AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION AND THE FUTURE OF THE ESTABLISHMENT CLAUSE

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INTRODUCTION

Cases involving the public display of religious symbols have long perplexed the courts.[1] These cases are important for many reasons. Public symbols have an important role in shaping our public culture.[2] Moreover, the cases provide the occasion for judges to articulate their understanding of the meaning of the Establishment Clause.[3] The Supreme Court's most recent venture into this area is the June 2019 decision in *American Legion v. American Humanist Ass'n* in which the Court rejected an Establishment Clause challenge to the display of the "Bladensburg" or "Peace" Cross (hereinafter "the Cross"), which was erected nearly 100 years ago as a memorial to honor soldiers who gave their lives in World War I.[4] This paper will examine the *American Legion* case and reflect upon the impact of the decision.

I. BRIEF REVIEW OF RELIGIOUS SYMBOL CASES

The Supreme Court has decided a series of cases involving the public display of religious symbols. In this section of the article, I will briefly review several of the Court's most important cases.

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1. *See generally* Richard S. Myers, *Church and State*, *in* AMERICAN LAW FROM A CATHOLIC PERSPECTIVE 95, 97–98 (Ronald J. Rychlak ed., 2015) [hereinafter Myers, *Church and State*]; Richard S. Myers, *The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment*, 11 CATH. SOC. SCI. REV. 245, 247–48 (2006) [hereinafter Myers, *Ten Commandments*]; Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of* Lynch v. Donnelly, 77 KY. L.J. 61, 62 (1988–89) [hereinafter Myers, *Nativity Scenes*].

2. Myers, *Ten Commandments*, *supra* note 1, at 249.

3. *Id.* at 249–50.

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

In 1984, in *Lynch v. Donnelly*,[5] the Court held that it did not violate the Establishment Clause for Pawtucket, Rhode Island to sponsor a Christmas display that included a Santa Claus house, a reindeer, a clown, an elephant, a teddy bear, a talking wishing well, Christmas lights, and a Nativity scene. Although it noted that it had "repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area[,]"[6] the majority "essentially applied the *Lemon* test"[7] and concluded that there was no Establishment Clause violation because "the city has a secular purpose for including the crèche, . . . the city has not impermissibly advanced religion, and . . . including the crèche does not create excessive entanglement between religion and government."[8] Justice O'Connor joined the majority opinion but wrote "separately to suggest a clarification of our Establishment Clause doctrine."[9] According to Justice O'Connor, a key focus of the Establishment Clause was to avoid an endorsement of religion.[10] As Justice O'Connor described the inquiry in *Lynch*, "[t]he central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed."[11] Justice O'Connor concluded that there was no Establishment Clause violation because the city had the legitimate secular purpose of celebrating a public holiday through its traditional symbols and that, in light of "the overall holiday setting,"[12] the city was not properly understood as conveying approval of Christianity. This latter conclusion was based on Justice O'Connor's assessment that found that the "display of the crèche in this particular physical setting [was] no more an endorsement of religion than such [accepted] governmental 'acknowledgements' of religion"[13] as legislative prayer and the printing of the national motto ("In God We Trust") on coins.[14]

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5. Lynch v. Donnelly, 465 U.S. 668 (1984).

6. *Id*. at 679.

7. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 624 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

8. *Lynch*, 465 U.S. at 685.

9. *Id.* at 687 (O'Connor, J., concurring).

10. *Id.* at 687–88.

11. *Id.* at 690.

12. *Id*. at 692.

13. *Id*. at 692–93.

14. *Id*. at 693.

