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SECONDARY MEANING AND RELIGION: AN ANALYSIS OF RELIGIOUS SYMBOLS IN THE COURTS

Eric D. Yordy* and Elizabeth Brown**

INTRODUCTION

[A]n image that began as an expression of faith was transformed.
—Justice Alito for the majority of the Court¹

[U]sing the cross as a war memorial does not transform it into a
secular symbol
—Justice Ginsburg for the dissent²

In the Supreme Court’s most recent freedom of religion case, Justice Alito and Justice Ginsburg disagreed about the actual and potential meaning of the Latin cross, a traditional symbol of Christianity in which the upright leg of the cross is longer than the horizontal arms of the cross.³ Justice Alito stated that the Latin cross, while not losing its religious meaning, has acquired what might be called a “secondary meaning” as a symbol of World War I.⁴ He couched his analysis in language suggesting that a religious symbol’s meaning may depend on its circumstances.⁵ While he also denied that he is minimizing the religious importance of the symbol, he continued to revisit the language of the secondary meaning, suggesting that the symbol simply is not religious in certain contexts.⁶

Justice Ginsburg, in contrast, argued that “[t]he Latin cross is the foremost symbol of the Christian faith” and that its use in a “war memorial does not transform it into a secular symbol.”⁷ The disagreement among the Justices with regard to the characterization of religious symbols in this 2019 case is the result of many years of struggle by the Court in dealing with religious symbols and the Establishment

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¹ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2075 (2019).

² *Id.* at 2104 (Ginsburg, J., dissenting).

³ *Compare id.* at 2089–90 (majority opinion) (noting importance of the cross as a symbol matched to Christianity), *with id.* at 2104 (Ginsburg, J., dissenting) (noting that the cross does not lose its Christian meaning because it was used as a war symbol).

⁴ *See id.* at 2089–90 (majority opinion).

⁵ *See id.*

⁶ *See id.*

⁷ *Id.* at 2104 (Ginsburg, J., dissenting).

Clause.⁸ This is the first time, however, that a Justice has used language reminiscent of trademark's secondary meaning doctrine in trying to assess whether the use of a religious symbol by a government entity violates the Establishment Clause.⁹ This marks a significant potential shift in the Court's approach to religious symbolism, with potential consequences for the extent of the First Amendment's guarantee of free exercise rights.¹⁰

This Article looks at the conflicting views of the Court (in the majority opinion, in concurrences, and in the dissenting opinion) on the nature of the religious symbol and whether the symbol is changed by context and proposes a new type of analysis that focuses on the context of the use of the symbol. In order to do this, we first look in Part I at the various tests proposed by the Court in Establishment Clause cases, and in particular, the analysis of religious symbols.¹¹ Part II outlines some basic principles of trademark law to set the stage for Part III.¹² There, we apply those trademark principles to religious symbols to determine whether those principles are conducive to an Establishment Clause analysis.¹³ Potential uses for trademark law principles here include the determination of whether a symbol is a *religious* symbol, if a religious symbol might become a secular symbol, and how context might influence the public perception of a religious symbol.¹⁴ We assess whether the Court's use of secondary meaning principles can be helpful to courts analyzing the use of religious symbols and whether it violates the Establishment Clause.¹⁵ The closing paragraph concludes that the principle of *context* is the key concept for religious symbol litigation but acknowledges that the principles of secondary meaning may help clarify a judge's analysis of that context.¹⁶ We then propose a structured approach to the analysis that uses the idea of secondary meaning to assist a court in determining whether the use of a religious symbol violates the Establishment Clause in a particular context.¹⁷

I. RELIGIOUS SYMBOLS IN A SECULAR WORLD

The First Amendment to the United States Constitution reads, in part, "Congress shall make no law respecting an establishment of religion"¹⁸ While a narrow

⁸ See *id.* at 2081 n.16 (majority opinion) (listing different categories of Establishment Clause cases); see also *id.* at 2080 (noting the changes within the Court's attempts to interpret the Establishment Clause over time).

⁹ See *id.* at 2081–85; *id.* at 2089–90.

¹⁰ See *supra* note 9 and accompanying text.

¹¹ See *infra* Part I.

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Section III.D.

¹⁷ See *infra* Section III.D.

¹⁸ U.S. CONST. amend. I.

interpretation of this clause would prohibit a state-sponsored religion,¹⁹ the clause has been interpreted more broadly over the years.²⁰ From opinions about prayers in schools and government meetings, to the use of state tax revenue to pay for playground equipment at a religious school, the Supreme Court has struggled to clearly define the parameters of the Establishment Clause.²¹

¹⁹ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

²⁰ See cases cited *infra* note 21.

²¹ For a sample of cases addressing the use of public tax revenue to support programs in religious organizations, see, for example, *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2017, 2024–25 (2017) (holding that the state could not deny a religious school a grant based on Establishment Clause concerns when the grant was for non-religious purposes and was open to all non-profit organizations except religious organizations); *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–44, 653, 662–63 (2002) (holding that an Ohio “school choice” tuition aid program that allowed for reimbursement for private school, including religious school, tuition did not violate the Establishment Clause); *Mitchell v. Helms*, 530 U.S. 793, 801, 835 (2000) (holding that the provision of government aid for materials and equipment to religious schools was not a violation of the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203, 208–09 (1997) (holding that the provision of remedial education by public school teachers did not violate the Establishment Clause when those services were provided in a religious school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (holding that providing disability services to a student at a religious school did not violate the Establishment Clause when those services were provided at all public schools); *Marsh v. Chambers*, 463 U.S. 783, 784–86, 795 (1983) (upholding the use of public funds to pay a legislative chaplain based on a long history of such use of funds); *Mueller v. Allen*, 463 U.S. 388, 390, 400 (1983) (upholding tax deductions for tuition and other educational expenses even when the taxpayer’s children attended religious schools); *Lemon v. Kurtzman*, 403 U.S. 602, 606–07, 612–13 (1971) (holding that state payments directly to religious schools to reimburse for salaries of teachers in secular subjects violated the Establishment Clause and introducing an entanglement test); *Walz v. Tax Comm’n*, 397 U.S. 664, 666, 680 (1970) (upholding property tax exemptions for religious organizations); *Everson*, 330 U.S. at 15–16 (holding that tax revenue could be used to pay for bus costs for students to attend school, even if they attend a religious school); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 373, 375 (1930) (holding that state tax dollars could be used to provide textbooks to children even if those children attended religious schools). For cases involving religious activities in public facilities, see, for example, *Town of Greece v. Galloway*, 572 U.S. 565, 564–70, 591–92 (2014) (holding that opening prayers for legislative and government meetings do not violate the Establishment Clause); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 317 (2000) (holding that prayer at public high school sporting events violated the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 580, 589 (1992) (holding that the inclusion of religious prayers at a public school graduation ceremony violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985) (holding that school prayer violated the Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 264–65, 277 (1981) (holding that the use of public school facilities for religious organization meetings when school was not in session did not violate the Establishment Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that a state law requiring Biblical readings in schools violated the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 422, 424 (1962) (holding that prayer in school violated the Establishment Clause, even if students were not required to participate); *Zorach v. Clauson*, 343 U.S. 306, 308, 315 (1952) (holding that release time to allow students to leave a public school

Although the Court has not heard many religious symbol cases, those it has heard have been the source of great public concern.²² For example, the Court has addressed whether a depiction of stone tablets engraved with the Ten Commandments hanging in a public courtroom or on the grounds of a public building violates the Establishment Clause.²³ The Court also has addressed when a menorah or a crèche (manger scene) might violate the Establishment Clause.²⁴ In the 2019 case at issue here, the Court decided whether a thirty-two-foot-tall Latin cross on a pedestal in the middle of a public roadway violated the Establishment Clause.²⁵

A. Establishment Clause Jurisprudence Establishes the Importance of Context in Evaluating Government Action

From its earliest Establishment Clause opinions, the United States Supreme Court has made it clear that the government is not allowed to interfere with the opinions or beliefs of people, but that it may step in to regulate behavior that might violate the peace and good order of society.²⁶ The Court further articulated that the purpose of the religion clauses is “to be . . . neutral in its relations with groups of religious believers and non-believers.”²⁷ However, in practice, it has been difficult for the Court to establish a way to determine whether government action violates these principles.²⁸ Several different approaches, including varying tests, have arisen in Supreme Court opinions.²⁹ While each test is different, there is one common theme: the context of the regulation is important.³⁰

to obtain religious education as an elective course at a religious institution did not violate the Establishment Clause); Illinois *ex rel.* McCullom v. Bd. of Educ., 333 U.S. 203, 205, 212 (1948) (holding that a program allowing religious education in public schools during the regular school day violates the Establishment Clause). For general cases regarding the establishment of religion by the government, see, for example, Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994) (holding that a state statute creating a special school district for a religious “enclave” violated the Establishment Clause); McGowan v. Maryland, 366 U.S. 420, 422, 453 (1961) (holding that state laws requiring business to close on Sunday did not unconstitutionally advance the Christian religion over religions that observed the Sabbath on other days of the week).

²² See *infra* notes 23–25 and accompanying text.

²³ *McCreary Cty. v. ACLU*, 545 U.S. 844, 873–74 (2005) (holding that the display violated the Establishment Clause).

²⁴ *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (holding that the display did not violate the Establishment Clause).

²⁵ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019).

²⁶ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 163–66 (1878) (holding that laws prohibiting polygamy did not violate this line because polygamy was an act that historically was against good order).

²⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (Jackson, J., dissenting).

²⁸ See cases cited *supra* note 21.

²⁹ See *infra* Sections I.A.1–4.

³⁰ See *infra* Sections I.A.1–4.

