

# Quetzalcóatl, Crosses and the New Constitutional Value of Multiculturalism

By LORI A. ADASIEWICZ

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## Introduction

In the San Francisco cityscape on a very clear day, from certain vantage points you might catch a glimpse of it. It blends into the surrounding

trees, coquettishly concealing its true form. It has been there for 63 years. It is the cross on Mount Davidson.

In 1992, a constitutional attack<sup>1</sup> was launched against this concrete and steel structure which stands 103 feet tall and 39 feet wide, the largest Latin Cross<sup>2</sup> on the American continents. The plaintiffs viewed the cross as a symbol of majoritarian intolerance and sought its destruction or removal. Surprisingly, among the San Francisco citizens who brought the action were several religious leaders and groups.<sup>3</sup> The plaintiffs contended that the ownership of the cross by the City of San Francisco violated the United States Constitution's Establishment Clause<sup>4</sup> as well as the No Preference Clause of the California Constitution.<sup>5</sup> Accordingly, the district court considered the cross under both California and federal precedent. The court determined that the cross's historical significance, physical setting, and cultural aspects distinguished the Mount Davidson Cross from other religious symbols on public land that had recently been found unconstitutional.<sup>6</sup> After a thorough discussion, the district court granted summary judgment for San Francisco and allowed the cross to stand.<sup>7</sup>

Unsatisfied, the plaintiffs brought an appeal before the Ninth Circuit, and there obtained the ruling they sought.<sup>8</sup> The appellate court, mechanically applying the No Preference Clause analysis introduced in *Ellis v. City of La Mesa*,<sup>9</sup> declared that the display violated the California Constitu-

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1. See *Carpenter v. City and County of San Francisco*, 803 F. Supp. 337 (N.D. Cal. 1992) (finding that the cross did not violate state or federal constitutions and entering summary judgment for the city).

2. The Latin cross is characterized by an upright or vertical bar crossed near the top by a shorter horizontal bar. AMERICAN HERITAGE DICTIONARY 1018 (3d ed. 1996).

3. See *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996), cert. denied, 117 S.Ct. 1250 (1997).

4. The Establishment Clause, along with the Free Exercise Clause, is found in the First Amendment to the United States Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

5. The California Constitution states: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4. The constitution further prohibits financial aid and grants of personal or real property from government agencies to religious organizations or for any religious purpose whatever. "[No government agency in California shall] ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose; nor shall any grant or donation of personal property or real estate ever be made . . . for any . . . sectarian purpose whatever." CAL. CONST. art. XVI, § 5.

6. See 803 F. Supp. at 340-41, 349 n.16.

7. See *id.* at 352.

8. See *Carpenter*, 93 F.3d at 627.

9. 990 F.2d 1518, 1524-25 (9th Cir. 1993).

tion.<sup>10</sup> The City of San Francisco appealed the ruling to the United States Supreme Court. While awaiting the Court's decision on granting certiorari, the San Francisco Landmarks Preservation Advisory Board, in an effort to save the cross from demolition, voted unanimously on January 15, 1997, to bestow landmark status on the Mount Davidson Cross.<sup>11</sup> The change in status was not enough to convince the Court to hear the case, and certiorari was denied on March 17, 1997.<sup>12</sup> Public reaction in San Francisco and across the nation reflected support for the cross and a desire to save what had become an icon.<sup>13</sup> But even the cross's biggest allies realized that the Supreme Court's decision meant the cross had to be sold or removed.<sup>14</sup>

At the south end of the San Francisco Bay lies the City of San Jose. There, city officials spent \$500,000 of public funds to commission the creation of an eight-foot statue. The entity to be memorialized: Quetzal-

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10. See *Carpenter*, 93 F.3d at 632. On the same day *Carpenter* was decided, the Ninth Circuit held that the City of Eugene violated the Establishment Clause of the United States Constitution by its ownership and display of a 51-foot Latin cross in a public park in *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (1996).

For a novel commentary on the *Carpenter* decision, see Terry Kay Diggs, *Dirty Harry, the Mount Davidson Cross and Symbols in Conflict*, S.F. EXAMINER, Sept. 24, 1996, Second Edition, at A17.

11. See Henry K. Lee, *Mount Davidson Cross Called Landmark by Panel*, S.F. CHRON., Jan. 16, 1997, at A17.

12. See *City and County of San Francisco v. Carpenter*, 117 S. Ct. 1250 (1997).

13. See Joan Ryan, *At Cross Purposes: Historic Value of Mount Davidson Icon Equal to Sectarian Value, Neighbors Say*, S.F. CHRON., Mar. 19, 1997, at A17; see also *Historic and Religious: The Old Rugged Cross*, ARIZ. REPUBLIC, Mar. 18, 1997, at B4 ("It was a remarkably intolerant argument to make in a city that prides itself on tolerance. . . . The quest for cultural sensitivity does not mean cities must be culturally sanitized."). But cf. Stephanie Salter, *Christians Don't Need a Municipal Cross to Bear*, S.F. EXAMINER, Mar. 23, 1997, at C15 ("As a follower of the Christian faith and a member of the American Civil Liberties Union, I'd like to thank the folks who went after a huge concrete symbol of religion in order to preserve a less tangible but equally important symbol of freedom.").

14. See *Reynolds Holding, S.F. Loses Legal Fight for Cross*, S.F. CHRON., Mar. 18, 1997, at A1. The cross and the 0.38 acre it stands upon were sold at auction on July 21, 1997 to the Council of Armenian American Organizations of Northern California for \$26,000. The group was incorporated just days before the auction with the purpose of preserving the cross for the community and as a memorial for the Armenians killed in the Ottoman Turk genocide. See Gerald D. Adams, *Mount Davidson Cross Sale Monday*, S.F. EXAMINER, July 19, 1997, at A1. The sale was ratified by 68% of San Francisco voters in the November 4, 1997 election. See *San Francisco Election '97: Bay Area Results*, S.F. EXAMINER, Nov. 5, 1997, at A16.

In anticipation of the vote, the attorney for the Armenian Council promised that "the cross will be preserved and open to the public." See Gerald D. Adams, *S.F. Cross Saved in Auction*, S.F. EXAMINER, July 22, 1997, at A3. Community reaction has been positive, since the cross will remain in place; that was exactly the result many were hoping for. See *id.* However, the controversy is still not over. On September 22, 1997, an atheistic group sued to enjoin the sale contending that the transaction was a sham due to stipulations in the deed of sale. See William Carl- sen, *Atheist Groups Sues S.F. Over Cross*, S.F. CHRON., Sept. 23, 1997, at A22.

cóatl, the Plumed Serpent God of the Aztec civilization.<sup>15</sup> San Jose sought to represent the multicultural population of the city.<sup>16</sup> The same year that the statue was erected, San Jose voluntarily removed its annual Nativity scene in response to citizen complaints.<sup>17</sup> Citizens objected to the \$200,000 of public funds that went into the yearly Christmas display,<sup>18</sup> which included secular symbols such as snowmen, reindeer and winter scenes as well as the Nativity. Interestingly, the Quetzalcóatl statue and the Christmas display were both located in the same park, the Plaza de César Chavez.<sup>19</sup>