In 1989, in *County of Allegheny v. ACLU*,[15] the Court considered the constitutionality of two holiday displays on public property. The Court held (by a 5–4 vote) that it did violate the Establishment Clause to display a crèche on the Grand Staircase of the Allegheny County Courthouse.[16] By a 6–3 vote, the Court held that it did not violate the Establishment Clause to place a Jewish menorah just outside the City-County building next to a Christmas tree and a sign saluting liberty.[17] Justice Blackmun's lead opinion applied the endorsement gloss on the *Lemon* test.[18] His analysis of the crèche display arguably departed from *Lynch*. Justice Blackmun viewed the crèche display in *County of Allegheny* as more religious than the display in *Lynch* and thus was inconsistent with "the constitutional command of secular government."[19] His analysis of the display including the menorah was intriguing. Justice Blackmun viewed the display as essentially secular.[20] Justice O'Connor agreed with the conclusion that the menorah display was not unconstitutional. Her conclusion was not based on the idea that the display was secular; rather, she emphasized that despite the religious quality of the menorah and Chanukah, the overall message was one of "pluralism and freedom of belief during the holiday season"[21] and thus did not endorse religion. Justice Kennedy thought both displays were constitutional.[22] Justice Kennedy applied the *Lemon* test[23] but also suggested that the Court should substantially revise its approach to Establishment Clause cases.[24] According to Justice Kennedy, a major focus ought to be on whether the challenged conduct was coercive.[25] Justice Kennedy thought that the Court's invalidation of the crèche display "reflect[ed] an unjustified hostility toward religion."[26]

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

16. *Id.* at 621. Justices Blackmun, Brennan, Marshall, Stevens, and O'Connor concluded that the crèche display was unconstitutional, *id.* at 579–80; *id.* at 637 (O'Connor, J., concurring in part and concurring in the judgment); *id.* (Brennan, J., concurring in part and dissenting in part); the dissenters were Justice Kennedy, Chief Justice Rehnquist, and Justices White and Scalia, *id.* at 655–79 (Kennedy, J., concurring in the judgment in part and dissenting in part).

17. *Id.* at 621. Justices Blackmun and O'Connor joined the dissenters on the constitutionality of the crèche display and concluded that the menorah display did not violate the Establishment Clause. *Id.*

18. *Id.* at 597.

19. *Id.* at 598, 611.

20. *Id.* at 620.

21. *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

22. *Id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

23. *Id.*

24. *Id.* at 656.

25. *Id.* at 659–63.

26. *Id.* at 655.

In June 2005, the Court decided *McCreary County v. ACLU*[27] and *Van Orden v. Perry*.[28] To no one's surprise, the Court was again closely divided. In *McCreary County*, the Court (by a 5–4 vote), held that the displays of the Ten Commandments in two county courthouses in Kentucky violated the Establishment Clause. The majority opinion by Justice Souter was joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. The displays evolved into three separate versions during the litigation and the displays before the Court included the Ten Commandments and other documents (e.g., Magna Carta, the Declaration of Independence, and the National Motto) as part of "The Foundations of American Law and Government Display."[29] The conclusion that there was an Establishment Clause violation was based on the majority's view that the third display violated the purpose prong of the *Lemon* test because, according to the Court's review of the record, there was "ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display."[30] With an eye to the Supreme Court's courtroom frieze that includes Moses holding the Ten Commandments, the majority did allow that its opinion did not mean "that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history."[31] Justice Scalia's dissent emphasized the Court's error in interpreting the Establishment Clause to require "neutrality between . . . religion and nonreligion."[32] He emphasized that the majority's approach promoted a "revisionist agenda of secularization."[33]

In contrast, in *Van Orden v. Perry*, the Court (again by a 5–4 vote) upheld the constitutionality of "the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds."[34] Chief Justice Rehnquist's opinion for three other Justices (Justices Scalia, Kennedy, and Thomas) did not think that the *Lemon* test was "useful in dealing with the sort of passive monument that Texas had erected on its Capitol grounds. [Rather, the Court's] analysis [was] driven both by the nature of the monument and by our Nation's history."[35] Although he did admit that the

27. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).
28. Van Orden v. Perry, 545 U.S. 677 (2005).
29. *McCreary Cnty.*, 545 U.S. at 855–56 (discussing the third display).
30. *Id.* at 881.
31. *Id.* at 874.
32. *Id.* at 885–93 (Scalia, J., dissenting).
33. *Id.* at 910.
34. Van Orden v. Perry, 545 U.S. 677, 681 (2005).
35. *Id.* at 686.