1. The *Lemon* Test

In 1971, Chief Justice Warren Burger attempted to synthesize Supreme Court precedent into a single test.³¹ The infamous and somewhat controversial *Lemon* test outlined three questions. First, does the government action have a secular purpose?³² Second, does the principal effect of that government action advance or inhibit religion?³³ Third, does the government action foster excessive entanglement with religion?³⁴ In order for a government action to be valid and not violate the Establishment Clause, a court must be able to answer the questions “yes,” “no,” and “no” in that order.³⁵ Because the test synthesized Establishment Clause cases with a broad range of government actions, from tax relief to draft registration requirements, the test is not easily applicable to religious symbols.³⁶ Even so, the second prong of *Lemon* takes the potential context of the government action into account in that the context of the action may determine whether it advances or inhibits religion.³⁷

2. The Historical Context Approach

The *Lemon* test, while providing a fair summary of prior Establishment Clause opinions, was difficult for the Justices to apply.³⁸ Within a dozen years, the Court upheld opening prayers in legislative sessions based instead on a “deeply embedded” history of legislative prayer in America.³⁹ Chief Justice Burger began his analysis with the words, “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”⁴⁰ Chief Justice Burger acknowledged that history and tradition would not be enough to justify a practice without other evidence, but declared that history and tradition are “not something to be lightly cast aside.”⁴¹ Because the Founding Fathers began meetings with prayer, the Chief Justice reasoned, “[T]he men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment”⁴² Justice Brennan, in dissent, applied

³¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

³² *Id.* at 612.

³³ *Id.*

³⁴ *Id.* at 613.

³⁵ *See id.* at 613–14.

³⁶ *See Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080–81 (2019).

³⁷ *See Lemon*, 403 U.S. at 612.

³⁸ *See Marcia Alembik, The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1180–92 (2006) (discussing the inconsistent usage of the *Lemon* test by the Supreme Court).

³⁹ *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

⁴⁰ *Id.*

⁴¹ *Id.* at 790 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (internal quotations omitted)).

⁴² *Id.* at 788.

the *Lemon* test to demonstrate that “if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”⁴³ Justice Brennan continued his dissent by addressing the purposes of the Establishment Clause—separation and neutrality.⁴⁴ Brennan concluded that prayer in a government building or in government meetings should be a violation because prayer in that context violates the principles of separation and neutrality.⁴⁵ The *Lemon* test arguably is the most famous of the Court’s Establishment Clause tests, but it has not been applied directly in many cases, including the recent Latin cross case.⁴⁶ But the *Lemon* test, despite several legal scholars’ recommendations, has not been explicitly overruled or rejected by the Court.⁴⁷

3. The Endorsement Test

In 1984, Justice O’Connor proposed that the underlying crux of an Establishment Clause violation should be whether the government action is intended to, and actually does, endorse religion over non-religion or endorse one particular religion or sect over others.⁴⁸ She saw the question as whether an action “sends a message to non-adherents 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.”⁴⁹ Given this language, the key factors in assessing an Establishment Clause violation are intent and impact.⁵⁰ Courts must look to the context of the government action; if there is discernable intent to promote religion, or a particular religion, then the action violates the Establishment Clause.⁵¹ Alternatively, if intent cannot be discerned, the Court looks to the context of the action to determine what message is being sent by the action.⁵²

⁴³ *Id.* at 800–01 (Brennan, J., dissenting).

⁴⁴ *Id.* at 801–06.

⁴⁵ *Id.* at 808.

⁴⁶ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (noting that several cases established a pattern that is “a testament to the *Lemon* test’s shortcomings”).

⁴⁷ *See id.* at 2092–93 (Kavanaugh, J., concurring) (explaining that the *Lemon* test has not been used and does not explain many of the Court’s decisions, but not advocating for its repudiation); *see also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 326 (noting that “[t]wo cases at the end of the 1994 term rang the death knell of the *Lemon* test as an integrated whole”); Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 106 (noting that “[t]he death of *Lemon* is . . . welcome” because of its inconsistent and confusing applications). *But see Am. Legion*, 139 S. Ct. at 2097 (Thomas, J., concurring) (“I would take the logical next step and overrule the *Lemon* test in all contexts.”).

⁴⁸ *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring).

⁴⁹ *Id.* at 688.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

4. The Coercion Test

Instead of mere endorsement, Justice Kennedy proposed a *coercion* test in a 1989 dissent.⁵³ Justice Kennedy acknowledged that religion has been, and continues to be, an important factor in our society.⁵⁴ To require the government to avoid any action that might give credit to religion, or acknowledge religion, would be hostile to religion and therefore would violate the principle that the government must be neutral with regard to religion.⁵⁵ Instead of setting an analytical bar at the level of “endorsement” or “advance or inhibit,” Justice Kennedy argued for a coercion test combined with a *de facto* establishment test.⁵⁶ First, the government cannot undertake any action that would coerce a person to “support or participate in any religion or its exercise.”⁵⁷ Second, it would violate the Establishment Clause if the government gave a direct benefit to religion to such an extent that it was establishing a state religion.⁵⁸ In answering both questions, Kennedy argued that the context of the government action would be critical.⁵⁹

5. The Recent State of Establishment Clause Analysis and Justice Disagreements

In the thirty years since Kennedy’s proposal of the coercion test, the Court has not settled on any unified analysis.⁶⁰ In 1992, Justice Kennedy wrote for a majority of the Court that holding prayer at school graduation violated the Establishment Clause.⁶¹ Although the lower courts had applied the *Lemon* test, Justice Kennedy’s majority opinion did not directly apply that test.⁶² Instead, it stated, “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”⁶³ Even though participation in graduation ceremonies is optional, the Court found that it is a seminal event in the life of an American youth and to force a choice of attending such a major event or being subjected to a religious prayer was unconstitutional.⁶⁴ It appeared, in that case,

⁵³ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁵⁴ See *id.* at 657.

⁵⁵ See *id.*

⁵⁶ See *id.* at 659.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ See *supra* note 29 and accompanying text.

⁶¹ *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992).

⁶² *Id.* at 592.

⁶³ *Id.*

⁶⁴ *Id.* at 595.

that the key contextual consideration was location, in that the action took place at a high school.⁶⁵

On the question of whether using government funds for a sign language interpreter for a deaf student at a private, religious school violated the Establishment Clause, the Court, while noting again that the lower courts used the *Lemon* test, focused only on the context of a neutral use of state funds without reference to the prongs of *Lemon*.⁶⁶ The Court again essentially ignored the prongs of the *Lemon* test in 1994 when it held that a state statute creating a school district specifically for a religious village was unconstitutional.⁶⁷ Justice Blackmun, in concurrence, stated, “I write separately only to note my disagreement with any suggestion that today’s decision signals a departure from the principles described in *Lemon v. Kurtzman*”⁶⁸ In both cases, the key component appeared to be the context of the action.⁶⁹

In 2005, Chief Justice Rehnquist pointed to several recent cases that failed to apply the *Lemon* test, noting:

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument [a depiction of the Ten Commandments] that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.⁷⁰

Again, context was crucial.⁷¹ This historical approach also was found in the Justice Kennedy’s 2014 opinion upholding prayer at public meetings.⁷² This historical approach would play a large role again in the 2019 Latin Cross case before the Supreme Court, discussed in more depth below.⁷³

⁶⁵ *See id.*

⁶⁶ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3, 13–14 (1993).

⁶⁷ *Bd. of Educ. v. Grumet*, 512 U.S. 687, 706–07 (1994).

⁶⁸ *Id.* at 710 (Blackmun, J., concurring).

⁶⁹ *See supra* notes 66–67 and accompanying text.

⁷⁰ *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

⁷¹ *See id.*

⁷² *See Town of Greece v. Galloway*, 572 U.S. 565, 571 (2014). Justice Kennedy was joined by Justice Alito and Chief Justice Roberts in his historical analysis. *Id.* at 568. Justice Thomas and Justice Scalia concurred, and discussed the analysis in terms of coercion. *See id.* at 604 (Thomas, J., concurring). Justice Breyer dissented, arguing that the predominantly Christian nature of the prayer-givers demonstrated a lack of neutrality, but did not apply the *Lemon* test. *See id.* at 611 (Breyer, J., dissenting). Justice Kagan also dissented and failed to use the *Lemon* test, instead taking factual issue with the nature of the forum and whether Justice Kennedy applied the historical analysis correctly. *See id.* at 616 (Kagan, J., dissenting).

⁷³ *See discussion infra* Section I.B.3.

B. The Establishment Clause and Religious Symbols

In several cases, the Court has addressed whether the public display of religious symbols violates the Establishment Clause.⁷⁴ In particular, the Court has issued opinions related to three religious symbols: holiday displays,⁷⁵ the Ten Commandments,⁷⁶ and the cross.⁷⁷ The Court has struggled to articulate when a religious symbol may be used constitutionally by the government or on government property.⁷⁸ It has approached each symbol differently and yet again, context has been a part of the discussion regardless of the test used.⁷⁹

1. Holiday Displays

In its first holiday display case, the Court addressed the public display of a crèche, or manger scene, as part of a broader holiday display.⁸⁰ The city of Pawtucket, Rhode Island, erected an annual holiday display located on privately owned land with components owned by the city.⁸¹ It included several holiday symbols not associated with Christianity *per se* but with the secular aspects of Christmas: a Santa Claus, a reindeer-pulled sleigh, red and white striped poles, a Christmas tree, lights, large toys, a “Seasons Greetings” banner, as well as a crèche consisting of the traditional Christian manger scene with a baby Jesus, angel, shepherds, and wise men.⁸² This arrangement was challenged in court as a religious symbol.⁸³ In analyzing the constitutionality of the crèche’s inclusion, the Court acknowledged the occasional intertwining of church and state: “In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.”⁸⁴

The Court held that while the crèche depicted a critical moment in Christianity, its inclusion merely acknowledged the history of the Christmas holiday and was not a violation of the Establishment Clause.⁸⁵ Chief Justice Burger noted that the Court was not bound by any particular test and argued for a contextual analysis with regard

⁷⁴ See discussion *infra* Sections I.B.1–3.