The situation angered Christians, who protested the removal of a traditional Christmas symbol. The commemoration of a deity whose history entailed extensive human sacrifice added injury to the insult.<sup>20</sup> The city's decisions also angered non-religiously motivated residents, who balked at the statue's price tag.<sup>21</sup> Despite the citizen protest against the sculpture of Quetzalcóatl, San Jose went ahead with its plan. A group of San Jose citizens sought an injunction against the city to prevent the installation of the statue.<sup>22</sup> In the order denying the injunction, U.S. District Judge James Ware devoted only three sentences to the constitutionality of the statue:

After having viewed the sculpture and heard counsels' arguments, the Court finds that the Plumed Serpent is an artistic representation

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15. Quetzalcóatl is one of the great gods of the Aztec Pantheon, recognized as the Feathered Serpent, God of Learning and of Priesthood, and was the principal deity of the city of Cholula. See GEORGE C. VAILLANT, *AZTECS OF MEXICO* 148 (1962). Quetzalcóatl is known for bringing spiritual awareness and enlightenment to the indigenous peoples of America. See TONY SHEARER, *LORD OF THE DAWN: QUETZALCÓATL* (1971) (Quetzalcóatl's "voice trumpets out of Mexico's past, it is sung by the Chicanos, Mexican Americans, Mexican Indians. . . . The philosophy of Quetzalcóatl shall be done on Earth."); see also FRAY DIEGO DURÁN, *BOOK OF THE GODS AND RITES AND THE ANCIENT CALENDAR* 130 (1971) ("This god Quetzalcóatl was adored in all the villages of the land, especially in Cholula, where he stood on a loft and prominent temple, in whose courtyard the Marqués del Valle, Don Hernando Cortés, ordered a massacre of five hundred natives.").

16. See *Alvarado v. City of San Jose*, No. CV 94-20773 JW, 1994 WL 655404, at \*1 (N.D. Cal. Nov. 16, 1994). The population of San Jose is 26.6% Latino. See San Jose Chamber of Commerce Statistics (1996).

17. See Jamie Beckett, *Praise and Protest as Quetzalcóatl Statue Unveiled*, S.F. CHRON., Nov. 19, 1994, at B10.

18. The San Jose Nativity scene was purchased with private monies and donated to the City of San Jose. See Linda Chavez, *Multiculturalism Now Our "Religion,"* COURIER-JOURNAL, Dec. 11, 1994, at 4D.

19. For a stinging editorial on the controversy, see Frank M. Luna, Kerman, "Dogma" on Display, FRESNO BEE, Dec. 2, 1994, at B4 ("[J]udicial consistency, fairness, and objectivity gives way to political chicanery when the revered Quetzalcóatl is given a prominent and civic place to display his 'positive cultural image,' as deemed by supporters. Apparently, the separation of church and state applies only to certain groups in America.").

20. See Beckett, *supra* note 17.

21. See *Id.*

22. See *Alvarado*, No. CV 94-20773 JW, 1994 WL 665404 (N.D. Cal. Nov. 16, 1994).

of an ancient civilization and is not a religious object. Accordingly, Plaintiffs have not established a likelihood of success on the merits. The City's installation of the Quetzalcoatl sculpture does not violate any constitutional provision.<sup>23</sup>

After failing to prevent its installation, the plaintiffs brought suit against the city in an attempt to have the statue removed.<sup>24</sup> The plaintiffs contended that the installation and maintenance of the Plumed Serpent God statue in a city park was a violation of the Establishment Clause of the First Amendment or the California Constitution and the No Preference Clause of the California Constitution, the same attack that succeeded in the Mount Davidson Cross case.<sup>25</sup> In its order granting summary judgment for the city, the district court commended the "artistic, cultural, historic, and educational value" of the statue and found that it enhanced the sense of community among San Jose residents.<sup>26</sup> The court stated that "[r]eligious significance [by itself] is insufficient to prove a constitutional violation."<sup>27</sup> Therefore, the court found no violation of the state constitution.<sup>28</sup>

On appeal,<sup>29</sup> the Ninth Circuit characterized the Plumed Serpent God statue as non-religious and briefly applied the lenient Establishment Clause standard established in *Lemon v. Kurtzman*.<sup>30</sup> The court dismissed the more restrictive No Preference analysis which had been used by the court in finding the Mt. Davidson Cross unconstitutional.<sup>31</sup> The Ninth Circuit affirmed,<sup>32</sup> and the statue remains in Cesár Chavez Plaza.

In this starkly inconsistent application of religion clause analysis, there lies a message. The message sent by striking down the Mount Davidson Cross (a majoritarian religious symbol) while upholding the Quet-

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23. *Id.* at \*2.

24. *See* *Alvarado v. City of San Jose*, No. CV 94-20773 JW, 1995 WL 66785 (N.D. Cal. Feb. 10, 1995).

25. *See id.* at \*2.

26. *See id.* at \*3.

27. *Id.* at \*2.

28. *See id.* at \*4.

29. *See* *Alvarado v. City of San Jose*, 94 F.3d 1223, 1231-32 (9th Cir. 1996).

30. 403 U.S. 602 (1971). Under *Lemon*, a statute or practice that touches upon religion must (1) have a secular purpose; (2) neither advance nor inhibit religion in its primary effect; and (3) not foster excessive entanglement with religion. *See id.* at 612-13. The *Alvarado* court noted that "[t]hrough much maligned by scholars and various Justices, *Lemon* has never been overruled, and the *Lemon* test is the one applied in this circuit." 94 F.3d at 1231. The Court also discussed O'Connor's "endorsement test" first mentioned in *Lynch v. Donnelly*, 465 U.S. 668, 691-692 (1984) (O'Connor, J., concurring) (holding that the city of Pawtucket, Rhode Island did not violate the Establishment Clause by erecting a creche in its annual Christmas display, despite its religious significance). O'Connor sought to clarify the *Lemon* test by focusing on institutional entanglement and on endorsement or disapproval of religion. *See Lynch*, 465 U.S. at 689.

31. *See* 94 F.3d at 1232-33.

32. *See id.* at 1233.

zalcóatl statue (a religious symbol of a political minority) is one of intolerance; or, rather, it is a new-found tolerance only for traditionally non-majoritarian values and ideologies. The Federal Constitution affirmatively mandates not merely tolerance, but accommodation, and forbids hostility toward any religion.<sup>33</sup> These constitutional guarantees should protect majoritarian religions just as they protect minority religions.<sup>34</sup> The law should apply equally to protect or to strike down these displays, regardless of denomination.

This Note will criticize the Ninth Circuit's inconsistent and conflicting analysis<sup>35</sup> in *Carpenter* and *Alvarado*, analyze the appropriate factors to consider in Religion Clause cases under both the United States and California Constitutions, and suggest a more consistent approach to Religion Clause cases in light of the increasingly pluralistic society of the United States and, in particular, California.

