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## Seeing Isn't Believing: Ahlquist v. City of Cranston and the Constitutionality of Religious Displays Under the Establishment Clause

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# Seeing Isn't Believing: *Ahlquist v. City of Cranston* and the Constitutionality of Religious Displays Under the Establishment Clause

Daniel W. Morton-Bentley\*

## I. INTRODUCTION

The latest casualty in the battle over religion in public schools is a banner that formerly adorned the halls of Cranston West High School. The banner was donated to the school by an alumnus in 1963 and contains the phrases: “Our Heavenly Father” and “Amen.”<sup>1</sup> The banner was painted onto the walls of Cranston West and remained there without incident for over four decades.<sup>2</sup> The ACLU began a concerted effort to remove the banner in 2010, and a Cranston West High School student, Jessica Ahlquist, sued the City of Cranston in 2011 (with the assistance of the ACLU) for creating an unconstitutional establishment of religion.<sup>3</sup> The U.S. District Court for the District of Rhode Island sided with Ahlquist and ordered the banner’s removal in *Ahlquist v. City of Cranston*.<sup>4</sup>

In the religious display context, the Supreme Court’s case law can be divided into two kinds of cases. First are what I call “active endorsement” cases, where a person (usually a student) is forced

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1. *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507, 511 (D.R.I. 2012).
2. *Id.*
3. *Id.* at 512.
4. *Id.* at 526.

to take part in, or listen to, religious conduct. Second are cases like *Ahlquist*, where plaintiffs view publically accessible objects or displays containing religious language or themes. I call these “passive viewing” cases.

In this Article, I argue that the *Ahlquist* Court incorrectly held that the banner was an unconstitutional establishment of religion. I additionally contend that the logic underlying passive viewing cases is flawed. Plaintiffs like *Ahlquist* should not have standing to pursue Establishment Clause cases where their injury is limited to the mere viewing of an object. Finally, I offer some ways in which Establishment Clause litigation can be reformed while respecting the standing requirement of the Constitution.

In Section II, I examine the Establishment Clause and how it has been interpreted by the Supreme Court in the twentieth and twenty-first centuries. The Court’s case law— which, by all accounts, is inconsistent — is organized into the categories of active endorsement and passive viewing. Section III analyzes the U.S. District Court’s *Ahlquist* opinion, paying attention to the Court’s interpretation of Establishment Clause case law. Section IV argues that passive viewing challenges such as *Ahlquist* should not be entertained by courts on standing and policy grounds. Section V is a brief conclusion.

## II. THE ESTABLISHMENT CLAUSE

The Establishment Clause, part of the 1791 Bill of Rights, reads: “Congress shall make no law respecting an establishment of religion . . .”<sup>5</sup> The Establishment Clause is one of two constitutional clauses concerning religious practice. The second, dubbed the Free Exercise Clause, provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].”<sup>6</sup> The precise relationship between the clauses has been the subject of much debate. The prevalent understanding is that the clauses operate independently, with the Establishment Clause preventing the creation of a state religion and the Free Exercise Clause prohibiting discrimination against any religious group.

In seeking to apply the Establishment Clause to contemporary disputes, two questions arise: first, what did the

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5. U.S. CONST. amend. I.

6. U.S. CONST. amend. I.

founders mean by establishment of religion? Second, irrespective of this original understanding, how has this clause been interpreted over time?

#### A. The Intent Behind the Establishment Clause

No one can precisely say what the founders meant when they prohibited laws “respecting” an “establishment” of religion. The Establishment Clause received little debate at the First Session of Congress in 1789.<sup>7</sup> The House and Senate generally supported it, and the only criticism directed at the religion clauses was that they were superlative because Congress did not have the power to enact religious legislation.<sup>8</sup> In spite of this criticism, the religion clauses enjoyed broad congressional support.<sup>9</sup>

#### B. The Supreme Court’s Establishment Clause Jurisprudence

The Supreme Court’s modern Establishment Clause jurisprudence began in 1940, when the Supreme Court held that the Establishment Clause was “incorporated” into the Fourteenth Amendment and applicable to the states.<sup>10</sup> This led to the proliferation of lawsuits against school districts, as schools proved to be the most frequent place that Americans encountered state-supported religious displays and rituals.

As Justice Hugo Black noted in *Everson v. Board of Education*, it is generally accepted that the Establishment Clause protects against the following things: “Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another [and] [n]o person can be punished for entertaining or professing beliefs or disbeliefs . . .”<sup>11</sup> Arguments beyond this, however, are a matter of contention. The vagueness of the Establishment Clause lends itself toward differing interpretations.

The Supreme Court has issued a number of Establishment

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7. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 76-79 (1986).

8. *Id.* at 79, 89.

9. *Id.* at 89.

10. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

11. 330 U.S. 1, 15-16 (1947).

Clause opinions, many of them in the public school context.<sup>12</sup> The facts, rationales, and holdings of these opinions are inconsistent. Generally, the Court has proved hostile to anything containing references to the Christian religion or God. This hostility is slightly lessened outside of the school context. In order to bring a measure of clarity to this body of case law, I have organized the Court's opinions into two groups; cases involving: (1) the active endorsement of religion; and (2) the passive viewing of objects with religious language or significance. Examples of these scenarios are explored more fully below, with special attention given to passive viewing cases such as *Ahlquist*.

### 1. Active Endorsement

Active endorsement cases involve situations where a student is required to say or do something that reflects a religious belief he or she does not hold. This can include forced attendance at an event where others recite prayers or read religious texts. The most famous example of this is the 1962 opinion of *Engel v. Vitale*,<sup>13</sup> where a group of ten students challenged the New Hyde Park, New York School District's recitation of a prayer at the beginning of the school day. The prayer was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."<sup>14</sup> The Court held that the overtly religious nature of the prayer rendered it unconstitutional.<sup>15</sup>

Another example of endorsement from the post-war era is the 1963 case of *School District of Abington Township, Pennsylvania*

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12. Establishment Clause challenges come up in a wide variety of contexts beyond public displays and practices. For example, there is a wide body of case law on the issue of public funding of religious schools. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970); *Everson*, 330 U.S. at 1. These cases are beyond the scope of this Article, which focuses on Establishment Clause challenges to governmental practices or displays.

13. 370 U.S. 421, 423 (1962).

14. *Id.* at 422.

15. *Id.* at 425 ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."). Also, although students could remain silent or leave the room, the Court declared that the religious nature of the prayer, in and of itself, violated the Establishment Clause. *Id.* at 430.

