

TRYING TO MAKE LEMONADE OUT OF *LEMON V. KURTZMAN*: A
DISCUSSION ON THE APPROPRIATE ANALYSIS FOR MONUMENTS IN
LIGHT OF A NEW PRESUMPTION

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INTRODUCTION

Across the river from bustling Washington, D.C. sits 624 acres of rolling green fields, blanketed by symmetric lines of white dots, nestled away behind a grand entrance.¹ As the three million annual visitors exit the highway and turn into the circle marking the entrance of Arlington National Cemetery, the white dots come into focus.² More than 400,000 headstones mark the final resting place of soldiers and their families.³ Depending on the day, flags may be present in front of the headstones, wreaths may be leaning against them, or active duty soldiers may be part of a ceremony. Some characteristics don't change based on the day, however. Rain or shine, 365 days a year, a soldier always stands guard in front of the Tomb of the Unknown Soldier. No matter the number of visitors in a day, the cemetery is reverent. Trees adorn the fields and birds chirp. These 624 acres are dedicated to honoring those who gave the ultimate sacrifice, conceived of as "our Nation's most hallowed ground."⁴

Less than an hour away, at the intersection of three major highways, in the center of Bladensburg, Maryland, sits a traffic circle. In the middle of the

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¹*Arlington National Cemetery Fast Facts*, CNN, <https://www.cnn.com/2013/10/21/us/arlington-national-cemetery-fast-facts/index.html> (last updated June 26, 2019); *Arlington National Cemetery*, THE CULTURAL LANDSCAPE FOUNDATION, www.tclf.org/landscapes/arlington-national-cemetery (last visited Sept. 11, 2019).

²CNN, *supra* note 1.

³*Id.*

⁴*About Funerals*, ARLINGTON NATIONAL CEMETERY, <https://www.arlingtoncemetery.mil/Funerals/About-Funerals> (last visited Aug. 16, 2019).

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traffic circle towers a forty-foot-tall Latin cross made of cement.⁵ An American flag flies on one side of the cross.⁶ No pathways guide pedestrians from the roadside through the busy traffic circle to the base of the cross. No other monuments are visible from the cross. Pawn shops and auto service centers conduct business across the street.⁷ In the center, where the four arms of the cross intersect, is a circle with a star in the middle of it. The words “valor,” “devotion,” “endurance,” and “courage” are written at the bottom of the cross and below that is a metal plaque, shrouded by bushes.⁸ Known as the “Peace Cross,” “Memorial Cross,” or “Bladensburg Memorial,” the cross looms over Bladensburg.⁹

Arlington National Cemetery has its own spattering of crosses. Many of the individual headstones have a cross at the top, above the deceased’s name. Other symbols may also appear, as there are more than sixty-five emblems available for placement on government headstones.¹⁰ Other crosses adorn the cemetery, including the white Argonne Cross, also erected to honor the memory of World War I servicemen, which stands in the southwest corner of the property.¹¹ When the question of the constitutionality of the Bladensburg Cross went to the Supreme Court, there was public outcry that Arlington would also be jeopardized.¹² That was never a possibility—the distinguishing

⁵The cross itself measures thirty-two feet tall, atop an eight-foot platform. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2077 (2019).

⁶*Am. Humanist Ass’n v. Md.-Nat’l Capital Park*, 147 F. Supp. 3d 373, 376 (D. Md. 2015), *rev’d sub nom. Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195 (4th Cir. 2017), *rev’d and remanded sub nom. Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

⁷Places and Surrounding Area, GOOGLE MAPS, <http://maps.google.com> (search “Peace Cross”).

⁸*Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195, 201 (4th Cir. 2017), *rev’d and remanded sub nom. Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

⁹*Am. Humanist Ass’n*, 147 F. Supp. 3d at 376.

¹⁰*National Cemetery Administration*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.cem.va.gov/hmm/emblems.asp> (last updated Mar. 20, 2019).

¹¹*Argonne Cross (WWI)*, ARLINGTON NATIONAL CEMETERY, <https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Argonne-Cross> (Oct. 7, 2015).

¹²Bruce Leshan, *Supporters say if the Supreme Court orders Bladensburg Peace Cross removed, hundreds of other memorials will have to be bulldozed*, WUSA9 (Feb. 25, 2019, 7:53 PM), <https://www.wusa9.com/article/news/local/maryland/supporters-say-if-the-supreme-court-orders-bladensburg-peace-cross-removed-hundreds-of-other-memorials-will-have-to-be-bulldozed/65-a60d9fd7-09a2-4326-86ce-7a56a2292009>.

factor between the two settings are their surroundings and how the crosses are integrated into their surroundings. The context of the crosses is very different, some are nestled away among tombstones and invite awed respect, while one stands booming from the center of Bladensburg. The context sends a message to viewers. The context is the difference between the crosses being understood as honoring those who gave the ultimate sacrifice in war and being understood as a town boasting a religious preference.

The First Amendment mandates a litany of protections.¹³ Among them, the Establishment Clause explicitly prohibits a government-established religion or a government-preferred religion.¹⁴ The specific contours of this protection are less clear and have fluctuated with the changing composition of the nine justices that sit on the Supreme Court and are responsible for saying what the Constitution means. Thus, as the tides of Court change, so too does the protection of the Establishment Clause. Because the terms of the clause are broad, it is especially susceptible to varied meaning based on different ideologies interpreting the Constitution. The precise protection afforded by the Establishment Clause is the critical first inquiry before analyzing a possible violation of the protection of the Establishment Clause. The protection mandates what the test must be; without knowing the contours of the protection, it is impossible to craft an analysis that will reliably determine violations. Because of the fluctuating protection, the law of the Establishment Clause has been marred by confusion for decades. Thus, no single Supreme Court opinion definitively declares the exact protection of the Establishment Clause. The best method for determining a guiding principle is looking to what is most consistent with established precedent.¹⁵

On June 20th, 2019, the Supreme Court held that the immense Bladensburg Cross situated on state property does not violate the Establishment Clause, ending litigation initiated in 2014.¹⁶ Erected as a World War I memorial, the dispute over the constitutionality of the huge statue raised sensitive issues, not easily resolved by existing Establishment

¹³U.S. CONST. amend. I.

¹⁴*Id.*

¹⁵*McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 890–91 (2005) (Scalia, J., dissenting) (“What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate.”).

¹⁶*Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019).