Ten Commandments are religious, Chief Justice Rehnquist emphasized that the monument was an acceptable part of "an unbroken history of official acknowledgement by . . . government of the role of religion in American life from at least 1789."[36] On the other hand, the unconstitutional display of the Ten Commandments in *Stone v. Graham* was limited to the public school setting.[37]

The deciding vote in *Van Orden v. Perry* was cast by Justice Breyer who declined to apply any "test" and instead exercised "legal judgment" in what he characterized as a "difficult borderline case[]."[38] After examining the way in which the text was used, the context of the display, and the history of the display (that is, that it had stood without generating apparent controversy for over 40 years), Justice Breyer concluded that the religious aspect of the Ten Commandments was "part of what is a broader moral and historical message reflective of cultural heritage."[39]

The Court's opinions did not provide much guidance. And over the years, lower courts split on the constitutionality of different displays and seals.[40] In many cases, the courts focused on the religious intensity of the display. In the context of Christmas displays, for example, the presence of non-religious symbols (e.g., a Santa Claus or a snowman or perhaps Snow White and the Seven Dwarfs) sometimes sufficiently diluted the religious aspect of the display to avoid an Establishment Clause violation. This focus on how many secular symbols are needed (one commentator referred to this as "the two plastic reindeer rule"[41]) drew the ire of Justice Scalia, who complained that it is an "embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to 'require scrutiny more commonly associated with interior decorators than with the judiciary.'"[42]

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36. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984)).

37. In *Stone v. Graham*, the Court held unconstitutional a Kentucky law that required that a copy of the Ten Commandments be posted on the wall of each public classroom in the state. Stone v. Graham, 449 U.S. 39, 41 (1980). The Court noted that "[t]he Ten Commandments are undeniably a sacred text." *Id.* The conclusion that the statute was unconstitutional was based on the Court's finding that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *Id.* The Kentucky statute therefore failed the first prong of the *Lemon* test. *Id.* at 42–43.

38. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

39. *Id.* at 703.

40. *See generally* Myers, *Nativity Scenes*, *supra* note 1, at 84–90 (discussing cases involving the public display of various religious symbols).

41. *See* Daniel Parish, Comment, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 260 n.52 (1994).

42. Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (alteration in original) (citation omitted) (quoting Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).

There was, moreover, confusion in the lower courts about what "test" to use in analyzing Establishment Clause cases. In 2018, one federal appellate judge, who noted that "the Supreme Court's Establishment Clause jurisprudence is a wreck[,]"[43] summarized the dilemma in this fashion:

> So in the light of the Supreme Court's most recent decisions, how exactly, should the [religious display in question] . . . be determined? What Establishment Clause analysis applies? Frankly, it's hard to say. The Court's Establishment Clause jurisprudence is, to use a technical legal term of art, a hot mess. *Lemon* came and went, and then came again—and now seems, perhaps, to have gone again. The Court flirted with an "endorsement" standard for a while, but it too appears to have fallen out of favor. The "coercion" test may still be a going concern, although it's not quite clear when it applies, and there seem to be competing versions of it, in any event. And then, of course, *Van Orden* and *Greece* have clarified that history and tradition play central roles in Establishment Clause analysis.[44]

The Court had an opportunity to provide some much-needed guidance when it agreed to hear the Bladensburg Cross case.

II. *AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION*

In 1918, a committee of residents of Prince George's County was formed to erect a memorial for county soldiers who had lost their lives in World War I. The committee decided that the memorial should be a cross. After the committee's fund-raising efforts faltered, the American Legion took over the project and completed the memorial in 1925. The monument is a thirty-two-foot-tall Latin cross on a large pedestal. Since its dedication, the Bladensburg Cross has served as the site of events honoring veterans. Other memorials have been added nearby. The monument, which is located on a traffic island, came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission acquired the Cross and the land to preserve the monument and address traffic-safety issues. Since 1961, the commission has spent over $100,000 to maintain and preserve the monument.