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*v. Schempp*.<sup>16</sup> *Schempp* was a consolidation of two cases challenging laws in Pennsylvania and Baltimore requiring readings from the (Christian) Holy Bible and a recitation of the Lord's Prayer at the beginning of each school day.<sup>17</sup> As in *Engel*, participation in either of these events was voluntary, and children could opt out of the process.<sup>18</sup> Nevertheless, after a lengthy review of the Court's Establishment Clause jurisprudence, the Court had little trouble concluding that these readings violated the Establishment Clause.<sup>19</sup>

In the recent case of *Newdow v. Rio Linda Union School District*, the Ninth Circuit Court of Appeals considered and rejected a challenge to a California law requiring that public school students recite the Pledge of Allegiance.<sup>20</sup> Most public schools require or recommend that children stand and recite the Pledge of Allegiance at the beginning of the school day. Plaintiff Michael Newdow and several other parents and children challenged a California statute requiring recitation of the Pledge of Allegiance.<sup>21</sup> The plaintiffs' challenge to Congress's 1954 Amendment to the Pledge (which added the words "under God") was tossed out on standing grounds since the Amendment did not require students to recite the Pledge.<sup>22</sup> However, the Court found standing under the California law, since several plaintiffs were children forced to recite the Pledge or silently remain in the classroom and tacitly endorse its message.<sup>23</sup> On the merits of the case, the Ninth Circuit found that the Pledge of Allegiance had secular aims and was not an establishment of religion.<sup>24</sup>

Finally, in the 1992 case of *Lee v. Weisman*, the Supreme Court held that a Rhode Island middle school graduation speech by a religious official (a Rabbi) containing references to "God" and

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16. 374 U.S. 203 (1963).

17. *Id.* at 205.

18. Students were required to obtain written permission in order to opt out. *Id.* at 205, 211-12.

19. *Id.* at 223.

20. 597 F.3d 1007, 1007-42 (9th Cir. 2010).

21. As well as the Rio Linda Union School District's policy implementing of the statute. *Id.* at 1012-23.

22. *Id.* at 1016.

23. *Id.* at 1018. On the merits of the case, the Ninth Circuit found that the Pledge of Allegiance had secular aims and was not an establishment of religion. *Id.* at 1034-42.

24. *Id.* at 1034-42.

the word “Amen” violated the Establishment Clause.<sup>25</sup> The Court indicated that the use of the prayer in front of school children had a “coercive” effect and that the Court must employ a heightened sensitivity when analyzing Establishment Clause challenges in the K-12 context.<sup>26</sup> Unlike *Engel*, the Court addressed the issue of whether the students who chose to remain in attendance suffered a real injury.<sup>27</sup> They do, the Court reasoned, because forcing dissenters to listen to a state-organized religious speech is functionally the same as making them speak out loud. As in *Engel* and *Schempp*, students were given the option of not attending the ceremony. The Court held that this was not a meaningful option, since the vast majority of students want to attend their high school graduations.<sup>28</sup>

## 2. *Passive Viewing*

Passive viewing opinions, like *Ahlquist*, involve litigation where a plaintiff has viewed an object that has some connection to a religious tradition. Often, as described more fully below, the “injuries” described by plaintiffs are emotional in nature and unverifiable.

One of the most well-known passive viewing cases is *Lynch v. Donnelly*, another Establishment Clause case originating in Rhode Island.<sup>29</sup> *Lynch* involved a holiday display put on by the City of Pawtucket. The display, put on for over 40 years before it was challenged, featured a variety of secular displays including “Santa’s House, inhabited by a live Santa who distributed candy[,] . . . four large, five-pointed stars covered with small white electric lights[, and] three painted wooden Christmas tree

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25. 505 U.S. 577, 581-82 (1992).

26. *Id.* at 592.

27. *Id.* at 593.

28. *Id.* at 594-95. Consider also *Santa Fe Independent School Dist. v. Doe*, a substantially similar challenge to student-initiated, student-led prayer preceding high school football games. 530 U.S. 290 (2000). The District argued that because the prayer was privately initiated, it constituted private speech immune from government regulation. The Court rejected this argument, finding that the state was indeed involved with the school prayer (the school had a policy on the topic) and, in any event, the speaker(s) used public resources to effectuate the prayers (including the use of the school grounds and the public address system).

29. 465 U.S. 668 (1984).

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cutouts . . .”<sup>30</sup> It also included a crèche with approximately life-size human figures, including the baby Jesus.<sup>31</sup> Several citizens claimed the crèche “offended their interest in the separation of church and state.”<sup>32</sup> Most dramatically, named plaintiff Daniel Donnelly claimed the display induced a state of “fear.”<sup>33</sup>

The Court dismissed these concerns and declared that the crèche was merely a small part of a secular holiday display.<sup>34</sup> The Court noted that the crèche cost the City nothing to maintain, and that the crèche was no more coercive than governmental recognition of the holiday itself, or the display of Christian paintings in federally owned museums.<sup>35</sup> In short, mere association of an object with a religion was not enough to make it an establishment of religion.<sup>36</sup>

The Supreme Court issued its two most famous passive viewing cases on the same day in 2005: *McCreary County v. ACLU* and *Van Orden v. Perry*. The opinions both involved displays of the Ten Commandments, with one opinion finding the display constitutional (*Van Orden*) and the other finding the display unconstitutional (*McCreary County*). The cases illustrate two distinctions that have proved decisive in passive viewing challenges: (1) whether a complained of object is isolated or part of a larger display; and (2) whether the persons who decided to display the object expressed religious motives.

In *McCreary County*, the ACLU challenged the State of Kentucky’s maintenance of the Ten Commandments in two county courthouses.<sup>37</sup> The McCreary County display was hastily erected after the County legislature passed a resolution requiring such a display. McCreary officials specifically requested that the display be placed in a “high traffic” area.<sup>38</sup> Pulaski County’s display opened to great fanfare, complete with a speech by a local Judge’s

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30. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1175 (D.R.I. 1981) (district court opinion).

31. 465 U.S. at 671.

32. 525 F. Supp. at 1157.

33. *Id.* at 1156.

34. 465 U.S. at 684-85.

35. *Id.* at 683.

36. *Id.* at 685.

37. 545 U.S. 844 (2005).

38. *Id.* at 851.

pastor on the certainty of God's existence.<sup>39</sup> The Counties made no pretense that these were anything but overtly religious displays. The ACLU quickly filed a suit challenging the displays as violations of the Establishment Clause.<sup>40</sup>

Realizing that a secular rationale was their best argument, the Counties' attorneys hastily assembled a secular justification for the displays, arguing that the Commandments were selected for display because the Commandments' ethical wisdom has informed, and continues to inform, American law.<sup>41</sup> The Supreme Court agreed with this reasoning,<sup>42</sup> but found that it was a "sham."<sup>43</sup> In other words, the Counties' justifications simply came too late. The Court did not discuss the issue of standing – apparently the ACLU's standing<sup>44</sup> to bring the action was assumed, or not disputed on appeal.

The Justices took a more generous view of a Ten Commandments display in *Van Orden v. Perry*.<sup>45</sup> This display of the Ten Commandments was a large, 6-foot tall monument that formed one part of a thirty-eight piece<sup>46</sup> display outside of the Austin, Texas County Courthouse. The other displays included secular monuments and memorials such as the "Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, [and] Volunteer Fireman" memorials.<sup>47</sup> Unlike the two Counties involved in *McCreary Country*, no religious fanfare greeted the monument's opening. The monument had been donated decades ago by the Fraternal Order of the Eagles in the hope that it would reduce

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39. *Id.* at 851, 869.

40. *Id.* at 852.

41. *Id.* at 852-53.

42. *Id.* at 856.

43. *Id.* at 865. While the Court didn't explicitly call the rationale a sham, the Court said that states cannot employ sham reasoning, and that it didn't believe the Counties' explanation. One can easily put two and two together.