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Clause case precedent.¹⁷ The Court's resulting opinion combined references to private companies who employ crosses in their trademark, a list of national monuments embedded in the cultural identities of cities, and an unhelpful criticism of the *Lemon* test, an unfavored but not overruled precedent, essentially giving a "thumbs-up" to the Cross remaining in its present state.¹⁸

The three-part test handed down in *Lemon v. Kurtzman* was thought to be the prevailing analysis for Establishment Clause violations. However, there is yet to be a consistently applied, clear and definite test for possible violations, as the Court has been consistent only in deciding cases on different grounds. While the Supreme Court has infrequently applied *Lemon*, courts of appeals continue to routinely employ it.¹⁹ Even Constitutional Law books published for law students teach the *Lemon* test as the starting point for all potential Establishment Clause violations, followed by a variety of caveats, including aid to religious schools, Sunday closing laws, and religious displays.²⁰

This Article examines the Court's Establishment Clause precedent, analyzes the Court's recent opinion in *American Legion v. American Humanist Association*, which has only further obfuscated Establishment Clause jurisprudence, and proposes a practical approach, more consistent with relevant precedent. Part I addresses the history of the Establishment Clause and analyzes related cases, an indispensable step in determining what protection the Establishment Clause provides. Part II discusses the incomplete holding in *American Legion v. American Humanist Association*. Part III exposes the befuddling decision of the Court not to follow relevant precedent, considers what the opinion means for Establishment Clause cases in the future, and suggests an approach that correctly applies historical Establishment Clause protections to religious monuments and symbols going forward.

¹⁷ *Id.* at 2074.

¹⁸ *Id.* at 2074–75, 2080, 2084; *McCreary Cty.*, 545 U.S. at 890–91.

¹⁹ Transcript of Oral Argument at 68, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717).

²⁰ STEVEN L. EMANUEL, *CONSTITUTIONAL LAW* 178–83 (16th ed. 2018).

I. HISTORY OF THE ESTABLISHMENT CLAUSE

A. *The Intent Behind the Establishment Clause*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²¹

These sixteen powerful words create both the Establishment Clause and the Free Exercise Clause. Grounded in the first half of the phrase, the Establishment Clause forbids the government from making any law “respecting an establishment of religion,” but furthermore, it prevents the government from favoring any religion. The Free Exercise Clause bars government action that would inhibit peoples’ practice of religion. Thomas Jefferson coined the idea of a “wall of separation between church and state” in a letter he wrote to the Danbury Baptists in Connecticut in 1802 during his term as President.²²

Everson v. Board of Education made the Establishment Clause binding on the states through the Fourteenth Amendment.²³ Justice Black’s opinion in *Everson* details the history underlying the adoption of the Establishment Clause in the Bill of Rights.²⁴ Initially, practices of the old world continued to plague colonists in the new world.²⁵ The English Crown granted charters to individuals and companies to establish a religion, which all people would be required to support.²⁶ The imposition of a tax to build and maintain churches and church property, as well as paying ministers’ salaries infuriated the colonists.²⁷ Virginia was particularly well-known at the time “where the established church had achieved a dominant influence in political affairs”²⁸ Thomas Jefferson and James Madison led the resistance against a proposal in the Virginia Legislature to renew a tax supporting the established religion.²⁹ Subsequent to their success, Jefferson wrote the “Virginia Bill for Religious Liberty” which stated, “[t]hat no man

²¹U.S. CONST. amend. I.

²²James Hutson, *A Wall of Separation*, INFORMATION BULLETIN Vol. 57, No. 6 (Library of Congress, Washington, D.C.), June 1998, <http://www.loc.gov/loc/lcib/9806/danbury.html>.

²³330 U.S. 1, 15 (1947).

²⁴*Id.* at 8–13.

²⁵*Id.* at 9–10.

²⁶*Id.* at 9.

²⁷*Id.* at 11.

²⁸*Id.*

²⁹*Id.* at 11–12.

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shall be compelled to frequent or support any religious worship, place, or ministry whatsoever”³⁰

Given Jefferson and Madison’s roles in drafting the First Amendment after their work in Virginia, the Court has recognized that the intended protection of religious liberty in the First Amendment was intended to be the same as that of the Virginia statute.³¹ Justice Black wrote that the Establishment Clause at least means: that an official church cannot be established, a state cannot influence or encourage people to worship, the government cannot prefer one religion, or a religion, by passing laws to aid religion, and the government cannot actively participate in religious affairs.³² *Everson* ultimately found a New Jersey statute, which provided reimbursement to parents for the cost of their children’s bus fare, some of which was spent to transport children to Catholic parochial schools, constitutional.³³ In his conclusion for the majority, Justice Black wrote, “[t]he State contributes no money to the [parochial] schools. It does not support them. . . . The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”³⁴

B. *The Nebulous Lemon Test*

Twenty-four years after *Everson*, the Supreme Court reconsidered the question of state funds funneled into church schools in *Lemon v. Kurtzman*.³⁵ One Pennsylvania program provided state reimbursement to nonpublic schools for teachers’ salaries and instructional materials in certain secular subjects.³⁶ A Rhode Island law paid teachers in nonpublic elementary schools an additional fifteen percent of their salary.³⁷ Both provided state aid to schools affiliated with religion.³⁸ In a consolidated opinion in 1971, the *Lemon* Court identified “three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and

³⁰ *Id.* at 12–13.

³¹ *Id.* at 13 (internal citations omitted).

³² *Id.* at 15–16.

³³ *Id.* at 18.

³⁴ *Id.*

³⁵ *See* 403 U.S. 602 (1971).

³⁶ *Id.* at 606–07.

³⁷ *Id.* at 607.

³⁸ *Id.*

active involvement of the sovereign in religious activity.”³⁹ Chief Justice Burger, writing for the majority, announced a three-inquiry test, based on criteria the Court developed over the years, to begin every analysis of a possible Establishment Clause violation.⁴⁰ Given in the context of state legislation, first, there must be a secular purpose.⁴¹ Second, the primary effect cannot advance or inhibit religion.⁴² Finally, the statute must not foster government entanglement with religion.⁴³ While created as the starting point for every Establishment Clause analysis, *Lemon* has since mostly lurked in the background as live precedent, its well-delineated lines alluring to lower courts, but largely left alone by the Supreme Court, which has skirted around it rather than overruling it.

C. *Lemon*—the One Hit Wonder

Since *Lemon*, the Supreme Court has considered a variety of potential other Establishment Clause violations, crafting different opinions in each case, some applying parts of *Lemon*, others ignoring *Lemon* altogether. Both *Lemon* and *Everson* centered on state legislation authorizing funding for religiously affiliated schools. Subsequent cases involving the practice of prayer, displays, and memorials demonstrate *Lemon*'s weaknesses outside of analyzing state legislation.

1. Legislative Prayer in *Town of Greece* and *Marsh*

Just twelve years after *Lemon*, the Court ignored the test altogether when it found legislative prayer constitutional in *Marsh v. Chambers*.⁴⁴ *Marsh* was thus thought of as an exception to Establishment Clause jurisprudence because no formal test was used.⁴⁵ Rather, the Court looked to the history of the practice, noting that the First Congress appointed and paid chaplains.⁴⁶

³⁹*Id.* at 612 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (internal quotations omitted)).

⁴⁰*Id.* at 612–13 (internal citation omitted).

⁴¹*Id.* at 612.

⁴²*Id.*

⁴³*Id.* at 613.

⁴⁴See *Marsh v. Chambers*, 463 U.S. 783, 791–96 (1983).

⁴⁵*Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014).