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43. Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1182 (11th Cir. 2018) (Newsom, J., concurring in the judgment).

44. *Id.* at 1179.

In 2014, the American Humanist Association and three individuals filed suit alleging that the memorial violated the Establishment Clause. The United States District Court for the District of Maryland rejected the plaintiffs' arguments.[45] The court found that the Cross did not run afoul of either the *Lemon* test or the approach set forth by Justice Breyer in *Van Orden v. Perry*.[46] On appeal, the Fourth Circuit (by a 2–1 vote) reversed.[47] The court largely used the *Lemon* test and found violations of both the second and third prongs of that test.[48] The full Fourth Circuit denied rehearing en banc over three dissents.[49]

The case was argued before the Supreme Court on February 27, 2019 and the Court issued its decision on June 20, 2019. By a 7–2 vote, the Court reversed the Fourth Circuit and found that the display did not violate the Establishment Clause.[50] Unfortunately, the Court did not clarify the law on these issues. Justice Alito's opinion for a majority of the Court did not use the *Lemon* test.[51] Instead, Justice Alito applied "a presumption of constitutionality for longstanding monuments, symbols, and practices."[52] Justice Alito explained that such a presumption was appropriate because of (1) the difficulty of identifying the original purpose of these displays, (2) the likelihood that with time the purposes associated with a display may multiply, and may well obscure the religious sentiment that may have been behind the display, (3) the likelihood that the message of a display of a religious symbol may change over time to also include maintaining such a display for its historical significance, and (4) the likelihood that removing longstanding displays "will strike many as aggressively hostile to religion."[53] After applying the presumption of constitutionality, Justice Alito concluded

45. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 147 F. Supp. 3d 373, 389 (D. Md. 2015).

46. *Id.*

47. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 874 F.3d 195, 212 (4th Cir. 2017).

48. *Id.* at 206–12.

49. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 891 F.3d 117, 117 (4th Cir. 2018) (en banc).

50. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019). Justice Alito's opinion for the Court was joined by Chief Justice Roberts and Justices Breyer and Kavanaugh. *Id.* Justice Kagan joined in part and concurred in part. *Id.* at 2094 (Kagan, J., concurring in part). Justices Thomas and Gorsuch concurred in the judgment. *Id.* (Thomas, J., concurring); *id.* at 2098 (Gorsuch, J., concurring). Only Justices Ginsburg and Sotomayor found that the display violated the Establishment Clause. *Id.* at 2103–13 (Ginsburg, J., dissenting).

51. *Id.* at 2081–82.

52. *Id.* at 2082.

53. *Id.* at 2082–85.

that the Cross did not violate the Establishment Clause. Justice Alito emphasized that although it was undeniably a religious symbol, the Cross had special significance in commemorating World War I that, coupled with the passage of time, had developed a historical importance, and that there was no indication that the display was intended to disparage or disrespect anyone.[54]

The portion of Justice Alito's opinion that explicitly rejected the *Lemon* test did not officially reflect the views of a majority. Justice Breyer (joined by Justice Kagan) wrote a concurring opinion that emphasized "that there is no single formula for resolving Establishment Clause challenges."[55] Among other factors, Justice Breyer (as he did in *Van Orden*) emphasized that the Cross had "stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed."[56] Justice Breyer noted that newer memorials would not necessarily be constitutional.[57] Justice Kavanaugh concurred and noted "that the *Lemon* test is not good law[,]"[58] and advocated a test that emphasized coercion.[59] Justice Kavanaugh explained that the Court's cases lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (1) is rooted in history and tradition; or (2) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (3) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[60]

Under this approach, the Cross, which is not coercive and is consistent with a history and tradition of such displays, does not violate the Establishment Clause.[61] Justice Kagan wrote a partial concurrence and distanced herself from Justice Alito's critique of *Lemon*.[62] Justice Kagan stated: "Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this

54. *Id.* at 2089–90.
55. *Id.* at 2090 (Breyer, J., concurring).
56. *Id.* at 2091.
57. *Id.*
58. *Id.* at 2093 (Kavanaugh, J., concurring).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 2094 (Kagan, J., concurring in part).

