were 17,000 signatures on the petition). The petition was located on a website that has since been discontinued, http://www.savethewrencross.org. For an archived copy of the petition, see Save the Wren Cross Chapel, Petition, http://web.archive.org/web/20070702051241/www.savethewrencross.org/petition.php (last visited Apr. 4, 2008).
revoked a large pledge to the College. An outraged alumnus even filed a lawsuit, ultimately unsuccessful, challenging the removal of the cross.

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. 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. 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 College's Board of Visitors embraced the compromise, and many opponents seemed to accept the resolution. The now-encased cross is located toward the front of the chapel,

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14 See Religion at a Public University, supra note 13.


16 Joint Statement of the Board of Visitors and the President, supra note 15.

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.

The controversy over the Wren Chapel cross provides an especially useful prism for exploring three facets of contemporary Establishment Clause law, all of which figured prominently in the arguments about removal of the cross. After a sketch in Part I 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 II 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. These competing positions were on display most recently and importantly in Hein v. Freedom from Religion Foundation, Inc., 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 equal or more important role as a structural limitation on government jurisdiction over religion, including the authority to promote religion.

The remainder of this Article explores how that structural limitation should be applied in the context of the display of the Wren Chapel cross. In Part III, 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

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19 See 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, at B8. The narthex is the entrance area farthest from the altar; the nave is the section in which the congregation sits. SHORTER OXFORD DICTIONARY 1887, 1893 (6th ed. 2007).

20 See supra note 5 and accompanying text.

21 See supra notes 8–9 and accompanying text.

22 Haley, supra note 2.

Establishment Clause jurisprudence, opponents of President Nichol'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 President Nichol's decision.

In Part IV, 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," 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.

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, but Justice Scalia's dissent in McCreary County v. ACLU of Kentucky has now brought this ambiguity to the forefront of debates over the Establishment Clause.

See, e.g., supra note 9 and accompanying text.
See infra notes 194, 264–66 and accompanying text.
See infra notes 225–50 and accompanying text.
See supra note 9 and accompanying text.
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, 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 depends on a secular justification for display of religious images, and there is no such justification 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.

I. BACKGROUND—RELIGION AND THE ROLE OF THE STATE IN THE COLLEGE OF WILLIAM AND 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, 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 purposes for the College. First, it would supply ministers to the Church of England in Virginia. Second, it would provide a place "that the [y]outh may be piously educated in good letters and manners." Third, it would spread the Gospel among the "Western Indians."

The 1693 charter is illuminating for many reasons, but especially because it so clearly demonstrates the union of religion and government after the Glorious

30 The Charter of the College of William and Mary, in Virginia [hereinafter Charter], in The History of the College of William and Mary from Its Foundation, 1660, to 1874, at 3–16 (Richmond, J.W. Randolph & English 1874).
31 See Charter, supra note 30, at pmbl.; see also Wilford Kale, Hark Upon the Gale: An Illustrated History of the College of William and Mary 17 (2d ed. 2007).
32 Charter, supra note 30, at para. 2; Kale, supra note 31, at 17.
33 Charter, supra note 30, at para. 2; Kale, supra note 31, at 17.
34 Charter, supra note 30, at para. 2; Kale, supra note 31, at 17.
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 non-believers. The concern for religion pervades the charter and appears in virtually every discussion of the content of instruction at the College.

Moreover, the charter promised substantial royal subsidies for the College. In addition to a direct payment for the construction of the College, the charter assigned to the College revenues from a portion of the tax on tobacco exports from Virginia and Maryland, as well as rents from certain royal lands. 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.

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, originally functioning as trustees and later as a corporate board, which was empowered to make regulations for the school provided such regulations did not conflict with the laws of the realm or to the canons and


36 KALE, supra note 31, at 17.


39 Id. at para. 15.

40 Id. at para. 17.

41 Id. at para. 16. On Washington's licensing by the college, see KALE, supra note 31, at 48.

42 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 Visitors was elected to exercise governance in the name of the College. See THE TRANSFER OF THE COLLEGE OF WILLIAM AND MARY, IN VIRGINIA, IN HISTORY OF WILLIAM AND MARY, supra note 30, at 17–33 (transferring control of the college from the trustees to a Board of Visitors); see also PARKE ROUSE, JR., A HOUSE FOR A PRESIDENT: 250 YEARS ON THE CAMPUS OF THE COLLEGE OF WILLIAM AND MARY 12 (1983). 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. Id. at 154–55.
constitutions of the Church of England, by law established. 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. In addition to the authority granted to the visitors, the charter gave the College's president and faculty a specifically political right—the power to select a representative in the General Assembly.

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. 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. In addition, Blair, followed by four of his pre-Revolution successors as president, served on the Governor’s Council, which combined judicial, administrative, and legislative functions within the colony.

Work on the College’s main building, now called the Sir Christopher Wren Building, commenced soon after the charter was granted, yet it was not ready for use until 1700. An early eighteen-century source attributed the building to the famous architect Sir Christopher Wren, and although the evidence for the attribution is scant, arguments for Wren’s involvement in the design are at least plausible. The College was originally planned as a quadrangle, but a shortage of funds limited construction

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43 Charter, supra note 30, at para. 9.
44 Blair and Nicholson were the most important figures in the 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 13–22 (1989). 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. Kale, supra note 31, at 21–22. Instead, the parishes in the colonies came under the jurisdiction of the Bishop of London. Id.
45 Charter, supra note 30, at para. 18.
46 Id. at para. 3.
47 KALE, supra note 31, at 43.
48 Four of Blair’s six successors before the American Revolution also held the position of commissary—William Dawson, Thomas Dawson, James Horrocks, and John Camm. Past Presidents, http://www.wm.edu/president/past.eighteen.php (last visited Feb. 14, 2008); see Rouse, supra note 42, 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 15–16 (1963) (discussing the role of commissary); id. at 455 (“Eight presidents of the college have been rectors of Bruton Parish Church.”).
49 Past Presidents, supra note 48. They were William Dawson, Thomas Dawson, William Yates, and John Camm. Id.; see also Rouse, supra note 42, at 21–73.
50 See KALE, supra note 31, at 31.
51 KORNWOLF, supra note 44, at 44–45.
52 See KALE, supra note 31, at 27–28; KORNWOLF, supra note 44, at 44–49.
to only two sides, the east range—the main classroom and residence quarters—and the north wing, which contained the Great Hall.\textsuperscript{53}

In 1699, the Virginia General Assembly solidified William and 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.\textsuperscript{54} Loss of the previous capitol building to fire prompted the decision, and from 1700–1704 the General Assembly met in the Great Hall of the College while a new capitol was under construction.\textsuperscript{55} The legislature would return to the College from 1747–1753 while the new capitol was rebuilt after another fire.\textsuperscript{56}

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.\textsuperscript{57} This delay was caused at least in part by a 1705 fire that destroyed the College building.\textsuperscript{58} Reconstruction did not begin in earnest until 1710 and was not completed until 1716.\textsuperscript{59} 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.\textsuperscript{60} The building was completed and the chapel consecrated in 1732.\textsuperscript{61}

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.\textsuperscript{62} Bishops of London served as chancellors of the school.\textsuperscript{63} The divinity school operated during this period, although it apparently failed to generate

\textsuperscript{53} The south wing, containing the chapel, was completed in 1732; the west range was never completed. \textit{See} KALE, supra note 31, at 29, 41; KORNWOLF, supra note 44, at 36–56; ROUSE, supra note 42, at 10, 12–13.

\textsuperscript{54} KALE, supra note 31, at 29.

\textsuperscript{55} \textit{Id.} at 31.

\textsuperscript{56} \textit{Id.} at 45.

\textsuperscript{57} \textit{See} Lyon G. Tyler, Early Courses and Professors at William and Mary College, Address to the Phi Beta Kappa Society, William and Mary College (Dec. 5, 1904), \textit{in} 14 WM. & MARY Q. 71 (1905); \textit{see also} KALE, supra note 31, at 35.

\textsuperscript{58} \textit{See} KALE, supra note 31, at 31; KORNWOLF, supra note 44, at 43–44; \textit{see also} Historical Sketch of the College of William and Mary, in Virginia [hereinafter Historical Sketch], \textit{in} HISTORY OF WILLIAM AND MARY, supra note 30, at 34, 40.