### I. Applicable Federal and State Standards

The Establishment Clause, along with the Free Exercise Clause, is found in the First Amendment to the United States Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>36</sup> The Establishment Clause was written into the Constitution to "prevent any national ecclesiastical establishment . . . ."<sup>37</sup> It was intended to guard against political divisiveness along religious lines.<sup>38</sup>

Similarly, the California Constitution prohibits governmental establishment of religion, ensures the free exercise of religion, and mandates that no preference be given to any one religion. Article I, section 4 provides: "Free exercise and enjoyment of religion without discrimination or

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33. See *Lynch*, 465 U.S. at 673 (citing *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952)) ("Anything less [than affirmative accommodation] would require the 'callous indifference' [the Court has] said was never intended by the Establishment Clause"); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948) ("[Hostility against any religion would be at] war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.").

34. See *Alvarado*, 94 F.3d at 1230 (stating that "the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions" but concluding that "it loses all its sense and thus its ability to protect when carried to the extreme . . .").

35. For further commentary on consistency in this area, see David Felsen, Comment, *Developments in Approaches To Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395 (1989).

36. U.S. CONST. amend. I.

37. 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1871 at 728 (1833).

38. See Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969).

preference are guaranteed.”<sup>39</sup> Article XVI, section 5 further prohibits financial aid and grants of personal or real property to religious organizations or for any religious purpose whatever.<sup>40</sup> This clause is commonly referred to as the “Ban on Aid to Religion.” California courts have interpreted the state constitution as being more protective of the principle of separation than the federal guarantee.<sup>41</sup>

#### A. The Federal Establishment Clause: *Lemon v. Kurtzman* and its Progeny

The United States Supreme Court has “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in th[e] sensitive area [of Establishment Clause jurisprudence].”<sup>42</sup> The United States Supreme Court has acknowledged that Establishment Clause language in the United States Constitution is “at best opaque” and that it “can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”<sup>43</sup> The Court in *Lynch v. Donnelly* wrote, “[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.”<sup>44</sup>

The Court, interpreting the First Amendment, has used various tests in Establishment Clause analysis.<sup>45</sup> During the past three decades, the Supreme Court has tentatively applied the three-prong test established in *Lemon v. Kurtzman*<sup>46</sup> and clarified in *Lynch*,<sup>47</sup> the so-called *Lemon* test.

The Court in *Lemon* identified “three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”<sup>48</sup> The Court devised a three-prong test to ensure that these evils are

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39. CAL. CONST. art. I, § 4.

40. See Cal. CONST. art. XVI, § 5.

41. See, e.g., *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991); *Hewitt v. Joyner*, 940 F.2d 1561, 1566-67 (9th Cir. 1991); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 569 (1989).

42. *Lynch v. Donnelly*, 465 U.S. 668, 679 (citations omitted). See also, *Allegheny v. ACLU*, 492 U.S. 573, 591 (1989) (citing *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)) (“[T]he myriad, subtle ways in which Establishment Clause values can be eroded’ are not susceptible to a single verbal formulation . . .”).

43. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

44. 465 U.S. at 678.

45. See DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 1-50 (1991).

46. 403 U.S. 602.

47. 465 U.S. 668.

48. 403 U.S. at 612 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

avoided: to be constitutionally permissible, a statute or government practice that touches upon religion must (1) have a secular purpose;<sup>49</sup> (2) neither advance nor inhibit religion in its principal effect;<sup>50</sup> and (3) not foster an excessive entanglement with religion.<sup>51</sup>

In *Lynch*,<sup>52</sup> the Court emphasized that “no fixed, per se rule can be framed”<sup>53</sup> and stressed that religious displays must be analyzed within the context they are found.<sup>54</sup>

Justice O’Connor’s often cited concurrence attempted to clarify and expand the *Lemon* test’s purpose and effect prongs.<sup>55</sup> The proper inquiry, she argued, should not be limited by a finding that a secular purpose exists, but should consider whether the government’s actual purpose is to endorse or disapprove of religion.<sup>56</sup> Further inquiry should also be made as to whether, despite the government’s actual permissible purpose, the practice in fact conveys a message of endorsement or disapproval.<sup>57</sup>

## B. California’s “No Preference” and “Ban on Aid to Religion” Clauses

The California Supreme Court has not addressed the subject of religious symbols on public land since its 1978 decision in *Fox v. City of Los Angeles*.<sup>58</sup> There, a city taxpayer brought suit against the city to enjoin the

49. See *Wallace v. Jaffree*, 472 U.S. 38, 75-77 (1985) (striking down an Alabama law mandating a period of silence in public schools “for meditation or voluntary prayer” and concluding that the statute had no secular purpose).

50. “A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.” *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). “The constitutional requirement of ‘primary secular effect’ has . . . become a misnomer; while retaining the earlier label, the Court has transformed it into a *requirement that any non-secular effect be remote, indirect and incidental.*” LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10 at 1215 (2d ed. 1988) (emphasis in original).

51. See 403 U.S. at 612-13. There are five entanglement doctrines applicable under the Establishment Clause: “(1) In challenges to government action . . . the action is unconstitutional if it creates excessive administrative entanglement between church and state . . . . (2) [T]he action is also unconstitutional if it turns over traditionally governmental powers to religious institutions . . . . (3) [T]he challenged action is subjected to stricter scrutiny if it breeds religiously based political divisiveness. (4) In seeking a religiously based exemption from a law or regulation, a party *may* be able to prevail . . . by showing that enforcement would create excessive administrative entanglement. (5) Courts and other agencies of government may not inquire into pervasively religious issues.” TRIBE, *supra* note 50, § 14-11 at 1226-27.

52. 465 U.S. 668.

53. *Id.* at 678.

54. See *id.* at 679-80.

55. See *id.* at 687 (O’Connor, J., concurring).

56. See *id.* at 690 (O’Connor, J., concurring).

57. See *id.*

58. 587 P.2d 663 (Cal. 1978).

illumination of a "huge" cross placed on the Los Angeles City Hall on Christmas and both Latin and Eastern Orthodox Easter Sundays.<sup>59</sup> The court held that the lighting of the cross, "a symbol particularly pertinent to the Christian religion,"<sup>60</sup> was unconstitutional under the California No Preference Clause and both California and Federal Establishment Clauses.<sup>61</sup> The court explicitly stated that the "case is marked by the location, size, and visibility of the Los Angeles cross."<sup>62</sup> The city, although permitted to "depict objects with spiritual content, . . . may not promote or give its stamp of approval to such spiritual content."<sup>63</sup>

The placement of the cross on the actual city hall building was influential to the court: "The city hall is not an immense bulletin board whereon symbols of all faiths could be thumbtacked or otherwise displayed."<sup>64</sup> The court concluded that by placing the cross on city hall, it appeared that Los Angeles was stamping its approval on the Christian faith.<sup>65</sup> Further, the cross was large enough to be and located such that it was "visible for many miles in many directions"<sup>66</sup> when illuminated. This was important to the court because people not participating in the holidays could see the cross, but not the secular symbols that accompanied the cross during the holidays.<sup>67</sup>

Turning to the California No Preference Clause,<sup>68</sup> the court noted that the California Constitution does not require that each religion always be represented.<sup>69</sup> The court concluded that illuminating "only the Latin cross, however, does seem preferential when comparable recognition of other religious symbols is impracticable."<sup>70</sup> The court noted that the illumination was in direct response to demands from members of the Christian faith.<sup>71</sup>

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59. *See id.* at 663-64.