⁴⁶*Id.*

Further scrutinized in 2014, the practice of prayer in government meetings was affirmed in *Town of Greece v. Galloway*.⁴⁷ In upstate New York, the Town of Greece invites “a minister or layperson of any persuasion” to lead an opening prayer at monthly board meetings.⁴⁸ The town is mostly comprised of Christians but has never denied anyone an opportunity to give the prayer.⁴⁹ “[T]he town invited a Jewish layman and the chairman of the local Baha’i temple to deliver prayers,” and the town granted a Wiccan priestess the opportunity to give the invocation.⁵⁰ However, the *Town of Greece* Court provided that, “*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings.”⁵¹ Finding a “permissible ceremonial purpose,” *Town of Greece*’s opening prayer did not violate the Establishment Clause.⁵²

The Court seems to explain that the Establishment Clause was not intended to provide protection from legislative prayer because the same First Congress that ratified the First Amendment also appointed chaplains.⁵³ Additionally, the Court pointed out that there was no evidence that attendees were obliged to be present for the prayer.⁵⁴ Within this context, the Court wrote that the purpose and effect were to acknowledge religious leaders and not to coerce participation or exclude persons present.⁵⁵ While discussing the purpose and effect of the practice resembles the analysis in *Lemon*, the Court was not applying *Lemon*. Instead, the Court followed *Marsh* and decided the constitutionality of board meeting prayer based on two grounds: tradition and noncoercion.⁵⁶

⁴⁷ *Id.* at 591–92.

⁴⁸ *Id.* at 569–71.

⁴⁹ *Id.* at 571.

⁵⁰ *Id.* at 572.

⁵¹ *Id.* at 576 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (internal quotation omitted)).

⁵² *Id.* at 591.

⁵³ *Id.* at 576.

⁵⁴ *Id.* at 590.

⁵⁵ *Id.* at 590–91.

⁵⁶ *Id.* at 591–92.

2. Ten Commandments Displays

The Court evaluated two different displays of the Ten Commandments and reached opposite results on the same day in 2005.⁵⁷ Justice Breyer cast the deciding vote in each case, deciding the more permanent display in *Van Orden* by a plurality and the décor-based display in *McCreary County* by a majority.⁵⁸ Comparing the two opinions, which considered the same religious content, provides insight into what resulted in one display being permissible while the other violated the protection of the Establishment Clause.

a. The Ten Commandments on The Texas Capitol Grounds in Van Orden

The Supreme Court considered whether a monument inscribed with the Ten Commandments sitting outside the Texas State Capitol building violated the Establishment Clause.⁵⁹ The challenged monument stands six feet high and three and a half feet wide amidst seventeen other monuments and twenty-one historical markers on the twenty-two acres surrounding the Texas Capitol.⁶⁰ Passersby view the monument unobstructed from a sidewalk while passing between the Capitol and Supreme Court building.⁶¹ Above the Ten Commandments are several carvings, including an eagle with the American flag.⁶² Below the Ten Commandments are two Stars of David, the Greek letters Chi and Rho, and an inscription stating that the monument was dedicated by the Fraternal Order of Eagles of Texas.⁶³

Chief Justice Rehnquist delivered the plurality opinion, writing that the *Lemon* test was not useful in considering the “passive monument” on the Texas Capitol grounds.⁶⁴ Instead, the Court analyzed the nature of the monument and the Nation’s history in finding it constitutional.⁶⁵ It specifically noted that it need not look beyond its own Courtroom, where, since 1935, Moses has held two plaques with portions of the Ten

⁵⁷ See *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

⁵⁸ *Van Orden*, 545 U.S. 677; *McCreary Cty.*, 545 U.S. 844.

⁵⁹ See *Van Orden*, 545 U.S. at 681.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 681–82.

⁶⁴ *Id.* at 686.

⁶⁵ *Id.*

Commandments in Hebrew.⁶⁶ The marble frieze in the courtroom is seven feet high.⁶⁷ Moses stands with seventeen other figures and the sixth through tenth Commandments are partially visible.⁶⁸

The plurality acknowledged that merely having religious content does not violate the Establishment Clause and additionally noted that the monuments on the Capitol grounds represent several strands in the State's political and legal history.⁶⁹ Justice Breyer's narrow and controlling concurrence acknowledged this to be a borderline case.⁷⁰ Context was the pivotal factor to Breyer. He wrote that the Ten Commandments may, in one context, simply convey a religious message, but the tablets used in the display on the Texas Capitol grounds denote a secular message.⁷¹ Additionally, significant to Breyer was that the setting did not lend itself to religious activity, but "provide[d] a context of history and moral ideals."⁷²

The plurality seemed to understand the protection of the Establishment Clause as a division between church and state, but additionally recognized the religious heritage significant in Texas history. The factors to come out of the *Van Orden* analysis are the nature of the monument and a connection to the Nation's history. The physical setting suggests secular ideals. The six-foot-tall monument is one of many on the grounds and sits unassumingly in the northwest corner of the fenced park.⁷³ The Texas Capitol Grounds guide makes it clear that the monuments honor Texas history.⁷⁴

⁶⁶ *Id.* at 688.

⁶⁷ Office of the Curator, *Courtroom Friezes: South and North Walls*, INFORMATION SHEET, (last updated May 8, 2003), <https://www.supremecourt.gov/about/northandsouthwalls.pdf>.

⁶⁸ *Id.* The sixth through tenth Commandments are: thou shalt not murder; though shalt not commit adultery; thou shalt not steal; thou shalt not bear false witness against thy neighbor; thou shalt not covet. *Exodus* 20:13–17.

⁶⁹ *Van Orden*, 545 U.S. at 690–91.

⁷⁰ *Id.* at 700.

⁷¹ *Id.* at 700–01.

⁷² *Id.* at 702.

⁷³ *The Texas Capitol Grounds: A Self-Guided Tour*, 3–4, https://tspb.texas.gov/plan/brochures/doc/in_print/grounds/grounds_brochure.pdf (last visited Aug. 16, 2019).

⁷⁴ *Id.*

b. Gold-Adorned Ten Commandments in McCreary County

Two counties in Kentucky defended gold-framed copies of the King James version of the Ten Commandments installed in their courthouses.⁷⁵ One county directed the display be placed in a high traffic area.⁷⁶ The other county held a ceremony to hang the display, in which the county Judge-Executive was accompanied by the pastor of his church.⁷⁷ The American Civil Liberties Union challenged the display, during which time each county authorized larger displays in resolutions reciting that the Ten Commandments undergird the civil and criminal code of Kentucky.⁷⁸ In addition to posting the resolution that called for a larger display, eight other framed documents with Christian undertones were added around the Ten Commandments.⁷⁹ The counties then made a third installment, this time posting a more extensive version of the Ten Commandments, as well as various other documents composing a collection titled, “The Foundations of American Law and Government Display.”⁸⁰

In finding that the displays violated the Establishment Clause, the Supreme Court explained that a secular purpose inquiry has been common since *Lemon*, but is rarely dispositive.⁸¹ The North Star is government neutrality.⁸² Justice Souter, writing for the majority, wrote that the

⁷⁵ *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844, 851 (2005).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 852–53.

