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TRUST IN GOD GOING TOO FAR: INDIANA'S "IN GOD WE TRUST" LICENSE PLATE ENDORSES RELIGION AT TAXPAYER EXPENSE

I. INTRODUCTION

On a September morning in 1814, as the smoke settled from a battle the night before, the sun rose in the eastern sky, and the morning dew began to dissipate, Frances Scott Key, inspired by a flag that remained flying through the night, wrote what would become the United States National Anthem.¹ The fourth stanza, in particular, is often claimed to herald for the first time what would develop into the phrase "In God We Trust."² It states in part,

Blest with vict'ry & peace may the heav'n-rescued land
Praise the Power that hath made & preserv'd us a nation!
Then conquer we must, when our cause it is just.
And this be our motto – "In God is our Trust[.]"³

"In God We Trust" did not resurface on the national scene until 1864 when it appeared on United States currency.⁴ After World War II and

¹ The Star Spangled Banner, http://americanhistory.si.edu/ssb/6_thestory/6b_osay/fs6b.html (last visited Sept. 23, 2007) (citing Stanza four of the poem written by Francis Scott Key after he witnessed an 1814 battle at Fort McHenry and saw the American flag flying the next morning amidst all of the smoke from the battle). See OSCAR GEORGE THEODORE SONNECK, REPORT ON "STAR-SPANGLED BANNER" "HAIL COLUMBIA" "AMERICA" "YANKEE DOODLE" 7-42 (Dover Publ'n, Inc. 1972) (providing an interesting insight on the Star Spangled Banner).

² Encyclopedia Smithsonian: Star-Spangled Banner and the War of 1812, http://www.si.edu/Encyclopedia_SI/nmah/starflag.htm (last visited Sept. 23, 2007). The Star Spangled Banner was not officially adopted as the national anthem of the United States until 1931 when President Herbert Hoover signed it into law. *Id.*

³ SONNECK, *supra* note 1, at 37.

⁴ ACLU of Ohio v. Capitol Square Rev. & Advisory Bd., 243 F.3d 289, 311 (6th Cir. 2001) (noting that one reason "In God We Trust" was placed on the national currency was the religious fervor during the Civil War). See generally Willard B. Gatewood, *Theodore Roosevelt and the Coinage Controversy*, 18 AM. Q. 35, 45 (1966), available at <http://www.jstor.org/stable/2711109> (discussing the history of Theodore Roosevelt's crusade to redesign the currency because he felt it was sacrilegious to place a Deity on a coin, and also discussing the great backlash President Roosevelt received as a result of maintaining his position that the phrase "In God We Trust" should be removed from the national currency). See also U.S. Treasury – Fact Sheet on the History of "In God We Trust," <http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> (last visited Sept. 23, 2007). The idea of placing "In God We Trust" on the currency first passed into legislation by an Act of Congress on April 22, 1864, authorizing the phrase to appear on the two-cent coin. *Id.* The Secretary of the Treasury received numerous letters from

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the increased threats of Communism and its non-religious practices, Congress adopted "In God We Trust" as the national motto.⁵ References to God in the public sphere have become increasingly common; for example, Indiana's General Assembly designed Indiana license plates

religiously devout peoples urging the United States to recognize God on United States coinage. *Id.* The United States Treasury website posted an excerpt from one of the letters written by a minister from Pennsylvania which stated in part,

Dear Sir: You are about to submit your annual report to the Congress respecting the affairs of the national finances.

One fact touching our currency has hitherto been seriously overlooked. I mean the recognition of the Almighty God in some form on our coins.

You are probably a Christian. What if our Republic were not shattered beyond reconstruction? Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation? What I propose is that instead of the goddess of liberty we shall have next inside the 13 stars a ring inscribed with the words PERPETUAL UNION; within the ring the allseeing eye, crowned with a halo; beneath this eye the American flag, bearing in its field stars equal to the number of the States united; in the folds of the bars the words GOD, LIBERTY, LAW.

This would make a beautiful coin, to which no possible citizen could object. This would relieve us from the ignominy of heathenism. This would place us openly under the Divine protection we have personally claimed. From my hearth I have felt our national shame in disowning God as not the least of our present national disasters.

To you first I address a subject that must be agitated.

Id. Since the phrase "In God We Trust" was first placed on the two-cent coin in 1864, Congress eventually placed it on the rest of the nation's coinage and other forms of paper currency over the years. *Id.*

⁵ See generally Proclamation No. 8038, 71 Fed. Reg. 43,343 (Aug. 1, 2006). See also The White House Website: 50th Anniversary of Our National Motto, "In God We Trust," 2006, <http://www.whitehouse.gov/news/releases/2006/07/20060727-12.html> (last visited Sept. 23, 2007) (referencing President Bush's Proclamation celebrating the 50th anniversary of "In God We Trust" as the national motto that was originally signed into law by President Dwight D. Eisenhower in 1956). See, e.g., *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 210 F.3d 703, 721 (6th Cir. 2000), *rev'd en banc*, 243 F.3d 289 (6th Cir. 2001). Courts that have addressed the issue surrounding the constitutionality of the motto have upheld it claiming that "In God We Trust" has little or nothing to do with government endorsement of religion. *Id.* at 721. Other such public references to God appeared on the national scene during the 1940s and 1950s amidst the height of the Cold War. *Id.* at 722 (describing the official adoption of the Pledge of Allegiance in 1942 and the words "one nation under God" being inserted in 1954). The Sixth Circuit Court of Appeals noted that there were strong religious reasons for inserting the references to God in the Pledge of Allegiance and adopting "In God We Trust" as the national motto, and that these decisions were heavily influenced by the threat from abroad and the strong conflicting views on human morality that the United States and the Soviet Union held. *Id.* See also *ACLU of Ohio*, 243 F.3d at 301 (pointing out that the phrase "In God We Trust" has also been displayed on government buildings and even above the chair where the Speaker of the House of Representatives sits while Congress is in session).

bearing the phrase "In God We Trust[,]" and these plates are available to Indiana citizens for the same cost as regular license plates.⁶

Specialty license plates are nothing new on America's roadways.⁷ In fact, specialty license plate programs are a great source of revenue for the sponsoring organization, while they cost the state and its taxpayers little or nothing at all.⁸ Whereas many specialty license plates simply promote local sports teams or universities, other plates have proved to be more controversial.⁹ One instructive example is the "Choose Life" license plate sponsored by various pro-life groups.¹⁰ Indiana's "In God We

⁶ IND. CODE § 9-18-24.5-1-5 (2006) (covering the availability of the "In God We Trust" license plate, its design, and the applicable fee); see also H.R. 1013, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006). See Editorial, *'In God We Trust' is Costly Specialty Plate*, MERRILLVILLE POST-TRIBUNE, Apr. 1, 2007, at A12 (discussing that the fee for funding this license plate is borne by all citizens of Indiana whether they have the plate or not because the fee is drawn from the state highway fund). The article alleges that the state has spent \$3.89 per plate and over one million dollars total to produce the "In God We Trust" license plates. *Id.*; Editorial, *Furthermore*, FORT WAYNE J. GAZETTE, Apr. 11, 2007, at 12A (noting that one in four drivers has the "In God We Trust" plate and that money from the state's Motor Vehicles Highway Account has covered the cost of these plates totaling more than 1.5 million dollars thus far at \$3.69 per plate).

⁷ Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit*, 68 ALA. LAWYER 212 (2007). Although the days of clever alphanumeric combinations to display a message by motorists are not over, states since about the 1980s have taken messages on license plates even further by offering specialty plate programs. *Id.* See Michael W. Hoskins, *Fees Drive License Plate Legal Challenge*, 18-5 IND. LAWYER 1, 25 (2007). Specialty plates allow motorists to express their love for their local university, the environment, or any other number of interests on a license plate that is usually distinctive in look with a special design different from the traditional state plate. *Id.* See also Olree, *supra*, at 213 (Some states have twenty to thirty different specialized plates from which to choose, while other states have as many as 500 choices); Traci Daffer, Note, *A License to Choose or a Plateful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 869-70 (2007) (explaining that as of June 2006 there were over 84,371 different specialty license plates available for motorists across the country, and in June 2003, forty-one states had specialty plate programs available).

⁸ Daffer, *supra* note 7, at 870 n.8 (demonstrating that as of early 2007, specialty plate programs raised 41.2 million dollars for space-related programs in Florida). See also *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (holding that the "Choose Life" message on license plates constituted government speech, and the license plates were constitutional because Tennessee controlled the message and approved the words used on the plate). *But see* *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (holding that "Choose Life" specialty plates were a mix of both government and private speech and were thus unconstitutional on the basis of viewpoint discrimination).

⁹ See *infra* notes 10-11.

¹⁰ See generally Daffer, *supra* note 7 (exploring the controversy regarding the "Choose Life" plate debate and the various litigation that has arisen). Daffer discussed the existing case law surrounding this issue and the circuit split as to whether the "Choose Life" plate should be classified as government or private speech. *Id.* See also Sarah E. Hurst, *A One Way Street to Unconstitutionality: The 'Choose Life' Specialty License Plate*, 64 OHIO ST. L.J. 957

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Trust" license plate, which prominently displays the motto "In God We Trust[,]'" has also spawned much debate among supporters and critics.¹¹ For example, the Indiana American Civil Liberties Union challenged this license plate as violating the Indiana Constitution's privileges and immunities clause, but importantly for this Note, did not allege a First Amendment violation.¹² This lawsuit has since been dismissed on summary judgment in favor of the state.¹³ Yet, Indiana is not alone in

(2003) (discussing that the "Choose Life" plates in various states should be held unconstitutional, in part for violating the Establishment Clause).

¹¹ See P.J. Huffstutter, *A Fight to Put the Brakes on a License Plate Law*, L.A. TIMES, Apr. 29, 2007, at 14 (discussing the controversy surrounding Indiana's "In God We Trust" license plates and the pending litigation by the Indiana ACLU).

¹² Hoskins, *supra* note 7, at 1 (explaining that the basis for the litigation is not about religion but about fairness). The lawsuit was initiated on behalf of an Allen County resident and filed in Marion Superior Court on Apr. 23, 2007. *Id.* This resident purchased an environmental plate, which carries a fee of forty dollars, part of which is an administrative fee to produce the plate and the rest of which is designated to the respective organization in support of its cause. *Id.* The resident contended that the "In God We Trust" plate carried a message and in fact was promoted by the Indiana Bureau of Motor Vehicles ("BMV") as a "no fee" specialty plate, but unlike other specialty license plates that promote a cause or message, the "In God We Trust" plate did not require an administrative fee to cover the cost of production. *Id.*; see also Ken Kusmer, *BMV Faces Lawsuit Over 'In God We Trust' Plates*, EVANSVILLE COURIER & PRESS, Apr. 24, 2007, at B6 (explaining the basis for the lawsuit filed by the Indiana Civil Liberties Union). See Indiana Bureau of Motor Vehicles: Indiana's License Plates, <http://www.in.gov/bmv/3999.htm> (last visited Sept. 22, 2007) (describing the plate as a "no-fee" specialty plate). *But see* Indiana Bureau of Motor Vehicles: Indiana's License Plates, <http://www.in.gov/bmv.platesandtitles/plates> (last visited Oct. 26, 2007) (describing the "In God We Trust" license plate as the "state's first alternative regular plate"). According to the Bureau's website, "This year, the Indiana Bureau of Motor Vehicles is offering 12 new license plates, including the state's new 'no-fee' specialty plate featuring an 'In God We Trust' design, and a new 'Support Our Troops' military plate." *Id.* Furthermore, the website mentions that those "who purchase special recognition license plates" shall pay certain fees listed, including group fees, administrative fees of which the "In God We Trust" plate is exempt, and registration charges. *Id.* The "Support Our Troops" plate appears not to require an administrative fee either, although it does require a twenty-dollar group fee that supports the "Military Family Relief Fund." *Id.* Thus, the classification of the "In God We Trust" plate as a specialty plate was not entirely clear because there were mixed statements regarding its status. See generally IND. CONST. art. I, § 23 (stating the Equal Privileges clause of the Indiana Constitution "shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens[]").

¹³ See Niki Kelly, *Judge Throws Out "In God" Tags Suit, Lack of Fee Challenged Appeal Likely*, FORT WAYNE J. GAZETTE, Aug. 18, 2008, at 1C (noting that a Marion County Judge granted summary judgment in favor of the State of Indiana in the litigation brought by the ACLU challenging Indiana's new "In God We Trust" plates). Ken Falk, attorney for the ACLU, said that "[w]e weren't challenging the message of 'In God We Trust,' just that any other message plate has a cost to it[.] . . ." *Id.* Furthermore, the trial court agreed with the state in finding that the plate is a regular plate, and not a specialty plate. *Id.* See also *Court Sides with BMV on 'God,' License Plate Fees Ruled this Decision Should Be Left to General Assembly*, EVANSVILLE COURIER & PRESS, Apr. 18, 2008, at B7 (quoting Judge Gary L. Miller, who

referencing God on its license plates. Nearly a dozen other state license plates display "In God We Trust" or "God Bless America[,]" but unlike Indiana's plates, most of them have been issued as specialty plates, which means that a driver who wants one must pay an additional fee for it.¹⁴

decided the case, "Courts are not to second-guess the Indiana General Assembly when it comes to calculations of this sort[.] . . .").

¹⁴ The following states charge a fee for the plate and clearly label it as a specialty plate on their motor vehicles website: Arkansas, Iowa, Louisiana, Missouri, Mississippi, North Carolina, Ohio, Tennessee, and Texas. See Arkansas (specialty license plate bears the phrase "In God We Trust"), available at http://www.arkansas.gov/dfa/motor_vehicle/mv_plates_detail.php?pl_id=87; Iowa (specialty license plate bearing the phrase "God Bless America"), available at <http://www.dot.state.ia.us/mvd/ovs/plates/bless.htm>; Louisiana (specialty license plate bears the phrase "In God We Trust"), available at http://omv.dps.state.la.us/Special%20Plates/SpecialPlates_display.asp (Select "In God We Trust" plate); Missouri (specialty license plate displaying the phrase "God Bless America with a depiction of the Statute of Liberty"), available at <http://dor.mo.gov/mvdl/motorv/plates/> (under "choose a design category and organization," click on the drop down box and select "organizational," then choose "God Bless America" and enter any text into box below and hit "submit"); Mississippi (specialty license plate bearing the phrase "God Bless America"), available at http://www.mstc.state.ms.us/mv1/tag_img/Godbles.jpg; North Carolina (specialty license plate containing the phrase "In God We Trust" with a "Support our Troops" ribbon displayed on the plate as well), available at <https://edmv-sp.dot.state.nc.us/sp/SpecialPlatesPortal.html> (click on "special plate viewers," select "special interest plate," and select "In God We Trust"); Ohio (specialty license plate bearing the phrase "One Nation Under God"), available at <https://www.oplates.com/NameLookup/PlateLookupWizard1.asp?ID=LCBUWDAFIEMTDTZKQHZBEUSBDYRFXMJWT DNJMQBWGUHRSPNOLK> (select "Passenger Car," click "submit," then select "One Nation Under God" and click "View this plate"); Tennessee (specialty license plate exhibiting the phrase "In God We Trust" with an image of a Bald Eagle on the plate as well), available at <http://www.tennessee.gov/revenue/vehicle/licenseplates/misc/miscdesc.htm#eagle>; Texas (specialty license plate displaying the phrase "God Bless America" along with a picture of a Bald Eagle), available at <http://rts.texasonline.state.tx.us/NASApp/txdotrts/SpecialPlateOrderServlet?grpId=60&pltid=84?nbr=121&type=OT>. Alabama and South Carolina offer specialty plates that display the phrase "God Bless America" or "In God We Trust" as well, but these states, like Indiana, do not charge a fee. See Alabama (specialty license plate bearing the phrase "God Bless America"), available at <http://www.revenue.alabama.gov/motorvehicle/specialty.html>, and South Carolina (specialty license plate displaying the phrase "In God We Trust"), available at <http://www.scdmvonline.com/DMVNew/PlateGallery.aspx?q=Specialty>. See also Jessica Gresko, *Florida Debates License Plates, State Would Be First in Nation to Offer Specialty Plates for Christians*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 24, 2008, at 3A (discussing the Florida Legislature's consideration of creating an "I Believe" specialty plate to promote Christian beliefs). The design would contain a Christian Cross, stained glass window, and the words "I Believe." *Id.* If created, Florida's plates would require a fee in addition to the regular administrative fee because of its status as a specialty plate. *Id.* Indiana's "In God We Trust" plate does not require an extra fee costing the same as the standard issue plate. *Id.* At this point the author of this Note is not aware of any litigation regarding the constitutionality of the "I Believe" plate or the Florida legislature's ability to create such a license plate.

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Irrespective of those dozen or so states, this Note contends that Indiana's "In God We Trust" license plate raises serious Establishment Clause and speech subsidy concerns because of the improper religious motivation behind the creation of the license plate and the State's failure to charge a fee for those who want to display the "In God We Trust" message.¹⁵ This Note explores the tangled web of Establishment Clause jurisprudence and its convergence with the expanding breadth of government speech relating to compelled subsidies. In doing so, this Note exposes the constitutional problems posed by Indiana's "In God We Trust" license plate. To this end, Part II explores the history and development of the United States Supreme Court's Establishment Clause decisions, along with the free speech and freedom of association problems that arise when the government compels citizens to pay for a message promulgated by the government.¹⁶ Part III applies current Establishment Clause and compelled subsidy tests to Indiana's license plates, demonstrating the deficiencies in the current doctrines to adequately address the "In God We Trust" message on the license plates.¹⁷ Part IV suggests that the "In God We Trust" license plate should be found unconstitutional because the Indiana General Assembly attempted to mask its religious purpose and is now compelling its citizens to subsidize a private message.¹⁸

Accordingly, this Note proposes that courts should use Justice Breyer's six interpretative tools—text, history, tradition, precedent,

¹⁵ Hoskins, *supra* note 7, at 1. See generally *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring). Capturing the reflective nature of the more current American "melting pot" society that was not present upon our nation's founding, Justice Brennan noted:

[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.

Id.

¹⁶ See *infra* Part II (discussing the various tests used by courts when reviewing the constitutionality of governmental displays containing religious symbols and the analysis adopted by courts when determining whether a governmentally compelled subsidy is occurring).

¹⁷ See *infra* Part III (suggesting that Indiana's "In God We Trust" license plate violates the Establishment Clause because the legislator who created the plate had an improper purpose, essentially endorsing religion, and also because by not charging a fee to cover the cost of production of the license plate, Indiana compels its citizens who disagree with the religious message to pay for the plate so that other citizens can display the message).

¹⁸ See *infra* Part IV. See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1224–25 (3d ed. 2006) (noting that the departure of Justice O'Connor from the composition of the Court would likely affect future Establishment Clause determinations).

purpose, and consequences – when analyzing the Indiana's "In God We Trust" license plate and other Establishment Clause cases.¹⁹ Additionally, courts, especially when dealing with license plates, should adopt the following four-factor test when analyzing a compelled subsidy speech issue: (1) determine the purpose behind the license plate; (2) determine who maintains editorial control of the message on the plate; (3) determine who is identified as the actual speaker of this message – government or private actor; and (4) determine who is held accountable for the speech.²⁰ Moreover, this Note advises future legislators, who are considering similar license plates, to demonstrate a clear secular purpose and to classify the plates as specialty license plates that require individual owners to pay an additional fee.²¹

II. BACKGROUND

Part II presents a brief history of Establishment Clause jurisprudence and surveys the legal backdrop of compelled subsidies doctrine relating to government speech.²² Part II.A focuses on the tests used to determine when religious displays by the government are constitutional under the Establishment Clause, as well as the possible underlying coercive and psychological effects of government messages.²³ Part II.B discusses the two main approaches to the compelled speech doctrine and conflicting appellate court tests used to determine who is speaking.²⁴

A. *Establishment Clause Jurisprudence*

A key concern surrounding the "In God We Trust" license plate is the possible violation of the Establishment Clause.²⁵ Although the

¹⁹ See *infra* Part IV; see also Dahila Lithwick, *Scalia and Breyer Sell Very Different Constitutional Worldviews*, SLATE, Dec. 6, 2006, <http://www.slate.com/id/2154993/> (last visited Nov. 20, 2008).