⁷⁵ See discussion *infra* Section I.B.1.

⁷⁶ See discussion *infra* Section I.B.2.

⁷⁷ See discussion *infra* Section I.B.3.

⁷⁸ See discussion *infra* Sections I.B.1–3.

⁷⁹ See discussion *infra* Sections I.B.1–3.

⁸⁰ *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 672.

⁸⁵ *Id.* at 686.

to Establishment Clause cases.⁸⁶ Because the crèche was passive (not forcing religion on any non-adherent), and was part of a larger display, the Chief Justice and the majority held that it did not violate the Establishment Clause.⁸⁷ Justice O'Connor, in concurrence, argued for use of the endorsement test and determined that in that context, the city did not endorse religion.⁸⁸

Five years later, the Court adopted Justice O'Connor's endorsement test when evaluating the context of another crèche in government displays in Pennsylvania.⁸⁹ At issue were two different displays.⁹⁰ In the first, the county allowed a religious organization to set up a traditional crèche on the central staircase of the county building, surrounded by some small poinsettia plants and evergreen trees decorated with red ribbons.⁹¹ The second display was hosted in a city-county building just down the street from the first display and was a broader holiday celebration containing a Christmas tree and a menorah to acknowledge the Jewish holiday of Chanukah.⁹² This display included a sign with the words, "Salute to Liberty."⁹³ Because the crèche display did not contain any "secular" holiday items to indicate that the crèche was historic and not religious, the Court found that the crèche display was a religious display and violated the Establishment Clause.⁹⁴ In contrast, through several different opinions, a majority of the Justices found that the menorah, as part of a broader display, did not violate the Establishment Clause.⁹⁵ Justice Blackmun wrote:

The menorah, one must recognize, is a religious symbol; it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.⁹⁶

Because the menorah was standing near a Christmas tree and the liberty sign, Justice Blackmun believed that the display was a broad celebration of the holiday season and not an endorsement of religion.⁹⁷ Justice O'Connor also found that the menorah did not endorse religion because of its context with other holiday memorabilia.⁹⁸

⁸⁶ *Id.* at 685.

⁸⁷ *Id.*

⁸⁸ *Id.* at 687, 689 (O'Connor, J., concurring).

⁸⁹ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989).

⁹⁰ *Id.* at 578.

⁹¹ *Id.* at 578–80.

⁹² *Id.* at 581–82.

⁹³ *Id.* at 582.

⁹⁴ *Id.* at 598.

⁹⁵ *See id.* at 613–14.

⁹⁶ *Id.*

⁹⁷ *Id.* at 614.

⁹⁸ *Id.* at 632 (O'Connor, J., concurring).

Justice Brennan, in dissent, opined that the inclusion of all religious symbols violated the Establishment Clause and stated, “I continue to believe that the display of an object that ‘retains a specifically Christian [or other] religious meaning’ is incompatible with the separation of church and state demanded by our Constitution.”⁹⁹ Justices Kennedy, Rehnquist, White, and Scalia argued that both the crèche and the menorah displays did not violate the Establishment Clause because both were passive acknowledgments of the religious nature and heritage of our country and did not advance religion in any meaningful way.¹⁰⁰ In fact forbidding those displays, they argued, would be hostile to religion and a violation of the government’s duty to accommodate religion.¹⁰¹

2. The Ten Commandments

The importance of context, as seen in the holiday display cases, was equally important when the Court analyzed the placement of the Ten Commandments in government buildings.¹⁰² In a 1980 per curiam opinion, the Court held that a Kentucky statute requiring the posting of the Ten Commandments, purchased with private donations, in every public school classroom violated the Establishment Clause.¹⁰³ Even though the Kentucky legislature specified that the purpose of the display was to provide context for the “fundamental legal code of Western Civilization and the Common Law of the United States,” the Court held that its “pre-eminent purpose” was religious.¹⁰⁴ The Court stated, “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”¹⁰⁵ The Court noted that the display violated the first prong of the *Lemon* test—that there was no true secular purpose for the government action.¹⁰⁶ In dissent, Justice Rehnquist argued that the Court should have deferred to the Kentucky legislature given its articulated secular purpose.¹⁰⁷ He further stated that “[t]he Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin,”¹⁰⁸ and the government should not ignore the historical significance of religious symbols merely because it invokes religious imagery for some of the population.¹⁰⁹

⁹⁹ *Id.* at 637 (Brennan, J., dissenting) (citations omitted).

¹⁰⁰ *Id.* at 655, 662 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁰¹ *Id.*

¹⁰² *See* *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (per curiam).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 39.

¹⁰⁵ *Id.* at 41.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 43–44 (Rehnquist, J., dissenting).

¹⁰⁸ *Id.* at 45–46.

¹⁰⁹ *Id.* at 46.

Twenty-five years later, in 2005, the Supreme Court held that a display of the Ten Commandments at the Texas state capitol building did not violate the Establishment Clause.¹¹⁰ In *Van Orden v. Perry*, a five-Justice majority agreed on the result, but no majority agreed on the rationale.¹¹¹ Four Justices, including Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy declined to apply the *Lemon* test or the endorsement test, and instead looked to the historical significance of the Ten Commandments as a foundation for our legal system.¹¹² The plurality distinguished the monument at the Texas capitol from the display of the Commandments in the Kentucky schools by underscoring the importance of context, noting that it had been “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”¹¹³ Justice Breyer, concurring in the result, focused on the context of the monument to conclude that the placement of the monument was intended to convey a secular, historical, and cultural message as opposed to a religious message.¹¹⁴ After evaluating the history of the monument and its placement on the capitol grounds, Justice Breyer opined that the monument served a “mixed but primarily nonreligious purpose.”¹¹⁵ In a pair of dissents, Justices Stevens¹¹⁶ and Souter¹¹⁷ focused on the nature of the monument and the clearly religious text of the commandments to conclude that there is no possible secular purpose that would overcome the presumption of religious purpose in using the Ten Commandments.¹¹⁸

On the same day that the Court held the display in Texas did not violate the Establishment Clause, it also held that the Ten Commandments in Kentucky courtrooms were placed there for religious purposes and so violated the Establishment Clause.¹¹⁹ Two counties in Kentucky had placed copies of the Ten Commandments on their courtroom walls.¹²⁰ After complaints, the two counties passed resolutions for broader displays, including not only the Ten Commandments, but also religious quotes from other government documents such as the phrase “endowed by their Creator” from the Declaration of Independence.¹²¹ Following an injunction by the district court, the counties put up modified displays including the Ten Commandments and

¹¹⁰ *Van Orden v. Perry*, 545 U.S. 677, 677 (2005).

¹¹¹ *Id.* at 679.

¹¹² *Id.* at 681–86.

¹¹³ *Id.* at 691 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)).

¹¹⁴ *Id.* at 701 (Breyer, J., concurring).

¹¹⁵ *Id.* at 703.

¹¹⁶ *Id.* at 721, 733–34 (Steven, J., concurring in part and dissenting in part) (“[D]isplaying this sectarian text at the state capitol should invoke a powerful presumption of invalidity [and a commitment to neutrality].”).

¹¹⁷ *Id.* at 738 (Souter, J., dissenting) (noting that the reality is that “the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same”).

¹¹⁸ *Id.* at 721 (Stevens, J., dissenting).

¹¹⁹ *McCreary Cty. v. ACLU*, 545 U.S. 844, 874 (2005).

¹²⁰ *Id.* at 851.

¹²¹ *Id.* at 853–54.

several non-religious documents such as the Magna Carta.¹²² These displays were again challenged.¹²³ Justice Souter, for the majority, held that the purpose of the display was a key factor in determining whether the government was acting in a neutral manner toward religion or was establishing religion.¹²⁴ In this case, the majority held that any secular purpose for the displays would have to be assessed as genuine, and not merely a sham to cover up a primarily religious purpose.¹²⁵ The Court used the *Lemon* test but included the notion of endorsement as part of the purpose analysis.¹²⁶ The Court found that the district court had “ample support” to find that the purpose was religious and upheld the lower court rulings that the display violated the Establishment Clause.¹²⁷

3. The Latin Cross

The Latin cross first made its appearance in a Supreme Court case in the 1989 holiday display case, when Justice Kennedy stated in his concurring opinion:

I do not doubt, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.¹²⁸

In at least two cases, however, the Court has held that a Latin cross in a public place does not violate the Establishment Clause.¹²⁹ Less than a decade after Justice Kennedy’s statement, the Court addressed the issue of the Latin cross on public property.¹³⁰ The public plaza surrounding the Ohio statehouse had been a public forum for over 100 years.¹³¹ Regulations regarding the use of the square were content neutral.¹³² Both public gatherings and unattended displays were allowed on the square.¹³³ The Ku Klux Klan applied for permission to put up an unattended

¹²² *Id.* at 855–56.

¹²³ *Id.* at 856.

¹²⁴ *Id.* at 862.

¹²⁵ *Id.* at 864.

¹²⁶ *Id.* at 860.

¹²⁷ *Id.* at 881.

¹²⁸ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989).

¹²⁹ *See Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758 (1995).

¹³⁰ *Pinette*, 515 U.S. at 758.

¹³¹ *Id.* at 757.