⁷⁹ *Id.* at 853–54 (“The documents were the ‘endowed by their Creator’ passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, ‘In God We Trust’; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s ‘Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,’ reading that ‘[t]he Bible is the best gift God has ever given to man’; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.” *Id.* at 854.).

⁸⁰ *Id.* at 855–56 (Documents in this third collection included “the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.”).

⁸¹ *Id.* at 859.

⁸² *Id.* at 860 (“The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”) (internal quotation and emphasis omitted) (first quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); then citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947); and then citing *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)).

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government violates the protection of the Establishment Clause when the predominant result “is to take sides.”⁸³ Absent an integration with other material to create a secular message, the display evidenced a religious message.⁸⁴

The Court further explained that the purpose prong of *Lemon* was designed to prevent government from abandoning neutrality.⁸⁵ To the Court, as it sat in 2005, “the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.”⁸⁶ Much of the Court’s opinion explained that it is clear that the government’s purpose cannot be religiously motivated. The stated purpose must not be a “sham.”⁸⁷ While the Ten Commandments may not be, and indeed are not, always unconstitutional, “under the Establishment Clause detail is key.”⁸⁸ The cumulative effect of circumstance and surrounding environment contribute to the all-important context of the display. Here, the Court specifically observed that a pastor spoke about the certainty of the existence of God at the county framing ceremony.⁸⁹ The Court’s extensive analysis of context also found it significant that the exhibit stood on its own; there was nothing to “counter” the religious message.⁹⁰ Considering the final installment of the Ten Commandments, the Court observed that it contained more purely religious text, and considered it odd that a collection of documents depicted as “foundational” to American government would include the Magna Carta, but not the Constitution, and the National Anthem, but not the Fourteenth Amendment.⁹¹ Holding “only that purpose needs to be taken seriously under the Establishment Clause and

⁸³ *Id.* (citing *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

⁸⁴ *Id.* at 857.

⁸⁵ *Id.* at 860 (quoting *Amos*, 483 U.S. at 335 (omission of emphasis)) (“*Lemon*’s ‘purpose’ requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters”).

⁸⁶ *Id.* at 875–76.

⁸⁷ *Id.* at 864 (“the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987)).

⁸⁸ *Id.* at 867.

⁸⁹ *Id.* at 869.

⁹⁰ *Id.* at 868–69.

⁹¹ *Id.* at 872.

needs to be understood in light of context;” the Court acknowledged that in other situations, a sacred text could be integrated into a display.⁹²

c. Conclusions from the Ten Commandments

In both of these cases, the integration of the display was decisive. The nature of the monument on the Texas Capital Grounds gave it the necessary context to be understood as reflecting the state’s heritage. Conversely, the unconnected golden frames in *McCreary County* suggested a plainly religious purpose. The difference between the Ten Commandments in *Van Orden*, those held by Moses at the Supreme Court, and those in golden frames in *McCreary County* is the context of the display. *McCreary County* had no context suggesting a secular ideal and thus did not maintain government neutrality.

The *Van Orden* Court explicitly stated that *Lemon* was not useful for considering the passive monument.⁹³ The *McCreary County* Court looked only to purpose and context in its analysis. Considering whether the displays fostered excessive government entanglement with religion, the third *Lemon* factor, had no application in this context. These displays of the Ten Commandments begin to illuminate that *Lemon*, as a three-factor test, does not fit in evaluating every type of Establishment Clause violation.

3. *Allegheny* and *Lynch*: the Key to Holiday Displays

In *Lynch v. Donnelly*, the Court condoned a crèche⁹⁴ that was part of a holiday display containing secular décor including: a Santa Claus house, reindeer pulling Santa’s sleigh, a Christmas tree, statues of carolers, candy-striped poles, a wishing well, a large banner reading “Seasons Greetings,” and several cut-out figures.⁹⁵ In *Allegheny*, the Court evaluated two holiday displays, one involving a menorah and the other a crèche.⁹⁶ This time, the menorah was constitutional while the crèche had “the effect of promoting or endorsing religious beliefs.”⁹⁷

⁹² *Id.* at 874.

⁹³ 545 U.S. 677, 686 (2005).

⁹⁴ A crèche is a Nativity scene. *Crèche*, MERRIAM-WEBSTER’S DICTIONARY (2019).

⁹⁵ 465 U.S. 668, 671, 699 (1984).

⁹⁶ 492 U.S. 573, 578 (1989).

⁹⁷ *Id.* at 621.

The Allegheny County courthouse displays a manger scene during the holiday season.⁹⁸ Baby Jesus, farm animals, shepherds, and wise men sit under the wooden manger, surrounded by a fence, and accented by poinsettia plants, a small evergreen tree, and a sign indicating the display was donated by the Holy Name Society.⁹⁹ Throughout the holiday season, musical groups perform at the display over the lunch hour.¹⁰⁰ These performances were dedicated “to world peace and to the families of prisoners-of-war and of persons missing in action in Southeast Asia.”¹⁰¹ The display is “not connected” to any other exhibit.¹⁰² A block away from the courthouse at the City-County Building, the city decorates a forty-five foot Christmas tree labeled as a “Salute to Liberty.”¹⁰³ The city added an eighteen-foot Chanukah menorah beside the tree.¹⁰⁴ The Court found that the menorah must be understood as part of the overall display “conveying the city’s secular recognition of different traditions for celebrating the winter-holiday season.”¹⁰⁵ Thus, the menorah alongside the Christmas tree provided enough context to hold the display permissible. The difference between the crèches in *Allegheny* and *Lynch* turned on their physical setting. In contrast to the crèche with baby Jesus and shepherds, accented by plants and lunch performances in *Allegheny*, the *Lynch* display was teeming with secular décor.¹⁰⁶

The *Lynch* Court addressed each of the three *Lemon* factors, but ultimately concluded that including the crèche in the display was a permissible endorsement and that any benefit to religion was unintended.¹⁰⁷ The *Allegheny* Court criticized the *Lynch* majority for deciding the case on these two bases and not providing a workable framework for subsequent cases.¹⁰⁸ Instead, the *Allegheny* Court lauded Justice O’Connor’s concurrence, finding that the concurrence rejected any tolerance of government endorsement of religion and providing a method for determining

⁹⁸ *Id.* at 579.

⁹⁹ *Id.* at 580.

¹⁰⁰ *Id.* at 581.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 581–82.

¹⁰⁴ *Id.* at 587.

¹⁰⁵ *Id.* at 620.

¹⁰⁶ Compare *Id.* at 580, with *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984).

¹⁰⁷ *Lynch*, 465 U.S. at 681, 683–85; *Allegheny*, 492 U.S. at 594.