²⁰ See *infra* notes 126–32 (adopting the Fourth Circuit Court of Appeals four-part test as used in *Planned Parenthood of South Carolina, Inc v. Rose*).

²¹ See *infra* Part V.

²² See *infra* Parts II.A–B.

²³ See *infra* Part II.A.

²⁴ See *infra* Part II.B.

²⁵ See *ACLU of Ohio v. Capitol Square Rev. and Advisory Bd.*, 210 F.3d 703, 712 (6th Cir. 2000), *rev'd en banc*, 243 F.3d 289 (6th Cir. 2001) (noting the very fine factual distinctions often drawn in Establishment Clause cases). See also CHEMERINSKY, *supra* note 18, at 1182 (discussing the effects of the incorporation of the Establishment Clause, which was first recognized by the Supreme Court in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)). However, according to Justice Thomas, the Establishment Clause should not be applied to the states because it was written only to prevent the national government from establishing a religion. *Id.* Adoption of Justice Thomas's view would drastically reshape the confines of

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Founding Fathers likely expressed religious sentiments, they vehemently expressed competing views about the meaning of the Establishment Clause.²⁶ To this day, religion has continued to play an integral role in

the power delegated to states and local municipalities and essentially provide free reign to those entities to advance or inhibit religion in whatever context they saw fit. *Id.*

²⁶ *Lee v. Weisman*, 505 U.S. 577, 632–36 (1992) (Scalia, J., dissenting) (discussing the history and traditions of religion in this country, particularly the use of prayer in the public sector). Other examples demonstrating an entanglement between the state and religion include references to a higher being within the Declaration of Independence, the common use of Bibles for swearing in public officials, and references by Presidents to God in their inaugural addresses. *Id.* at 633–34; *see also* *Van Orden v. Perry*, 545 U.S. 677, 686–90 (2005) (offering more visually apparent references to the tradition of using religious symbols in American society). *See* NOAH FELDMAN, *DIVIDED BY GOD* 247 (Farrar, Straus & Giroux 2005) (“Madison himself understood that paying the chaplains of the House and Senate out of public funds was a constitutional anomaly, and he wisely suggested that the Congress ought to pay for their services from their own pockets.”); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977) (quoting Madison and Jefferson regarding the dangers of government forcing a person to monetarily contribute to support any establishment, and noting that Jefferson stated that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical[.]”). *But see* *Marsh v. Chambers*, 463 U.S. 783, 788 (1983) (“Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”). *See also* DARIEN A. MCWHIRTER, *THE SEPARATION OF CHURCH AND STATE* 4 (The Oryx Press 1994) (citation omitted). Despite the entanglement of religion with the nation’s early history, many of the founders strongly advocated a separation between the state and religion. *Id.* In summation, one of the more famous statements capturing the essence of separation of church and state was made by Thomas Jefferson,

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between church and State.

Id. *See generally* Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O’Connor and the Establishment Clause*, 39 *ARIZ. ST. L.J.* 895 (2007), for an interesting discussion of the development of the religion clauses and the influence that religion has played in the nation’s founding. The Merritt article documents the colonial period and the established religions that were held in some of the colonies. *Id.* at 898–904. The article provides statistical analysis concerning how Americans felt toward religions in general and the passions and violence that such feelings created. *Id.* at 918–29. In fact, one study detailed the power of the Evangelical Christian voting bloc in the 2000 presidential election that proposed a theory of “religious threat” as one motivational tool for the group to turn out in high numbers to vote. *Id.* at 929–30. *See generally* MICHAEL W. MCCONNELL, JOHN H. GARVEY, AND THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 1–100 (Aspen Law & Business 2002) (discussing the history of the Establishment Clause and the religious tension that has existed in the country even prior to its founding); CHEMERINSKY, *supra* note 18, at 1184–85 (discussing that the Founding Fathers held three main points of views, which

the nation's development.²⁷ Over time, three views have emerged for interpreting the Establishment Clause—strict separation, neutrality, and accommodation.²⁸ The current religious and political climate in the

have shaped both the courts' and society's current understanding of the Establishment Clause and its meaning). Chemerinsky cited to Professor Laurence Tribe who noted that there was the "evangelical view[...]" associated with Roger Williams, which sought to protect religion from the worldly corruptions of the state. CHEMERINSKY, *supra* note 18, at 1184. There was also the view held by Jefferson who wanted to insulate the government and secular institutions from the ecclesiastical incursions (building a wall of separation), and the view of Madison, which sought to decentralize the power between the state and religion to promote the healthy competition of ideas, both secular and religious, so that no one sect was favored over another. *Id.*

²⁷ School Dist. Abington Twp. v. Schempp, 374 U.S. 203, 237–38 (1963). Justice Brennan highlighted the dangers of using history as a guiding principle when seeking the true meaning of the Establishment Clause:

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons[...][T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed. While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church[...], they gave no distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Id. (footnote omitted). See, e.g., FELDMAN, *supra* note 26, at 199–200 (noting that since the *Marsh v. Chambers* decision, there has been a rising of values-based evangelicalism, beginning with the Christian Conservative movement in 1984 to ensure control over the changing Supreme Court). See generally CNN website, New Huckabee ad appeals to Christian conservatives, <http://www.cnn.com/2008/POLITICS/01/01/huckabee.christians/index.html> (last visited Jan. 2, 2008) (reflecting this trend in the 2008 Presidential Primary campaigns, which included discussions about faith and values, the Christian Coalition voting bloc, and accusations of political advertisements containing "Christian" messages and symbolism); MSNBC website, Huckabee stands by 'Christ' comment, <http://www.msnbc.msn.com/id/22443302/> (last visited Feb. 6, 2009) (same); MSNBC website, Romney: No religious test for president, <http://www.msnbc.msn.com/id/22129738/> (last visited Jan. 2, 2007) (stressing his religious beliefs and his support for religion in the public sphere in an attempt to quell some voters anxieties concerning his Mormon faith).

²⁸ See CHEMERINSKY, *supra* note 18, at 1192–98 (discussing more broadly the three approaches used by the Court in approaching Establishment Clause jurisprudence). Strict interpretation is often most aligned with Jefferson's wall of separation, and any violation of this principle imposes a coercive effect on the citizens to comply either explicitly or implicitly with the consequence of feeling like an outsider for noncompliance. *Id.* at 1192. Neutrality theory is best exemplified by the view of Justice O'Connor who articulated that the Court should look to the "reasonable observer" in determining the effects of the law. *Id.* at 1193–96. Although this approach is often criticized as ambiguous and difficult to apply, a majority of the Court, at least as it was comprised a few years ago, seems to have

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United States embodies these diverging views—a climate which many people believe has contributed to the polarization of the nation.²⁹ Indeed, recent litigation in Indiana clearly reflects this religious strife.³⁰

adopted this approach, which seeks to minimize the concern of making people potentially feel like outsiders. *Id.* at 1196. The other approach used by the Court is the accommodation theory, which is by far the most expansive literal approach to the Establishment Clause. *Id.* Essentially, under the accommodation theory, the government would violate the Establishment Clause only if it were to literally establish a house of worship. *Id.* This interpretation more closely resembles Justices Kennedy's and Scalia's coercion theory, mandating equal treatment of both religious and non-religious groups. *Id.* at 1196–97.

²⁹ STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 1 (Univ. of Ala. Press 2002) (highlighting the new political agenda by the Christian right to “reclaim America”). A convention that was held in Fort Lauderdale in 1996 offered a series of workshops to help train concerned Christians on how to put their faith into action in the public arena. *Id.* At the conclusion of the conference, the following sentiments were offered:

For more than thirty years, America has undergone a sustained and wide-ranging attack on the godly foundation which made our nation a well-ordered bastion of liberty, peace, and prosperity. That attack is finally meeting resistance. More and more Christians are awakening to their duty to defend faith and freedom in an increasingly hostile, secular society. Now more than ever, they have discovered the need to reclaim America.

Id.; see also Debra Lemoine, *Judge Gets Arguments on School Board Meeting Prayers*, BATON ROUGE ADVOCATE, Sept. 10, 2004, at 1 (explaining how a local group of conservative Christians were able to organize and form a Community Network that was able to successfully get a minister appointed to the local school board to help advance the group's agendas). See, e.g., Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 515–16 (2006) (noting that the Rehnquist Court signaled a change in how the religion clauses should be interpreted, and this change continued throughout President George W. Bush's presidency). The authors elaborated,

There has been a distinct and genuine move from the Warren and early Burger Court's general hostility to government support of religion to a new theory of “neutrality” The Court now places relatively few barriers in the way of state or federal funds going to religious schools or other religious organizations so long as the purpose is not a naked preference for religious versus secular organizations. Some advocates believed—some with horror, some with joy—that this portended a full 180 degree turn, in which the Supreme Court would define “neutrality” as requiring support for religious education so long as nonreligious education received support. . . .

[I]t is impossible to estimate the shelf life of the Court's twin—and many would say incoherent—decisions in *McCreary County v. ACLU* and *Van Orden v. Perry* regarding government-supported displays of religion in the public square. In these two cases, the Court struck down a publicly supported display of the Ten Commandments in Kentucky, but upheld one in Texas. Justice Kennedy was in dissent in *McCreary County*, and in the plurality in *Van Orden*. Given that he is the new swing Justice, this means that *Van Orden*, which gave local

Recently in *Hinrichs v. Bosma*,³¹ four Indiana taxpayers alleged that prayers used to open legislative sessions in the Indiana General Assembly were sectarian in nature and highly favorable of the Christian faith.³² The Seventh Circuit Court of Appeals upheld the preliminary

governments far greater leeway to place religious iconography in public places, probably represents the wave of the future. One can nevertheless imagine a wide range of different possible directions for Establishment Clause and Free Exercise doctrine, depending on remaining opportunities for President Bush to make appointments before his term expires in January 2009, the results of the 2006 elections (which might shift control of the Senate or weaken the Republican majority there), and, perhaps most importantly, the winner of the 2008 presidential election. It is worth noting, however, that a Democratic appointment replacing Justice Stevens in 2009 would likely preserve the current status quo that features Kennedy as the swing Justice, while replacing Stevens with a strong conservative would have a much more significant impact on the jurisprudence of the religion clauses[]

....
Id. (footnotes omitted). See generally Faith-Based and Community Initiatives, <http://www.whitehouse.gov/government/fbci/> (last visited Sept. 29, 2007) (displaying information regarding the Office of Faith Based Initiatives, an office President Bush created, and claiming that the office's mission is "Compassion in Action"); Posting Jay Sekulow, In God We Trust - Protecting Our National Motto, American Center for Law & Justice (Apr. 2006), <http://www.aclj.org/News/Read.aspx?ID=2201> (last visited Feb. 7, 2009) (describing the importance of the national motto and the commitment by the American Center for Law & Justice to defend the religious heritage of the United States of America). But see Posting Erwin Chemerinsky, *Time to Fight the Religious Right* to THE HUFFINGTON POST http://www.huffingtonpost.com/erwin-chemerinsky/time-to-fight-the-religio_b_8048.html?view=screen (Sept. 28, 2005, 21:48 EST) (discussing that the greatest threat to the nation's freedom comes from the religious right and that efforts should be put in place to counter their influence). See generally Mark Stricherz, *Primary Colors: How a Little-Known Task Force Helped Create Red State / Blue State America*, BOSTON GLOBE, Nov. 23, 2003, available at http://www.boston.com/news/globe/ideas/articles/2003/11/23/primary_colors/ (last visited Nov. 6, 2007) (pointing out the sharp political divisions in the country by concluding that in the sixteen years of the study, there has never been a wider gap between red and blue states).

³⁰ Eddie Baeb, *Indiana's Christians to Fight Ruling*, BUFFALO NEWS (New York), Dec. 15, 2005, at A9 (referencing a study from Indiana University that claimed roughly 82% of Hoosiers identified themselves as Christian while less than one percent identified as Jewish or Muslim). See generally *'In God We Trust' is Costly Specialty Plate*, *supra* note 6, at A12 (acknowledging that Indiana is a conservative state, and noting that its choice to offer its citizens a license plate that references God is not surprising).

³¹ 440 F.3d 393, 403 (7th Cir. 2006), *rev'd*, *Hinrichs v. Speaker of the House of Rep. of Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007). See Anne Abrell, Note, *Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception*, 42 VAL. U. L. REV. 145 (2007), for an in-depth analysis of the *Hinrichs* case and legislative prayer.

³² *Hinrichs*, 440 F.3d at 395-97. *Hinrichs* contained many examples of legislative prayers consisting of direct references to Jesus Christ that were often sectarian and focused on the Christian faith. *Id.* at 395-96. In fact, one of the legislative sessions opened up with a song titled, "Just a Little Talk with Jesus." *Id.* at 395. See also Posting of Don Byrd to Blog from the Capital, http://www.bjconline.org/cgi-bin/2007/11/7th_circuits_bosma_reversal_sh.

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injunction ordered by the lower court to preclude these prayers, and held that the prayers likely violated the Establishment Clause.³³ After the court upheld the injunction, the Indiana General Assembly re-instituted legislative prayers, making sure that these prayers were non-sectarian in nature.³⁴ Representative Woody Burton, who authored the legislation for the “In God We Trust” license plates, responded to this re-institution of prayer in the Indiana General Assembly by saying that he was “tickled to death” that prayer was again permitted in the House

html (November 1, 2007 19:37) (discussing the effect of the *Hein* decision on taxpayer standing challenges and in view of Establishment Clause concerns). A Jewish lobbyist group traveled to Indianapolis to lobby state senators and representatives and had an exchange with Speaker Bosma regarding *Hinrichs*, which was in litigation at the time, and afterward, one lobbyist, Mr. Don Byrd, had the following comments:

Speaker Bosma wondered why we hadn’t discussed the controversy surrounding the issue of prayer in House chambers. He told us his version of what happened and what he believes, and a passionate exchange took place. The end of this exchange left us, the Jewish delegation, in shock. Speaker Bosma, defending the prayer issue, asked, “How many Jews are there in Indiana? About 2%? There are at least 80% Christians in Indiana.”

Id. Mr. Byrd, a Rabbi with the Jewish delegation, felt that Speaker Bosma’s statement provided insight into some of the sentiments that reside within the General Assembly and the perceived majority rule attitude. *Id.* Mr. Byrd worried that these sentiments are increasingly common as a result of the Court’s recent Establishment Clause and taxpayer standing jurisprudence. *Id.*

³³ *Hinrichs*, 440 F.3d at 402–03 (holding that a court-ordered stay, which would permit the sectarian prayers to continue, was not warranted because Speaker Bosma failed to meet his burden of showing that the opposing parties did not have standing and that the Establishment Clause was not violated). *But see* *Hinrichs v. Speaker of the House of Rep. of Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007) (holding that Indiana taxpayers did not have standing to challenge the alleged violation of the Establishment Clause concerning the General Assembly’s prayer session and its sectarian overtones). The Seventh Circuit reversed its earlier decision based on the Court’s recent decision in *Hein v. Religious Freedom Foundation*, 127 S. Ct. 2553 (2007). *Id.* at 590. Although the Seventh Circuit noted that, a pecuniary interest is not the only means of establishing standing. . . . In the context of an alleged Establishment Clause violation, we have stated that “allegations of direct and unwelcome exposure to a religious message” are sufficient to show the injury-in-fact necessary to support standing.

Id. at 590 n.5 (citation omitted). The *Hinrichs* court noted the factual importance of the plaintiffs dropping their alternative reason for standing, which was that Mr. Hinrichs was no longer personally affected by the sectarian prayers because he was no longer going to be engaged as a lobbyist at the statehouse. *Id.* Therefore, the only alleged basis for standing was the basis of taxpayer standing, which was denied in light of *Hein*. *Id.* The Court of Appeals for the Seventh Circuit gave a detailed analysis of the *Hein* decision and its effect on Establishment Clause challenges under taxpayer standing. *Id.* at 590–600. The court noted that past Supreme Court decisions held that the same standing requirements for federal taxpayers applied to state taxpayers as well. *Id.* at 592, 596 n.6.

³⁴ *Indiana House Opens with a Hope and a Prayer*, EVANSVILLE COURIER & PRESS, Jan. 9, 2007, at A1.

because it is a long tradition that should be continued.³⁵ Burton's legislative record also contains a history of supporting legislation that contains religious overtones, such as a ban on gay marriage.³⁶

Representative Burton has tried to downplay the religious message affiliated with the "In God We Trust" license plates, but some of his statements can be interpreted to reveal religious motives.³⁷ For example, on the one hand, Burton stated that he hoped that the new license plates "would be embraced by 'both patriots and those of faith.'"³⁸ On the

³⁵ See *id.* (referencing the litigation that was appealed to the Seventh Circuit regarding non-sectarian prayer conducted during Indiana's legislative session).

³⁶ See Steve Walsh, *'In God We Trust' Makes Statement*, MERRILLVILLE POST-TRIBUNE, Mar. 21, 2007, at A3. See *Burton: Private, Not State, Funds Gay Center*, FORT WAYNE NEWS SENTINEL, Oct. 7, 1994, at 8A. Representative Burton has also been outspoken in the Indiana legislature on some other topics that are controversial. *Id.* Burton opposed public funding for an office at Indiana University that would benefit gay and lesbian students, and he was one of the most vocal critics. *Id.* Instead, he urged the students and university to seek private funding, even though the student government, faculty leaders, and board of trustees had already expressed their approval for the public funds to be used for the office. *Id.* Burton posited what seems to be an apparent contradiction because the "In God We Trust" license plates that he helped create use public funding:

Failure to stop funding for the GLB [Gay, Lesbian, Bi-Sexual] office will encourage cultural centers for other minority groups, such as "fat people, skinny people, Nazis, pro-choice people and pro-life groups" . . . "[s]hould we spend \$50,000 for each of those special interest groups[]" . . . "[i]t is my opinion that this is where we draw the line."

Id. Burton planned to propose an amendment that would cut five-hundred thousand dollars from the university's budget if the university decided to fund the center. *Id.*

³⁷ See Niki Kelly, *BMV Unveils "God" Plate for '07*, FORT WAYNE J. GAZETTE, Aug. 11, 2006, at 8C (discussing the availability of the newly designed license plate offered in early 2007 to Indiana residents at no extra charge). "Seeing the 'In God We Trust' license plate come to life is a momentous occasion for everyone involved[.]" *Id.* (quoting Representative Woody Burton, a Republican lawmaker from Greenwood, Indiana). "It is my hope that thousands of Hoosiers will choose this plate and display it proudly." *Id.* (quoting Mr. Burton); Deanna Martin, *In God We Trust License Plate Clears Senate Committee*, AP ALERT, Feb. 8, 2006, available at WL APALERTPOLITICS 20:29:16 (quoting Representative Burton as having stated that the "In God We Trust" license plates concerned our nation's heritage and promoted "an important motto from American history[.]"); see also Associated Press, *Plates Put Trust in God*, MERRILLVILLE POST-TRIBUNE, Jan. 7, 2006, at A9 (quoting Representative Burton as stating, "What I want is exactly what it says on the dollar bill[.] . . . Nothing more[.]" (quotations omitted)). On the other hand, some statements by Representative Burton seem to relay his implicit promotion for religion, even if a monotheistic one. See *State Puts 'Trust' in New Plates*, EVANSVILLE COURIER, Jan. 21, 2007, at B1 (quoting Representative Burton, "I'm a faith-based person, anyways, [sic] and there had been so much attack on religion throughout this country[.]"). See generally *Plates Put Trust in God*, *supra*, at A9 (referencing that for the second consecutive year, Representative Burton advocated for legislation to support "In God We Trust" license plates). Burton has made it a point at times to mention that the license plates are not specifying any one god. *Id.*

³⁸ Huffstutter, *supra* note 11, at 14. See Woody Burton—He Listens. He Cares. He Takes Action., <http://www.woodyburton.com/> (last visited on Oct. 13, 2007) (providing a link to Representative Burton's legislative website containing various photographs depicting his

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other hand, some of his statements, such as, “I’m a Christian, but I don’t care if you’re Christian or Jewish or Muslim []. . . . Your god may not be my god, but this is still a country that’s based on faith. Why can’t you tout that on your license plate?”, reveal a faith-based motivation.³⁹ Burton’s reasons for introducing the “In God We Trust” license plates are relevant to the Establishment Clause discussion because his personal incentives shed light on the purpose of the license plates.⁴⁰ To illustrate the intricate nature of the Establishment Clause, Part II.A.1 discusses cases involving governmental displays of religious symbols.⁴¹

1. Making “Lemon”ade from Lemons: The *Lemon* Test and Its Application

In *Lemon v. Kurtzman*,⁴² the Supreme Court adopted a three-part test that is commonly used to examine displays of religious symbols challenged pursuant to the Establishment Clause.⁴³ To pass

involvement with the “In God We Trust” license plate; click on “Legislative History” in the drop down scroll). One of the photographs is Representative Burton presenting a license plate to his pastor. *Id.* See also Indiana House of Representatives Republican Caucus: State Representative Woody Burton, http://www.in.gov/legislative/house_republicans/homepages/r58/meet.html (last visited on Oct. 13, 2007) (containing information about Representative Burton on his legislative web page). See also Posting of Advance Indiana: In Burton Brothers Eric Trusts, <http://advanceindiana.blogspot.com/2005/05/in-burton-brothers-eric-trusts.html> (May 20, 2005, 16:58 EST). The author acknowledges that the neutrality of this website is not known, but merely uses it to present people’s sentiments on various legal topics in Indiana.