\textsuperscript{59} KALE, supra note 31, at 35. An Indian school also operated at the College after 1712. \textit{Id.} at 37–39. Like the divinity school, enrollment in the Indian school appears not to have matched expectations. \textit{See id.} at 39.

\textsuperscript{60} \textit{Id.} at 40–41; ROUSE, supra note 42, at 12.

\textsuperscript{61} Historical Sketch, supra note 58, at 41, 43; KALE, supra note 31, at 41; ROUSE, supra note 42, at 12.

\textsuperscript{62} \textit{See} KALE, supra note 31, at 41.

\textsuperscript{63} ROUSE, supra note 42, at 225 app. 1 (listing chancellors of the College).
a significant number of new clergy for the church; records indicate that fewer than forty graduates of the divinity school received ordination.\footnote{64} 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 nineteenth century.\footnote{65} 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.\footnote{66} 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.\footnote{67} 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.\footnote{68}

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.\footnote{69} The reform abolished the divinity school and replaced those professorships with ones in law and medicine.\footnote{70} But the visitors rejected Jefferson’s proposal to make the College a state institution.\footnote{71} The course in medicine did not last long, although the lectures in law provided a financial mainstay for the institution until the Civil War.\footnote{72}

\footnote{64} Id. at 34–35.

\footnote{65} Historical Sketch, supra note 58, at 46–47; KALE, supra note 31, at 57–60; ROUSE, supra note 42, at 77–85. On the extension of the surveyor’s office after the Revolution and disestablishment, see The Rev. John Bracken v. The Visitors of Wm. & Mary College, 7 Va. (3 Call) 573, 593 (1790) (discussing surveyor’s office in John Marshall’s argument for the College, appearing before the Virginia Supreme Court of Appeals, in a lawsuit concerning the powers of the College).

\footnote{66} ROUSE, supra note 42, at 79–80.

\footnote{67} KALE, supra note 31, at 60.


\footnote{69} See MARSDEN, supra note 37, at 70; Tyler, supra note 57, at 76–78; see also DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 85 (2006); KALE, supra note 31, at 57–59; ROUSE, supra note 42, at 77–79.

\footnote{70} Tyler, supra note 57, at 76.

\footnote{71} KALE, supra note 31, at 59.

\footnote{72} Id. at 76.
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. Even before the war, Anglicanism had been overshadowed by the rapid growth of evangelical movements, such as the Baptists and Methodists, following the First Great Awakening. 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 and Mary since 1777 and second-cousin of the more famous Virginian. 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. 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. Having failed to transform William and Mary into a secular state university, Jefferson founded the University of Virginia in Charlottesville in 1825. Other religious denominations were also establishing colleges in Virginia during this period, including the Presbyterians (Hampden-Sydney in 1783), Baptists (University of Richmond in 1830), and Methodists (Randolph Macon in 1830), further reducing the potential student pool for William and Mary.

Notwithstanding this competition, enrollment at the College rebounded during the 1830s, owing at least in part to the improving fortunes of the Episcopal Diocese.

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74 Noll, supra note 73, at 120–22.

75 Goodwin, supra note 73, at 141–44; Rouse, supra note 42, at 92; William Meade Bishop, Episcopal Church, Address to the Convention (May 22, 1845), in Journal of the Convention of the Protestant Episcopal Church in the Diocese of Virginia 13–17 (1845) (describing the early history of the diocese and service by James Madison as bishop); see also Past Presidents, supra note 48.

76 See Past Presidents, supra note 48.

77 See Kale, supra note 31, at 67–68; Noll, supra note 73, at 120–22.

78 Kale, supra note 31, at 69.

79 See id. at 47.

80 Rouse, supra note 42, at 99.

81 See Holmes, supra note 69, at 85; Kale, supra note 31, at 70–73; Marsden, supra note 37, at 70; Rouse, supra note 42, at 98–100.

82 Marsden, supra note 37, at 70; Rouse, supra note 42, at 100.

83 See Ray McAllister, Schools of Thought on 175 Years, Richmond Times-Dispatch, Mar. 3, 2005, at B1.

84 See id.
in Virginia and the leadership of Adam Empie, a renowned preacher who became the College president in 1827 and served until 1836. Empie restored the chapel and revived the practice of daily prayer before classes. 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 1848–1849 academic year and the removal of all but one of the College faculty. 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. 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.

A new building, in an Italianate style quite different from the original, was quickly erected. 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. 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 in 1868. Although the College 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. The College 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

85 KALE, supra note 31, at 73–76. Enrollment continued to increase under Thomas Roderick Dew, an alumnus and faculty member who became president in 1836. Id. at 76.
86 ROUSE, supra note 42, at 102.
87 KALE, supra note 31, at 76–78.
88 ROUSE, supra note 42, at 114.
89 See KALE, supra note 31, at 78–83.
90 KALE, supra note 31, at 82–85; ROUSE, supra note 42, at 121–22; Historical Sketch, supra note 58, at 54–56.
91 KALE, supra note 31, at 83–85 (including sketches of the 1859 building); ROUSE, supra note 42, at 122; Historical Sketch, supra note 58, at 56–57.
92 KALE, supra note 31, at 86.
93 Id. at 86–88.
94 Id. at 88.
95 Id. at 90; ROUSE, supra note 42, at 138.
96 ROUSE, supra note 42, at 138.
97 See KALE, supra note 31, at 123–27 (describing the increased focus on academic programs); Past Presidents, http://www.wm.edu/president/past/twenty.php (last visited Feb. 14, 2008).
Charles Edward Bishop to teach Greek and French. Bishop was a Presbyterian minister and had been educated at European universities. Those two aspects of his biography reflect parallels between William and Mary and other Protestant colleges during the late nineteenth century. The model of scientific and objective higher education drawn from European models permeated many institutions of higher education during the period. 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. 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. 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.” 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.

In 1888, the College reopened with a new source of funding and a new governance structure. 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. 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.

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98 ROUSE, supra note 42, at 145.
99 Id.
100 MARSDEN, supra note 37, at 101–21.
101 See id. at 167–80.
102 See id.
103 Extracts from the Laws of the College of William and Mary [hereinafter Extracts], in HISTORY OF WILLIAM AND MARY, supra note 30, at 178–79.
104 Id.
106 KALE, supra note 31, at 91; ROUSE, supra note 42, at 143.
107 KALE, supra note 31, at 91.
108 Id. at 100.
109 Id. at 102.
110 Id.; ROUSE, supra note 42, at 154–55.
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.\textsuperscript{111} 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 to 1909, Goodwin raised funds for and supervised the restoration of that church, a project that formed only part of his overall vision for restoring Williamsburg and the College.\textsuperscript{112} 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.\textsuperscript{113} Within a few years, Goodwin had convinced John D. Rockefeller, Jr., to finance the restoration of the College’s original buildings.\textsuperscript{114} Full restoration of the main building, renamed the Sir Christopher Wren Building, was completed in 1931 and returned the structure as closely as possible to a mid-eighteenth century appearance.\textsuperscript{115} Rockefeller’s involvement with Goodwin and the College projects ultimately led to his decision to underwrite the restoration of Colonial Williamsburg\textsuperscript{116} 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-eighteenth 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.\textsuperscript{117} The chancel is surrounded by a simple altar rail, within which is located the wooden communion table.\textsuperscript{118} 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.\textsuperscript{119}

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

\textsuperscript{111} The rector of Bruton Parish was a particularly vocal opponent of the state takeover of William and Mary, and his opposition created significant conflict between the College and the church and even within the vestry of the church. ROUSE, \textit{supra} note 42, at 152–54.

\textsuperscript{112} KALE, \textit{supra} note 31, at 126; ROUSE, \textit{supra} note 42, at 180–81.

\textsuperscript{113} ROUSE, \textit{supra} note 42, at 180–82.

\textsuperscript{114} Id.

\textsuperscript{115} \textit{See id.} at 183; \textit{see also} KORNWOLF, \textit{supra} note 44, at 60–65 (including floor plans showing the difference before and after the 1932 restoration of the chapel).

