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Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause

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Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause

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“It seems good to mark and to remember for a little while the place where a man died.”¹

I. INTRODUCTION

Private roadside memorials are part of a growing trend among the bereaved who seek to “make sense of senseless deaths” along the public roadways.² These memorials, which often feature a Latin cross, are part of deeply meaningful bereavement practices that support the grieving process. As such, these memorials are created to satisfy a human need during a time of crisis and are, therefore, largely constructed without regard to the legality of erecting such markers.³ Courts have yet to provide clear guidance on the constitutionality of erecting and maintaining these private memorials on public spaces. This Article considers the constitutional guideposts for evaluating roadside memorial crosses and offers some practical solutions for policymakers struggling to balance the needs of the bereaved with the interests of the community.

1. JOHN STEINBECK, *THE LOG FROM THE SEA OF CORTEZ* 70 (1941).

2. Robert M. Bednar, *Denying Denial: Trauma, Memory, and Automobility at Roadside Car Crash Shrines*, in *RHETORIC, REMEMBRANCE AND VISUAL FORM* 128, 129, 134 (Anne Teresa Demo & Bradford Vivian eds., 2012); Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 *OMEGA* 221, 221 (2003).

3. Holly Everett, *Roadside Crosses and Memorial Complexes in Texas*, 111 *FOLKLORE* 91, 96 (2000); Jon K. Reid & Cynthia L. Reid, *A Cross Marks the Spot: A Study of Roadside Death Memorials in Texas and Oklahoma*, 25 *DEATH STUD.* 341, 349, 352 (2001).

These memorials are intensely personal, idiosyncratic expressions motivated by a seemingly senseless death.⁴ Senseless deaths along the roadways surprise and shock us because modern technological advances lull us into thinking we have some measure of control over death.⁵ Roadside memorials are most often created by friends and family members of teenagers who die in car crashes.⁶ Scholars confirm that public opinions about roadside memorials are mixed: “Some claim never to see them, some are angered by them, some place them by the side of the road and never go back, others tend them regularly.”⁷ Public officials are often concerned about the visual distraction and traffic hazards these memorials can create.⁸

Two instances, one from Massachusetts and the other from Australia, illustrate some of the tension between the needs of the bereaved and the interests of the public. In Shutesbury, Massachusetts, a seventeen-year-old died in a one-car accident, and the teen’s father constructed a roadside cross to commemorate his “last alive” place.⁹ Two homeowners who lived near the accident site wanted the cross removed. The cross commemorated the site at the end of one of the homeowner’s driveway for over six years. The homeowners said it was a constant, painful reminder of the night they and other neighbors went to aid the dying teen.¹⁰

In Ormeau, Australia, a nineteen-year-old was struck and killed by a vehicle as he walked home. His memorial was thrice vandalized when the teen’s laminated photograph was taken down and the flow-

4. Jennifer Clark & Majella Franzmann, *Authority from Grief, Presence and Place in the Making of Roadside Memorials*, 30 DEATH STUD. 579, 584 (2006); C. Allen Haney et al., *Spontaneous Memorialization: Violent Death and Emerging Mourning Ritual*, 35 OMEGA 159, 162 (1997).

5. Haney et al., *supra* note 4, at 161.

6. Collins & Rhine, *supra* note 2, at 226 (“Among the 18 deaths documented in the survey, the average victim was 17, with a range from 7 months to 34 years.”); Reid & Reid, *supra* note 3, at 347 (“The modal age was 17, with 11 [of 78] of the deceased being of this age. The next closest age in frequency was 19, with 4 decedents.”).

7. Reid & Reid, *supra* note 3, at 341.

8. See, e.g., *Arizona Removing Roadside Memorials: Families Upset Over State Policy; Officials Point to Safety Concerns*, ARIZ. REPUBLIC, Oct. 6, 2007, at A1, available at 2007 WLNR 27636278 (“The roadside memorials, [the Arizona Department of Transportation] says, are too much of a safety hazard and can be too distracting for motorists.”).

9. Nick Grabbe, *Leverett Neighborhood Wrestles with Weight of Cross*, AMHERST BULL. (June 27, 2008), <http://www.amherstbulletin.com/story/id/98909/>, cited in George E. Dickinson & Heath C. Hoffmann, *Roadside Memorial Policies in the United States*, 15 MORTALITY 154, 163–64 (2010).

10. Grabbe, *supra* note 9; cf. *Residents Condemn Roadside Gravestone*, PLYMOUTH EVENING HERALD, Aug. 30, 2008, at 5, available at 2008 WLNR 16446088 (“Since the appearance of the inscribed headstone we [government officials] have received many complaints from local residents who find it very distressing to be reminded of this young man’s tragic death when they pass every day.”).

ers were removed. A note was left on the memorial site explaining the removal: “The community of Ormeau have [sic] endured this memorial site for one year and two months and we feel that is by far long enough.”¹¹ The note also admonished the teen’s parents that the roadside was not a gravesite and that the family should be thoughtful of the community. In response, the teen’s parents proclaimed the right to grieve for as long as necessary: “We never put the cross there to offend anyone. This has absolutely gutted our family. It’s not always going to be there, but it should be up to us to take it down when we’re ready.”¹²

Within the legal scholarship there has been no systematic examination of the roadside memorial phenomenon or the animating forces behind the growing popularity of commemorating the “last alive” place of a loved one.¹³ Understanding the phenomenon is an important first step in analyzing the Free Speech and Establishment Clause issues that are raised by the presence of these private memorials on public space. The Supreme Court has emphasized that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”¹⁴ This Article joins the legal scholarship exploring “mixed speech,” which is neither purely private speech nor purely government speech.¹⁵

This Article canvasses the interdisciplinary literature devoted to the roadside memorial phenomenon and then examines the Free

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11. Selina Steele, *Hard Road—Vandals Target Memorials*, SUNDAY MAIL (Queensl., Austl.), Feb. 11, 2001, at 7, cited in Clark & Franzmann, *supra* note 4, at 587; see also *Vandals Target Roadside Memorial*, THE MISSISSAUGA NEWS, Oct. 4, 2012, at 1, available at 2012 WLNR 21153366 (“A Mississauga man [in Canada] is heart-broken that items are continually being removed from his son’s roadside memorial in Georgetown.”)
 12. Steele, *supra* note 11, cited in Clark & Franzmann, *supra* note 4, at 587.
 13. Cf. Eric B. Ashcroft, Note, *American Atheists, Inc. v. Davenport: Endorsing a Presumption of Unconstitutionality Against Potentially Religious Symbols*, 2012 BYU L. REV. 371 (2012) (arguing the Tenth Circuit incorrectly applied the endorsement test by concluding the roadside memorial crosses violated the Establishment Clause); Elizabeth A. Murphy, Note, *Courts Mistakenly Cross-Out Memorials: Why the Establishment Clause is Not Violated by Roadside Crosses*, 39 HOFSTRA L. REV. 723 (2011) (arguing privately maintained roadside memorial crosses do not violate the Establishment Clause).
 14. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).
 15. See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571 (2011); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009); Amy Riley Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971 (2008); Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587 (2008).

Speech interests of memorial makers and the Establishment Clause concerns raised by having private crosses along public roadways. Part I describes the history and animating forces behind the roadside memorial phenomenon. Part II traces public opinion and public policies regarding roadside memorials. In response to this growing phenomenon, state and local policymakers have adopted a patchwork of regulations that range from allowing and promoting roadside memorials to banning and removing all privately made memorials. Public sentiments mirror this range of policies with some individuals respecting and applauding roadside crosses, while others within the community object to the macabre eyesores that seek to sanctify the public roadways. Parts III and IV set out the Free Speech and Establishment Clause framework within which the roadside memorial phenomenon rests. Memorial makers have a Free Speech claim to erect a marker on the “last alive” place of a loved one, and governments must be careful not to appear to endorse a religious message and violate the Establishment Clause by allowing religiously themed markers to remain on public property.¹⁶

The unresolved question that is explored in Part V is whether a government creates grounds for an Establishment Clause challenge by either erecting or allowing roadside crosses to remain along public roadways. It is unclear what the consequences are for states that allow private memorial crosses to remain on public roadways. It is also unclear what happens when official, state-sponsored markers are supplemented with private crosses and religious messages, which the government does not remove.

Private religious speech in a designated or traditional public forum is generally free from Establishment Clause concerns.¹⁷ However, private religious speech may lose its “purely private” nature by its placement in a public space.¹⁸ The public roadways have not been treated as traditional public fora where individuals can express themselves without government restraint or limitation. And by not removing the private religious displays, it is unclear if a government runs

16. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 486 (2009) (Souter, J., concurring) (“[W]henver a government maintains a monument [that] has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government’s adoption of the tenets expressed or symbolized.”).

17. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767, 770 (1995) (plurality opinion) (“By its terms [the Establishment] Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.”).

18. *See Haupt*, *supra* note 15, at 588.

the risk of appearing to tacitly adopt the religious message.¹⁹ The Supreme Court in *Pleasant Grove City, Utah v. Summum* reflected this position when it explained, “It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.”²⁰ Therefore, according to the Court, “Because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”²¹

Monuments and symbols are subject to more than one interpretation. And these monuments and symbols can communicate a message on behalf of more than one speaker. The roadside crosses undoubtedly speak on behalf of the private individuals who were motivated to erect them. But, by allowing the roadside crosses to remain on public property, the government may also passively adopt the message of the memorial cross.

Constitutionally permissible avenues for policymakers to address roadside memorials are discussed in Part V. Governments that create a limited public forum for the bereaved to express the two-fold message of remembrance of the deceased and caution to other drivers may satisfy the Free Speech interests of the memorial makers. Additionally, Establishment Clause concerns about government endorsement of religion may be forestalled if the government consistently applies viewpoint-neutral criteria for speakers and topics and also disclaims control or endorsement of the message.

19. See *Summum*, 555 U.S. at 471; see also *Capitol Square*, 515 U.S. at 800 (Stevens, J., dissenting) (“[S]igns and symbols are generally understood to express the [property] owner’s views.”).

20. *Summum*, 555 U.S. at 471.

21. *Id.* at 471. A government that speaks through a religious display is making a dangerous gamble. Chief Justice Roberts’s first question at *Summum* oral argument reflected this danger.

[Y]ou’re really just picking your poison, aren’t you? I mean, the more you say that the monument is Government speech to get out of the . . . Free Speech Clause, the more it seems to me you’re walking into a trap under the Establishment Clause. If it’s Government speech, [declining to display *Summum*’s “Seven Aphorisms” stone monument in a public park] may not present a free speech problem, but what is the Government doing speaking – supporting the Ten Commandments?

Transcript of Oral Argument at 4, *Summum*, 555 U.S. 460 (2009) (No. 07-665). This tension has not escaped scholarly attention. Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 *DRAKE L. REV.* 1 (2009); Erwin Chemerinsky, *A Dangerous Free Speech Ruling*, *TRIAL*, July 2009, at 60; Mary Jean Dolan, *Government Identity Speech and Religion: The Establishment Clause Limits After Summum*, 19 *WM. & MARY BILL RTS. J.* 1 (2010); Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause*, 104 *NW. U. L. REV. COLLOQUY* 280 (2010).

II. TOWARD AN UNDERSTANDING OF THE ROADSIDE MEMORIAL PHENOMENON

A. Roadside Memorials Are Growing in Popularity

The roadside memorial phenomenon is growing in popularity across the country.²² As scholar Keith Suter notes, “Death has moved out of the cemetery.”²³ This new social trend has proliferated over the past two decades.²⁴ Scholars argue that while it is a new social trend, it is not merely a fad.²⁵ This phenomenon, scholars explain, “is part of a longer and complex story about the meaning of both death and grieving in a particular time and place.”²⁶

The nationwide diffusion of roadside memorials can be seen in every state, including Hawaii and Alaska.²⁷ And while it is a relatively recent trend around the country, in some southwestern states, especially Texas, New Mexico, and Arizona, the practice dates back more than 200 years.²⁸ This blended, or syncretic, expression is thought to reflect Hispanic, Catholic, and indigenous influences.²⁹ In the American Southwest, small white crosses were placed at the roadside to mark the rest areas for funeral procession pallbearers traveling by foot from the church to the graveyard.³⁰ These sanctified and holy rest areas, called “descansos”—which means “resting places” in Spanish—have since evolved into memorials to commemorate deaths at traffic fatality locations.³¹

Today, roadside memorials are no longer just an idiosyncratic, rural, southwestern practice; they can be seen across the globe.³² Roadside memorials are becoming an international phenomenon and are along the roadways in New Zealand, Australia, the Middle East, Eu-

22. See, e.g., Keith Suter, *Roadside Memorials: Sacred Places in a Secular Era*, 292 CONTEMP. REV. 51, 51 (2010) (“The creation of ad hoc ephemeral memorials (as distinct from stone or other permanent memorials) had suddenly become a fact of contemporary life.”).

23. *Id.*

24. Clark & Franzmann, *supra* note 4, at 580 (“[T]he practice has proliferated in the last 15 odd years and drawn the attention of scholars and journalists who argue they represent a new social trend.”).

25. Collins & Rhine, *supra* note 2, at 236 (“[I]t becomes evident that most roadside memorials are not the product of a fad but someone’s abiding involvement with a place.”).

26. JOHN BELSHAW & DIANE PURVEY, PRIVATE GRIEF, PUBLIC MOURNING: THE RISE OF THE ROADSIDE SHRINE IN BRITISH COLUMBIA 15 (2009).

27. Collins & Rhine, *supra* note 2, at 222–23.

28. *Id.*; Dickinson & Hoffmann, *supra* note 9, at 154.

29. Collins & Rhine, *supra* note 2, at 221; Holly J. Everett, *Crossroads: Roadside Accident Memorials in and Around Austin, Texas* 51 (June 30, 1998) (unpublished M.A. thesis, Memorial University of Newfoundland).

30. Dickinson & Hoffman, *supra* note 9, at 155.

31. Collins & Rhine, *supra* note 2, at 224–25.

32. *Id.* at 225.

rope, Japan, and the Americas.³³ Roadside memorials are erected in both rural and urban spaces: “Shrines are erected on busy street corners adjacent to megastores and fast food restaurants, in the medians of multilane roadways and freeways, and on private property.”³⁴

B. Road Death Is a “Bad Death”

In our modern society, death is professionally managed and largely invisible.³⁵ With modern advances, people are living longer, healthier lives,³⁶ and death is less present in our daily consciousness.³⁷ Matters of death are handed over to the professionals: law enforcement, emergency medical technicians, doctors, coroners, funeral directors, and ministers.³⁸ In North America, nearly three-quarters of all deaths today occur in health care institutions.³⁹ Death has moved out of the home and into professional institutions, with the majority of deaths now taking place in hospitals and nursing homes.⁴⁰ Rather than caring for dying family members in the home, the current trend is to outsource that care to third-party professionals.⁴¹ Death is no longer an integrated part of life; it is insulated within institutions of death.⁴² And consequently, we are less accustomed to death, and a sudden, unexpected death often leaves the bereaved traumatized and shocked.⁴³

Unexpected, violent deaths of individuals participating in the routines of life that we think are safe, such as daily commutes, are consid-

33. Jennifer Clark, *Challenging Motoring Functionalism: Roadside Memorials, Heritage & History in Australia & New Zealand*, 29 J. TRANSPORT HIST. 23, 24 (2008); Dickinson & Hoffmann, *supra* note 9, at 155; Rebecca M. Kennerly, *Getting Messy: In the Field and at the Crossroads with Roadside Shrines*, 22 TEXT & PERFORMANCE Q. 229, 240–41 (2002).

34. Everett, *supra* note 3, at 91.

35. DAVID WENDELL MOLLER, CONFRONTING DEATH: VALUES, INSTITUTIONS, AND HUMAN MORTALITY 112 (1996) (noting that modern advances have made death “culturally invisible”); Margaret Gibson, *Death and Grief in the Landscape: Private Memorials in Public Space*, 17 CULTURAL STUD. REV. 146, 146 (2011) (“The place and space of death is highly managed and regulated in modern society, creating the taken-for-granted attitude that death will be largely absent and invisible in most everyday environments.”).

36. Howard E. Freeman et al., *New Dimensions of Dying*, in THE DYING PATIENT xiii, xvi (Orville G. Brim, Jr. et al., eds., 1981) (noting “whereas half the population used to die before the age of 40, half now live beyond the age of 70”).

37. Bednar, *supra* note 2, at 134.

38. Collins & Rhine, *supra* note 2, at 234.

39. Kenneth V. Iserson, *Notifying Survivors About Sudden, Unexpected Deaths*, 173 W. J. MED., 261, 262 (2000) (“In the United States and Canada, about 70% of deaths occur in health care institutions . . .”).

40. Freeman et al., *supra* note 36, at xvii.

41. *Id.*

42. JACK B. KAMERMAN, DEATH IN THE MIDST OF LIFE: SOCIAL AND CULTURAL INFLUENCES ON DEATH, GRIEF AND MOURNING 8 (1988).

43. Haney et al., *supra* note 4, at 169; Suter, *supra* note 22, at 57.

ered “bad deaths.”⁴⁴ Anthropologist David Lee Kozak explains the difference between a “good death” and a “bad death”: “A ‘good’ death is essentially any death that is due to old age, prolonged sickness, or a ‘natural’ death that comes gradually and is therefore expected. A ‘bad’ death . . . is one that is sudden, violent, unpredicted, and therefore ‘unnatural.’”⁴⁵

In the United States, more than 30,000 people die in traffic collisions each year.⁴⁶ In developed nations, traffic fatalities are becoming a leading cause of death.⁴⁷ The World Health Organization estimates 1.2 million people are killed in road crashes each year worldwide, resulting in economic costs exceeding \$500 billion.⁴⁸ In spite of the statistics on road deaths, the public generally perceives driving to be a safe activity. Professor and road safety expert Richard Tay notes that because of this perceived safety, “road fatalities are often received with great shock.”⁴⁹

A road fatality is often shocking to friends and family because the sudden, unexpected death of a young, healthy person violates our expectations. Professor of surgery and bioethics Kenneth Iserson explains that a sudden death “leaves survivors unprepared for the loss.”⁵⁰ The unexpected death leaves survivors in a different type of shock and affects the grieving process in a different way than does an expected death. Such deaths, Dr. Iserson explains, “strike blows to the very essence of life for those left behind.”⁵¹

44. David Lee Kozak, *Dying Badly: Violent Death and Religious Change Among the Tohono O’Odham*, 23 *OMEGA* 207, 213 (1991).