³⁹ Huffstutter, *supra* note 11, at 14 (quotations omitted).

⁴⁰ See generally *infra* Part II.A.1.

⁴¹ See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding a crèche display, which was located in a Christmas display, constitutional in part because of the several secularized displays surrounding it); *cf.* *Cty. of Allegheny v. ACLU Greater Pittsburgh Ch.*, 492 U.S. 573 (1989) (holding that a crèche display on the grand staircase of the county courthouse violated the Establishment Clause because it endorsed religion). In rendering its opinion, the Court emphasized the contextual placement of the display and its close relation with perceived endorsement of religion by the government. *Allegheny*, 492 U.S. at 598–602. The plurality noted that the term endorsement is closely related to the term promotions and that “any endorsement of religion [i]s ‘invalid[.]’” *Id.* at 593–95. The plurality rejected Justice Kennedy’s proselytization test, which required more accommodation by the government for religious purposes. *Id.* at 602. The Court in *Allegheny* also noted other areas where the Establishment Clause had been violated, such as state-sponsored prayer in public schools, displaying the Ten Commandments in public school classrooms, and conditioning the holding of public office by requiring the belief in an existence of God. *Id.* at 591 nn.40–41.

⁴² 403 U.S. 602 (1971).

⁴³ *Id.* at 612–13. See *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (noting that “[s]ince 1971, [it] has decided 31 Establishment Clause cases[.]” and all have employed the *Lemon* test, except *Marsh v. Chambers* 463 U.S. 783 (1983)). See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC

constitutional muster, a governmental display containing religious symbols must have a secular purpose; its principal or primary effect must be one that does not endorse or inhibit religion; and it must not foster "an excessive government entanglement with religion."⁴⁴ Justice O'Connor narrowed the focus of *Lemon's* purpose and effects prongs by adding the consideration of whether a reasonable observer would view the purpose or primary effect of the government's display of religious symbols as endorsing religion.⁴⁵ Although the Court normally defers to

MONEY 111-17 (Rowman & Littlefield 1996) (proposing that the government should adopt a position of neutrality, remove itself from certain policy-oriented messaging, and neither favor nor inhibit religion). Monsma posits an interesting view of this theory through the guise of higher education by claiming that if the government were to remove itself from the business of financially supporting higher education, then both the secular and religious institutions would be on a level playing field. *Id.* at 114. Monsma suggests that the distinction between sacred and secular is too easily blurred and difficult to apply consistently and that a neutral approach would avoid this distinction entirely. *Id.* at 116.

⁴⁴ *Lemon*, 403 U.S. at 612-13. For purposes of this Note, the two factors of the *Lemon* test most applicable are the purpose and endorsement prongs.

⁴⁵ *Lynch*, 465 U.S. at 687-94. See also *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 210 F.3d 703, 713-15 (6th Cir. 2000), *rev'd en banc*, 243 F.3d 289 (6th Cir. 2001) (referencing Justice O'Connor's concurring view that the main question to address when seeking the purpose for the law is whether a reasonable observer would find that the government was endorsing religion); *Lynch*, 465 U.S. at 690 (quoting Justice O'Connor who said, "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval[']"). (emphasis omitted). See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (determining that the main issue was "whether the government's actual purpose is to endorse or disapprove of religion[']"). However, sometimes Justice O'Connor's statements are presented as a separate test, best exemplified when she stated:

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Id. at 70 (O'Connor, J., concurring). See also *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 779-780 (1995) (discussing Justice O'Connor's articulation as to the "reasonable person[.]" likening it to the reasonable person often used in tort law). The general standard of endorsement relies on what a member of the overall community would find offensive, as opposed to what a highly sensitive person may find offensive. *Id.* See generally *CHEMERINSKY*, *supra* note 18, at 1202-06 (providing a general overview of the *Lemon* test in its current form and the uncertain future of the test especially with the ever evolving make-up of the Court).

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the state legislature's articulation of a secular purpose, such articulation must nonetheless "be sincere and not a sham."⁴⁶

To determine whether a governmental display of religious symbols violates the Establishment Clause, the Court looks to the content of the display (i.e., the components of the display, including any text exhibited therein), any legislative history concerning the display's creation, the historical development of the display, and the contextual placement of the display.⁴⁷ *Van Orden v. Perry*⁴⁸ and *McCreary County v. ACLU of Kentucky*,⁴⁹ decided on the same day, demonstrate how the Court evaluates whether the placement of religious symbols on government property violates the Establishment Clause.⁵⁰ Both cases involved the display of the Ten Commandments on government property.⁵¹ Yet, after

⁴⁶ *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (discussing that where deeper investigation reveals that the stated purpose is superfluous, merely inventing a secular purpose to circumvent an Establishment Clause violation will not suffice). The Court was presented with a Louisiana law that sought to prohibit the teaching of evolution in public schools unless it also taught creationism as an alternative theory to promote academic freedom. *Id.* at 581-82. The Court conducted a deeper investigation into the legislative history that led it to conclude that the Balanced Treatment Act was unconstitutional for lacking a secular purpose. *Id.* at 596-97. The Court highlighted the personal statements by the legislator who helped to enact the bill, such as, "evolution is contrary to his family's religious beliefs[.]" and "I view this whole battle as one between God and anti-God forces[.]" *Id.* at 593, n.14. See also *McCreary Cty., Ky., v. ACLU of Ky.*, 545 U.S. 844, 859-65 (2005) (discussing the continued importance of *Lemon's* purpose prong and its effect on the constitutionality of the overall act or display at issue).

⁴⁷ *Edwards*, 482 U.S. at 594-95 (discussing the process of ascertaining the purpose behind a law or a governmental display). Justice Powell's concurrence further elaborated on this concept, although he noted, "[a] religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate." *Id.* at 597-99 (Powell and O'Connor, JJ., concurring). Justice Powell acknowledged the historical significance of religion in this country and noted that the Bible, if used in a historical context, can be utilized in an educational setting. *Id.* at 605-06. He noted that the Bible is the "world's all-time best seller" and contains "literary and historic value apart from its religious content." *Id.* at 608. However, Justice Scalia suggested that the Court, when determining the purpose as required by *Lemon*, meant to determine the "actual" purpose behind the legislative action and whether the legislature "acted with a 'sincere' secular purpose," not simply what the out-of-context "legislative purpose" may be. *Id.* at 613-14 (Rehnquist, C.J. and Scalia, J., dissenting). Justice Scalia also noted that the Court, at least at the time of the *Edwards* decision, had only invalidated previous laws or displays containing religious references when it was wholly motivated by a religious purpose. *Id.* at 614.

⁴⁸ 545 U.S. 677 (2005) (plurality opinion).

⁴⁹ 545 U.S. 844 (2005).

⁵⁰ See *infra* notes 53-63 and accompanying text.

⁵¹ *Van Orden*, 545 U.S. at 681 (involving a challenge by a Texas resident to a monument displaying the Ten Commandments on the grounds of the Texas State Capitol as violating the Establishment Clause); cf. *McCreary*, 545 U.S. 844, 881 (involving displays of the Ten Commandments inside Kentucky courthouses and holding that the displays violated the Establishment Clause).

evaluating the placement and development of these monuments, the Court reached two different conclusions regarding whether the Ten Commandments displays violated the Establishment Clause: in *Van Orden*, the Court determined that the display did not violate the Establishment Clause, whereas in *McCreary*, the Court determined that the display did violate the Establishment Clause.⁵²

In *Van Orden*, Chief Justice Rehnquist wrote a four-justice plurality opinion that failed to apply all three prongs of the *Lemon* test and instead pointed to the long legislative history discussing religion's impact on the formation of the country as the underpinning of its analysis.⁵³ The Ten Commandments monument in question had been placed on the grounds of the Texas State Capitol alongside several other primarily secular monuments representing the state's diverse history.⁵⁴ The Court determined that it must distinguish whether the display of the Ten Commandments was merely passive or whether it actively confronted

⁵² *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (noting that, unlike *Van Orden*, *McCreary* was different because of the short and turbulent history surrounding the display, which revealed that the true purpose behind the display was to endorse religion). See Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768 (7th Cir. 2001) (noting that Indiana recently faced a legal challenge to a Ten Commandments monument). Indiana originally had a monument on its state capitol grounds like the one in *Van Orden* until it was destroyed by a vandal and subsequently replaced with the monument that prompted the litigation. *Id.* The replacement monument was found to violate the Establishment Clause even though it contained some historical messages on it. *Id.* at 773. The Seventh Circuit Court of Appeals found that the new monument failed *Lemon's* purpose prong and its primary effect was to endorse religion, in part because of the large text displayed on the monument conveying the Ten Commandments and also because of the monument's visible placement on the Statehouse grounds. *Id.* at 770-73. The court noted that even though the Ten Commandments may have a secular purpose, the state retains the burden of proving that it has taken the appropriate steps to prevent a religious purpose. *Id.* at 771.

⁵³ *Van Orden*, 545 U.S. at 682-92. Essentially, the Court applied part of O'Connor's modified *Lemon* test when it determined that, taking into consideration the various factors that established the monument's placement, a reasonable observer would not likely find that the monument endorsed religion. *Id.* The Court did not fully apply the *Lemon* test but instead determined that the test was inapplicable to the current situation. *Id.* at 686. The Court noted that in certain contexts, such as school classrooms, the placement of such religiously affiliated displays has been held unconstitutional. *Id.* at 690. But here the Court emphasized the passage of time before the placement of the monument was challenged as well as the identifiable dual significance of the display which seemed to demonstrate that the religious effects of the display were merely incidental to the display's main purpose. *Id.* at 691-92.

⁵⁴ *Id.* at 682. The Court noted that the monument in question had been on display for more than forty years and was surrounded by seventeen other monuments and twenty-one "historical markers," many of which were secular items that were significant to the development and identity of Texas's history. *Id.* The monument was also paid for by private funds and clearly inscribed on it was the following message: "[p]resented to the people and youth of Texas by the Fraternal Order of Eagles of Texas 1961." *Id.* at 681-82.

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passersby.⁵⁵ The plurality found that the monument was merely passive, evidenced by the fact that the petitioner had walked past the monument for years prior to bringing the lawsuit.⁵⁶ Ultimately, the Court held that the placement of the monument did not violate the Establishment Clause because “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”⁵⁷ Justice Breyer concurred in the judgment, providing the critical fifth vote, stressing that the purpose behind the monument was primarily secular, noting that its physical placement on the capitol grounds among several other non-religious displays and its visibility for more than forty years without objection were reasons that strongly favored upholding the constitutionality of the Ten Commandments monument.⁵⁸

⁵⁵ *Id.* at 691-92; *see also* ACLU Neb. Found. v. City of Plattsmouth, Neb., 419 F.3d 772, 776-77 (8th Cir. 2005), *rev'g en banc*, 358 F.3d 1020 (8th Cir. 2004) (holding that a similar Ten Commandment display donated by the Fraternal Order of Eagles more than thirty-five years prior did not violate the Establishment Clause). *Plattsmouth* dealt with a Ten Commandments display similar to the one at issue in *Van Orden*. *Plattsmouth*, 419 F.3d at 773-75. The Court of Appeals for the Eighth Circuit held that the display did not violate the Establishment Clause for many of the same reasons articulated in *Van Orden*. *Id.* at 775-78. Furthermore, the *Plattsmouth* display was also not legally challenged based on its constitutionality for some thirty-five years, insulating the display from invalidation on endorsement claims similar to *Van Orden* because any perceived sectarian nature surrounding the display lost its effect over time and the display became more passive. *Id.* at 778. There was a factual difference between *Plattsmouth* and *Van Orden*: the display in *Plattsmouth* stood by itself and was not surrounded by other secular displays to detract from its potential religious message, as was the case in *Van Orden*. *Id.* at 777 n.7.

⁵⁶ *Van Orden*, 545 U.S. at 691-92.

⁵⁷ *Id.* at 690 (noting that the placement of the Ten Commandments on the grounds of the capitol was more passive than the display of the Ten Commandments in a school classroom, which more directly confronts people). *See also* Alan E. Garfield, *What Should We Celebrate on Constitution Day?*, 41 GA. L. REV. 453, 485-89 (2007) (discussing the history of the monuments and the parties in the lawsuit, and pointing out how the monuments made their way to the grounds of the Texas State Capitol). Interestingly, the monuments were part of a publicity stunt by Cecil B. DeMille for his movie, *The Ten Commandments*. *Id.* at 485. DeMille garnered the support of the Fraternal Order of Eagles, a group founded by theater owners, to help erect the monuments around the country. *Id.* at 485-86. The monuments were unveiled for public display near the time that the movie opened in theaters with the help of Charlton Heston and Yul Brynner, both star actors in the movie. *Id.* at 486. It was not until forty years later when a homeless, hard-on-his-luck Texas attorney who passed this monument every day for many years decided to bring suit challenging it. *Id.* Garfield described the passionate feelings of both those who wanted to preserve the religious symbols and those who called for separation. *Id.* at 487-90.

⁵⁸ *Van Orden*, 545 U.S. at 698-704 (Breyer, J., concurring). Justice Breyer disagreed with the plurality's heavy reliance on the broader historical background of religion in the country and instead argued for a more pragmatic and fact-sensitive approach. *Id.* at 698-99. Justice Breyer also acknowledged that the Fraternal Order of Eagles, a private organization that is primarily secular in nature, had donated the monument to recognize

On the other hand, in *McCreary*, the Court held that the placement of the Ten Commandments display in two Kentucky county courthouses violated the Establishment Clause.⁵⁹ The Court focused its analysis on the purpose prong of the *Lemon* test and emphasized that the ever-changing history behind the placement of the Ten Commandments revealed that the display lacked the required secular purpose; indeed, the Court found that the display had been driven by religious motivation.⁶⁰ The Court recognized that a Ten Commandments display

the role of the Ten Commandments in shaping civic responsibility. *Id.* at 701. Likewise, the placement of the monument on the capitol grounds demonstrated nothing sacred, evidenced further by the fact that for more than forty years, passersby apparently did not view the monument as endorsing religion, or at least no one had ever initiated litigation over the issue. *Id.* at 702-03. *See also* *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 210 F.3d 703, 721 (6th Cir. 2000), *rev'd en banc*, 243 F.3d 289 (6th Cir. 2001) (holding that Ohio's motto, "With God All Things Are Possible[.]" did not offend *Lemon's* three pronged test, even though the phrase was taken from Matthew 19:26, because it was enough removed from its original biblical source such that a reasonable observer would not view it as endorsing religion). "The reasonable observer, much like the reasonable person of tort law, is the embodiment of a collective standard and is thus 'deemed aware of the history and context of the community and forum in which the religious display appears.'" *ACLU of Ohio*, 210 F.3d at 721.

⁵⁹ *McCreary Cty., Ky., v. ACLU of Ky.*, 545 U.S. 844, 873-74 (2005) (holding that although *Lemon's* purpose prong may not always by itself be dispositive, it nonetheless remains important when determining whether a law or religious display violates the Establishment Clause; to be sure, the context in which a display was created and also its development over time must not be overlooked because these facts often provide insight into the purpose behind a display).

⁶⁰ *Id.* at 851-74. The Court discussed the historical development of the display, which McCreary County had altered three times; each alteration attempted to modify the overall display by adding more items to it to give it a secular purpose. *Id.* at 850. For instance, McCreary County added to the display "historical" items like the Magna Carta, the Declaration of Independence excerpting the words "endowed by their Creator[.]" and one document stating that "[t]he Bible is the best gift God has ever given to man[.]" *Id.* at 853-54 (alteration in original). The Court pointed out that "'the display [was][to] be posted in 'a very high traffic area' of the courthouse.'" *Id.* at 851 (second alteration in original). Although the Court acknowledged that purpose is an essential element to many constitutional doctrines, the Court is not required to look for some secret motive. *Id.* at 861-63. The Court emphasized that the requisite secular purpose cannot be merely secondary, and Justice O'Connor has stated that the "secular purpose must be serious to be sufficient." *Id.* at 864-65 n.11. *But see* *Books v. Elkhart Cty.*, 401 F.3d 857, 858, 869 (7th Cir. 2005) (holding that a Ten Commandments display contained within a "Foundations of American Law and Government Display" at the local county government building did not violate the Establishment Clause because the "Foundations" display contained various other secular items, which detracted from the Ten Commandments potential religious message, and the placement of the Ten Commandments in the overall display lacked any religious motivation). Although this case was decided prior to *McCreary*, it appeared to suggest that the religious motivation must dominate and that a religious message need not be absent from the display. *Id.* at 863; *see* *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (stating, "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate[.]").

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may potentially have either a secular or religious message.⁶¹ Nonetheless, the majority applied Justice O'Connor's modified *Lemon* test and held that, in this case, the Ten Commandments would likely be perceived as endorsing religion.⁶² Despite the county's repeated attempts to secularize the display by adding other less religiously focused items to it, the Court noted that given the controversial history underlying the placement of the Ten Commandments, a reasonable observer would likely see the religious purpose behind the display.⁶³

Van Orden and *McCreary* highlight the Court's diverging views regarding the Establishment Clause doctrine.⁶⁴ The four justices who joined the plurality opinion in *Van Orden* likely would have upheld the Ten Commandments display in both cases, whereas the four dissenting justices in *Van Orden* likely would have invalidated both displays, finding that the government had endorsed religion.⁶⁵ Only Justice Breyer saw a distinction between the monument in *Van Orden* and the monument in *McCreary*, finding the monument in *Van Orden* constitutional, but finding *McCreary's* display unconstitutional.⁶⁶ *Van Orden* and *McCreary* emphasize that the historical development behind

⁶¹ *McCreary*, 545 U.S. at 869, n.17 (acknowledging that the Ten Commandments have had an effect on the nation's legal code and common law). As Justice O'Connor stated in *McCreary*, "[i]t is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment." *Id.* at 884 (O'Connor, J., concurring).

⁶² *Id.* at 851-74.

⁶³ *Id.* at 866. The County argued that if any purpose were to be inferred in this case, the court should determine the purpose only from the latest news concerning the event, not the display's history in its entirety. *Id.* The Court responded by noting that "the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show[.]" *Id.*

⁶⁴ See CHEMERINSKY, *supra* note 18, at 1224-25 (providing an overview of *Van Orden* and *McCreary*, which resulted in opposite holdings, and highlighting the reasoning the Court applied in each case).

