



Supreme Court May Reconsider Establishment Clause Jurisprudence in Challenge to Cross Display: Part Two

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On February 27, in *American Legion v. American Humanist Association*, the Supreme Court is scheduled to hear oral argument on the constitutionality of a large cross that was erected as a war memorial in Prince George's County, Maryland. Last year, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [held](#) that the cross display violated the First Amendment's Establishment Clause. The Supreme Court [agreed](#) to review this decision, [considering](#) not only whether the memorial is unconstitutional but also what test should govern this inquiry. The case thus presents the Court with the opportunity to clarify its Establishment Clause jurisprudence—an area of the law that [scholars](#) and [judges](#) alike routinely deride for lacking clear legal rules. It also offers the first significant opportunity for the newest members of the Court, Justices Gorsuch and Kavanaugh, to weigh in on this area of the law.

This is a two-part Legal Sidebar. [Part One](#) briefly reviewed existing Establishment Clause jurisprudence. Part Two, below, focuses on *American Legion*, reviewing the lower court decision and the parties' arguments before the Supreme Court. It discusses ways the Court might resolve the case, as well as the significant implications the Court's decision could have for Congress.

Fourth Circuit Decision

The [Peace Cross](#) display that the Supreme Court is considering in *American Legion* was held unconstitutional by a divided panel of the [Fourth Circuit last year](#). The challenged monument is a 40-foot-tall Latin cross that the American Legion erected in 1925. During fundraising efforts and at the monument's dedication, the private organizers [emphasized](#) the religious nature of the cross. The cross's base contains a plaque with the names of the Prince George's County soldiers who died in World War I. A Maryland state agency, the Maryland-National Capital Park and Planning Commission (Commission), acquired the cross in 1961 and has maintained the monument since. The cross, which [stands](#) "in the center of one of the busiest intersections in Prince George's County, Maryland," is [now](#) "part of a memorial park honoring veterans in Bladensburg" that includes smaller [war memorials](#) located in the vicinity.

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The American Humanist Association (AHA), along with a number of individual plaintiffs, sued the Commission and the American Legion, [arguing](#) that the state’s “display and maintenance of the Cross violates the Establishment Clause.” The Fourth Circuit agreed, [applying](#) *Lemon*—but with “due consideration given to” the “factors” articulated in Justice Breyer’s *Van Orden* [concurrence](#). The appellate court first [held](#) that the state had “satisf[ie]d the first prong of *Lemon*” by stating “legitimate secular purposes for displaying and maintaining the cross”: maintaining highway safety and honoring soldiers.

However, the panel opinion concluded that the Peace Cross [failed](#) the second *Lemon* prong. The court [said](#) that the Latin cross has “inherent religious meaning,” stating that even its secular symbolism of World War I and of death is reliant on “its affiliation with the crucifixion of Jesus Christ.” The Fourth Circuit [noted](#) that the cross “contains a few secular elements,” including the plaque at the base of the cross, but ultimately said that “the sectarian elements [of the display] easily overwhelm the secular ones.” The majority opinion [emphasized](#) “the immense size and prominence of the [Peace] Cross” as compared to the cross’s secular elements and to the other war monuments, especially in light of the fact that the cross was largely viewed by motorists who could not see these secular displays. In light of these factors, the Fourth Circuit [held](#) that “a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion.”

Finally, the majority opinion [held](#) in the alternative that the Peace Cross violated the Establishment Clause under the third prong of *Lemon*, by creating an excessive government entanglement with religion. The court [noted](#) that the state had spent “at least \$117,000 to maintain the Cross and has set aside an additional \$100,000 for restoration.” The majority also [concluded](#) that the display itself “amount[ed] to excessive entanglement,” by “displaying the hallmark symbol of Christianity . . . in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both.”

Chief Judge Gregory dissented, [concluding](#) that the Peace Cross did not violate the Establishment Clause. The dissent also [applied](#) the *Lemon* test, but with respect to the second prong, would have held that a reasonable observer [understands](#) the cross to be a secular war memorial rather than an endorsement of Christianity. With respect to the third prong, the dissenting judge [believed](#) that the state’s maintenance of the memorial did not constitute excessive entanglement, [saying](#) that, by spending money on “lighting and upkeep,” the state is not “involved in any church-related activities” or “promot[ing] any religious doctrine.”