44. So long as any member of an organization has standing and the organization represents this person's interests, the organization has standing under the Constitution. The counties challenged the ACLU's standing at the trial level, and the District Court held that the ACLU had organizational standing. The Counties either dropped this argument on appeal, or stipulated to it before the Supreme Court.

45. 545 U.S. 677 (2005).

46. Composed of "17 monuments and 21 historical markers." *Id.* at 681.

47. *Id.* at n.1.

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juvenile delinquency.<sup>48</sup> This history satisfied the Court that the monuments were constitutionally permissible because there was no evidence of any religious intent. Furthermore, the displays were part of a larger display containing secular objects. As in *McCreary County*, the Court failed to address whether the plaintiff, Thomas Van Orden, had standing to bring the action based simply on observing the monument.<sup>49</sup>

## III. AHLQUIST V. CITY OF CRANSTON

The story of *Ahlquist* begins 50 years ago, when the banner in question was first displayed at Cranston West High School.<sup>50</sup> Cranston West was opened in 1959 to support Cranston's growing population and is one of the City's two high schools.<sup>51</sup> From its inception, Cranston West was no stranger to expressions of Christian faith. Classes began with a recitation of the Lord's Prayer until the U.S. Supreme Court disapproved of such prayers in its 1962 decision *Engel v. Vitale*.<sup>52</sup> Similarly, the prayer banner at issue was raised four years after the school opened.<sup>53</sup> It was donated by the Class of 1963,<sup>54</sup> the first class to graduate from Cranston West.<sup>55</sup>

The banner's message is not overtly religious and does not reference the text of the Bible. It is primarily concerned with secular aspirations, such as the ability "to grow mentally and

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48. Sylvia Moreno, "Supreme Court on a Shoestring: Homeless Man Takes On Texas, Religious Display", WASHINGTON POST, Feb. 21, 2005 at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A40461-2005Feb20.html> (last accessed Oct. 19, 2012). The Eagles donated similar displays to courthouses around the country. *Id.* The precise link between the presence of the Commandments and a decrease in juvenile delinquency is unclear. My best guess is the Eagles hoped the monument would instill the fear of God in wayward youth.

49. Van Orden suggested that his decision to file the lawsuit was, in part, due to an overabundance of free time. Van Orden was a former attorney who, after a personal breakdown, became homeless. He told the Washington Post that he brought suit since his "schedule [wa]s kind of light." Moreno, *supra* note 48.

50. *Ahlquist v. City of Cranston*, 840 F.Supp.2d 507, 511 (D.R.I. 2012).

51. *Id.* at 510.

52. *Id.* at 511; *Engel v. Vitale*, 370 U.S. 421 (1962).

53. *Ahlquist*, 480 F. Supp. 2d at 511.

54. *Id.*

55. *Id.* at 510.

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morally” and “to be kind and helpful.”<sup>56</sup> It does, however, include two religious phrases: “Our Heavenly Father” and “Amen.” It measures about 8 feet in height, and is painted directly on to the wall of the school’s gymnasium. It reads, in its entirety:

SCHOOL PRAYER  
OUR HEAVENLY FATHER,  
GRANT US EACH DAY THE DESIRE TO DO OUR BEST,  
TO GROW MENTALLY AND MORALLY AS WELL AS  
PHYSICALLY,

TO BE KIND AND HELPFUL TO OUR CLASSMATES AND  
TEACHERS,  
TO BE HONEST WITH OURSELVES AS WELL AS WITH  
OTHERS,  
HELP US TO BE GOOD SPORTS AND SMILE WHEN WE  
LOSE AS WELL AS WHEN WE WIN,  
TEACH US THE VALUE OF TRUE FRIENDSHIP,  
HELP US ALWAYS TO CONDUCT OURSELVES SO AS TO  
BRING CREDIT TO CRANSTON HIGH SCHOOL WEST.

AMEN<sup>57</sup>

Jessica Ahlquist entered Cranston West as a freshman in the summer of 2009.<sup>58</sup> Ahlquist attended several mandatory school events in the auditorium, but did not notice the prayer banner until a friend pointed it out to her.<sup>59</sup> An avowed atheist,<sup>60</sup> Ahlquist testified that the religious language in the banner grew to bother her: “It seemed like it was saying, every time I saw it, ‘You don’t belong here.’”<sup>61</sup> Ahlquist contacted the ACLU, who told her that it had already received an anonymous complaint about the banner.<sup>62</sup> She decided to start a discussion about the issue,

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56. *Id.* at 511.

57. *Id.*

58. *Id.* at 512.

59. *Id.*

60. Abby Goodnough, “Student Faces Town’s Wrath in Protest Against a Prayer”, N.Y. TIMES, Jan. 26, 2012, *available at* [http://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-lawsuit.html?\\_r=0](http://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-lawsuit.html?_r=0) (last accessed Oct. 19, 2012).

61. *Id.*

62. *Id.*

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creating a Facebook page dedicated to a discussion of the prayer mural.<sup>63</sup>

The ACLU wrote a letter to Cranston officials in July of 2010 requesting that the banner be taken down.<sup>64</sup> In response, the Cranston School Committee organized several public hearings on the issue.<sup>65</sup> The hearings were, to say the least, acrimonious. Members of the Cranston community, including religious officials, community members, and Ahlquist voiced their opinions on the banner. Community members generally supported the mural's continued presence.<sup>66</sup> Two religious officials and Ahlquist recommended that the mural be removed.<sup>67</sup> Several others equivocated, indicating that they supported the mural, but did not want the City to become embroiled in costly litigation.<sup>68</sup>

A significant amount of the U.S. District Court's opinion in *Ahlquist* is devoted to the conduct of the public at these hearings.<sup>69</sup> Although it did not mention Clarence Darrow or William Jennings Bryan, the Court likened the public meetings to the famed "Scopes monkey trial" of 1925.<sup>70</sup> The Court was not entirely unjustified: the record of the town meetings is replete with off-the-cuff, dogmatic comments.<sup>71</sup> Indeed, in response to Ahlquist's comments, a member of the community said: "[i]f people

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63. *Ahlquist*, 840 F. Supp. 2d at 512 (D.R.I. 2012).

64. *Id.*

65. *Id.* at 512-16 (discussing the Town Meetings).

66. *See, e.g., id.*

67. *Id.* at 512-13 (recommendations of Dr. Donald Anderson, Executive Minister of the Rhode Island State Council of Churches and Rabbi Amy Levin of Temple Torat Yisrael in Cranston); *Id.* at 516 (recommendation of Ahlquist).

68. *See, e.g., id.* at 514-16.

69. *Id.* at 512-16.

70. *Tennessee v. Scopes*, more popularly known as the "Scopes Monkey Trial", was a criminal prosecution of John T. Scopes for teaching the theory of evolution in a Tennessee classroom. The trial, then and now, was a circus. Famed defense attorney Clarence Darrow represented Scopes, and populist William Jennings Bryan prosecuted the case (he had not tried a case in decades). The case is significant for the divisions it exposed: northern versus southern, urban versus rural, and science versus religion. Scopes was found guilty and fined \$100, although this was overturned on appeal. The trial was the subject of Jerome Lawrence and Robert Edwin Lee's 1955 play, *Inherit the Wind*. *See generally* KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY 337-38 (2011).