\textsuperscript{116} \textit{See ROUSE, \textit{supra} note 42, at 182.}

\textsuperscript{117} KORNWOLF, \textit{supra} note 44, at 64. Compare the present interior of the chapel with its Victorian appearance, which may be seen in KALE, \textit{supra} note 31, at 95.

\textsuperscript{118} The College has a video of the chapel interior available at Virtual Tour of the Wren Chapel, \url{http://www.wm.edu/about/wren/wrenchapel/htmls/virtualtour.html} (last visited Feb. 16, 2008).

\textsuperscript{119} VERNON PURDUE DAVIS \& JAMES SCOTT RAWLINGS, THE COLONIAL CHURCHES OF VIRGINIA, MARYLAND, AND NORTH CAROLINA: THEIR INTERIORS AND WORSHIP 60 (1985); Virtual Tour of the Wren Chapel, \textit{supra} note 118.
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. 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.

To summarize—the College of William and 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, and finally to an institution wholly owned and operated by the State of Virginia since early in the twentieth century. The College chapel has existed since the school’s royal phase but was restored in the twentieth century—after the onset of full state control—in an architectural style consistent with eighteenth 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.

II. 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. Such treatment, he argued, was inconsistent with the school’s commitment to diversity and its identity as a public institution. 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.

120 Godson, supra note 2.  
121 Id.  
122 Sanford Charles Gladden, John Millington (1779–1868), 13 WM. & MARY C. Q. HIST. MAG. 155, 157 (1933); Godson, supra note 2.  
123 See supra note 2 and accompanying text.  
125 Nichol, Statement to the Board of Visitors, supra note 1.  
126 See id.  
127 See supra note 8 and accompanying text.  
128 See supra notes 7–8 and accompanying text.
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 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, which requires the presence of a live “case” or “controversy” as a predicate of adjudication in the federal courts. 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. The Supreme Court’s most recent encounter with the Clause was in *Hein v. Freedom from Religion Foundation, Inc.* In *Hein*, the Court rejected the asserted standing of federal taxpayers to complain of discretionary executive expenditures in support of the President’s Faith-Based and Community Initiatives. *Hein* 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—its character as a jurisdictional limitation on the authority of government over religion, a limitation that exists whether 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 and Mary. In a message to the Board of Visitors, Nichol said:

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129 U.S. CONST. art. III.
130 *Id.* art. III, § 2.
132 127 S. Ct. 2553.
133 *Id.*
134 *Id.* at 2559.
135 We first suggested this jurisdictional conception of the Clause in Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 84 (2002). We say more about this conception in Part IV, below, as we discuss governmental acknowledgment of religion. For a related conception of the Establishment 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).
136 President Nichol played a large role in appointing Justice O’Connor to Chancellor of
[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. That distinction, I believe, to be contrary to the best values of the College.\textsuperscript{137}

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 \textit{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.”\textsuperscript{138} 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 government intended that meaning.\textsuperscript{139}

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.\textsuperscript{140}

\begin{footnotes}
\footnotetext{137} Nichol, Statement to the Board of Visitors, supra note 1; see also Petkofsky, supra note 1. 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. Email from Gene Nichol, President, College of William & Mary, to Students of William & Mary (Dec. 20, 2006, 13:38:16 EST), 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. \textit{See, e.g.}, Gene R. Nichol, Jr., \textit{Injury and the Disintegration of Article III}, 74 CAL. L. REV. 1915 (1986); Gene R. Nichol, Jr., \textit{Justice Scalia, Standing, and Public Law Litigation}, 42 DUKE L.J. 1141 (1993); Gene R. Nichol, Jr., \textit{Rethinking Standing}, 72 CAL. L. REV. 68 (1984).


\footnotetext{139} \textit{Id. at 690}; see also McCreary County v. ACLU of Ky., 545 U.S. 844, 883–84 (2005) (O’Connor, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 624–32 (1989) (O’Connor, J., concurring in part).

\end{footnotes}
According to this view, the importance of religious belief for individual identity makes people especially vulnerable to such disparagement. 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.

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 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.”

Nichol’s opponents claimed that, instead of highlighting a hypothetical person’s experience of offense, 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. 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. Such coercion may take a variety of forms, including 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.”

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141 EISGRUBER & SAGER, supra note 140, at 124–28.
142 Id. at 127–28.
143 See supra note 8 and accompanying text.
144 See supra notes 7–8 and accompanying text.
145 Newt Gingrich & Christopher Levenick, Laus Deo: Crossing the Line at William and Mary, NAT. REV. ONLINE, Jan. 31, 2007, available at http://article.nationalreview.com/?q=OWNkZWJiYThlZGMzMyMzRhZTQwNDYwMGQ1ZGQyNDJmNDg.
146 Id.
147 See id.; Haley, supra note 2.
148 See Haley, supra note 2. But see Meredith Henne, William & Mary’s Chapel at a Crossroad, FIRSTTHINGS, Feb. 28, 2007, available at http://www.firstthings.com/onthesquare/?p=647 (noting that one heavily redacted letter reported unease, and Nichol said he received numerous verbal comments “echoing this sentiment”).
150 County of Allegheny, 492 U.S. at 659–60. Justice Kennedy expanded further on his
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."\(^{151}\) Under this theory, permanent display of the Wren Chapel cross would cause no material harm because the display is merely "passive or symbolic" rather than coercive.\(^{152}\)

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 \textit{Lee v. Weisman},\(^{153}\) 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.\(^{154}\) 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.\(^{155}\)

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 \textit{Hein v. Freedom from Religion Foundation}.\(^{156}\) \textit{Hein} involved an Establishment Clause challenge to conferences promoting the Faith-Based and Community Initiatives (FBCI), held by the White House Office of Faith-Based and Community Initiatives and several executive branch agencies.\(^{157}\) The plaintiffs alleged that the conferences violated the Establishment Clause by endorsing and promoting religion.\(^{158}\) The government moved to dismiss the complaint, arguing that the plaintiffs lacked standing to bring the lawsuit.\(^{159}\) Citing \textit{Flast v. Cohen},\(^{160}\) the plaintiffs asserted that they were injured as taxpayers because the conferences were funded with revenues generated by taxation.\(^{161}\) Although taxpayers as such normally do not have standing to challenge the constitutionality of government expenditures,\(^{162}\) \textit{Flast} created an

\(^{151}\) \textit{County of Allegheny}, 492 U.S. at 662.
\(^{152}\) See id.
\(^{154}\) \textit{Id.} at 640–44 (Scalia, J., dissenting). Justice Thomas joined in this opinion. \textit{Id.}
\(^{155}\) \textit{Id.} at 631–46.
\(^{157}\) \textit{Hein}, 127 S. Ct. at 2559.
\(^{158}\) \textit{Id.} at 2560–61.
\(^{159}\) \textit{Id.} at 2561.
\(^{160}\) 392 U.S. 83 (1968).
\(^{161}\) \textit{Hein}, 127 S. Ct. at 2565.
\(^{162}\) Daimler Chrysler Corp. v. Cuno, 547 U.S. 332 (2006) (holding that state and local
exception for suits brought under the Establishment Clause. The government argued that the court should limit the application of Flast to expenditures that have been specifically authorized by Congress, and the FBCI conferences lacked such authorization. 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. On appeal, the Seventh Circuit reversed, ruling that the plaintiffs did have standing under Flast. 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.

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. Justice Alito and the two other Justices who joined his 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. 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.

taxpayers lack standing to complain in federal courts of alleged illegality of state franchise tax credit); Frothingham v. Mellon, 262 U.S. 447 (1923) (holding that federal taxpayers lack standing to complain of allegedly unconstitutional federal expenditures).

163 Flast, 392 U.S. at 106.
165 Id. at **24–27.
167 Freedom from Religion Found. v. Chao, 433 F.3d 989 (7th Cir. 2006).
168 Hein, 127 S. Ct. at 2572.
169 Id. at 2559–72 (joining Justice Alito, were Chief Justice Roberts, and Justice Kennedy). Alito’s opinion for the plurality expressed doubt about the correctness of Flast but refused to overrule it. Id. at 2571–72. Kennedy’s separate concurrence signaled his commitment to taxpayer standing under Flast. Id. at 2572 (Kennedy, J., concurring). Kennedy, however, agreed, with the plurality opinion that Flast does not apply when the executive branch exercises discretion to aid religion. Id.
170 Id. at 2571–72 (plurality opinion).
Flast, the plurality concluded, did not compel recognition of taxpayer injury from discretionary expenditures by executive branch agencies. Of the five Justices in the majority, only two, Scalia and Thomas, thought Flast should be overruled on the ground that a taxpayer does not suffer a distinct individual injury when public funds are used for religious purposes, regardless of which branch has authorized the expenditures.