sphere—as this very suit shows."[63] Justice Thomas wrote separately to reiterate his view that the Establishment Clause does not apply to the states.[64] Justice Thomas also stated that he would reject *Lemon* altogether and that the proper focus was on whether the government action involved actual legal coercion.[65] Here, Justice Thomas noted that "this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion."[66] Justice Thomas stated that he could not "join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases."[67] But Justice Thomas did note that "the plurality rightly rejects [*Lemon*'s] relevance to claims, like this one, involving 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.'"[68] Justice Thomas then went on to note that "I agree with that aspect of its opinion. I would take the logical next step and overrule the *Lemon* test in all contexts."[69] Justice Gorsuch (joined by Justice Thomas) also wrote a separate opinion and concurred only in the judgment. Justice Gorsuch explained that the suit ought to be dismissed for lack of standing. He rejected an "offended observer" theory of standing,[70] which depended on his rejection of the *Lemon* test and on his view that the Court ought to focus on the "real impact"[71] of the government action being challenged (which seems to reflect his sympathy with an approach to the Establishment Clause that looks to coercion, as described in the opinions of Justices Kavanaugh and Thomas). Justice Ginsburg (joined by Justice Sotomayor) dissented.[72] The dissent, as did Justice Sotomayor's dissent in *Trinity Lutheran* (which was also joined by Justice Ginsburg),[73] sounded the separationist alarm. Justice Ginsburg concluded that the Court had departed

63. *Id.*

64. *Id.* at 2094–95 (Thomas, J., concurring in the judgment).

65. *Id.* at 2095.

66. *Id.*

67. *Id.* at 2098.

68. *Id.* at 2097.

69. *Id.*

70. *Id.* at 2098 (Gorsuch, J., concurring in the judgment).

71. *Id.* at 2103.

72. *Id.* at 2103–13 (Ginsburg, J., dissenting).

73. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., dissenting); *see* Richard S. Myers, *The Significance of* Trinity Lutheran, 17 AVE MARIA L. REV. 1, 4–5 (2019) [hereinafter Myers, *Significance of* Trinity Lutheran] (discussing Justice Sotomayor's dissent).

from the requirement that the government be neutral towards religion and nonreligion by displaying a symbol with "a starkly sectarian message."[74]

III. IMPLICATIONS

Because a majority of the Court did not join Justice Alito's opinion in full, the implications of *American Legion* are not at all clear. This portion of the article reflects upon the lessons of *American Legion*.

A. Old Displays Are Likely Constitutional

One message seems to be that longstanding displays are probably constitutional. The Third Circuit's August 8, 2019 decision in *Freedom from Religion Foundation, Inc. v. County of Lehigh* is a good example.[75] In *County of Lehigh*, the plaintiffs challenged the constitutionality of the county's seal, which "[f]or almost 75 years . . . has included a Latin cross surrounded by nearly a dozen secular symbols of historical, patriotic, cultural, and economic significance to the community."[76] The federal district court found that the county seal violated the Establishment Clause.[77] The district court used a "hybrid *Lemon*-endorsement test."[78] Interestingly, the judge noted that he disagreed with the approach to Establishment Clause issues used by the Supreme Court and the Third Circuit. The district court judge thought that the seal did not violate the Establishment Clause because the seal "is a passive symbol that does not coerce any citizen to practice or adhere to Christianity, and does not establish a county religion."[79] In the end, however, the judge found an Establishment Clause violation based on precedent that the judge was required to use.[80]

After the Court decided *American Legion v. American Humanist Ass'n*, the Third Circuit reversed.[81] The court read *American Legion* as abandoning the *Lemon* test in passive display cases.[82] The court then relied on the

74. *Am. Legion*, 139 S. Ct. at 2104 (Ginsburg, J., dissenting) (quoting Salazar v. Buono, 559 U.S. 700, 736 (2010) (Stevens, J. dissenting)).