60. *Id.* at 664.

61. A concurring opinion stated that the practice violated the Ban on Aid to Religion Clause. *See id.* at 668 (Bird, C.J., concurring).

62. *Id.* at 665.

63. *Id.* at 666 (citing *Allen v. Hickel*, 424 F.2d 944, 948 (D.C. Cir. 1970)).

64. 587 P.2d at 665.

65. *See id.*

66. *Id.* at 664.

67. *See id.*

68. *See supra* note 5.

69. *See* 587 P.2d at 665.

70. *Id.* The court cited *Evans v. Selma Union High Sch. Dist.*, 222 P. 801 (Cal. 1924), to distinguish the present illumination of the cross on City Hall from the maintenance of religious texts in a public school library.

71. *See* 587 P.2d at 664. The court took judicial notice of city reports stating, "the Orthodox request for an Easter cross 'does appear to conflict with the spirit of said policy,' though not with 'the letter.'" *Id.* at 665. Also considered in evidence were citizen letters to the city council expressing gratitude for "the acknowledgement shown the Orthodox faith by having the symbol

The Los Angeles City Council's motion authorizing the cross in 1973 explicitly spoke of "an illuminated cross to commemorate Eastern Orthodox Easter."<sup>72</sup> This was enough to find that the city was granting a preference to one religion.

The concurrence pointed out that public funds were expended to maintain and illuminate the cross during the holidays.<sup>73</sup> According to the director of the bureau of public buildings, the cost for lighting the cross for Christmas 1975 was to be \$103. This expenditure of tax revenue would violate the California Ban on Aid to Religion Clause.<sup>74</sup>

More recently, in *Okrand v. City of Los Angeles*,<sup>75</sup> the California Court of Appeal considered whether Los Angeles violated either the United States or the California Constitution by displaying an unlit menorah near a decorated Christmas tree in the rotunda of its city hall.

The court found that the menorah satisfied all three prongs of the *Lemon* test: The menorah had the secular purpose of education due to its extensive history and artistic value,<sup>76</sup> it did not advance religion in its principal effect,<sup>77</sup> and it did not foster an excessive governmental entanglement with religion.<sup>78</sup> Furthermore, the menorah did not violate the California No Preference Clause because it was displayed with other symbols of religion and culture, and therefore granted no preference to the Jewish faith.<sup>79</sup> Los Angeles did not expend public funds to maintain the menorah, so the California Ban on Aid to Religion clause was not implicated.<sup>80</sup>

In *Ellis v. City of La Mesa*,<sup>81</sup> the Ninth Circuit held that San Diego's ownership of the 36-foot tall Mount Helix Cross and the 43-foot tall Mount Soledad Cross, both situated in public parks, violated the No Preference Clause of the California Constitution.<sup>82</sup> There, the Ninth Circuit held the relevant factors in determining whether a display violates the California Constitution are: "(1) the religious significance of the display, (2) the size

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of Christianity, the cross, displayed on the four sides of the city hall building on the eve of our Easter." *Id.*

72. *Id.*

73. *See id.* at 671 n.7 (Bird, C.J., concurring).

74. *See supra* note 40.

75. 207 Cal. App. 3d 566, 568 (1989).

76. *See id.* at 573. The City Hall rotunda continually displays different artistic, ethnic, and historical exhibits. The Christmas tree standing near the menorah was decorated with ornaments of varied religious and cultural significance. *See id.* at 574.

77. *See id.* at 574.

78. *See id.* at 577-78.

79. *See id.*

80. *See id.*

81. 990 F.2d 1518 (1993). *Ellis* also considered a third cross, a depiction of the Mount Helix Cross, which provided "the focal point for one of the City of La Mesa's official insignia." *Id.* at 1520. Because it is not a physical display on public land, it will not be addressed in this Note.

82. *See id.* at 1520.

and visibility of the display, (3) the inclusion of other religious symbol, (4) the historical background of the display, and (5) the proximity of the display to government buildings or religious facilities."<sup>83</sup>

Both crosses stood atop hills in public parks. The property where the Mount Helix Cross stood was donated to the city by a private citizen, who conditioned the conveyance on continued existence of the cross and continued performance of religious services on Easter Sunday.<sup>84</sup> Although a trust fund was created by the donor to maintain the cross and finance the services, public funding had been used on occasion for these purposes and the trust fund was administered by county employees.<sup>85</sup> The Mount Helix Cross is visible from a substantial distance and is illuminated nightly.<sup>86</sup> In fact, the cross is also used as a navigational tool for pilots.<sup>87</sup>

The Mount Soledad Cross, constructed<sup>88</sup> in the 1950s, replaced several wooden crosses erected by private citizens and destroyed by vandals.<sup>89</sup> It stands on land owned by the City of San Diego and is visible from a substantial distance; for example, it can be seen from the nearby interstate highway.<sup>90</sup> The cross was dedicated in 1954 as a war memorial and has served as a location for secular remembrance ceremonies, and for weddings and baptisms.<sup>91</sup> Although the Mount Soledad Memorial Association, a private group, provided most of the funding for the cross maintenance, some public funding was also expended.<sup>92</sup>

The primary case on California's Ban on Aid to Religion Clause is *California Teachers Ass'n v. Riles*.<sup>93</sup> There, the California Supreme Court found unconstitutional a statute which permitted the Superintendent of Public Instruction to lend, without charge, public school textbooks to students attending private, sectarian schools.<sup>94</sup> The court found that the program reduced the cost of books to the schools and thus indirectly furthered

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83. *Id.* at 1524-25.

84. *See id.* at 1521.

85. *See id.*

86. *See id.* at 1520-21.

87. *See id.*

88. In 1952, the Mount Soledad Memorial Association, a private organization, obtained city council permission to erect the cross on Mount Soledad. *See id.* at 1521. The Association supervised and paid for the construction of the current 43-foot concrete cross without municipal funding. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. 632 P.2d 953 (Cal. 1981).

94. *See id.* at 954, 964.

the religious purpose of those schools.<sup>95</sup> Consequently, the lending was an aid to religion.

The program was not a permissible indirect or remote benefit,<sup>96</sup> nor was the provision of textbooks a generalized public service.<sup>97</sup> Thus, it could not be justified on a "child benefit" theory.<sup>98</sup> The court concluded that the statute violated the Ban on Aid to Religion Clause of the California Constitution.<sup>99</sup>

In *Hewitt v. Joyner*,<sup>100</sup> the Ninth Circuit addressed the constitutionality of San Bernadino County's ownership of the Antone Martin Memorial Park. The park exclusively contained religious statuary depicting scenes from the New Testament.<sup>101</sup> Without addressing the federal issues, the court found that the County's ownership, maintenance, and operation of the park violated California's Establishment Clause.<sup>102</sup>

The heirs of the owner and sculptor of the statues donated the park to the County on the condition that the religious statues remain.<sup>103</sup> Since the conveyance in 1961, the County had added picnic facilities, parking, and restrooms.<sup>104</sup> The County had also printed brochures containing Biblical passages, and placed advertisements for the park in the telephone directory.<sup>105</sup> Further, the Yucca Valley Parks and Recreation District has spent \$5,500 annually on park maintenance, a portion of which was contributed by the San Bernardino County General Fund.<sup>106</sup>

The court interpreted the California No Preference Clause of article I, section 4<sup>107</sup> to require that "not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially."<sup>108</sup> Assuming that the California and Federal Establishment Clauses are interchangeable, the court borrowed an analogy from *Lynch*.<sup>109</sup> The court concluded that the Antone Martin Memorial Park was unlike a museum that displays articles of religious importance.<sup>110</sup> A museum "negates

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95. *See id.* at 957, 963.