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. Flast, the dissent asserted, recognized the unique character of injury inflicted upon the consciences of taxpayers who are compelled to provide funds used by the government to support religion. That injury is the same whether it is imposed 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.

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 Board, the full Fifth Circuit vacated a decision of a panel of the court, which had recognized the plaintiff’s standing to sue based on his allegation that he had attended the meetings and had 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. 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.

Concurring in the en banc ruling, Judge DeMoss would have gone even further and rejected observer standing regardless of the proof offered by the plaintiff that he

171 Id. at 2566.
172 Id. at 2573–84 (Scalia, J., concurring).
173 Id. at 2584–88 (Souter, J., dissenting). Souter was joined in dissent by Justices Breyer, Ginsberg, and Stevens. Id.
174 Id. at 2585–86.
175 Id. at 2584–86.
176 Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494 (5th Cir. 2007) (en banc).
177 Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006), reh’g granted, 478 F.3d 679 (5th Cir. 2007), vacated in part, 494 F.3d 494 (5th Cir. 2007).
178 Id. at 194–96.
179 Doe, 494 F.3d at 499.
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had attended meetings and been offended by board-sponsored sectarian prayers.\textsuperscript{180} 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.\textsuperscript{181} Because the plaintiff voluntarily attended the school board meetings, DeMoss reasoned, plaintiff has "established only a general grievance indistinguishable from the one that any other non-attendee citizen could have."\textsuperscript{182}

However explicable the focus on individual injury may be for purposes of satisfying the 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.\textsuperscript{183} Those who believe coercion is a necessary element of an Establishment Clause violation need to 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.\textsuperscript{184}

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

\textsuperscript{180} Id. at 499–501 (DeMoss, J., concurring).
\textsuperscript{181} Id. at 500.
\textsuperscript{182} Id.
\textsuperscript{184} See Lee v. Weisman, 505 U.S. 577, 621 (1992) (Souter, J., concurring). Justices Stevens and O'Connor joined Justice Souter's concurrence. Id. at 609.
on the heightened risk of conflict over religious differences, others on the danger of religious discrimination posed when government becomes involved in religious matters, others on the transcendent character of religious obligations, and still others on a more general concern with nurturing an environment in which religion can flourish.

In our own work, we have discussed and critiqued these views and offered our own 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. 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, the government violates the Establishment Clause when it asserts competence to proclaim the 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." 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 obscure deeper questions about the extent to which the government may accommodate the religious practices of college students or acknowledge the religious


186 See EISGRUBER & SAGER, supra note 140, at 51–67.


190 Id.


history of the College and religious beliefs of those in the College community. It is those questions—raised at William and Mary entirely outside the constraining context of Article III, requirements of personal injury, and the specialized rules of federal court adjudication—that 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 by 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 and Mary.

III. 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. This 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. But the presence of chapels and chaplaincies in higher education has received surprisingly scant legal attention.

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195 We are indebted to a paper on this subject written by Andrea Goplerud. See God on Campus: The Constitutionality of Religious Programming on State University Campuses (Apr. 20, 2007) (unpublished manuscript, on file with the William and Mary Bill of Rights
At the time William and Mary became a state institution in 1907, most public universities had chapels, and many required students to attend daily services. The content of chapel services reflected the non-denominational Protestant "establishment" that had prevailed at most universities since the mid-nineteenth century. 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 disappeared by the early 1940s. Voluntary chapel programs continued, however, some led by chaplains employed by the universities and others by volunteers or campus ministers paid by religious organizations.

In the years following the Second World War, developments in Establishment Clause law had 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, but the most important developments followed in 1962 and 1963 when the Court struck down officially sponsored prayer and Bible reading in


196 The College Year-Book and Athletic Record for the Academic Year 1896–97 (Edwin Emerson, Jr. ed., New York, Stone & Kimball 1896) [hereinafter College Year-Book] (containing an alphabetical listing of all institutions of higher education, with description of chapel attendance policies for most institutions); see Seymour A. Smith, Religious Cooperation in State Universities: An Historical Sketch 3 (1957); id. at 423. William and Mary had a mandatory chapel attendance policy. Id. at 422. In 1891, the Illinois Supreme Court rejected a constitutional challenge to a mandatory chapel attendance policy at the University of Illinois. North v. Bd. of Trs. of Univ. of Ill., 137 Ill. 296 (1891); see Kauper, supra note 195, at 81–82.


198 See Kauper, supra note 195, at 78; Marsden, supra note 37, at 344–45. For a discussion of on campus religious activities during this period, see generally Smith, supra note 196, at 18–72.

199 See George W. Jones, The Public University and Religious Practice: An Inquiry into University Provision for Campus Religious Life (1973) (providing survey of school-sponsored religious activities at public universities, as of 1972); Smith, supra note 196, at 74–104.

public schools. Although those decisions involved primary and secondary education, public university administrators understood that the decisions had significance for their institutions. 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. 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 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.

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—victims of budgetary and constitutional concerns—this period also witnessed the adoption of a surprisingly over-compliant response to the 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 an impermissible public subsidy of religion.

In Widmar v. Vincent, a religious student group at the University of Missouri at Kansas City (UMKC) challenged such a policy, claiming that the exclusion of the group from campus facilities violated the students' rights under the Free Exercise

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203 HART, supra note 197, at 208–22; JONES, supra note 199, at 31.
204 HART, supra note 197, at 223–34.
205 Jones provides the best description of this shift. See JONES, supra note 199, at 6–33.
206 Id. at 8, 10, 35; Robert L. Johnson, Ministry in Secular Colleges and Universities, in THE CHURCH’S MINISTRY IN HIGHER EDUCATION 216, 219 (John H. Westerhoff ed., 1978); Goplerud, supra note 195, at 12.
207 See, e.g., Widmar v. Vincent, 454 U.S. 263, 265 & n.3 (1981) (discussing university regulations that barred use of campus facilities "for purposes of religious worship or religious teaching by either student or nonstudent groups").
and Free Speech Clauses. UMKC argued that the policy was required by the Establishment Clause, but the Supreme Court disagreed. By an eight-to-one 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. 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.

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

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 University of Virginia, 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.

The group sued, alleging that UVA's denial of the printing subsidy violated its rights under the Free Speech, Free Exercise, and Equal Protection Clauses. Wide Awake claimed that the printing subsidy constituted a limited public forum, and by

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210 Id. at 270–75.
211 Id. at 277.
212 Id. at 273–75.
213 Id.; see also Keegan v. Univ. of Del., 349 A.2d 14, 16–19 (Del. 1975), cert. denied, 424 U.S. 934 (1976) (holding that exclusion of student religious groups from use of campus facilities violated both the Establishment Clause and Free Exercise Clause).
214 Widmar, 454 U.S. at 274.
215 Id. at 274.
216 Id. at 274–75.
218 Id. at 824–26.
219 Id. at 825–27.
220 Id. at 827.
excluding religious groups, UVA had imposed an impermissible content-based restriction on access to that forum. 221 UVA asserted that the Establishment Clause prohibited the university from subsidizing the printing costs of a religious publication and the Fourth Circuit agreed. 222 But the Supreme Court reversed the circuit court’s decision with a five-to-four majority ruling that availability of the printing subsidy was indistinguishable from the access to physical facilities of the school at issue in Widmar. 223

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 the costs of bringing speakers to campus, then the religious character of some student groups should not disqualify them from such benefits. 224 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 constitutional character as the issues presented in Widmar and Rosenberger. President Nichol’s decision to move the cross did not involve the 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

222 Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994), rev’d, 515 U.S. 819 (1995). 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 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. Rosenberger, 515 U.S. at 832–38. UVA lost in Rosenberger, but the Court’s subsequent decision in Locke v. Davey, 540 U.S. 712 (2004), suggested that the Court was mindful of the concerns raised by the university in Rosenberger. In Davey, the Court held that the exclusion of the pursuit of a theology degree from an otherwise-inclusive state scholarship program did not violate the Free Exercise Clause. Id.
223 Rosenberger, 515 U.S. 819.
224 For a recent application of Widmar and Rosenberger, see Roman Catholic Foundation v. Walsh, No. 07-cv-505-jcs, 2008 U.S. Dist. LEXIS 4137 (W.D. Wis. Jan. 17, 2008) (holding that state university could not withhold student activity funds from a Roman Catholic student group).
decision in *Zorach v. Clauson*. Zorach involved a New York program under which parents could arrange to have their children released from public school in order to attend religious instruction during the school day. 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. In an opinion written by Justice Douglas, a six-to-three 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.” The public schools did not require students to attend, supervise the teachers, determine the content of instruction, or even provide the facilities. The accommodation, the Court reasoned, merely responded to the request of parents by opening time in the school day for voluntary religious education.