71. *Ahlquist*, 840 F. Supp. 2d at 513-14.

want to be Atheist, it's their choice and they can go to hell . . .”<sup>72</sup> Another said: “If you take the banner down, you are spitting in the face of Almighty God.”<sup>73</sup> The comments cited in the Court’s opinion do not paint a flattering portrait of the banner’s supporters.

The result of the meetings was that the prayer banner would remain,<sup>74</sup> but it was to be accompanied by an explanatory marker indicating that the banner was historical, and not intended to “promot[e] any ethnic, political, or religious [view].”<sup>75</sup> Unsatisfied with this compromise, the ACLU contacted Ahlquist and asked if she would serve as the named plaintiff in an action against the City of Cranston. Ahlquist agreed.<sup>76</sup> *Ahlquist v. City of Cranston* was filed on April 4, 2011.<sup>77</sup>

#### A. The Court’s Opinion

The District Court for the District of Rhode Island held that the Prayer Banner was constitutionally impermissible and ordered its removal. The Court’s analysis is divided into two sections: (1) Ahlquist’s standing to bring her claim; and (2) the constitutionality of the banner under the Establishment Clause. These issues are analyzed below.

##### 1. *Standing*

All litigants who bring actions in federal court must demonstrate that they have standing to bring a claim. In order to prove that they have standing to bring a claim, litigants must demonstrate three factors: (1) an “injury in fact” (an injury recognized by the law as legitimate);<sup>78</sup> (2) redressability

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72. *Id.* at 513.

73. *Id.* at 514.

74. *Id.* at 515.

75. *Id.* at 516.

76. *Id.*

77. *Id.* The case could have brought in State or Federal Court – Ahlquist and the ACLU most likely chose federal court since a decision would be issued faster (state courts are notoriously slow compared to their federal counterparts). Additionally, the federal forum may have been seen as advantageous for Ahlquist, as a state court might feel more loyalty toward the banner.

78. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

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(allegations showing that a judicial decision would resolve the problem alleged); and (3) causation (facts proving that the defendant's activity caused the alleged injury).<sup>79</sup> This requirement is derived from Article III of the U.S. Constitution, which provides that federal courts may only hear "case[s]" or "controvers[ies]."<sup>80</sup> Standing is not simply a box to be checked when a plaintiff claims he or she was harmed – it is an important method of ensuring that claims satisfy the Constitution's minimal requirements. More broadly speaking, it helps "maintain [ ] the public's confidence in an unelected but restrained Federal Judiciary."<sup>81</sup>

The defendants argued that Ahlquist did not suffer an injury in fact by merely viewing the mural. Defendants advanced two reasons in support of their argument. First, Ahlquist admitted in sworn testimony that she did not notice the mural until a friend pointed it out to her. Even after Ahlquist became aware of the mural, she testified that she didn't "really think much about it at first."<sup>82</sup> Second, Ahlquist admitted in a radio interview that she was not actually offended by the mural, but merely opposed to it because she thought it was unconstitutional.<sup>83</sup> Ahlquist, in response, argued that her psychological injury (namely, feeling "upset," "exclu[ded]," and "ostraciz[ed]") was legitimate and, further, the kind of injury deemed sufficient in Establishment Clause cases.<sup>84</sup>

The District Court resolved the issue by consulting federal case law on the issue of standing.<sup>85</sup> This case law delineates the rules for cases on either end of the injury spectrum. On the one hand, those litigants who allege a "personal stake in the outcome" have been found to have standing.<sup>86</sup> On the other hand, those litigants who have endured "the psychological consequence . . .

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79. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982); *see also* Robert J. Pushaw Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons From Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010).

80. U.S. CONST. art. III, § 2.

81. *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011).

82. *Ahlquist v. City of Cranston*, 840 F.Supp.2d 507, 517 (D.R.I. 2012).

83. *Id.* at 516.

84. *Id.* at 512.

85. *See id.* at 517-20.

86. *Id.* at 517 (*quoting* *Lujan v. Defenders v. Wildlife*, 504 U.S. 555, 579 (1992)).

produced by observation of conduct with which one disagrees” do not.<sup>87</sup> As one might expect, most cases fall somewhere between these poles.

In determining whether Ahlquist endured a legitimate injury, the Court first declared that the Supreme Court’s statements on standing were conflicted and of little help. Rather than “cherry pick” phrases from Supreme Court’s opinion, wrote Judge Lague, the Court would analyze how the issue of standing played out in practice.<sup>88</sup> The Court looked at five opinions, three that rejected standing, and two that endorsed it.<sup>89</sup>

The Court first looked at *Lujan v. Defenders of Wildlife*, a challenge under the Administrative Procedures Act to actions taken by the U.S. Department of the Interior. The plaintiffs, a group of environmental and conservation groups, challenged the government’s determination that the Endangered Species Act did not apply abroad.<sup>90</sup> The plaintiffs claimed that they were injured because they had traveled, and planned to return, to foreign countries.<sup>91</sup> The Supreme Court ruled that this was insufficient to establish standing, since the plaintiffs’ connection to the countries in question was merely aspirational. Since the plaintiffs had no connection to the foreign destinations, a governmental decision directed toward those countries would not injure the plaintiffs in a legal sense.<sup>92</sup>

Next, the Court turned to two Establishment Clause cases denying standing. First was *Elk Grove Unified School District v. Newdow*,<sup>93</sup> a father’s complaint against a school district for forcing his daughter to recite the Pledge of Allegiance’s “under God” clause.<sup>94</sup> This case was dismissed by the Supreme Court on a technicality: the child’s mother filed a motion to intervene in the case, stating that she was the daughter’s legal guardian and that neither she nor her daughter opposed the recitation of the pledge. Thus, *Newdow* proved little help in deciding what should be made

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87. *Id.* (quoting *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464 (1982)).

88. *Id.* at 518.

89. *Id.* at 518-19.

90. *Id.* at 518.

91. *Id.*

92. *Id.*

93. 542 U.S. 1 (2004).

94. *Id.* at 5.

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of the prayer banner.

The second challenge, *Valley Forge Christian College v. Americans United for Separation of Church and State*<sup>95</sup>, revolved around the issue of taxpayer standing to bring Establishment Clause challenges. The plaintiff in *Valley Forge* was an organization composed of 90,000 “taxpayers” with no connection to the facts of the litigation, save the fact that its members’ taxes paid for a transfer of federal land to a bible college.<sup>96</sup> The *Valley Forge* Court dismissed the organization’s complaints as generalized grievances unworthy of judicial consideration.<sup>97</sup>

The Court then considered two active endorsement cases where the Court found standing. First was *Abington School District v. Schemp*,<sup>98</sup> a challenge to a Pennsylvania law requiring that ten passages from the Bible were read every morning of each public school day. These passages were read by a student via a public address broadcast that all students were required to listen to.<sup>99</sup> The Court, with little rationalizing, declared that the students’ required presence “surely suffice[d] to give [the plaintiff] standing.”<sup>100</sup> Next was *Engel v. Vitale*<sup>101</sup>, a similar challenge by ten students to a prayer read each school day in New York’s public schools. The prayer began with “Almighty God” and ended with “Amen.”<sup>102</sup> The Court did not even mention standing in its opinion; it simply took it for granted.<sup>103</sup>

Finally, the Court turned to the case that best supported its argument: *Lee v. Weisman*.<sup>104</sup> The plaintiff in *Lee* was a student in Providence, Rhode Island who complained of an upcoming graduation speech that would include an “invocation and benediction” by a religious official. The Court found standing based on two factors: (1) the student’s current enrollment at

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95. 454 U.S. 464 (1982).