45. *Id.*

46. See *FARS Data Tables, Summary*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www-fars.nhtsa.dot.gov/Main/index.aspx> (last visited December 15, 2012) (showing motor vehicle crashes and fatalities from 1994 to 2009 and noting The National Highway Traffic Safety Administration (NHTSA) reported 30,797 fatal car crashes for 2009); *Traffic Safety Facts Crash Stats*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Apr. 2011), <http://www-nrd.nhtsa.dot.gov/Pubs/811451.pdf> (noting NHTSA also reported 33,808 motor vehicle deaths in 2009 and 32,788 in 2010); STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 693 (2011), available at <http://www.census.gov/prod/2011pubs/12statab/trans.pdf> (showing that the U.S. Census Bureau reported 35,900 deaths caused by motor vehicle accidents in 2009).

47. Suter, *supra* note 22, at 54 (“A person dies in a road accident somewhere around the world every 30 seconds.”).

48. WORLD REPORT ON ROAD TRAFFIC INJURY PREVENTION 3, 5 (Margie Peden et al. eds., 2004), available at http://www.who.int/violence_injury_prevention/publications/road_traffic/world_report/chapter1.pdf.

49. Richard Tay, *Drivers’ Perceptions and Reactions to Roadside Memorials*, 41 ACCIDENT ANALYSIS & PREVENTION 663, 663 (2009); Richard Tay et al., *Effects of Roadside Memorials on Traffic Flow*, 43 ACCIDENT ANALYSIS & PREVENTION 483, 483 (2011).

50. Iserson, *supra* note 39, at 261.

51. *Id.* Sociology professor Kathy Charmaz confirms that a sudden death, in which there is “no particular anticipation, suggestion, or wish,” has the capacity to

Neuropsychologist Robyn Howarth confirms that “[t]he loss of a loved one is one of the most distressing emotional experiences people face, yet virtually everyone will deal with grief at some point.”⁵² Even though distressing, the majority of bereaved individuals experience “uncomplicated grief.”⁵³ However, for some people, “complicated grief” follows sudden, traumatic, and unexpected losses. Dr. Howarth explains normal, uncomplicated grief: “Despite the emotional difficulty associated with loss, most people experience a ‘normal’ grieving process in which they endure a period of sorrow, numbness, and even guilt or anger, followed by a gradual fading of these feelings as the griever accepts the loss and moves forward.”⁵⁴ Complicated grief, on the other hand, deviates from the norm in duration and symptom intensity.⁵⁵ Complicated grief, according to Dr. Howarth, “is characterized by a sense of disbelief, anger and bitterness, recurrent emotional pangs, yearning and longing, and preoccupation with thoughts of the deceased, which often include intrusive thoughts about the death.”⁵⁶ Researchers confirm that the sudden, traumatic, and unexpected death of a child is one of the most intense grief experiences for a parent.⁵⁷ Thus, complicated grief and bereavement should be expected for road deaths of young, healthy individuals.⁵⁸

“temporarily disrupt[] the character of ordinary events” for the bereaved. KATHY CHARMAZ, *THE SOCIAL REALITY OF DEATH* 142 (1980).

52. Robyn A. Howarth, *Concepts and Controversies in Grief and Loss*, 33 *J. MENTAL HEALTH COUNSELING* 4, 4 (2011).
53. Selby Jacobs & Kathleen Kim, *Psychiatric Complications of Bereavement*, 20 *PSYCHIATRIC ANNALS* 314, 314–17 (1990).
54. Howarth, *supra* note 52, at 4.
55. *Id.* at 5.
56. Paula L. Hensley & Paula J. Clayton, *Bereavement: Signs, Symptoms, and Course*, 38 *PSYCHIATRIC ANNALS* 649, 650 (2008).
57. See generally CELIA HINDMARCH, *ON THE DEATH OF A CHILD* (3d ed. 2009); Grace A. Seecharan et al., *Parents’ Assessment of Quality of Care and Grief Following a Child’s Death*, 158 *ARCHIVES PEDIATRICS & ADOLESCENT MED.* 515, 515–20 (2004) (finding fathers and mothers had similar levels of grief, and mothers who experienced the sudden death of a child had somewhat more intense grief reactions than those whose child died of a chronic condition).
58. See generally THERESE A. RANDO, *TREATMENT OF COMPLICATED MOURNING* (1993).

C. Constructing the Roadside Memorial

Roadside memorials are not limited to any religion or heritage.⁵⁹ And while roadside memorials are individual and unique,⁶⁰ they often share common qualities.⁶¹ In constructing roadside memorials, builders overwhelmingly choose a Latin cross as the focal point.⁶² Scholars who have studied roadside memorials confirm that “[t]he one universal theme among roadside memorials, if indeed any exists, is that the cross is a dominant feature of most roadside memorials”⁶³

While crosses are often used in roadside memorials, the symbol is not always used for purely religious reasons.⁶⁴ Roadside crosses are multivocal and can be used to communicate a range of meaning, from the plainly religious to the quasi-secular.⁶⁵ For some memorial makers, the Latin cross is used as a generic marker of death rather than as an exclusively Christian symbol.⁶⁶ The cross can represent amor-

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59. Researchers John Belshaw and Diane Purvey confirm “roadside shrines are not homogenous in their origin, their kind, their meaning, or their intent. This is true within some regions and internationally. But in their diversity, there is a sameness.” BELSHAW & PURVEY, *supra* note 26, at 67. See also Kennerly, *supra* note 33, at 240–41 (“While roadside shrines have appeared consistently and profusely in the Southwest, further research suggests that the practice is not linked to any particular geographic region.”).
60. Dickinson & Hoffmann, *supra* note 9, at 156 (“[R]oadside memorials carry tremendous diversity in style and origin.”).
61. Clark, *supra* note 33, at 34 (“Visual similarities—and there are many—point to roadside memorialisation [sic] as an identifiable phenomenon.”).
62. Reid & Reid, *supra* note 3, at 349 (finding in a study of seventy-eight roadside memorials, crosses were featured prominently in seventy-three of the sites); Deborah L. Wagner, *Death, Memory, and Space: A Rural Community Response to Roadside Memorials 4* (August 2008) (unpublished M.A. thesis, University of Texas at San Antonio) (on file with author) (“Of the sites identified in this study, 85 percent incorporated a cross into the feature and of these 100 percent were Latin crosses (the vertical length is greater than the horizontal crossbar.”); see also Clark & Franzmann, *supra* note 4, at 580 n.i (finding that out of 430 roadside memorials in Australia and New Zealand identified between 1989 and 2004, 93% of the memorials used a cross as the primary structure).
63. Dickinson & Hoffmann, *supra* note 9, at 164. Moreover, “The cross is typically the memorial when a religious symbol is displayed.” *Id.*
64. Collins & Rhine, *supra* note 2, at 229–30 (“Here, then, appears to be a dichotomy: crosses are overwhelmingly employed in the design of memorials but apparently more as a matter of cultural integration, i.e., a reflex as opposed to an intentional or specific act of faith, at least in an institutional or denominational sense.”). See also Clark, *supra* note 33, at 35 (“The cross acts as the central element from which other elements radiate, because the cross as body forms an easy structure upon or around which to hang, display, or build other elements.”).
65. Everett, *supra* note 3, at 91.
66. Clark, *supra* note 33, at 34 (“The cross is a recognisable [sic] Christian symbol, but it is most likely used by memorial makers as a symbol of death. At the same time the cross physically separates a sacred place from a secular space.”); Chris Ross, *Roadside Memorials: Public Policy vs. Private Expression*, AM. CRTY. & COUNTY, May 1, 1998, at 50, 53 (“Memorial supporters acknowledge religious con-

phous spirituality⁶⁷ and may be a popular choice to generically symbolize death because of the dearth of other appropriate symbols to commemorate a death.⁶⁸ The Latin cross can also symbolize the human form, with the horizontal crossbar representing outstretched arms and the vertical beam representing the head and body.⁶⁹ Often, in multiple-person fatalities, a separate cross is used to represent each person.⁷⁰

Some roadside memorials are only a simple white cross, whereas others include elaborate displays of objects and mementos.⁷¹ The tokens incorporated into the elaborate displays can include flowers, candles, teddy bears, photographs, rosaries, scarves, sports equipment, handwritten notes, poems, and music, as well as car parts from the wreckage.⁷² Some of these memorials have new objects added for special occasions such as birthdays, holidays, and the anniversary of the

cerns, but feel that the use of the cross symbol as a marker of death is so practical and universal that it essentially transcends the original Christian symbolism.”).

67. Clark & Franzmann, *supra* note 4, at 591 (“The memorial cross has become a symbol of amorphous spirituality easily detached from any particular institution.”).

68. *Id.* (“The use of the cross may, in fact, be little more than an attempt to find culturally appropriate symbols to express death and the sacred, where there is a paucity of such symbols apart from those offered by institutional religion.”).

69. Compare MARGARET VISSER, *THE GEOMETRY OF LOVE: SPACE, TIME, MYSTERY AND MEANING IN AN ORDINARY CHURCH* 32 (2000) (identifying and analyzing the cross as a representation of the human form reflected in the architecture of a church; “A church is often cross-shaped—that is, in the form of a human body, with the arms constituted by the transept, the head by the apse, and the heart by the altar.”), with Clark, *supra* note 33, at 35–36 (identifying and analyzing the cross in roadside memorials as a visual depiction of the fragility of the human body; “Nowhere is their pattern clearer or more stark than on the road at Huntly between Hamilton and Auckland in New Zealand where a life-size cross wears a black jacket.”).

70. Clark, *supra* note 33, at 35.

71. Bednar, *supra* note 2, at 129.

72. See, e.g., Collins & Rhine, *supra* note 2, at 230 (noting “the widespread and sometimes prolonged practice of leaving flowers, notes, poems, photos, music tapes, CDs, scarves, pinwheels, balloons, and less frequently, beer, pretzels, or candy at the site”); Dickinson & Hoffmann, *supra* note 9, at 154 (“The memorial may be decorated with flowers, a teddy bear, a football jersey, a toy, photograph, or some other personal item of the deceased person.”); Everett, *supra* note 3, at 91–92 (noting roadside memorials “incorporate any number of changing elements, including flowers (both fresh and artificial), toys, photographs, ceramic figurines, handwritten notes, religious objects (saint statuettes and pictures, rosaries), seasonal decorations such as Christmas ornaments or Easter eggs, and car parts collected from the wreckage of the inciting accident”); Kennerly, *supra* note 33, at 235 (noting the artifacts or tokens left at the memorial can include personal items, like a hard hat, boots, cigarette lighter, a shot glass, jewelry, wind chimes or toys, or automobile parts from the wreckage, or religious items, like a rosary, crucifix, and statues of the Virgin Mary or other saints).

death.⁷³ Professor of Folklore Holly Everett explains, “Items placed at many of the crosses reflect an ongoing dialogue with the deceased (notes, inscriptions on bridge railings), and the continuation of missed celebrations (toys, homecoming mums, graduation tassels).”⁷⁴ While the tokens or “offerings” are often left at a roadside memorial by friends and family members of the deceased, strangers sometimes add to the memorial, too.⁷⁵

Another common feature of roadside memorials is that they are created as close as possible to the “last alive” place,⁷⁶ which is often on a public right-of-way.⁷⁷ The “last alive” place has deeply meaningful significance for the bereaved.⁷⁸ Often memorial makers take great effort to identify precisely where they believe the “last alive” place to be.⁷⁹ Clues like blood stains and tire tracks on the ground where a vehicle stopped are often used to identify the now sacred place.⁸⁰ Memorial makers treat this space as sacred.⁸¹ The meaning and sacredness of the space comes from the spilled blood at the accident site.

Because of the meaningfulness of the place, these memorials often reflect a blended sense of spirituality and the maker’s own sense of what ritual is appropriate and necessary.⁸² Even when memorials are unlawful, family and friends assert a self-proclaimed sense of authority to erect the memorial because, as scholars Jennifer Clark and Majella Franzmann explain, the bereaved’s authority is “drawn from the intensity of grief, from a belief in the spiritual presence of the deceased, combined with a profound sense of the importance of place.”⁸³

73. Clark & Franzmann, *supra* note 4, at 590; Collins & Rhine, *supra* note 2, at 230; Dickinson & Hoffmann, *supra* note 9, at 154.

74. Everett, *supra* note 29 (thesis at 133).

75. Clark & Franzmann, *supra* note 4, at 590; Collins & Rhine, *supra* note 2, at 232.

76. Clark, *supra* note 33, at 38; Suter, *supra* note 22, at 53.

77. Collins & Rhine, *supra* note 2, at 226.

78. Clark & Franzmann, *supra* note 4, at 589 (“There is material evidence at the memorial sites that communication with the deceased takes place, and that the deceased is believed to be present in some way and capable of receiving the communication.”); Everett, *supra* note 3, at 98 (“[F]or some of those whom I interviewed, the accident site was the last place where their loved one was conscious, and thus really ‘alive,’ regardless of the place of clinical death.”).

79. Collins & Rhine, *supra* note 2, at 227–28.

80. *Id.* at 228.

81. See Collins & Rhine, *supra* note 2, at 228. Professor Emerita of Anthropology Sylvia Grider confirms that “many people regard roadside crosses as sacred but not necessarily religious.” Sylvia Grider, *Should Roadside Memorials Be Banned?*, N.Y. TIMES (July 12, 2009, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>.

82. Clark & Franzmann, *supra* note 4, at 589. Roadside memorials “demonstrate an eclectic use of traditional mourning symbols unprescribed and undirected by any recognized or authorized practitioner of ritual.” *Id.* at 582.

83. *Id.* at 579. The bereaved are often willing to “kick up a fuss” to erect a memorial. *Id.* (observing “more and more families and friends touched by tragedy are willing to ‘kick up a fuss,’ assume authority to express their grief in ways that implicitly

The perceived higher moral knowledge of mourners appears to empower them to grieve the way they desire.⁸⁴ Clark and Franzmann note that mourners are “willing to take grief out of the confines of the cemetery and beyond the emotional and spiritual boundaries of the church, to construct for themselves a new sacred place fully recognizing that this process is open-ended and only those who grieve know when it is time to stop.”⁸⁵

D. The Message of the Roadside Memorial

Roadside memorials communicate in a way grave markers tucked away in a quiet cemetery cannot.⁸⁶ Professor of communication studies Robert Bednar has examined the roadside memorial phenomenon and articulates the dual message of the memorials. On the one hand, the message is:

This should not have happened; I do not accept this as a matter of course; I will not allow you to ignore it either; by building this shrine where I have, I am making my personal story public; I refuse to forget, and I refuse to let you forget either.⁸⁷

On the other hand, Professor Bednar notes the memorials say: “[D]on’t let *this* happen to you or someone who loves you or someone you love—where ‘this’ is not only the crash and the death but also the materially present grief and anguish that drives the construction of the shrine itself.”⁸⁸ The roadside memorial can serve as a pilgrimage site for family and friends to remember and respect the deceased.⁸⁹ But it can also serve as a warning to other drivers.⁹⁰ And this warning to others can help the bereaved find meaning in an otherwise meaningless death.⁹¹

Private memorials on public space, made sacred by the death of a loved one, may be an attempt to counter a meaningless and any-

and explicitly challenge the authority of church or state, and transform the roadside into their own sacred space”).

84. *Id.* at 588. As evidenced by the behavior of the memorial makers, it appears these memorial makers believe “the mourning family has the moral authority to express their grief and that this should take precedence over government regulations and concerns.” *Id.* at 587.

85. *Id.* at 588. See also Haney et al., *supra* note 4, at 162 (“Spontaneous memorialization is not constrained by culturally-based norms which prescribe the amount of time allotted for ritual action nor the appropriate amount of time for bereavement.”).

86. Everett, *supra* note 29 (thesis at 185).

87. Bednar, *supra* note 2, at 137.

88. *Id.*

89. George Monger, *Modern Wayside Shrines*, 108 *FOLKLORE* 113, 114 (1997).

90. Everett, *supra* note 29 (thesis at 178); Monger, *supra* note 89, at 114.

91. Everett, *supra* note 29 (thesis at 179) (“Viewing the crosses as cautionary and potentially life-saving helps those who have lost a loved one in a fatal collision locate meaning in an otherwise senseless death.”).

mous death.⁹² Road deaths are largely anonymous as modern forces work quickly and efficiently to remove evidence of an accident. The dead or injured are swiftly removed from the scene and any road damage is repaired as soon as possible.⁹³ Roadside memorials mark and identify what would otherwise be an invisible death spot.⁹⁴ Therefore, roadside memorials may be a way to forestall an anonymous, depersonalized death on the modern roadway.⁹⁵

For some bereaved, the ritual of creating a roadside memorial meets a human need that interment in a cemetery cannot.⁹⁶ Grieving rituals offer the bereaved comfort and solace and provide structure and order during times of crisis and disorder.⁹⁷ Roadside memorials are often in addition to a traditional interment, rather than a substitute for one.⁹⁸ And while the deceased are interred elsewhere, for some families the roadside memorial is the main and immediate locus for remembering the loved one.⁹⁹ The proliferation of roadside memorials is evidence that this form of remembrance meets an important human need.¹⁰⁰

Modern culture tends to minimize and deritualize bereavement practices, such that these bereavement rituals have now “deteriorated in meaning.”¹⁰¹ Scholars posit that this deritualization and deterioration has “led to insufficient grieving and inadequate resolution of

92. Clark, *supra* note 33, at 29–30.

93. *Id.* at 30.

94. Gibson, *supra* note 35, at 150.

95. Clark, *supra* note 33, at 27–28 (“The memorials serve as an expression of resentment and resistance to the apparent random inevitability and anonymity of continuing road trauma.”); Clark & Franzmann, *supra* note 4, at 594 (“Memorialization, may, in fact, be part of a fight against the depersonalizing process of modernization and urbanization.”); Robert James Smith, *Roadside Memorials—Some Australian Examples*, 110 *FOLKLORE* 103, 103–04 (1999) (“In essence, this [roadside memorial] is an attempt to declare and maintain a public grief against the seeming anonymity and erasure of most highway deaths.”).

96. See Haney et al., *supra* note 4, at 169.

97. Haney et al., *supra* note 4, at 160; Bronna D. Romanoff & Marion Terenzio, *Rituals and the Grieving Process*, 22 *DEATH STUD.* 697, 698 (1998).

98. Dickinson & Hoffmann, *supra* note 9, at 155; MacKenzie Scott, *Roadside Crosses: Personal Shrines in Public Places*, *THE CHRISTIAN CENTURY*, July 12, 2011, at 11.

99. Collins & Rhine, *supra* note 2, at 230; Everett, *supra* note 3, at 96; Reid & Reid, *supra* note 3, at 351.

100. See ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 4 (Mark S. Cladis ed., Carol Cosman trans., Oxford University Press, World Classics 2001) (1912) (“[W]e must reach beneath the symbol to the reality it embodies and which gives it its true meaning. The most barbarous or bizarre rituals and the strangest myths translate some human need, some aspect of life, whether individual or social.”).