75. Freedom from Religion Found., Inc. v. Cnty. of Lehigh, 933 F.3d 275, 281, 285 (3d Cir. 2019).

76. *Id.* at 278.

77. Freedom from Religion Found., Inc. v. Cnty. of Lehigh, No. 16-4504, 2017 U.S. Dist. LEXIS 160234, at *30, *33 (E.D. Pa. Sept. 28, 2017).

78. *Id*. at *22.

79. *Id.* at *33.

80. *Id.* at *33–34.

81. *Cnty. of Lehigh*, 933 F.3d at 285.

82. *Id.* at 281.

"strong presumption of constitutionality" that the Court said was appropriate when addressing the constitutionality of longstanding displays,[83] and found that that the presumption had not been overcome.[84] Therefore, the Third Circuit found that the county seal did not violate the Establishment Clause. The court noted the historical significance of the inclusion of the cross as part of the seal and noted that requiring the elimination of the cross might well be thought of as reflecting a hostility to religion that ought to be avoided.

The Eleventh Circuit's ruling in *Kondrat'yev v. City of Pensacola* also confirms that old displays are likely constitutional.[85] Prior to the Supreme Court's decision in *American Legion*, the Eleventh Circuit had "affirmed a district court's decision ordering the removal of a 34-foot Latin cross from the City of Pensacola's Bayview Park on the ground that the City's maintenance of the cross violated the First Amendment's Establishment Clause."[86] After remand from the United States Supreme Court "for further consideration in light of *American Legion*[,]"[87] the Eleventh Circuit held that "the cross's presence on city property doesn't violate the Establishment Clause."[88]

The Eleventh Circuit also concluded that *American Legion* had "jettisoned *Lemon v. Kurtzman*—at least for cases involving 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies'—in favor of an 'approach that focuses on the particular issue at hand and looks to history for guidance.'"[89] The Eleventh Circuit also considered the impact of *American Legion*'s "'strong presumption of constitutionality' for 'established, religiously expressive monuments, symbols, and practices.'"[90] The court noted some confusion about whether the presumption automatically applied in every case involving an established monument or whether the four considerations Justice Alito cited "prescribe[d] a list of prerequisites that must obtain before the presumption applies."[91] The court found that it did not matter; the court stated: "we

83. *Id.*

84. *Id.* at 284.

85. Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1334 (11th Cir. 2020).

86. *Id.* at 1321.

87. *Id.*

88. *Id.*

89. *Id.* at 1322 (citation omitted) (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087, 2097 & n.16 (2019) (plurality opinion)).

90. *Id.*

91. *Id.* at 1330.

conclude that we needn't choose between these two readings, because we are satisfied that the presumption attaches under either one."[92] Moreover, the Eleventh Circuit found that the presumption had not been rebutted.[93] Noting that it was not clear how the presumption could be rebutted, the court found "no basis for concluding that the presumption of constitutionality has been overcome in this case."[94]

These decisions indicate that the *American Legion* decision has now changed the law in this area. In the past, many courts have found Establishment Clause violations when government seals contained crosses. The lower court rulings in *American Legion*, *County of Lehigh*, and *Kondrat'yev* cases are good examples. The post-*American Legion* decisions by the Third and Eleventh Circuits in *County of Lehigh* and *Kondrat'yev* demonstrate how the law has now changed.

So, it seems clear that courts will be increasingly receptive to allowing government displays of religious symbols, at least when those displays have been around for many years. But because of the lack of clear guidance from a majority of the Supreme Court, the inquiry will be very much dependent on the facts of each case.[95]

B. The Court's Approach to Establishment Clause Issues Continues to Improve

As the Third and Eleventh Circuits' opinions indicate, a majority of the Court has rejected the use of the *Lemon* test in religious display cases. But *Lemon* has not been clearly buried.

The Court's approach to Establishment Clause issues, though, continues to move in a more desirable direction. The Court is worlds away from emphasizing the "constitutional command of secular government."[96] Perhaps the Court was concerned about the implications of this position, which led one noted commentator to argue that the names of cities and towns (e.g., St. Paul, or Los Angeles) violated the Establishment Clause.[97] The

92. *Id.* at 1331.