¹³² *Id.*

¹³³ *Id.* at 758.

cross on the square, where permission already had been granted for a Christmas tree and a menorah.¹³⁴ The board that oversaw the application process denied the application, stating that putting up a cross would violate the Establishment Clause because of the appearance that the city “endorsed” the religious message of the cross.¹³⁵ Because the square was open to all, the Court held that the board’s rationale of avoiding an Establishment Clause violation was invalid and that the state must allow the cross to be erected in the public forum.¹³⁶ Justice Scalia specifically declined to use the endorsement test in this case, calling the city’s defense an argument for “transferred endorsement” where the government’s intentionally neutral activities could not be turned into endorsement because of private action in a neutral setting.¹³⁷ Justices O’Connor and Souter applied the endorsement test to determine that there was no risk of perceived endorsement given the facts of this case.¹³⁸

Thirty years after Justice Kennedy’s dicta about the Establishment Clause prohibiting the placement of a Latin cross on the roof of a city building, in 2019, the U.S. Supreme Court held that a large Latin cross, located in a median of a major road, did not violate the Establishment Clause.¹³⁹ After World War I concluded, private citizens in Prince George’s County, Maryland, raised money and erected a memorial for forty-nine county residents who died in that war.¹⁴⁰ The memorial, completed in 1925, was a thirty-two-foot-tall Latin cross.¹⁴¹ The memorial was located at the end of the National Defense Highway—the connector route from Annapolis, Maryland, to Washington, D.C.—which also has a history as a World War I memorial.¹⁴² When the memorial was dedicated, religious leaders prayed at the ceremony, and the religious symbolism of the cross was mentioned by the U.S. Representative who spoke.¹⁴³ Because of the growth of the area as a major metropolitan center, in 1961, the state of Maryland purchased the land and the memorial.¹⁴⁴

¹³⁴ *Id.*

¹³⁵ *Id.* at 759.

¹³⁶ *Id.* at 769.

¹³⁷ *Id.* at 764.

¹³⁸ *Id.* at 772 (O’Connor, J., concurring in part and concurring in the judgment).

¹³⁹ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019). The Court did decide one other case related to the Latin cross in 2010. In *Salazar v. Buono*, the issue, however, was not whether the placement of the cross on federal land was a violation of the Establishment Clause, but whether a Congressional action to exchange land upon which the cross sat to a private party for an equivalent parcel of land was a violation of a prior, lower court order, to remove the cross. 559 U.S. 700, 710 (2010). The Court declined to rule on the Establishment Clause issue. *See id.* at 722–23. Instead, several separate opinions were issued concluding that the district court erred. *See id.*

¹⁴⁰ *Am. Legion*, 139 S. Ct. at 2077.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2078.

The memorial had been used repeatedly as part of patriotic, not religious, celebrations.¹⁴⁵ The area surrounding the cross became a remembrance region, with memorials to fallen soldiers from several wars and other tragic events in U.S. history, including the terrorist attacks on September 11, 2001.¹⁴⁶ The cross memorial, however, was separated by several hundred feet and sat on an island between lanes of traffic.¹⁴⁷

In the majority opinion, Justice Alito noted that crosses may have both religious and secular meanings.¹⁴⁸ He pointed to the cross as a component of corporate logos and national flags (Blue Cross Blue Shield, the Red Cross, and the flag of Switzerland for example) as examples of the cross's conversion into an almost entirely secular symbol.¹⁴⁹ He then described the Latin cross as having religious meaning as well as secular meaning through its association with World War I and the European graveyards.¹⁵⁰ Justice Alito, in a section joined by a plurality but not a majority, discussed the problems with the *Lemon* test and declined to use it in that case.¹⁵¹ Instead, Justice Alito used a contextual argument to demonstrate that the cross is not solely a religious symbol and that the context and use of the cross in this situation was not religious.¹⁵² The majority further noted that even if the original purpose of a display was religiously motivated, time may change the perception and purpose of a religious display.¹⁵³ The majority concluded that even if the origin and purpose of the display had been religious initially, the message of the display may have evolved from a religious message to a secular message.¹⁵⁴ In dissent, Justices Ginsburg and Sotomayor argued that the cross was so intimately associated with Christianity that use in another setting does not change the meaning of the cross, but instead changes the nature of the setting from secular to more sacred.¹⁵⁵ Justice Ginsburg also noted that soldiers' headstones in Europe are not exclusively crosses, but include white marble markers with a cross for Christian soldiers and a Star of David for Jewish soldiers.¹⁵⁶ This, she noted, indicated that those headstones were not secular markers, but were religious markers and that any association of the cross with those cemeteries stemmed, not from a secular association, but merely resulted from the statistics of Christian dead to non-Christian dead.¹⁵⁷

¹⁴⁵ *Id.* at 2068–69.

¹⁴⁶ *Id.* at 2077–78.

¹⁴⁷ *Id.* at 2078.

¹⁴⁸ *Id.* at 2074.

¹⁴⁹ *Id.* at 2074–75.

¹⁵⁰ *Id.* at 2075.

¹⁵¹ *Id.* at 2078–79.

¹⁵² *Id.* at 2089–90.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2084 (pointing to the tragic 2019 fire at the Notre Dame cathedral in Paris and statements by leaders that the cathedral was a cultural icon and a historic building without focus on its religious nature).

¹⁵⁵ *Id.* at 2103–04 (Ginsburg, J., dissenting).

¹⁵⁶ *Id.* at 2109.

¹⁵⁷ *Id.* at 2110.

The central dispute in the 2019 case is whether a religious symbol, in particular the Latin cross, can achieve such a secondary association to become a secular symbol, with the majority holding that it can and the dissent arguing that it cannot.¹⁵⁸ While not expressly stated in terms of “secondary meaning,” this argument is also evident from the “context” argument of the crèche, menorah, and Ten Commandment cases.¹⁵⁹ In the next Section, we offer a brief overview of the secondary meaning doctrine in trademark law, followed by an analysis of the application of secondary meaning to religious symbols to determine how a symbol becomes a religious symbol and how those religious symbols might develop a secondary meaning, allowing the government to use them without violating the Establishment Clause.¹⁶⁰

II. TRADEMARK PRINCIPLES EMPHASIZE COMMERCIAL CONTEXT IN DETERMINING THE SCOPE OF MARK PROTECTION

Context is a key concept in trademark law. Trademark law is rooted in the idea that a mark, logo, slogan, or similar device can be associated with a product or service to indicate the source of the product or service.¹⁶¹ Trademarks used in interstate and international commerce are governed by the Lanham Act.¹⁶² The Lanham Act became law in 1946 with the purpose of “the codification of all existing trademark statutes, the carrying out by statute of our international commitments, the modernization of the trademark statutes, remedying constructions of the present statutes, and the simplification of trademark practice.”¹⁶³ Next, we will look at general trademark principles under the Lanham Act in order to determine their applicability to Establishment Clause cases in the following Sections.¹⁶⁴

A. Trademark Protection Generally

When one thinks of the association between a symbol, a word, or a mark, and some product or service, one must consider the schema of trademark law and its varying levels of protection.¹⁶⁵ The level of protection a mark receives depends on

¹⁵⁸ See *id.* at 2090 (majority opinion); *id.* at 2104 (Ginsburg, J., dissenting).

¹⁵⁹ See generally *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹⁶⁰ See *infra* Part II.

¹⁶¹ See Beverly W. Pattishall, *The Lanham Trademark Act of Fifty-Some History and Comment*, 86 TRADEMARK REP. 442, 442–48 (1996).

¹⁶² 15 U.S.C. §§ 1051–1141n (2012).

¹⁶³ Pattishall, *supra* note 161, at 442 (citing S. REP. NO. 1333, at 5 (1946)). Intrastate trademarks are governed by state trademark law. See, e.g., Milton W. Handler, *Are the State Antidilution Laws Compatible with the National Protection of Trademarks?*, 88 TRADEMARK REP. 419, 437–38 (1998). The scope of protection and remedies may differ. See *id.*

¹⁶⁴ See *infra* Section II.A.

¹⁶⁵ See, e.g., 15 U.S.C. § 1051 (outlining the application process for trademark registration).

several factors and can change over time.¹⁶⁶ It may be helpful to think of the protection as a continuum of protection levels instead of distinct levels that are triggered by certain events or circumstances.¹⁶⁷

Trademark law focuses on protecting an association between a good and the source of that good.¹⁶⁸ By statutory definition, a trademark is

any word, name, symbol, or device, or any combination thereof—
(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.¹⁶⁹

Trademark protection can be based on the nature of the mark, or on the context of the mark with relation to the product.¹⁷⁰ In general, the more unusual a mark or word is that is associated with a product, the more protection it receives.¹⁷¹ Judge Friendly described four classes of protection “in an ascending order which roughly reflects . . . the degree of protection accorded [as] (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.”¹⁷² Some commentators, and even the Supreme Court, have separated this fourth category into two different categories, arguing that fanciful marks, those created or made up specifically to serve as a trademark, are even more protected than an existing mark that is used arbitrarily for an unrelated product.¹⁷³

Fanciful trademarks occur when a company makes up a word or mark that does not describe the product for which the mark is being used.¹⁷⁴ Examples include Xerox, Listerine, Advicor, and Velcro.¹⁷⁵ Fanciful marks receive the greatest trademark

¹⁶⁶ See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

¹⁶⁷ See *id.*

¹⁶⁸ See 15 U.S.C. § 1127.

¹⁶⁹ *Id.*

¹⁷⁰ See *Abercrombie & Fitch Co.*, 537 F.2d at 9–11.

¹⁷¹ See, e.g., *id.* (describing the general trademark levels of protection).

¹⁷² *Id.* at 9.

¹⁷³ See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); see also Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731, 742 (2017).

¹⁷⁴ See generally Linford, *supra* note 173 (describing fanciful trademarks but questioning if any mark is truly unrelated to the product).