101. See Romanoff & Terenzio, *supra* note 97, at 699. See also Haney et al., *supra* note 4, at 168 (“Since most death in America is controllable and invisible, grieving logically follows the same norms.”).

grief.”¹⁰² Current bereavement practices are often “one-time events,” which fail to honor and support a grieving process that extends beyond the one-time funeral ritual.¹⁰³ Modern practices allow time off from work only for certain family members and only for limited periods of time.¹⁰⁴ Social convention does not expect mourning displays beyond these relatives or beyond these prescribed times. Indeed, scholars have observed that “[p]sychiatric care may be recommended for those who fail to contain their grieving within these restrictions.”¹⁰⁵ Modern practices also abandon older traditions like wearing mourning dress or paying respects to the deceased in the family’s parlor room.¹⁰⁶ Scholars criticize that our contemporary bereavement practices are “often inauthentic,” “hollow and rigid,” and “devoid of an opportunity for genuine healing.”¹⁰⁷

These modern, abbreviated funeral rituals may be effective for some, especially when a death comes later in life, or after an illness, because the bereaved have had some opportunity to pre-grieve.¹⁰⁸ However, contemporary grieving rituals are inadequate for a death that is sudden, unanticipated, or violent or is the death of a child.¹⁰⁹ For these types of deaths, researchers have found that the grieving process is “likely to be prolonged, with mourners reporting high distress, disorganization, and active grieving for many years following the loss.”¹¹⁰ For many mourners of a “bad death,” the contemporary funeral rituals are insufficient because unexpected deaths often violate and shatter a mourner’s expectations of the world.¹¹¹

New, supplementary rituals may be necessary to aid in the grieving process.¹¹² Spontaneous memorials erected on the “last alive” place at the roadside are an example of an emerging ritual that helps satisfy this need in the grieving process.¹¹³ The physical objects or mementos left at a roadside memorial can come to symbolize the deceased, and the tokens can contain multiple meanings that represent the mourner’s relationship with the deceased.¹¹⁴ Mourners can main-

102. Romanoff & Terenzio, *supra* note 97, at 699 (citations omitted); *cf.* Haney et al., *supra* note 4, at 161 (“When effective responses to crises become ritualized, their very familiarity brings about a feeling of comfort and empowerment.”).

103. Romanoff & Terenzio, *supra* note 97, at 699.

104. Haney et al., *supra* note 4, at 168.

105. *Id.*

106. *Id.*

107. Romanoff & Terenzio, *supra* note 97, at 699 (citations omitted).

108. *See id.* at 700–02.

109. *Id.* at 704 (describing a death that “challenge[s] core assumptive structures”).

110. *Id.* at 705 (citations omitted).

111. *Id.*

112. Haney et al., *supra* note 4, at 161 (noting the creation of a spontaneous memorial “does not replace traditional funerary rites”).

113. *Id.*

114. Romanoff & Terenzio, *supra* note 97, at 705.

tain a relationship with the deceased through these objects or mementos. These tokens become an extension of the self,¹¹⁵ and often suggest there is an ongoing interaction with the deceased.¹¹⁶ Scholars who have studied the phenomenon of roadside memorials confirm that “[w]hen personal items are included in the memorial (toys, sports equipment, favorite snacks, CDs, etc.) there is a strong suggestion that the builders are seeking to create a sense of continuity, to emotionally sustain the deceased in their own lives.”¹¹⁷

These objects, according to grief counselor Peter Poses, are “containers for feelings of loss and sadness” and help to make people “feel secure, feel at home away from home.”¹¹⁸ According to Poses, leaving these objects at a memorial “represents an attempt to contain the madness of the situation.”¹¹⁹ These offerings help the bereaved maintain a connection with the deceased.¹²⁰ Maintaining this connection with the deceased during the grieving process often leads to a sense of control over events and feelings, and eventually closure of the process.¹²¹

These roadside memorials aid in the grieving process of the loss of ordinary individuals, who are neither heroes nor martyrs.¹²² Memorials are erected for people going about their daily lives, rather than people who have done great deeds.¹²³ There appears to be a growing urge to memorialize ordinary life in public and expressive ways. Roadside memorials are part of what American studies Professor Er-

115. DEBORAH LUPTON, *THE EMOTIONAL SELF* 43 (1998) (“Material objects can generate emotional responses [T]hey are possessed of a certain agency or capacity to act within and shape social relations and perceptions. Social interaction with and through material forms tends to destabilize subject/object boundaries such that material objects can become extensions of the body and therefore of personhood.”).

116. Collins & Rhine, *supra* note 2, at 228.

117. *Id.* at 235. A similar phenomenon can be seen at other memorial sites like the Vietnam War Memorial; Place de l’Alma tunnel in Paris, where Princess Diana was fatally injured; and the fence around the blast site at the federal building in Oklahoma City. See Edward T. Linenthal, *Memory, Memorial, and the Oklahoma City Bombing*, *CHRON. OF HIGHER EDUC.*, Nov. 6, 1998, at B4, B5 (“For many survivors and family members of victims, the fence [that surrounded the blast site around the Alfred P. Murrah Federal Building in Oklahoma City became] a place to talk with the dead.”).

118. Rebecca Jones, *Mourning Glory When Tragedy Strikes, Grief Hits the Road in Mini-Shrines*, *ROCKY MOUNTAIN NEWS*, April 22, 1998, at 8D, available at 1998 WLNR 839571.

119. *Id.*

120. Romanoff & Terenzio, *supra* note 97, at 707 (“[F]or many bereaved, there is a need to maintain an ongoing psychic connection with the deceased”).

121. *Id.* at 706.

122. Everett, *supra* note 29 (thesis at 23) (noting that on public roadways across the country, “an increasing number of sanctified spaces [are] created in memory of individuals who were neither well-known nor martyrs”).

123. Clark, *supra* note 33, at 39.

ika Doss calls “memorial mania,” or the “contemporary obsession with issues of memory and history and an urgent, excessive desire to express, or claim, those issues in visibly public contexts.”¹²⁴ This mania is evidence of a culture that is anxious about its relationship with time, history, and memory.¹²⁵ MacKenzie Scott, pastor of First Baptist Church in Lewisburg, Pennsylvania, echoes this view: “A traditional cemetery, with its balance of individual grave and collective location, may simply seem too impersonal in a world that has become anxious about personal freedoms.”¹²⁶

When interviewed, memorial makers often have a hard time fully articulating what need animates their desire to make memorials or their purpose in making them.¹²⁷ Memorial makers reject the suggestion that a memorial is a means of gaining closure, and instead, many indicate that it is a way of maintaining continuity with the deceased.¹²⁸ Ongoing mourning and remembrance is evidenced by maintenance of the memorial site. Some memorials are carefully and lovingly maintained for years,¹²⁹ suggesting that rather than “saying good-bye” or “letting go,” the bereaved continue to relate to the deceased through these memorials.¹³⁰

Geography professors Charles Collins and Charles Rhine have studied this phenomenon and confirm, “More than anything else, the avowed purpose of the memorial is to keep the deceased’s memory alive.”¹³¹ But then it is unclear why this redundancy is necessary—the memorial service and burial in a cemetery are intended to do just that.¹³² Perhaps the answer is linked to the way we handle death in modern society.¹³³ Scholars and researchers are still working out why

124. ERIKA DOSS, *THE EMOTIONAL LIFE OF CONTEMPORARY PUBLIC MEMORIALS: TOWARDS A THEORY OF TEMPORARY MEMORIALS* 7 (2008). Professor Doss notes these “[c]ontemporary acts, rituals, or performances of memorialization are often exorbitant, frenzied, and extreme—or manic.” *Id.*

125. Bednar, *supra* note 2, at 136.

126. Scott, *supra* note 98, at 12. Pastor Scott also observes, “Perhaps the proliferation of crosses along the byways is another instance of the dream of getting off the grid and defying the stifling conventions of civilization.” *Id.*

127. Clark & Franzmann, *supra* note 4, at 594–95; Collins & Rhine, *supra* note 2, at 232.

128. Collins & Rhine, *supra* note 2, at 235.

129. Gibson, *supra* note 35, at 157.

130. Reid & Reid, *supra* note 3, at 353. *See also* Dickinson & Hoffmann, *supra* note 9, at 155 (“A roadside marker located ‘outside’ the cemetery may allow the deceased to continue to exist in the world of the living.”).

131. Collins & Rhine, *supra* note 2, at 234.

132. *Id.*

133. Kennerly, *supra* note 33, at 243 (“[T]he proliferation of roadside shrines throughout the United States may have more to do with the often contested behaviors related to death, remembrance, travel, and protection that link individuals to communities than with any particular religious practice.”).

some bereaved feel the need to build these roadside memorials.¹³⁴ Nevertheless, mourners have shown a willingness to assert their own moral authority to build and maintain them, irrespective of public opinion or legal authorization.¹³⁵

In an era of declining religiosity, these memorials may offer meaning and solace in very personal and unique ways.¹³⁶ Waning reliance on established, church-based rituals is evidenced by a worldwide decline in mainstream church membership and attendance.¹³⁷ Scholars have noted that memorial makers often report dissatisfaction with conventional religious practices.¹³⁸ Perhaps in response to this dissatisfaction, there is an emerging rise in the individual's own spiritual authority.¹³⁹ Roadside memorials reflect this trend and attest to the growth of personalized rituals.¹⁴⁰ These memorials have a "pagan, do-it-yourself element" that some contemporary mourners find satisfying.¹⁴¹ Roadside memorials are a complex and multivocal phenomenon. Individually, the roadside memorial communicates a multilayered message of remembrance and warning. Collectively, the phenomenon communicates a critique against modernity—modern transportation, modern culture, modern death practices, and modern religion.

134. Clark & Franzmann, *supra* note 4, at 594–95.

135. *Id.* (“[M]emorial makers are prepared to assume their own authority to build, maintain and defend roadside memorials and . . . this authority taking can explicitly challenge the role of the government and bypass the church as the prime social purveyors and mediators of grief rituals.”).

136. *Id.* at 583, 595.

137. *Id.* at 583; Alasdair Crockett & David Voas, *Generations of Decline: Religious Change in 20th-Century Britain*, 45 J. FOR SCI. STUDY OF RELIGION 567 (2006) (examining continuous decline of religion throughout the 20th century in Britain); C. Kirk Hadaway et al., *Overreporting Church Attendance in America: Evidence that Demands the Same Verdict*, 63 AM. SOC. REV. 122 (1998) (confirming decline in weekly attendance at religious services in the United States).

138. Clark & Franzmann, *supra* note 4, at 583 (“Those who construct memorials now often speak of not finding meaning in the rituals of conventional religion and see their memorials either as an alternative or even in outright opposition to conventional religion.”); Kennerly, *supra* note 33, at 251 (“Some shrine builders complain that church services were conducted by clerics who did not have a personal relationship with the deceased or the family, noting that the liturgy and ritual were devoid of meaning in the face of their sudden and traumatic loss.”).

139. Clark & Franzmann, *supra* note 4, at 582.

140. Clark & Franzmann, *supra* note 4, at 583 (“The modern construction of roadside memorials may be a specific expression, perhaps, of a bigger phenomenon, a current groundswell of disregarding institutional forms that once sufficed for the crisis moments of life. More than ever, people are beginning to take religion and meaning-making out of the hands of the government or established religious [sic].”); Dickinson & Hoffmann, *supra* note 9, at 155 (“Today’s commemorative sites represent a shift in the way that western societies regard death, funerals, and mourning rituals; death-negating practices seem to gradually give way to greater expressiveness in public mourning.”).

141. Clark & Franzmann, *supra* note 4, at 593 (citation omitted).

III. PUBLIC OPINION AND PUBLIC POLICY ON ROADSIDE MEMORIALS

A. Public Opinion on Roadside Memorials

The proliferation of roadside memorials poses a problem for public officials, who are in an ongoing quandary concerning how to balance traffic safety and the aesthetic interests of the community with the grieving process of the bereaved.¹⁴² Balancing the interests of road safety and maintenance, visual blight, and Establishment Clause concerns with the needs of the grieving is “a public relations minefield.”¹⁴³ Roadside memorials have been a source of controversy and debate in both the United States¹⁴⁴ and in other countries around the world.¹⁴⁵

Public opinion is mixed about whether roadside memorials should be permitted or not.¹⁴⁶ The public is generally deferential to roadside memorials that have been erected,¹⁴⁷ even if the public does not fully share the memorial maker’s sense of sacredness of the site.¹⁴⁸ And

142. Collins & Rhine, *supra* note 2, at 222.

143. *Id.* at 226. “[E]nforcement efforts become a public relations disaster, especially if memorial builders choose to take their plight to the public via the media.” *Id.* at 241.

144. *See, e.g.*, Dickinson & Hoffmann, *supra* note 9, at 156 (“[T]he placement of crosses on public property has been controversial in a number of American states.”); Robert Tiernan et al., *Should Roadside Memorials Be Banned?*, N.Y. TIMES (July 12, 2009, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/>.

145. Clark, *supra* note 33, at 38.

146. Professor Richard Tay explained his mixed survey findings and concluded that “[o]verall, public support for roadside memorials is divided but leaning more towards allowing than disallowing them.” Tay, *supra* note 49, at 666. Tay continues:

The single most popular option is the strict no roadside memorial policy. Therefore, it is tempting to conclude that a policy that does not allow roadside memorials should be adopted. However, this view is preferred by only 30.5% of the respondents. In addition to this group, 7.9% of the respondents also selected the unofficially disallow option. Together, these two choices were preferred by 38.4% of the respondents. On the other hand, the share of respondents who chose officially allow, allow with standardised [sic] memorials and unofficially allow amounted to 51.0% of all the respondents. Therefore, it would appear that a relative bigger share of the public was in support of allowing roadside memorials. The remaining 10.6% of the respondents opted to allow only under special circumstances or allow on a case-by-case basis.

Id.

147. Collins & Rhine, *supra* note 2, at 241 (“With a few vocal exceptions, the public seems either to respect the right of families and friends to act in this fashion, or to be willing to ignore the issue.”).

148. Collins & Rhine, *supra* note 2, at 232 (“[T]he attitude of most in the general public is respect, though it probably stops short of sharing a sense that these sites are sacred in any conventional definition of that attribution.”); Tay, *supra* note 49, at 664 (surveying college-aged drivers and finding most drivers support allowing

while generally deferential to extant memorials, when polled about prospective memorials, the public's response is ambivalent. When asked in the abstract how long any roadside memorial should be allowed to remain erected, public opinion is divided between those preferring to allow a memorial to remain for an unlimited amount of time and those preferring not to allow the memorials to be erected at all.¹⁴⁹ Additionally, public opinion concerning whether roadside memorials are a distraction to drivers is also divided between those who find them distracting and those who find them a reminder to drive more carefully.¹⁵⁰

While roadside memorials can be deeply meaningful and healing for the mourners, some observers object to the sanctification of public roadsides. Those who voice criticism suggest that the roadside memorials are "disingenuous" or "personal propaganda," the makers are "faking it for attention," or the memorial is a "pious form of littering."¹⁵¹ As an illustration of such criticism, Benjamin Radford, managing editor of the *Skeptical Inquirer* magazine, asks: "If an old woman dies while shopping in a supermarket, should her family sue to erect a memorial to her in aisle 12 next to the soups? Or in the parking lot?"¹⁵² Radford then observes, "Thousands of people die each day in the United States. Each one of those people had families, friends, hopes, and dreams. Yet we do not erect public memorials for them. Is a death from a car crash any more significant (or worthy of memorial) than any other death?"¹⁵³

Memorials on public spaces are situated to draw in strangers to share in the grieving process.¹⁵⁴ Some memorials are clearly visible and are intended to be seen,¹⁵⁵ while others are more personal and

roadside memorials but that they also preferred standardized or official memorials).

149. Tay, *supra* note 49, at 666 ("With respect to time limit, no limit was chosen by the largest percentage (26.0%) of the respondents, followed closely by no time at all (24.9%). Between these extremes, 49.1% preferred to have some time limit imposed on roadside memorials, with 1 month (19.2%) being most popular limit, followed by 1 week (11.5%).").
150. *Id.* ("In terms of self-reported effects on actual driving behaviour [sic], 46.8% reported that the presence of roadside memorials was likely to distract them while they were driving; 39.1% reported that roadside memorials made them think about their driving, and 32.1% reported that roadside memorials made them drive more cautiously.").
151. Kennerly, *supra* note 33, at 245.
152. Benjamin Radford, *Religion on the Roadside: Traffic Fatality Markers Generate Controversy*, FREE INQUIRY, Winter 2001/2002, at 59.
153. *Id.*
154. Clark, *supra* note 33, at 38 ("[T]he public nature of these memorials allows a wider range of people to participate in the grieving process.").
155. Gibson, *supra* note 35, at 156 (explaining that for the more visible memorials, "[w]hile it is generated out of private grief and memory, its style is nevertheless performative—it is there to be seen").

private.¹⁵⁶ Participating in a stranger's roadside memorial can promote a sense of group solidarity, "a symbolic coming together of the community in mourning."¹⁵⁷ Yet, sometimes strangers do not welcome being drawn into the grieving process because it brings unwanted reminders of death.¹⁵⁸ For some, memorials are an unwelcome testament to the fragile and fleeting nature of life. These memorials are powerful reminders of the inherent dangers of driving. And viewers are reminded of these dangers while driving down the same roadway where someone else died.¹⁵⁹ According to Doug Tindall, a maintenance engineer for the Oregon Department of Transportation (DOT), his department "regularly receives calls regarding roadside memorials. Most callers want displays removed because they don't want continual reminders of someone's death in a traffic accident."¹⁶⁰ Echoing this sentiment, a resident near a roadside memorial in Florida wrote an e-mail to the city mayor: "The erection of memorials near our home only serves to regularly reinforce our personal pain each time we turn into the neighborhood."¹⁶¹ Memorial-making can be productive and healing for the maker, but the memorial can also bring unwanted, "vicarious trauma" to other drivers who are forced to experience it.¹⁶²

In addition to viewing a memorial as an unwanted reminder of tragic loss, some individuals see a memorial as a "macabre eyesore."¹⁶³ Journalist Stephanie Warsmith observed, "The teddy bears turn soggy and gray. Flowers wilt. Handwritten tributes become illegible. Rather than serving as a tribute to someone who died, they become an eyesore."¹⁶⁴ Some markers deteriorate and disappear, whereas others are devotedly maintained for years and are redeco-

156. *Id.* at 157 ("In contrast, other memorials are first and foremost messages of love to the dead. They communicate grief in a more intimate way and their public face is incidental to the death occurring in a publicly visible setting.")

157. Monger, *supra* note 89, at 114.

158. Reid & Reid, *supra* note 3, at 353 ("Some prefer that others' mourning behavior not intrude on them as they travel the roadway.")