In separate dissents, 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 accommodation. Moreover, they highlighted the program’s impact on non-participating students, who were required to remain at school during the period of religious instruction. 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. 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, Estate of Thornton v. Caldor, Inc., Corporation of the Presiding Bishop v. Amos, and Texas Monthly, Inc. v. Bullock. Wallace 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. In Caldor, employers challenged a Connecticut statute that required them to accommodate employees’ requests for Sabbath observance. In Amos, the Court considered an amendment to a federal civil rights law that exempted religious organizations from prohibitions on religion-based employment discrimination. Texas Monthly involved a challenge to the exemption of religious publications from a state sales tax imposed on other publications.

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, generate four consistent criteria for determining whether an accommodation violates the Establishment Clause. First, the accommodation must relieve a government-imposed burden on religious exercise. Second, no 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

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236 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 Twp. v. Schempp, 374 U.S. 203, 294–304 (1963) (Brennan, J., concurring). In Schempp, supporters of mandatory 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. See id. Public schooling did not impede students’ access to religious experience; moreover, the alleged accommodation was imposed on all students, not just to those who specifically requested the experience. Id. at 298–99.

241 Wallace, 472 U.S. at 40 & n.2 (citing ALA. CODE § 16-1-20.1 (Supp. 1984)).
242 Caldor, 472 U.S. at 704–05, 707–08.
243 Amos, 483 U.S. at 335–38.
244 Texas Monthly, 489 U.S. at 5.
246 We elaborate on these cases and criteria in Lupu & Tuttle, supra note 194, at 101–16.
247 See infra Part III.A.
248 See infra Part III.B.
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 should be applied to both the Wren Chapel and its cross.

A. Response to Burden on Religion

The first criterion provides the distinguishing characteristic of a religious accommodation: 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. 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 because religious publications subjected to the tax would have been burdened in exactly the same manner as non-religious publications. Thus, the Court held, exemption of religious publications conferred on these publications 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 that did not specifically mention prayer had already set aside the time for meditation at the beginning of school.

In contrast, the Court upheld the accommodation in Amos because it found that religious 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. 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. 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 from extending broader protection than the Constitution’s minimum requirement. Indeed, the Court found application of the earlier exemption had chilled religious organizations’ exercise of the protection, because the exemption had required the organizations to anticipate which positions would be treated as sufficiently religious to be exempted

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249 See infra Part III.C.
250 See infra Part III.D.
253 Id. at 25.
256 Id. at 335–36.
257 Id. at 336–37.
from anti-discrimination law and had led to litigation over the exemption's boundaries.\footnote{Id. at 336.} The broader exemption, the Court concluded, was appropriately responsive to this burden on religious exercise.\footnote{Id. at 336–38.} 

At first glance, the Wren Chapel and cross appear to be significantly different from the accommodations challenged in \textit{Wallace}, \textit{Caldor}, \textit{Amos}, and \textit{Texas Monthly}. \textit{Amos} and \textit{Texas Monthly} addressed negative accommodations—that is, the government merely declined to extend a particular regulation to the protected religious practice.\footnote{Id. at 329 (concerning an exemption from Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1); \textit{Texas Monthly}, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (concerning an exemption from Texas state sales tax, \textit{TEX. TAX CODE ANN.} § 151.312 (Vernon 1982)).} Even \textit{Wallace} and \textit{Caldor} would have required only limited government interaction with the accommodation.\footnote{\textit{Id.} at 329 (concerning an exemption from Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1); \textit{Texas Monthly}, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (concerning an exemption from Texas state sales tax, \textit{TEX. TAX CODE ANN.} § 151.312 (Vernon 1982)).} The moment-of-silence provision at issue in \textit{Wallace} needed only the teacher to announce the meditation period, while the protection for Sabbath observance in \textit{Caldor} depended on private employers' compliance with the statutory mandate, enforced only upon complaint by particular employees.\footnote{\textit{Id.} at 336–38.} The Wren Chapel and its cross, however, involve affirmative acts in support of religion and thus have more in common with the religious accommodations found in the military, in prisons, and in 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.\footnote{\textit{Id.} at 329 (concerning an exemption from Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1); \textit{Texas Monthly}, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (concerning an exemption from Texas state sales tax, \textit{TEX. TAX CODE ANN.} § 151.312 (Vernon 1982)).} 

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' opportunities to practice their faith.\footnote{\textit{Id.} at 336–38.} Those who serve in the military suffer similar burdens on their exercise of religion, in addition to the other personal and familial stresses that are unique to the demands of military life.\footnote{\textit{Id.} at 329 (concerning an exemption from Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1); \textit{Texas Monthly}, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (concerning an exemption from Texas state sales tax, \textit{TEX. TAX CODE ANN.} § 151.312 (Vernon 1982)).} Thus, the military chaplaincy also meets the standard of responsiveness to a government-imposed burden. Hospital in-patients may be similarly deprived of

\footnotesize{\begin{itemize}
\item \textit{Caldor}, 472 U.S. at 706–08; \textit{Wallace}, 472 U.S. at 40.
\item \textit{See, e.g.,} \textit{Carter v. Broadlaws Med. Ctr.}, 857 F.2d 448 (8th Cir. 1988); \textit{Katcoff v. Marsh}, 755 F.2d 223 (2d Cir. 1985).
\item \textit{See, e.g.,} \textit{Katcoff}, 755 F.2d at 234–35; \textit{Lupu & Tuttle, supra} note 194, at 118–20.
\end{itemize}}
ordinary access to religious experience at a time when patients may be especially in need of religious counseling or comfort.\footnote{See, e.g., Freedom from Religion Found. v. Nicholson, 469 F. Supp. 2d 609 (W.D. Wis. 2007). Our analysis of this decision is available online. Ira C. Lupu & Robert W. Tuttle, Freedom from Religion Foundation, Inc. \textit{(and others)} v. R. James Nicholson, Secretary of the Department of Veteran Affairs \textit{(and others)}, \textit{LEGAL UPDATE}, (Jan. 16, 2007), \url{http://www.religionandsocialpolicy.org/legal/legalupdatedisplay.cfm?id=55}.}

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.\footnote{See Widmar v. Vincent, 454 U.S. 263, 288–89 (1981) (White, J., dissenting) (arguing that university students suffered no significant burden on religion, even by exclusion from use of campus facilities). On campus religious life more generally, see \textsc{John Schmalzbauer}, \textit{Campus Ministry: A Statistical Portrait, Essay Forum on the Religious Engagements of American Undergraduates} (2007), \url{http://religion.ssrc.org/reforum/Schmalzbauer.pdf}.} 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 the employment of full-time chaplains.\footnote{The controversy over the proposed hiring of a chaplain for the Iowa State University football team, described \textit{supra} note 195, 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. \textit{See ISU Faculty Opposes Chaplain, OMAHA WORLD-HERALD}, May 26, 2007, at 2C; \textit{see also Pastor Named to ISU Football “Life Skills” Position, SIOUX CITY J.}, July 26, 2007, \url{http://www.siouxcityjournal.com/articles/2007/07/26/news/latest_news/fdac39adc2e1a8ef862573240044f747.txt}.} 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.\footnote{See, e.g., \textit{Campus Life}, \url{http://www.wm.edu/campus_life/} (last visited Feb. 17, 2008) (listing services and opportunities available to students at the College of William and Mary).} To enhance students' experience of college life, schools provide
opportunities for entertainment, arts, athletics, socializing, and even self-governance. 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.