⁶⁵ *Id.* at 1224-25. *Van Orden's* plurality consisted of Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas. *Id.* The dissenters were Justices Stevens, O'Connor, Souter, and Ginsburg. *Id.*

⁶⁶ *Id.* See also *Van Orden v. Perry*, 545 U.S. 677, 701-04 (2005) (Breyer, J., concurring). Unlike the four-justice plurality, Justice Breyer's concurrence considered the purpose behind the displays and the consequences imposed on the reasonable observer for looking at it. *Id.* See also *infra* Part IV (discussing Justice Breyer's six interpretative tools—text, history, tradition, precedent, the purpose of a statute (or display in this case), and the consequences—which Justice Breyer appeared to utilize when determining the proper result in *Van Orden*).

the creation of a governmental display containing religious symbols and its placement, contextually, may determine its constitutionality.⁶⁷

2. Follow the Leader: Coercion Test and Group Norms

Although *McCreary* served as a reminder that context and placement are important in determining the constitutionality of a religious symbol on government property, the potential effects that such a symbol may have on people should also be considered.⁶⁸ In *Lee v. Weisman*,⁶⁹ Justice Kennedy discussed the coercive effects of the use of prayer in schools.⁷⁰ In addition, coercion has also impacted some of the Court's previous decisions, particularly those concerning religious symbolism.⁷¹ This Note next examines the Court's two approaches to considering whether a religious symbol or message has a coercive effect, as well as psychological studies that reveal that individuals tend to have an underlying desire to conform to societal group norms.⁷²

⁶⁷ CHEMERINSKY, *supra* note 18, at 1224–25 (noting that future cases will have to be judged in a highly contextual set of circumstances in order to determine the proper outcome). Chemerinsky also speculated that with the departure of Justice O'Connor from the Court, similar cases could result in a dramatically different outcome. *Id.*; see also Mike Schaps, Comment, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 CAL. L. REV. 1243, 1260–61 (2006) (discussing the convoluted Establishment Clause doctrines, and noting that each case usually involves specific factual distinctions that determine its outcome).

⁶⁸ See *infra* Part II.A.2.

⁶⁹ 505 U.S. 577 (1992).

⁷⁰ *Id.* (holding that a prayer at a middle school graduation ceremony violated the Establishment Clause). See also CHEMERINSKY, *supra* note 18, at 1185 (noting that many cases involving the use of prayer and other religious activities in schools have been litigated).

⁷¹ See generally *Lee v. Weisman*, 505 U.S. 577 (1992) (recognizing Justice Scalia's physical coercion test and Justice Kennedy's more psychologically based test); *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 866 (2005) (acknowledging the effects that posting the Ten Commandments in a public area may have on people). See also Elizabeth B. Halligan, Note, *Coercing Adults?: The Fourth Circuit and the Acceptability of Religious Expression in Government Settings*, 57 S.C. L. REV. 923, 925 (2006) (recognizing that the Supreme Court has addressed various public school prayer cases but has dealt with adult prayer only in the legislative prayer setting). But see *Marsh v. Chambers*, 463 U.S. 783, 789–92 (1983) (noting that legislative prayer is different than prayer in schools because it has been around since the founding of this country and adults are not as impressionable as children); *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (holding that the Virginia Military Institute's dinner time prayer violated the Establishment Clause due to the coercive elements unique to the military college).

⁷² See *infra* Parts II.A.2.a–b.

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a. *Coercion Jurisprudence*

Lee involved a challenge to invocations given during graduation ceremonies by a clergyman at the request of public school officials where middle and high school students were present.⁷³ Although the invocations were nonsectarian in nature, Justice Kennedy noted that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way [that] ‘establishes a [state] religion or religious faith, or tends to do so.’”⁷⁴ Justice Kennedy applied what is sometimes referred to as a psychological coercion test, emphasizing that the students were more impressionable than adults and the students did not have a “true” option to decide whether to attend the graduation ceremony.⁷⁵ In addition, Justice Kennedy dismissed the argument that a nonsectarian prayer, or civic religion, should be allowed, and reasoned that the government should not involve itself in coordinating invocations to be delivered by clergymen at public school graduation ceremonies.⁷⁶ The Court further noted that

⁷³ *Lee*, 505 U.S. at 580–84 (citing copies of the prayers that were given by the Rabbi at the respective graduation ceremonies).

⁷⁴ *Id.* at 587 (third alteration in original). See also Eric Brander, *Hoosiers Choosing God Controversial ‘In God We Trust’ Plates Showing Up Everywhere*, EVANSVILLE COURIER & PRESS, July 1, 2007, at A3 (noting that BMV Vehicles workers at various locations were allegedly “pushing” the “In God We Trust” plates on customers). In fact, the state has since sent a memorandum to all employees stating as follows:

“[w]e want to remind you that while we want to inform customers of plate selections, as good customer service, employees should not promote this plate, or any other plate, over another[.]” “Some customers have suggested that some branch employees are pushing the IGWT plate to the exclusion of others. As you are aware, this is not our policy.”

Id.

⁷⁵ *Lee*, 505 U.S. at 592–96. Justice Kennedy highlighted psychological evidence indicating that adolescents are more likely to be pressured by peers to conform their behavior to whatever the norm is than adults. *Id.* The Court noted that although student attendance at the ceremony was not required, it presented a student the difficult choice to either be exposed to the invocation or choose to miss the graduation ceremony despite having worked so diligently to graduate from high school. *Id.* at 595. Justice Kennedy noted the potential effects of remaining silent during the prayers and questioned whether such silence signified respect or subjected the student to subtle coercion. *Id.* at 593. Justice Kennedy also recognized the significance of the ceremony for the graduating student and her family, as well as the sense of accomplishment that accompanies such ceremonies or other similar events. *Id.* at 595. He dismissed the government’s position that the majority’s preference should prevail over the dissenting minority’s position and that individuals who associate with the minority position should simply not attend the ceremony if truly offended. *Id.* at 596.

⁷⁶ *Id.* at 589–90 (noting that James Madison cautioned against having the government remove itself from the business of religion). Justice Kennedy noted that the government

under the First Amendment not all religion must be removed from the public sphere, but that "the measure of constitutional adjudication is the ability and willingness to distinguish between [the] real threat and mere shadow."⁷⁷ The Court determined that under *Lemon*, the prayers at the graduation ceremony amounted to government endorsement of religion.⁷⁸

In sharp contrast, Justice Scalia's dissent in *Lee* embraced historical evidence to support his contention that the nation is intertwined with religion and that such intertwinement does not amount to endorsement of religion.⁷⁹ Justice Scalia explained that unconstitutional coercion occurs only when the government actually forces conduct or threatens the individual if he fails to act.⁸⁰ Justice Scalia criticized Justice Kennedy's psychological coercion test, describing it as unfounded and an "embarrassment" to the Establishment Clause.⁸¹ Indeed, the dissent dismissed psychologically coercive evidence and its potential underlying effects.⁸²

b. "In or Out": Group Norms

Although psychological studies are not always well received by courts, extensive research has established the impact that symbolism and messages have on people.⁸³ One aspect of this research deals with group

should not show favoritism toward any religion. *Id.* at 590. "[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 591-92. See also Saumya Manohar, Comment, *Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229, 235-36 (2006) (discussing psychological theories that explain the dangers posed by the government endorsing a message through covert means).

⁷⁷ *Lee*, 505 U.S. at 598.

⁷⁸ *Id.* at 584-86.

⁷⁹ *Id.* at 632-36 (Rehnquist, C.J., White, Scalia, & Thomas, JJ., dissenting).

⁸⁰ *Id.* at 640-44.

⁸¹ *Id.* at 636. Justice Scalia compared the Court's reliance on psychology to that of interior decorating, noting that the Court has delved into an area that it is not equipped to handle. *Id.* Justice Scalia dismissed the Court's position that the students were essentially obligated to attend the ceremony and were therefore coerced. *Id.* Justice Scalia also questioned the Court's protective nature toward students, especially those in high school who are old enough to vote, noting that the Court does not extend adults a similar protective blanket regarding the possible coercive effects of religious invocations at events. *Id.* at 639.

⁸² See *infra* Part II.A.2.b.

⁸³ MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* 74 (Harper & Row 1966) (explaining how social norms can transform into powerful tools in group settings). Sherif noted that some slogans or phrases, once they are standardized, can become so engrained in the public psyche that they can move people to action. *Id.* For instance, Sherif posits the phrases, "Liberty, Equality, Fraternity[.]" used during the French Revolution; "Life, Liberty, and the pursuit of happiness[.]" common to the United States revolution; and "[t]o

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norms.⁸⁴ The theory of group norms is that members of a group influence each other, which leads to relative uniformity in the beliefs and behaviors of the individuals within the group.⁸⁵ This theory is founded on the idea that an individual's desire to espouse a view that is deemed correct is outweighed by the fear of being isolated by other members of the group.⁸⁶ Numerous studies have demonstrated the effects that a group can have on an individual member's desire to conform to the group.⁸⁷

Solomon Asch's Line Study is illustrative.⁸⁸ Asch's experiment demonstrates that a high percentage of people, when placed within

make the world safe for democracy[.]” a common war time expression and a phrase often used to justify the current War on Terror. *Id.* Sherif cautioned about the dangers of such phrases and their power to be used by leaders and other persons to call others into action. *Id.* See also *Lee*, 505 U.S. at 592 (discussing the effects of coercion, Justice Kennedy noted, “[t]he concern may not be limited to the context of schools, but it is most pronounced there[.]”); John Valery White, *Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303 (2002) (discussing the legal system's skepticism of psychological data in light of *Brown v. Board of Education* and the criticism directed at the Court for using only sociological data, and no law, to support its decision).

⁸⁴ SHERIF, *supra* note 83, at 85 (noting that in any organized society, norms “serve as focal points in the experience of the individual, and subsequently as guides for [the individual's] actions[.]”). Group norms regulate everyday life and people often subconsciously adhere to them. *Id.* Norms often form through people's frames of reference, which serve as the basis for people's stereotypes, customs, and values. *Id.* Once a person has a frame of reference, he or she can later adapt this frame of reference based on the new stimuli presented. *Id.*

⁸⁵ LEON FESTINGER, STANLEY SCHACHTER, & KURT BLACK, *SOCIAL PRESSURES IN INFORMAL GROUPS: A STUDY OF HUMAN FACTORS IN HOUSING* 72 (Stanford Univ. Press 1950). This book noted that pressures exerted on a group can be overt or hidden, and at times can be formalized. *Id.* at 101. Examples of these social pressures are as follows: people opening doors for others, particularly men for women; the way people dress for certain situations; and the types of career paths certain people take, such as following the family business. *Id.* See also GENEVIEVE PAICHELER, *THE PSYCHOLOGY OF SOCIAL INFLUENCE* 82 (Cambridge Univ. Press 1988) (illustrating the underlying principle of group norms by quoting Hans Christian Anderson: “[t]here were five little peas in a pod, they were green, the pod was green, they believed that the entire world was green and for them this was certainly true!”) (quotation omitted); Manohar, *supra* note 76, at 236 (warning that nontransparent government messages can potentially indoctrinate the public).

⁸⁶ PAICHELER, *supra* note 85, at 82 (highlighting the impact of majority influences). Paicheler pointed out that a person's decisions are heavily tied to those of the group around him. *Id.* “This is true in two respects: he fears a negative judgment and seeks to induce positive evaluations; he relies on others in establishing a point of view that agrees with [the rest of the group].” *Id.*

⁸⁷ See *infra* notes 88-90. See generally Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN ST. L. REV. 77 (2007) (discussing the Establishment Clause's coercion tests, the psychological theory of expressive attitudes, and this theory's effect on people in real situations).

⁸⁸ PAICHELER, *supra* note 85, at 84-90 (discussing the experiment and its findings). Another study likely known to people who have completed a basic undergraduate-level psychology class is Stanley Milgram's Shock Experiment, which revealed that people,

group settings, are likely to conform to the behaviors and beliefs expressed by those around them.⁸⁹ Most of the subjects in the experiment claimed they actually subscribed to the ideas espoused by members of the group and gave false answers merely because they did not want to express views different than those of their peers.⁹⁰ Thus, the theory of group norms suggests that external messages often lead people to change their behaviors in order to conform to the group.⁹¹

From a review of the intricately woven Establishment Clause jurisprudence, the following principles emerge: (1) the governmental display containing religious symbols must have a secular purpose; (2) the display's principal or primary effect should not be seen by the reasonable observer as endorsing religion; and (3) there should not be an excessive entanglement between the government and religion.⁹² To

when given "suggestions" by an authoritative figure, in this case the experimenter, followed these "suggestions[.]" even where doing so caused them to behave contrary to accepted social norms. *Id.* at 89-90.

⁸⁹ *Id.* at 85. Asch's experiment consisted of groups of seven to nine people, and only one confederate (i.e., an individual who was "in" on the experiment) was placed in each group. *Id.* Asch then presented each group with one standard line of a specified length and then three comparison lines that varied in length consisting of small, medium, and large. *Id.* One of the three comparison lines was an exact match to the standard line, and those that did not match the standard line were intentionally made to obviously not match. *Id.* The confederates gave false responses on seven out of twelve matching attempts, so that Asch could assess how the unsuspecting subjects would respond to this perplexing situation. *Id.*

⁹⁰ *Id.* Participants stated that social motivations, and not the desire to be correct, were their main concern. *Id.* Other concerns may have been that the collective group could not be wrong or that the subject did not want to be different. *Id.* As Asch posited, they became "indifferent to the task; they became unconcerned with it, no longer worried about the imprecision of their judgments. Their sole objective was not to stand out, not to deviate." *Id.* Asch himself stated,

A theory of social influences must take into account the pressures upon persons to act contrary to their beliefs and values. They are likely to bring to the fore powerful forces that arise from the social milieu at the same time that they may reveal forces, perhaps no less powerful, that individuals can mobilize to resist coercion and threats to their integrity . . . Current thinking has stressed the power of social conditions to induce psychological changes arbitrarily. It has taken slavish submission to group forces as the general fact and neglected or implicitly denied the capacities of men for independence, for rising under certain conditions above group passion and prejudice. Our present task is to observe directly the interaction between individuals and groups when the paramount issue is that of remaining independent or submitting to social pressure.

Id.

⁹¹ See *supra* Part II.A.2.b (discussing the theory of group norms and its application in various psychological studies).

⁹² See *supra* notes 44-45 and accompanying text (describing the *Lemon* test and its pronged approach).

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determine whether the governmental display of religious symbols violates the aforementioned test, courts consider various elements, including the history behind the display, public statements by government officials during the legislative process, where the display is placed on government property, and what items are included in the display.⁹³ Additional considerations underlying a potential Establishment Clause violation when a government display contains religious symbols are whether government coercion is present and the displays affect on group norms.⁹⁴

B. *Compelled Speech Cases*

The Supreme Court recognizes two doctrines regarding compelled speech.⁹⁵ The first doctrine maintains that the government cannot force a person to endorse or express a message with which he disagrees.⁹⁶ *Wooley v. Maynard*⁹⁷ illustrated this principle. In *Wooley*, a New Hampshire resident covered up the state's motto—"Live Free or Die"—on his license plate because he "refuse[d] to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously, and politically abhorrent."⁹⁸ The Court held that the New Hampshire

⁹³ See *supra* note 47 and accompanying text (same as above).

⁹⁴ See *supra* Parts II.A.2.a-b (articulating Justice Kennedy's psychologically based coercion test, Justice Scalia's opposing physical coercion analysis, and the theory of group norms and its greater impact on society's behaviors).

⁹⁵ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (discussing the differences between compelled subsidies and pure government speech).

⁹⁶ *Id.* See *supra* note 74. This Note does not discuss the precise issues addressed in *Wooley* because Indiana has not made "In God We Trust" its only official license plate. However, this Note explores complaints by the public that have asserted that the "In God We Trust" license plates have been 'forced' on some people by BMV employees, and the implicit coercive effects of group norms that could result from such actions by BMV employees. See *supra* note 74.

⁹⁷ 430 U.S. 705 (1977).

⁹⁸ *Id.* at 713. Since 1969, the State of New Hampshire has required that license plates on non-commercial vehicles display the State's motto, "Live Free or Die[.]" *Id.* at 707. Under New Hampshire law it was a misdemeanor to knowingly obscure or cover the alphanumeric combination on the license plate, including the state motto. *Id.* In 1974, the petitioners, devout Jehovah's Witnesses, began to cover up the state motto on their license plate because they found it objectionable. *Id.* at 707-08. During a state court trial, in which Mr. Maynard represented himself, the court imposed a twenty-five dollar fine, but suspended it in return for good behavior. *Id.* at 708. Mr. Maynard, however, continued to object to promoting the state motto on his license plate (by covering up the motto) and after a second trial date, was sentenced to fifteen days in county jail. *Id.* See generally *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding a West Virginia law unconstitutional because it compulsorily required students to pledge allegiance to the flag or else face expulsion and because it imposed possible criminal sanctions against both students and parents).

legislature could not constitutionally require its citizens to "display the state motto upon their vehicle license plates[]" or face criminal sanctions.⁹⁹

The second doctrine involves the government compelling citizens to subsidize the government's messages. In sharp contrast to *Wooley*, the Court in *Johanns v. Livestock Marketing Ass'n*¹⁰⁰ rejected claims brought by beef growers who challenged a government imposed tax aimed at subsidizing the government sponsored promotional campaign—"Beef. It's What's for Dinner."¹⁰¹ The Court upheld the tax, reasoning that the government may compel subsidization from its citizens for its various governmental messages, provided that the government identifies itself as the speaker.¹⁰² After *Johanns*, even where the government engages in viewpoint discrimination, the government appears to have wide-ranging discretion concerning how it subsidizes its own message.¹⁰³ This is true regardless of whether private citizens volunteer to advocate the message.¹⁰⁴ However, when the government creates and funds a private

⁹⁹ *Wooley*, 430 U.S. at 714, 717 (footnote omitted).

¹⁰⁰ 544 U.S. 550 (2005).

¹⁰¹ *Id.* at 553-55 (discussing the Beef Growers of America, which, funded by various beef producers on behalf of the government, produced the familiar advertisements of "Beef. It's What's for Dinner[]"); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 385 (6th Cir. 2006) (Boyce, J., concurring in part and dissenting in part).

¹⁰² See generally *Johanns*, 544 U.S. at 559 (holding that when the government speaks, and is sufficiently accountable for its own speech, it can compel the public to subsidize the message; in these instances, the government is not subject to First Amendment scrutiny). "[C]ompelled support of a private association is fundamentally different from compelled support of government." *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977)). But cf. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that the government could not compel the mushroom grower, United Foods, to advertise a government message when the mushroom grower objected to the speech asserting the regulatory purpose was purely advertising and not some broader government regulatory scheme).

¹⁰³ See *Johanns*, 544 U.S. at 557.

¹⁰⁴ *Bredesen*, 441 F.3d at 377-78 (noting that drivers who select the "Choose Life" license plate are volunteering to carry forth the government's message because "they pay out of their own pockets for the privilege of putting the government-crafted message on their private property[]"). See also *Johanns*, 544 U.S. at 559 (discussing the newly defined power of the government speech doctrine). In *Johanns*, Justice Scalia commented,

"Compelled support of government"—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies."

Id.

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forum for speech, it is not permitted to discriminate based on viewpoints contained in the message,¹⁰⁵ nor is it permitted to compel people to pay for the message of a private group.¹⁰⁶ Ultimately, the government may neither force a private citizen to speak nor compel a citizen to pay for a private entity's message with which he disagrees.¹⁰⁷

Crucial to deciding whether a compelled subsidy is constitutional is determining who is speaking and whose message is being advanced.¹⁰⁸ The Supreme Court has decided several cases that have addressed the issue of who is speaking and the limits to which the government may compel a citizen to subsidize the message.¹⁰⁹ However, the Fourth and Sixth Circuit's "Choose Life" license plate cases have specifically dealt with speech upon license plates and these cases illustrate the important distinction between government and private speech.¹¹⁰ Parts II.B.1-2 explores these "Choose Life" license plate cases in greater depth.¹¹¹

1. Government Speech

In *ACLU of Tennessee v. Bredesen*,¹¹² the Sixth Circuit Court of Appeals addressed the constitutionality of a Tennessee law that permitted a local pro-life organization to create a specialty license plate promoting its

¹⁰⁵ See generally *Planned Parenthood of S.C., Inc., v. Rose*, 361 F.3d 786, 794-99 (4th Cir. 2004). See also *United Foods*, 533 U.S. at 413-16 (determining that the compelled subsidy for the mushroom growers' advertising campaign was unconstitutional because the speech, by itself, was the principal object of the campaign and not as part of some broader regulatory scheme).