159. Bednar, *supra* note 2, at 133, 140 (noting "their location on the roadside presupposes that people in automobiles will see them in roadspace . . ."); Clark & Franzmann, *supra* note 4, at 587 ("The non-grieving can see memorials as an intrusion upon their space.")

160. Karen Schmidt, *Roadside Memorials Spark Religious Freedom Dispute*, CHRISTIANITY TODAY, Apr. 3, 2000, at 20.

161. *Memorials Create Dilemma for Cities*, SUN SENTINEL, Feb. 25, 2012, at 1A, available at 2012 WLNR 4080769.

162. Bednar, *supra* note 2, at 134 ("As individual shrine builders heal through repeating their encounter with the affective memory embodied in the shrine site, they bring the trauma to the rest of us, giving us an intrusive traumatic memory for us to work through in a different way.")

163. Dickinson & Hoffmann, *supra* note 9, at 156 (citations omitted).

164. Stephanie Warsmith, *Tattered Memorials to Dead Taking Toll in Neighborhoods*, AKRON BEACON J., Oct. 9, 2011, at A1, available at 2011 WLNR 20751801.

rated on auspicious dates or holidays.¹⁶⁵ But once the mourning process no longer needs the memorial, it is often neglected.¹⁶⁶ And then it is unclear who, if anyone, will maintain the memorial.¹⁶⁷ Roadside memorials that fall into disuse and disrepair can deteriorate into blight or clog road drains.¹⁶⁸

More than just an issue of aesthetics, roadside memorials raise concerns about road maintenance and road safety. These memorials can interfere with road maintenance and mowing operations.¹⁶⁹ Mementos left at roadside memorials can become hazardous projectiles when tall grass is mowed.¹⁷⁰ Roadside memorials can also pose a safety hazard to other drivers.¹⁷¹ Sociology professors George Dickinson and Heath Hoffman, who surveyed state DOT officials, found that 70% of officials said roadside memorials were considered a safety hazard in their state.¹⁷² An Arizona DOT spokesperson reported that of the 4,000 rear-end collisions that occurred in a year, “a troubling number involved drivers who stopped to view roadside memorials.”¹⁷³ In Wyoming, the DOT considers roadside memorials dangerous and cited an accident where the death of a child was attributed to a driver who was distracted by a memorial for two young pedestrians killed earlier at the same site.¹⁷⁴ And in Texas, a young woman was struck

165. Collins & Rhine, *supra* note 2, at 235.

166. See Gibson, *supra* note 35, at 158.

167. Smith, *supra* note 95, at 105 (“Still, one wonders if there will be a gradual decline of the practice at individual sites after several years, once the memorialisation [sic] has served its purpose—in the same way that the number of flowers on a grave decreases over the years.”).

168. Clark & Franzmann, *supra* note 4, at 585; Everett, *supra* note 29 (thesis at 89); Reid & Reid, *supra* note 3, at 350.

169. Everett, *supra* note 29 (thesis at 57) (“The [roadside memorial] assemblages have become so numerous as to render routine roadway maintenance difficult.”).

170. Collins & Rhine, *supra* note 2, at 236 (“Plainly, any structure placed on the margins of a road hinder or complicate its maintenance. This is especially true of mowing operations along highways. Wood or metal crosses, stones, bits of decorative fencing, even votive candles and teddy bears interfere with normal procedures. Likewise, on private lands, especially in fields, memorials obstruct normal crop cultivation and harvesting.”).

171. See, e.g., *Friends Upset WSDOT Removed Roadside Memorial* (KING 5 News Broadcast Apr. 2, 2012), available at <http://www.king5.com/news/local/Friends-upset-WSDOT-removed-roadside-memorial-145784275.html> (“WSDOT said it was becoming a hazard because other drivers were slowing down to look at it [the memorial cross] along Interstate 405.”).

172. Dickinson & Hoffman, *supra* note 9, at 161.

173. Collins & Rhine, *supra* note 2, at 238.

174. Chris Ross, *supra* note 66, at 52; cf. Daniella Miletic, *Roadside Tributes Blamed for Fatal Crash*, AGE (Australia), July 11, 2009, at 3, available at 2009 WLNR 27592896 (“Police believe the two-week-old shrine made for the teenagers killed at the intersection . . . distracted 21-year-old Melissa l’Anson, who died when her car was hit by a B-double truck . . . [as she] slowed down to look at the messages as she turned right at the intersection.”).

and killed by a car while she was visiting the roadside memorial of her cousin following the cousin's funeral.¹⁷⁵

In light of experiences like these, some state officials have concerns about the safety hazards posed by roadside memorials.¹⁷⁶ However, the traffic safety researchers who have examined the hazards posed by these memorials have found them to be generally safety-neutral. Two studies report no statistically significant effect from roadside memorials.¹⁷⁷ And one study found that while drivers were less likely to run through red lights at intersections with roadside memorials,¹⁷⁸ the researcher warned that such memorials could raise "other safety concerns, including potential hazards to pedestrians, cyclists and maintenance workers."¹⁷⁹ Professor Tay, a traffic safety expert, also cautions that leaving roadside memorials completely unregulated could raise safety concerns because "[w]ithout some forms of restrictions in place, some memorials erected may become a potential hazard due to their size and materials used."¹⁸⁰

While scientific data on the effects of roadside memorials is still emerging, there is a body of research on the effects of roadside advertisements. Researchers have found street-level advertisements, such as those on the side of a bus stop, pose a greater hazard than raised-level advertisements, such as a billboard.¹⁸¹ Street-level advertisements hold drivers' attention longer because of their location within the "cluttered areas of the visual scene" where drivers are attending to

175. Reid & Reid, *supra* note 3, at 352–53. *See also* Everett, *supra* note 29 (thesis at 57) ("Additionally, TxDOT [Texas Department of Transportation] officials fear they are dangerously distracting to drivers.").

176. *See* Anthony Edward Churchill, *Roadside Memorials and Traffic Safety* 43 (August 2007) (unpublished M.S. thesis, University of Calgary) (on file with author) ("Municipalities' chief concerns are distraction [of drivers] and the perception that roadside memorials are safety hazards.").

177. Tay, et al. *supra* note 49, at 484–86 (finding roadside memorials did not have any significant effect on speeding and following too closely, however, no positive effects on safety were found either); Churchill, *supra* note 176 (thesis at 92) ("The effects of memorials on traffic behaviour [sic] in both the study of short and long term effects have been shown to be statistically insignificant."). Moreover, personal roadside memorials are unlikely to provide an effective cautionary or salutary effect on drivers: "The finding that roadside memorials do not affect driver speed or following distance suggests that use of conventional roadside memorials as a safety countermeasure for speed or following distance issues is unlikely to be effective." *Id.* at 93.

178. Tay, *supra* note 49, at 669 ("The number of red light violations in a 6-week period at selected intersections after the installation of the roadside memorials was found to be significantly lower (16.7%) than the violation rates in the 6-week period before the installation of the roadside memorials.").

179. *Id.*

180. *Id.*

181. David Crundall et al., *Attraction and Distraction of Attention with Roadside Advertisements*, 38 ACCIDENT ANALYSIS & PREVENTION 671, 671–77 (2006).

other street objects and passing cars.¹⁸² Researchers have found that when drivers have more visual clutter to filter through, it takes them longer to process and make sense of the traffic landscape.¹⁸³ Additionally, clutter narrows the observer's useful field of view and increases the amount of time needed to process the information in view.¹⁸⁴ Street-level advertisements may also hold drivers' attention longer than raised-level advertisements because drivers are less comfortable averting their eyes from the roadway for prolonged glances.¹⁸⁵ As a corollary, drivers may be able to process raised-level advertisements with shorter glances than street-level advertisements because there is less visual clutter to contend with when a billboard is viewed against the sky or buildings.¹⁸⁶ Researchers have also found that older drivers process cluttered traffic scenes more slowly and less accurately than younger drivers.¹⁸⁷ And with an aging population of drivers, state governments have legitimate concerns about driver distraction and road hazards.¹⁸⁸

182. *Id.* at 676.

183. Theo Boersema et al., *Conspicuity in Realistic Scenes: An Eye-Movement Measure*, 20 APPLIED ERGONOMICS 267, 267-73 (1998) (suggesting longer latencies for high-clutter scenes resulted from a greater number of fixations needed to locate a target).

184. Toshiaki Miura, *Active Function of Eye Movement and Useful Field of View, in a Realistic Setting in FROM EYE TO MIND: INFORMATION ACQUISITION IN PERCEPTION, SEARCH, & READING* 119, 119-27 (Rudolf Groner et al., eds., 1990); Cynthia Owsley et al., *Visual / Cognitive Correlates of Vehicle Accidents in Older Drivers*, 6 PSYCHOL. & AGING 403, 403-15 (1991).

185. Crundall, *supra* note 181, at 676 ("The greater the distance between the fixation on an advertisement and the road ahead, the greater the impulse to return the eyes to the forward position as soon as possible. As RSAs [raised-level advertisements] are further away from the optimum fixation position than SLAs [street-level advertisements], it is natural that drivers will tend to fixate RSAs for a shorter amount of time.")

186. *Id.*

187. Geoffrey Ho et al., *Visual Search for Traffic Signs: The Effects of Clutter, Luminance, and Aging*, 43 HUMAN FACTORS 194, 205 (2001) ("Older adults were slower and less accurate and required more fixations to acquire a traffic sign.")

188. *Id.* at 205 ("This suggests that in time-limited situations that involve visually complex scenes (e.g., a busy intersection), older adults are more likely than younger adults to misidentify a sign or miss a sign altogether. The driving population is aging rapidly."). In light of this scholarship, traffic safety researchers suggest that "roadway engineers should consider reducing the number of competing signs (e.g., advertisements), avoiding redundant signs, and making traffic signs that are central to the safety of the driver more conspicuous." *Id.*

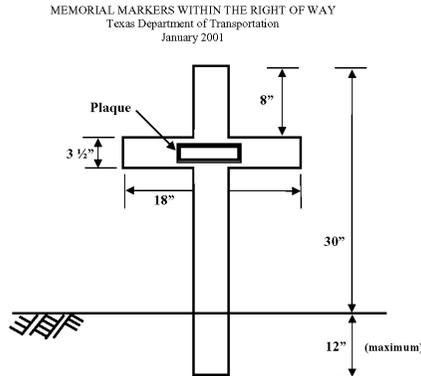
B. Patchwork of Public Policies on Roadside Memorials

State and local governments across the country have adopted a patchwork of policies and regulations for roadside memorials.¹⁸⁹ Policymakers struggle to balance the needs of the bereaved and the needs of the community. Many governments are considering appropriate limits on roadside displays as a way to balance these needs.¹⁹⁰ Nearly half of the states have adopted some policy regarding the placement of roadside memorials.¹⁹¹ Policies vary widely with some states expressly permitting private markers, some allowing only state-sponsored markers, some having no express policy, and some expressly prohibiting all private roadside markers—yet often not enforcing the prohibition.

States like Alaska,¹⁹² Virginia,¹⁹³ and Texas¹⁹⁴ expressly permit private memorials. Traffic-related fatalities in Texas may be commemorated by a marker that is “no more than 30 inches high and no wider than 18 inches” and is located in a place that “does not distract motorists.”¹⁹⁵ The Texas DOT “Use of Right of Way by Others Manual” includes a sketch that illustrates the size and construction limitations for right of way markers; the sample marker is a 30” x 18” Latin cross.

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189. Michael Risinit, *Displays Help With Grief; Some Call Them Depressing, Unsafe*, J. NEWS (Weschester, N.Y.), June 2, 2004, A1, available at 2004 WLNR 23055889 (noting “regulations nationwide are a hodgepodge of do’s and don’ts”).
 190. Hannah Dreier, *East Contra Costa Agency to Crack Down on Roadside Memorials*, CONTRA COSTA TIMES, Apr. 15, 2011, available at 2011 WLNR 7458502 (“Nationwide, states and cities are grappling with roadside memorials as they become more common. Though some local agencies have placed restrictions on memorials, it’s unusual to ban them outright.”). See Cara Hogan, *Hampstead Proposes Roadside Memorial Ordinance*, EAGLE-TRIB., Dec. 27, 2010, available at 2010 WLNR 25455635; Jo Ann Hustis, *Lasting Memories*, MORRIS DAILY HERALD, Aug. 25, 2011, available at 2011 WLNR 16829809; Neil Johnson, *Roadside Memorial for Man Sparks Controversy*, JANESVILLE GAZETTE, Jan. 16, 2012, available at 2012 WLNR 1024690; *Memorials Create Dilemma for Cities*, supra note 161; Warsmith, supra note 164, at A1; Sam Wheeler, *Signs of Remembrance*, ASHLAND DAILY TIDINGS, Aug. 21, 2011, available at 2011 WLNR 17417056.
 191. Dickinson & Hoffmann, supra note 9, at 158 (identifying that 23 states, or 46%, have adopted a policy).
 192. ALASKA STAT. § 19.25.260 (2010); DEP’T OF TRANSP. & PUB. FACILITIES, STATE OF ALASKA, A PRIMER FOR ROADSIDE MEMORIALS, available at <http://www.dot.alaska.gov/stwddes/dcsrow/assets/pdf/roadsidememorials.pdf>.
 193. 24 VA. ADMIN. CODE § 30-151-550 (2012); VA. DEP’T OF TRANSP., GUIDELINES FOR ROADSIDE MEMORIALS (2006), available at http://www.virginiadot.org/business/resources/NOVA_FairfaxPermits/FairfaxPermits_RoadsideMemorialGuidelines.pdf.
 194. TEX. DEP’T OF TRANSP., USE OF RIGHT OF WAY BY OTHERS MANUAL 3-22 to 3-23 (2005), available at <http://onlinemanuals.txdot.gov/txdotmanuals/use/use.pdf>.
 195. *Id.*

Figure 1. “Sketch of Typical Marker” from the Texas DOT “Use of Right of Way by Others Manual.”¹⁹⁶



Other states, such as West Virginia¹⁹⁷ and South Carolina,¹⁹⁸ do not expressly prohibit private memorials but do offer a state-approved sign. In West Virginia a loved one can select a sign with one of three messages along with the name of the deceased: (1) “Please Drive Safely”—available for all victims of highway fatalities; (2) “Please Buckle Up”—available for highway fatalities where the victim was not wearing a seat belt; and (3) “Don’t Drink and Drive”—available for victims of a vehicular crash involving alcohol or drugs.¹⁹⁹ By offering official signs, state officials hope the bereaved will opt for the state-issued sign rather than making their own.²⁰⁰ However, observers note that it does not appear that the state-sponsored memorial program is an adequate substitute for a privately made memorial.²⁰¹

196. *Id.* at 3-24.

197. W. VA. DEP’T OF TRANSP., ROADSIDE MEMORIALS, available at <http://www.transportation.wv.gov/highways/traffic/roadsidememorials/Pages/default.aspx>.

198. S.C. DEP’T OF TRANSP., ROADSIDE MEMORIAL SIGN, available at http://www.scdot.org/getting/community_roadside_memorials.aspx.

199. W. VA. DEP’T OF TRANSP., ROADSIDE MEMORIALS, available at <http://www.transportation.wv.gov/HIGHWAYS/TRAFFIC/ROADSIDEMEMORIALS/Pages/default.aspx>.

200. Steve Jones, *Roadside Signs May Be Tough Sell in S.C.*, MYRTLE BEACH SUN NEWS, Aug. 9, 2010, available at 2010 WLNR 15813529 (“South Carolina highway officials hope the availability of new, state-provided signs at places where people have died on roadways will cut down on the number of homemade memorials along the sides of roads.”).

201. *Sales Slow for State’s Roadside Memorials*, CHARLESTON GAZETTE, June 1, 2010, at 9A, available at 2010 WLNR 11413548 (“The state’s [West Virginia] idea of offering official roadside memorial signs to families of those killed in traffic accidents isn’t catching on with residents.”); see also Craig Schneider, *DOT: Make-shift Tributes Must Go*, ATLANTA J.-CONST., Feb. 10, 2011, at A1, available at 2011 WLNR 2626628 (reporting that for one bereaved mother in Georgia, a white state-issued sign was inadequate because it “would not be personal enough”).

States like Wyoming,²⁰² Colorado,²⁰³ Georgia,²⁰⁴ and Florida²⁰⁵ prohibit private memorials, but will erect a state-approved sign to mark the “last alive” place of a loved one. In Florida, for example, the DOT will erect a fifteen-inch round “Drive Safely” marker on state roads for accident victims, unless local regulations prohibit them.²⁰⁶ States like Illinois,²⁰⁷ New Hampshire,²⁰⁸ California,²⁰⁹ and New Mexico²¹⁰ offer state signs only for victims of certain types of traffic fatalities, such as DUI deaths.²¹¹ But accident victims who were themselves driving while under the influence of alcohol or controlled substances are ineligible for official memorial signs in states like Texas,²¹² South Carolina,²¹³ and Illinois.²¹⁴ And by participating in

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202. WYO. DEP’T OF TRANSP., ROADSIDE MEMORIAL PROGRAM (2003), *available at* <http://www.dot.state.wy.us/files/content/sites/wydot/files/shared/Public%20Affairs/Roadside%20Memorial%20Program%20Brochure.pdf>; Dan Frosch, *Wyoming Finds a Place for Crash-Site Memorials*, N.Y. TIMES, Oct. 26, 2008, at A21, *available at* <http://www.nytimes.com/2008/10/26/world/americas/26iht-wyoming.4.17256888.html> (“Wyoming started enforcing a ban on roadside memorials more than five years ago, after they began appearing so often that transportation officials felt they could distract and obstruct drivers in a dangerous way.”).
 203. COLO. DEP’T OF TRANSP., SAFETY & TRAFFIC ENGINEERING BRANCH, ROADSIDE MEMORIAL SIGNAGE PROGRAM CRITERIA (2009), *available at* <http://www.coloradodot.info/library/forms/cdot1314.pdf> (“Signs may *only* be installed on State highways. Signs installed on State highways within a city or town require local government approval.”).
 204. GA. CODE ANN § 32-6-50 (2010); *see* GA. DEP’T OF TRANSP., MEMORIAL MARKERS, *available at* <http://www.dot.state.ga.us/doingbusiness/permits/Pages/MemorialMarkers.aspx>.
 205. FLA. DEP’T OF TRANSP., WELCOME TO THE HIGHWAY SAFETY MEMORIAL MARKER PROGRAM, *available at* <http://www.dot.state.fl.us/statemaintenanceoffice/memorial%20markers.shtm>.
 206. *Id.*
 207. ILL. DEP’T OF TRANSP., DUI MEMORIAL SIGN PROGRAM, *available at* <http://www.dot.il.gov/oper/duimemorialprogram.html>. *See* 605 ILL. COMP. STAT. 125/15 and 125/20 (West 2007 & Supp. 2012) (offering a “Please Don’t Drink and Drive” sign).
 208. N.H. REV. STAT. ANN. § 236:48-a (Supp. 2012) (outlining DWI Victim Fatality Sign Program).
 209. CAL. DEP’T OF TRANSP., VICTIMS MEMORIAL SIGN PROGRAM, *available at* <http://www.dot.ca.gov/hq/traffops/signtech/signdel/victims.htm>. *See* CAL. STS. & HIGH. CODE § 101.10 (West 2005 & Supp. 2012) (offering a “Please Don’t Drink and Drive” sign followed by: “In Memory of (deceased victim’s name)” along state highways).
 210. N.M. CODE R. §18.20.7.8 (LexisNexis 2012) (“The standard sign features the words ‘Please Don’t Drink and Drive’ ‘In memory of (victim’s name(s)).’”).
 211. In states like Oregon and Utah, roadside sign along state highways are available to commemorate police officers killed in the line of duty. OR. REV. STAT. § 366.930 (2011); OR. ADMIN. R. 734-026-0010 to -0045 (2013); UTAH CODE ANN. § 72-7-110 (Supp. 2012).
 212. 43 TEX. ADMIN. CODE § 25.953(e) (2013) (determining eligibility for Memorial Sign Program).
 213. S.C. DEP’T OF TRANSP., ROADSIDE MEMORIAL SIGN, *available at* http://www.scdot.org/getting/community_roadside_memorials.aspx.

the state-approved sign program, mourners in Illinois are expressly discouraged from augmenting the official memorial with personal items.²¹⁵

The cost of the sign and length of time it may remain erected varies among the states that offer approved signs. Roadside markers are free in Florida²¹⁶ and Wyoming²¹⁷ but cost up to \$350 in Texas²¹⁸ and \$1,000 in California.²¹⁹ Roadside markers may stay in place for one year in Florida;²²⁰ two years in Illinois;²²¹ three years in West Virginia, which is renewable for another three years for \$200;²²² seven years in California;²²³ and the life of the sign in South Dakota.²²⁴ In states like Texas²²⁵ and Virginia,²²⁶ the memorial sign is offered to the victim's family after it is removed from the roadside. And in New Mexico it is a misdemeanor to knowingly deface or destroy a roadside memorial.²²⁷

Other states, such as Pennsylvania, Ohio, New York, Rhode Island, and Nebraska do not have an official policy for roadside memorials but will remove any marker that poses a safety hazard.²²⁸ And in

214. 605 ILL. COMP. STAT. § 125/15(f) (West 2007 & Supp. 2012) (excluding memorial marker for impaired victim drivers “unless the next of kin of any other victim or victims killed in the crash consent in writing to the erection of the memorial marker”).