¹⁷⁵ See *id.* at 741, 743 (noting Xerox and discussing cases related to Listerine and Advicor); see also Thomas M. Dunlap, *File Broadly, Clearly for Optimal Trademark Protection*, ASPATORE, May 2016, 2016 WL 3476385, at *3 (listing Exxon, Kodak, and Xerox as fanciful marks); *Velcro Companies to Public: It's Hook and Loop, Not Velcro*, VELCRO (Sept. 25, 2017), <https://www.velcro.com/press-and-news/velcro-companies-public-hook-loop-not-velcro/> [<https://perma.cc/ER6T-MYJL>] (describing the Velcro mark).

protection because they only exist to draw a connection between a product and a manufacturer.¹⁷⁶ Many common brands today might be considered fanciful because they do not mean anything to the public, even if there was some original meaning.¹⁷⁷ For example, A&W was named for the owners, Allen and Wright.¹⁷⁸ EOS stands for “Evolution of Smooth.”¹⁷⁹ But, since neither of those definitions or meanings had any meaning to the public (and probably still do not), these could be fanciful marks.¹⁸⁰ A fanciful mark obtains protection because of the origin and nature of the mark rather than the context of the use of the mark.¹⁸¹

Arbitrary marks, in contrast, require more consideration of context and consist of “a pre-existing word [used] to sell a product unrelated to that word.”¹⁸² A common example is that of Apple as a mark to distinguish cell phones and other technology.¹⁸³ Another example, though possibly less widely known, is e.l.f.¹⁸⁴ This common term for a mythical creature is associated with makeup and stands for “eyes, lips, face.”¹⁸⁵ These marks do not inherently suggest the product being sold, but instead acquire meaning through consumer association.¹⁸⁶ Interestingly, these marks are considered very strong marks and the “new meaning” for consumers does not have to be proven in order to receive protection.¹⁸⁷

At the opposite end of the spectrum are generic terms.¹⁸⁸ These terms cannot be protected as trademarks because the terms are so associated with the product itself (and not the manufacturer or source of the product) that they cannot be or can no longer be owned by a particular manufacturer.¹⁸⁹ Marks that begin in a more protected category may become generic over time.¹⁹⁰ In an interesting continuum, companies may

¹⁷⁶ See Linford, *supra* note 173, at 740–41.

¹⁷⁷ See Madeline Raynor, *50 Acronyms and Initialisms All Spelled Out*, MENTAL FLOSS (May 8, 2018), <https://mentalfloss.com/article/538094/acronyms-and-initialisms-spelled-out?s=4> [<https://perma.cc/8VVE-FFU9>].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See Linford, *supra* note 173, at 743–44.

¹⁸¹ See *id.*

¹⁸² *Id.* at 739.

¹⁸³ *Id.*; see also Steve Rivkin, *How Did Apple Computer Get Its Brand Name?*, BRANDING STRATEGY INSIDER (Nov. 17, 2011), <https://www.brandingstrategyinsider.com/2011/11/how-did-apple-computer-get-its-brand-name.html> [<https://perma.cc/75C6-QX7V>] (noting that the name came from a discussion soon after Steve Jobs returned from working at an apple orchard).

¹⁸⁴ Raynor, *supra* note 177.

¹⁸⁵ *Id.*

¹⁸⁶ See Linford, *supra* note 173, at 744.

¹⁸⁷ See *id.* at 745 (describing arbitrary trademarks as strong marks because they draw a new connection between a common term and an unrelated product).

¹⁸⁸ See Stephen R. Baird, *Putting the Cart Before the Horse in Assessing Trademark Validity—Toward Redefining the Inherently Generic Term*, 14 J. CORP. L. 925, 927–28 (1989).

¹⁸⁹ See *id.* at 929.

¹⁹⁰ *Id.* at 930–31.

spend years trying to build a strong link in the minds of consumers between their product and their brand, only to have it become a generic term.¹⁹¹

Descriptive and suggestive marks both are characterized by an inherent relationship between the mark and the word.¹⁹² The difference between the two is a matter of degree and was described in 1968 this way: “A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of goods. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods.”¹⁹³

Because suggestive marks require some imagination, they may be protected.¹⁹⁴ An example would be “Chicken of the Sea.”¹⁹⁵ This mark does not tell the consumer what the product is, or describe the manufacturer, but it does evoke some images that give the consumer some idea of what the product is.¹⁹⁶

For descriptive marks, or marks that inherently relate to the product for which it is used, proof of secondary meaning is required before the mark is protected.¹⁹⁷ Secondary meaning is an inherently contextual analysis.¹⁹⁸ Because secondary meaning is the focus of our later discussion about religious symbols, some examples will help illustrate the principles of secondary meaning.¹⁹⁹

B. Secondary Meaning

In an early secondary meaning case, the Supreme Court emphasized the importance of drawing the relationship between a manufacturer and a product.²⁰⁰ In 1938,

¹⁹¹ See, e.g., *Bayer Co. v. United Drug Co.*, 272 F. 505, 515 (S.D.N.Y. 1921) (declaring the term Aspirin generic); see also *Velcro Brand, Don't Say Velcro*, YOUTUBE (Sept. 25, 2017), <https://www.youtube.com/watch?v=rRi8LptvFZY> [<https://perma.cc/H63E-PVDF>]. Velcro Brand Companies have used humor to strengthen their trademark, including a follow-up video. *Velcro Brand, Thank You for Your Feedback—Don't Say Velcro*, YOUTUBE (June 4, 2018), <https://www.youtube.com/watch?v=ZLWMQLMiTPk> [<https://perma.cc/654G-UX3V>]. Even the company that makes Band-Aid adhesive strips has gotten more aggressive in advertising. *Compare PhakeNam, 70's Ads: Band-Aid Stuck on Band-Aid Brand*, YOUTUBE (Aug. 3, 2014), <https://www.youtube.com/watch?v=HAsQrngfFLw> [<https://perma.cc/27VU-QD8X>] (1970s commercial where the term “I am stuck on Band-Aid Brand” occurs several times), *with Rewind Me, Band-Aid Stuck on Band-Aid Jingle 90s Commercial (1997)*, YOUTUBE (Sept. 1, 2018), https://www.youtube.com/watch?v=M7KdFyaW_x8 [<https://perma.cc/2CZP-NZSJ>] (1997 commercial where every instance of the term Band Aid is followed by the term “brand”).

¹⁹² See *Stix Prods., Inc. v. United Merchs. & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968).

¹⁹³ *Id.*

¹⁹⁴ See *id.*

¹⁹⁵ *Suggestive Trademark: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/suggestive-trademark> [<https://perma.cc/GT2B-PGDQ>] (last visited Apr. 14, 2020).

¹⁹⁶ *Id.*

¹⁹⁷ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).

¹⁹⁸ See *infra* Section II.B.

¹⁹⁹ See *infra* Sections III.A–C.

²⁰⁰ See *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 116–19 (1939).

National Biscuit Company, Inc. sued Kellogg Company to stop it from using the term “shredded wheat.”²⁰¹ National Biscuit Company was the successor of the original developer of the product known as shredded wheat.²⁰² Kellogg Company introduced a cereal called shredded wheat which had similar ingredients but a different manufacturing process.²⁰³ The United States Supreme Court determined that the term “shredded wheat” was a generic term for the product that was not affiliated with any particular manufacturer, thus rendering it ineligible for trademark status.²⁰⁴ The Court rejected National Biscuit’s argument that the name was protected because it had obtained a secondary meaning, linking the term to the specific product manufactured by National Biscuit’s predecessors at a particular plant at Niagara Falls.²⁰⁵ While the Court acknowledged that the Niagara Falls plant was the sole location for producing any product named shredded wheat for several years, the Court stated that National Biscuit had to show “that the primary significance of the term in the minds of the consuming public is not the product but the producer.”²⁰⁶ The Court then stated that National Biscuit failed to show that the term and the manufacturer were so closely linked to create the secondary meaning.²⁰⁷

In 2000, the Third Circuit described secondary meaning as “exist[ing] when the mark ‘is interpreted by the consuming public to be not only an identification of the product or services, but also a representation of the origin of those products or services.’”²⁰⁸ The court further stated that this secondary meaning is established by the efforts of the manufacturer, intentionally drawing a connection between the mark and the manufacturer’s version of the product.²⁰⁹ The court then stated that there was no legal consensus as to how to develop a secondary meaning for a product.²¹⁰ Even so, it listed several factors, including: the extent of sales and advertising leading to a connection in the minds of buyers, the length of use of the mark by the provider of the good or service, how exclusively the provider used the mark before a competitor began using it, customer surveys and testimony, the size of the provider, the number of sales by the provider, and the number of provider customers.²¹¹ Thus, it appears that secondary meaning is a function of consumer belief based on one or many proxy measures.²¹²

²⁰¹ *Id.* at 113.

²⁰² *Id.* at 113–14.

²⁰³ *Id.* at 114.

²⁰⁴ *Id.* at 116–17.

²⁰⁵ *Id.* at 118.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 118–19.

²⁰⁸ *Commerce Nat’l Ins. Servs., Inc. v. Commerce Ins. Agency, Inc.*, 214 F.3d 432, 438 (3d Cir. 2000) (citation omitted).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See id.*

In a 2018 dispute between Converse and Skechers, the Court of Appeals for the Federal Circuit noted that trademark protection is founded in distinguishing a product's source.²¹³ The court noted that this distinctiveness can be inherent or by "secondary meaning."²¹⁴ The key test for secondary meaning, according to the court, is whether the public primarily identifies the mark with the source of a product or service instead of with the product or service itself.²¹⁵ It is language similar to this that the Supreme Court used in the Latin cross case, debating whether the cross is primarily affiliated with religion or with World War I.²¹⁶ At the same time, the Court seemed to argue over the use of the symbol in particular contexts.²¹⁷

III. DETERMINING WHETHER TO APPLY TRADEMARK PRINCIPLES TO RELIGIOUS SYMBOLS INVOLVES QUESTIONS ABOUT THE NATURE OF SYMBOLIC MEANING

The debate within the Supreme Court seems to be related to two different aspects of trademark law.²¹⁸ First, is the relationship between a symbol and religion based on the nature of the symbol (like a fanciful trademark)²¹⁹ or is the relationship between a symbol and religion related to context (similar to secondary meaning)?²²⁰ The U.S. Patent and Trademark Office does not register "religious trademarks" but does allow the registration of religious symbols as part of a trademark.²²¹ For our

²¹³ *Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110, 1116 (Fed. Cir. 2018).

