



No More *Lemon* Law? Supreme Court Rethinks Religious Establishment Analysis

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The Supreme Court weighed in on the constitutionality of public monuments involving crosses and other religious symbols when it issued its decision in *American Legion v. American Humanist Association* on June 20, 2019. Seven Justices agreed that the [Bladensburg Peace Cross](#) does not violate the First Amendment’s Establishment Clause. But several separate opinions revealed divisions among the Justices on how to approach religious establishment claims—and more generally, disagreements about the proper role of sectarian religious displays in public life. As discussed in more detail in this previous [Sidebar](#), *American Legion* presented the Court with the opportunity to fundamentally rethink its Establishment Clause jurisprudence. While a majority of Justices appear to have abandoned a prior approach known as the *Lemon* test, at least in the context of government use of religious symbols, there was no single majority opinion agreeing on what test should apply in future Establishment Clause claims. The decision therefore leaves significant room for debate on how to resolve Establishment Clause challenges.

Background

The [First Amendment’s](#) Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” In *Everson v. Board of Education*, issued in 1941, the Supreme Court defined the prohibitions of the Establishment Clause as follows:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”

As suggested in the above quotation, the Court has [held](#) that the Establishment Clause’s protections exceed what the plain text might suggest: the Clause prohibits more than formal government establishments of national religions, and applies beyond “[Congress](#),” to the entire federal government and also to states, through the Fourteenth Amendment.

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In the decades since, the Court has grappled with how to determine whether any given government action is sufficiently “neutral” towards religion. As described in [this Sidebar](#), the Court’s opinions have adopted a few different tests to guide their Establishment Clause analyses. The primary analysis has been the [Lemon test](#), which says that for a government action to be constitutional, (1) it “must have a secular legislative purpose;” (2) “its principal or primary effect must be one that neither advances nor inhibits religion;” and (3) it “must not foster an excessive government entanglement with religion.” In later cases, the Court applied an “endorsement” test [developed](#) from *Lemon*, [asking](#) whether a “reasonable observer” would think that a government practice “has the purpose or effect of ‘endorsing’ religion.” However, the Court [does not always](#) apply *Lemon* in its Establishment Clause decisions. Further, [various Justices](#) have criticized the *Lemon* test, [arguing](#) that it is not “based on either the language or intent” of those who drafted the Constitution and that the test is [inconsistently applied](#). Nonetheless, the Supreme Court has used *Lemon* to analyze the constitutionality of various government displays that involve religious symbols, [approving of some](#) and [ruling that others](#) violate the First Amendment depending on the particular factual circumstances.

By contrast, however, in *Van Orden v. Perry*, issued in 2005, four members of the Court concluded that the *Lemon* framework was “not useful” to analyze “passive monument[s]” like the Ten Commandments display at issue in that case. Instead, the plurality opinion [looked to](#) “the nature of the monument and . . . our Nation’s history” in holding that the monument did not violate the Establishment Clause. However, Justice Breyer, providing the fifth vote to uphold the monument, looked to the totality of the circumstances, [using](#) the *Lemon* factors as a “useful guidepost[]” in the inquiry. Among other factors, he stressed that the monument had stood on the grounds of the Texas state capitol for 40 years without anyone objecting. In his opinion, this [suggested](#) that “few individuals . . . understood the monument” as impermissibly promoting religion. Under these circumstances, Justice Breyer [argued](#) that removing the monument might exhibit a “hostility toward religion” that could “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”

More recently, in *Town of Greece v. Galloway*, decided in 2014, the Court did not invoke *Lemon* at all, but instead employed what has since been described as a “[history and tradition](#)” test. In that case, the Court considered whether a town violated the Establishment Clause by opening its monthly board meetings with sectarian prayers. The majority opinion approved of the practice [because](#) it “fit[] within the tradition [of legislative prayer] long followed in Congress and the state legislatures.” The Court [concluded](#) that “the Establishment Clause must be interpreted by reference to historical practices and understandings.”