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 publicize their campus activities. 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.

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. The constitutional questions about public university chapels thus should not focus on the existence of such facilities, but rather—as we discuss below—on their configuration and policies for their use.

Of course, the dispute at William and Mary involved not the general availability of a chapel, but the display of a specific religious symbol within a particular chapel. Compared with the provision of a chapel or religious life coordinator, a permanent display of a particular faith's religious symbol might not appear to respond to 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.\textsuperscript{275} 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 selection of religious content.

\textit{B. Voluntary Participation, Private Religious Content}

The second criterion serves as a corollary of the initial requirement of government responsiveness to private religious need. The 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.\textsuperscript{276} The concept of accommodation has long emphasized this distinction between promoting state religion and facilitating private religious experience. Concurring in \textit{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.\textsuperscript{277} And in \textit{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.\textsuperscript{278} 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 criterion, as would any other required program of religious instruction or observance.\textsuperscript{279} But public universities are very unlikely to return to compulsory religious

\textsuperscript{275} 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.

\textsuperscript{276} \textit{See}, \textit{e.g.}, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 298–300 (1963) (Brennan, J., concurring).

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} 472 U.S. 38, 67–79 (O'Connor, J., concurring).

\textsuperscript{279} \textit{See}, \textit{e.g.}, Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003), \textit{cert. denied}, 541 U.S. 1019 (2004) (holding that Virginia Military Institute practice of prayer before meal, at which attendance is required, violates the Establishment Clause); Anderson v. Laird, 466 F.2d 283 (D.C. Cir.), \textit{cert. denied}, 409 U.S. 1076 (1972) (holding that a compulsory chapel attendance policy
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 a 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, 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 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 seventeenth century Anglican ideas about scripture and sacrament, minister and congregation.280 Of course, universities may choose to provide separate chapels for all major faith groups, so each group can worship in a setting that embodies its tradition.281 But scarcity of resources and other problems of administration point to the option of one, all-inclusive chapel. If a school, like William and Mary, has only one chapel, must the 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

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280 DAVIS & RAWLINGS, supra note 119, at 12-19; DELL UPTON, HOLY THINGS AND PROFANE: ANGLICAN PARISH CHURCHES IN COLONIAL VIRGINIA 47-62 (1997); Henne, supra note 148.

281 The military academies have multiple chapels, but very few other schools have more than a single facility. See Savethewrencross.org, Top State Universities and National Military Academies (survey) (copy on file with authors and William and Mary Bill of Rights Journal). Military academies such as the Air Force Academy, West Point, and the Naval Academy all have multiple facilities for different faiths. See United States Air Force, Cadet Chapel Fact Sheet, http://www.usafa.af.mil/superintendent/pa/factsheets/chapel.htm (last visited Jan. 28, 2008); United States Naval Academy, Chaplain Center, http://www.usna.edu/Chaplains/services.htm (last visited Jan. 28, 2008); West Point Chapels, http://www.usma.edu/Chaplain/chapels.htm (last visited Jan. 28, 2008).
are capable of being used by all faiths. We recognize that, for reasons of belief, some faith groups might not worship in facilities used at other times by other religious communities. But a particular faith tradition’s need to worship in a 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. The wooden table—not a traditional altar—highlights the significance of the Eucharist as a communal meal rather than a repetition of Christ’s sacrifice. The low chancel rail, compared to a medieval rood screen, dramatically reduces the distance between the congregation and minister. The placement of the pulpit and lectern signifies the relative importance of scripture and preaching and reduces the emphasis on liturgy. As others have observed, these architectural emphases carry an implicit historical and theological message of anti-Catholicism, rejecting the Roman Catholic Church’s teachings on the priesthood, the sacraments, and the means of salvation.

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. The configuration is based on the eighteenth-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-eighteenth-century appearance. 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

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282 See supra notes 117–19 and accompanying text; see also Henne, supra note 148.
283 UPTON, supra note 280, at 9–10, 47–62; Henne, supra note 148.
284 DAVIS & RAWLINGS, supra note 119, at 12–19; UPTON, supra note 280, at 50.
285 UPTON, supra note 280, at 47–50.
286 Id.
287 See, e.g., Henne, supra note 148.
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 re-
represent a religious norm or even the lowest common denominator among Christians.
Rather, our claim is only that the chapel can serve as a multi-faith accommodation of
student, rather than government, choice of religious experience. 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 pulpit, the permanent dis-
play 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 government compulsion of students to participate in the
accommodation.\textsuperscript{289} By selecting Christianity as the default faith of the chapel, the
College departed from the role as facilitator of student religious experience and under-
took 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 coordi-
nator that they had a different religious preference. The coordinator then invited all
students—except those who 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 com-
petence 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 perma-
nent 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.\textsuperscript{290}

\textsuperscript{289} Although related, the requirements of voluntariness and privately-selected content are
independently necessary conditions. In \textit{Schempp}, for example, a student could opt out of par-
ticipation in the religious exercises, but that right to object did not save the constitutionality
\textit{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

\textsuperscript{290} 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
of a longstanding large granite monument of the Ten Commandments from a state house
although a sanctuary that is pervasively 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.

C. 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. 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. 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. The Court held that creation of the school district violated the Establishment Clause because the benefit of such a district was not generally available to other religious groups and the needs of Satmar Hasidim could have been met without recourse to the special preference.

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 on 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. If the religious life coordinator serves as a gatekeeper, any grounds is likely to be perceived as governmental hostility to religion, and will also promote religious conflict. But see Gingrich & Levenick, supra note 145 (arguing that decisionmakers regarding the Wren Chapel cross should have avoided the conflict generated even by removal of the portable cross, and that application of the Establishment Clause should emphasize avoidance of conflict with settled practices).

291 See McCreary County v. ACLU of Ky., 545 U.S. 844 (2005).
292 For a discussion of various theories that embody some concept of neutrality, see Douglas Laycock, Substantive Neutrality Revisited, 110 W. VA. L. REV. 51 (2007).
295 Grumet, 512 U.S. at 702–07.
296 For example, a school need not have an equal number of hours of use of religious facilities available for Christians, Jews, and Muslims if there are a dozen Christian groups on campus and only one or two groups of the other faiths.
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 prayer when formal religious services are not scheduled.\(^{297}\)

As we discussed in the previous Section, configuration of a chapel is likely to reflect culture-bound assumptions about religious experience.\(^ {298}\) 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.\(^ {299}\) 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 now 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


\(^{298}\) See supra Part III.B.

\(^{299}\) The most notable example is Islam; mosques do not have seating in the worship space. See, e.g., Religions in Canada: Islam, http://www.forces.gc.ca/hr/religions/engraph/religions18_e.asp (last visited Feb. 18, 2008).
on them. Indeed, even the chapel’s consecration 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.\footnote{No religious community is entitled to a privileged position in state-controlled space based on some theory of prior—perhaps adverse—possession.}

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.\footnote{See, e.g., Charles A. Rees, \textit{Remarkable Evolution: The Early Constitutional History of Maryland}, 36 U. BALTIMORE L. REV. 229 (2007) (discussing religious toleration in colonial Maryland).} 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.

\textit{D. 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 \textit{Caldor} when it struck down a rule that protected employees’ Sabbath observance;\footnote{Estate of Thornton v. Caldor, 472 U.S. 703 (1985).} the Court held that 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.\footnote{\textit{Id.} at 709–11.} In \textit{Cutter v. Wilkinson},\footnote{544 U.S. 709 (2005).} 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.\footnote{\textit{Id.} at 722–26.}

The religious accommodations at issue on public university campuses do not pose the serious risk of hardship or personal injury to others at issue in \textit{Caldor} and \textit{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 purpose.

IV. 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 violate the Clause when it merely “acknowledges” religion. Although Justices and commentators have often used the terms “accommodation” and “acknowledgment” interchangeably, the two terms refer to distinct practices and 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.