96. *See id.* at 963.

97. *See id.*

98. *See id.*

99. *See id.* at 954.

100. 940 F.2d 1561 (9th Cir. 1991).

101. *See id.* at 1563.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See supra* note 5.

108. *Hewitt*, 940 F.2d at 1567 (emphasis added).

109. 465 U.S. 688, 692.

110. *See Hewitt*, 940 F.2d at 1568.

any message of endorsement of [religious] content.”<sup>111</sup> San Bernardino County, however, appeared to endorse the Christian religion through Biblical brochures and advertisement, and the direct and substantial financial support of the park with taxpayer dollars. This, the court concluded, violated California’s Establishment, No Preference, and Ban on Aid to Religion Clauses.<sup>112</sup>

## II. The Ninth Circuit’s Inconsistent Analysis in *Carpenter and Alvarado*

### A. Christian Cross Violates Constitution: *Carpenter v. City and County of San Francisco*

The constitutional attack in *Carpenter v. City and County of San Francisco*<sup>113</sup> challenged the City’s ownership and maintenance of the Mount Davidson Cross as a violation of the No Preference Clause and the Ban on Aid to Religion Clause of the California Constitution. These guarantees of government neutrality are far more extensive than the federal requirement of separation of church and state.<sup>114</sup> For this reason, and because of a judicial preference to decide cases under state law,<sup>115</sup> the Ninth Circuit did not reach the federal constitutional question.

Mechanically applying the five *Ellis* factors,<sup>116</sup> the court began by assuming that the Mount Davidson Cross had religious significance. The court did not define “religious” or provide any guidance in determining whether a particular object might carry “religious significance.” Rather, the Ninth Circuit pointed to the fact that it is a cross,<sup>117</sup> that it contained “Christian relics,”<sup>118</sup> and that Christian services were held there,<sup>119</sup> and concluded that the “cross carries great religious significance. Indeed, to suggest otherwise would demean this powerful religious symbol.”<sup>120</sup>

At 103 feet tall, the size of the cross was undeniably a factor weighing against it. The court relied on *Hewitt v. Joyner*,<sup>121</sup> when considering

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111. *Id.* (citing *Lynch*, 465 U.S. at 692).

112. *See* 940 F.2d at 1571.

113. 93 F.3d 627 (9th Cir. 1996).

114. *See, e.g.*, *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991) (holding that religious invocations and benedictions at public high school graduation ceremonies are constitutionally impermissible).

115. *See, e.g.*, *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985).

116. *See supra* text accompanying note 83.

117. *See* 93 F.3d at 630.

118. *See id.*

119. *See id.*

120. *Id.*

121. 940 F.2d 1561 (9th Cir. 1991) (striking down a religious statuary visible only from within the park).

whether a religious display must be visible from a great distance beyond a public park in order to raise constitutional questions.<sup>122</sup> The *Hewitt* court concluded that “[w]hether the display is visible to the users of the public park would seem to be the more relevant inquiry.”<sup>123</sup> The court accepted evidence that the cross was visible from several points around the city.<sup>124</sup> The City submitted a Visibility Study, which “may show that spotting the Cross is difficult on a foggy day.”<sup>125</sup> But the court did not find this significant. Circuit Judge Diarmuid O’Scannlain, writing for the court, stated, “Constitutional guarantees should not depend on the weather, especially in San Francisco.”<sup>126</sup>

On considering the inclusion of other religious symbols, the third *Ellis* factor, the court concluded that “[t]he fact that San Francisco may have other religious symbols in its art collection spread throughout the City does not minimize the Cross’ effect.”<sup>127</sup> As in *Ellis*, the court did not look beyond the immediate area of the display in determining whether other religions were sufficiently represented.<sup>128</sup> The Mount Davidson Park does not contain any other symbols, and thus this factor, too, weighed against the cross.

Supporters of the cross compiled a historical background for the display, which the court considered under the fourth *Ellis* factor.<sup>129</sup> Although the cross had considerable historical significance, its “historical significance must be independent of the display’s religious content.”<sup>130</sup> The cross has a copper box embedded in its foundation, a sort of “time capsule,” which holds newspapers, telephone directories, two Bibles, two rocks from the garden of Gethsemane, and a jug of water from the Jordan River.<sup>131</sup> At the site where the cross now stands, the first Sunrise Easter service was held under a wooden cross in 1923.<sup>132</sup> In 1932, the city gained title to the

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122. See 93 F.3d at 631.

123. *Id.* at 631 n.8.

124. See *id.* at 631.

125. *Id.*

126. *Id.*

127. *Id.*

128. See *id.* Judge O’Scannlain appeared to conclude that religious monuments throughout a city do not bear upon the constitutionality of any one display. If this is true, then the constitutionality of each of those religious displays would be called into question by the attack on the first. Further, requiring a city to erect all monuments related to religion in one location might appear as an endorsement of religion in general over non-religion, also prohibited by the Constitution. See *Torasco v. Watkins*, 367 U.S. 488 (1961) (applying the protection of the Establishment Clause to atheists); cf. *Ellis*, 990 F.2d at 1526.

129. See 93 F.3d at 631-32.

130. *Id.*

131. *Id.* at 628.

132. See *id.*

land and created Mount Davidson Park.<sup>133</sup> The following year, the city sought permission to erect a permanent cross, because the wooden crosses had been repeatedly destroyed by fire, wind, and vandals.<sup>134</sup> The City Attorney concluded that the cross was constitutional under legal principles applicable at that time.<sup>135</sup>

Further, the plaintiffs offered the dedication ceremony in 1933 as evidence of the cross's secular historical significance, where President Franklin D. Roosevelt pressed a golden telegraph key in Washington D.C., thereby illuminating the cross from our nation's capitol.<sup>136</sup> The court found the event to be intertwined with religious significance, since it took place on the eve of Palm Sunday to illuminate the cross for Easter week.<sup>137</sup> Further, the court found that the cross's longevity was insufficient to create historical significance and render it a permissible religious display.<sup>138</sup>

Considering the final *Ellis* factor, the court conceded that the display was far from government buildings or any religious facilities.<sup>139</sup> This last factor alone, as the court saw it, was insufficient to distinguish the Mount Davidson Cross from the Mount Helix and Mount Soledad Crosses struck down in *Ellis*.<sup>140</sup> Therefore, the court concluded that the Mount Davidson Cross stood in violation of the No Preference Clause of the California Constitution.<sup>141</sup>

In its analysis, the court responded to the plaintiffs' arguments that the cross should stand because it was a cultural landmark or a piece in San Francisco's art collection.<sup>142</sup> The court reasoned that the fact that the cross had become a popular tourist attraction could not "ameliorate [the] violation of [the No Preference Clause]. If anything, such facts increase the likelihood of an impermissible appearance of religious preference."<sup>143</sup> Further, the court dismissed the argument that the cross could "be properly

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133. *See id.*

134. *See id.*

135. *See id.* In 1934, the Federal Establishment Clause did not apply to the states and the California Constitution contained no similar provision. It was not until 1947 that the Supreme Court held that the Establishment Clause of the U.S. Constitution was applicable to the states via the Fourteenth Amendment in *Everson v. Board of Education*, 330 U.S. 1 (1947). The California Establishment Clause was not adopted until 1974, forty years after the Mount Davidson Cross was created.