Amidst this backdrop, the plaintiffs in *American Legion* [challenged](#) the constitutionality of the [Bladensburg Peace Cross](#). They argued that Maryland violated the Establishment Clause by maintaining this war memorial, a 40-foot-tall Latin cross. Applying the *Lemon* test, the U.S. Court of Appeals for the Fourth Circuit agreed with these challengers. In short, the appellate court [held](#) that the “immense size and prominence of the [Peace] Cross” outweighed its few secular elements. Although the base of the monument had a plaque with the names of local soldiers who died in World War I and was inscribed with the words “valor,” “endurance,” “courage,” and “devotion,” the court emphasized that these secular elements were not readily visible to onlookers, most of whom would be viewing the Peace Cross from their cars. Accordingly, the court [held](#) that “a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion.”

The Supreme Court’s Seven Opinions

The Supreme Court [reversed](#) the lower court decision, holding that Maryland’s maintenance of the Peace Cross did not violate the Establishment Clause. Although seven Justices ultimately approved of the Peace Cross, they did so in six different opinions, reflecting disagreement about how, exactly, to resolve the case. Justice Alito wrote the [opinion](#) for the Court, joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh. Certain portions of that opinion represented only a plurality, however, as Justice

Kagan declined to join those sections. Justices Breyer, Kagan, and Kavanaugh also filed concurrences, as did Justices Thomas and Gorsuch. Thus, while Justices Thomas and Gorsuch joined in the judgment of the Court and seemed to agree with at least some aspects of the plurality opinion, they did not join Justice Alito's opinion. Finally, Justice Ginsburg dissented, joined by Justice Sotomayor.

Justice Alito's opinion first considered whether to apply *Lemon* to analyze the constitutionality of the Peace Cross. Writing for only a plurality, Justice Alito [detailed](#) the shortcomings of the *Lemon* test, noting that the Supreme Court itself had declined to apply this framework in a number of cases. Resuming a majority, the opinion then [reviewed](#) a number of factors that "counsel[ed] against" applying *Lemon* to government uses of religious symbols. The Court [stated](#) that when assessing "monuments, symbols, or practices that were first established long ago," it can be difficult to determine the government's "purpose" in using these symbols, particularly because these purposes can "[multiply](#)" over time. The messages conveyed by these symbols may also change, and the Court [said](#) that "[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity." Under these circumstances, the Court [concluded](#) that *removing* such a monument "may no longer appear neutral," but could instead be interpreted as "aggressively hostile to religion," citing Justice Breyer's concurring opinion in *Van Orden*. Concluding its analysis of what test was most appropriate under the circumstances, a plurality of the Court [noted](#) that in other cases, the Court has not employed *Lemon*, but instead has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." The plurality [said](#) that "monuments, symbols, and practices with a longstanding history" should be judged under this approach and upheld if they follow "tradition."

The remainder of Justice Alito's opinion, in which he [held](#) that the Peace Cross did not violate the Establishment Clause, represented a majority of the Court. The majority [acknowledged](#) that the cross is a Christian symbol, but decided that "the symbol took on an added secular meaning when used in World War I memorials." In the view of the Court, the Peace Cross itself [had](#) "acquired historical importance" to the Bladensburg community. Consequently, the Court [concluded](#) that "destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."

Justice Breyer wrote a separate [concurrence](#) joined by Justice Kagan, primarily to [restate](#) his belief "that there is no single formula for resolving Establishment Clause challenges." Instead, he based his decision that the Peace Cross was constitutional on a review of all the factual circumstances, [emphasizing](#) that different facts might change his view of the case. He also [stated](#) that he did not view the majority opinion as adopting a "'history and tradition test' that would permit any newly constructed religious memorial on public land" regardless of the particular circumstances.

Justice Kagan said in her own [concurring opinion](#) that while she agreed with most of the majority opinion, she believed that *Lemon*'s "focus on purposes and effects is crucial in evaluating government action in this sphere." Further, while she [agreed](#) that history and tradition may be significant factors in an Establishment Clause analysis, she did not want to "sign on to any broader statements about history's role in Establishment Clause analysis."

