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## **HISTORY HAS SOURED THE LEMON TEST**

*Trevor J. Sherrard*

## **HISTORY HAS SOURED THE LEMON TEST**

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*“It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.”*<sup>1</sup>

Almost a century ago, a group of distraught women in Prince George’s County, Maryland, joined together with one thing in common: their sons had given their lives in defense of this great country.<sup>2</sup> These men were from all different races, creeds, and walks of life but their mothers came together for the sole purpose of constructing a monument in remembrance of their lives.<sup>3</sup> With the help and support of the American Legion, the bereaved mothers decided on a Latin cross to mirror the cross-shaped grave markers in the European cemeteries where their sons’ bodies lay.<sup>4</sup> For many years this monument served as a reminder of not only the ultimate sacrifice that an individual could make for his country, but the ultimate sacrifice a family makes as well. However, after ninety-three years, the Fourth Circuit decided to destroy this piece of history in the name of political correctness and religious tolerance by applying a test that is unsuitable when dealing with the use of public displays of religious symbols that memorialize our country’s fallen.<sup>5</sup>

The Peace Cross remained untouched and revered as a memorial to Prince George’s heroes until three individuals, almost a century after its construction, became offended at the sight of the cross while they were driving in the area.<sup>6</sup> These individuals brought suit and in their complaint believed “a more fitting symbol of [veterans’] sacrifice would be a symbol of the Nation for which they fought and died, not a particular religion.”<sup>7</sup> These three individuals believed the display of the Peace Cross amounted to governmental affiliation with Christianity and was a violation of the First Amendment’s Establishment Clause.<sup>8</sup> The Fourth Circuit agreed that the Memorial’s religious symbolism “overshadow[ed] its secular elements,” and employed a test known as the *Lemon* test to come to that conclusion.<sup>9</sup>

Recently, the Supreme Court granted certiorari for the case in *American Legion v. American Humanist Ass’n*, and decided that although the cross was a preeminent Christian symbol,

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<sup>1</sup> See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg J., dissenting).

<sup>2</sup> See Ann E. Marimow, et.al., *A World War I cross under siege*, WASHINGTON POST (Sept. 21, 2018), [https://www.washingtonpost.com/graphics/2018/local/maryland-peace-cross/?utm\\_term=.9bea51a8e3be](https://www.washingtonpost.com/graphics/2018/local/maryland-peace-cross/?utm_term=.9bea51a8e3be).

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* (stating the War Department gave families the option of leaving the soldiers’ bodies in Europe for permanent burial or shipping them home at government expense for interment in national or private cemeteries; the bodies of at least three of the forty-nine remain in France); see also Denise Lavoie, *Appeals Court denies bid to reconsider ruling on Peace Cross*, THE ASSOCIATED PRESS (Mar. 1, 2018), <https://apnews.com/4570e41d285f4ee4a4cd8e4a2b16e70e>.

<sup>5</sup> See *Am. Humanist Ass’n v. Md.-Nat’l Cap. Park & Plan. Comm’n*, 874 F.3d 195, 211-12 (4th Cir. 2017).

<sup>6</sup> *Id.* at 201-02.

<sup>7</sup> *Id.* at 202.

<sup>8</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion. . . .”).

<sup>9</sup> See *Am. Humanist Ass’n*, 874 F.3d at 206, 210.

destroying the cross would not further the ideas of respect and tolerance that the First Amendment embodied.<sup>10</sup> Although Justice Samuel Alito,<sup>11</sup> who wrote the majority's opinion, emphasized that the *Lemon* test "present[ed] particularly daunting problems" regarding a historical public display of a religious symbol, the Court did not definitively overrule the use of the *Lemon* test.<sup>12</sup> In fact, Justice Elena Kagan,<sup>13</sup> in her concurring opinion, praised the "[*Lemon*] test's focus on purpose and effects" as being "crucial in evaluating government action in this sphere."<sup>14</sup>

By leaving multiple tests to deal with public displays of religious symbols, the Court has left Establishment Clause jurisprudence in a continued state of chaos. In lower courts, judges can use what are expected to be objective tests, in a subjective way; essentially picking and choosing the test that fits their personal and political beliefs. However, as this comment will show, the *Lemon* test is not the proper analysis to use when evaluating whether a historical public display of a religious symbol is a violation of the First Amendment's Establishment Clause.