¹⁰⁸ 492 U.S. at 594.

whether a display has the effect of endorsing religion—what viewers would understand the purpose of the display to be.¹⁰⁹ The test combines the purpose and effect prongs from *Lemon* but describes that the inquiry turns upon the context in which the challenged object appears.¹¹⁰

Thus, the *Allegheny* Court considered the crèche and menorah in the context of their physical settings and whether it had the effect of endorsing religion.¹¹¹ It found this to be the proper analysis in light of the accepted protection that “this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization.”¹¹² First evaluating the crèche, the Court found that the adornments around the crèche contributed to its endorsement of religion and that the carols performed there “augment[ed] the religious quality,” concluding that viewers would understand it to be present only with government support and approval.¹¹³ Considering the display of the menorah, the grounds for finding it constitutional was not the presence of the Christmas tree; a simultaneous endorsement of both Christianity and Judaism would also violate the Establishment Clause.¹¹⁴ Rather, the Court explained that the Christmas tree is not itself a religious symbol and is the chief secular symbol of the winter-holiday season.¹¹⁵ Thus, the tree standing more than twice the height of the menorah was the predominant element in the display and the menorah acknowledged that there are other holiday traditions contemporaneously celebrated.¹¹⁶ While the menorah is a religious symbol associated with Chanukah, like Christmas, Chanukah has secular aspects, but does not have an alternative secular symbol.¹¹⁷

The Establishment Clause protection espoused in *Allegheny*, which harmonized the result in *Marsh*, is that government cannot permit a display that has the effect of endorsing religion. Endorsing or disapproving of religion suggests the government is taking a role other than one that is neutral. Thus, the protection conceived of in these holiday display cases is similar to that stated in the Ten Commandments cases. The preferred inquiry to

¹⁰⁹ *Id.* at 595.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 597.

¹¹² *Id.* at 590.

¹¹³ *Id.* at 599–600.

¹¹⁴ *Id.* at 615.

¹¹⁵ *Id.* at 617.

¹¹⁶ *Id.* at 617–18.

¹¹⁷ *Id.* at 613–14.

guarantee this protection combined the purpose and effect prongs from *Lemon*, similarly displacing the need for the entanglement factor. These cases were also decided by their context, whether there was an integrated secular objective, understood to determine what message the government practice communicates. While aspects of the *Lemon* factors provided relevant inquiries, the analysis breaks down when forced as a three-element test.

4. *Buono*—A White Cross in the Desert

In the rural Mojave Desert, a Latin cross not more than eight feet tall stands atop a rock located on federal land.¹¹⁸ The two simple white posts are not visible from the highway, which runs ten miles in the distance.¹¹⁹ Similar to the Bladensburg Cross, private citizens erected the original memorial in 1934 to honor soldiers lost in World War I.¹²⁰ At one time, a sign identified the cross as a memorial, but the reconstructed cross now stands alone.¹²¹

Buono brought suit after a third-party's request to build a Buddhist shrine nearby was denied.¹²² *Buono*'s original suit sought an injunction requiring the cross's removal.¹²³ While that suit was pending, Congress enacted a land exchange authorization statute, which would transfer the land occupied by the cross to a private party.¹²⁴ *Buono* then sought to enjoin compliance with this statute.¹²⁵ Ultimately, the Supreme Court remanded the case and explained that the lower courts had not adequately considered all the circumstances, namely the land-transfer statute, in determining the necessity of injunctive relief.¹²⁶ The Court also noted that this case was not well suited for announcing categorical rules.¹²⁷ Yet, the framework provided to the lower court to use on remand gives important considerations. The Court was vague in its statement of the protection guaranteed by the Establishment Clause, but stated that the cross was "not an attempt to set the *imprimatur* of the state on

¹¹⁸ *Salazar v. Buono*, 559 U.S. 700, 705–07 (2010).

¹¹⁹ *Id.* at 707.

¹²⁰ *Id.* at 705–06.

¹²¹ *Id.* at 707.

¹²² *Buono v. Norton*, 371 F.3d 543, 549 (9th Cir. 2004).

¹²³ *Buono*, 559 U.S. at 707.

¹²⁴ *Id.* at 709.

¹²⁵ *Id.* at 710.

¹²⁶ *Id.* at 721–22.

¹²⁷ *Id.* at 722.

a particular creed.”¹²⁸ Thus, the Court seems to be stating that there was a secular ideal motivating the cross’s creation. Even for these two simple posts in the desert “[t]ime also has played its role.”¹²⁹ Noting that the structure has been present on Sunrise Rock for nearly seventy years, the Court acknowledged that people regularly gather at the cross to pay their respects.¹³⁰

While not as specific as the other cases, *Buono* should be understood as permitting a cross to remain in the desert, where viewers would not so readily believe it occupies the location only because of government support and approval. The standard dictated—that the cross does not attempt to set the imprimatur of the state—aligns with the protection declared in the Ten Commandments and holiday display cases that government not endorse a particular religion. The Court’s considerations of the purpose for the cross and its context in the rural Mojave Desert as a place for visitors to spend time in reverence are analogous to the considerations in *Allegheny*. The entanglement factor was again not applicable, and *Lemon* did not provide a dispositive framework.

5. Precedential Backdrop

These cases encompass the most significant recent opinions from the Supreme Court on the Establishment Clause. Both *Everson* and *Lemon* decided the constitutionality of state legislation while simultaneously forming the foundation of modern Establishment Clause precedent. *Lemon* attempted to craft a three-factor test for all Establishment Clause cases, yet subsequent cases expose *Lemon*’s weaknesses as a test when applied outside the context of legislation. The practice of prayer was decided based on its accordance with the traditions of the First Congress. Ten Commandments and holiday displays were decided by their purpose and context, while *Buono* seemed to suggest the same analysis for a memorial. This was the precedent against which the Court considered the constitutionality of the Bladensburg Cross.

¹²⁸ *Id.* at 715.

¹²⁹ *Id.* at 716.

¹³⁰ *Id.* Congress designated the cross as a national memorial. *Id.*

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II. MORE LEMONS DO NOT MAKE LEMONADE: AN ANALYSIS OF THE SUPREME COURT'S OPINION IN *AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION*

In a seven to two decision, the Supreme Court upheld the constitutionality of the Bladensburg Cross without overruling *Lemon*.¹³¹ Justices Breyer, Kavanaugh, Kagan, Thomas, and Gorsuch all authored concurrences, and Justice Ginsburg penned the dissent.¹³²

A. *Getting to the Supreme Court*

Title to the Cross and land was transferred to the Maryland-National Capital Park and Planning Commission (the "Commission") in 1961.¹³³ The Commission explained that it acquired the property due to safety concerns given the Cross's location at the intersection of busy roadways.¹³⁴ On February 25, 2014, The American Humanist Association, on behalf of several residents of Prince George's County, filed suit alleging that the ownership, expenditure of funds, and prominent display of the Bladensburg Cross on public grounds violated the Establishment Clause.¹³⁵ At the time suit was filed, the State Roads Commission had spent a total of \$117,000 on the statue.¹³⁶ In addition, the Commission pays to keep the memorial lit at night and, in 2008, budgeted an additional \$100,000 for renovations that have not yet been finished.¹³⁷ The District Court granted Defendants' motions for summary judgment.¹³⁸ The Fourth Circuit Court of Appeals reversed, finding there to be "excessive religious entanglement."¹³⁹ The Fourth Circuit found that the display and maintenance of the cross violated the Establishment Clause, noting that it violated two of the *Lemon* factors and that the *Van*

¹³¹ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

¹³² *Id.* at 2067.