²¹⁴ *Id.*

²¹⁵ *Id.* (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)).

²¹⁶ *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089–90 (2019).

²¹⁷ *See id.*

²¹⁸ *See, e.g., Linford, supra note 173, at 733; Vincent N. Palladino, Assessing Trademark Significance: Genericness, Secondary Meaning and Surveys*, 92 TRADEMARK REP. 857 (2002).

²¹⁹ *See Linford, supra note 173, at 791.*

²²⁰ *See Palladino, supra note 218, at 859.*

²²¹ *See, e.g., David A. Simon, Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA: INTELL. PROP. L. REV. 233, 268 (2008) (discussing trademark battles between religious organizations, including splinter organizations and competing churches). A search on the U.S. Patent and Trademark Office website reveals several trademarks that include religious symbols: using the design code 24.13.01 (the design code for "Cross, Latin (shorter horizontal lines); Latin cross (shorter horizontal lines)") reveals 6,733 trademarks and a brief review of a sample of those show that they include the Latin cross but are not simply the Latin cross. *Trademark Electr. Search Sys. (TESS)*, U.S. PATENT & TRADEMARK OFFICE, <http://tess2.uspto.gov/tmdb/dscm/dsc-24.htm#24> (last visited Apr. 14, 2020); *see also* U.S. PATENT & TRADEMARK OFFICE, <http://tmsearch.uspto.gov/bin/gate.exe> (last visited Apr. 14, 2020). A search for "menorah" shows it is part of the design code 13.01.01 "Candle holders, candle sticks; Candles; Holders, candle; Menorah" and reveals 1,498 trademarks. *Trademark Elec. Search Sys. (TESS)*, U.S. PATENT & TRADEMARK OFFICE, <http://tmsearch.uspto.gov/bin/gate.exe> (last visited Apr. 14, 2020); *see also* U.S. PATENT & TRADEMARK OFFICE, http://tess2.uspto.gov/tmdb/dscm/dsc_13.htm#13 (last visited Apr. 14, 2020). A review of those indicate that many are not the menorah but are types of candles in the trademark. Some that do

broader discussion about when the government's use of religious symbols violates the Establishment Clause, we must ask how to determine whether a symbol is a religious symbol at all.

The key questions, in trademark terms, are: (1) how a symbol becomes a "religious symbol"; (2) whether a religious symbol can lose its affiliation with religion because it has become so ubiquitous that society no longer associates it with religion (akin to becoming generic); and (3) whether the analysis of a religious symbol primarily should be focused on context (something akin to secondary meaning).²²² We address each of these questions in turn.

To be clear, we are not proposing that religious symbols must meet any trademark principle threshold to become religious symbols. We use trademark principles here to demonstrate how the Court tends to view the meaning of the symbol to determine whether a violation of the Establishment Clause has occurred.

A. The Application of Trademark Principles to the Acquisition of Symbols' Religious Meaning

When does a symbol become a religious symbol? In part, this depends on who you ask. In some religions, a symbol may have strong religious connotations to some while meaning nothing to members of other religions. The question is broader than whether a particular religion can claim protection or religious status for a symbol. This question is whether a symbol is universally accepted as a religious symbol, regardless of denomination or creed.²²³

Using trademark language, the easiest symbols to designate as religious would be the equivalent of descriptive or suggestive marks.²²⁴ These marks would give the general population some idea about the nature of the religion.²²⁵ For example, the crèche may be considered a descriptive mark.²²⁶ An angel hovering over a stable, while poorly dressed parents look at their newborn baby lying in a manger, shepherds kneel in worship, and richly dressed men stand to the side offering expensive gifts might suggest that the religion centers around the baby and the circumstances of the baby's birth.²²⁷

include the menorah are "A Cup Full of Chutzpah Hebrew Coffee Estd 2018" (using a menorah stylized as a cup of coffee), and a trademark identified as "enoch." See *Trademark Electr. Search Sys. (TESS)*, U.S. PATENT & TRADEMARK OFFICE, <http://tmsearch.uspto.gov/bin/gate.exe> (last visited Apr. 14, 2020).

²²² See Palladino, *supra* note 218, at 857–58, 860–62.

²²³ See generally Steven J. Olsen, *Protecting Religious Identity with American Trademark Law*, 12 CHI.-KENT J. INTELL. PROP. 131 (2013).

²²⁴ See Linford, *supra* note 173, at 738.

²²⁵ See *id.*

²²⁶ See, e.g., *id.*

²²⁷ See *id.* at 738–39.

It also is easy to designate as “religious,” marks that are the equivalent of a fanciful mark—that is, a mark created for the purpose of religious worship (like a mark that might be invented or developed to identify a product).²²⁸ A highly fanciful example would be the flying spaghetti monster of the purported Pastafarian religion.²²⁹ While not deemed a “religion” by the courts, the symbol of a flying ball of spaghetti and meatballs with tentacular eyes would indeed be a “creation” for the purpose of identifying the religion.²³⁰ A less fantastical example related to an acknowledged religion would be the Church of Jesus Christ of Latter-day Saints’ depiction of the angel Moroni.²³¹ That particular depiction or symbol did not exist until it was commissioned for the construction of the Salt Lake City temple and has been affiliated with the Church of Jesus Christ of Latter-day Saints ever since.²³²

A bit more difficult to classify as religious are symbols that have become affiliated with religion somewhat arbitrarily. There may be a reason for the affiliation in the mind of the adherents of the religion, but to “outsiders,” the linkage seems arbitrary.²³³ An arbitrary religious symbol would be a symbol that existed before it was affiliated with the religion, would not have been inherently associated with the religion, and yet has become affiliated with the religion.²³⁴ While arbitrary trademarks receive high levels of protection, one could argue that the secondary meaning doctrine should apply to the designation of putative religious symbols that are not fanciful, but are also not descriptive.²³⁵ The Latin cross would be such a symbol.²³⁶

²²⁸ See *id.* at 733–34.

²²⁹ See generally *About*, CHURCH OF THE FLYING SPAGHETTI MONSTER, <https://www.venganza.org/> [<https://perma.cc/ENC6-FB8D>] (last visited Apr. 14, 2020). The Pastafarian religion was deemed a parody and not a true religion by U.S. District Court Judge John Gerrard in *Cavanaugh v. Bartlet*, but the point remains that a flying spaghetti monster would be the equivalent of a fanciful trademark worthy of the highest levels of protection as a religious symbol. 178 F. Supp. 3d 819, 829 (D. Neb. 2016).

²³⁰ See *Cavanaugh*, 178 F. Supp. 3d at 829, 833.

²³¹ Lynn Arave, *Angel Moroni Is a Prominent Church Symbol*, DESERET NEWS (June 11, 2011), <https://www.deseret.com/2011/6/11/20373376/angel-moroni-is-a-prominent-church-symbol.html> [<https://perma.cc/KR6P-SXKF>]. The authors mean no disrespect in using the term “fanciful” to apply to a religious symbol of deep meaning to any particular faith. The authors are merely drawing parallels to trademark law.

²³² *Id.*

²³³ An example from business might be SUN Microsystems. To the consumer, this may seem like an arbitrary mark, but to the owners, it stood for Stanford University Network. Lester Earnest, *Sun Microsystem’s Somewhat Crooked Startup*, STAN. (June 20, 2017), <http://web.stanford.edu/~learnest/spin/sunup.html> [<https://perma.cc/7V76-NCCW>].

²³⁴ See Linford, *supra* note 173, at 739.

²³⁵ See, e.g., Lee B. Burgunder, *Can the PTO Find Its Way with Jesus?*, 19 MARQ. INTELL. PROP. L. REV. 63, 67–68 (2015) (arguing that the U.S. Patent and Trademark Office has been too quick to allow registration of marks using the name or term “Jesus,” and arguing that it should start requiring secondary meaning before registering those marks).

²³⁶ See Linford, *supra* note 173, at 739.

At the time of the founding of Christianity, the cross was a device of torture and death.²³⁷ And while it may be that Christians adopted the Latin cross as something of a symbol of the crucifixion of Jesus Christ, the cross was not considered a widespread symbol of the Christian faith until the reign of Constantine in the fourth century.²³⁸ And so a symbol, completely unrelated to religion, became a symbol of a worldwide religion.²³⁹

Another religious symbol, arbitrary in its origins, is the symbol of the fish, known as an ichthys or ichthus.²⁴⁰ This symbol consists of two intersecting arcs meeting on one end and with the other end extending beyond the meeting point to create what can look like a fish tail.²⁴¹ The symbol is not a descriptive or even suggestive symbol as the religion is not about fish.²⁴² It is not a fanciful symbol, as the fish symbol has existed for centuries.²⁴³ Its affiliation with the Christian religion may require explanation, making it an arbitrary application of a symbol to religion.²⁴⁴

As with trademarks, the key question is whether the symbol has become associated with religion in the minds of the public. The U.S. Patent and Trademark Office defines trademark and service mark as such:

A trademark is generally a word, phrase, symbol, or design, or a combination of these elements, that identifies and distinguishes the source of one party's goods from those of others. A service mark is the same as a trademark except that it identifies and distinguishes the source of a service rather than goods.²⁴⁵

²³⁷ BRUCE W. LONGENECKER, *THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL* 1–3 (2015).