Justice Kavanaugh also [wrote separately](#), agreeing that the Supreme Court has never consistently applied the *Lemon* test. Instead, he said that the Court's jurisprudence [revealed](#) a distinct "overarching set of principles:"

If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

However, Justice Kavanaugh **emphasized** that government actions “outside” this “safe harbor” might still be judged unconstitutional under appropriate circumstances. In his **opinion**, the Peace Cross did not violate the Establishment Clause because “[t]he practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition.”

Justice Thomas **concurred** in the judgment, writing separately to **reiterate** his own view of the Establishment Clause. He first **called** again for the Court to reconsider whether the Establishment Clause does in fact apply to the states, or whether instead it applies only to “law[s] enacted by ‘Congress,’” per the text of the First Amendment. In addition, Justice Thomas **argued** that the Court should evaluate Establishment Clause claims by reference to historical forms of “coercion” and **clarified** that he would “overrule the *Lemon* test in all contexts.” He **would have held** that the Peace Cross was constitutional because the challengers had “not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of religion.” The state had not committed any acts of coercion, **according to** Justice Thomas, because it had “not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship.”

Justice Gorsuch also **concurred** in the Court’s judgment and did not join the majority opinion. In a separate opinion joined by Justice Thomas, Justice Gorsuch **argued** that the Court should have dismissed the case because the groups challenging the Peace Cross lacked **standing**. In order to bring a legal claim, the concept of standing, which derives from Article III of the Constitution, requires plaintiffs to show (among other things) that they have suffered a **concrete and particularized injury**. Justice Gorsuch **said** that it was insufficient for the plaintiffs to show that they were “offended” by the monument, given that the Supreme Court has generally “rejected the notion that offense alone qualifies” as an injury for Article III standing purposes. In his view, mere “**offended observers**” should not be able to litigate Establishment Clause violations. While Justice Gorsuch primarily focused on this procedural issue, he also offered his thoughts on the plurality’s approach to the case, **saying** that while he approved of a “historically sensitive” approach to religious claims, he was less sure that “‘longstanding monuments, symbols, and practices’ are ‘presumpt[ively]’ constitutional.” He **raised** practical and theoretical concerns about such a presumption for “old” monuments. Instead, he **said** that the Supreme Court’s message should be “unmistakable”: “Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*.” **According to** Justice Gorsuch, government actions must be judged by whether they comply with the “ageless principles” set down in the Constitution.

In **dissent**, Justice Ginsburg stressed the cross’s religious nature, **noting** that it has become a marker for Christian soldiers’ graves “precisely because” the cross symbolizes “sectarian beliefs.” She **stated** that “[b]y maintaining the Peace Cross on a public highway, [the state] elevates Christianity over other faiths, and religion over nonreligion.” Even though the state’s purpose of “memorializing the service of American soldiers” was both secular and permissible, in **her view**, the state could not “serve this objective by displaying a symbol that bears ‘a starkly sectarian message.’” To reach this conclusion, Justice Ginsburg employed the endorsement test, an offshoot of *Lemon*, but did not cite *Lemon* itself. She **asked** whether the government display “ha[d] the ‘effect of endorsing religion.’” Applying this analysis, she **argued** that “when a cross is displayed on public property, the government may be presumed to endorse its religious content.” And **according to her**, the circumstances surrounding the Peace Cross confirmed the memorial’s sectarian, religious character.

Implications for Congress and Federal Law

The various opinions in this case confirm the Court’s pivot away from the *Lemon* test, following the *Van Orden* plurality decision in 2005 and *Town of Greece* in 2014. Of all the Justices, only Justice Kagan explicitly **argued** that the *Lemon* factors should continue to inform the Court’s analysis of Establishment Clause claims, although the dissenting opinion also **employed** an **endorsement test** that was built on

Lemon. Instead, a majority of the Court’s members have said that they will now look primarily to history and tradition to assess the constitutionality of at least some government actions. However, due to the fractured nature of these opinions, it is not clear that the Court has settled on a replacement for the *Lemon* test. The plurality opinion [stated](#) that “monuments, symbols, and practices with a longstanding history” should be evaluated by reference to historical practices. But although Justices Breyer and Kavanaugh joined this plurality, their separate opinions suggested that they would also consider other factors, perhaps allowing some of the same types of considerations that fell under the *Lemon* rubric to remain relevant. Justice Thomas [reiterated](#) his view that only historically grounded forms of coercion violate the Establishment Clause, but also joined Justice Gorsuch’s opinion [arguing](#) that the appropriate test was whether a given monument or practice was consistent with historical practices.