¹⁰⁶ *Abood*, 431 U.S. at 259 (holding that the government may not compel subsidies of union workers for political campaigns with which the union workers disagreed, but may compel the workers to pay for activities related to collective bargaining). But cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (holding that compelled subsidies for agricultural marketing that focused on California fruit growers was constitutional because subsidy for the marketing was part of a larger regulatory scheme to promote government speech).

¹⁰⁷ See *supra* notes 96, 105-06 and accompanying text.

¹⁰⁸ *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 385 (6th Cir. 2006) (Boyce, J., concurring in part and dissenting in part). See *W. Va. Ass'n of Club Owners & Fraternal Serv., Inc. v. Musgrave*, 512 F. Supp. 2d 424, 430-32 (S.D. W.Va. 2007) (noting the constitutional importance of determining who is speaking because citizens cannot challenge the funding of government speech, but may attack compelled funding of private speech).

¹⁰⁹ See *infra* Parts II.B.1-2.

¹¹⁰ See *Bredesen*, 441 F.3d at 375-80 (upholding the "Choose Life" license plate as permissible government speech). But see *Rose*, 361 F.3d at 786 (finding South Carolina's "Choose Life" license plates were a mixture of government and private speech and so impermissible). See generally Manohar, *supra* note 76, at 229-31 (discussing the different approaches taken by the Fourth and Sixth Circuits in their analysis of the "Choose Life" license plate).

¹¹¹ See *infra* Parts II.B.1-2.

¹¹² 441 F.3d 370.

ideology.¹¹³ The ACLU of Tennessee initiated a lawsuit because pro-choice groups were being denied the ability to create such a plate to further their viewpoint.¹¹⁴ In determining whether Tennessee's "Choose Life" license plate was government or private speech, the Sixth Circuit Court of Appeals, applying *Johanns*, held that the State of Tennessee had acted within its constitutional limits because the plate constituted government speech.¹¹⁵

The court in *Bredesen* reasoned that *Johanns* applied because the State of Tennessee, through the statute it enacted, determined and had final approval of the message that appeared on the license plate.¹¹⁶ Although the court conceded that individuals who chose to display the "Choose Life" license plate were engaging in expressive conduct, such actions did not create a private forum.¹¹⁷ The government was conveying its own message, even if it did not expressly identify itself as the speaker, and incidental help the government received from private organizations had little relevance.¹¹⁸ The Sixth Circuit Court of Appeals referred to *Johanns*

¹¹³ *Id.* at 371-72.

¹¹⁴ *Id.* at 372-73. The Tennessee legislature enacted into law a statute that permitted the creation of the "Choose Life" license plates. *Id.* at 372. During the same legislative session that created the "Choose Life" plates, Planned Parenthood attempted to persuade the Tennessee legislature to create a "Pro-Choice" license plate as well, but was unsuccessful. *Id.* The district court relied on the Fourth Circuit's reasoning in *Rose* and determined that mixed speech was occurring and held that the license plate engaged in viewpoint discrimination. *Id.* at 372-73.

¹¹⁵ *Id.* at 375. See generally Manohar, *supra* note 76, at 229 (providing an in-depth discussion of the main issues that were presented and the analysis used by the Sixth Circuit for its holding in *Bredesen*).

¹¹⁶ *Bredesen*, 441 F.3d at 376-77. Even though parts of the message were developed by New Life, a religious group, the state still maintained the overall veto power to approve or deny the message and control the design of the plate. *Id.* The plaintiffs argued that it was really "mixed speech" taking place, but the court dismissed this argument. *Id.*

¹¹⁷ *Id.* at 377. The court distinguished Tennessee's "Choose Life" license plates from the "Live Free or Die" plates at issue in *Wooley* because Tennessee motorists were not compelled to display the "Choose Life" message, but instead had to purchase the plate as a specialty plate. *Id.* at 377-78.

¹¹⁸ *Id.* at 376-77. In regard to the first factor, the Court of Appeals for the Sixth Circuit noted that it is not implausible that the state would use a specialty license plate program to promote its message. *Id.* at 376. This is further evidenced by the fact that Tennessee allows many organizations to promote messages while it restricts some organizations from doing so. *Id.* The second factor was analogized to *Johanns* in which the beef promotion messages were "outsourced" to another entity but the Secretary of Agriculture still had the final approval of the message. *Id.* at 377. The court noted that the third factor, also compared to the promotional message in *Johanns*, determined that any reasonable person would attribute a state-issued license plate to the government's issuing of a message. *Id.* The court did note that the Court of Appeals for the Fourth Circuit in *Rose* ruled to the contrary. *Id.* at 380. However, the court dismissed the Fourth Circuit's ruling because the Supreme Court's decision in *Johanns*, which was decided after the Fourth Circuit made its decision, established a new test that clearly identified the speech in *Bredesen* as government speech.

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and also *Rust v. Sullivan*¹¹⁹ to determine that “[n]o constitutionally significant distinction exists between volunteer disseminators and paid disseminators.”¹²⁰

The dissent suggested that the majority misapplied *Johanns* in this situation because the speech was not compelled.¹²¹ Rather than focus on the specific “Choose Life” license plate, the dissenting judge explained that the license plate program as a whole encouraged private speech, and that the state merely provided the medium of exchange.¹²² The judge

Id. Also, the court did not think that the Fourth Circuit’s analysis would apply well to this case. *Id.*

¹¹⁹ 500 U.S. 173 (1991). *Rust* involved doctors who worked at a medical clinic that received government funds. *Id.* at 178. After issuing government funds to the medical clinic, the government prohibited the doctors from discussing abortion or any other related topics with their patients. *Id.* at 178–82. The doctors disagreed with this policy and challenged it; however, the Court held that when a private entity receives public funds, the government has the right to condition receipt of those funds on the fact that the message disseminated is consistent with the government’s wishes. *Id.* at 183, 196–200.

¹²⁰ *Bredesen*, 441 F.3d at 378 (comparing the doctors in *Rust* to the Tennessee “volunteers” who put the message on their license plates). Similar to *Rust*, the *Bredesen* court determined that if a forum were created, it would force the state to produce messages that run counter to its interests. *Id.* at 378–79. *But see* Manohar, *supra* note 76, at 230–31 (discussing the dangers of permitting the government to speak in deceptive ways). An interesting example of such hidden speech highlighted in the article was that in the years between 2003 and 2005, “at least twenty federal agencies spent \$1.6 billion making and distributing [to local television stations] prepackaged news segments[.]” which “praised various administration policies ranging from the war in Iraq to fighting computer viruses.” *Id.*

¹²¹ *Bredesen*, 441 F.3d at 380–85 (Boyce, J., concurring in part, dissenting in part) (discussing that the majority’s decision allows the “government speech doctrine” to broadly control and take over the First Amendment analysis). Judge Boyce pointed to two flawed areas in the majority’s reasoning: the mischaracterization of the specialty license plate program and mistaken application of compelled subsidies, where nothing was compelled. *Id.* at 380–81. Tennessee did not compel citizens to pay for the “Choose Life” specialty plate, but instead charged an additional fee to only those people who chose this plate. *Id.* at 384. Accordingly, Judge Boyce noted that if the citizens of Tennessee had been compelled to subsidize a “Choose Life” message, then it would have been more plausible that *Johanns* apply. *Id.* at 387.

¹²² *Id.* at 382–84. Judge Boyce, concurring in *Bredesen*, highlighted that Tennessee had about 150 license plates available for motorists to choose from and that many of these plates had little to do with a government interest. *Id.* at 382–83. Judge Boyce also noted that Tennessee promoted its specialty license plate program by offering specialty plates for persons who preferred to show their support for their school or community rather than the government. *Id.* at 384. Another line of support that favored a finding that Tennessee was in reality promoting private speech, not government speech, was that the state required 1,000 people to preorder the “Choose Life” plates before it began to distribute them. *Id.* Judge Boyce noted that despite fears expressed by the majority, the Fourth Circuit’s holding in *Rose* had not led to the “doomsday scenario” of organizations like the Ku Klux Klan or the Nazi party taking their messages to the state’s license plates. *Id.* at 391. Thus, Tennessee could continue to maintain viewpoint neutral regulations as long as it required that 1,000 paid orders be placed before the plate is issued. *Id.* However, if a group were able to garner the necessary number of signatures, then the state would have to issue the

penned the following statement regarding who the First Amendment is designed to protect: "The First Amendment was not written for the vast majority of [Tennesseans]. It belongs to a single minority of one."¹²³ Despite the dissent's position, *Bredesen's* majority determined that *Johanns'* reasoning was persuasive and fully applicable to the instant case.¹²⁴ Thus, Tennessee's "Choose Life" license plate was government speech and as such was not susceptible to a compelled subsidy challenge.¹²⁵

2. A Mixed Bag: Government and Private Speech

In contrast to the Sixth Circuit Court of Appeals, the Fourth Circuit Court of Appeals in *Planned Parenthood of South Carolina v. Rose*¹²⁶ determined that South Carolina's "Choose Life" license plates contained both government and private speech.¹²⁷ The law that permitted these specialty plates to be distributed to motorists was very detailed, as were other specialty plate programs in South Carolina.¹²⁸ Although Planned Parenthood never applied for specialty plates, litigation ensued challenging the State of South Carolina on the grounds that the new "Choose Life" license plates discriminated based on viewpoint.¹²⁹ After

plates. *Id.* But, as Judge Boyce noted, no evidence suggested that states had been flooded with requests for Ku Klux Klan or other similar plates. *Id.*

¹²³ *Id.* (alteration in original).

¹²⁴ See *supra* notes 116–20 and accompanying text.

¹²⁵ See *supra* note 115 and accompanying text.

¹²⁶ 361 F.3d 786, 787 (4th Cir. 2004).

¹²⁷ *Id.* at 777. Cf. *Bredesen*, 441 F.3d at 391 (Boyce, J., concurring in part, dissenting in part).

¹²⁸ *Rose*, 361 F.3d at 788–89 (discussing the specificity of South Carolina's statute as to who could purchase the "Choose Life" plates). Drivers who wanted the plates not only had to pay a fee but also were required to register with the organization that was going to receive the funds. *Id.* at 788.

¹²⁹ *Id.* at 787–89. In 2001, South Carolina enacted a statute that authorized the creation of a "Choose Life" specialty license plate for purchase by South Carolina drivers. *Id.* at 788. Each person who purchased one of these license plates was required to pay an additional fee beyond the normal cost associated with plate registration. *Id.* Any group that wanted to create a specialty plate could do so by meeting certain qualifications and applying to the Department of Public Safety ("DPS"), but DPS could deny or modify the plate if it deemed it inappropriate or offensive to the greater community. *Id.* Although Planned Parenthood never applied to DPS for a specialty plate, Planned Parenthood had lobbied the South Carolina legislature to pass a bill creating a "Pro-Choice" plate but was not successful. *Id.* Interestingly, the general statute for specialty license plates in South Carolina specified that a specialty plate was available only to certified members of the respective organization and that such a plate could contain only a symbol or emblem of the organization. *Id.* at 789. However, the statute that created the "Choose Life" plate permitted the phrase "Choose Life[.]" clearly more than only a symbol or emblem, to be displayed on the plate, and the statute also indicated that the plate was available to anyone who wanted it. *Id.* Even

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the court determined that Planned Parenthood had standing because they had a personal stake in the outcome of the litigation, it addressed the First Amendment question regarding whether South Carolina's "Choose Life" plates amounted to government or private speech.¹³⁰ In deciding this question, the Fourth Circuit Court of Appeals applied a four-factor test.¹³¹ The test consisted of determining "the central purpose of the program in which the speech in question occur[red][,]" the degree of editorial control by the speaker, the identity of the actual speaker, and the party that bore the ultimate responsibility for the message.¹³²

Applying this four-factor test, the *Rose* court found that the purpose of the "Choose Life" plate was to promote the State's preferred pro-life viewpoint and that the State had editorial control over the message displayed on the plate.¹³³ Reasoning further, the court decided that the third and fourth factors cut in favor of private speech because the message on a specialty plate is usually identified with the person displaying it.¹³⁴ Ultimately, the court concluded that the message

though Planned Parenthood did not apply for a specialty plate under the general statute, it was not required to because it contended that doing so would permit it to display only a symbol or emblem of a pro-choice organization, not to display the phrase "Pro-Choice" on the plate (like the "Choose Life" plate), thus, still leading to discrimination. *Id.* at 791.

¹³⁰ *Id.* at 789-92 (holding that the plaintiffs demonstrated a personal stake in the outcome of the litigation, which made the controversy redressable). If the "In God We Trust" license plates are challenged pursuant to the First Amendment compelled subsidy doctrine, standing is likely to be a contested issue. See generally CHEMERINSKY, *supra* note 18, at 60-64 (explaining the basic doctrine of standing and both the constitutional and prudential purposes served by the doctrine). Within the confusing doctrine of standing is the concept of generalized grievances and taxpayer standing. *Id.* at 90-98. The Supreme Court has held that a taxpayer, in general, does not have standing to litigate a case because he merely shares "a general interest common to all members of the public." *Id.* at 92. However, one exception recognized by the Court, though subsequently narrowed, was in *Flast v. Cohen*, 392 U.S. 83 (1968). *Id.* *Flast* established a two-prong test to allow petitioners to achieve taxpayer standing in a case in which the government had allegedly violated the Establishment Clause by subsidizing various religious institutions. *Id.* at 92-93. See generally *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that a Texas tax exemption offered to individuals who purchased certain religious publications that were used primarily for teaching religious texts was unconstitutional for violating the Establishment Clause because it was too narrowly written, provided benefits only for religious purposes, and lacked a secular purpose).

¹³¹ *Rose*, 361 F.3d at 792-93.

¹³² *Id.* The *Rose* court applied the test from *Sons of Confederate Veterans* and found that the license plates consisted of private speech. *Id.* at 793.

¹³³ *Id.* at 793-94. The court noted that, unlike the "Choose Life" license plate in *Sons of Confederate Veterans*, this "Choose Life" license plate was developed through the legislative process and signed into law by the Governor. *Id.* at 793. The plate in *Sons of Confederate Veterans* had originated with the state, and the state had determined that the plate would read "Choose Life." *Id.*

¹³⁴ *Id.* at 793-94. The *Rose* court relied on *Wooley* for the proposition that "even messages on standard license plates are associated at least partly with the vehicle owners." *Id.* at 794.

contained on a specialty license plate is both government and private speech, and, thus, applying a bright-line rule would oversimplify the situation.¹³⁵ The *Rose* court, explaining that license plates contain mixed speech, referenced *Wooley* and noted that the association between the message displayed on the plate and the vehicle owner is even stronger when a specialty plate is at issue.¹³⁶

The *Rose* court then held that South Carolina had engaged in viewpoint discrimination because it permitted a pro-life message but denied a pro-choice message.¹³⁷ The court explained that allowing the pro-life message to dominate the forum could mislead people to believe that most South Carolinians adopt a pro-life position.¹³⁸ This rationale parallels what the Supreme Court has cautioned against in the Establishment Clause context, specifically that "[e]ndorsement 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."¹³⁹

Although the *Rose* court briefly acknowledged that the speech implicated the government because the legislature enacted the specialty license plate program, it dismissed this argument as shortsighted for failing to recognize the unique nature of specialty license plates.¹⁴⁰ When

The court noted that this association is strengthened when the vehicle owner displays a specialty license plate. *Id.* As the *Rose* court pointed out, a person who sees someone with a "Choose Life" license plate would correctly assume that the person holds a pro-life view. *Id.* The court analogized the situation to that of a bumper sticker identifying the message of its owner and not that of its manufacturer. *Id.* The court concluded, unlike its holding in *Sons of Confederate Veterans, Inc.*, that such speech is not completely private speech, but rather it contains both government and private speech. *Id.* See also *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 386 (6th Cir. 2006) (quoting Thomas Jefferson who once said, "'To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical[']").

¹³⁵ *Rose*, 361 F.3d at 794.

¹³⁶ *Id.*; see also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (in referencing *Wooley*, the court noted that "[o]bliging people to 'use their private property as a 'mobile billboard' for the State's ideological message' amounted to impermissible compelled expression[']")

¹³⁷ *Rose*, 361 F.3d at 794.

¹³⁸ *Id.* at 798. See also Manohar, *supra* note 76, at 234–36. Manohar highlighted two major concerns with allowing the government to hide behind private volunteers. The first concern is that it enables the government to dominate the marketplace of ideas without the visible check of the political process. *Id.* at 234. The second concern is that it enables the government to indoctrinate the minds of both the messengers and receivers of the message; the more force the government has in controlling the market, the less ability the private individual has to counter this force. *Id.*

¹³⁹ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)

¹⁴⁰ *Rose*, 361 F.3d at 798–99. See also *Choose Life Ill., Inc. v. White*, No. 04 C 4316, 2007 WL 178455, at *7 (N.D. Ill. Jan 19, 2007), *rev'd*, 547 F.3d 853 (7th Cir. 2008). Recently, in *Choose Life Ill., Inc. v. White*, the Northern District of Illinois adopted the Fourth Circuit's reasoning

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license plates promote a wide array of messages, the identity of the government as speaker is often obscured.¹⁴¹ After *Johanns*, determining the speaker is critical to the outcome of the litigation because who is speaking—the government or a private individual—determines whether the subsidization of the speech is exempt from First Amendment analysis.¹⁴²

III. ANALYSIS

An idiosyncrasy triggered by Indiana's "In God We Trust" license plates is the issue of who is speaking—the government or the private individual. Not only is the identification of the speaker essential to the outcome in compelled subsidy challenges,¹⁴³ but also the distinction is important in the Establishment Clause context as well.¹⁴⁴ Indiana would likely contend that "In God We Trust" is government speech to avoid a compelled subsidy claim, and it would also likely claim "In God We Trust" to be patriotic to avoid Establishment Clause concerns. However, if "In God We Trust" is classified as religious, then Indiana may claim the plate to be private speech, in an attempt to distance itself from the phrase and overcome an Establishment Clause challenge.¹⁴⁵ Part III analyzes this dichotomy of Establishment Clause jurisprudence and

from *Rose* and held that specialty license plates constitute private speech, especially because the specialty plates at issue were initiated by a private organization that maintained considerable editorial control over them. *Id.* The Northern District of Illinois Court, much like the Court of Appeals for the Fourth Circuit in *Rose*, recognized that license plates contain aspects of government speech. *Id.* at *6. Yet, when a private individual, who has paid for a plate that carries a particular message, displays the plate, it becomes private speech. *Id.* But see *Choose Life Ill., Inc.*, 547 F.3d at 855-56 (The Seventh Circuit Court of Appeals reversed the Northern District of Illinois, however, concluding that Illinois had engaged in permissible content regulation because it did not permit any specialty license plates dealing with the subject of abortion, regardless of viewpoint). Yet, the Seventh Circuit Court of Appeals agreed with the district court's finding that license plates, particularly specialty ones, are a mixture of government and private speech and that after *Johanns*, the four-factor test from *Rose* remains the best mode of analysis to determine who is speaking. *Id.* at 859-64.

¹⁴¹ *Rose*, 361 F.3d at 798-99.

¹⁴² See Manohar, *supra* note 76, at 229 (highlighting the constitutional importance of defining who is speaking—the government or a private entity—in determining whether the law in question is valid).

¹⁴³ See *supra* Part II.B.

¹⁴⁴ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000). The Supreme Court held that students' self-initiated prayers before high school football games, which were permitted by the school district, violated the Establishment Clause. *Id.* The Court concluded, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 302.