96. *Ahlquist*, 840 F. Supp. 2d at 518.

97. *Id.* Were this an Establishment Clause case, taxpayer standing would likely have sufficed. See *infra* discussion of taxpayer standing in part IV.

98. 374 U.S. 203 (1963). This case is described above in part II.

99. *Id.* at 206-07.

100. *Id.* at 224.

101. 370 U.S. 421 (1962). This case is described above in part II.

102. See *Engel v. Vitale*, 370 U.S. 421 (1962).

103. *Id.*

104. 505 U.S. 577 (1992).

Classical High School in Providence; and (2) the likelihood, if not certainty, that the invocation and benediction would take place at her graduation.<sup>105</sup> Thus, like the plaintiffs in *Shemp* and *Engel*, the student would be present at a school event featuring religious speech.

Considering these cases, the *Ahlquist* Court threw its lot in with the cases that found standing. Judge Lageux expressed confidence that the Supreme Court would find standing here, arguing that Ahlquist endured an injury similar to those endured by the plaintiffs in *Schemp*, *Engel*, and *Lee*.<sup>106</sup> Further, Judge Lageux found Ahlquist's situation "readily distinguishable" from the plaintiffs in *Lujan*, *Valley Forge*, and *Elk Grove*.<sup>107</sup> Having found standing, the Court analyzed the permissibility of the prayer banner under the Establishment Clause.

## 2. *The Prayer Banner*

The *Ahlquist* Court, in no uncertain terms, found the prayer banner unconstitutional. To reach that point, the Court waded through the clutter that is the Supreme Court's body of Establishment Clause case law. Relying on a recent First Circuit opinion,<sup>108</sup> the Court analyzed the following factors: (1) The three-pronged test from *Lemon v. Kurtzman*; (2) an "endorsement" analysis derived from *Lynch v. Donnelly*;<sup>109</sup> and (3) a "coercion" analysis derived from *Lee v. Weisman*.<sup>110</sup>

### a. Lemon Test

As a starting point, the Court applied the venerable yet oft-criticized *Lemon v. Kurtzman* test.<sup>111</sup> This test has three parts. First, the test asks whether the governmental policy (or display) in question reflects a clearly secular purpose. The *Ahlquist* Court

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105. *Ahlquist v. City of Cranston*, 840 F.Supp.2d 507, 524 (D.R.I. 2012) (quoting *Lee v. Weisman*, 505 U.S. at 584).

106. *Id.* at 520.

107. *Id.*

108. Interestingly, the case the Court relied upon, *Freedom From Religion Found. v. Hanover School District*, held that the words "under God" in the Pledge of Allegiance do not make the Pledge an unconstitutional establishment of religion. 626 F.3d 1, 8 (1st Cir. 2010).

109. 465 U.S. 668 (1984).

110. 505 U.S. 577 (1992).

111. 403 U.S. 602 (1971).

concluded that it did not.<sup>112</sup> Although several members of the school board expressed support for the banner based on values such as “conveying moral values to high school students[,] . . . history and tradition[, and] . . . respecting each student’s contributions to the school”, two members’ explicit endorsement of the banner based on religious grounds doomed the defendants’ argument.<sup>113</sup> Since *Lemon* requires a “clearly” secular purpose, the Court had little trouble concluding that Cranston West’s motivations in maintaining the banner were not wholly secular.<sup>114</sup>

The Court also suggested that the mural’s donation and initial display was “clearly religious.” But despite the fact that the banner includes the phrases “our heavenly father” and “Amen”, there is no evidence of the motivations underlying the banner’s creation.<sup>115</sup> The Court also suggested that Cranston West’s decision to display the prayer mural in 1963 was a deliberate snub at the Supreme Court, since Cranston was forced to eliminate mandatory school prayer following the Court’s 1962 opinion in *Engel v. Vitale*.<sup>116</sup> This, however, is a matter of speculation: it is equally likely that Cranston West officials deemed the banner religiously innocuous.

Next, the Court asked whether the mural has the “primary effect of advancing or hindering religion.”<sup>117</sup> The Court stated that “[t]o the extent the installation . . . has an[y] effect, its impact is to advance religion.”<sup>118</sup> This is a curious statement since, as with the circumstances surrounding the banner’s donation, there does not appear to be evidence one way or the other. Indeed, the most that can be said is that Ahlquist (and possibly others) disapproved of the banner. Perhaps motivated by this dearth of evidence, the Court speculated as to the motivations of the banner’s supporters: “[t]he retention of the Prayer Mural . . . reflects the nostalgia felt by some members of the community who remember fondly when . . . religion . . . could be practiced in public schools with impunity.”<sup>119</sup>

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112. Ahlquist v. City of Cranston, 840 F.Supp.2d 507, 521 (D.R.I. 2012).

113. *Id.* at 521.

114. *Id.* at 522.

115. *Id.* at 521.

116. *Id.*

117. *Id.* at 522.

118. *Id.*

119. *Id.* at 522.

The Court delivered its coup-de-grâce by explaining why Cranston failed to “avoid excessive entanglement with religion.”<sup>120</sup> The Court found Cranston’s actions, vis-à-vis the School Committee members’ conduct, “troubling.”<sup>121</sup> The Court was unimpressed by the rowdy and boorish comments at the public meetings. Of course, these comments came almost exclusively from members of the public, not school officials.<sup>122</sup> However, the Court linked the School Committee members to the melee by pointing out that five of the members “expressed avowals of their own religious beliefs.”<sup>123</sup>

Finally, the Court chastised the School Board for creating “civic divisiveness” by “focus[ing] on the Prayer Mural” and “exposing [themselves] to a situation where a loud and passionate majority encouraged [them] to . . . override the constitutional rights of a minority.”<sup>124</sup> This is a curious statement, given that Ahlquist and an unnamed complainant could equally be said to have initiated the civic divisiveness by contacting the ACLU and filing a lawsuit. The Supreme Court expressly disapproved of the Ahlquist court’s rationale in the 1984 case of *Lynch v. Donnelly*: “apart from this litigation there is no evidence of political friction or divisiveness over the [complained of object] . . . A litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.”<sup>125</sup>

#### b. Endorsement

The Court next conducted an “endorsement” analysis, asking if Cranston’s actions had “the purpose or effect of endorsing, or promoting religion.”<sup>126</sup> This test is derived from former Justice Sandra Day O’Connor’s concurrence in the case of *Lynch v. Donnelly*.<sup>127</sup> While largely duplicative of the *Lemon* test, the First

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. 465 U.S. 668, 684-85 (1984).

126. *Id.* at 714.