²³⁸ *Id.* at 1–8.

²³⁹ The Latin cross may not be considered an arbitrary mark today because it has lost its contemporaneous meaning as a device of torture and death. Even so, at the time, the application of the device to identify adherents to a particular religion would have been the equivalent of an arbitrary trademark. *Id.*

²⁴⁰ Elesha Coffman, *What Is the Origin of the Christian Fish Symbol?*, CHRISTIANITY TODAY (Aug. 8, 2008), <https://christianitytoday.com/history/2008/august/what-is-the-origin-of-the-Christian-fish-symbol.html> [<https://perma.cc/A2WW-YHJN>].

²⁴¹ See, e.g., Blair Parke, *Ichthys, The Christian Fish Symbol: 5 Origin and History Facts*, BIBLESTUDYTOOLS (Apr. 25, 2019), <https://www.biblestudytools.com/bible-study/topical-studies/the-christian-fish-symbol-origin-and-history-facts.html> [<https://perma.cc/3BCW-BKCB>]; see also *What Does the Christian Fish Symbol Mean (Icthus/Icthus)?*, GOTQUESTIONS, <https://www.gotquestions.org/Christian-fish-symbol.html> [<https://perma.cc/34RP-EHFF>] (last visited Apr. 14, 2020) [hereinafter *Christian Fish Symbol*].

²⁴² See *supra* notes 240–41.

²⁴³ See Coffman, *supra* note 240.

²⁴⁴ See *Christian Fish Symbol*, *supra* note 241 (explaining that the fish represents several stories from the New Testament where Jesus fed multitudes with a small number of fish, and ate fish with his disciples).

²⁴⁵ U.S. PATENT & TRADEMARK OFFICE, *PROTECTING YOUR TRADEMARK: ENHANCING*

For our purposes, we would consider a “religious” symbol to be a symbol that is identified with religion in a similar manner.

Once a symbol may be legitimately called a “religious symbol,” our next question asks whether those symbols can ever lose their status as religious symbols, the equivalency of becoming “generic” under trademark law.²⁴⁶

B. Can a Religious Symbol Become Generic or “Lose” Its Religious Association?

If a religious symbol is used too often by different religious organizations, that symbol would not lose its “religiousness.” If a particular religion attempts to trademark that symbol, it may be denied if other denominations use it or the public affiliates that symbol with religion generally, but the symbol would still be “religious.”²⁴⁷ In fact, several religious terms have been declared generic by various courts because of their inability to distinguish between two different religions or sects—they fail to identify the source—but those terms are still considered religious.²⁴⁸

It is a harder discussion when a religious symbol becomes affiliated with something other than religion. Justice Alito argued that the cross has become known as a symbol for many things, including corporations, non-religious charities, and even nations.²⁴⁹ The apparent debate between Justice Alito and Justice Ginsburg focuses on the question of whether the *symbol* has had a change of status.²⁵⁰ One could read Justice Alito’s language to indicate that the Latin cross has become generic, and can no longer be the subject of an Establishment Clause violation claim, as it is no longer “religious.”²⁵¹

Of course, just like the analysis under trademark law, the determination that a symbol has lost its religious nature would be a fact-based, and possibly statistics-based, analysis by a court.²⁵² Aspirin was not generic until a court declared it so, and Velcro and Band-Aid have taken steps to ensure that a court will not declare them generic.²⁵³

In addressing specifically religious symbols that are not considered the equivalent of generic, we then ask: Is the critical factor in an Establishment Clause case the context in which the symbol is being used? If so, can religious symbols have a secondary meaning that is secular and that would allow the government to use them without violating the Establishment Clause?

YOUR RIGHTS THROUGH FEDERAL REGISTRATION 2 (2019), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> [<https://perma.cc/CB4X-8K4R>].

²⁴⁶ See Linford, *supra* note 173, at 745; see also Palladino, *supra* note 218, at 858–60.

²⁴⁷ See Palladino, *supra* note 218, at 858–60.

²⁴⁸ Olsen, *supra* note 223, at 135.

²⁴⁹ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2075 (2019).

²⁵⁰ See *id.* at 2074–78; *id.* at 2103–04.

²⁵¹ See *id.* at 2075.

²⁵² See Palladino, *supra* note 218, at 870, 873.

²⁵³ See *supra* note 191 and accompanying text.

C. Do Secondary Meaning Principles Assist in the Establishment Clause Analysis?

It is important to note that Justice Alito did not expressly state that the cross was a generic symbol that had lost its association with religion.²⁵⁴ Instead, he essentially stated that the cross had acquired a secondary meaning.²⁵⁵ Problematic for Justice Alito's argument is the fact that he overgeneralizes the symbol by including many types of crosses and not focusing on the Latin cross in particular.²⁵⁶

Even if we focus on the Latin cross in particular, Justice Alito seems to argue that the Latin cross has become associated enough with World War I that it is not primarily a religious symbol.²⁵⁷ Justice Ginsburg disagreed, also focusing on the nature of the symbol instead of the context of the use.²⁵⁸

Justice Ginsburg argued that the Latin cross (in particular) is so entwined with the Christian religion that it is impossible for it to become generic or even to have a secular meaning in any context.²⁵⁹ To support her argument, Justice Ginsburg points to statistics and surveys, stating, "To non-Christians, nearly 30% of the population of the United States . . . the State's choice to display the cross on public buildings or spaces conveys a message of exclusion"²⁶⁰ In her view, the argument for secondary meaning, as we see it in trademark law, does not support a secondary meaning for the cross—that the public still sees this symbol as predominantly a Christian symbol and there would be no secondary meaning.²⁶¹

²⁵⁴ *Am. Legion*, 139 S. Ct. at 2075.

²⁵⁵ *See id.* at 2090.

²⁵⁶ *See* LONGENECKER, *supra* note 237, at 12–18 (describing several types of crosses, including the Byzantine T cross (which has no "arm" above the cross bar), the Latin cross (also known as a body cross), the equilateral cross (where the four arms of the cross are equal in length), the Egyptian Ankh (which has a loop at the top instead of a straight "arm"), the gamma cross (made by connecting four Greek letter gammas together and that has developed a secondary meaning as a swastika of World War II)).

²⁵⁷ *Am. Legion*, 139 S. Ct. at 2074–80.

²⁵⁸ *Id.* at 2104 (Ginsburg, J., dissenting).

²⁵⁹ *Id.* at 2107.

²⁶⁰ *Id.* at 2106 (citing PEW RES. CTR., *AMERICA'S CHANGING RELIGIOUS LANDSCAPE* 4 (2015)).

²⁶¹ *Id.* In 1984, Justice Brennan argued that one cannot remove the religious overtones of a symbol simply by putting it in a somewhat secular situation. While dissenting in one of the crèche cases, he stated:

[E]ven in the context of . . . [a] seasonal celebration, the crèche retains a specifically Christian religious meaning. I refuse to accept the notion implicit in today's decision that non-Christians would find that the religious content of the crèche is eliminated by the fact that it appears as part of the city's otherwise secular celebration of the Christmas holiday.

Lynch v. Donnelly, 465 U.S. 668, 708 (1983) (Brennan, J., dissenting). Of course in that case, the religious symbol at issue was the crèche, which we previously described as a descriptive or suggestive symbol. *See supra* note 227 and accompanying text.

The focus on the symbol itself creates a status argument instead of focusing on the Establishment Clause question that asks if the *use* of the symbol establishes religion.²⁶² The Court should focus on the context of the use and the meaning of the symbol within that context—essentially to ask what evidence is needed to show that in a given context a religious symbol, which is not generic and still retains its religious overtones, has acquired a secular meaning that overcomes the religious background or history. In trademark law, the courts look to surveys, length of time of the use of symbols in association with a particular company or source of the product, and how widespread the use of the symbol is in relation to the particular company or source.²⁶³ By “flipping” the analysis, courts could look at surveys to demonstrate that the meaning of the symbol is not primarily religious for those not affiliated with the particular religion, as well as how widespread the use of the symbol is in non-religious contexts.²⁶⁴ This analysis does not cause a symbol to become less religious but does indicate that in the mind of the general public (not of that faith), the symbol does not send a religious message. Thus, we are not declaring a symbol no longer religious, which might be seen as hostile to religion,²⁶⁵ but instead are declaring when that symbol has become associated with secular meaning enough that non-adherents do not see or feel the endorsement of that faith by the government.²⁶⁶

But does a declaration that a symbol has a particular secondary meaning to a majority of the population assist in an Establishment Clause violation case? A key underlying principle of the Establishment Clause, as stated by the Court, is neutrality to religion.²⁶⁷ Using a statistical, or social science, approach to the meaning of the symbol may be neutral enough to satisfy the Establishment Clause analysis. But if the purpose of the Establishment Clause is to protect minority religions from the establishment of a religion by the majority, the statistical analysis may not pass constitutional muster.²⁶⁸ Are there examples where a symbol may pass this social science survey type of analysis and be considered secular but would still send a message of exclusion to the minority? Possibly. The question then becomes less statistical and more contextual.

²⁶² See *Am. Legion*, 139 S. Ct. at 2074–78; *id.* at 2103–04 (Ginsburg, J., dissenting).

²⁶³ See, e.g., Lawrence G. Evans, Jr. & David M. Gunn, *Trademark Surveys*, 79 TRADE-MARK REP. 1, 5 (1989).

²⁶⁴ See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 744–53 (2001) (outlining how to design a survey that is appropriate for collecting information on religious symbols and public perception).

²⁶⁵ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting) (noting hostility to religion is not mandated by the Establishment Clause).

²⁶⁶ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (defining endorsement).

²⁶⁷ See *supra* notes 45–46 and accompanying text.

²⁶⁸ See *supra* Section I.A.3 and accompanying notes.