136. *See* 93 F.3d at 629.

137. *See id.* at 631.

138. *See id.*

139. *See id.* at 632.

140. *See id.*

141. *See id.*

142. *See id.*

143. *Id.* (citing *Ellis*, 990 F.2d at 1525).

viewed as one of the works of art in [San Francisco's] art collection."<sup>144</sup> The court stated that, "the argument that a religious display is art or a tourist attraction will not protect the display from restrictions on government-sponsored religion which the people of California have put in their Constitution."<sup>145</sup>

**B. Statute of Pagan God Does Not Violate the Constitution: *Alvarado v. City of San Jose***<sup>146</sup>

Before analyzing the constitutionality of San Jose's Quetzalcóatl statue, the Ninth Circuit in *Alvarado v. City of San Jose* used definitions from the Third and Seventh Circuits<sup>147</sup> to determine that the statue did not fall within the definition of "religious."<sup>148</sup> The Ninth Circuit rephrased its inquiry as "whether Quetzalcóatl or the Plumed Serpent has current religious significance."<sup>149</sup> This inquiry focused not on the symbolism or significance of the display itself, but whether the religion represented by the statue has "current religious adherents."<sup>150</sup> Although there are no cases holding that a religious belief must be current to merit protection under the Religion Clauses, the court relied on this assumption as its basis for its First Amendment analysis.<sup>151</sup> Despite a long history of worship in Latin America,<sup>152</sup> evidence of existing New Age beliefs and Mormon teachings which invoke the spirituality of Quetzalcóatl,<sup>153</sup> and a resurgence of the worship of the ancient deity in southern Mexico,<sup>154</sup> the court concluded that these beliefs did not "constitute[] a discernible religion" nor did they meet any definition of "religion."<sup>155</sup> Apparently, the symbol must not only

144. 93 F.3d at 632.

145. *Id.* (quoting *Hewitt*, 940 F.2d at 1572).

146. 94 F.3d 1223 (9th Cir. 1996).

147. The Seventh Circuit, in holding that Wiccan beliefs and practices did not constitute a recognizable "religion" for Establishment purposes, stated "[a] general working definition of religion for Free Exercise purposes is any set of beliefs addressing matters of 'ultimate concern' occupying a 'place parallel to that filled by . . . God' in traditionally religious persons." *Fleischfresser v. Directors Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994) (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970)).

The Third Circuit held that the Science of Creative Intelligence Transcendental Meditation was a religion since "[r]eligion, as comprehended by the First Amendment now includes mere affirmation of belief in a supreme being . . . , invocation of a supreme being . . . , and reading verses from the Bible without comment." *Malnak v. Yogi*, 592 F.2d 197, 199 (3rd Cir. 1979).

148. 94 F.3d at 1227-28.

149. *Id.* at 1227.

150. *Id.*

151. *See id.*

152. *See id.* at 1226.

153. *See id.* at 1229-31.

154. *See id.* at 1231.

155. *Id.* at 1232-33.

have current religious adherents, but also they must be the type that a federal judge would consider significant.

The Ninth Circuit refused in *Alvarado* to adhere to its own procedures for adjudicating federal cases involving state constitutional issues.<sup>156</sup> Federal constitutional issues should be avoided when state constitutional law is available as an alternative ground.<sup>157</sup> Despite this established rule, and the alleged "non-religious" nature of the statue, the court undertook a cursory Federal Establishment Clause analysis based on *Lemon* and *Lynch*.<sup>158</sup> The court found "not even a shadow of a threat that the City has advanced religion" and held that the statue did not violate the Federal Constitution.<sup>159</sup>

Further, even though the No Preference Clause of the California Constitution has been found more protective of separation of church and state than the Federal Establishment Clause,<sup>160</sup> the court did nothing more than quote the California No Preference Clause and conclude that San Jose did not prefer one religion over another, or appear to do so.<sup>161</sup>

### III. Toward a More Consistent Approach: Melding the Various Tests into One

The disparate results obtained in *Carpenter* and *Alvarado* call for a stricter standard of analysis than that applied by the Ninth Circuit. The court in one instance tore down a Christian cross by applying a single "controlling" case, and in the next instance upheld the statue of an ancient deity by burying it beneath philosophical discussions regarding the definition of religion and a loose application of the Federal Constitution.

The various constitutional clauses do not compel or permit courts to become vehicles for societal affirmative action, bestowing suspect classification on minority religious symbols while applying a nearly per se test to symbols of popular religions.<sup>162</sup> The proper analysis should take a com-

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156. See, e.g., *Hewitt*, 940 F.2d at 1565.

157. See *id.*; see also *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985).

158. See 94 F.3d at 1231-32.

159. *Id.* at 1232.

160. See, e.g., *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 847 (Cal. 1991) ("The Attorney General has emphasized the broad scope of the preference clause: 'It would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion' [than that found in the 'no preference' clause and] [o]ur case law has also recognized the strength of this clause, and acknowledged that in some instances it might warrant a separation of church and state more strict than that called for in the federal Constitution.") (quoting 25 Ops. Cal. Att'y Gen. 316, 319 (1955) and citing *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978)).

161. See 94 F.3d at 1233.

162. For a provocative analysis, see Jesse H. Choper, *Colloquy: Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994).

prehensive view of the symbol and the context in which it appears.<sup>163</sup> This type of analysis would promote equal treatment of religions and therefore tolerance of diversity.

The analysis must begin with a threshold determination of the religious nature of the symbol. This "religious nature" should be determined through a workable definition<sup>164</sup> "that goes beyond the closely bounded limits of theism, and accounts for the multiplying forms of recognizably legitimate religious exercise."<sup>165</sup> When a court attempts to define religion by drawing analogies to commonly accepted faiths, the definition unduly limits the concept of religion. By focusing on the externalities of a belief system<sup>166</sup> such as the faith's age, its apparent social value, political elements, number of adherents and the demands made on them, the consistency of practice among members, and outward trappings such as scriptures, prayers and organizational structures, this definition unduly restricts the concept of religion.<sup>167</sup>

The Jeffersonian "wall of separation" between church and state is not absolute.<sup>168</sup> In expounding upon the original intent to accommodate religious beliefs, the Supreme Court noted in *Lynch* that, "[i]t is clear that neither the 17 draftsmen of the Constitution nor the Congress of 1789, saw any establishment problem in the employment of congressional chaplains to offer daily prayers in Congress, a practice that has continued for nearly two centuries."<sup>169</sup> Because the Establishment Clauses of the United States and California Constitutions prohibit the "establishment" of religion, a finding that a display on public land has religious character cannot be determinative. Finding that an object falls into the definition of "religious" is not enough to render it unconstitutional. The United States Supreme Court has never required total separation of church and state.<sup>170</sup> "No significant segment of our society and no institution within it can exist in a vacuum or

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163. For a comprehensive approach, see JESSE H. CHOPER, *ENDANGERING RELIGIOUS LIBERTY: SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* (1995).