127. See Raymond C. Pierce, *The First Amendment “Undergod”*: Reviewing the Coercion Test in Establishment of Religion Claims, 35 HAMLINE

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Circuit has identified it as a separate analysis.<sup>128</sup> After describing Ahlquist's feelings of dejection and ostracization, the Court clarified that the test asks if "a reasonable and objective observer fully aware of the background and circumstances . . . would view the Prayer Mural and the conduct of the School Committee [as an endorsement of religion]."<sup>129</sup>

The Court found that an objective observer would deem the banner and the School Committee's conduct endorsements of Christianity.<sup>130</sup> It reached this conclusion by engaging in the temporal feat of analyzing the mural "at three points in time": the time of the banner's creation, the period between 1963 – 2011, and the time of the School Committee meetings.<sup>131</sup> The Court concluded that a reasonable observer would discern religious intentions when the banner was first displayed, not draw an opinion one way or the other during the intervening years, and again feel that the banner was an endorsement around the time of the School Committee hearings.<sup>132</sup> The Court did not explain how or why an observer would have realized the mural's religious intent in 1963, but nevertheless concluded that there was sufficient endorsement of religion.

## c. Coercion

The *Ahlquist* Court also examined the degree of coercion imposed by the banner. The "coercion" test is derived from language in *Lee v. Weisman*, discussed above.<sup>133</sup> The coercion here, the Court admitted, was minimal to non-existent. Nevertheless, the Court declared that courts must employ "heightened sensitivity" when examining religion in public schools, and, further, that the facts of this case demanded "heightened scrutiny."<sup>134</sup> The Supreme Court has indeed indicated that public school children deserve special protection under the Establishment Clause. The Court's rationale is that

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L. REV. 183, 188 (2012).

128. *Ahlquist*, 840 F. Supp. 2d. at 521.

129. *Id.* at 523.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See Pierce*, *supra* note 127, at 189.

134. *Ahlquist*, 840 F. Supp. 2d 507, 524.

young people feel more social pressure to conform than adults do; thus, children are more easily susceptible to conform to religious practices observed at school.<sup>135</sup> This rationale was developed in the active endorsement context, and makes less sense when applied to a passive viewing situation like *Ahlquist*. Nevertheless, in the spirit of affording special protection to children, the Court sided with Ahlquist.<sup>136</sup>

#### d. Public Displays

Finally, the Court bolstered its analysis with a closer look at Establishment Clause litigation involving religious displays in public places. The Court focused on two of the most significant opinions: *Van Orden v. Perry*<sup>137</sup> and *Stone v. Graham*.<sup>138</sup> Both opinions involved publicly sponsored displays of the Ten Commandments. *Van Orden* involved a public display on the grounds of the Texas State Capitol, while *Stone* involved a mandatory display of the Ten Commandments in Kentucky classrooms.<sup>139</sup> The only real distinction that can be drawn between the cases – as the *Ahlquist* Court noted – is that *Stone* involved a public school system. As noted above, the Supreme Court has often suggested that religious displays in public schools should be afforded special treatment due to the impressionability of youth. The Court offered a final, lengthy quote from Rhode Island's most famous inhabitant, Roger Williams, before ordering the removal of the banner.<sup>140</sup>

### 3. *The Aftermath*

Although litigation promises finality, it often opens new, or exacerbates existing, wounds. This was the case with *Ahlquist*.

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135. *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992).

136. *Ahlquist*, 840 F. Supp. 2d at 526.

137. 545 U.S. 677 (2005).

138. 449 U.S. 39 (1980).

139. *Ahlquist*, 840 F. Supp. 2d at 524-25.

140. *See id.* at 525-26. (“There goes many a ship to sea . . . whose weal and woe is common . . . It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked on one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any.”).

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The most prominent victim was Ahlquist herself. Ahlquist received death threats<sup>141</sup> and online smears.<sup>142</sup> A Rhode Island State Senator, Peter J. Palumbo, called Ahlquist an “evil little thing.”<sup>143</sup> Opponents and classmates sent Ahlquist cruel messages, saying she was, for example, “unloved” and “psycho.”<sup>144</sup> The campaign against Ahlquist became so heated that she was accompanied to school by an armed guard for a period. Even three local florists refused to deliver flowers to Ahlquist based on her outspoken opposition to the mural.<sup>145</sup> This conduct is deplorable and inexcusable. One cannot help but note the irony that those who support the magnanimous message of the Cranston West Prayer Banner would engage in such tactics. Quoth the banner: “Help us to be good sports and smile when we lose as well as when we win.”

The City of Cranston decided not to appeal Judge Lagueux’s opinion.<sup>146</sup> Perhaps the most compelling reason to end the litigation was to cut off future legal costs. Cranston most likely spent hundreds of thousands of dollars defending itself.<sup>147</sup> Additionally, the City and School District were required to pay the

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141. See Maria Armental, “*Cranston police investigate threats to student who sued over Cranston West prayer banner*”, *PROV. J. BULL.*, (Apr. 12, 2012), <http://news.providencejournal.com/breaking-news/2012/04/cranston-police-31.html> (Ahlquist received a handwritten letter in February of 2012 threatening her with “bodily harm and sexual assault”).

142. Mark Schieldrop, *Ahlquist: Fight over Mural, Despite Harrassment, Threats, “Worth It.”*, *CRANSTONPATCH*, (Jan. 16, 2012), <http://cranston.patch.com/articles/ahlquist-fight-over-mural-despite-harrassment-threats-worth-it>.

143. Goodnough, *supra* note 60.

144. Elisabeth Harrison, *R.I. Student Draws Ire Over School Prayer Challenge*, *NPR NEWS*, (Feb. 14, 2012), <http://www.npr.org/2012/02/14/146538958/rhode-island-district-weighs-students-prayer-lawsuit>.

145. Paul Davis, *Florist Found in Connecticut to Deliver Roses to Cranston West Prayer Banner Opponent*, *PROJ. J. BULL.*, (Jan. 19, 2012), <http://news.providencejournal.com/breaking-news/2012/01/cranston-floris.html>.

146. News Staff, *Cranston school prayer banner: Panel won't appeal ruling*, *PROV. J. BULL.*, (Feb. 16, 2012), <http://news.providencejournal.com/breaking-news/2012/02/cranston-school-13.html>.

147. An article in the Providence Journal suggested that the cost of appealing the District Court’s opinion alone might reach \$500,000. See Paul Davis, *Cranston School Prayer Banner: Appeal Could Cost \$500,000, Lawyer Says*, *Prov. J. Bull.*, (Feb. 16, 2012), <http://news.providencejournal.com/breaking-news/2012/02/cranston-school-12.html>.

ACLU \$150,000 in legal fees because Ahlquist prevailed.<sup>148</sup> Many members of the public did not want to give up so easily. As late as March, a group of seven intervenors appealed to the First Circuit Court of Appeals to secure their right to intervene and, thus, appeal the decision.<sup>149</sup> This proved unsuccessful and the banner was removed on March 3 and 4 of 2012.<sup>150</sup> The process took 11 hours, and involved physically removing a section of the wall containing the banner. In an Indiana Jones-like ending, the Providence Journal reported that the Prayer Banner is now “being preserved at an undisclosed location.”<sup>151</sup>

#### IV. REJECTING PASSIVE VIEWING ESTABLISHMENT CLAUSE CHALLENGES

##### A. Introduction

What was the *Ahlquist* opinion all about? The District Court cast it as a tale of religious zealotry gone amok. Ahlquist was a brave dissenter who challenged a visible symbol of a City's endorsement of Christianity.<sup>152</sup> However, Ahlquist's lawsuit can also be cast as a thinly veiled complaint about the City of

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148. Lynn Arditi, *Cranston, Schools to Split Legal Fees in Prayer Banner Case*, PROV. J. BULL. (Apr. 23, 2012), <http://news.providencejournal.com/breaking-news/2012/04/cranston-school-17.html>.