¹⁴⁵ See *infra* Parts III.A-B.

compelled subsidy doctrines as applied to Indiana's "In God We Trust" license plates, which, in the end, will likely determine the constitutionality of the plates.¹⁴⁶

A. *Applying the Establishment Clause: Context, Purpose, and Coercion*

The current state of Establishment Clause jurisprudence often leaves courts confused as to how to apply the various doctrines to the issues presented.¹⁴⁷ In fact, the Supreme Court in *McCreary* summarized this confusion as follows:

[I]t has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.¹⁴⁸

Indeed, challenges to the Establishment Clause are often highly fact specific as courts examine many variables.¹⁴⁹ At times, the Establishment Clause's lack of definitional precision resembles the Court's imprecise obscenity or pornography jurisprudence, where Justice Stewart acknowledged the Court was "trying to define what may be indefinable[.]" but that he knew a violation when he saw it; perhaps in this case, despite a clear standard, a reasonable observer knows when an entity endorses religion.¹⁵⁰ Part III.A highlights analytical gaps in the Court's current Establishment Clause jurisprudence with regard to examining the context, purpose, and coercive effects of Indiana's "In God We Trust" plates.¹⁵¹

1. *Revealing Context and Purpose*

Applying Establishment Clause jurisprudence to Indiana's "In God We Trust" license plates presents an interesting conflict because of the

¹⁴⁶ See *infra* Parts III.A-B.

¹⁴⁷ See *supra* Part II.A.1.

¹⁴⁸ *McCreary Cty., Ky., v. ACLU of Ky.*, 545 U.S. 844, 860 n.10 (2005) (citation omitted).

¹⁴⁹ *Id.* at 891-93 (Scalia, J., dissenting) (highlighting the various areas in which the Court has upheld laws that seemed to favor religion).

¹⁵⁰ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting Justice Stewart's oft-quoted statement "I know it when I see it[]" ("it" referring to obscenity), made in reference to an obscene motion picture that was exhibited to an audience in violation of Ohio law).

¹⁵¹ See *infra* Parts III.A.1-2.

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phrase used on the plates and the public discourse surrounding the adoption of the plates.¹⁵² In analyzing cases involving governmental displays of religious symbols, the Court has focused on history and context and has suggested that history and context often reveal the true purpose behind a display of religious symbols.¹⁵³ Since its adoption, the national motto—“In God We Trust”—has survived legal challenges, and indeed, the use of the motto by itself would not likely violate the Establishment Clause.¹⁵⁴ However, having placed the motto “In God We Trust” on Indiana’s license plates, Indiana has taken the phrase to a whole new medium and context that lacks the long history and common usage that has purportedly absolved the phrase of any religious connotation.¹⁵⁵

¹⁵² See *infra* notes 153–80 and accompanying text.

¹⁵³ See Schaps, *supra* note 67, at 1256–57 (stating that the Court must consider the past actions in their entirety because “purpose matters[.]”). Justice Breyer holds this view—that context and the historical development of the item in question matters. *Id.* at 1258–60.

¹⁵⁴ See *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (noting that at least three other circuits have upheld the national motto, “In God We Trust[.]” as constitutional under alleged Establishment Clause violations). The Sixth Circuit acknowledged that the Supreme Court has never questioned the motto against its Establishment Clause jurisprudence, but that the motto would likely withstand any potential attack regarding its validity. *Id.*; see also *Allegheny v. ACLU Greater Pittsburgh Ch.*, 492 U.S. 573, 602–03 (1989) (stating that the national motto and the pledge of allegiance have been considered in dicta of Supreme Court decisions and found to be ceremonial deism). See generally *ACLU of Ohio v. Capitol Sq. Rev. & Advis. Board*, 210 F.3d 703, 720–22 (6th Cir. 2000) (highlighting that the motto is ceremonial deism protected from the Establishment Clause jurisprudence because it has lost its religious message). In *ACLU of Ohio*, the Sixth Circuit noted two decisions from the Ninth and Tenth Circuits, which found that the national motto does not offend the Constitution and would not, by itself, endorse religion to a reasonable observer. *Id.* at 721–22. See also *supra* note 134 (this Note is *not* arguing that the national motto itself violates the Establishment Clause, but rather that its usage in this new context, on a license plate, violates the Establishment Clause, especially when viewed in light of surrounding evidence). Similarly, “In God We Trust” displayed on a license plate contains an attribution problem due to the complexities of whether this is a private statement or endorsement from the government. *Supra* note 134. See generally *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 377 (6th Cir. 2006). Yet, license plates are government property and issued by the government, and thus they still can be identified with the government promoting this message, especially when it is the legislature that enacted this bill and chose to single it out as a cost-free alternative. *Id.*

¹⁵⁵ See *supra* notes 64–67 (discussing how the long history, tradition, and context of the monuments in *Van Orden* were important to upholding their validity, and how Justice Breyer, who provided the concurring vote in *Van Orden*, found these elements especially important to finding the monuments constitutional). See also *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (noting that Establishment Clause cases are highly fact sensitive). See *Allegheny*, 492 U.S. at 603. Although “there is an obvious distinction between crèche displays and references to God in the [national] motto and the pledge[.] . . . [and] history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitim[iz]e practices that demonstrate the government’s allegiance to a particular sect or creed.” *Id.* (footnote omitted). The Court continued:

The Seventh Circuit Court of Appeals in *Indiana Civil Liberties Union v. O'Bannon*¹⁵⁶ reiterated that context matters when determining whether a religious symbol (or phrase) displayed by the state violates the Establishment Clause.¹⁵⁷ Furthermore, the size of the text on a display may shed light on the display's purpose and may affect the determination of whether the display is constitutional.¹⁵⁸ As the United States Supreme Court has noted, it must be determined whether the display is merely passive in its use or actively confronts the passersby.¹⁵⁹ With regard to Indiana's "In God We Trust" license plates, the "In God We Trust" language is placed on Indiana's state-issued license plates that many motorists see regularly.¹⁶⁰ The words on the Indiana license plates,

Indeed, in *Marsh* itself, the Court recognized that not even the "unique history" of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had "removed all references to Christ." Thus, *Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today. Nor can *Marsh*, given its facts and its reasoning, compel the conclusion that the display of the crèche involved in this lawsuit is constitutional. . . .

The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. . . . Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

Id. at 603–04 (citations omitted).

¹⁵⁶ 259 F.3d 766 (7th Cir. 2001).

¹⁵⁷ *Id.* at 778. The original Ten Commandments display was erected in the 1950s and resembled the monument in *Van Orden*; this original monument was destroyed in 1991, and it was the replacement monument that was at issue in this litigation. *Id.* at 768. The court described in detail the visual make-up of the monument and noted that the monument also contained other documents like the state constitution and Bill of Rights. *Id.* at 769. The monument was placed on the statehouse grounds among several other monuments recognizing things such as Indiana women, civil engineers, and Civil War history. *Id.* As the 1991 monument significantly differed from the original display, the Seventh Circuit Court of Appeals determined that the purpose behind the original display would not transfer to the 1991 version. *Id.* at 771. The court determined that, contextually, nothing appeared to detract from the monument's religious message because there was no unifying theme linking the other displays. *Id.* at 773.

¹⁵⁸ *Id.* at 772–73. The Seventh Circuit closely scrutinized the size of the text on the Ten Commandments monument, which was one inch larger than the other documents on the display, and noted that it was highly visible to a passerby and that it drew attention to its religious message, leading to its unconstitutional fate. *Id.*

¹⁵⁹ See *supra* note 55 and accompanying text.

¹⁶⁰ See Bureau of Motor Vehicles Website, <http://www.in.gov/bmv/4645.htm> (last visited Feb. 8, 2009) (displaying the "In God We Trust" license plate for a visual look at the design of the Indiana "In God We Trust" plate). Cf. Plateshack,

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particularly “God” and “Trust[.]” occupy a prominent position.¹⁶¹ Moreover, unlike the situation in *Van Orden*, in which the monument of the Ten Commandments was surrounded by several other secular monuments representing the state’s diverse history, the message on Indiana’s “In God We Trust” license plate is not surrounded by numerous other secular items, displays, or messages that detract from the potentially religious message on the license plate. Moreover, the plate does not contain any explanation that “In God We Trust” is the national motto.¹⁶²

When the phrase “In God We Trust” is considered in conjunction with the history and purpose surrounding the enactment of the “In God We Trust” plates in Indiana, the constitutionality of these plates becomes even less clear.¹⁶³ The Court’s recent decision in *McCreary* appears to revive *Lemon*’s focus on the purpose behind the display, thereby designating purpose as a critical factor in assessing governmental displays of religious messages.¹⁶⁴ The *McCreary* court emphasized that

<http://www.plateshack.com/y2k/Tennessee/tn2007eagle.jpg> (last visited Nov. 10, 2007) (showing Tennessee’s plate with “In God We Trust” on it). A portion of the money collected from people purchasing the Bald Eagle specialty license plate went to a foundation that raises money for protection of the bald eagle. *Id.* See <http://www.eagles.org/> for more information.

¹⁶¹ See *supra* note 160. Compare Bureau of Motor Vehicles Website, <http://www.in.gov/bmv/4645.htm> (last visited Feb. 8, 2009) (displaying a picture of Indiana’s “In God We Trust” license plate, pictured below, to show the font size of “God” and “Trust” in the “In God We Trust” motto), with The Pew Forum on Religion and Public Life, http://pewforum.org/assets/images/in-god-we-trust_large.jpg (last visited Feb. 8, 2009) (displaying a picture of the back of a twenty dollar bill, pictured below, to show the uniformity of the font of all of the words in the “In God We Trust” motto).



¹⁶² See *ACLU Neb. Foundation v. City of Plattsmouth*, 419 F.3d 772, 778–81 (8th Cir. 2005), *rev’g en banc*, 358 F.3d 1020 (8th Cir. 2004) (Bye & Arnold, JJ., dissenting) (discussing that an Establishment Clause challenge should not be decided based on a simple passage of time, mathematical formula, or a basic consideration of history and tradition).

¹⁶³ See *infra* notes 164–80.

¹⁶⁴ See *supra* note 60 and accompanying text. See CHEMERINSKY, *supra* note 18, at 1202 (noting that in *Van Orden* the Court used the symbolic endorsement test to uphold the monument display, while in *McCreary* the Court used the *Lemon* test to strike down the monument display). Justice Souter defended the purpose prong of *Lemon*, despite its harsh critics on the Court, when he stressed that the prong was the very foundation of Establishment Clause jurisprudence. *Id.* at 1203; see also Schaps, *supra* note 67, at 1249 (noting that the decision by the Court in *McCreary* relied heavily on the purpose prong of

courts must investigate "readily discoverable fact[s]," including the legislative history of the display, the sequence of events leading up to the enactment of the display, and comments made by the sponsor of the display.¹⁶⁵ Moreover, the reasonable observer need not "turn a blind eye

Lemon). See generally *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 886-93 (2005) (Scalia, J., dissenting) (when deciding Establishment Clause cases, Justice Scalia often relies on, as he did in *Van Orden*, the history and tradition of the Founding Fathers to validate the challenged practice, whether it is legislative prayer or governmental displays). In *McCreary*, in support of an accommodationist position, Justice Scalia noted that when the Founding Fathers referenced God or the Creator, they presumably spoke of a monotheistic God. *Id.* at 894. Justice Scalia has also often suggested that some members of the Court desire to take religion out of the public sphere altogether, but he recanted this in a story he told while in Europe the day after the September 11, 2001 attacks. *Id.* at 885. He noted that a European judge commented to him after hearing President Bush's television address to the nation, in which the President ended by saying "God bless America," that the judge wished his head of state could espouse similar sentiments during a national tragedy, but was forbidden from doing so because of the strict separation of church and state in many Western European countries. *Id.* at 885-86. But see *supra* note 19 (referring to Justice Brennan's quote in *Abington Sch. Dist.*). While Justice Scalia's positions on the Establishment Clause are reasonable and may very well be the case, Justice Brennan aptly articulated that the diverse mix of religions and irreligion in this country was not likely considered in 1787. *supra* note 19. Although a strict separation approach may alleviate some of the confusing decisions handed down by the Supreme Court because it would provide a clearer approach—similar to Justice Scalia's neutral law of general applicability approach to the Free Exercise clause in *Employment Division v. Smith*, 494 U.S. 872 (1990)—this Note is not suggesting that any public, governmental reference to God must be stricken. This Note merely suggests that the muddled jurisprudence of the Court has quite possibly permitted Indiana to find a loophole in the Court's reasoning by permitting suspicious motivations because of perceived legitimate methods.

¹⁶⁵ *McCreary*, 545 U.S. at 862-63. As the Court noted, "A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion." *Id.* at 863. If an objective observer, aware of the history and other events surrounding the enactment of the display, did not perceive a religious message, then the endorsing concern is essentially eliminated. *Id.*; see also *ACLU v. Rowan Cty.*, 513 F. Supp. 2d 889, 902 (E.D. Ky. 2007) (noting other considerations that a court can evaluate when deciphering the purpose behind the governmental display). But see *McCreary*, 545 U.S. at 900-03 (Scalia, J., dissenting) (criticizing strongly the majority in *McCreary* for exploring the purpose and the legislative history behind a challenged law). In *McCreary*, Justice Scalia noted that the majority manipulated *Lemon's* basic requirements to fit the outcome they desired. *Id.* at 900. Justice Scalia questioned the majority's use of the reasonable observer and wondered why a law could be found unconstitutional because of what a reasonable person would think of a display even though the display could have a purely secular purpose. *Id.* at 900-01. Furthermore, Justice Scalia inquired about the Court's shifting demands for the secular purpose when reviewing a challenged display claiming, "the Court replaces *Lemon's* requirement that the government have 'a secular . . . purpose,' with the heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." *Id.* at 901-02 (citations omitted). See also Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home for Minority Religions?, 81 ST. JOHN'S L. REV. 819, 819-21 (2007) (discussing Justice Scalia's interpretation of the Establishment Clause and his influence over the Court). The article noted that, if given the

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to the context in which [a] . . . [display] arose.”¹⁶⁶ The *McCreary* Court noted that, although a display could violate *Lemon*’s purpose prong because its history manifests a sectarian purpose, another display—similar in content, but lacking such historical sectarian purpose—could be deemed constitutional.¹⁶⁷ “[I]t is appropriate that [displays] be treated differently, for . . . one display . . . [may] be properly understood as demonstrating a preference for one group of religious believers as against another.”¹⁶⁸ Such is indeed the case with Indiana’s “In God We Trust” plates.

The statements Representative Burton made regarding the “In God We Trust” plates, and the context in which he made them, strongly suggest that his intent was to promote religion.¹⁶⁹ According to the Indiana House of Representatives-Republican Caucus, Representative Burton stated,

“We put this bill forward so that our citizens could express their belief regardless of their religious background[.]” . . . “This license plate reflects Hoosiers’ faith and values[.] . . . Because this is non-denominational, Hoosiers will pay for the cost to

chance, Justice Scalia would likely replace the *Lemon* test with the actual coercion test. *Id.* at 831–35. However, the Court in *McCreary* highlighted various decisions where the Court did require a heightened secular purpose. *McCreary*, 545 U.S. at 859–60 n.9.

¹⁶⁶ *McCreary*, 545 U.S. at 866.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 866 n.14.

¹⁶⁹ See H.B. 1029, 114th Gen. Assem., Reg. Sess. (Ind. 2005) (proposing “In God We Trust” license plates for Indiana motorists); see also H.B. 1013, 114th Gen. Assem., Reg. Sess. (Ind. 2006) (proposing the current version of the “In God We Trust” license plates); H.B. 1189, 114th Gen. Assem., Reg. Sess. (Ind. 2005) (proposing an “In God We Trust” sticker to be placed on license plates for a fee of twenty-five dollars); H.B. 1279, 113th Gen. Assem., Reg. Sess. (Ind. 2003) (proposing an “In God We Trust” license plate that the legislature did not ultimately authorize). See *Hoosier Values at the Statehouse*, Vol. 1 Issue 1 (May 9, 2006) (noting that various faith-based groups have been working on the design for the “In God We Trust” license plate). The article emphasized faith and values for Indiana residents and appeared alongside other faith-based topics. *Id.* Governor Daniels, referring to the “In God We Trust” plates, stated, “Our Constitution restricts the establishment of religion, it does not require the absence of it.” *Id.* See Huffstutter, *supra* note 11, at 14 (noting that originally there was contention as to what the funds recovered from the “In God We Trust” license plates would be used for, whether these funds would go to religious groups, and whether the license plates violated the Establishment Clause; thus, Representative Burton must have strategically avoided these issues by categorizing the plates as standard plates rather than specialty plates). An interesting question is that if these plates are purely intended to promote our national heritage, then why should there be any discussion or fear on the part of Representative Burton as to where the funds would go? See Bradner, *supra* note 74, at A3 (perhaps one State Representative wondered this as well when he voted “no” to the license plate because he felt it “pander[ed] to the religious[.]”).

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produce the plate and there will be no money going to any specific organization. . . . As our new Governor said[,] 'we are a state of people who speak plainly,' that's what those who purchase this plate are doing.'¹⁷⁰

Similar comments were made in *McCreary* by a pastor, who accompanied one of his parishioners, the Judge-Executive, at the courthouse ceremony where the Ten Commandments were unveiled.¹⁷¹ The pastor stated that the Ten Commandments represented a "creed of ethics[.]" and that displaying them was "one of the greatest things the judge could have done to close out the millennium."¹⁷² Even though various members of the Court have made conflicting statements regarding the precise standard required by *Lemon's* purpose prong, the majority in *McCreary* explained that the secular purpose of a display must be both sincere and genuine.¹⁷³ Both the legislative history and the

¹⁷⁰ See Indiana House of Representative-Republican Caucus, http://www.in.gov/legislative/house_republicans/thisweek/index050121.html (last visited Oct. 11, 2007). Representative Burton also claimed that, "[w]ith this proposal, there is no fiscal impact to the state. If the bill makes it out of the Indiana Senate and approved by the Governor, it will be available for purchase beginning January 1, 2006. Any license holder may apply to purchase the 'In God We Trust' plate." *Id.*

¹⁷¹ *McCreary*, 545 U.S. at 851 (noting that the county legislative body issued an order "requiring the display [to] be posted in a very high traffic area of the courthouse[.]" (alteration in original) (internal quotations omitted).

¹⁷² *McCreary*, 545 U.S. at 851. See also *supra* note 38 (discussing the display of a picture of Representative Burton presenting a ceremonial license plate to his pastor at a ceremony marking the distribution of the new license plate). This appears similar to the hanging ceremony of the Ten Commandments display that was at issue in *McCreary*. 545 U.S. at 851.

¹⁷³ See *supra* note 60 and accompanying text. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia and Thomas, J.J., concurring) (Justice Scalia, a vocal critic of the Court's Establishment Clause jurisprudence, has led a spirited crusade to abandon *Lemon's* three-pronged test). Justice Scalia's disgust for the *Lemon* test was humorously captured when he wrote:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again[. . . .] [t]he secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish to do so, but we can command it to return to the tomb at will.

Id. at 398-99. *Lamb's Chapel* involved a school district that had denied a local evangelical church the ability to use school facilities after normal hours to show a series of films, which focused on child rearing and Christian values. *Id.* at 387-89. The Court held that the school district's actions violated the public forum doctrine, and permitting the films to be shown did not violate the Establishment Clause, nor did it offend *Lemon's* three-part test. *Id.* at 390-95. Justice Scalia's concurrence criticized the Court's invocation of the *Lemon* test as misguided. *Id.* at 399-400 (stating, "I will decline to apply *Lemon*—whether it validates or invalidates the government action in question . . ."). Justice Scalia is a strong advocate for

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purpose behind the enactment of a display must be considered when assessing the actual effect of the display.¹⁷⁴ Said differently, a theoretically legitimate end should not be accomplished by impermissible means; therefore, it is not only important to consider the display itself, but also the content and history of the display.¹⁷⁵

Similarly, under Justice O'Connor's modified *Lemon* test, sometimes referred to as the Endorsement test, a reasonable observer in Indiana might regard Indiana's "In God We Trust" license plates as carrying a religious message, not merely the national motto.¹⁷⁶ Significantly, as the Court in *McCreary* explained, "reasonable observers have reasonable memories," and a reasonable Indiana citizen is unlikely to forget the controversy surrounding the purpose of a particular governmental display.¹⁷⁷ Indeed, the reaction by the public to the religious overtones of Indiana's "In God We Trust" license plates is evidenced in the numerous newspaper and internet-based articles and commentary accompanying these articles.¹⁷⁸ For instance, one person who purchased

abandoning the *Lemon* test in Establishment Clause challenges due to its unmanageable standards and inconsistent application. *See id.*

¹⁷⁴ *See supra* Parts III.A.1, IV.A (discussing Justice Breyer's approach in *Van Orden*).