93. *Id.* at 1333–34.

94. *Id.* at 1334.

95. *See* Woodring v. Jackson Cnty., 458 F. Supp. 3d 1029, 1043 (S.D. Ind. 2020) (finding that a county's display of a Nativity scene violated the Establishment Clause), *vacated*, No. 20-1881, 2021 WL 344797, at *1 (7th Cir. Feb. 2, 2021) (holding that the county's display of the Nativity scene did not violate the Establishment Clause).

96. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 611 (1989).

97. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986).

Court no longer insists on the secularization of the displays. The Court has increasingly emphasized that it is trying to avoid a hostility to religion.[98] That seemed to be where the Court was headed several decades ago when it emphasized the privatization of religion,[99] which often seemed to result in hostility.[100] The extreme versions of the privatization theory are in the past.[101] The Court is far more willing to allow the government to recognize the importance of religion in our history and public life.[102]

The Court seems to be edging closer to adopting a coercion test. This approach, which I think is the proper focus,[103] seems to be gaining ground in recent decades. Adopting a coercion test would largely end litigation over the constitutionality of religious displays. This might have important benefits. The government display of religious symbols would not of course be mandatory. Governments might decide to make the prudential judgment not to display religious symbols. But the choice to display a religious symbol might prove valuable, as I have noted in some past writings.[104] Such displays, which are often thought of as coercive efforts to proselytize,[105] might rather instead be viewed as an exercise of humility. These governmental acknowledgements of the importance of religion in our history help to reinforce the idea that our nation is "'under God' and subject to a transcendent order."[106] This idea may well serve as a more secure

98. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084–85 (2019) ("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.").

99. *See* Myers, *Church and State*, *supra* note 1, at 95–96; Richard S. Myers, *The Privatization of Religion and Catholic Justices*, 47 J. CATH. LEGAL STUD. 157, 158 (2008); Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 CATH. SOC. SCI. REV. 223, 224 (2001); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 22 (1991).

100. Myers, *Significance of* Trinity Lutheran, *supra* note 73, at 10. In *Espinoza v. Mont. Dep't of Revenue*, Justice Thomas noted that the "Court's adoption of a separationist interpretation has itself sometimes bordered on religious hostility." Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266 (2020) (Thomas, J., concurring).

101. *See* Myers, *Significance of* Trinity Lutheran, *supra* note 73, at 6–10.

102. *See* Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (noting "that the Framers considered legislative prayer a benign acknowledgment of religion's role in society").

103. Myers, *Ten Commandments*, *supra* note 1, at 253; Myers, *Nativity Scenes*, *supra* note 1, at 97–106.

104. Myers, *Church and State*, *supra* note 1, at 98; Richard S. Myers, Comment, *A Comment on the Death of* Lemon, 43 CASE W. RES. U. L. REV. 903, 908–09 (1993) [hereinafter Myers, *Death of* Lemon].

105. Myers, *Death of* Lemon, *supra* note 104, at 908.

106. *Id.* at 909.

foundation for the health of our society[107] than the pursuit of "a revisionist agenda of secularization."[108]

CONCLUSION

The Court's opinion in *American Legion* reached a result that did not surprise many observers.[109] The Court concluded that the Bladensburg Cross did not violate the Establishment Clause. The Court's ruling was modest. The Court made it clear that Establishment Clause challenges to longstanding displays containing religious symbols will likely fail. Unfortunately, the Court did not settle the continuing debate about the proper approach or test to use in Establishment Clause cases. The Court did, though, continue to move Establishment Clause doctrine in a positive direction. The Court continues to reject the privatization thesis and is moving closer to adopting a coercion test.

107. Myers, *Ten Commandments*, *supra* note 1, at 252; Myers, *Death of* Lemon, *supra* note 104, at 909.

108. McCreary Cnty. v. ACLU, 545 U.S. 844, 910 (2005) (Scalia, J., dissenting).

109. *See* Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 93.