Therefore, Part I of this comment will explore the history and background of Establishment Clause jurisprudence, specifically on the contrasting tests the Supreme Court has used throughout the years. Part II will then discuss how the Court has employed several different tests to religious displays on public property, causing confusion in the lower courts. As a result, this comment will argue for a unifying historical analysis to be applied not only to create stability, but also to preserve a piece of history while remembering the brave men and women who gave their lives fighting for this great country.

## **I. History of the Establishment Clause**

The First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>15</sup> However, the Supreme Court has struggled, and continues to struggle, to apply a definite test concerning the public displays of religious symbols. Justice Clarence Thomas<sup>16</sup> has said, "[i]t is difficult to imagine an area of the law more in need of clarity."<sup>17</sup> A judge in the Sixth Circuit has gone so far as to call this situation "Establishment Clause purgatory."<sup>18</sup> Moreover, the underlying question remains unanswered: which test should be used regarding public displays of religious symbols?

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<sup>10</sup> *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2090 (2019).

<sup>11</sup> See Encyclopedia of World Biography, *Alito, Jr., Samuel Anthony*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/legal-and-political-magazines/alito-jr-samuel-anthony> (last updated Oct. 13, 2019) (stating relevant history and facts of Justice Alito).

<sup>12</sup> *Am. Legion*, 139 S. Ct. at 2081.

<sup>13</sup> See Encyclopedia of World Biography, *Kagan, Elena*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/kagan-elena> (last updated Oct. 3, 2019) (stating relevant history and facts of Justice Kagan).

<sup>14</sup> *Am. Legion*, 139 S. Ct. at 2094 (Kagan, J., concurring in judgment).

<sup>15</sup> See U.S. CONST. amend. I.

<sup>16</sup> See CNN Library, *Clarence Thomas Fast Facts*, WALLBUILDERS.COM (June 21, 2019, 12:36 PM), <https://www-m.cnn.com/2013/03/07/us/clarence-thomas-fast-facts/index.html?r=https%3A%2F%2Fwww.google.com%2F> (stating relevant history and facts of Justice Thomas).

<sup>17</sup> See *Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011).

<sup>18</sup> See *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005).

**(a) And So, It Begins – Everson v. Board of Education**

The first case that catapulted modern Establishment Clause jurisprudence into the spotlight was decided only seventy years ago with *Everson v. Board of Education*.<sup>19</sup> The Court ruled that a New Jersey transportation subsidy program that applied to students at parochial schools did not violate the Establishment Clause.<sup>20</sup> Justice Hugo Black<sup>21</sup> famously wrote for the majority, “[t]he 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.”<sup>22</sup> Even though the majority found that New Jersey’s subsidy program did not breach this high and impregnable wall, the Court had made its intentions clear: there must be a separation between church and state.<sup>23</sup>

**(b) The Lemon Test**

In 1971, the Supreme Court granted certiorari for *Lemon v. Kurtzman*.<sup>24</sup> The Court was asked whether Rhode Island and Pennsylvania statutes, which provided aid to church-related schools, violated the Establishment Clause of the First Amendment.<sup>25</sup> Justice Warren Burger (“Justice Burger”)<sup>26</sup> answering this question for the Court, explained that there were “three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”<sup>27</sup> To protect us from these evils, the Court concluded that in order for the challenged government action to be valid, it must first pass a three-prong analysis, now commonly referred to as the *Lemon* test.<sup>28</sup>

In order to pass the *Lemon* test, the challenged conduct: (1) must have a secular legislative purpose;<sup>29</sup> (2) its primary effect must be one that “neither advances nor inhibits religion”;<sup>30</sup> and (3) must not create “an excessive government entanglement with religion.”<sup>31</sup> If the challenged

<sup>19</sup> See generally *Everson v. Bd. Of Educ.*, 330 U.S. 1 (1947).

<sup>20</sup> *Id.* at 18.

<sup>21</sup> See West’s Encyclopedia of American Law, *Black, Hugo Lafayette*, ENCYCLOPEDIA.COM (2005), <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/hugo-lafayette-black> (stating relevant history and facts of Justice Black).

<sup>22</sup> See Wallbuilders, *The Separation of Church and State*, WALLBUILDERS.COM (Dec. 31, 2016), <https://wallbuilders.com/separation-church-state/> (discussing how the phrase “erected a wall between church and state” was originally taken from an exchange of letters between President Thomas Jefferson and the Baptist Association of Danbury).