Supreme Court Consideration of the Peace Cross

The Commission and the American Legion appealed the Fourth Circuit’s decision to the Supreme Court, and in November 2018 the Court [granted](#) the petitions for certiorari. The Court agreed to [consider](#) what test should apply when considering Establishment Clause challenges to public monuments. Thus, *American Legion* offers the Court the opportunity to clarify its understanding of the Establishment Clause and to state definitely how courts should analyze the constitutionality of religious displays. The petitioners, arguing in support of the Peace Cross, urge the Court to embrace a more accommodationist approach, while AHA, claiming that the state’s display of the Peace Cross violates the Establishment Clause, takes a more separationist view. Interestingly, no party primarily argues that the Court should retain *Lemon*, although AHA does [argue](#) in the alternative that if the Court does wish to reconsider the proper analysis for Establishment Clause inquiries, it should reaffirm the *Lemon* test.

One option is for the Court to abandon *Lemon* altogether and broadly adopt the “[history and tradition](#)” approach it took in *Town of Greece v. Galloway*. The United States, arguing as an amicus in support of the petitioners, takes this position, [saying](#) that the Court should evaluate the constitutionality of “passive displays” by reference to historical practice. The Solicitor General [contends](#) that the Peace Cross, viewed in light of practices that it says the Founders embraced, “does not raise any of the concerns against which

the Establishment Clause protects.” By contrast, AHA [argues](#) that historical practice does not support the government’s display of the Peace Cross [because](#) there is no history supporting “government displays that align the government with one particular religion,” and [because](#) the Founders never approved of the prominent, permanent display of solitary Latin crosses. Further, AHA [claims](#) that the Court has never held—and should not now rule—that historical pedigree alone can validate a government practice with the purpose and effect of favoring a particular religion. Taking a slightly different position from the United States, and perhaps echoing AHA’s concerns, the Commission says that while historical practice may often suffice to validate a display, it will not *always* be dispositive, [saying](#) that even longstanding practices may be suspect if they have “often been employed to proselytize or denigrate non-adherents” or if “a specific practice var[ies] from tradition in a way that removes it from that tradition’s protective ambit.”

American Legion argues for an even more accommodationist test, [asking](#) the Supreme Court to hold that “symbolic display[s]” violate the Establishment Clause only if they are “coercive,” in the [sense](#) that they “coerce belief in, observance of, or financial support for religion.” Although the United States argues for a slightly different test, the Solicitor General [agrees](#) with the American Legion that “the founding generation understood the Establishment Clause as prohibiting governmental coercion of religious belief or adherence, but as permitting governmental acknowledgement of religion in public life.” While the United States [says](#) that history defines “what types of actions are (or are not) coercive,” the American Legion [says](#) that its coercion inquiry “is broader than merely asking whether the specific practice challenged was accepted by the Framers.” Nonetheless, American Legion [claims](#) that its coercion standard is grounded in original understandings of religious “establishment.” The American Legion also [maintains](#) that this test “provides a workable approach” that is more consistent with “longstanding national traditions.” According to [that group](#), the display of the Peace Cross is constitutional because there is no evidence that it “compels anyone to make a religious profession, has been exploited to excessively proselytize, mandates any form of religious exercise, or involves any other historically grounded form of coercion.”

AHA opposes the adoption of the coercion test, [asserting](#) that this “categorical rule” would “give[] the greenlight to virtually all religious displays, regardless how sectarian, conspicuous, contemporary, or religiously motivated.” The group also [says](#) that the coercion test would be contrary to the Court’s existing Establishment Clause case law and [argues](#) that it “would yield harrowing, unprincipled, and inconsistent results.”