¹³³ *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 201 (4th Cir. 2017), *rev'd and remanded sub nom. Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

¹³⁴ *Id.* ("[T]he Commission purports that it assumed responsibility to 'maintain[], repair[], and otherwise car[e] for' the Cross.").

¹³⁵ *Id.* at 202.

¹³⁶ *Id.* at 201.

¹³⁷ *Id.*

¹³⁸ *Am. Humanist Ass'n v. Md-Nat'l Capital Park*, 147 F. Supp. 3d 373, 376 (D. Md. 2015), *rev'd*, 874 F.3d 195 (4th Cir. 2017), *rev'd and remanded sub nom. Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

¹³⁹ *Am. Humanist Ass'n*, 874 F.3d at 211.

Orden factors were unsupported.¹⁴⁰ The Commission petitioned for certiorari.¹⁴¹ The petition was granted on November 2, 2018 and oral arguments were held February 27, 2019.¹⁴²

Fundraising for the Bladensburg cross began in 1918.¹⁴³ Donors were asked to sign a pledge recognizing the existence of God, “the Supreme Ruler of the universe.”¹⁴⁴ Local media at the time described the project as a “mammoth cross, a likeness of the Cross of Calvary, as described in the Bible.”¹⁴⁵ The town chose a central location on which to build the cross, then owned by the city of Bladensburg, and construction began in September 1919.¹⁴⁶ Funds ran out in 1922 and the project, including the land, was conveyed to the American Legion who would finish the construction.¹⁴⁷ When the Cross was completed in 1925, the dedication ceremony included a Roman Catholic priest and a Baptist minister saying prayers.¹⁴⁸ The meaning of the cross as a symbol of Calvary was reaffirmed; no religions other than Christianity were represented.¹⁴⁹ Some services have been held at the Cross over the years, with evidence indicating that all were Christian in nature.¹⁵⁰

For more than twenty years, the Cross stood as the only monument in the area.¹⁵¹ Now, however, two memorials honoring World War II and Korea-Vietnam veterans have been added, as well as a memorial walkway honoring the lives lost on 9/11.¹⁵² A War of 1812 monument and two soldiers elevated on poles were installed after the suit was filed.¹⁵³ These memorials compose the Veterans Memorial Park in Bladensburg, denoted by a small sign at the

¹⁴⁰ *Id.* at 212.

¹⁴¹ Petition for Writ of Certiorari, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) No. 17-1717, 2018 WL 3199160.

¹⁴² *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

¹⁴³ *Am. Humanist Ass’n*, 874 F.3d at 200.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (internal quotation marks omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 200–01; *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2077 (2019).

¹⁴⁹ *Am. Humanist Ass’n*, 874 F.3d at 201.

¹⁵⁰ *Id.*

¹⁵¹ Brief for Respondent at 10, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (No. 17-1717, 18-18), 2019 WL 338889.

¹⁵² *Id.*

¹⁵³ *Id.* The soldier cut-outs are about five feet tall. *Id.*

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entrance to a walking path about 600 feet from the Cross.¹⁵⁴ Each of the other memorials is at least 200 feet away from the Cross.¹⁵⁵ The sign is not visible from the highway, none of the other memorials tower taller than ten feet high, and no other religious symbols are present.¹⁵⁶ Significant today is the Cross's location at one of the busiest intersections in the county.¹⁵⁷

B. Comparing Precedent with the Current Case

Given the elusive inquiry for Establishment Clause cases, this case presented intersecting issues and an opportunity for the current Court to clarify *Lemon* and the appropriate analysis for monuments under the Establishment Clause. The case most on-point was *Buono*, as both challenged displays were crosses on public land erected as World War I memorials. However, the two crosses have important similarities and differences. Similar to the cross in the Mojave Desert, the Bladensburg Cross was chosen “to honor and respect those whose heroic acts, noble contributions, and patient striving help[ed] secure an honored place in history for this Nation and its people.”¹⁵⁸

Unlike the cross in the Mojave Desert, the Bladensburg Cross does not evoke imagery of the thousands of plain white crosses, row upon row, so famously associated with the Great War that the line opens the poem, “In Flanders Fields.”¹⁵⁹ A far cry from the makeshift crosses of battlefields, assembled out of whatever wooden materials could be scavenged, the Bladensburg cross is constructed of thick cement arms.¹⁶⁰ It does not mimic the simple white crosses that bestrew battlefields. Its description as a Latin cross is unique only in that a Latin cross signifies that the vertical section of the cross below the horizontal bar is longer than the other three arms.¹⁶¹ Further, in contrast to the cross in *Buono*, and inconsistent with being characterized as a memorial, there is no solemn place for visitors to mourn.

¹⁵⁴ *Am. Humanist Ass'n*, 874 F.3d at 201.

¹⁵⁵ *Id.* at 202.

¹⁵⁶ *Id.* at 201–02.

¹⁵⁷ Brief for Respondent at 8, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717, 18-18), 2019 WL 338889.

¹⁵⁸ *Salazar v. Buono*, 559 U.S. 700, 721 (2010).

¹⁵⁹ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2075–76 (2019).

¹⁶⁰ Brief for Respondent at 8, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717, 18-18), 2019 WL 338889.

¹⁶¹ *Am. Legion*, 139 S. Ct. at 2075 n.6.

Its location at the center of a traffic circle where three highways intersect makes it likely that the Bladensburg cross has been seen by more rattlesnakes than humans, unlike the cross in the desert.¹⁶²

In *Buono*, Justice Kennedy explained that the Cross was not built to promote a Christian message and then cited his own concurrence in *Allegheny*.¹⁶³ He juxtaposed the serendipitous way this cross in the desert came to be on federal land compared to a hypothetical cross atop of City Hall: “the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”¹⁶⁴ The Bladensburg Cross falls somewhere between this constitutional cross in the Mojave Desert and Justice Kennedy’s hypothetical cross on City Hall. The Bladensburg Cross stands four times taller than the cross in the middle of the Mojave Desert, is more permanently affixed, and is located in a prominent area of town on land that viewers may quickly assume is government-owned. A central location owned by Bladensburg was chosen at the time of building, and, over time, the city has permitted the cross to remain as the town built three highways that converge around the memorial. Similar to the prominent location occupied by the crèche in *Allegheny*, augmented by choral performances, the Bladensburg Cross’s location at the intersection of three busy highways accentuates its message.