<sup>23</sup> See *Everson*, 330 U.S. at 18.

<sup>24</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>25</sup> *Id.* at 606-07.

<sup>26</sup> See Encyclopedia of World Biography, *Warren E. Burger*, ENCYCLOPEDIA.COM (2004), <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/warren-earl-burger> (stating relevant history and facts of Justice Burger).

<sup>27</sup> See *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

<sup>28</sup> See Karthik Ravishankar, *The Establishment Clause’s Hydra: the Lemon Test in the Circuit Courts*, 41 Dayton L. Rev 261, 264-65 (stating the *Lemon* test was a combination of three previous decisions).

<sup>29</sup> See *Abington v. Schempp*, 374 U.S. 203, 223 (1963) (finding a state law mandating the recitation of the Lord’s Prayer in schools unconstitutional because there was a lack of a secular purpose).

<sup>30</sup> See *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963)) (“If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”).

<sup>31</sup> See *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 674 (1970) (“We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion.”).

conduct fails to meet a single prong, it fails entirely. The Court found that both Rhode Island's and Pennsylvania's statutes were unconstitutional under this analysis.<sup>32</sup> It is arguable that the *Lemon* test created a single, universally applicable, Establishment Clause standard. A mere two years later, however, the three prongs of the *Lemon* test were regarded as "no more than helpful signposts" when dealing with Establishment Clause Issues.<sup>33</sup>

### (c) A Historical Aspect - *Marsh v. Chambers*

Twelve years after *Lemon*, the Supreme Court was forced to deal with the issue of legislative prayer in *Marsh v. Chambers*.<sup>34</sup> Ernest Chambers, a citizen of Nebraska and member of the Nebraska State Legislature, challenged the Legislature's practice of opening its state legislative session with prayer, claiming the prayer violated the Establishment Clause of the First Amendment.<sup>35</sup> Once again, Justice Burger wrote for the majority of the Court, but instead of applying the *Lemon* test that he coined years earlier, the Court instead looked to the historical aspect of prayer in our country.<sup>36</sup> The Court determined that since the Nebraska State Legislature had been opening its sessions with prayer for over a century, and the opening of legislative sessions with prayer is consistent with our country's national practice, this was not a step toward an establishment of a religion, but simply an acknowledgement of beliefs that are held in the hearts of many Americans across the country.<sup>37</sup>

### (d) The Endorsement Test - *Lemon* with a Twist

In 1984, just one year after *Marsh v. Chambers* was decided, the Court in *Lynch v. Donnelly* was presented with the question of whether a city's public display of a religious crèche,<sup>38</sup> erected in conjunction with Christmas, violated the First Amendment's Establishment Clause.<sup>39</sup> While Justice Burger wrote for the Court using the analytical framework of the *Lemon* test to determine that the crèche was not a violation of the Establishment Clause,<sup>40</sup> Justice Sandra Day O'Connor ("Justice O'Connor"),<sup>41</sup> in her concurrence, offered a slight improvement to the *Lemon* test.<sup>42</sup>

Justice O'Connor believed the government could be in violation of the Establishment Clause in two principal ways: (1) excessive governmental entanglement with religious institutions

<sup>32</sup> See generally *Lemon*, 403 U.S. at 606-7.

<sup>33</sup> See *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

<sup>34</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>35</sup> See John R. Vile, *Marsh v. Chambers (1983)*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/456/marsh-v-chambers> (last visited Oct. 21, 2018).

<sup>36</sup> *Id.*

<sup>37</sup> See *Marsh*, 463 U.S. at 792.

<sup>38</sup> See *Crèche*, DICTIONARY.COM (2019), <http://www.dictionary.com/browse/creche> (defining a Crèche as "a small or large modeled representation or tableau of Mary, Joseph, and others around the crib of Jesus in the stable at Bethlehem").

<sup>39</sup> See generally *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding that no secular purpose existed in the nativity scene and because it was Christmas, the display did not advance or inhibit religion).

<sup>40</sup> See generally *id.*

<sup>41</sup> See UXL Encyclopedia of World Biography, *O'Connor, Sandra Day*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/people/social-sciences-and-law/supreme-court-biographies/sandra-day-oconnor> (last viewed Nov. 12, 2018) (stating relevant history and facts of Justice O'Connor).