215. 605 ILL. COMP. STAT. § 125/15(e) (West 2007 & Supp. 2012) (“The qualified relative shall agree not to place or encourage the placement of flowers, pictures, or other items at the crash site.”).

216. FLA. DEP’T OF TRANSP., Procedural Document Topic No. 850-050-004-c, HIGHWAY SAFETY MEMORIAL MARKERS (Mar. 15, 2007), *available at* <http://www.dot.state.fl.us/proceduraldocuments/procedures/bin/850050004.pdf> (last visited Mar. 13, 2013).

217. WYO. DEP’T OF TRANSP., ROADSIDE MEMORIAL PROGRAM, *available at* http://www.dot.state.wy.us/wydot/news_info/roadside_memorials (last visited Mar. 13, 2013).

218. 43 TEX. ADMIN. CODE § 25.952 (2013) (permitting the request of a memorial sign); 43 TEX. ADMIN. CODE § 25.954(a) (2013) (setting fee at \$350.00).

219. CAL. DEP’T OF TRANSP., VICTIMS MEMORIAL SIGN PROGRAM, *available at* <http://www.dot.ca.gov/hq/traffops/signtech/signdel/victims.htm> (last updated Nov. 16, 2010).

220. FLA. DEP’T OF TRANSP., *supra* note 205.

221. 605 ILL. COMP. STAT. § 125/20(c) (West 2007 & Supp. 2012).

222. W. VA. CODE R. § 157-6-9.5.i (2012).

223. CAL. STS. & HIGH. CODE § 101.10(d)(1) (West 2005 & Supp. 2012).

224. S.D. DEP’T OF PUB. SAFETY, THINK SIGN INFORMATION, *available at* http://dps.sd.gov/enforcement/accident_records/think_sign_information.aspx (last visited Mar. 13, 2013).

225. 43 TEX. ADMIN. CODE § 25.957(c) (2013) (noting the applicant may take possession of the sign after it has been removed).

226. 24 VA. ADMIN. CODE § 30-151-550(D) (2012) (“After the two-year term . . . the memorial shall be removed by VDOT personnel [and] [t]he memorial nameplate will be returned to the applicant or the designated family member . . .”).

227. N. M. STAT. ANN. § 30-15-7 (Supp. 2012).

228. JoAnne Klimovich Harrop, *Roadside Shrines Help Loved Ones Deal With Tragedy*, PITTSBURGH TRIB. REV., July 4, 2010, *available at* 2010 WLNR 13421675

the absence of an official state policy, some states have “guidelines” for handling roadside memorials,²²⁹ and other jurisdictions allow policies to be enacted and enforced at the local or municipal level.²³⁰ In New Jersey, privately erected memorials may remain along the Atlantic City Expressway for only ten days, after which the South Jersey Transportation Authority will remove them.²³¹ Some Florida cities, such as Boca Raton and Weston, prohibit all memorial markers on city roads while other cities, such as Tamarac and Parkland, handle incidents on a case-by-case basis.²³² The Town of Stoughton, Massachusetts, for example, has no official policy on roadside memorials.²³³ Stoughton Police Department’s spokesman Robert Devine says, “Over time, they [roadside memorials] usually get taken down once they start getting in rough shape.”²³⁴ Moreover, he notes, “I think you’d be hard-pressed to find a town that has a specific bylaw. Usually it’s just a matter of decorum, and once some time passes to heal, it gets cleared up.”²³⁵

As an alternative to a roadside memorial sign, Delaware offers a “green memorial” that allows a tree, bush, or garden to be planted in

(“While there is no law against erecting roadside memorials, PennDOT District 11 spokesman Jim Struzzi says there is kind of an unwritten procedure. ‘PennDOT is certainly sympathetic to the needs of the family and friends when it comes to roadside memorials,’ he says. ‘We would prefer not to see them, but conversely, we appreciate what they mean to people. We would say, if they want to erect them, that they keep in mind where they are erecting the roadside memorial so as not to be distracting to drivers.’”); Perry Brothers, *Crosses Relay Messages*, CINCINNATI ENQUIRER, June 8, 1999, at A1, available at 1999 WLNR 8445925; Warsmith, *supra* note 164, at A1 (“The Ohio Department of Transportation doesn’t permit memorials, but allows them to remain as long as they don’t pose a hazard or draw away drivers’ attention. When the state does maintenance work, such as mowing, memorials in the way are removed, said Justin Chesnic, a spokesman for the department’s District 4.”).

229. Dickinson & Hoffmann, *supra* note 9, at 158 (“Two other states (Iowa and Minnesota) reported not having a policy but included with their returned survey a ‘statement’ or ‘guidelines’ that spelled out how private memorials would be handled in the absence of state legislation.”); Schneider, *supra* note 201, at A1 (noting Georgia cities and counties regulate their own roadways and thus set their own roadside memorials policies).

230. Schneider, *supra* note 201, at A1 (“Five of those states with a policy also said that ‘counties, cities, or precincts’ in their state have their own regulations regarding roadside memorials and four additional states without an official state policy indicate that counties, cities, or other jurisdictions have their own policies.”). See also Reid & Reid, *supra* note 3, at 351 (noting that in states like Texas, “enforcement practices vary from county to county”).

231. N.J. ADMIN. CODE § 19:2-5.10(c) (2013).

232. *Memorials Create Dilemma for Cities*, *supra* note 161, at 1A.

233. Erin Shannon, *How Long Is Too Long for Roadside Memorials?*, PATRIOT LEDGER, Oct. 9, 2012, at 8, available at 2012 WLNR 21512743.

234. *Id.*

235. *Id.*

the vicinity of a highway fatality.²³⁶ In states like Utah,²³⁷ Missouri,²³⁸ and Wisconsin,²³⁹ mourners are encouraged to participate in the Adopt-A-Highway roadside cleanup program and use the program sign as a memorial to the loved one. David Vieth, Wisconsin's bureau of highway operations director, says, "Wisconsin isn't just concerned that the memorials are a distraction for drivers whizzing by. Officials also worry about the potential safety hazard when mourners stop to visit the memorials, often just a few feet off the interstate."²⁴⁰

Roadside memorials are prohibited as an obstruction or encroachment of a highway in states like Indiana,²⁴¹ Iowa,²⁴² Montana,²⁴³ and North Dakota.²⁴⁴ But these laws are often not enforced.²⁴⁵ In states where erecting roadside memorials is prohibited, public officials often turn a blind eye to memorials out of respect.²⁴⁶ Journalist Chris Ross notes that "in probably no other area of public life does practice diverge so dramatically from official policy."²⁴⁷

236. Mike Chalmers, *States Seek Alternatives to Roadside Memorials*, USA TODAY, June 4, 2010, at 3A, available at 2010 WLNR 11439853.

237. UTAH DEP'T OF TRANSP., POLICY FOR ROADSIDE MEMORIALS (2005), available at <http://www.udot.utah.gov/main/uconowner.gf?n=10465114960298226>.

238. *Memorial Designation Programs*, MO. DEP'T OF TRANSP., <http://www.modot.org/services/MemorialDesignationPrograms.htm> (last visited Mar. 21, 2013).

239. WIS. DEP'T OF TRANSP., REMEMBERING A LOVED ONE: MEMORIALS ON STATE HIGHWAYS (2012), available at <http://www.dot.wisconsin.gov/business/rules/docs/roadside.pdf>. See also *Crosses to Bear*, PROVIDENCE J. BULL., Oct. 23, 2005, at A1, available at 2005 WLNR 17261982 ("Relatives of the deceased can adopt a two-mile section of highway and have a standard sign erected there in the name of the deceased. But they must also agree to clean their section of roadway at least three times a year.")

240. J.R. Ross, *States Eye Bans on Roadside Memorials: Officials Fear the Shrines Will Be a Distraction to Other Motorists and May Cause More Accidents*, GRAND RAPIDS PRESS, July 13, 2003, at F8, available at 2003 WLNR 13842930.

241. IND. CODE ANN. § 9-21-4-6 (West 2012).

242. IOWA CODE ANN. § 318.3(7) (West 2012).

243. MONT. CODE ANN. § 60-6-101 (2011) (prohibiting encroachments on the right of way for state highways); MONT. DEP'T OF TRANSP., MONT. RIGHT OF WAY OPERATIONS MANUAL ch. 7 (2007) (defining encroachments), available at http://www.mdt.mt.gov/other/rw/external/manual/chapter_7.pdf.

244. N.D. CENT. CODE § 24-03-23 (2002).

245. Robert Medley, *Heaven Begins at Roadside Crosses*, OKLAHOMAN, April 29, 2012, at 21A, available at 2012 WLNR 9136664; Seth Seymour, *Roadside Memorials Against Law; However, State Is Sympathetic*, VIRGINIAN-PILOT & LEDGER STAR, July 12, 2005, at 8, available at 2005 WLNR 12830393.

246. Dreier, *supra* note 190 ("Roadside memorials technically violate the law because they are on public property, but they are often untouched because of their sensitive nature."); *Memorials Create Dilemma for Cities*, *supra* note 161, at 1A ("Cities across Florida have rules for regulating the erection or duration of roadside memorial markers. But some don't follow them, to avoid the delicate and emotional issue of taking down a marker in memory of somebody who was killed.")

247. Ross, *supra* note 66, at 50; accord Schneider, *supra* note 201, at A1 ("They are already prohibited under state law, and many are removed as workers cut the

Scholars have found a common theme of deference among DOT officials, who try to balance safety concerns while simultaneously respecting a family's need to grieve for the loved one.²⁴⁸ State officials are generally sensitive to the grief of the loved ones and show a great deal of deference to the memorials, notwithstanding any official policy.²⁴⁹ In states where roadside memorials are illegal, authorities often leave the memorials in place unless a complaint is lodged.²⁵⁰ These local agencies take the unofficial stance of acknowledging the need for individuals to grieve and leave most memorials undisturbed.²⁵¹ Professor of communication studies Rebecca Kennerly, who has extensively studied roadside memorials, explains that these shrines are typically "granted a certain 'grace' insofar as they are considered spontaneous expressions of grief and therefore authentic and above reproach."²⁵²

IV. ROADSIDE MEMORIALS AND THE FREE SPEECH CLAUSE

Roadside memorials serve as a powerful signifier of death and space. And while these symbols do not lend themselves to a single message or meaning,²⁵³ they undoubtedly serve an important expressive function for the loved ones of the deceased.²⁵⁴ The memorial speaks as much for the memorial maker as it does the loved one who is memorialized by reflecting the maker's image of the loved one.²⁵⁵ But

grass and pick up litter along the roadways. But workers often leave the memorials for a time in deference to family and friends.”)

248. Dickinson & Hoffmann, *supra* note 9, at 161; Kennerly, *supra* note 33, at 244 (“Despite federal and state laws, local government agencies responsible for safety and maintenance of public roads often indicate a reluctance to remove roadside shrines.”).
249. Dickinson & Hoffmann, *supra* note 9, at 163; Collins & Rhine, *supra* note 2, at 236.
250. Dickinson & Hoffmann, *supra* note 9, at 161; Collins & Rhine, *supra* note 2, at 237.
251. Kennerly, *supra* note 33, at 244.
252. *Id.* at 251. This “grace” is also reflected in the policy statement from various state agencies. For example, Arizona’s Historic Preservation Specialists acknowledge that while “Roadside Memorials are not considered historic properties,” Arizona DOT treats these memorials “with respect for the families that install and maintain the memorials.” ENVTL. PLANNING GROUP., ARIZ. DEP’T OF TRANSP., HISTORIC PRESERVATION HANDBOOK 69–70 (2008), available at www.azdot.gov/highways/EPG/EPG_Common/Docs/Technical/Cultural/HPT_Handbook.doc. And Alaska’s “Primer for Roadside Memorials” starts with the caption “We respect your feelings.” DEP’T OF TRANSP. & PUB. FACILITIES, STATE OF ALASKA, A PRIMER FOR ROADSIDE MEMORIALS (n.d.), available at <http://www.dot.state.ak.us/stwddes/dcsrow/assets/pdf/roadsidememorials.pdf>.
253. See JANET L. DOLGIN, SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS 185 (Janet L. Dolgin et al. eds., 1977).
254. Wagner, *supra* note 62 (thesis at 84).
255. *Id.* at 85.

the expressive right to memorialize a loved one is not unbounded. The Supreme Court has noted that “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”²⁵⁶

A. Adequacy of Alternative Channels of Communication When All Roadside Memorials Are Banned

For the states that prohibit all roadside memorials, the question arises whether such a prohibition abridges the Free Speech interests of the memorial maker. Content-neutral restrictions on speech in public fora are considered reasonable time, place, and manner regulations if they are narrowly tailored to serve a significant government interest and leave open adequate alternative channels of communication.²⁵⁷ The Supreme Court has emphasized that time, place, and manner restrictions “are not invalid simply because there is some imaginable alternative that might be less burdensome on speech;” indeed, such regulations “must be narrowly tailored to serve the government’s legitimate, content-neutral interests but . . . need not be the least-restrictive or least-intrusive means of doing so.”²⁵⁸

The courts have confirmed that states may regulate signage and commercial advertising based on aesthetic and traffic safety concerns.²⁵⁹ These significant governmental interests extend to both

256. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

257. For urban streets, which like city parks are generally viewed as traditional public fora, a valid time, place, and manner regulation must satisfy three criteria: (1) content-neutral; (2) serve significant governmental interests; and (3) leave open adequate alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981). Content-based regulations, on the other hand, must (1) be necessary, (2) serve a compelling governmental interest, and (3) be narrowly drawn to achieve that end. *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981); *Carey v. Brown*, 447 U.S. 455, 461, 464–65 (1980).

258. *Ward*, 491 U.S. at 798–99.

259. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 790–91 (1984); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514–17 (1981); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1109–11 (5th Cir. 1987) (upholding a total ban on portable signs because (1) the ordinance furthered the city’s aesthetic interest, (2) ban of portable signs was not substantially broader than necessary to protect that interest, and (3) there were ample methods of communication available as alternatives to portable signs); *Harnish v. Manatee Cnty., Fla.*, 783 F.2d 1535, 1540 (11th Cir. 1986) (upholding a total ban on portable and changeable copy temporary signs because the ban “advanced the governmental goal of protecting the aesthetic environment of Manatee County, and the record [was] bare of evidence from which it might be inferred that less restrictive means existed to accomplish the objective . . .”); *see also Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 823 (6th Cir. 2005) (emphasizing that “billboard regulations, whatever other strengths and weaknesses they may have, advance a police power interest in curbing community blight and in promoting traffic safety”).

commercial and noncommercial speech. In upholding a city's ban on all signs on public property, the Supreme Court ruled the ordinance was a constitutionally permissible time, place, and manner restriction for three reasons.²⁶⁰ First, the government has a "weighty, essentially esthetic interest" in reducing visual clutter.²⁶¹ Second, content-neutral regulation applied regardless of the subject matter on the signs.²⁶² And third, there were ample alternative channels of communication because the ban did not extend to private property, and nothing indicated that these signs were a "uniquely valuable or important mode of communication."²⁶³

In evaluating the availability of alternative channels of communication, some courts require that an alternative means provide only a "reasonable opportunity" for the speaker to communicate the message,²⁶⁴ whereas other courts focus more on the adequacy of the available communicative avenues.²⁶⁵ The Supreme Court has explained that alternative channels that "involve more cost and less autonomy" are "less likely to reach persons not deliberately seeking sales information," are "a less effective media for communicating the message," and are thus "far from satisfactory."²⁶⁶ The Supreme Court has struck down regulations that afford such unsatisfactory alternative channels.²⁶⁷ However, courts are unwilling to invalidate a regulation

260. *Taxpayers for Vincent*, 466 U.S. at 811–15. The inquiry into "ample alternative channels of communication" is not coextensive with the "less restrictive means" test. The Seventh Circuit Court of Appeals has clarified that "less restrictive means" examines whether there are other, equally effective regulations that are less restrictive of protected activity, whereas "ample alternative channels" examines whether the remaining modes of communication are sufficient and equivalent to the prohibited modes. *Wis. Action Coal. v. City of Kenosha*, 767 F.2d 1248, 1254 n.3 (7th Cir. 1985) ("It is important to distinguish 'less restrictive means' (or equivalently 'less restrictive alternatives') from 'ample alternative channels.' The former denotes an inquiry into whether there are other regulations which are less restrictive of protected activity but protect the governmental interest served by the challenged regulation. The 'ample alternative channels' inquiry focuses on methods of communication and asks whether those methods not prohibited by the challenged regulation are equivalent to the prohibited methods.").