Buono does not provide the only precedential value in evaluating the Bladensburg Cross. The Ten Commandments and holiday display cases are additionally relevant. Unlike the constitutional menorah in *Allegheny* and constitutional crèche in *Lynch*, neither of which stood alone, the Bladensburg Cross is not integrated into a setting with secular symbols; no other memorials are visible from the Cross. Unlike the six-foot-tall Ten Commandments in *Van Orden*, nothing readily indicates the Bladensburg Cross’s historical significance. Its physical setting further betrays it in comparison to the physical setting deemed permissible in *Van Orden*. It is simply an enormous cross, standing alone, maintained by the city government, greeting visitors and travelers on their way through Bladensburg.

¹⁶² *Buono*, 559 U.S. at 725. (Alito, J., concurring) (“As a result, at least until this litigation, it is likely that the cross was seen by more rattlesnakes than humans.”).

¹⁶³ *Id.* at 715.

¹⁶⁴ *Id.* (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

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C. Modern Statements on the Protection of the Establishment Clause

The cases illuminate what analysis the Court has used to decide practices, displays, and monuments. While the stated protection of the Establishment Clause is often less clear in the opinions, it is generally that government must maintain neutrality. Just short of a year before the *American Legion* opinion, the Court, sitting with Kennedy instead of Kavanaugh, articulated the protection guaranteed by the Establishment Clause in a similar way, that “[o]ur cases recognize that the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another”¹⁶⁵ However, the stated protection given in *American Legion* is that “[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously.”¹⁶⁶ While Justice Alito acknowledged that understanding the precise protections of the Establishment Clause “has proved to be a vexing problem,” the standard dictated in this case deviates from the precedent and gave the first clue that this opinion would fail to rectify Establishment Clause jurisprudence.¹⁶⁷

D. The Holding: Passage of Time and a Strong Presumption

At least this much is clear: *Lemon* is not working.¹⁶⁸ The Court found four reasons why *Lemon* is especially problematic in cases involving religiously associated words or symbols.¹⁶⁹ These four reasons are the justification for applying “a presumption of constitutionality for longstanding monuments, symbols, and practices” instead of attempting to evaluate them under *Lemon*.¹⁷⁰ First, it is often impossible to know the precise motivations for erecting or initiating a monument or practice at the time the Court considers its constitutionality.¹⁷¹ Citing *Buono*, the Court explains that there was little evidence to determine what the purpose in erecting the memorial was, which only resulted in supposition.¹⁷²

¹⁶⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982) (internal citations omitted)).

¹⁶⁶ 139 S. Ct. at 2074.

¹⁶⁷ *Id.* at 2080.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2081.

¹⁷⁰ *Id.* at 2081–82.

¹⁷¹ *Id.* at 2082.

¹⁷² *Id.*

Second, the Court explained that the purpose associated with established monuments often multiples with time.¹⁷³ Using the Ten Commandments as an example, at issue in both *Van Orden* and *McCreary County*, the Court wrote that they have historical significance and were intended to serve a secular purpose.¹⁷⁴ Such a reason resembles the dual significance approach to evaluating Establishment Clause violations. Buttressing the new presumption, Justice Alito explained, “[e]ven if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment.”¹⁷⁵

Third, monuments may “become embedded features of a community’s landscape and identity,” supporting a presumption of constitutionality.¹⁷⁶ Justice Alito used the Statue of Liberty and Notre Dame cathedral to illustrate how a city, and indeed a nation, may embrace a monument without embracing its roots.¹⁷⁷ Finally, the fourth reason promulgated was that, once a longstanding monument has gained such significance in a city, its removal may not be seen as a neutral action.¹⁷⁸

In conclusion of these four rationales, the Court stated that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.”¹⁷⁹ The Court’s condition that this presumption only applies to those monuments and practices that are longstanding makes the distinction that a religious purpose would be more obvious where there is a new monument or practice. It is unclear whether any, and if so, what, further analysis accompanies the presumption. The Court applied the principles from *Town of Greece* and *Marsh*, looking only to the role that religion plays in the lives of many Americans.¹⁸⁰ Ultimately, it was “[f]or all these reasons” that the Court held the Cross to be constitutional, reiterating that the Cross has come to represent more than Christianity, that destroying the Cross would not be neutral, and that holding otherwise would not further ideals of tolerance and respect.¹⁸¹

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2083.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2084.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2085.

¹⁸⁰ *Id.* at 2087–88.

¹⁸¹ *Id.* at 2090.

III. CRITICISM AND PROPOSED ANALYSIS

The Court in *American Legion v. American Humanist Association* recognized that *Lemon* is not a good fit for every type of Establishment Clause challenge, but the Court missed two important steps. First, it once again side-stepped *Lemon*, merely criticizing it without either overturning it or giving any indication of its present-day value. Second, it authorized a strong presumption of constitutionality given the passage of time. It gave no guidance for how much time, but instead left Establishment Clause precedent with a new, crude presumption that essentially condones any monument, display, or practice that has gone long enough without challenge.

The first reason espoused for the new presumption, that determining a purpose may result in supposition, directly contradicts the first *Lemon* prong—having a secular purpose. Purpose was an important consideration in the Court’s analysis of the Ten Commandments and holiday displays, however. The motivating purpose at the time of construction is not the important consideration, but what viewers would understand the purpose to be. Next, Justice Alito wrote that the second reason for the presumption is that a religious purpose may become veiled with time.¹⁸² However, the Court referenced both *Van Orden* and *McCreary County*, where the distinguishing characteristic was that the Ten Commandments in *Van Orden* were integrated into a setting suggestive of secular motivations.¹⁸³ Today, the cross remains the preeminent symbol of Christianity, symbolizing the death of Jesus Christ on the cross, and the Bladensburg Cross stands alone.¹⁸⁴ Third, many historical monuments or buildings become iconic of cities. While Notre Dame has attained its own notoriety, becoming iconic of Paris, and the Statue of Liberty has also earned its own significance, the Bladensburg Cross does not rise to this level. Millions of tourists do not annually flock to Maryland to photograph the memorial. While the Statue of Liberty now stands for ideals of freedom rather than friendship with France, the same level of public knowledge about the significance of the Bladensburg Cross is a stretch. It seems unlikely that a newcomer to Bladensburg would know that the Cross is a World War I memorial when driving by, given the absence of anything else around it. It remains a giant cross, symbolic of Christianity, in the middle of a roadway.

¹⁸² *Id.* at 2082.

¹⁸³ *Id.* at 2083.

¹⁸⁴ *Id.* at 2104 (Ginsburg, J., dissenting).

Fourth and finally, this is not the only Court to lament that a finding of unconstitutionality may be seen as hostile to religion, undermining government neutrality. Here, Justice Alito described, “[a] government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”¹⁸⁵ This gratuitously violent imagery is arguably true, but misses the point entirely. This case is not requesting the government reprint all money that says “In God We Trust;” it is not requesting “under God” be omitted from the Pledge of Allegiance; it is not requesting that Christmas Day no longer be recognized as a federal holiday; it is not requesting that city names that reference the divine be changed. The United States seems more at risk of striking many as aggressively hostile to irreligion, rather than religion. The protection of the Establishment Clause is government neutrality and an unwillingness to consider altering the context of religious memorials for concern of it making the government appear hostile towards religion is misplaced.