164. On the difficulty of defining religion, see generally Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Val D. Ricks, *To God God's, To Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053 (1993).

165. *TRIBE*, *supra* note 50, § 14-16 at 1180.

166. *See id.* at 1181.

167. *See id.* at 1181-82.

168. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878) (citing 8 JEFF. WORKS, 113).

169. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

170. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 211 (1948).

in total or absolute isolation from all the other parts, much less from government."<sup>171</sup>

Although a symbol's purpose need not be exclusively secular, the absence of any clear secular intent would likely offend each of the Establishment Clauses.<sup>172</sup> However, secular intent has been and should continue to be broadly defined by the courts, to include education, representation of segments of a community, preservation of historical and cultural relics, and promotion of civic aesthetics.

The display must neither advance nor inhibit religion in its primary effect.<sup>173</sup> The government should not endorse nor appear to endorse any particular religion,<sup>174</sup> neither should it disapprove nor appear to disapprove of any religion. The size and visibility of the display should be considered together when assessing the impact of the display. But neither characteristic should be dispositive. If there exists a city-wide art collection which includes representations of various religious symbols, the symbols should have the same fate. If one religious symbol in a collection is found unconstitutional, then it would follow that the others are also *prima facie* unconstitutional. The scope of the search for other symbols should extend beyond the immediate area where the one symbol is found to determine if, city-wide, one religion is being preferred over another. Thus, the existence of other symbols from different religions mollifies the individual impact of each display. The location of a display can also give the appearance that the government is endorsing a religion, and should also be considered. A religious display atop city hall might appear as governmental endorsement of a religion, while one located in a large park along with other attractions might not.

The public religious display must not foster an excessive entanglement with religion.<sup>175</sup> The line should not be crossed by *de minimis* financial allocations of tax revenue, as long as symbols of one faith are not disproportionately found in the absence of symbols of other faiths. California's Ban on Aid Clause prohibits financial assistance in all forms to religious causes. The language of the provision clearly expresses the

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171. *Lynch*, 465 U.S. at 673.

172. *See* *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (stating that "a statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion."); *see also* *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (suggesting that the inquiry does not mean "that the law's purpose be unrelated to religion" rather, "[the requirement of secular purpose] aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.").

173. *See* *Lemon*, 403 U.S. at 612 (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

174. *See* *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

175. *See* *Lemon*, 403 U.S. at 613 (citing *Walz v. Tax Comm'n.*, 397 U.S. 664, 674 (1970)).

intent to grant no public monies in furtherance of any particular religion. This clause cannot be read to forbid any government money from ever reaching a religious group, but rather, that government money may not further or aid in the group's religious purpose. By maintaining a statue or a cross on public land, the government does not necessarily further the efforts of any particular faith. In fact, illumination of a symbol with religious connotations would not necessarily show a preference, as long as it does not occur only in conjunction with specific religious events. The City of San Francisco pays to illuminate the Golden Gate Bridge, Coit Tower, and other tourist attractions during night-time hours. The content of a tourist attraction should not determine whether it is adequately maintained or illuminated. In fact, lighting some symbols and leaving others dark could appear as government disapproval of a particular religion and offend the Establishment Clauses.

Political devisiveness should be an important factor in deciding these cases. In San Jose, where the Nativity was pulled and the Meso-American God was not, the community was torn by the message of intolerance.<sup>176</sup> In San Francisco, where a diverse array of religious and spiritual monuments exist,<sup>177</sup> the cross should not fall alone.

In keeping with the No Preference Clause of the California Constitution, the government should not grant a preference to any religion over another. The inclusion of *all* religious symbols is not necessary, but a variety of symbols from different faiths and cultures would protect the city against claims of granting preference to one religion.

One last factor that should be considered is the existence of a disclaimer on the religious display. Mandating disclaimers on religious dis-

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176. For social commentary on the conflict, see Jamie Beckett, *San Jose Pulls Nativity Scene, Stirs New Fight*, THE SAN DIEGO UNION-TRIB., Dec. 1, 1994, at A-5 ("If we're going to be a community of diversity, let's include Christians . . . . Either you have to remove religion from public areas, or . . . you should include everybody."); *Praise and Protest as Quetzalcóatl Statue Unveiled: Aztec dances, Picket Signs in San Jose Park*, S. F. CHRON., Nov. 19, 1994, at B10 (Quoting one anti-abortion protestor as stating, "This shows arrogance and ignorance of the fact that babies were sacrificed to Quetzalcoatl.").

177. The City of San Francisco, whose name itself derives from a saint, maintains numerous religious and spiritual attractions, among others: a Pagoda and Japanese Tea Garden, a statue of Buddha, a Holocaust Memorial, a Madonna, an Aztec mural and sites for a Sikh religious procession, a pagan prayer gathering, and a children's candlelight vigil. See Steve Albert, *S.F.'s Cross Examination; City Facing Constitutional Attack on Mount Davidson Cross Before Ninth Circuit*, THE RECORDER, Nov. 15, 1994, at 1. One wonders if these have not been challenged because they are politically correct markers which celebrate our new constitutional value of multiculturalism.

plays on public property<sup>178</sup> would avoid the appearance of a governmental “stamp of approval” on the religious message of the display while allowing the display to stand. In conjunction, the court could offer a shifting burden of proof. When a government actor fails to take affirmative steps to disclaim endorsement of an arguably religious display on public property, the burden should fall on the government to prove the constitutionality of the display.<sup>179</sup>

#### IV. Applying a Comprehensive Analysis to *Carpenter and Alvarado*

The Ninth Circuit allowed the serpent god statue to stand in commemoration of the Latino community of San Jose, while it struck down the Latin cross atop Mt. Davidson. While the “religious” nature of each symbol may not be equal in degree, the application of relevant constitutional provisions should be the same. Otherwise, judicially-designated “insignificant” religions will be afforded constitutional protections that more established religions are not; that is not what the constitutional protections suggest.

##### A. Do the Symbols Have Religious Significance?

Whether either of the two displays can be subjected to religion clause scrutiny depends on the definition of “religious.” The Supreme Court has not developed a clear standard, but it is generally agreed that it should be broadly defined.<sup>180</sup> The Latin cross is generally regarded as religious,<sup>181</sup> but the statue, while less recognized, is also religious. Visitors to the statue made offerings of flowers and food. They “made obeisance” to the statute and burned incense. School students took part in a ceremonial procession to the sculpture. One observer left a card bearing the following words:

O Dei Quetzacóatl  
May your many feathers loft our  
diverse souls across the chasm of religious artifice.<sup>182</sup>

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178. See Recent Case, *Establishment Clause - Religious Displays on Public Property - Colorado Supreme Court Upholds Display of Ten Commandments on Public Property - State v. Freedom From Religion Foundation*, 109 HARV. L. REV. 530, 530 (1995).