261. *Taxpayers for Vincent*, 466 U.S. at 806.

262. *Id.* at 810–12.

263. *Id.* at 812.

264. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986); *Galena v. Leone*, 638 F.3d 186, 203 (3d Cir. 2011).

265. *See, e.g., Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 745 (1st Cir. 1995) (noting "the lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate").

266. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (internal citations omitted).

267. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (ample alternative channels not available); *Linmark Assocs.*, 431 U.S. at 93 (alternatives unsatisfactory).

simply because it restricts the speaker's "preferred method of communication."²⁶⁸

Courts have also found alternative channels of communication inadequate when the regulation forecloses "an entire medium of public expression across the landscape of a particular community or setting."²⁶⁹ The Supreme Court has been troubled by laws that completely foreclose an entire medium of expression. The Court struck down ordinances that completely banned the distribution of pamphlets within a municipality,²⁷⁰ handbills on the public streets,²⁷¹ door-to-door distribution of literature,²⁷² and live entertainment.²⁷³ While prohibitions that completely foreclose an entire medium may be content-neutral, the Court emphasized "the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."²⁷⁴

The Ninth Circuit Court of Appeals has identified four factors to consider in determining whether alternatives for communication are ample and adequate.²⁷⁵ First, "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience."²⁷⁶ Second, an alternative avenue is not adequate if the location of the expressive activity is part of the expressive message.²⁷⁷ Third, an alternative forum is not adequate if it burdens the spontaneity of the speech, like

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268. *United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008); *accord Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011) ("Any time, place, and manner restriction must leave open ample alternative channels by which speakers can communicate their messages, although speakers are not entitled to their best means of communication.") (internal quotation omitted); *Ross v. Early*, 758 F. Supp. 2d 313, 322 (D. Md. 2010) ("Speakers are not entitled to their ideal means of communication; the Constitution demands only that individuals retain the ability to communicate effectively.") (internal quotation omitted).
269. *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005); *accord Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1225 (10th Cir. 2007).
270. *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938).
271. *Jamison v. Texas*, 318 U.S. 413, 416 (1943).
272. *Martin v. City of Struthers*, 319 U.S. 141, 145–49 (1943); *Schneider v. Town of Irvington*, 308 U.S. 147, 164–65 (1939).
273. *Schad v. Mount Ephraim*, 452 U.S. 61, 75–76 (1981).
274. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).
275. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2009).
276. *Id.* (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990)); *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) ("The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.").
277. *Long Beach*, 522 F.3d at 1024 (citing *Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004)); *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005).

requirements for advanced notice or registration.²⁷⁸ And fourth, the cost and convenience of an alternative channel is a consideration.²⁷⁹ The Ninth Circuit has also noted the “analysis of time, place, and manner restrictions should include an inquiry into whether the regulation so alters the content of a message in a public forum as to hamper speakers from conveying what they mean to convey.”²⁸⁰

A number of states prohibit roadside memorials. These content-neutral regulations serve the significant government interests of protecting traffic safety and community aesthetics. The unresolved question is whether a complete ban on all roadside memorials leaves ample and adequate alternatives for the mourner’s communication. Memorial makers can argue that the place of the memorial is so inextricably intertwined with the message of the memorial that moving the memorial to another place would not be an ample and adequate alternative.

A cemetery or other memorial site is not an adequate substitute for a roadside memorial. The “last alive” place is deeply important to memorial makers. The site is of supreme importance because it is sanctified by the spilled blood of the loved one.²⁸¹ Scholars emphasize “the issue of placement and place is absolutely critical to the bereaved who ascribe to the location a special, even a sacred, significance.”²⁸² Placement of the memorial on the “last alive” place has the effect of transforming the public land into a private, sacred space.²⁸³

Moving the memorial elsewhere would be ineffective and would viti-ate the importance of placing the memorial on the “last alive” place. The message of remembrance and caution are inextricably intertwined with the “last alive” place.²⁸⁴ Thus, the location of the speech is part of the expressive message. Changing the location undermines the message. As Professor Bednar observes, “Moving the memorial elsewhere would negate the shrine’s function as a spatially unique portal between the living and the dead, where mourning intervenes in the site of trauma.”²⁸⁵ A memorial in a cemetery does not allow the memorial maker to communicate with the intended audience, namely

278. *Long Beach*, 522 F.3d at 1024. See also *ACLU of Colo. v. City and Cnty. of Denver*, 569 F. Supp. 2d 1142, 1164 (D. Colo. 2008) (explaining that an alternative requiring a permit or some other type of notice is not an adequate alternative).

279. *Long Beach*, 522 F.3d at 1024.

280. *Galvin*, 374 F.3d at 756.

281. See KENNETH E. FOOTE, *SHADOWED GROUND: AMERICA’S LANDSCAPES OF VIOLENCE AND TRAGEDY* 8 (Univ. of Tex. Press rev. ed. 2003) (“Sanctification involves the creation of what geographers term a ‘sacred’ place—a site set apart from its surroundings and dedicated to the memory of an event, person, or group.”).

282. Collins & Rhine, *supra* note 2, at 239.

283. Suter, *supra* note 22, at 53.

284. See *Long Beach*, 522 F.3d at 1024.

285. Bednar, *supra* note 2, at 136.

other drivers along the roadway.²⁸⁶ Memorial makers can argue that they would have no alternative avenue to communicate their cautionary tale to other drivers if the memorial is removed from the roadside. Thus, these memorial signs are a “uniquely valuable or important mode of communication.”²⁸⁷

These roadside memorials leave visible and poignant reminders of death on public space.²⁸⁸ Justice John Paul Stevens has acknowledged that sometimes “the location of the sign is a significant component of the message it conveys.”²⁸⁹ By removing these memorials from the site of death, the message of the memorial is altered. By eliminating the roadside memorial, would-be memorial makers argue they do not have an adequate alternative channel to communicate their messages.

B. Adequacy of Alternative Channels of Communication When a Uniform, Official Marker Eliminates Personal Involvement in the Roadside Memorial

Some states prohibit handmade roadside memorials, but offer uniform, official markers to commemorate road deaths. These content-neutral regulations again serve the significant government interests of road safety and aesthetics. But the unresolved question is whether a policy that eliminates personal involvement and participation with the creation of the memorial offers an adequate alternative channel of communication for a would-be memorial maker.

Scholars who have studied roadside memorials suggest that an official marker can never fully replace the want or the need of some bereaved to remember the deceased at their “last alive” place.²⁹⁰ For those who would erect a roadside memorial, the personal involvement is key to the enduring therapeutic merit of the marker.²⁹¹ And even when official policies offer an official marker in lieu of a handmade marker, spontaneous memorials often still occur.²⁹²

286. See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).

287. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

288. Gibson, *supra* note 35, at 152.

289. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting) (plurality opinion).

290. Collins & Rhine, *supra* note 2, at 226 (“It is increasingly evident, however, that official markers, from whatever source, are no substitute for those built by family and friends.”).

291. *Id.* at 240.

292. *Id.* at 241 (“Whether they seek to eliminate or to standardize roadside memorials, policy makers and enforcement personnel will continue to be frustrated by the spontaneous memorial conundrum.”).

Erecting state-approved markers while banning privately-made memorials may offer an inadequate alternative channel of communication, and this inadequacy is illustrated in two ways. First, the bereaved will often quickly replace a removed memorial.²⁹³ Anthropology professor Sylvia Grider has observed that even when state officials remove roadside memorials, the bereaved “simply replace them.”²⁹⁴ And second, the bereaved will often supplement a sanctioned marker or erect a private memorial nearby.²⁹⁵ The mother of a 21-year-old who was killed in a car accident recently told a journalist that a state-issued sign “would not be personal enough” for her.²⁹⁶ When state-issued signs are insufficient, the bereaved will often find ways to personalize the sign and create a memorial. Professor Kennerly notes that she has personally “encountered numerous small shrines at the base of state-sanctioned markers in both Florida and New Mexico.”²⁹⁷ By either supplementing an official marker or by erecting a handmade memorial in addition to a state marker, the bereaved are communicating that the official marker alone is an inadequate alternative for communication.

Scholars observe that memorial makers are generally not constrained legally or culturally. Memorial makers evince a self-possessed moral authority to erect their own memorial and to grieve the way they want and need to.²⁹⁸ Eliminating personal involvement in the memorial gives would-be memorial makers a claim that such a policy burdens the spontaneity of the speech and undermines the expression.²⁹⁹

V. ROADSIDE CROSSES AND THE ESTABLISHMENT CLAUSE

The Establishment Clause has often been employed as the vehicle to challenge the display of religious symbols on public property.³⁰⁰ For some in the community, the endorsement of religion through dis-

293. Kennerly, *supra* note 33, at 246.

294. Grider, *supra* note 81 (“I regard the attempts of various authorities to legislate or regulate this custom as futile and misguided because those who feel the need to memorialize their loved ones near the roadways where they died will continue to do so, regardless of legislation or other attempts at control. In many cases, where authorities have removed roadside shrines, families and loved ones simply replace them. Tradition is a powerful force in society.”).

295. Kennerly, *supra* note 33, at 246.

296. Schneider, *supra* note 201, at A1.

297. Kennerly, *supra* note 33, at 246.

298. Clark & Franzmann, *supra* note 4, at 586; Haney et al., *supra* note 4, at 161.

299. *See* Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1024 (9th Cir. 2008); Galvin v. Hay, 374 F.3d 739, 756 (9th Cir. 2004); ACLU of Colo. v. City and Cnty. of Denver, 569 F. Supp. 2d 1142, 1164 (D. Colo. 2008).

300. The Establishment Clause helps insulate religion from politics and vice versa. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE ix (McMillian Publ'g Co. 1986) (“Given the extraordinary religious diversity of our nation, the establishment

plays of religious symbols on public lands undermines respect for diversity of faith traditions and moral philosophies, whereas others view the invalidation of public displays of religious symbols as evidence of hostility toward religion. This is a hotly contested area of the law, and the Supreme Court's jurisprudence on the constitutionality of religious symbols on public property continues to evolve.³⁰¹

A. Sometimes the Display of a Crèche Scene on Public Property Violates the Establishment Clause, but Sometimes It Does Not

In this evolving jurisprudence, the Supreme Court has held that sometimes the government may erect a crèche, or nativity scene,³⁰² on public property, but sometimes it may not.³⁰³ In *Lynch v. Donnelly*, the Court held that a crèche located in a display near the heart of the

clause functions to depoliticize religion; it thereby helps to defuse a potentially explosive situation.”).

301. This evolution has not escaped criticism. See, e.g., Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006) (characterizing Establishment Clause doctrine as “a hopeless muddle” and arguing that “[a]t one point or another in recent years, one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause”); Roxanne L. Houtman, *ACLU v. McCreary County: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 397 (2005) (“[I]n the past thirty years, the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous.”); Sarah M. Isgur, “*Play in the Joints: The Struggle to Define Permissive Accommodation Under the First Amendment*,” 31 HARV. J.L. & PUB. POL'Y 371, 371 (2008) (noting the Supreme Court has created “multiple and overlapping analytical frameworks” in its Establishment Clause jurisprudence); Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 94 (2007) (characterizing the Court's efforts in *McCreary* and *Van Orden* as “[doing] little to clarify the law” and “leaving lower courts to sort out the principles that resulted in such disparate results regarding substantially similar displays”); L. Darnell Weeden, *A First Amendment Establishment Clause Analysis of Permanent Displays on Public Property as Government Speech*, 35 T. MARSHALL L. REV. 217, 221 (2010) (“Establishment Clause law is unquestionably unstable after *McCreary* and *Van Orden* . . .”).
302. A crèche is “a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 580 n.4 (1989).
303. Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding display of a crèche in the city's shopping district), with *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (striking down display of a crèche on the grand staircase of the county courthouse). See also *Elewski v. Syracuse*, 123 F.3d 51 (2d Cir. 1997) (upholding a crèche with a banner reading “Gloria in Excelsis Deo,” located in a park 300 feet from a menorah and down the street from secular holiday symbols); *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990) (upholding a 15-foot stable, without the figurines commonly found in a crèche, located on the grounds of the state capitol, 100 yards from a Christmas tree); *Smith v. Cnty. of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (holding a crèche located on the lawn of a county office building unconstitutional).

city's shopping district that included a variety of Christmas symbols, such as "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights," and a "Season's Greetings" banner was not a violation of the Establishment Clause.³⁰⁴ Writing for the Court, Chief Justice Burger applied the three-part *Lemon* test³⁰⁵ and concluded the nativity scene was permissible in the context of the city's overall Christmas display.³⁰⁶ First, the crèche had a secular purpose in celebrating and depicting the origins of the Christmas holiday and acknowledging our shared national heritage.³⁰⁷ Second, any advancement of, or benefit to, religion resulting from the scene was "indirect, remote and incidental" and no more an advancement of religion than other types of conduct found permissible in prior cases, such as legislative prayers,³⁰⁸ release time for public school students to attend religious education,³⁰⁹ tax exemptions for church properties,³¹⁰ and Sunday closing laws.³¹¹ And third, there was no excessive entanglement between religion and government because there was no evidence of ongoing, day-to-day interaction between church and state

304. *Lynch*, 465 U.S. at 671.

305. Under the *Lemon* analysis, a governmental activity or law is constitutional if the following three criteria are satisfied: (1) it has a secular purpose; (2) the principal or primary effect of which must neither advance nor inhibit religion; and (3) it must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

306. *Lynch*, 465 U.S. at 679.

307. *Id.* at 680 ("When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. . . . The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.").

308. *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding Nebraska's use of official Legislative Chaplains to give opening prayers at sessions of the state legislature).

309. *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a program allowing release of public school students from classes to attend off-campus religious exercises).

310. *Walz v. Tax Comm'n. of N.Y.C.*, 397 U.S. 664 (1970) (upholding tax exemption for religious, educational, and charitable organizations). *But see* *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (holding tax exemption limited to religious periodicals "effectively endorses religious belief").

311. *Lynch*, 465 U.S. at 681–83 ("We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. . . . [And the] display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums."); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday Closing Laws).

over the display, and the public expense involved was minimal.³¹² The Court applied the *Lemon* analysis in this case, yet it emphasized its “unwillingness to be confined to any single test or criterion in this sensitive area.”³¹³

Five years later, the Supreme Court in *County of Allegheny v. ACLU*,³¹⁴ held the display of a crèche on the courthouse’s grand staircase violated the Establishment Clause. The courthouse was the seat of county government, and the grand staircase was the “main,” “most beautiful,” and “most public” part of the courthouse.³¹⁵ But, in the same case, the Court also held that an 18-foot Chanukah menorah placed next to a 45-foot Christmas tree outside another local government building did not violate the Establishment Clause.³¹⁶ The Court’s ruling turned on the “particular physical setting” of each display.³¹⁷ The crèche was not exhibited with any other secular objects that would detract from the display’s religious message, and it bore an “indisputably religious” banner praising “Glory to God in the Highest.”³¹⁸ By prominently displaying this religious scene in the seat of local government, the Court observed, “No viewer could reasonably think that it occupies this location without the support and approval of the government.”³¹⁹ On the other hand, the menorah was part of a combined display with a Christmas tree and sign saluting liberty.³²⁰ This combined display celebrated secular aspects of both Judaism and Christianity.³²¹ The Court recognized that the city could celebrate

312. *Lynch*, 465 U.S. at 684 (“There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket’s purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the City owns the crèche, now valued at \$200, the tangible material it contributes is *de minimis*.”).

313. *Id.* at 678–79 (“In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.”); *cf.* *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (noting the factors identified in *Lemon* serve as “no more than helpful signposts”).

314. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

315. *Id.* at 579.

316. *Id.* at 597.

317. *Id.* (“Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective ‘particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.”).

318. *Id.* at 598.

319. *Id.* at 600 (“Thus, by permitting the ‘display of the crèche in this particular physical setting,’ the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.”) (internal citation omitted).

320. *Id.* at 614 (“The necessary result of placing a menorah next to a Christmas tree is to create an ‘overall holiday setting’ that represents both Christmas and Chanukah—two holidays, not one.”).

321. *Id.* at 617–18 (“The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the

Christmas and Chanukah as cultural traditions, independent of their religious significance.³²² Rather than endorsing religion, the Court found the display of the menorah, the Christmas tree, and the sign saluting liberty had the effect of acknowledging that “both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.”³²³

B. Sometimes a Government Display of the Ten Commandments on Public Property Violates the Establishment Clause, but Sometimes It Does Not

The Supreme Court has held that sometimes a city may display the Ten Commandments on public property, but sometimes it may not.³²⁴ On the same day, the Supreme Court issued two differing opinions on the constitutionality of displaying the Ten Commandments on public property. Justice Stephen Breyer provided the key swing vote in the two cases.

In *Van Orden v. Perry*, a 6-foot tall monument inscribed with the Ten Commandments was placed among seventeen monuments and twenty-one historical markers on the twenty-two acres surrounding the Texas State Capitol.³²⁵ The monument was donated and erected

18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.”).

322. *Id.* at 615 (“Because government may celebrate Christmas as a secular holiday, it follows that government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city’s acknowledgment of Chanukah as a contemporaneous cultural tradition.”).
323. *Id.* at 616. Justice O’Connor’s “endorsement” approach, refined the *Lemon* analysis. *See id.* at 592 (adopting Justice O’Connor’s approach); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).
324. *Compare Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion) (holding the Establishment Clause was not violated by a long-standing public display of the Ten Commandments on the grounds of a state capitol), *with McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (holding the Establishment Clause was violated by the display of the Ten Commandments in two Kentucky courthouses).
325. *Van Orden*, 545 U.S. at 681. The 17 monuments are “Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts’ Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans,

in 1961 by a private civic and patriotic organization.³²⁶ In analyzing the Establishment Clause issue, a plurality of the Court stated the *Lemon* test was “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”³²⁷ The plurality also recognized the religious significance of the Decalogue, as well as its “undeniable historical meaning,” and concluded “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”³²⁸ The plurality held the inclusion of the Ten Commandments monument for nearly forty years among the other political and legal monuments on the Capitol grounds was not a violation of the Establishment Clause.³²⁹

Justice Breyer provided the fifth vote and wrote separately to concur in the judgment that the monument was not a violation of the Establishment Clause.³³⁰ Justice Breyer noted that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”³³¹ He acknowledged *Van Orden* was a “borderline case,” and in evaluating difficult borderline cases, Justice Breyer saw “no test-related substitute for the exercise of legal judgment.”³³² He emphasized the need to “remain faithful to the underlying purposes of the [Religion] Clauses” and “take account of context and consequences measured in light of those purposes.”³³³ In this fact-intensive examination, Justice Breyer found the context and physical setting of the display suggested the state intended the “nonreligious aspects of the tablets’ message to

Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.” *Id.* at 681 n.1.