149. News Staff, *Group Seeks to Reopen Cranston Prayer Banner Case*, PROV. J. BULL. (May 14, 2012), <http://news.providencejournal.com/breaking-news/2012/05/group-seeks-to-2.html>.

150. Meg Fraser, *Prayer Banner Comes Down*, CRANSTON HERALD, (Mar. 7, 2012), [http://www.cranstononline.com/stories/Prayer-mural-comes-down,68657?search\\_filter=cranston+prayer+banner&town\\_id=3&sub\\_type=stories](http://www.cranstononline.com/stories/Prayer-mural-comes-down,68657?search_filter=cranston+prayer+banner&town_id=3&sub_type=stories).

151. See Arditi, *supra* note 148. In the movie *Raiders of the Lost Ark*, swashbuckling archaeologist Indiana Jones (played by Harrison Ford), pursues the “Ark of the Covenant”, a legendary artifact containing the tablets inscribed with the Ten Commandments handed down to Moses on Mt. Sinai. *Raiders Of The Lost Ark* (Paramount Pictures 1981). The Ark is eventually discovered and possesses unfathomable power. American governmental officials confiscate the Ark and, in the movie's final scene, the Ark is wheeled into a vast warehouse, presumably never to be seen again. See *id.*

152. For an even rosier iteration of this argument, see Charles Haynes, *In Rhode Island, a Lesson in Religious Freedom*, WASH. POST, (Jan. 24, 2012), [http://www.washingtonpost.com/blogs/on-faith/post/in-rhode-island-a-lesson-in-religious-freedom/2012/01/24/gIQAlcXJOQ\\_blog.html](http://www.washingtonpost.com/blogs/on-faith/post/in-rhode-island-a-lesson-in-religious-freedom/2012/01/24/gIQAlcXJOQ_blog.html).

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Cranston's religious homogeneity.<sup>153</sup> Under this view, the banner is neither here nor there – it was simply a tool for opportunist individuals and organizations to win a skirmish in the cultural battle over public references to Christianity.

If this is the correct interpretation – and I argue that it is – then we must seriously question the continued wisdom of passive viewing cases. I am not convinced that challenges such as *Ahlquist's*<sup>154</sup> involve an establishment of religion. These situations involve the voluntary, passive viewing of objects with religious significance. The Supreme Court has made it clear that compelled or encouraged attendance at events containing religious material constitutes a state establishment of religion. This is reasonable given the inherent coercion in forcing children to speak or listen to religious speech. However, objects containing religious language that can be found in public institutions do not involve any coercion and should not, in my view, constitute an establishment of religion. My primary argument is that these complaints violate the constitutional mandate of standing. There are plaintiffs who could have a valid claim to standing, but not passive viewers. Additionally, I offer some specific critiques of the *Ahlquist* Court opinion.

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153. The City of Cranston is a largely Catholic community. One websites place the Catholic population at well above 40%. See Sperlberg's Best Places, [http://www.bestplaces.net/religion/city/rhode\\_island/cranston](http://www.bestplaces.net/religion/city/rhode_island/cranston) (last accessed Oct. 19, 2012) (43.31% as of June 2012).

154. A case very similar to *Ahlquist's* was filed in the United States District Court for the Western District of Virginia in 2011. *Doe 1 v. Sch. Bd. of Giles Cnty.*, No. 7:11-cv-00435-MFU (W.D. Va. Sept. 13, 2011); Complaint, *Doe 1*, No. 7:11-cv-00435-MFU (W.D. Va. Sept. 13, 2011), available at <http://acluva.org/wp-content/uploads/2011/09/20110913GilesCo10CsDoecomplaint.pdf>). In that case, students challenged public school displays of the Ten Commandments that were erected in the wake of the Columbine High School shootings of 1999. According to the complaint, the displays were taken down and put back up again a few times. The complaint alleges that the School District finally buckled to pressure and approved a compromise measure in June of 2012 that would replace the Ten Commandments with a photocopy of a history textbook placing the Ten Commandments in historical perspective. See Laurence Hammack, *Giles County to remove Ten Commandments from Narrows High School*, THE ROANOKE TIMES (Jun. 1, 2012), <http://www.roanoke.com/news/roanoke/wb/309612>. See also Christopher J. Heaney, *Cooking Up a New Lemon Test: The Establishment Clause, Displays of Religious Objects, and Lessons From India*, 10 FIRST AMEND. L. REV. 559, 597-605 (2012).

## B. Standing

As *Ahlquist* illustrates, standing is often given short shrift in Establishment Clause cases. Standing is a constitutional mandate that cannot be waived or overlooked. Yet this is exactly what many federal courts do. As noted above, courts have found standing simply based on a person's claim that he or she saw something with a religious theme and was offended. The argument that these passive viewings constitute legally redressable injuries is dubious. At best, these claims produce a psychological disagreement, which is insufficient according to Supreme Court case law.<sup>155</sup>

It seems clear that plaintiffs like *Ahlquist* do not, as required by the Constitution, suffer an injury sufficient to confer standing. In a thorough and insightful examination of this issue, Commentator Mary Alexander Myers observed that a Court's determination of standing "often turns on seemingly arbitrary factors such as whether the plaintiff is . . . in public school or how often the plaintiff encounters religious displays . . ." <sup>156</sup> More succinctly, Ms. Myers described the Court's collective decisions as "inconsistent and irrational."<sup>157</sup> Faced with this difficulty, however, Ms. Myers recommends that the Court hear the vast majority of psychological injuries, at least in the Establishment Clause context. While I agree with Ms. Myers' analysis, I disagree with her conclusion. I believe it is impossible to validate psychological injuries in light of the constitutional imperative to only decide "case[s]" or "controvers[ies]." Thus, the only constitutionally permissible way to get around this problem is to more carefully police Establishment Clause claims.

The Supreme Court has unequivocally stated that mere psychological disagreement is not enough to confer standing. One cannot escape the conclusion that the most *Ahlquist* suffered was a psychological harm, if anything. *Ahlquist* viewed the banner a

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155. *Ahlquist v. City of Cranston ex rel. Strom*, 840 F. Supp. 2d 507, 518-19 (D.R.I. 2012) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 465 (1982)).

156. Mary Alexander Myers, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence*, 65 VAND. L. REV. 979, 982 (2012).

157. *Id.* at 982-83, 1003-04.

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few times, and admitted that she did not notice it until a friend pointed it out. Further to the point, she admitted that she was not offended by the banner, but only wanted to vindicate her constitutional rights. This should not be recognized as a legally sufficient injury.