179. See *id.*

180. See *supra* notes 118-121 and accompanying text.

181. A Latin Cross placed in the Statehouse plaza in Columbus, Ohio by the Ku Klux Klan was found to be a religious display in *Capitol Square Review v. Pinette*, 515 U.S. 753 (1995).

182. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226 (9th Cir. 1996).

### B. Do the Symbols Establish Religion in Primary Effect?

Neither the Mount Davidson Cross nor Quetzalcóatl have the primary effect of establishing a religion. Neither explicitly calls for people to adhere to any particular faith. The Quetzalcóatl statue standing in a park does not establish a religion. Although the cross is more recognizably religious than the statue of Quetzalcóatl, its primary purpose was not to establish or further a religion, but to make permanent the private efforts to erect a cross atop Mount Davidson for secular as well as sectarian purposes. The fact that San Francisco's Art Commission was consulted on the design shows that the cross was more than a religious symbol.<sup>183</sup>

### C. Do the Symbols Have a Secular Purpose?

Because a broad spectrum of combined secular and religious motives are constitutionally acceptable, both monuments have a secular purpose. The Mount Davidson Cross has independent historical significance,<sup>184</sup> and the Quetzalcóatl statue represents Latino contributions to the San Jose community.

### D. Do the Symbols Either Advance or Inhibit Religion?

The purpose of the cross was not to advance religion. It exists as both a secular and a sectarian monument, since the design for the Mount Davidson Cross was approved by the city's art commission. Although tall and large, most of the cross is concealed by surrounding trees in a 40-acre park, far from any government buildings.<sup>185</sup> Furthermore, San Francisco maintains various symbols representing different faiths throughout the city.

The Quetzalcóatl statue, although smaller, is prominently displayed in a downtown city park. San Jose had enormous discretion in determining how to represent the various ethnic groups that contributed to the city. It chose, however, to commemorate a pagan deity by spending \$500,000 to erect a new statue of an ancient god, in the face of citizen protest and in spite of the amended provisions of the California Constitution.<sup>186</sup> For this reason, the statue presents a greater appearance of government endorsement.<sup>187</sup>

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183. See *Carpenter v. City and County of San Francisco*, 803 F. Supp. 337, 348 (N.D. Cal. 1992).

184. See *id.*

185. The Mount Davidson Cross should nonetheless wear a disclaimer because of the commonly recognized religious message it carries.

186. See *supra* note 161 and accompanying text.

187. Of course, San Jose could mitigate the appearance of endorsement by placing a prominent disclaimer on the Quetzalcóatl statue.

**E. Is there Excessive Governmental Entanglement?**

Entanglement has traditionally been assessed in terms of either administrative entanglement or political divisiveness.<sup>188</sup> Neither display demands any ongoing administrative entanglement of the respective cities with any religion. The courts should have considered the amount of money spent in proportion to other monuments and tourist attractions. Spending public money to maintain religious displays would be inappropriate if disproportionately high. The district court found that no money is expended to maintain the cross.<sup>189</sup> The land where the cross stands is still owned by the City of San Francisco and used regularly by residents as a recreational site. On the other hand, Quetzalcóatl was publicly funded with \$500,000. Both the Mount Davidson Cross and the Quetzalcóatl statue have provoked serious political divisiveness as evidenced by the lawsuits under discussion. But litigation over a display should not be determinative, otherwise any individual or group could decide the constitutionality of a display merely by filing suit against the government. Further, complaints aimed solely at the allocation of tax dollars should not be persuasive unless religion is involved.

**F. Does the Government Grant a Preference to a Religion Through these Displays?**

San Francisco maintains several religious and spiritual displays on public land. By displaying many religions common to its citizens, it is not granting a preference to any one faith. However, in San Jose, the media focused on the voluntary removal of the Nativity scene from a Christmas display including many secular symbols and the adamant decision to go forward with plans to erect the Quetzalcóatl statute. Generally, maintenance is less trouble than removal or creation. Maintaining the cross, an obvious religious symbol, is arguably no worse than creating the statue of Quetzalcóatl, which is less obviously religious.

Spending a minimal amount of public money to maintain the Mount Davidson Cross, a recognized religious symbol, is no worse than spending a larger amount to erect a statue of Quetzalcóatl, a little-known, but still religious symbol. The courts should not look at just one factor, but rather, at the entire context to determine the constitutionality of a religious display on public land.

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188. See Harry Simon, Note, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L. J. 499, 504 (1986) (citing *Lemon*, 403 U.S. at 612-15).

189. See *Carpenter*, 803 F. Supp. at 345.

## Conclusion

Application of a comprehensive test suggests that the cross in *Carpenter* and the statue of Quetzalcóatl in *Alvarado* should both be permitted to remain on public property, or they should both come down.<sup>190</sup> In our increasingly divided communities, we need reminders that tolerance is a virtue.

As Justice Douglas observed in *Zorach v. Clausen*,<sup>191</sup> "We are a religious people whose institutions presuppose a Supreme Being."<sup>192</sup> This notwithstanding, the courts should recognize the historical contribution religious groups have made to this nation. Just as the Latino culture has benefitted the City of San Jose, Christians have also contributed to this country, to the extent that San Francisco was founded by Father Francisco Palou as a Catholic mission in 1776, and named after Saint Francis of Assisi.<sup>193</sup> Both groups have improved this state, and the nation, through their unique presence.

The decisions reached under current Religion Clause analysis leave much to be desired in both method and result. The Supreme Court, in denying certiorari in the *Carpenter* case, has left our courts drifting in a morass of clumsy, unworkable standards for these cases.<sup>194</sup> Although this is a highly sensitive area, the courts should not so easily avoid finding a comprehensive analysis to end the arbitrary and conflicting outcomes.

Among San Francisco's most beloved personalities, the late Herb Caen had this to say about the recent decision:

THE LAW is the law and the law is an arse. I refer of course to the Mount Davidson cross, apparently doomed by those who see it as something insidious rather than an eloquent landmark loved even by atheists. . . . Separation of church and state is a must! So is judgment and intelligence.<sup>195</sup>

We can only hope that in the future the courts will incorporate more judgment and intelligence while upholding the separation of church and state.

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190. For a commentary on the non-preferential accommodationist and strict separatist approaches to Religion Clause analysis, see John Witte, Jr., *Essay: The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L. J. 489 (1991).

191. 343 U.S. 306 (1952).

192. *Id.* at 313.

193. See TOM COLE, A SHORT HISTORY OF SAN FRANCISCO 15 (1981).

194. *But cf.* Simon, *supra* note 188 (examining the divergence between federal and California law on government aid to religion and advocating the adoption of California law as a model for greater protection against state-sponsored religious displays).

195. Herb Caen, *Poor Herbert's Almanac*, S.F. CHRON., Aug. 29, 1996, at C1.