¹⁷⁵ *See supra* Part III (referring to *McCreary* and the county's efforts to find a secular purpose for the Ten Commandment's display through its continual transformations).

¹⁷⁶ *See supra* note 10; *see also* Taking Down Words: In God We Trust: New License Plates Are As Popular As Predicted Last Year, http://www.takingdownwords.com/taking_down_words/2007/01/in_god_we_trust.html#comment-27442014 (last visited Nov. 10, 2007) (posting comments on a blog that highlight the reaction by the public to these plates; most see it as making a religious statement).

¹⁷⁷ *McCreary*, 545 U.S. at 866 (noting that "[its] precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose[']'" (second alteration in original). Moreover, the Court emphasized that "purpose matters[]" and that "it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether [the display] lacks a history demonstrating that purpose." *Id.* at 866 n.14.

¹⁷⁸ *See generally* Northwest Indiana Times: 'In God We Trust' Motto Still Causes Debate, http://www.nwitimes.com/articles/2007/10/01/news/top_news/docb2b32b03ca4d304f86257366007e1c1d.txt (last visited Nov. 10, 2007) (posting numerous comments by local citizens which revealed the overwhelming religious sentiments and reactions to the use of the motto on Indiana's plates). The following comments were taken from people posting remarks on the website after the article was published: "Plain and Simple. People of ALL faiths should be respected, and should those with no faith. The government must be here to help and service all of us, not just a certain group. In doing so, they must remain [sic] NEUTRAL on religious beliefs [sic] and not support anyone belief system." *Id.* While another person said, "Hey, if you donnn't [sic] like the phrase 'In GOD We Trust' on your license plate, buy a vanity plate. I personally trust in God[.]" and another person titled "More Christians than you think" wrote, "I believe in God but was disappointed when I renewed my registration online and was NOT given the option of obtaining one of these plates. So, there would be a lot more of these plates riding around. Do any of the gang members have these plates?" *Id.*

an "In God We Trust" license plate stated, "You know, I just like the idea of going with one that talks about God[] . . . Besides, it's cheaper [than a specialty license plate] and that's what really sells me on it."¹⁷⁹ Yet, as the Court in *Allegheny* suggested, the government may not favor any religion over irreligion, even a monotheistic, non-denominational religion.¹⁸⁰

2. Coercion: Safety in Numbers?

As Indiana's "In God We Trust" license plates become more common, public acceptance of the plate gains strength.¹⁸¹ To be sure, although Indiana motorists are not being forced into choosing the "In God We Trust" license plate, implicit coercion may be more likely to occur as the plates become more popular.¹⁸² The proliferation of "In God We Trust" plates may leave certain segments of society feeling as though they are outsiders and not part of the popular group.¹⁸³ Further, some anecdotal evidence shows that Bureau of Motor Vehicle ("BMV") employees, at least initially, suggestively favored the "In God We Trust" license plate over the standard plate to its customers.¹⁸⁴ This would have resulted in some individuals, who were visiting the BMV to receive their new license plates, being forced to speak by disclosing their opposition to the plate's message to the BMV employees, thereby casting themselves as outsiders and not within the favored group.¹⁸⁵

¹⁷⁹ Huffstutter, *supra* note 11, at 14.

¹⁸⁰ *Allegheny v. ACLU Greater Pittsburgh Ch.*, 492 U.S. 573, 593-97 (1989). The government cannot promote or support religious messages by religious organizations either. *Id.* at 600. *See supra* notes 176-79 (Thus, the use of "In God We Trust" on Indiana's license plates could at the very least be viewed as promoting religion in general, even if a particular God is not explicitly named).

¹⁸¹ *See* Inside Indiana Business, <http://www.insideindianabusiness.com/newsitem.asp?ID=24744> (last visited Nov. 10, 2007) (noting that more than one million "In God We Trust" license plates have filled Indiana roadways). Representative Burton stated, "I am proud that the people of Indiana are standing up for our nation's motto and choosing the 'In God We Trust' license plate[] . . . Even though some people are challenging the word 'special' surrounding the alternative license plate, the only thing that is truly special about this plate is that people want to display it." *Id.* *See supra* notes 12-14 (discussing the mixed messages as to whether the Indiana "In God We Trust" plate is a specialty plate or an alternative regular plate).

¹⁸² *See supra* note 181.

¹⁸³ *See Furthermore, supra* note 6, at 12A (asking if drivers are beginning to "wonder if you might be the last driver without an 'In God We Trust' license plate?").

¹⁸⁴ *See* Brander, *supra* note 74, at A3 (noting that there have been confirmed allegations that some BMV employees have pushed the plates upon motorists).

¹⁸⁵ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (recognizing that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all[]").

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Similarly, various psychological studies show that dissemination by the government of a perceived religious message can change the attitudes of people.¹⁸⁶ However, even Solomon Asch, the experimenter who conducted the line studies, recognized that the theory of group norms has its limits.¹⁸⁷ It is true that Indiana citizens can express their displeasure with the “In God We Trust” license plates in a variety of ways, which could counter the effect that a perceived group adherence may have.¹⁸⁸ But this situation necessarily forces citizens to speak, which violates the principle established in *Wooley* that inherent in the First Amendment is “the right to speak freely and the right to refrain from speaking at all.”¹⁸⁹ Just as the Court has cautioned against disseminating a message to nonadherents that they are outsiders, the court should also acknowledge the powerful psychological impact of group norms and the desire by individuals to adhere to a collective message.¹⁹⁰

B. An Analytical Reflection: A Taxing Approach

Throughout their history, license plates were used merely to identify the cars with their owners.¹⁹¹ Today, the license plate has moved well beyond the simple alphanumeric combination on a plain-colored background toward a mobile billboard of sorts that carries a message for

¹⁸⁶ Manohar, *supra* note 76, at 236 (listing three cues that the government can use to better effectuate its message). One of the cues mentioned deals with pure numbers noting that “[t]he government can increase the persuasiveness of its speech by enlisting multiple, ostensibly independent agents . . . to send its message.” *Id.* Another cue that is present in Indiana’s situation is popularity because “[i]f the government uses private speakers to make its message seem more popular than it actually is . . . it can increase the persuasiveness of that message.” *Id.*

¹⁸⁷ PAICHELER, *supra* note 85, at 88.

¹⁸⁸ Manohar, *supra* note 76, at 235 (noting that drivers could place bumper stickers on their cars or utilize other means to display their opposition, thus keeping the public discourse open to their ideas). Likewise, Indiana motorists can let their voice be heard through editorial columns, as some have done, or by not choosing the plate altogether. *See generally id.*

¹⁸⁹ *Wooley*, 430 U.S. at 714.

¹⁹⁰ *See supra* notes 181–89. *See also* CHEMERINSKY, *supra* note 18, at 1226–27 (discussing the government’s interactions with religion and the premise of ceremonial deism). Chemerinsky pointed to the factors highlighted by Justice O’Connor that would guide courts as to whether government interactions would be deemed ceremonial deism or a violation of the Establishment Clause. *Id.*

¹⁹¹ *See* Indiana Bureau of Motor Vehicles, <http://www.in.gov/bmv/vote/history/> (last visited Nov. 10, 2007) (discussing the history of Indiana license plates with illustrative pictures showing the progression of the design of the “In God We Trust” plate). *Cf.* Massachusetts RMV Website, <http://www.mass.gov/rmv/history/index.htm> (last visited Nov. 10, 2007) (discussing the history of license plates in general and, specifically, in Massachusetts).

almost any interest a person desires.¹⁹² This Section explores the collision of compelled subsidies jurisprudence and Indiana's "In God We Trust" license plates, and the mixture of government and private speech that results.¹⁹³

Indiana's "In God We Trust" license plate presents a unique conflict because it contains elements of *Bredesen* and *Rose*.¹⁹⁴ In particular, the plate has been designated by Indiana's BMV as both an alternative regular plate and a no-fee specialty plate.¹⁹⁵ Although the circuit courts in *Bredesen* and *Rose* focused on whether the states had engaged in viewpoint discrimination, the analysis used by both courts highlights the complexity involved in determining the speaker with regard to the message on a license plate.¹⁹⁶ As the dissent in *Bredesen* aptly noted, to view a license plate as purely government speech would oversimplify the situation.¹⁹⁷ The Southern District Court of West Virginia, in *West Virginia Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*,¹⁹⁸ acknowledged the lack of guidance from the Court in *Johanns* in determining "when the government is speaking and when it is

¹⁹² See Indiana Bureau of Motor Vehicles, *supra* note 191 (noting that Indiana developed specialty plates in 1977 and that currently, in Indiana, there are over 75 specialty plates available to choose from for an extra cost). See also Massachusetts RMV Website, <http://www.mass.gov/rmv/history/index.htm> (last visited Nov. 10, 2007) (noting that in 1993, Massachusetts issued a high number of specialty plates).

¹⁹³ See *infra* Part III.B.

¹⁹⁴ See *supra* Part II.B and accompanying text (discussing differences between government and private speech in the context of license plates).

¹⁹⁵ See Indiana Bureau of Motor Vehicles: Indiana's License Plate, <http://www.in.gov/bmv/plates/index.html> (last visited Nov. 10, 2007) (noting that the "In God We Trust" license plate is a "'no-fee' specialty plate"); BMV Unveils 'In God We Trust' License Plate Design, <http://www.insideindianabusiness.com/newsitem.asp?ID=19174> (last visited Nov. 10, 2007) (noting that "[n]o additional fee [beyond the standard charge] will be enforced for purchase of the ['In God We Trust'] plate, as is the case with all other specialty license plates[']'). But see H.B. 1013, 114th Gen. Assem., Reg. Sess. (Ind. 2006) (stating in the bill that "it is not a special group recognition license plate[']"); Indiana Bureau of Motor Vehicles: Indiana's License Plate, <http://www.in.gov/bmv/platesandtitles/plates/> (last visited Nov. 10, 2007) (noting that this is the "state's first alternative regular plate").

¹⁹⁶ See *supra* Part II.B and accompanying text (noting that the *Bredesen* and *Rose* courts dealt with "Choose Life" specialty plates and determined whether the respective states engaged in viewpoint discrimination when permitting various pro-life organizations to create them).

¹⁹⁷ *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380-85 (6th Cir. 2006) (Boyce, J., concurring in part, dissenting in part).

¹⁹⁸ 512 F. Supp. 2d 424 (S.D. W.Va. 2007) (granting a preliminary motion, and concluding that a ban on limited video lottery advertising regulated private speech).

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regulating private speech.”¹⁹⁹ The district court synthesized other cases to reach its conclusion.²⁰⁰

The *Musgrave* court articulated four guiding principles, which have developed from *Johanns* and other government speech cases.²⁰¹ First, speech is more likely to be government speech if the message asserts an “overarching message.”²⁰² Second, speech is more likely to be government speech if the government asserts a high “degree of control . . . over its purported message[.]”²⁰³ Third, speech is more likely to be government speech when the government funds the activity at issue or provides a benefit.²⁰⁴ Fourth, speech is more likely to be government speech when the government asserts a particular “rationale for insulating [itself] from normal First Amendment scrutiny when it is speaking[.]”²⁰⁵ To resolve the complexity of who is speaking—the government or private citizens—the *Musgrave* court then adopted the four-factor test elucidated in *Rose*.²⁰⁶ The *Musgrave* court noted that this four-factor test was consistent with the decision in *Johanns* and that, in certain situations, the speech occurring can be both government and private, as was the case in *Rose*.²⁰⁷ Therefore, even after *Johanns*, *Rose*’s four-factor test is best equipped to handle the conflicting speech that appears on license plates, especially specialized plates that bear a message.²⁰⁸

Applying this four-factor test to the “In God We Trust” license plates produces a mixed result.²⁰⁹ The central purpose behind the “In God We Trust” plate presents a fascinating problem, in part because of

¹⁹⁹ *Id.* at 432.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* (emphasizing that in such cases the government would be politically accountable for its message).

²⁰⁶ *Id.* at 435. The district court focused on the “level of control [that] the government can exercise over the content of the speech.” *Id.* at 430. If the government is speaking, it can select and tailor its message as it sees fit, whereas if the government engages in private speech, it is limited. *Id.* The *Musgrave* court also discussed in detail the government speech that was at issue in *Rust*, which was found permissible. *Id.* at 430–31. The *Musgrave* court concluded that the rationale behind allowing government speech to occur, as in *Rust* and other cases, was because the electorate can hold the speakers accountable if they do not like the message and use the ballot box in future elections to change the message. *Id.* at 431.

²⁰⁷ *Id.* at 433.

²⁰⁸ See *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 863–64 (7th Cir. 2008) (noting that the Fourth Circuit’s four-factor test remains applicable when dealing with license plates).

²⁰⁹ See *infra* notes 210–21 (describing the application of the four-factor test to Indiana’s plates).

Representative Burton's mixed statements regarding the plate's creation and the public reaction to its alleged purpose.²¹⁰ Although Indiana likely wants to be identified as the speaker of the plate's message so that the reasoning set forth in *Johanns* would apply—precluding a First Amendment challenge—if the government was identified as promoting a religious message, this could result in an Establishment Clause problem.²¹¹ The first element of the four-factor test—whether the government asserts an overarching message—more likely cuts in favor of government speech because the state was trying to promote a message as evidenced by Representative Burton's statements.²¹² Similarly, the second factor of editorial control more likely cuts in favor of government speech because the message on Indiana's "In God We Trust" license plate originated in the state legislature, and although private faith-based groups aided in crafting the design of the plate, the government maintained final editorial control.²¹³ Similar to the facts and reasoning in *Rose*, where the South Carolina license plate originated with the state and the legislature chose the "Choose Life" message, Indiana too would likely be found as the creator of the message displayed on its "In God We Trust" plates.²¹⁴

²¹⁰ See *supra* notes 37, 176–78 and accompanying text. See also *Musgrave*, 512 F. Supp. 2d at 433 (indicating that an important consideration related to the first factor of *Rose*'s four-factor test in determining whether speech is government or private is whether the government seeks to raise revenue or promote its message).

²¹¹ See *supra* Parts II.A.1, II.B.1 (presenting various court cases and their respective reasoning as it relates to when a government display of religious symbols violates the Establishment Clause and when the government is impermissibly compelling a subsidy).

²¹² See *supra* note 210.

²¹³ See *supra* note 133 and accompanying text (noting that Tennessee maintained editorial control over the "Choose Life" plate in *Bredesen*).

²¹⁴ See *supra* note 133 and accompanying text (referencing the factual scenario in *Rose*, where the state maintained primary control over the content of its "Choose Life" message leading the Fourth Circuit Court of Appeals to find that the second factor of the four-factor test weighed in favor of South Carolina). See also *Musgrave*, 512 F. Supp. 2d at 433–34 (noting that the second factor is relevant only when the government promotes its message or when the government's central purpose of its message is unclear). If the central purpose is unclear—as it may be with the "In God We Trust" license plates—then the second factor of the test, editorial control, may shed light on the central purpose analysis used when determining the first factor. *Id.* at 434. "There is a correlation between the presence of a programmatic message and whether the second [...] factor favors a finding of government or private speech. When courts determine that the first [...] factor favors a finding of government speech, they usually also find that the second [...] factor weighs in favor of government speech, and vice versa." *Id.* at 437. The *Musgrave* court noted that if, however, the government promotes a message, then the remaining three factors are to be considered in determining whether the government's message may be attributed to a private speaker. *Id.* The court noted that finding government speech based on the second factor helped prevent the message from being attributed to private speakers, in which case the government does not have to identify itself as the speaker. *Id.* at 436–37. The court

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However, with regard to the third factor of this four-factor test—the identity of the speaker—the private owner would be the speaker because the plate is on the private owner’s vehicle and the private owner chose to display the message.²¹⁵ As the district court in *Musgrave* concluded, “It is not difficult to think of situations where the owner of an item is different from the person speaking about the item.”²¹⁶ The court noted that the technical ownership of the item, in Indiana’s case a license plate, was not always outcome determinative, but instead it was “ownership of the means of communication that was important.”²¹⁷ Thus, the third factor cuts in favor of private speech because most people would likely identify the speaker to be the vehicle owner.²¹⁸ Similarly, the fourth factor—who bears the ultimate responsibility for the speech—weighs in favor of the private individual, even if not as heavily, for the same rationale as the third factor.²¹⁹ However, unlike in *Rose* where South Carolina charged a fee to display the “Choose Life” plates, Indiana does not charge a fee to display the “In God We Trust” plates.²²⁰ Nonetheless, applying the

stated, “First Amendment issues may arise, however, when viewers identify government speech as private speech.” *Id.* at 437.

²¹⁵ See *supra* notes 134–36 and accompanying text (noting that specialty license plates are often identified with the drivers and owners of vehicles). See also *Musgrave*, 512 F. Supp. 2d at 434 (stressing that although the Court in *Johanns* did not address the third and fourth factors, it did not foreclose the use of these factors in future cases). The district court, taking its guidance from the Supreme Court, cautioned against reading the principles in *Rust* too broadly. *Id.*

²¹⁶ *Id.* at 437.

²¹⁷ *Id.* at 434.

²¹⁸ See *supra* notes 134–36 and accompanying text (discussing the four-factor test used by the Fourth Circuit Court of Appeals in *Rose*). See also *Musgrave*, 512 F. Supp. 2d at 437 (stating, “common sense suggests that the LVL [limited video lottery] retailers are the literal speakers when their own business names are at issue. Similarly, passersby who view limited video lottery advertising will likely assume that the private establishment doing the advertising is the speaker, not the State of West Virginia[.]”). These situations parallel that of a license plate displayed on a motorist’s car.

²¹⁹ See *supra* note 134 (discussing specifically the third and fourth factors of the four part test used in *Rose*). See also *Musgrave*, 512 F. Supp. 2d at 438 (cautioning that simply because the state creates the existence of the item in question does not always make it responsible for the speech put forth by private parties on that item). The district court noted that simply because the state legalized the video lottery machines and was responsible for their existence did not mean the state was responsible for the speech put forth by the private LVL retailers on these machines. *Id.* If this premise were true, then the fourth factor “would always favor the government because the government can always be held responsible for its regulatory decisions.” *Id.*

²²⁰ See *supra* notes 6, 121 (noting that no additional fee is charged for choosing the “In God We Trust” license plate). See *supra* notes 121–22 (noting that the dissent in *Bredesen* suggested that the compelled subsidy doctrine would apply if no fee were charged to individuals who selected the specialty license plates). However, even under *Johanns*, the question of who is speaking would still need to be determined, and in the context of license plates, it appears that the four-factor test set-forth by the Fourth Circuit Court of Appeals in

Fourth Circuit's reasoning, Indiana's license plates appear to carry mixed speech by both the government and the private vehicle owner.²²¹

Because Indiana's "In God We Trust" license plates likely constitute mixed speech, the next issue to be decided is whether this mixture amounts to a compelled subsidy.²²² A complication arises here because the message on a license plate is not easily identified with the government.²²³ If private speech is occurring, then *Aboud v. Detroit Board of Education*²²⁴ should control the analysis, leading to the conclusion that a compelled subsidy, in theory, is taking place because the state is forcing taxpayers to pay for a private message with which they disagree.²²⁵ However, the Court's expanding definition of government speech, and its continued erosion of taxpayer standing to challenge these claims, especially after *Hein v. Religious Freedom Foundation*,²²⁶ may prohibit such an action.²²⁷ Therefore, although a compelled subsidy claim might be actionable, unless a citizen of Indiana could demonstrate a sufficient emotional injury, his claim may be barred by the doctrines of taxpayer standing and generalized grievances.²²⁸

Rose is the best tool for managing the complexities involved in addressing who is speaking. *supra* note 140.

²²¹ See *supra* notes 209–20 and accompanying text.

²²² See *infra* notes 223–27 and accompanying text.