<sup>42</sup> See *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring in judgment).

and (2) governmental endorsement or disapproval of religion.<sup>43</sup> Justice O'Connor submitted that the proper inquiry under the *Lemon* test's primary effect prong is whether the government intended to convey a message of endorsement or disapproval of religion.<sup>44</sup> Additionally, the Court is expected to employ this "improvement" to the *Lemon* test from the perspective of a reasonable observer, while examining both the subjective and the objective components of the message communicated by the government.<sup>45</sup>

Lower courts now view the endorsement test as a legitimate part of *Lemon's* second prong, and observe that under this test, they must assess the totality of the circumstances surrounding the display to determine whether "a reasonable observer of the display in its particular context perceives a message of governmental endorsement or sponsorship of religion".<sup>46</sup>

### (e) The Coercion Test

Just five years after *Lynch v. Donnelly*, the ACLU in Pennsylvania challenged two state sponsored holiday displays, a Chanukah menorah<sup>47</sup> and a crèche, located on public property in downtown Pittsburgh in *County of Allegheny v. ACLU*.<sup>48</sup> In this case, the plurality used Justice O'Connor's endorsement test to reach the conclusion that based on differences in surrounding settings and meanings, the crèche display had an unconstitutional effect where it was located, but the menorah display did not.<sup>49</sup>

However, Justice Anthony M. Kennedy ("Justice Kennedy")<sup>50</sup> respectfully concurred in part and dissented in part, feeling that the crèche display was not unconstitutional and believing that the endorsement test "reflected an unjustified hostility toward religion, a hostility that is inconsistent with history and precedent."<sup>51</sup> Justice Kennedy noted that the use of Justice O'Connor's concurrence in *Lynch v. Donnelly* in the present case was not appropriate.<sup>52</sup> Instead, Justice Kennedy concluded that while the two principles that guide Justice O'Connor's endorsement test were distinct, there was no coercion, and "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."<sup>53</sup> It was not until three years after *Allegheny* was decided, however, that the Court finally looked solely to governmental coercion as the sole basis for its decision in *Lee v. Weisman*.<sup>54</sup>

<sup>43</sup> See *id.* at 687-88.

<sup>44</sup> *Id.* at 691; see also *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 624 (1989).

<sup>45</sup> See *Lynch*, 465 U.S. at 690.

<sup>46</sup> See *Elewski v. Cty of Syracuse*, 123 F.3d 51, 53 (2d Cir. 1997); see also *Books v. City of Elkhart*, 235 F.3d 292, 326 (7th Cir. 2000); see also *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 650 F.3d 30, 40-41 (2d Cir. 2011).

<sup>47</sup> See *Menorah*, DICTIONARY.COM (2019), <http://www.dictionary.com/browse/menorah> (defining a Menorah as "a candelabrum having nine branches, for use on the Jewish festival of Hanukkah").

<sup>48</sup> See *Elewski*, 492 U.S. at 578.

<sup>49</sup> *Id.* at 579.

<sup>50</sup> See Encyclopedia of World Biography, *Anthony M. Kennedy*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/anthony-m-kennedy> (last viewed Nov. 12, 2018) (stating relevant history and facts of Justice Kennedy).

<sup>51</sup> See *Cty. of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

<sup>52</sup> *Id.* at 668 ("[i]t has never been my understanding that a concurring opinion . . . could take precedence over an opinion joined in its entirety by five Members of the Court.").

<sup>53</sup> *Id.* at 662.

<sup>54</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992); see also Richard R.W. Fields, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, (2005) U. CHI. LEGAL F.

**(f) A Historical Test— *Van Orden v. Perry* and *Town of Greece v. Galloway***

In *Van Orden v. Perry*, the Court was faced with the tough question of whether a display of the Ten Commandments on government property outside the Texas State Capitol was a violation of the Establishment Clause of the First Amendment.<sup>55</sup> Here, the Court specifically declined to use the *Lemon* test and considered it “not useful in dealing with th[is] sort of passive monument.”<sup>56</sup> Instead, the Court decided the proper analysis should be driven by both the nature of the monument and by our Nation’s history with the monument.<sup>57</sup> The Court recognized the role that God had in our Nation’s heritage and that “[t]he history of man was inseparable from the history of religion”<sup>58</sup> and “simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>59</sup>