While the Supreme Court signaled its willingness to revisit and possibly revise its Establishment Clause jurisprudence in its order granting the petition for certiorari, at least two of the briefs have suggested that the Court might be able to resolve the case before it under existing case law, without more broadly reconsidering Establishment Clause jurisprudence. First, the Commission [states](#) that “nearly every Member of the Court has agreed on at least this much: A passive monument that uses religious symbolism does not violate the Establishment Clause if either (1) the purpose and the objective meaning of the display are predominantly secular, or (2) the monument fits into a national history and tradition of similar displays.” [Relying](#) largely on the longstanding and widespread “tradition of using crosses as symbols of commemoration,” the Commission [contends](#) that the Peace Cross meets both of these criteria.

Like the Commission, the AHA [argues](#) that the case can be resolved under existing precedent—but the AHA claims a different principle settles the dispute. The group [says](#) that the Establishment Clause prohibits sectarian endorsement of religion, in the sense that “government may not demonstrate a preference for one religion over *other religions*.” [Noting](#) that the Peace Cross is a “permanent sectarian monument,” the AHA [claims](#) that the display “clearly aligns the government with Christianity”—and discriminates against non-Christian soldiers, at least some of whom, [says](#) the AHA, do not view the cross as “a benign secular symbol that honors their sacrifices.” AHA points to the context of the monument, [citing](#) factors noted in *Van Orden* and other Supreme Court cases to [argue](#) that the Peace Cross would

communicate “to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both.”

Implications for Congress

Although this case involves the constitutionality of a particular monument located on state property, *American Legion* may ultimately have broader implications for the federal government, given that the case provides the Court the opportunity to revisit its Establishment Clause jurisprudence. If the Court abandons *Lemon* and adopts a new, more accommodationist test, whether for all Establishment Clause inquiries or merely for challenges involving passive religious displays, that new inquiry may govern future inquiries into the constitutionality of a host of federal actions. And even if the Court holds only that *Lemon* does not govern this *particular* inquiry, this may still signal a further narrowing of *Lemon* and a move by the Roberts Court toward a more accommodationist view of the Establishment Clause.

The Court’s opinion in *American Legion* may offer hints as to how the Court would analyze a variety of other actions. The Establishment Clause controls the federal government’s ability to fund religious institutions, host religious activities, and otherwise support religion. For example, litigants have (with varying levels of success) challenged under the Establishment Clause:

- a [presidential proclamation](#) restricting certain foreign nationals from entering the country;
- the “[Hyde Amendment](#),” a federal appropriations provision that “den[ie]d public funding for certain medically necessary abortions”;
- the [use](#) of federal funds to organize conferences at which the President “praised the efficacy of faith-based programs in delivering social services”;
- the [use](#) of federal funds to purchase educational materials in religious schools;
- a federal agency’s [sale](#) of land to a religious college;
- the [use](#) of prayers at the presidential inaugural ceremony; and
- the [inclusion](#) of the words “so help me God” in the naturalization oath.

More immediately, there are a number of crosses erected as monuments on public ground, including in [Arlington National Cemetery](#). (Notably, the majority opinion below [offered](#) possible ways to distinguish the crosses displayed in Arlington, although [some commentators](#) arguing in defense of the Peace Cross have claimed that the Fourth Circuit decision “[threatens](#)” Arlington’s memorials.) The Court’s resolution of this case may have significant implications for these federal displays. Particularly if the Court’s decision adopts a more separationist view and suggests that these religious displays are now unconstitutional, federal action may be needed to bring the government in compliance with the Establishment Clause. In the opinion below, the majority [clarified](#) in a footnote that it was not requiring Maryland to “remov[e] the arms or raz[e] the [Peace] Cross entirely,” saying that on remand, the parties would be “free to explore alternative arrangements that would not offend the Constitution.” Alternatives might include alterations to emphasize the secular aspects of any public memorials or transferring ownership of memorials to private hands—although any future actions would have to be evaluated in light of governing precedent. In one divided [2010 decision](#), the Supreme Court approved of a federal statute that transferred control of federal land containing a Latin cross that was erected as a World War I memorial to a private party.

Oral argument in this case is [scheduled](#) for February 27, 2019. The Justices’ questions at oral argument may signal whether they are seeking to clarify and further refine the Court’s Establishment Clause jurisprudence and what they think of the various tests that the parties have proposed.

Author Information

Valerie C. Brannon
Legislative Attorney

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