²²³ See *infra* Parts IV.A.–B. (noting the Court's statement in *Wooley* that a license plate can serve as a mobile billboard). See generally *supra* notes 220–22 (suggesting that Indiana's "In God We Trust" plates seem to interplay the analysis of *Johanns*, but as explained above, the Fourth Circuit's four-factored test seems better-equipped than *Johanns* pure government speech doctrine to analyze the issue).

²²⁴ 431 U.S. 209 (1977).

²²⁵ *Id.* at 234–35 (recognizing that a person "should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State[]"). The Court referenced James Madison's sentiments, "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" *Id.* at 234 n.31. However, in the past, taxpayers have subsidized copies of prayers that were collected and published in books for distribution to legislative members and nonmembers. See *Chambers v. Marsh*, 675 F.2d 228, 235 (8th Cir. 1982), *rev'd*, *Marsh v. Chambers*, 463 U.S. 783 (1983).

²²⁶ *Hein v. Religious Freedom Found.*, 127 S.Ct. 2553, 2568 (2007).

²²⁷ See *supra* notes 33, 130 (discussing *Hinrichs* and the proposition that there is still a possible cause of action pursuant to the compelled subsidy doctrine if it can be shown that a person is affected emotionally by exposure to the license plate).

²²⁸ See *supra* notes 223–27 and accompanying text.

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IV. PROPOSED COURT ANALYSIS: MCCREARY SUGGESTS THAT CONTEXT AND PURPOSE MATTER IN ESTABLISHMENT CASES, AND WHO IS SPEAKING – GOVERNMENT OR INDIVIDUAL – DETERMINES COMPELLED SUBSIDIES

The problem with Indiana's "In God We Trust" license plates is that, through them, Indiana appears to be on the cusp of violating both the Establishment Clause and compelled subsidy doctrines, but the plates nonetheless may escape invalidation.²²⁹ The crux of the problem emerges from the alleged purpose behind the plates and its coercive consequences; more particularly, the plate not only contains a religious message that is viewed as endorsing religion, but it also forces citizens of Indiana who disagree with the message to pay for other private citizens to display it.²³⁰ To avoid such a capricious outcome, this Note proposes that courts should adopt the six interpretative tools, articulated by Justice Breyer in *Van Orden* and *McCreary*, as a more nuanced approach to address an Establishment Clause challenge to Indiana's "In God We Trust" plates if one were brought or in cases similar to it.²³¹ Furthermore, courts should apply *Rose's* four-factor test when dealing with a mixed speech issue, which here resulted from the message on Indiana's "In God We Trust" license plates.²³² Such analysis leads to the conclusion that Indiana's "In God We Trust" plate, in its current form, is unconstitutional.²³³

²²⁹ See *infra* notes 230–33 (discussing the Establishment Clause and compelled subsidy complications surrounding Indiana's "In God We Trust" license plates and its unconstitutionality as currently administered). See generally *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844 (2005). Such a danger was reflected by both Jefferson when he "refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution[.]" and Madison when he "criticized Virginia's general assessment tax not just because it required people to donate 'three pence' to religion, but because 'it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.'" *Id.* at 878.

²³⁰ See *supra* Part III.

²³¹ See *infra* Part IV.A.

²³² See *supra* note 208 (referencing the Seventh Circuit Court of Appeals holding in *Choose Life Ill., Inc* that *Rose's* four factored test is still appropriate when dealing with speech issues and license plates). See also *supra* notes 96, 116–20 (Such analysis would still permit a finding that would be consistent with the doctrine of government speech expounded in *Johanns*). If the "In God We Trust" license plate were the sole official plate of the state and the only one available to residents at no extra cost, then the third and fourth factors would weigh more heavily to finding government speech because the government would more likely be affiliated as the literal speaker. *Supra* notes 116–20. Furthermore, the government would bear more of the direct responsibility for the speech because a driver would not have, in effect, the same choice as Indiana residents currently do. *Supra* notes 116–20.

²³³ See *supra* notes 19–21 (putting forth the proposed analysis a court should use if considering a law suit regarding Indiana's "In God We Trust" license plates on Establishment Clause and compelled subsidy grounds). See generally *McCreary*, 545 U.S. at

2009] *Indiana's "In God We Trust" License Plates* 1367A. *Navigating the Establishment Clause Waters: Purpose, Perception, and Precedent*

Due to complex factual scenarios frequently presented to courts in Establishment Clause challenges and the tenuous balancing of free exercise, freedom of expression, and freedom of association concerns that often occurs, this Note proposes that Justice Breyer's six interpretative tools would be the most effective and pragmatic method for analyzing religious displays by the government and whether Indiana's "In God We Trust" plates violate the Establishment Clause.²³⁴ Justice Breyer applies his interpretive "tools" when reviewing litigation before the Court; he considers the text of the statute (or in this case the content of the display), history, tradition, precedent, the purpose of a statute (or here the purpose of the display), and the consequences of the law (or display).²³⁵ His method incorporates the various perspectives of the Court—separation, neutrality, and accommodation—while at the same time combining the three Establishment Clause tests of *Lemon*, endorsement, and coercion.²³⁶ Its application to Indiana's "In God We Trust" plate would likely render the plate unconstitutional.

If *McCreary* is not an aberration, then Indiana's "In God We Trust" license plate likely violates the Establishment Clause because it lacks the

908 (Scalia, J., dissenting) (Post *McCreary*, where the majority sorted through the changing displays of the two Kentucky Courthouses, revealing the creators' underlying religious purpose, it seems as though Indiana has found a way to move through the Court's jurisprudence seemingly undetected). Justice Scalia cautioned the Court of this fallacy when he stated,

Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

Id. (Scalia, J., dissenting).

²³⁴ See *supra* Parts II.A.1, III.A.1 (presenting Justice Breyer's analysis, used when deciding Establishment Clause cases, and discussing how Justice Breyer utilizes his six interpretative tools to determine whether an Establishment Clause violation exists).

²³⁵ See Lithwick, *supra* note 19. Lithwick's article discussed the debate between Justices Breyer and Scalia on Constitutional theory and their differing interpretations of how to analyze a case on review. *Id.* Justice Breyer claimed the Court would be misguided to not include the last two parts of his interpretive method, while Justice Scalia considered these last two parts too subjective and misleading. *Id.* Justice Breyer proclaimed that if only Constitutional truths mattered, then the Court should have nine historians instead of lawyers, to which Justice Scalia countered that such a scenario is better than having nine ethicists deciding the Constitutional fate of a case on his or her personal whim. *Id.*

²³⁶ See *supra* Parts II.A.1-2 and accompanying text (discussing various Establishment Clause cases and the analyses utilized by the courts in each case discussed).

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required secular purpose and is therefore viewed as endorsing religion.²³⁷ Although the text of the statute that authorized the creation of the plates does not contain a blatant religious statement, the State of Indiana endorses religion by not charging a fee for the “In God We Trust” plate like it charges for other specialty plates.²³⁸ Just as the Ten Commandments could be displayed in either a sectarian or non-sectarian manner, this Note contends that the same argument can be made for the national motto, especially as used on Indiana’s license plate.²³⁹ Similarly, while the tradition and history of the phrase “In God We Trust” itself has become more secularized through the passage of time, it lacks any tradition of being placed on a license plate.²⁴⁰ In fact, in line with *stare decisis*, judicial precedent established in *McCreary* suggests that Representative Burton’s statements and continued efforts to promote the plates can be interpreted as his desire to advocate his strong religious convictions. This inference is enhanced when viewed in the wake of legislative prayer litigation.²⁴¹ Furthermore, Indiana’s actions lack

²³⁷ See *supra* notes 59–63 (discussing *McCreary* and its holding that the displays of the Ten Commandments were unconstitutional for endorsing religion).

²³⁸ See *supra* notes 6, 169 and accompanying text (referring to the bill’s history and text).

²³⁹ See *supra* note 169. See Anthony Flecker, Comment, *Though Shalt Make No Law Respecting an Establishment of Religion: ACLU v. McCreary County, Van Orden v. Perry, and the Establishment Clause*, 21 ST. JOHN’S J. LEGAL COMMENT, 239, 247–49 (2006) (noting that drawing the distinction between government and private speech is critical in determining whether the speech is constitutional or violates the Establishment Clause). Flecker further explored the dynamic of whether speech takes place in a public forum or on private property. *Id.* at 248–49.

²⁴⁰ See *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting). Even Justice Scalia, a member of the Court less likely than other members to find an Establishment Clause violation, recognized that the Ten Commandments could, depending on their use, violate the Establishment Clause. *Id.* See also *supra* notes 133–36 (applying Rose’s four-factor test). Therefore, though it may be challenging to persuade the Court to determine that the National motto—“In God We Trust”—advances a religious message, this Note contends that, depending on the context in which this motto is used, it may indeed advance a religious message. *Supra* notes 133–36. Specifically, when the “In God We Trust” message appears on license plates, this raises the issue of attribution because a license plate is not similar to coinage or government buildings that are clearly representative of the government’s own message. *Supra* notes 133–36. Moreover, a person does not “choose” the coins or money that he or she carries in the same way that he or she “chooses” which license plate to display on his or her vehicle. See *supra* note 136. See also *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). To be sure, as the Court suggested in *Wooley*, a person’s license plate is much more of a private billboard than the coins he or she possesses. *Id.* See generally *supra* note 136. Therefore, when the “In God We Trust” message appears on an individual’s license plate, it advances a religious message. See generally *supra* note 136.

²⁴¹ See *supra* notes 31–35 and accompanying text. See generally *McCreary*, 545 U.S. at 863 (Nevertheless, although the Court stated that “[a] secret motive stirs up no strife and does nothing to make outsiders of nonadherents, . . .” Representative Burton’s statements may not leave his intentions completely secret).

judicial precedent: recent court decisions concerning license plates (*Rose* and *Bredesen*) have primarily dealt with viewpoint discrimination involving the "Choose Life" message—not Establishment Clause concerns.²⁴²

Justice Breyer's analytical tools provide a workable mode of analysis that, as demonstrated in *McCreary*, shed light on the true purpose behind the "In God We Trust" plates.²⁴³ Failure to utilize Justice Breyer's analytical "tools" would allow Indiana's General Assembly to hide behind their legislative methods to achieve their impermissible ends of endorsing religion.²⁴⁴ Indiana's "In God We Trust" license plates may not fit neatly into the Court's Establishment Clause jurisprudence because of the phrase used; however, based on *McCreary*'s precedent, a court should find an Establishment Clause violation.²⁴⁵

The "In God We Trust" license plate appears to violate even the tenets of an accommodationist's perspective because the actions taken by the General Assembly appear to be preferential to a particular group at

²⁴² See *supra* Part II.B (discussing issues concerning viewpoint discrimination in *Bredesen* and *Rose*).

²⁴³ See *supra* Parts II.A.1, III.A (discussing the analysis Justice Breyer has applied in various Establishment Clause cases and how his six interpretative tools have contributed to this analysis).

²⁴⁴ See *supra* Part III.A (suggesting that Indiana's "In God We Trust" license plates were created with an impermissible religious purpose). See also *supra* note 233 (while Justice Scalia cautions that applying Justice Breyer's six interpretive tools would cause government entities to hide their true religious motives—following, of course, the legal advice rendered by government lawyers—it follows from general criminal law principles that one is not punished for his or her mere thoughts, but is punished only when those thoughts are combined with action); *supra* Part II.A.2 (explaining that verbal expression combined with actions may create the appearance of endorsement within the community, leading to the coercive effects that the Establishment Clause is supposed to prohibit); *supra* note 58 (referencing *Van Orden* where Justice Breyer's concurring vote stressed that the passage of time without objection and the true purpose behind the display was not to promote religion).

²⁴⁵ See *supra* notes 62–63 (discussing *McCreary*'s holding finding the Ten Commandment displays in the two Kentucky County Courthouses unconstitutional). The Court's muddled Establishment Clause doctrines would likely permit the "In God We Trust" license plates because *McCreary* created a potential ambiguity and also because the composition of the Court has changed since *McCreary* was decided. See CHEMERINSKY, *supra* note 18, at 1224–25. The changed composition of the Court, with Justice Alito having replaced Justice O'Connor, likely leaves Justice Kennedy with the deciding vote, and he is not likely to find an Establishment Cause violation. *Id.* This Note therefore acknowledges that the current Court would likely find the "In God We Trust" license plate constitutional, but contends that such a result should not be the case. *Supra* notes 62–63 (again suggesting *McCreary*'s holding should control a court's decision regarding the "In God We Trust" license plates).

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the expense of others.²⁴⁶ While the Court has concluded that the Establishment Clause must differentiate between the “real threat and mere shadow[,]”²⁴⁷ it must not be forgotten that sometimes lurking in the shadows are threats more dangerous than those readily apparent.²⁴⁸ Indiana’s “In God We Trust” license plate lacks the required secular purpose, can be viewed as endorsing religion, and may have psychologically coercive effects on its citizens; thus, it should be found unconstitutional.²⁴⁹

B. “Compelling” a Controversy: A Fair Tax, Equitable Results

Similarly, the “In God We Trust” message contained on the license plates reflects both private and government speech, which is not embraced by all, yet is being paid for by all taxpayers.²⁵⁰ The Court’s reasoning in compelled subsidy challenges post-*Johanns* implies that messaging rarely will violate the Constitution, provided that any trace of the government can be found as the speaker, whether the government’s identification is hidden or not.²⁵¹ Yet, Indiana’s “In God We Trust” license plate is dissimilar to government buildings, government-issued money, or even the only official state plate or flag.²⁵² Unlike these traditional medium, the Indiana’s “In God We Trust” license plates are a far more unique medium, in which the speech that is occurring is mixed, as the Fourth Circuit’s four-factor test more appropriately demonstrates.²⁵³ Unlike license plates that promote the environment, the home state university, or other special interests, which are paid for by those who choose to pay an extra fee to place it on their automobile, Indiana’s “In God We Trust” license plate is subsidized by taxes of all residents, whether citizen “A” chose the “In God We Trust” license plate or not.²⁵⁴

²⁴⁶ *But see generally* Kolenc, *supra* note 165 (describing what the world would be like in Justice Scalia’s neighborhood, as the author phrased it, if Justice Scalia’s views regarding the Establishment Clause and accommodation of religion were adopted by a majority). Kolenc’s piece explores the test that Justice Scalia would use in lieu of *Lemon*’s three-pronged approach—the actual coercion test announced in *Lee*. *Id.* at 831–35. Kolenc suggested that Justice Scalia’s accommodationist approach would be more protective of and appealing to minority religions than that of a strict separationist approach. *Id.* at 836–70.

²⁴⁷ *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

²⁴⁸ *See supra* Part III.A.

²⁴⁹ *See supra* Part III.A.

²⁵⁰ *See supra* Part III.B.

²⁵¹ *See supra* Part II.B.

²⁵² *See supra* Part II.B.

²⁵³ *See supra* Part III.B.

²⁵⁴ *See supra* Part I.

Given this scenario, some Indiana residents who choose the "In God We Trust" plate may choose the plate for its *religious message*, while others may advocate *national pride* because the message is the national motto. Either way, Indiana's "In God We Trust" plate carries a message that is affiliated with a private person and is paid for by taxpayers who may not agree with the message.²⁵⁵ As the Court in *Everson* stated, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."²⁵⁶ These sentiments should still ring true today. Yet, *Flast's* progeny, resulting in the increasing restrictions on standing, and the recent decision in *Johanns*, which expanded the amount of speech falling outside First Amendment analysis when the government is the speaker, suggest that a compelled subsidy argument would be unsuccessful.²⁵⁷ Nevertheless, a potentially impermissible act should not be able to escape judicial scrutiny merely because of crafty engineering.

Even if "In God We Trust" plates are considered government speech, the conclusion that government is forcing citizens to subsidize speech (that some people perceive as containing a religious message) should lead courts to question the constitutionality of the "In God We Trust" license plates.²⁵⁸ Furthermore, using the mixed speech analysis from *Rose*, a court should apply the four-factor test set forth in *Rose* and *Musgrave*, which invokes many of the same elements as Justice Breyer's six interpretive tools used to assess Establishment Clause issues.²⁵⁹ The four-factor test focuses on the central purpose behind the law (or in this case the display): (1) Was the law or display designed to promote a government message (purpose)?; (2) Who has editorial control of the message—the government or private entity (the text)?; (3) What is the

²⁵⁵ See *supra* notes 209–21.

²⁵⁶ *Everson v. Ewing Bd. of Educ.*, 330 U.S. 1, 16 (1947) (explaining examples of practices that the Establishment Clause is designed to prohibit).

²⁵⁷ See *supra* notes 227–28. See also *Hein v. Religious Freedom Foundation*, 127 S. Ct. 2553, 2568 (2007) (dismissing the argument that the President's faith-based initiative program was invalid; although upholding *Flast's* narrow exception to taxpayer standing while refusing to expand it to apply to the issue presented in the litigation). As it stands, *Hein* seems to suggest that the Court is not willing to expand *Flast's* exception anytime soon. *Id.* at 2569. On the other hand, Indiana's "In God We Trust" license plate poses a different issue than the issues raised in the other cases because the "In God We Trust" message on the state-issued license plates is not as clearly identified with the government. See *Olree*, *supra* note 7, at 213 (noting that a specialized license plate is different than pure government speech); *supra* note 140 (discussing *Rose* and the Seventh Circuit Court of Appeals decision in *Choose Life Ill., Inc.* reiterating that messages on license plates can contain a mixture of government and private speech).

²⁵⁸ See *supra* Parts III.A–B.

²⁵⁹ See *supra* Parts III.B, IV.A.

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identity of the actual speaker – the government or private person (akin to history, tradition, and precedent)?; (4) Who bears the ultimate responsibility for the message – again, the government or a private entity (equating to the consequences of the law or display)?²⁶⁰ As applied to Indiana’s “In God We Trust” license plate, this four-factor test demonstrates, as discussed above in Part III, that the plate contains mixed speech, resulting in citizens paying for the “In God We Trust” message regardless of whether they agree with it.

V. CONCLUSION: GUIDING PRINCIPLES

Indiana’s “In God We Trust” plates have spawned strong reactions from supporters and critics alike.²⁶¹ Indiana’s General Assembly could have avoided potential Establishment Clause and compelled subsidy concerns regarding the “In God We Trust” license plate by clearly categorizing the plate as a specialty plate and charging an administrative fee to cover the cost of production similar to the fee charged for other specialty plates.²⁶² Moreover, to further the alleged secular purpose of the plate, the state could have collected organizational fees and contributed those fees to a secular organization, much like Tennessee did when it contributed the money it collected from the sales of its specialty license plates to the Bald Eagle Foundation.²⁶³ Instead, Indiana chose not to charge any fees because it wanted to avoid potential issues that could result from the monies going to a religious organization for a plate that is purportedly secular in purpose and effect. However, in doing so the Indiana General Assembly may have created more problems than it likely contemplated.

McCreary suggests that Indiana’s “In God We Trust” license plates violate the Establishment Clause because these plates lack the requisite secular purpose, endorse religion, and may have a coercive effect on Indiana citizens. Furthermore, the four-factor test set forth by the Fourth Circuit Court of Appeals, when applied to the “In God We Trust” license plate, leads to the conclusion that the license plate contains mixed speech, resulting in a First Amendment compelled subsidy violation. However, the Supreme Court’s expanding definition of government speech and the continual erosion of the *Flast* exception may leave Indiana citizens with less ability to challenge the General Assembly’s actions because few will be able to demonstrate the personal harm

²⁶⁰ See *supra* Part IV.A.

²⁶¹ See *supra* Part II.

²⁶² See *supra* Parts I, II.

²⁶³ See *supra* Parts II, IV.

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required for standing.²⁶⁴ Nevertheless, Indiana's "In God We Trust" license plate in its current form is unconstitutional, and the Indiana General Assembly should charge an extra fee similar to any other specialty plate that promotes a message. And as license plates displaying personal messages or other special interests continue to grow in popularity, future legislatures and reviewing courts should closely examine the plates, utilizing the interpretative tools and tests described above because the plates present a real threat.

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²⁶⁴ See *supra* Part III.B.

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