A. Time is an Ill Measure of Constitutionality

No guidance was given for how much time makes a monument or practice “established,” just that “[t]he passage of time gives rise to a strong presumption of constitutionality.”¹⁸⁶ It has long been true that a period of time left unchallenged does not make a monument constitutional. Even before *Lemon* existed, the Court provided that “[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”¹⁸⁷ Certainly, citizens have an interest in having their country abide by its constitution, even if a violation is not immediately recognized or pursued.

Time as the single determinative factor is too brute to be accurate. Furthermore, it is inconsistent with prior case law.¹⁸⁸ A set of facts as similar as those in *Buono* should have made that opinion more relevant to the decision in this case; the fact that it wasn’t is telling of the state of Establishment Clause jurisprudence. The Court has considered the role of

¹⁸⁵ *Id.* at 2084–85.

¹⁸⁶ *Id.* at 2085.

¹⁸⁷ *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970).

¹⁸⁸ *See* *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014); *Salazar v. Buono*, 559 U.S. 700, 716 (2010).

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time in cases before, but it has not been the dispositive point.¹⁸⁹ The addition of this new presumption will only further confuse Establishment Clause case law.

B. History as a Teacher, not a Guide

“However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.”¹⁹⁰

In addition to the simple passage of time, Justice Alito further explained that monuments, symbols, and practices that were followed in the First Congress should be presumed constitutional.¹⁹¹ The *American Legion Court* followed *Town of Greece* in this regard: legislative prayer, in the spirit of *Marsh*, was held constitutional given its purpose of beginning meetings with reverent minds.¹⁹² But, significantly, legislative prayer had grown more conscientiously inclusive; prayer has since been led by chaplains “from a variety of faiths, including Islam, Hinduism, Buddhism, and Native American religions.”¹⁹³

However, the Court gave no explanation for why *Town of Greece* and *Marsh* are the appropriate standard in a controversy over a cement monument, while *Allegheny* or *Van Orden* did not garner the same relevance. The test for a practice should not be the same as that for a monument. Indeed, the *Allegheny Court* drew attention to the difference between a specifically Christian symbol and more general religious references like those in prayer.¹⁹⁴ A prayer may be written and amended at present to convey its intended message and to explicitly state that it “seek[s] peace for the Nation, wisdom for its lawmakers, and justice for its people.”¹⁹⁵ The content of a prayer and its context can be edited to be understood as not endorsing any particular religion. In contrast, a monument designed and built to withstand the elements and the passage of centuries cannot be so easily edited and should, therefore, be subject to a different analysis.

¹⁸⁹ *Buono*, 559 U.S. at 716. See also *Galloway*, 572 U.S. at 575.

¹⁹⁰ *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

¹⁹¹ *Am. Legion*, 139 S. Ct. at 2089.

¹⁹² *Id.* at 2087–89.

¹⁹³ *Id.* at 2088.

¹⁹⁴ 492 U.S. at 603.

¹⁹⁵ *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014).

It was in light of the historical significance that the First Congress paid chaplains that the prayers in both *Town of Greece* and *Marsh* were held not to be violative. While that may be appropriate for considering the practice of prayer, it does not provide the intended Establishment Clause protection to ensure memorials do not align the government with religion. Furthermore, the broader issue is that deciding cases based on what follows the traditions of the First Congress would stagnate society. The culture of the First Congress endorsed slavery and prohibited women from voting. This antiquated bellwether is an inappropriate and unsustainable posture for a modern, inclusive society to adopt.

C. A More Consistent Holding

The correct holding in this case was not as difficult as the opinion suggests. A more appropriate, consistent, and precise standard is one like that applied in *Allegheny*, where tradition and references to heritage are part of the analysis of a display's context. Context provides a better test because it evaluates the effect the display communicates. It considers what viewers would understand the purpose of the display to be. The simple Establishment Clause protection, summarized, is that the government cannot align itself with any religion, or religion over irreligion. A position of neutrality honors the protection that Jefferson and Madison conceived. Neutrality can be tolerant of religious heritage; it can be respectful of differences, as long as the physical setting informs the viewer of these ideals. The accompanying test for monuments and displays should be whether the context of the monument or display has the effect of aligning government with religion. Context accounts for history and heritage. It allows holiday displays to contain both festive secular and religious decorations. It allows the Ten Commandments to sit outside the Texas State Capital, paying homage to Texas history.

The Bladensburg Cross should have never ended up at the center of three intersecting highways in Maryland. While the Court believes a memorial's location in a cemetery is unnecessary, the lack of a quiet place to remember the fallen runs counter to the very purpose of a memorial.¹⁹⁶ However, today the Cross sits where it sits. Some of the mothers of the forty-nine men whom it honors think of the cross as a headstone for their sons. Instead of chopping off the Cross's arms or relocating it, a prominent sign, visible from the roadway, that names the Cross as a World War I memorial would provide

¹⁹⁶ *Am. Legion*, 139 S. Ct. at 2086.

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sufficient context suggestive of a secular ideal.¹⁹⁷ Bladensburg need not endorse Christianity in order to retain an important part of its heritage, erected to remember those who never came home.

Just as the crèche standing alone in *Allegheny* violated the Establishment Clause, so too does the Bladensburg Cross as it currently stands. The towering Cross sends the message that Christianity is preferred in Bladensburg—precisely what the Establishment Clause was intended to protect against.

IV. CONCLUSION

Historical monuments have been recently controversial. A holding more consistent with case precedent and more navigable for future cases in lower courts did not require a finding that the Bladensburg Cross violates the Establishment Clause and compels its removal. A sign would give this massive cross context beyond being a religious symbol in the middle of a traffic circle. Additional signage in the area could better advertise the area as Bladensburg’s Memorial Park. The Cross, in its current form doubles as a “Welcome to Bladensburg!” proclamation. Context is the difference between sending a message that Christianity is preferred in Bladensburg and sending a message that Bladensburg honors its young men who gave the ultimate sacrifice.

The conclusion and accompanying opinion the Court rendered in this case is unsurprising but only further confuses Establishment Clause jurisprudence. *Lemon* lives on, yet now a presumption of constitutionality exists for longstanding monuments, symbols, and practices that follow traditions of the First Congress. Just as *Lemon* failed as a one-size fits all, so too will analyzing monuments and symbols under the same standard as practices.

This case begs the question of what future Establishment Clause cases may look like: what arguments are relevant, what analysis will the Court engage in, and is *Lemon* forever going to lurk? It is difficult to imagine that the Court would have ruled the same way if a behemoth Star of David or Buddha were at issue here. Establishment Clause violations will continue to be wild cards with the Court molding an opinion ad hoc to reach the conclusion it wants to reach.

¹⁹⁷ A similar solution was suggested in *Buono*. *Salazar v. Buono*, 559 U.S. 700, 722 (2010).