326. *Id.* at 682.

327. *Id.* at 686; *cf.* *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion.”).

328. *Van Orden*, 545 U.S. at 690; *cf.* *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*) (holding unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom because of the statute’s plainly religious purpose).

329. *Van Orden*, 545 U.S. at 691–92.

330. Justice Breyer’s concurrence in the judgment can be seen as the controlling opinion in *Van Orden*. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (internal quotations omitted).

331. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

332. *Id.* at 700.

333. *Id.*

predominate.”³³⁴ The display was donated by a secular civic organization and the monument itself “prominently acknowledge[d]” its donor, which “further distance[d] the State itself from the religious aspect of the Commandments’ message.”³³⁵ And the physical setting of the monument “suggest[ed] little or nothing of the sacred” and did “not readily lend itself to meditation or any other religious activity.”³³⁶ Finally, Justice Breyer emphasized that forty years had passed, during which time the monument had not been challenged.³³⁷ This length of time suggested to him that “few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, [or] primarily to promote religion over nonreligion”³³⁸

In *McCreary County v. ACLU of Kentucky*, issued the same day as *Van Orden*, Justice Breyer voted with a five-to-four majority to hold the display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause.³³⁹ Two Kentucky counties prominently displayed large, gold-framed copies of an abridged text of the King James version of the Decalogue in courthouse hallways. After the lawsuits were filed, the Ten Commandments were supplemented with secular historical and legal documents, such as the Star Spangled Banner’s lyrics and the Declaration of Independence.³⁴⁰ According to the counties, the purpose of displaying the Ten Commandments along with the other documents was to emphasize the significant role these texts played in the foundation of the American system of law and government.³⁴¹ Yet, foundational documents like the Fourteenth Amendment and the original Constitution of 1787 were not included in the display.³⁴² Writing for the majority, Justice David Souter noted “under the Establishment Clause detail is key.”³⁴³ And after examining the iterations of the displays, the Court found the displays failed the secular purpose prong of the *Lemon* test because the dominant religious nature of the Ten Commandment display was unmistakable.³⁴⁴

334. *Id.* at 701.

335. *Id.* at 701–02.

336. *Id.* at 702.

337. *Id.* at 679.

338. *Id.*

339. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (Justice Souter wrote the opinion of the Court and was joined by Justices Stevens, O’Connor, Ginsburg, and Breyer).

340. *Id.* at 853–54.

341. *Id.* at 870–71.

342. *Id.* at 872.

343. *Id.* at 867.

344. *Id.* at 872 (“No reasonable observer could swallow the claim that the Counties had cast off the [sectarian] objective so unmistakable in the earlier displays.”).

C. Sometimes Religious Displays on Public Property Are Government Speech, Which Is Immune from Free Speech Challenges, but Sometimes They Are Private Speech on Public Property

In evaluating religious displays on public property, the Supreme Court has sometimes held that the displays are government speech, which is immune from Free Speech challenges, but sometimes they are private speech on public property. In 2009, a religious sect brought a Free Speech challenge to a government's refusal to display its religious monument on public property.³⁴⁵ Interestingly, the religious organization did not pursue an Establishment Clause challenge to the government's display of another religious monument on public property. In a public park in Pleasant Grove City, Utah, eleven privately donated monuments, including a Ten Commandments monument, were on permanent display.³⁴⁶ Summum, a religious organization founded in 1975, sought to erect a stone monument in the park containing the "Seven Aphorisms" of Summum.³⁴⁷ When the city refused, Summum brought suit arguing the city violated the Free Speech Clause by accepting a Ten Commandments monument and denying the Seven Aphorisms monument.³⁴⁸

In rejecting Summum's challenge, the Court explained in *Pleasant Grove City, Utah v. Summum* that the Free Speech Clause has no application where the state is engaging in its own speech: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."³⁴⁹ The Court explained that unlike speeches and other transitory expressive acts, "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."³⁵⁰ While the line between private speech and government speech at times may be difficult to discern, in this instance the Court had no trouble determining it was government speech: "Permanent monuments displayed on public property typically represent government speech."³⁵¹ Government can speak through its own government-financed monuments, but it can also speak through privately financed monuments that a government elects to accept and display.³⁵² Governments exercise selection and

345. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

346. *Id.* at 464.

347. *Id.* at 465.

348. *Id.*

349. *Id.* at 467.

350. *Id.* at 464.

351. *Id.* at 470.

352. *Id.* at 470–71 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government

control over the permanent monuments that are displayed on public lands; thus, the message from these displays is government speech.³⁵³

The Court explained that because installing permanent monuments in a public park is not analogous to delivering speeches or holding marches and demonstrations, the traditional public forum analysis does not apply to permanent monuments.³⁵⁴ Public parks are capable of accommodating a large number of public speakers “without defeating the essential function of the land,” but these parks “can accommodate only a limited number of permanent monuments.”³⁵⁵ “Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.”³⁵⁶ The Court also distinguished temporary, seasonal displays from permanent monuments: “Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.”³⁵⁷ While the forum analysis generally does not apply to permanent monuments on public property, the Court did illustrate an instance when the public forum doctrine could apply: “[F]or example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message [the forum doctrine might properly be applied to a permanent monument].”³⁵⁸

land.”); *cf. id.* at 485 (Souter, J., concurring) (“I have qualms, however, about accepting the position that public monuments are government speech categorically.”).

353. *Id.* at 472 (majority opinion) (“Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”).

354. *Id.* at 478.

The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Id. at 480.

355. *Id.* at 478.

356. *Id.* at 479.

357. *Id.* at 480 (distinguishing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), where a private group, the Ku Klux Klan, requested to erect a cross for a period of sixteen days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah).

358. *Id.*

During the term following *Sumnum*, in *Salazar v. Buono*, the Court again faced the issue of displaying a religious symbol donated by a private entity on public land.³⁵⁹ In 1934, members of the Veterans of Foreign Wars placed a Latin cross in the Mojave Desert to honor American soldiers who died in World War I.³⁶⁰ The cross was located on federal land in the Mojave National Preserve on a granite outcropping known as Sunrise Rock.³⁶¹ The cross was made of four-inch diameter white metal pipes and was less than eight feet tall.³⁶² It had been replaced or repaired a number of times over the years.

The Ninth Circuit, in 2004, affirmed the district court's permanent injunction on the grounds the display violated the Establishment Clause because the Mojave cross conveyed an impression of governmental endorsement of religion.³⁶³ Because the Government did not appeal the Ninth Circuit's conclusion that the cross violated the Establishment Clause, that judgment became final and unreviewable upon the expiration of the deadline for filing a petition for certiorari.³⁶⁴

While the Mojave cross case was pending before the lower courts, Congress, in a series of legislative enactments between 2001 and 2004, twice prohibited the use of federal funds to remove the cross,³⁶⁵ designated the cross a national memorial,³⁶⁶ and then transferred the one acre of land on which the Mojave cross sits to the Veterans of Foreign Wars with the requirement that if the cross ceased to be a war memorial, the land would revert to the federal government.³⁶⁷ Petitioner challenged Congress's land transfer as a violation of the district court's original permanent injunction.³⁶⁸ The Ninth Circuit agreed the land transfer was a violation of the permanent injunction and affirmed the district court's order.³⁶⁹ The Supreme Court ruled five to four that the land transfer did not violate the district court's original injunction.³⁷⁰ The Supreme Court remanded the case to the lower

359. *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

360. *Id.* at 1811 (2010) (plurality opinion).

361. *Id.* at 1811.

362. *Id.* at 1812.

363. *Buono v. Norton*, 371 F.3d 543, 548–549 (9th Cir. 2004).

364. *See Salazar*, 130 S. Ct. at 1813–14.

365. Consolidated Appropriations Act, Pub. L. No. 106–554, § 133, 114 Stat. 2763, 2763A–230 (2000); Department of Defense Appropriations Act, Pub. L. No. 107–248, § 8065(b), 116 Stat. 1519, 1551 (2002).

366. Department of Defense Appropriations Act, Pub. L. No. 107–117, § 8137(a), 115 Stat. 2230, 2278 (2002).

367. Department of Defense Appropriations Act, Pub. L. No. 108–87, § 8121(a)–(e), 117 Stat. 1054, 1100 (2003).

368. *Buono v. Norton*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

369. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

370. *Id.* at 1071.

court to decide whether or not the land transfer constituted an “illicit governmental purpose.”³⁷¹

The narrow grounds of the *Salazar v. Buono* decision leave unresolved many of the questions that are raised by the presence of a memorial cross on public land. In dicta, the plurality in *Salazar* noted that the government need not eradicate all religious symbols in the public realm to avoid governmental endorsement of religion: “A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs.”³⁷²

On the heels of the *Salazar* opinion, the Tenth Circuit Court of Appeals ruled that 12-foot memorial crosses erected on public property for fallen highway patrol troopers, bearing the highway patrol’s official symbol, violated the Establishment Clause.³⁷³ The private organization that erected the memorial crosses explained that a cross was selected to memorialize the officer because “only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety.”³⁷⁴ The crosses displayed the honored trooper’s name, rank, and badge number, the official state trooper “beehive” symbol, the deceased trooper’s picture, and a plaque with the trooper’s biographical information.³⁷⁵ On public land, the memorial crosses were privately maintained and owned.³⁷⁶ The state of Utah expressly stated it neither officially approved nor disapproved of the memorial markers, but it nevertheless gave the private organization permission to erect thirteen markers on public property throughout the state, two of which were erected in front of a highway patrol office.³⁷⁷

371. *Salazar v. Buono*, 130 S. Ct. 1803, 1819–21 (2010).

372. *Id.* at 1818 (plurality opinion). The plurality also explained that “a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” *Id.* at 1820.

373. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *amended and reh’g denied*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011). The Supreme Court issued the *Salazar* opinion on April 28, 2010, and the Tenth Circuit panel issued its *American Atheists, Inc. v. Duncan* opinion on August 18, 2010. The Tenth Circuit delayed issuing its *Duncan* opinion, awaiting the Supreme Court’s decision in *Salazar*. *Duncan*, 616 F.3d at 1152 n.5. Rehearing en banc in *American Atheists, Inc. v. Davenport* was denied on December 20, 2010. *Davenport*, 637 F.3d at 1101.

374. *Duncan*, 616 F.3d at 1151.

375. *Id.* at 1150.

376. *Id.* at 1151.

377. *Id.* at 1151, 1151 n.3.

The Tenth Circuit rejected the memorial maker's Free Speech arguments.³⁷⁸ Relying on the Supreme Court's *Pleasant Grove City, Utah v. Summum* language, the circuit court was persuaded that these were "privately financed and donated monuments that the government accept[ed] and display[ed] to the public on government land," for which "as a general matter, [the Free Speech Clause's] forum analysis simply does not apply."³⁷⁹ The Tenth Circuit thus determined that these memorial crosses were not private speech on public land, but rather were government speech, "the scope and content of which is restrained, inter alia, by the Establishment Clause."³⁸⁰

Evaluating the Establishment Clause challenge, the Tenth Circuit applied the *Lemon* test³⁸¹ and could "discern a plausible secular purpose" in erecting the memorial crosses to commemorate fallen troopers and to promote highway safety.³⁸² Yet the court found the memorials had the impermissible effect of conveying to a reasonable observer that the state was endorsing Christianity.³⁸³ The court distinguished Christmas displays from the memorial crosses because Christmas "has been widely embraced as a secular holiday" while "there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death."³⁸⁴ The court also distinguished a permissible Ten Commandments display, when part of a historical presentation, from the memorial crosses here because the crosses "stand alone, adorned with the state highway patrol insignia and some information about the trooper who died there."³⁸⁵ Additionally, the court noted that these 12-foot memorial crosses were ten times larger than typical roadside memorials, which were often between twelve and sixteen inches tall.³⁸⁶ The size and location of the crosses bolstered the court's conclusion that a reasonable observer would believe that the state was endorsing Christianity through the use of the Latin cross, which "is unequivocally a symbol of the Christian faith."³⁸⁷

378. *Id.* at 1150.

379. *Id.* at 1154 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 480 (2009)).

380. *Id.*

381. *Id.* at 1156 (acknowledging that while the test has been much maligned, "the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*" (citations omitted). The Tenth Circuit interpreted the purpose and effect prongs of the *Lemon* test in light of Justice O'Connor's endorsement test, which makes the "inquiry very case-specific." *Id.* at 1157.

382. *Id.* at 1157.

383. *Id.* at 1160.

384. *Id.* at 1161-62.

385. *Id.* at 1162.

386. *Id.*

387. *Id.* at 1159 (quoting *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1022 (10th Cir. 2008)); see also *id.* at 1161 ("We agree that a reasonable observer would

The Tenth Circuit split five to four, denying rehearing of the case en banc.³⁸⁸ The private organization that erected the memorial crosses appealed to the Supreme Court.³⁸⁹ The Court declined the opportunity to rule on whether a cross on the public roadway to commemorate the “last alive” place of a fallen state trooper is an Establishment Clause violation.³⁹⁰ In his dissent from the denial of the writ of certiorari, Justice Thomas said, “Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.”³⁹¹

In light of this “jurisprudence in shambles,” state and local governments are left with little guidance in charting a course for adopting policies on roadside memorials. In the appeal of the Tenth Circuit case, twenty states filed an amicus brief asking the Supreme Court to accept the petition for certiorari and clarify whether states may offer memorials and monuments that include religious imagery.³⁹² The states also sought guidance on whether an official, state-sponsored memorial sign that is augmented with religious symbols by a private person would run afoul of the Establishment Clause.³⁹³ The brief concluded with the following plea: “Some states may decide to exclude religious imagery from official memorials, while others may permit it in some sensible way. But a state’s policy should not be influenced by confusion about what the Establishment Clause requires.”³⁹⁴

VI. CONSIDERING A CONSTITUTIONALLY PERMISSIBLE ROADSIDE CROSS MEMORIAL

Memorial makers are avoiding readily available alternative avenues for ventilating their expression. By avoiding or supplementing the cemetery memorial, these bereaved are communicating that the

recognize these memorial crosses as symbols of death. However, we do not agree that this nullifies their religious sectarian content because a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.”); *id.* at 1162 (“[T]he mere fact that the cross is a *common* symbol used in roadside memorials does not mean it is a *secular* symbol.”).

388. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011).

389. *Am. Atheists, Inc. v. Davenport*, 132 S. Ct. 12 (Nos. 10-1276 & 10-1297) (Oct. 31, 2011).

390. *Id.*

391. *Id.* at 13 (Thomas, J., dissenting); *see also* *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (Alito, J., respecting denial of certiorari) (“This Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity”).

392. Brief for the States of Louisiana et al. as Amici Curiae in Support of Petitioners, *Am. Atheists*, 132 S. Ct. 12 (No. 10-1297), 2011 WL 2066580, at *9–*10.

393. *Id.* at *9.

394. *Id.* at *10.

cemetery is an inadequate avenue for their expression. The growing popularity of this mode of expression, which raises traffic safety, aesthetics, and religious neutrality concerns, forces policymakers to decide whether to regulate this expression.

If policymakers either ignore or expressly permit roadside crosses, it remains unresolved whether states open themselves up to an Establishment Clause challenge by tacitly or expressly permitting crosses to remain on public lands. Governments must be careful not to appear to endorse religion by adopting the message of the memorial cross on public land. As Justice Souter observed, “[W]henever a government maintains a monument [that] has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flatout establishment of religion, in the sense of the government’s adoption of the tenets expressed or symbolized.”³⁹⁵ To assess Establishment Clause concerns created by roadside crosses on public roadways, it is important to determine both the speaker and the message.

In light of the post-modern sensibilities evinced by the Supreme Court in *Pleasant Grove City, Utah v. Sumnum*, it is unclear who the speaker is or what the message is when a roadside cross is erected on public property. The *Sumnum* Court recognized that “it frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.”³⁹⁶ Thus, the message of the original creator of the display may differ from the message of the entity that expressly or tacitly accepts the display.³⁹⁷

In evaluating whether speech is private or governmental, the Supreme Court has focused on the degree of editorial control over the message.³⁹⁸ The degree of editorial control and ultimate responsibility

395. *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 486 (2009) (Souter, J., concurring).

396. *Id.* at 476.

397. *Id.* at 477.

398. *Id.* at 473 (“Rather, the City has ‘effectively controlled’ the messages sent by the monuments in the Park.”); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005) (“The message . . . is effectively controlled by the Federal Government itself.”); see Haupt, *supra* note 15, at 571 (arguing for an “effective control” test to determine legal responsibility when the government and private individuals jointly engage in speech). The circuit courts of appeal have refined the test and created a four-factor analysis for distinguishing between private speech and government speech: (1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker;” and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech; see, e.g., *Sons of Confederate*

ity for the speech will depend on the contours of the particular policy adopted by a government. When a government erects and maintains a uniform, state-approved roadside memorial, a court is most likely to conclude the memorial is government speech.³⁹⁹ An official state-sponsored marker that has a single, uniform message, such as Florida's "Drive Safely," is government speech rather than pure private speech. But, as outlined below, policymakers may desire to avoid Establishment Clause concerns by creating a limited public forum where editorial control over the content of the speech shifts to a private speaker.

In addition to the uncertainty about the speaker, there is uncertainty about the message communicated by roadside crosses on public property. The Supreme Court's Establishment Clause jurisprudence contemplates that a display can have multiple meanings and messages. Justice Breyer, concurring in *Van Orden*, concluded the "religious aspect" of the Decalogue display did not predominate.⁴⁰⁰ And the Court in *McCreary* concluded, after examining the iterations of the Decalogue displays, that the displays failed the secular purpose prong of the *Lemon* test because the dominant religious nature of the displays was unmistakable.⁴⁰¹ The notion that a religious aspect or a religious nature can predominate implies there are other aspects or messages that do not predominate, yet still exist. This suggests a multiplicity of meanings or messages can exist within a display. This multiplicity of meaning was also reflected in *Sumnum*: "[T]he monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."⁴⁰² The *Sumnum* Court also suggested a certain indefiniteness of meaning because the message of a display may not be static: "The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity."⁴⁰³

Roadside memorials are multivocal. They can simultaneously communicate more than one message, on behalf of more than one speaker.

Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002); *Wells v. City and Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000).

399. *Cf. ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376–77 (6th Cir. 2006) (finding the "Choose Life" specialty license plate was government speech and not private speech because the state had veto power over the design and authority over every word used; it was thus the state's "own message").

400. *Van Orden v. Perry*, 545 U.S. 677, 701–02 (2005) (Breyer, J., concurring).

401. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 872 (2005).