In 2014, Justice Kennedy wrote the opinion for the majority in *Town of Greece v. Galloway*.<sup>60</sup> The Court had to decide whether the Town of Greece, New York, violated the Establishment Clause when the newly elected town supervisor decided to invite a local clergyman to deliver a prayer before monthly town board meetings.<sup>61</sup> Justice Kennedy wrote that given the precedent used in *Marsh v. Chambers* of looking to the historical aspect of the prayer, the practice of prayer in the legislature was again ruled not to be a violation of the First Amendment’s Establishment Clause.<sup>62</sup>

However, Justice Kennedy clarified that the case of *Marsh v. Chambers* must not be understood as permitting a practice that would amount to a constitutional violation if not for its history, but rather the case teaches us that the Establishment Clause should be interpreted “by reference to historical practices and understandings.”<sup>63</sup> Most importantly, Justice Kennedy stated that it was “not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”<sup>64</sup> Justice Kennedy urged that the challenged practice must be evaluated “against the backdrop of historical practice;” and if these historical practices were accepted by the Framers or are “long endured” and have become “part of our heritage and tradition,” then that practice should be upheld.<sup>65</sup>

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541, 558 (“The modern coercion test is rooted in Justice Kennedy’s dissent in *Allegheny County*; however, it was not applied in a majority opinion until *Lee v. Weisman*.”).

<sup>55</sup> See *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>56</sup> *Id.* at 686.

<sup>57</sup> See generally *Van Orden v. Perry*, 545 U.S. at 677.

<sup>58</sup> See *Van Orden*, 545 U.S. at 687; see also *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

<sup>59</sup> See *Van Orden*, 545 U.S. at 690.

<sup>60</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811, 1815 (2014).

<sup>61</sup> *Id.* at 1815-16.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1819.

<sup>64</sup> See *Town of Greece*, 572 U.S. 565, 134 S. Ct. at 1819 (emphasis added); see also Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO S CT. REV 71, 84-85 (2013-14).

<sup>65</sup> *Id.* (explaining that even the practices that the Framers have never participated in, such as reciting the Pledge of Allegiance in school rooms, if those practices have become part of our national heritage, then they should be upheld); see also *Town of Greece*, 572 U.S. 565, 134 S. Ct. at 1825.

## II. Why a Historical Analysis Should be Used When Analyzing the Peace Cross

As previously discussed, the Court now faces an enormous dilemma: by leaving multiple tests to analyze public displays of religious symbols, Establishment Clause jurisprudence is in a state of disarray.<sup>66</sup> By not overruling the *Lemon* test in *Am. Legion v. Am. Humanist Ass'n*, critics of the Supreme Court's decision think that another challenge to a public display of a religious symbol is imminent.<sup>67</sup> When a challenged display does arise, the Court should now apply a unifying historical analysis to help guide courts when dealing with public displays of religious symbols.

Use of this unifying historical analysis, mirrors the points given to us in both *Town of Greece* and *Van Orden*, and asks: (1) what is the history of the actual display; (2) what is our Nation's history with this type of display; and (3)(a) is this a display of religion that would have been accepted by the Framers, and if not, (3)(b) has the display become long endured and part of our national heritage. If the answer to this analysis would lead an "apolitical reasonable person"<sup>68</sup> to believe the display has become part of our National tradition, then the display is not a violation of the First Amendment's Establishment Clause and should remain intact.

On the other hand, lacking national history does not make the display unconstitutional. Instead, if the challenged display fails the unifying historical analysis, then it would be subject to the *Coercion* test. In a sense, when dealing with public displays of religious symbols, this historical analysis is a test used in advance of any other test as a "historical override."<sup>69</sup> The benefits of applying a unifying historical analysis are many, but this comment will focus on two specific reasons: (1) to preserve our Nation's history and (2) to resolve the confusion that remains in the lower courts.

### (a) Preserve Our Nation's History

Winston Churchill once said, "If we open a quarrel between past and present, we shall find that we have lost the future."<sup>70</sup> The Supreme Court has allowed a quarrel between past and present by not expressly overruling the *Lemon* test when it reached its conclusion in *Am. Legion v. Am. Humanist Ass'n*. To avoid such a quarrel, this comment's unifying historical analysis is warranted in future cases involving public displays of religious symbols. By not specifically striking down the application of the *Lemon* test, the Supreme Court has allowed future challenges to numerous other war memorials, military awards, and even National monuments in our country.