The idea of acknowledgment has been an important theme in Establishment Clause 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 and Lynch v. Donnelly. In Marsh, the Court rejected an Establishment Clause challenge to the practice of state-sponsored prayer in the Nebraska legislature, and in Lynch, the Court rejected a challenge to the city of Pawtucket’s Christmas display. Chief Justice Burger wrote the majority opinions in both cases, and he used a similar

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307 For a thorough and recent account and analysis of the standards governing the expression of religious messages by the state, see Daniel O’Conkle, The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard, 110 W. VA. L. REV. 315 (2007).

308 463 U.S. 783 (1983). A number of Justices had earlier advanced the idea that government should be permitted to recognize the importance of religion. See Zorach v. Clauson, 343 U.S. 306, 313–14 (1952); Illinois ex rel. McCollum, 333 U.S. 203, 244 (1948) (Reed, J., dissenting).


310 Marsh, 463 U.S. 783.

argument to uphold both practices. Burger reasoned that the history of the Establishment Clause does not support a strict separation of church and state. 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. He summarized the argument in the claim that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”

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. Dissenting in *Lee v. Weisman* and *McCreary County v. ACLU of Kentucky*, 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.

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

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312 See id.; *Marsh*, 463 U.S. 783.
315 *Id.* at 674; see *Marsh*, 463 U.S. at 792 (upholding the constitutionality of governmental “acknowledgment of beliefs widely held”).
317 *Id.* at 657–60 (Kennedy, J., concurring in part and dissenting in part).
320 *McCreary County*, 545 U.S. at 893–900 (Scalia, J., dissenting); *Lee*, 505 U.S. at 644–46 (Scalia, J., dissenting); see *Van Orden v. Perry*, 545 U.S. 677, 687 (2005) (stating that the Court has recognized and acknowledged “the role of God in our Nation’s heritage”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 30 (2004) (Rehnquist, J., concurring) (finding the phrase “under God” in the Pledge of Allegiance is a permissible “public recognition of our Nation’s religious history and character”).
321 See infra Part IV.A.
322 See infra Part IV.B.
323 See infra Part IV.C.
constitutional premises underlying each concept of acknowledgment, and we suggest how each would apply to permanent display of the Wren Chapel cross.

A. 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. For example, the National Park Service, which maintains the Mormon Pioneer National Historic Trail, may explain why the pioneers were emigrating. 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. 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 that the programs failed to maintain a consistently descriptive attitude toward the subject. More frequently, however,


327 See, e.g., Doe v. Porter, 188 F. Supp. 2d 904 (E.D. Tenn. 2002), aff’d, 370 F.3d 558 (6th Cir. 2004) (holding that Bible classes conducted in public schools violated the Establishment
the programs have been challenged over the implementation of the religion curriculum, as teachers redirected the courses to serve religious purposes. 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 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. If, however, one believes that statements about history can be falsified, then one might also believe that the courts should play a role in policing acknowledgments of religion.

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

Clause because content of instruction was devotional); Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998) (partially granting an injunction based on an Establishment Clause challenge to curriculum courses in public schools).

See, e.g., Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983) (holding that Bible study classes in public schools violated the Establishment Clause because control over instruction was delegated to religious officials without adequate public supervision); see also Doe, 188 F. Supp. 2d at 913–14 (finding an impermissible delegation to religious institution of public school instruction).

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

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 Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that reference to Intelligent Design theory in public school science curriculum violated the Establishment Clause because the theory is religious, not scientific, in character).
of the common law. Many medieval and early modern legal writers made the same assertion, although very few contemporary legal historians would agree. Modern scholarship generally locates the roots of the common law tradition in pre-Christian Anglo-Saxon sources. 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.

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. The underlying basis for the claim is indisputable. As we described in Part I, the College was largely founded for religious purposes and maintained its identity as a church institution until at least the Civil War. 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-eighteenth century-design of worship space. The decision to replicate eighteenth-century design was not accidental or arbitrary.

331 See McCreary County v. ACLU of Ky., 545 U.S. 844, 856–57 (2005) (describing the claim by the government that the Ten Commandments represent a 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).


333 Brief of Baptist Joint Committee, supra note 332, at 20–23.


335 See supra Part I.

336 See supra notes 115–21 and accompanying text.

337 See KORNWOLF, supra note 44, at 64–65.

338 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 within the past hundred years.” Henne, supra note 148. The claim is true but highly misleading.
That era defines the identities of both the College of William and 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.\(^{339}\)

In a representation of an eighteenth-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.\(^{340}\) That belief continued well into the nineteenth century, until the Oxford Movement led many Anglican congregations to adopt a more ornamented style of worship.\(^{341}\) Instead of a cross, the altar of an eighteenth-century Anglican church would have been adorned with a communion plate and cup, often made of silver or gold.\(^{342}\)

The anachronism undermines the purported intent to acknowledge the school’s religious origins. Because the cross display is not an accurate representation of eighteenth-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.\(^{343}\) But the altar cross lacks any plausible connection to eighteenth-century worship practice.

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.


\(^{340}\) See DAVIS & RAWLINGS, supra note 119, at 238–43 (using maps to show typical Anglican Churches in colonial times); UPTON, supra note 280, at 118–19; Henne, supra note 148.


\(^{342}\) UPTON, supra note 280, at 152–55.

\(^{343}\) DAVIS & RAWLINGS, supra note 119, at 21–24, 280; UPTON, supra note 280, at 120–33, 147–55.
If the presence of the cross on the chapel's altar table was historically accurate, would it be constitutional for a public college to support such a display? Under an anti-endorsement theory of non-establishment, the relevant question would be whether a reasonable observer would perceive such a display as a state endorsement of Christianity. Although an affirmative answer to that question seems obvious at first glance, the problem is not as simple as it appears. Under the current law, reasonable observers are presumed to know the history of the relevant place, so perhaps such observers would understand that the state intended the display to recognize a historical truth—rather than manifest a reverential attitude—about the use of icons in the chapel.

In contrast, a theory that used the symbol's obvious religious significance to trigger a shift in the burden of persuasion might make a significant difference in the evaluation of the display. If its constitutionality depended on the state being able to show that the display was an acknowledgment of history rather than a manifestation of religious belief, the state would have to affirmatively demonstrate that the display was in service of such a historical account. In the case of a functioning college chapel, the state presumably would be obliged to put up the appropriate signs and labels in the worship space so that virtually all observers—not just the hypothetical, reasonable ones—would be able to see that the state was capturing the historically accurate configuration of the space rather than expressing contemporary reverence for a Christian symbol. The difference between "endorsement" theory and "acknowledgment" theory, properly understood, thus in some circumstances will make it more difficult for the state to promote a religious faith in the guise of serving other, legitimate goals.

President Nichol did not defend his decision to remove the cross as a restoration of historic authenticity, and the defense seems only to have been identified by those responding to opponents of that decision. 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 justify it as an acknowledgment under this first definition of that term.

B. 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

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345 Pinette, 515 U.S. at 779–82.

346 See Henne, supra note 148 (claiming that the argument about historical inaccuracy of the cross display was raised by College professors Melvin Ely and Rhys Isaac, not by President Nichol).
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.  

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

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*, in which he wrote that "[w]e are a religious people whose institutions presuppose a Supreme Being." 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.  


See *McCreary County*, 545 U.S. at 899 (Scalia, J., dissenting).  


See *McCreary County*, 545 U.S. at 885-911; *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).
Justice Scalia derived his understanding of permissible religious acknowledgment from a reading of Establishment Clause history, 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 or if the activity involves religious claims that are narrower and more specific than the inclusive monotheism embraced by the founders.

Justice Scalia's concept of acknowledgment has generated a vigorous reaction, 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 *Everson v. Board of Education* 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 even between monotheism and other religious traditions. The requirement of official neutrality extends only to monotheist faiths. 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. 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. Even if Chief Justice Roberts and Justice Alito eventually chose to adopt

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335 *McCreary County*, 545 U.S. at 899–900 (Scalia, J., dissenting).


337 *Id.* at 908–909.

338 *Id.* at 909.

339 See *McCreary County*, supra, at 909.
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 Christianity’s distinctive symbol violates the Establishment Clause.