402. *Sumnum*, 555 U.S. at 474. In light of this multiplicity of meaning, it is unclear if a display's meaning is entirely subjective. However, it is unlikely the Supreme Court's jurisprudence will go this route.

403. *Id.* at 477.

Identifying a single, predominant message can sometimes be difficult, and such messages may change over time.⁴⁰⁴ For example, a single, festooned memorial along a roadway sends a different message than a mass of memorials stretched along a highway. The aggregation of individual memorials sends a message about the hazardousness of the highway in a way a single memorial cannot.

In responding to the complex roadside memorial phenomenon, policymakers vary greatly both in general attitude toward roadside memorials, as well as in the details and aspects of the particular policies. To balance the needs of the bereaved with the needs of the community, policymakers have three options: (1) completely ban the activity; (2) do nothing and ignore the memorials; or (3) craft a state program that strives to balance the competing interests, while not transgressing the First Amendment.⁴⁰⁵

A. Total Ban on All Roadside Memorials

Policymakers have broad discretion to regulate for the health, welfare, and safety of citizens.⁴⁰⁶ Traffic safety and community aesthetics are squarely within the purview of states to regulate.⁴⁰⁷

404. *Id.* at 476–77.

405. “Having the right memorial policy is significant because transportation agencies need to balance the safety and maintenance considerations with the needs of loved ones to grieve for their losses and the people’s desire to memorialise [sic] certain public figures.” *Tay, supra* note 49, at 669.

406. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (“States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935) (“[T]he police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety, and morals.”); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (noting the police power “is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people”).

407. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (“It is well settled that the state may legitimately exercise its police powers to advance esthetic values.”); *ACORN v. St. Louis County*, 930 F.2d 591, 596 (8th Cir. 1991) (“The government need not wait for [roadway] accidents to justify safety regulations.”); *U.S. Labor Party v. Oremus*, 619 F.2d 683, 688 n.4 (7th Cir. 1980) (upholding ban on in-the-roadway solicitation and noting the State need not wait for personal injuries); *see also* Chris Hamilton, *Safety Concerns Clash with Roadside Memorials*, DULUTH NEWS TRIB., Sept. 23, 2004, at 1A, available at 2004 WLNR 19253579 (“[C]iting safety concerns for drivers and the people who tend to the memorials . . . the Minnesota Department of Transportation quietly established a policy to remove hundreds of roadside memorials across the state.”).

Policymakers have a compelling interest to protect the safety of roads and welfare of citizens.⁴⁰⁸ When faced with a state regulating because of the safety hazards posed by roadside memorials, courts are likely to view a total ban on all roadside memorials as a reasonable restriction that serves significant governmental interests.⁴⁰⁹

Yet memorial makers have a cognizable First Amendment argument that they lack alternative avenues to communicate the message of the memorial if it is removed from the roadside. The Supreme Court has emphasized that “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”⁴¹⁰ And a speaker is not entitled to her “preferred” or “best” means of communication.⁴¹¹ But restrictions that completely foreclose “a common means of speaking” are suspect because they “can suppress too much speech.”⁴¹² Such regulations can “hamper speakers from conveying what they mean to convey.”⁴¹³ And the message that memorial makers mean to convey is complex and often idiosyncratic. Yet scholars observe the common bipartite message of remembrance of the deceased and warning to other drivers. The bereaved have an alternative channel to communicate respect for the deceased in a cemetery. However, by eliminating the memorial cross from the “last alive” place along the roadside, a significant component of the message is lost. The cautionary tale to other drivers is inextricably intertwined with the location of the expressive activity.⁴¹⁴

It is an open question whether a court will recognize the dual message of the memorial. If a court recognizes roadside memorials as a “common means” of sending a caution to other drivers, as well as maintaining a connection with the deceased, then memorial makers’ lack of alternative avenues to communicate the warning may lead a court to invalidate a total ban. On the other hand, if a court concludes

408. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981) (noting the twin goals “traffic safety and the appearance of the city” are “substantial governmental goals”).

409. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”) (internal quotation omitted).

410. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

411. *Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011); *United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008).

412. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

413. *Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004).

414. *See Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1024 (9th Cir. 2008); *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005).

that the predominant message of the roadside memorial is to commemorate the deceased, a court may uphold a total ban on the grounds the cemetery is an ample alternative avenue to keep the deceased's memory alive.

If a court determines that a cemetery or other designated memorial site is an adequate alternative channel to commemorate the deceased, the policy choice to ban all roadside memorials will likely be upheld in the face of a Free Speech challenge.⁴¹⁵ In practice, only a handful of states have elected to promulgate a total ban. And in those states, enforcement of the ban is lax because removing a grieving family's roadside memorial can quickly become a public relations fiasco.⁴¹⁶

B. Do-Nothing Approach Toward Roadside Memorials

Some policymakers choose to turn a blind eye to roadside memorial activity, unless and until someone in the community complains or the DOT determines the memorial is a traffic hazard.⁴¹⁷ This laissez-faire approach may raise Establishment Clause concerns because an unauthorized, unattended cross that is nevertheless allowed to remain on public property may raise the specter of endorsing Christianity. In the case of the fallen highway patrol officers, the Tenth Circuit ruled 12-foot crosses erected and maintained by private individuals were government speech because the government allowed them to remain on public land.⁴¹⁸ This holding in *Duncan* was despite the government's express statement that it neither approved nor disapproved of the message.⁴¹⁹ A government's failure to enforce general laws that prohibit unauthorized signs and items along the roadways may raise

415. See *Johnson v. City and Cnty. of Phila.*, 665 F.3d 486, 490 (3d Cir. 2011) (upholding city's ordinance prohibiting the posting of signs on utility poles, streetlights, and trees in a public right-of-way because the content-neutral ordinance was narrowly tailored to serve the city's interest in safety and aesthetics, and placing signs on private property provided a sufficient alternative channel to the banned signs on public property); *Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 790-92 (8th Cir. 2004) (concluding the Free Speech rights of pro-life protestors were not insulated from restrictions on the display of the roadside signs when the signs jeopardize the health, welfare, and safety of passing motorists); *Foti v. City of Menlo Park*, 146 F.3d 629, 642 (9th Cir. 1998) (finding city ordinance restricting size and number of picket signs "was permissible in light of the City's substantial interest in requiring drivers to devote greater attention to driving conditions and the road signs").

416. See *supra* notes 248-52 and accompanying text.

417. *Collins & Rhine, supra* note 2, at 237 ("In some jurisdictions authorities will not apply local ordinances until specific complaints are received."); *Dickinson & Hoffmann, supra* note 9, at 161 ("After receiving a complaint, 91% of the respondents said the DOT removes the memorial in response to the complaint and 9% leave the memorial as is.")

418. *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1154 (10th Cir. 2010) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470, 480 (2009)).

419. *Id.*

an Establishment Clause problem. And failing to adopt some form of regulations abdicates a responsibility to balance the competing interests. Social contract theory would suggest that government has a duty to balance competing constitutional interests of its citizen.⁴²⁰ Moreover, leaving roadside memorials unregulated and unenforced disfavors those who abide by the law while favoring those who flout the law.

C. State-Sponsored Roadside Memorial Program

Many state policymakers have recognized that turning a blind eye to the roadside cross phenomenon is not a long-term policy option. The interests of the bereaved and the community eventually collide. A growing number of states have started offering state-sponsored markers to commemorate the “last alive” place of a loved one.⁴²¹ Policymakers are coming to recognize that banning roadside memorials wholesale is politically unpopular and ineffective—while nonetheless constitutionally permissible. The bereaved have shown an inclination to construct roadside memorials without regard to the legality of erecting such memorials. And states that have removed unlawful roadside memorials have heard an outcry of public condemnation. As scholars have observed, “[E]nforcement efforts become a public relations disaster, especially if memorial builders choose to take their plight to the public via the media.”⁴²² Policymakers may decide a better course is to channel the expression into an avenue that minimizes both the risks to traffic safety and the risk of creating the appearance of government endorsement of religion.

State policymakers who seek to afford the bereaved an alternate avenue of expression could craft a state-sponsored memorial program that gives the bereaved a voice, while the government retains some measure of control over the markers to help minimize the safety risks and aesthetic concerns. A state-sponsored roadside memorial program could afford a limited public forum for the bereaved to construct their message.⁴²³

420. See *City of Chi. v. Sturges*, 222 U.S. 313, 322 (1911) (“The obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact.”); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (“The people . . . erected their Constitutions . . . to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact . . .”). See also Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 47 (1997) (“[C]onstitutions are merely manifestations of the social contract . . .”).

421. See *supra* notes 197–200 and accompanying text.

422. Collins & Rhine, *supra* note 2, at 241.

423. Cf. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 675 (1998) (finding candidate debate was a limited public forum for private speech because “[t]he

1. *A Limited Public Forum*

The contours and specifics of the limited public forum vary and could be tailored to the needs of the particular jurisdiction. For example, state signs could be uniform in size and erected where the DOT determines it to be safe, but the DOT could delegate editorial control to the bereaved who can customize the message to have a voice in the memorial. Alternatively, policymakers could permit a shadowbox-type structure on a raised platform or pole so mowing operations would not be disturbed. The shadowbox-type structure would allow for three-dimensional objects to be secured off of the ground. The state program would need to ensure that the appropriate structure would be promptly erected as close to the crash site as safely possible. A two-dimensional sign or a shadowbox-type structure could be permitted on the site for a limited amount of time. Policymakers could decide the appropriate length of time, be it three months, six months, one year, five years, or twenty years.⁴²⁴ Policymakers could also allow renewable periods after payment of a small processing fee. After the allotted time has expired, the next of kin could be given the memorial.

A designated public forum for roadside death memorials could forestall Establishment Clause concerns about government speech endorsing a religious message. A court is likely to find that by allowing the bereaved to select and customize the message on a state-approved sign, it is private speech rather than government speech. The *Pinette* Court concluded that private religious speech in a traditional public forum did not reflect government endorsement of religion because the government did not sponsor the speech, the speech occurred on property specifically held open to the public, and the same application process was required of all groups wishing to use the forum.⁴²⁵ As Justice Souter noted in his *Sumnum* concurrence, not all private religious symbols on public property raise Establishment Clause concerns: “[T]here are circumstances in which government maintenance

very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster”). A limited public forum is functionally equivalent to a nonpublic forum. *Gentala v. City of Tuscan*, 213 F. 3d 1055, 1062 n.4 (9th Cir. 2000) (“[T]he distinction between a limited public forum and a nonpublic forum is a semantic distinction without an analytic difference.”); *Warren v. Fairfax Cnty.*, 196 F.3d 186, 194 n.8 (4th Cir. 1999) (en banc) (noting the “limited public forum [is] analytically indistinct from a nonpublic forum”).

424. Transient speech on public property does not reflect on the government the same way that more permanent forms of expression, like stone monuments, do. See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 471 (2009). The Supreme Court has recognized that private individuals with religious messages, like holiday carolers or temporary religious displays, on public lands do not evince to the reasonable observer government endorsement of the message. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 612 (1989).

425. *Capitol Square*, 515 U.S. at 763.

of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind.”⁴²⁶

The *Sumnum* Court seemed mindful of the possibility that monuments on public property could reflect private speech to which Free Speech principles, rather than Establishment Clause concerns, would apply: “[I]f a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message [the Free Speech forum doctrine might properly be applied to the monument].”⁴²⁷ Thus, the Free Speech review, rather than Establishment Clause scrutiny, would likely apply to a regulation that allows the bereaved, meeting some certain criterion, to create a roadside memorial or to place the name or a private message on a roadside memorial.⁴²⁸

Moreover, the Supreme Court has reiterated that once individuals are given access to a forum, otherwise qualified individuals cannot be denied access to the forum because of their “religious perspective.”⁴²⁹ Thus, in a limited public forum, the bereaved could customize and create their own message and include religious symbols and messages because once the government creates a limited public forum for roadside memorials, it cannot exclude religious messages without engaging in viewpoint discrimination.⁴³⁰ And any remaining Establishment Clause concerns raised by state-sponsored roadside memorials could be mitigated by adding a disclaimer.⁴³¹ With an appropriate disclaimer, the reasonable observer would be aware that it

426. *Sumnum*, 555 U.S. at 487 (Souter, J., concurring).

427. *Id.* at 480.

428. *But see* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.13 (2000) (“[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.”).

429. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 832 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395–96 (1993) (holding a state could not allow secular groups after-hours access to school premises but deny religious groups the same access); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that since a university’s forum was already available to other groups, religious groups could not be excluded).

430. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113–14, 120 (2001) (ruling that a school could not deny a Christian club access to school facilities that were available to other student clubs); *Rosenberger*, 515 U.S. at 847–48 (holding a university could not deny subsidies to religious student publications when it gave subsidies to secular student publications).

431. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O’Connor, J., concurring) (“I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State’s role clear to the community.”); *id.* at 784 (Souter, J., concurring) (“I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.”); *see also Rosenberger*, 515 U.S. at 823–24, 841 (discussing the disclaimers printed in the student publication and noting “the government has not fostered or encouraged any mistaken impression that the student newspapers speak for the University”).

is private religious speech occurring in a limited public forum, rather than government endorsement of a religious message.⁴³²

2. *Permissible Limits on a Limited Public Forum*

While disclaimers are available to underscore that a message belongs to a private individual rather than the government, there could be instances when a government would not want to allow certain speech on the public roadways. States will likely want to circumscribe the topics communicated on roadside memorials and prevent political and commercial messages, as well as vulgar sexual references, profanity, or hate speech. In a limited public forum, a government would not be forced to entertain just any speech on these memorials. The government may cabin a limited public forum to its purpose.⁴³³ As such, the government may limit the choice of topics or class speakers in a limited public forum, but it may not limit the viewpoints expressed.⁴³⁴ Access to a limited public forum may be restricted only if the limitations are “reasonable in light of the purpose” of the forum and are not based on the speakers’ viewpoints.⁴³⁵

If state policymakers want discretion to limit memorial messages that offend public sensibilities, such authority would likely pass constitutional muster if the policies are clearly articulated and consistently enforced.⁴³⁶ The Department of Veterans Affairs guidelines on “Available Emblems of Belief for Placement on Government Headstones and Markers” may provide a useful starting point for crafting such policies.⁴³⁷ These guidelines offer over fifty emblems of belief, as

432. *Cf.* Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 675 (1998) (characterizing candidate debate as private speech forum in part because of “implicit representation of the broadcaster . . . that the views expressed were those of the candidates [and] not its own”).

433. *See Rosenberger*, 515 U.S. at 829 (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

434. *Forbes*, 523 U.S. at 682; *id.* at 677–78 (“The government can restrict access to a nonpublic forum ‘as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’” (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))).

435. *Cornelius*, 473 U.S. at 800.

436. *See* Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 Nw. U.L. REV. 1357, 1408–28 (2001) (setting out constitutionally permissible access standards for non-public forums).

437. *See* U.S. DEP’T OF VETERANS AFFAIRS, *Available Emblems of Belief for Placement on Government Headstones and Markers*, <http://www.cem.va.gov/hmm/emblems.asp> (last visited Feb. 23, 2013) (“No graphics (logos, symbols, etc.) are permitted on Government-furnished headstones or markers other than the available emblems of belief, the Civil War Union Shield, the Civil War Confederate Southern Cross of Honor, and the Medal of Honor insignias.”).

well as a method for requesting additional emblems of belief.⁴³⁸ If the state DOTs want to retain discretion to deny certain symbols and messages on memorials, they must promulgate viewpoint-neutral standards that are consistently applied.⁴³⁹ Applying these neutral standards “quite precisely”⁴⁴⁰ is necessary to avoid the appearance that the government “is seeking to handicap the expression of particular ideas.”⁴⁴¹

As the Court has often repeated, the particular facts of the case and the context of the display loom large in the Court’s analysis of Establishment Clause cases.⁴⁴² Therefore, it is unlikely a single Supreme Court case will afford a sweeping answer to the roadside memorial phenomenon or a comprehensive answer to the range of options and permutations available to state and local policymakers. Whether or not a government may display a crèche scene or the Ten Commandments turns on the details and context of the exhibit. Similarly, the permissibility of a roadside cross will likely also turn on the details and context of the display. Policymakers must struggle to strike a careful balance between competing interests and concerns of its citizens, while making sure not to endorse someone else’s religious message.⁴⁴³

438. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 437 (outlining instructions for requesting an emblem not available for inscription).

439. *Cf.* Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 470–71 (2001) (discussing requirements for a constitutional specialty license plate program).

440. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 13 (1st Cir. 1994).

441. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

442. *See, e.g.,* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (noting “the effect of the government’s use of religious symbolism depends upon its context”); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (invalidating a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls because the Commandments were posted purely as a religious admonition, not “integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (invalidating required daily Bible readings in public schools, yet noting the “study of the Bible or of religion, when presented objectively as part of a secular program of education, may not [offend] the First Amendment”).

443. *Cnty. of Allegheny*, 492 U.S. at 600–01 (“[T]he Establishment Clause does not limit only the religious content of the government’s own communications. It also prohibits the government’s support and promotion of religious communications by religious organizations. Indeed, the very concept of ‘endorsement’ conveys the sense of promoting someone else’s message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government’s lending its support to the communication of a religious organization’s religious message.”) (internal citation omitted).

VII. CONCLUSION

The roadside memorial phenomenon lies at the crossroads of cultural, social, religious, and legal forces. This Article contributes to the legal scholarship by drawing together cross-disciplinary research and delving into the meaning and purpose of roadside memorials. This Article also examines the legal issues implicated by the Free Speech Clause and the Establishment Clause. States that ban all roadside memorials may face Establishment Clause challenges. If courts embrace the roadside memorial as a means of warning other drivers, as well as maintaining a connection with the deceased, then memorial makers' lack of alternative avenues to communicate the warning may lead courts to invalidate a total ban. But if courts conclude the predominant message of the roadside memorial is to commemorate the deceased, courts may uphold a total ban on the grounds the cemetery is an ample avenue to keep the deceased's memory alive. States that choose to ignore, or tacitly permit, roadside memorial crosses also face Establishment Clause concerns. Unattended private roadside crosses that are allowed to remain on public lands risk creating an appearance of government endorsement of the religious message. However, for states that choose to create a limited public forum in which the bereaved can have some measure of control over the message, any religious message is unlikely to be attributed to the government. So long as states create and consistently apply viewpoint-neutral regulations on the types of messages and speakers that are acceptable, and include an appropriate disclaimer, these regulations are likely to pass constitutional muster. This Article offers practical solutions to those policymakers who seek to reduce the risk of traffic hazards created by private memorials, while offering an alternative avenue for the bereaved to actively participate in creating the message that commemorates the loved one. Armed with a better understanding and appreciation of the constitutional consequences, as well as the animating forces behind these memorials, law and policymakers within each state can decide how best to regulate these memorials.