<sup>66</sup> See *Rowan County v. Lund*, 138 S. Ct. 2564, 2564 (2018) (quoting Justice Thomas "[t]his Court's Establishment Clause jurisprudence is in disarray.").

<sup>67</sup> See David L. Hudson Jr., *The Fate of the Lemon Test: DOA or Barley Surviving?*, FREEDOM FORUM INSTITUTE (July 8, 2019), <https://www.freedomforuminstitute.org/2019/07/08/the-fate-of-the-lemon-test-d-o-a-or-barely-surviving/>.

<sup>68</sup> See *Apolitical*, DICTIONARY.COM, <http://www.dictionary.com/browse/apolitical> (last viewed Oct. 10, 2018) (defining *apolitical* as not political; of no political significance; not involved or interested in politics).

<sup>69</sup> See Rassbach, *supra* note 64 ("First, in the conflict between *Lemon* and *Marsh*, *Marsh* is not so much the exception as it is the rule. *Marsh*'s historical analysis trumps the *Lemon* test, not the other way around. Second, the Court introduces a "historical override" to all Establishment Clause claims.").

<sup>70</sup> See Mike Masnick, *Churchill's Heirs Seek To Lose The Future By Charging Biographer To Quote His Words*, TECH DIRT (Jan. 22, 2013), <https://www.techdirt.com/articles/20130118/16193821734/churchills-heirs-seek-to-lose-future-charging-biographer-to-quote-his-words.shtml>.

**(1) Memorials**

The United States Government has frequently used crosses as a symbol to commemorate our Country's fallen soldiers, and perhaps most notable to this topic are the two crosses that were constructed and placed in the Arlington National Cemetery in Virginia. First, the Argonne Cross was designed and dedicated in 1923, and just like the Peace Cross, it was built for the American men and women who gave their lives fighting during World War I.<sup>71</sup> It has been regarded as "a silent reminder of the largest, bloodiest, and most important battle fought by American troops during the war—and the final push that helped compel Germany to surrender."<sup>72</sup> The second memorial in Arlington National Cemetery is the Canadian Cross of Sacrifice, proposed by the Canadian Prime Minister as a memorial to the American citizens who lost their lives fighting with the Canadian Armed Forces in World War I.<sup>73</sup> This cross is seen as a sentiment of America's friendship with Canada and is a testimony of the goodwill and the common bond that we share with our neighbor to the north.<sup>74</sup> However, by displaying the "preeminent symbol of Christianity" publicly, these monuments could possibly be viewed as endorsing religion.<sup>75</sup> Consequently, these iconic memorials could be the next in line for the chopping block.

Similarly, many historical holocaust memorials could be considered endorsements of religion by the numerous religious symbols used to memorialize "the Six Million Jews of Europe and those millions of other victims who were tortured and murdered by the Nazis."<sup>76</sup> In New Orleans, a holocaust memorial is located in Woldenberg Park on the bank of the Mississippi River, and is visited by an estimated 700,000 people annually.<sup>77</sup> The memorial consists of nine panels, each with different designs and as one walks around the memorial different distinct images form. The first and the most prominent image to form is of a large yellow six pointed Star of David.<sup>78</sup> The Star of David is viewed by most as a Jewish religious symbol composed of two overlaid triangles that form the shape of a hexagram.<sup>79</sup> However, promotion of a religion was not the intention of the memorial; the artist that made the New Orleans Holocaust Memorial made it to

<sup>71</sup> See Mike Stroud, *Argonne Cross*, HMBD.ORG (June 16, 2016), <https://www.hmdb.org/marker.asp?marker=45119> (stating the relevant history of the Argonne Cross); The American Legion, *The Argonne Cross Memorial*, LEGION (Feb. 3, 2017), <https://www.legion.org/memorials/235901/argonne-cross-memorial>.

<sup>72</sup> See Philip Kennicott, *Memorials to World War I May Be Less Obvious, But More Meaningful*, WASHINGTON POST (Aug. 8, 2014), [https://www.washingtonpost.com/entertainment/museums/memorials-to-world-war-i-may-be-less-obvious-but-more-meaningful/2014/08/07/f1b934c0-19ba-11e4-9e3b-7f2f110c6265\\_story.html?utm\\_term=.87b9bb1e3377](https://www.washingtonpost.com/entertainment/museums/memorials-to-world-war-i-may-be-less-obvious-but-more-meaningful/2014/08/07/f1b934c0-19ba-11e4-9e3b-7f2f110c6265_story.html?utm_term=.87b9bb1e3377).