In response, it could be argued that barring certain Establishment Clause lawsuits insulates overtly religious displays from lawsuits. I offer two points in response. First, in a battle between a constitutional mandate (standing) and social policy (Establishment Clause litigation), social policies must yield to the Constitution. Second, excluding passive viewing cases would not prevent persons with a more direct injury from bringing suit. For example, if taxpayer money is used to purchase a religious object that is publicly displayed, a taxpayer could bring suit based on his or her status as a taxpayer.

Remitting one's income taxes is not usually sufficient to establish standing; however, the Supreme Court carved out an exception for Establishment Clause cases in the 1963 case of *Flast v. Cohen*.<sup>158</sup> The *Flast* Court set out general principles about when a taxpayer has standing, and confined its holding to the Establishment Clause context. This exception remains the law today.<sup>159</sup> One can imagine other circumstances giving rise to a personal injury – for example, if a community created a religious display as a deliberate attempt to alienate or target a religious minority.

Beyond the issue of standing, the *Ahlquist* opinion is problematic for broader reasons that illustrate the deficiencies of the Supreme Court's Establishment Clause jurisprudence. I address some of these problems below.

### C. *Ahlquist* and the Establishment Clause

Perhaps the most peculiar part of the *Ahlquist* opinion is that

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158. 392 U.S. 83 (1968).

159. The *Flast* exception was arguably weakened by the Supreme Court's 2011 opinion in *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1439 (2011). *Winn* involved a taxpayer challenge to tax breaks given to individuals who donate money to school tuition organizations that, in turn, occasionally offer scholarships to private religious schools. *Id.* The Court held that the policy in question was a tax credit, and not a governmental expenditure. *See id.* at 1447.

it attributed religious motives to the raising of the prayer banner when there is no evidence of Cranston's motives in this regard. The Supreme Court has consistently focused on the motivations of public entities when they created or displayed objects with religious language or themes. Indeed, it was the sole factor that produced different outcomes in *McCreary County* and *Van Orden*. And yet, the *Ahlquist* Court glossed over this distinction and found that contemporary religious support for the banner was good enough. Clearly the message the *Ahlquist* Court gathered from the Supreme Court's jurisprudence was that any expression of religious faith is anathema to a display or activity. This is far too demanding a standard.

Another problematic aspect of the *Ahlquist* opinion is its insistence that children – students, specifically – receive different treatment under the Establishment Clause. The Supreme Court has repeatedly suggested that Courts must exercise additional sensitivity to ensure that children are not exposed to religious displays. This rule has no basis in the Constitution and is bad policy.

The Supreme Court's rationale is that children are especially susceptible to religious messages that the impartial state should not be promoting. The Court has even referenced psychological studies that support this claim.<sup>160</sup> This argument, however, is flawed for several reasons. First, the term "children" encompasses a group with a substantial range in age and cognitive ability. Second, the Court has assumed that students are smart enough to draw the required inferences connecting the school to an unconstitutional establishment of religion, but not smart enough to avoid being brainwashed by such efforts. Children are not impressionable vessels who cannot think for themselves. *Ahlquist* is living proof: she was only fourteen at the time she complained to the ACLU.<sup>161</sup> Third, the Court ignores the fact that children are accustomed to engaging in mandatory behavior that they do not give much thought to. Not everyone who speaks "under God" in the Pledge of Allegiance or views an object with references to a

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160. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

161. *See Goodnough*, *supra* note 60 (*Ahlquist* was sixteen as of January 16, 2012).

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Supreme Deity thinks much of it.<sup>162</sup>

Finally, it bears mentioning that Establishment Clause lawsuits like *Ahlquist*'s are often resolved according to the political affiliation of the judge hearing the case.<sup>163</sup> A recent study by Professors Gregory C. Sisk and Michael Heise of Establishment Clause cases from 1996 – 2005 found that Democratic-appointed judges upheld 57.3 percent of Establishment Clause challenges, while Republican-appointed judges upheld 25.4 percent of challenges.<sup>164</sup> In other words, an Establishment Clause challenge heard before a Democratically-elected Judge is 2.25 times more likely to succeed.<sup>165</sup> The authors noted that the malleable nature of Supreme Court case law gives judges intellectual wiggle-room to find in favor of the party representing his or her political beliefs.<sup>166</sup> While a plaintiff can choose a federal or state forum for his or her Establishment Clause claim, the decision about which judge will hear the case is often left to the Court's internal rules. This creates the potential for even more uncertainty.

#### V. CONCLUSION

The *Ahlquist* opinion illustrates three problems that are endemic to Establishment Clause litigation. First, *Ahlquist* ignores the standing requirements imposed by the Constitution. Second, it recognizes a special rule for religious displays in public

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162. Justice Potter Stewart got at the strange nature of the adult/child distinction in his dissent in *Engel v. Vitale* 370 U.S. 421, 450, n.20 (Stewart, J., dissenting) (“[I]s the Court suggesting that the Constitution permits judges and Congressmen and Presidents to join in prayer, but prohibits school children from doing so?”).

163. This was not the case in *Ahlquist*: Judge Lagueux was nominated by Republican President Ronald Reagan. See Biography of Senior Judge Ronald R. Lagueux, <http://www.rid.uscourts.gov/menu/judges/judicialofficers/lagueux.html> (last accessed March 20, 2013). Judges, however, have motivations besides political ones. Judge Lagueux has served the Rhode Island State and Federal Judiciary for over forty years, and has been a Senior Judge since 2001. *Id.* Most people, toward the end of their career, would rather defend the venerable principle of separation of church and state instead of tacitly endorsing the hostility expressed toward *Ahlquist*.

164. Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in Federal Courts*, 110 MICH. L. REV. 1201 (2012).

165. *Id.*

166. *Id.*

schools, a rule nowhere to be found in the text of the Constitution. Third, it reiterates the message that an object containing any language invoking Christianity is unconstitutional.

The District Court had Roger Williams on its side, and I have chosen my intellectual company accordingly. The late professor and historian Leonard W. Levy wrote a book on the Establishment Clause in 1986. Professor Levy was a proponent of a strict wall of separation between church and state. Yet even Professor Levy recognized that lawsuits challenging every reference to a Supreme Being were a bit much:

Some silly suits, such as those seeking to have declared unconstitutional the words “under God” in the pledge of allegiance or in the money motto “In God We Trust” have . . . deleterious effects. Separationists who cannot appreciate of principle of *de minimis* [violations] ought to appreciate a different motto – “Let sleeping dogmas lie.”<sup>167</sup>

Professor Levy recognized that religion – namely, Christianity – is a part of American culture, and attempts to rid American culture of any and all mention of it are futile at best, and foolish at worst.

The Establishment Clause has too long been pressed into service as a political tool. Many courts have assisted these efforts by ignoring the constitutional mandate of standing. Rejecting passive viewing challenges like *Ahlquist* would help bring clarity and integrity to Establishment Clause jurisprudence.

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167. Levy, *supra* note 7, at 177. Cranston West alumnus Brittany Lanni spoke to this as well. See Goodnough, *supra* note 60 (Regarding Ahlquist’s offense at mention of the divine, Ms. Lanni suggested: “take all the money out of your pocket, because every dollar bill says, ‘In God We Trust.’”).