C. 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* represents the most prominent example of the cultural acknowledgment theory. The plaintiffs in *Lynch* challenged the inclusion of a crèche in a city-sponsored Christmas display. They argued that the crèche was a distinctly religious symbol, and the city’s embrace of that symbol reflected impermissible government support for religion. In rejecting the challenge, the Court pointed to the history of public recognition of religion and focused particularly on longstanding practices related to religious holidays. For example, Presidents and Congress issue proclamations that commemorate religious holidays, governments close their offices and give workers paid vacations, and cities across the country erect displays to express public celebration of the holiday season.

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. 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

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363 *Id.* at 670–72.
364 *Id.*
365 *Id.* at 674–78.
366 *Id.* at 674–85.
367 See *Id.* at 680–81.
become part of the broader culture.\textsuperscript{368} 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.\textsuperscript{369}

The reasoning in \textit{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.\textsuperscript{370} Under the idea of accommodation, particular government-imposed burdens on religious exercise give rise 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 those who are politically influential.

Thus, in \textit{Lynch}, the Court held that acknowledgments of religion must further a secular purpose\textsuperscript{371} independent of the reinforcement or affirmation of popular religious beliefs, although the purpose of the acknowledgment need not be exclusively secular.\textsuperscript{372} Celebration of the Christmas holiday, the Court reasoned, has 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.\textsuperscript{373} Moreover, the Court permitted the city to include within its display a reference to the religious origins of the event.\textsuperscript{374} That reference—the crèche—did not transform the entire display into a religious message.\textsuperscript{375} Instead, the crèche recognized the contribution of religion to the overall cultural experience of the holiday.\textsuperscript{376}

The idea of cultural acknowledgment in \textit{Lynch} depends heavily on the logic developed earlier in \textit{McGowan v. Maryland},\textsuperscript{377} in which the Court rejected an Establishment Clause challenge to a law that required most places of business to close on Sundays.

\textsuperscript{368} \textit{Id.}
\textsuperscript{369} \textit{Id.} at 685–86.
\textsuperscript{370} See HOLMES, FAITHS OF THE FOUNDING FATHERS, \textit{supra} note 69, at 86–87 (describing Jefferson’s religious beliefs).
\textsuperscript{371} 465 U.S. at 680–81.
\textsuperscript{372} \textit{Id.} at 681, n.6.
\textsuperscript{373} \textit{Id.} at 680–85.
\textsuperscript{374} \textit{Id.} at 685–86.
\textsuperscript{375} \textit{Id.} at 685.
\textsuperscript{376} \textit{Id.} at 684–85.
\textsuperscript{377} 366 U.S. 420 (1961).
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. 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. The choice of Sunday as the state's coordinated day of respite from business did not reflect a preference for Christianity, but rather a recognition of the practice already adopted by a majority of the state's citizens, including many non-Christians. The Establishment Clause did not require the state to ignore existing and widespread social practices when selecting the weekly day of rest. 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.

Not all acts of alleged cultural recognition pass this test. In County of Allegheny v. ACLU, a splintered Supreme Court invalidated a display of a stand-alone Christmas crèche 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 crèche alone, the Court ruled, celebrated the religious meaning of the holiday and lacked connection to the day's secular significance. 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.

Similarly, the Court's disposition of the Ten Commandments cases, 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, a five-to-four majority parsed the history of the

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378 Id. at 431.
379 Id. at 446–52.
380 Id. at 451–52.
381 Id. at 452.
382 Similarly, approval of nonsectarian legislative prayer in Marsh v. Chambers, 463 U.S. 783 (1983), was premised on the secular purpose of solemnizing legislative procedures, as well as the historically accurate acknowledgment of a longstanding practice of legislative prayer.
384 Id. at 598; see also id. at 623–32 (O'Connor, J., concurring). Justices Brennan and Stevens joined O'Connor's concurrence. Id.
385 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.
386 McCreary County v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).
display of the Decalogue in the county courthouse and concluded that public officials had posted the document for the purpose of celebrating its religious content. 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 pretextual rather than an authentic acknowledgment of the Ten Commandments' place in the secular culture.

On the same day, a different five-to-four alignment in the Supreme Court produced a decision in Van Orden that upheld the display of the Ten Commandments on the Texas state capitol grounds. In Van Orden, Justice Breyer's decisive concurring 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. In addition to recognizing this secular purpose, Breyer also emphasized the divisive quality of removing a longstanding monument to which many people in the community were attached for cultural and religious reasons.

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 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 and Mary. The lower courts have proven capable of administering the distinctions demanded by the theory of cultural acknowledgment. In Doe v. Village of Crestwood, 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 crèche 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. 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.

These two considerations are conceptually linked. A government-supported act of cultural acknowledgment that includes explicit and robust religious activity, such

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387 McCreary County, 545 U.S. at 867–73.
388 Id. at 873 n.22 (distinguishing McGowan v. Maryland, 366 U.S. 420 (1961)).
390 Van Orden, 545 U.S. at 701 (Breyer, J., concurring).
391 See id. at 698–704.
392 917 F.2d 1476 (7th Cir. 1990), cert. denied, 505 U.S. 1218 (1992).
393 Id. at 1478–79.
394 Id. at 1478.
395 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.
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 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. This argument was buttressed by the fact that the cross was originally donated to the church in memory of a nineteenth-century professor at William and 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. 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.

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397 See supra notes 121-22 and accompanying text.
398 917 F.2d 1476.
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 Article 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 Establishment Clause, in part because President Nichol framed his decision in terms of offense to those who may have been made to feel like religious outsiders by the default position of the cross on the chapel’s altar table.400

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 and 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 and 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 eighteenth 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.

400 See supra note 5 and accompanying text.
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 the College will endure long after adversarial tempers have cooled.

EPILOGUE

On February 12, 2008, Gene Nichol resigned, effective immediately, as president of the College, after being informed by the College’s Rector that his contract as president would not be renewed in July 2008. Nichol’s decision concerning the display of the cross in the Wren Chapel played a prominent part in that resignation. Nichol’s public letter of resignation included the following:

I have made four decisions, or sets of decisions, during my tenure that have stirred ample controversy.
First, as is widely known, I altered the way a Christian cross was displayed in a public facility, on a public university campus, in a chapel used regularly for secular College events—both voluntary and mandatory—in order to help Jewish, Muslim, Hindu, and other religious minorities feel more meaningfully included as members of our broad community. The decision was likely required by any effective notion of separation of church and
state. And it was certainly motivated by the desire to extend the College’s welcome more generously to all. We are charged, as state actors, to respect and accommodate all religions, and to endorse none. The decision did no more.

... It is fair to say that, over the course of the past year, I have, more than once, considered either resigning my post or abandoning the positions I have taken on these matters—which I believe crucial to the College’s future. But as I did so, I thought of other persons as well.

I thought of those students, staff, faculty, and alumni, not of the religious majority, who have told me of the power of even small steps, like the decision over display of the Wren Cross, to recognize that they, too, are full members of this inspiring community.

... I have also hoped that this noble College might one day claim not only Thomas Jefferson’s pedigree, but his political philosophy as well. It was Jefferson who argued for a “wall of separation between church and state”—putting all religious sects “on an equal footing.”

A public letter to the William and Mary community, released that same day, from Rector Michael K. Powell of the College’s Board of Visitors, had only this to say about the controversy regarding the placement of the cross in the Wren Chapel:

Many policies championed by President Nichol are fully embraced by the Board. We agree unflinchingly with the President’s efforts to make William and Mary a more diverse educational environment. His achievements in this area will be the most enduring part of his legacy. We will continue the pursuit with vigor and will insist that all future presidents of the College do as well. . . . [S]o there is no doubt, the Board will not allow any change in the compromise reached on the placement of the Wren Cross.

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These events took place well after we delivered this Article at the law school in October of 2007 and while the Article was in the editorial process. We offer no view on the merits of Gene Nichol’s tenure as president of the College. Those who focus on the College’s history will eventually be the judges of that. But we do believe that the decision to change the placement of the Wren Cross was, as Gene Nichol suggested in his letter, constitutionally correct. And we expect that any attempt to restore the cross to its former default position, on the altar table of the Wren Chapel, would invite costly and divisive litigation that the College would be destined to lose.