D. An Approach for Analyzing the Establishment of Religion in Cases of Religious Symbols

The Establishment Clause tests, from the *Lemon* test to the endorsement test, have all included context.²⁶⁹ Justice Alito, in his opinion that seemed to indicate the ability to develop a secular, secondary meaning for a religious symbol, also focused on the historical, locational, and visual context of the symbol.²⁷⁰ Justice Ginsburg, on the other hand, seemed to argue that some symbols cannot be secular no matter the context.²⁷¹

Given the nature and importance of religion in society, and the confusion of the Court in analyzing Establishment Clause cases, we posit that the Court should focus on context as the determining factor in an Establishment Clause claim. Courts should continue to use an endorsement test using trademark principles to assist in determining if a violation has occurred in the context of religious symbols.²⁷² That modified approach would ask the following questions:

1. What is the *particular* symbol at issue?
2. Is the symbol in question a *religious* symbol?
3. Does the symbol have a current, generally understood secular meaning in addition to its religious meaning?
4. Will the use of the symbol, in the context it is used, send a message to non-adherents of the religion that they are outsiders to the political system?

One can use trademark principles to further refine the questions. The first question looks at the specifics of the symbol being used. Guidelines from the U.S. Patent and Trademark Office state, “When marks sound alike when spoken, are visually similar, have the same meaning (even if in translation), and/or create the same general commercial impression in the consuming public’s mind, the marks may be considered confusingly similar.”²⁷³ Courts should use this type of definition to determine if the symbol used by the government is sufficiently similar to an acknowledged religious symbol to require further examination. If the symbol is similar to the religious symbol, then the courts address the level of association between the mark and religion in the second and third questions.

The second and third questions relate to distinctiveness and secondary meaning. In trademark terms, question two asks if the mark is related to religion in a manner similar to a fanciful mark,²⁷⁴ arbitrary mark,²⁷⁵ or a descriptive mark that has developed

²⁶⁹ See *supra* Section I.A and accompanying text.

²⁷⁰ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074–78 (2019).

²⁷¹ See *id.* at 2104 (Ginsburg, J., dissenting).

²⁷² See *supra* notes 51–52 and accompanying text.

²⁷³ U.S. PATENT & TRADEMARK OFFICE, *supra* note 245, at 4.

²⁷⁴ See Linford, *supra* note 173, at 733.

²⁷⁵ See *id.* at 739.

a secondary meaning.²⁷⁶ The third question then asks if that mark has developed a secular secondary meaning that lessens the association with religion or lowers the “protection” of that symbol.

Finally, the fourth question asks if the symbol is being used in a religious context or not. If a symbol is highly religious (fanciful or arbitrarily associated with religion) with little or no secular secondary meaning, then it would be seen as religious in more contexts. If a symbol has become more generic or has developed a significant secular secondary meaning, then the symbol may be used in more contexts without violating the Establishment Clause.

To answer the questions, judges can look to statistical data, survey data, or anecdotal evidence for the first three.²⁷⁷ For example, in the Latin Cross case, Justice Ginsburg points out that less than four percent of the World War I memorials contain a Latin cross and points out that the overwhelming majority of these memorials contain no Latin cross, using statistics to refute the majority’s citation of seven examples where the Latin cross is included in a war memorial.²⁷⁸ The final question incorporates the context of the *Lemon* and endorsement tests and requires judicial analysis to determine the reasonable impact of the use of the symbol on non-adherents of the religion the symbol represents.²⁷⁹

Applying these questions to the prior cases related to religious symbols may or may not result in different outcomes but will result in a consistent analysis. In evaluating the displays of the crèche, or manger scene,²⁸⁰ the first two questions are easy to answer—the manger scene is a religious symbol that portrays the Christian story of the birth of Jesus Christ. Question three is likely also easy to answer—the manger scene does not have a generally secular meaning.²⁸¹ In no case before the Supreme Court was there any indication that the crèche had a secular meaning.²⁸² Even if one imparted a secondary meaning related to Christmas on the manger scene, the purpose of the manger scene with regard to Christmas is to portray the Christian origins of the holiday.²⁸³ The final question then becomes the key question in the case.

In the Rhode Island case, where the crèche was displayed with many secular symbols, the court held that the context related to the history of the holiday and did not send a religious message.²⁸⁴ The Pennsylvania crèche case also looked to context related to the menorah which was part of a larger display to hold it was not a violation of the Establishment Clause, but for the crèche that was standing alone in a courthouse, the

²⁷⁶ See Palladino, *supra* note 218, at 859.

²⁷⁷ See Diamond & Koppelman, *supra* note 264, at 744–53.

²⁷⁸ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2111 (Ginsburg, J., dissenting).

²⁷⁹ See *supra* notes 10–13, 23–24 and accompanying text.

²⁸⁰ See generally *Lynch v. Donnelly*, 465 U.S. 668 (1984).

²⁸¹ See *id.* at 695–97 (Brennan, J., dissenting).

²⁸² See *id.* at 695–98.

²⁸³ See *id.* at 695; Palladino, *supra* note 218, at 859.

²⁸⁴ See *supra* notes 43–44 and accompanying text.

context sent a message that the county endorsed Christianity.²⁸⁵ Rather than using language that might secularize the symbol, the Court could simply acknowledge that the presence of a religious symbol in this context does not send a message of non-inclusion to non-adherents of the religion.²⁸⁶

With regard to the Ten Commandments cases,²⁸⁷ again the first two questions are simple to answer. The Ten Commandments, as articulated on the statues or plaques, would be the symbol and are clearly religious in nature, given their origin in the Bible (or Torah).²⁸⁸ The question of whether there is a secular meaning for the Ten Commandments also is fairly clear. The Ten Commandments do not have a generally accepted secular purpose or meaning. They are inherently and completely religious. The question then becomes the context. Does the use of the Ten Commandments as part of a display that is clearly labeled as a display on the sources of law and includes other religious texts, as well as secular government documents (such as the Constitution, Magna Carta, etc.), send a message that the government is endorsing religion?²⁸⁹ That is a question the Court must answer. But instead of secularizing the symbol, the Court should embrace the religious symbol and assess whether the message being sent is one of endorsement.

The same analysis occurs with the Latin cross. In the most recent case, the Justices disagreed on the definition of the symbol being used, with Justice Alito looking at a broad definition of “cross” and Justice Ginsburg focusing on the particular “Latin cross.”²⁹⁰ Under our proposed first question regarding the particular symbol being used, Justice Alito should focus his discussion on the cross to the Latin cross instead of the Greek cross as represented by the Red Cross, Blue Cross Blue Shield, and other businesses. In answering question two, all of the Justices agreed that the Latin cross is a religious symbol.²⁹¹ Even Justice Alito acknowledged that the Latin cross was primarily a religious symbol.²⁹²

The Justices likely would disagree on whether there is a current, generally understood secular meaning. The argument could go something like this: The Latin cross is a religious symbol, but it also has a relationship to World War I. That relationship was relevant in the early 1900s but may not be as relevant now. Do people today affiliate the Latin cross with the war? The answer to the question would rely in part on some sort of social research. Data would be needed. At a minimum, Justice Alito and Justice Ginsburg would require more statistics and more numbers on which to base a

²⁸⁵ See *supra* notes 47–51 and accompanying text.

²⁸⁶ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 613–14 (1989) (“The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.”).

²⁸⁷ See *supra* notes 56–78 and accompanying text.

²⁸⁸ See *supra* notes 56–78 and accompanying text.

²⁸⁹ See *supra* notes 56–78 and accompanying text.

²⁹⁰ See *supra* Section I.B.3.

²⁹¹ See *supra* Section I.B.3.

²⁹² See *supra* Section I.B.3.

decision.²⁹³ In the Latin cross case, Justice Ginsburg's numbers are quite clear: she notes that of the forty World War I displays in the United States that include a Latin cross only constitute four percent of the World War I monuments in the nation.²⁹⁴

The fourth question is again key. If the data shows that the Latin cross is heavily associated with World War I, the Justices can use information in the weight of the analysis, but the basic question still is whether its use sends a message to non-Christians (in this case) that they are outsiders to the political system, or does the context of the Latin cross reduce or eliminate that message?

To be fair to Justice Alito, in his Latin Cross opinion, he also stated:

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.²⁹⁵

The proposed test does not eliminate the ability of the Court to make reasoned judgments, nor does it eliminate the possibility for disagreement. It does, however, give guidance to the Court on how to approach a religious symbol case. It takes current Establishment Clause jurisprudence, especially the endorsement modification of the *Lemon* test,²⁹⁶ and applies some trademark principles to help the Court assess the message that the symbol sends to the public.

CONCLUSION

The U.S. Supreme Court's Establishment Clause jurisprudence, particularly with regard to religious symbols, is a complicated body of multiple tests and pronouncements.²⁹⁷ When determining whether a governmental use of a purported religious symbol violates the Establishment Clause, the Court can use some basic trademark principles to help articulate its positions and results.²⁹⁸ The articulated approach proposed in this Article incorporates those principles to assist a court in systematically evaluating a symbol to determine if it is a religious symbol, if it has any prominent secular affiliations or meanings, and whether the context of the use violates the Establishment Clause. This proposal is not a magic formula that will ensure total predictability in Establishment Clause cases but it should assist the Court in assessing the key underlying issues in an establishment question regarding the effect of the government's interaction with religion and whether it "establishes" religion.

²⁹³ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079 (2019); *id.* at 2102–04 (Ginsburg, J., dissenting).

²⁹⁴ *Id.* at 2111 (Ginsburg, J., dissenting).

²⁹⁵ *Id.* at 2074 (majority opinion).

²⁹⁶ *See supra* notes 10–13 and accompanying text.

²⁹⁷ *See supra* Section I.B.

²⁹⁸ *See supra* Section III.A.