<sup>73</sup> See James E. Peters, *Canadian Cross of Sacrifice, (WWI/WWII/Korean)*, ARLINGTON CEMETERY, <https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Canadian-Cross> (last visited Nov. 1, 2018).

<sup>74</sup> *Id.*

<sup>75</sup> See Am. Humanist Ass'n, 874 F.3d at 207 (explaining the Fourth Circuit's reasoning that because the Peace Cross was a "preeminent symbol of Christianity", it was a violation of the Establishment Clause).

<sup>76</sup> See *The New Orleans Holocaust Memorial*, HOLOCAUST MEMORIAL, <http://www.holocaustmemorial.us/> (last updated June 1, 2003) (quoting what the New Orleans Holocaust Memorial Sculpture consist of).

<sup>77</sup> *Id.*; see also Bruce Nolan, *Rabbi Ed Cohn set to celebrate 25 years at Temple Sanai*, NOLA, (Mar. 3, 2012), [https://www.nola.com/religion/index.ssf/2012/03/rabbi\\_ed\\_cohn\\_set\\_to\\_celebrate.html](https://www.nola.com/religion/index.ssf/2012/03/rabbi_ed_cohn_set_to_celebrate.html).

<sup>78</sup> See *The New Orleans Holocaust Memorial*, HOLOCAUST MEMORIAL, <http://www.holocaustmemorial.us/view1.htm> (last updated June 1, 2003)(describing the first view seen while looking at the Holocaust Memorial).

<sup>79</sup> MJL, *What is the Star of David?*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/star-of-david-hot-topic/> (last viewed Nov. 2, 2018) (discussing the relevant history of the Magen David, commonly known as the Star of David).

symbolize “the persecution and humiliation of the Jews by their Nazi tormentors.”<sup>80</sup> Even these symbols displayed in memory of lives lost to religious persecution could be challenged and placed into question as well.

## (2) Military Awards and Traditions

Not only monuments with religious undertones are at stake for removal or modification, the United States Military has also used the cross in their awards to symbolize extraordinary heroism while engaged in armed conflict.<sup>81</sup> The Air Force Cross,<sup>82</sup> Navy Cross,<sup>83</sup> and the Distinguished Service Cross<sup>84</sup> are the second highest awards given for military valor, behind only the Medal of Honor, and all three are in the shape of a cross.<sup>85</sup> Nevertheless, according to previous interpretations of *Lemon’s* standards, the distribution of these cross-shaped awards by United States military officials may be seen as endorsing a religion, and therefore could also be challenged.

Cross-shaped awards are not the only military awards threatened by not overruling the *Lemon* test. The United States requires the six-pointed Star of David to be etched onto the blade of all military swords.<sup>86</sup> Once again, the Star of David is mostly viewed as a religious symbol; however, this mark was historically used to signify that the blade of the sword was manufactured using a method that western traders first encountered in Damascus, and in order to meet military specifications, all swords must have this “religious display” engraved on them.<sup>87</sup>

Even the Medal of Honor, the highest honor a soldier can receive for their valor in combat, could be at risk.<sup>88</sup> The Medal of Honor is designed in the shape of an inverted five-point star, the same shaped star used on our American flag.<sup>89</sup> However, a five-pointed star is also commonly

<sup>80</sup> See *The New Orleans Holocaust Memorial*, HOLOCAUST MEMORIAL, <http://www.holocaustmemorial.us/view1.htm> (last updated June 1, 2003) (describing the first view seen while looking at the Holocaust Memorial); see also *Holocaust Badges*, HOLOCAUST MEMORIAL CENTER, <https://www.holocaustcenter.org/holocaust-badges>, (last visited on Nov. 8, 2018) (explaining that during the Holocaust, the Jewish people were forced to wear a yellow star of David badge on their clothing).

<sup>81</sup> *Air Force Cross*, USAFE ENLISTED HERITAGE, <http://usafeenlistedheritage.org/distinguished/decorated/criteria/?id=3> (last viewed Nov. 2, 2018) (discussing the history of the Air Force Cross).