In addition, Justice Gorsuch’s [opinion](#) may prompt governments in the future to more vigorously contest whether plaintiffs challenging state actions have proved that they have standing to bring suit. It is unclear, though, whether a majority of the Court agrees with his more narrow view of Establishment Clause standing. Justice Thomas joined his opinion, and Justice Kavanaugh, while a judge on the U.S. Court of Appeals for the D.C. Circuit, [suggested](#) that he might similarly believe that plaintiffs demonstrating only “offense” at a religious message could not demonstrate a sufficient injury. However, Justice Kavanaugh did not join Justice Gorsuch’s opinion. A narrower view of standing could significantly limit plaintiffs’ ability to sue to vindicate violations of the Establishment Clause.

Overall, the *American Legion* decision indicates that the Court is embracing a more [accommodationist](#) view of the Establishment Clause relative to at least some of its mid-to-late 20th Century cases. If this case does reflect a broader shift in the Court’s jurisprudence, such a shift could affect a wide variety of Establishment Clause challenges, allowing the government more leeway to [accommodate sectarian](#) religious activities. The majority opinion [concluded](#) that at least with respect to government use of religious symbols, “[t]he passage of time gives rise to a strong presumption of constitutionality.” This statement suggests that the Court may be more accommodating toward religion at least where a given practice has a long history.

But while the Court appears to have abandoned *Lemon* in the context of government “[monuments, symbols, and practices](#),” there may be questions about whether *Lemon* still applies to [other types](#) of Establishment Clause challenges. (And litigants may disagree about what may be classified as a longstanding “symbol” or “practice” that should be evaluated under the plurality’s “[tradition](#)” rubric.) As discussed in this [Sidebar](#), the Court’s Establishment Clause jurisprudence may govern a wide variety of challenges to federal actions. For example, lower courts are currently considering a [few different challenges](#) to a so-called “[conscience rule](#)” recently issued by the Department of Health and Human Services (HHS). [According to the agency](#), this rule “protects individuals and health care entities from discrimination on the basis of their exercise of conscience in HHS-funded programs.” Some of the [challengers](#) have [cited](#) the *Lemon* factors in arguing that this rule violates the Establishment Clause by creating a preference for religion. To take another example, the U.S. Court of Appeals for the D.C. Circuit recently [rejected](#) an Establishment Clause challenge to the U.S. House of Representative’s decision to deny an atheist’s request to serve as guest chaplain. Although the majority opinion in *American Legion* did not clearly state what test should apply to Establishment Clause claims outside the context of longstanding monuments or practices, the various opinions nonetheless suggest that historical understandings of the Establishment Clause and the existence of analogous traditions will be important for many members of the Court in assessing whether a government action is constitutional.

Looking to the more immediate consequences of the judgment, those who defended the Peace Cross during [oral argument](#) had claimed that if the Supreme Court ruled the Cross unconstitutional, it would jeopardize the constitutionality of a variety of other government memorials containing religious symbols, including the [Canadian Cross of Sacrifice in Arlington National Cemetery](#) and the [Irish Brigade monument at Gettysburg](#). The Court’s decision appears to allay those concerns by suggesting that crosses

may constitutionally be used to commemorate those who died in war—although as some of the Justices emphasized, each monument must be reviewed on its own terms. And beyond monuments that involve Latin crosses, the [majority opinion](#) appears to create a strong presumption of constitutionality for any public displays that have stood for a number of years, although it is not clear how many years must pass before a memorial is entitled to such a presumption.

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