<sup>82</sup> See *Air Force Cross (AC)*, TRACES OF WAR, <https://www.tracesofwar.com/awards/1715/Air-Force-Cross-AC.htm>, (last visited on Nov. 8, 2018) (discussing the history of the Air Force Cross).

<sup>83</sup> See *The Navy Cross*, NAVAL HISTORY AND HERITAGE COMMAND (Sept. 17, 2019), <https://www.history.navy.mil/browse-by-topic/heritage/awards/decorations/navy-cross.html> (discussing the history of the Navy Cross).

<sup>84</sup> See *Distinguished Service Cross*, THE HALL OF VALOR PROJECT, <https://valor.militarytimes.com/award/2>, (last visited on November 8, 2018) (discussing the history and brave men who received the Distinguished Cross Award).

<sup>85</sup> See *Air Force Cross*, *supra* note 81; see also *Awards*, THE HALL OF VALOR PROJECT, <https://valor.militarytimes.com/awards> (last visited on Nov. 8, 2018) (discussing and listing the brave men who have received this honor).

<sup>86</sup> *Six-pointed star on U.S. swords*, MARLOW WHITE, <https://www.marlowwhite.com/military-sword-information/m-faq-six-point-star.html> (last visited Nov. 2, 2018) (discussing the history of the six-pointed star on all military swords in the United States and England).

<sup>87</sup> *Id.*

<sup>88</sup> *The Medal of Honor*, ARMY.MIL, <https://www.army.mil/medalofhonor/history.html> (last visited November 2, 2018) (discussing the history of the Medal of Honor in the United States).

<sup>89</sup> *Id.*

referred to as a pentagram,<sup>90</sup> a symbol used by Wiccans, Satanists, and even Occultists as a representation of the five elements: spirit, fire, air, water, and earth.<sup>91</sup> Also, each Medal of Honor has a prominent figure engraved inside the pentagram, Minerva the Roman Goddess of wisdom and war.<sup>92</sup> Relying strictly on the *Lemon* test's interpretation of Establishment Clause jurisprudence, these Military Awards and Traditions could also be viewed by a lower court as endorsing a religion, and could be erased from history as well.

### (3) National Monuments

Furthermore, not just war memorials and awards are in question, some historic landmarks like the Washington Monument have been so ingrained in our Nation's history that we have forgotten their religious affiliations. The Washington Monument was designed in 1845 by Robert Mills, and it was built to honor the father of our country and encapsulate George Washington's greatness.<sup>93</sup> The Washington Monument stands at 555 feet tall, and upon its completion in 1844, was considered the tallest building in the world.<sup>94</sup> The monument was built in the shape of an Egyptian obelisk in order to evoke the timelessness of ancient civilizations.<sup>95</sup> However, an obelisk in ancient Egyptian times represented the benben, the primordial mound on which the Egyptian god Atum stood during the creation of the world.<sup>96</sup>

The Washington Monument is not the only landmark in Washington D.C. that has religious affiliations built within its architecture. The U.S. Treasury Building,<sup>97</sup> the Second Bank of the United States,<sup>98</sup> and even our Supreme Court<sup>99</sup> were designed and modeled after the Parthenon in Athens, a temple originally built to worship the deity Athena.<sup>100</sup> By *Lemon's* standards, the historical meaning and the landmarks large physical settings could be perceived as advancing a specific religion by a lower court, and they too could be challenged and removed.<sup>101</sup>

The application of this comment's unifying historical analysis requires that we examine: (1) what is the history of the actual display; (2) what is our Nation's history with this type of display; and (3)(a) is this a display of religion that would have been accepted by the Framers, and

<sup>90</sup> See *Pentagram*, DICTIONARY.COM, <https://www.dictionary.com/browse/pentagram?s=t>, (last visited November 8, 2018) (defining Pentagram as a five-pointed, star-shaped figure made by extending the sides of a regular pentagon until they meet, used as an occult symbol by the Pythagoreans and later philosophers, by magicians, etc.).

<sup>91</sup> Catherine Beyer, *Pentagrams Meaning*, THOUGHTCO. (Sept. 24, 2018), <https://www.thoughtco.com/pentagrams-4123031> (discussing the many different meanings of the Pentagram).

<sup>92</sup> *Design and Symbolism*, MEDAL OF HONOR CONVENTION, <https://www.mohconvention.com/the-medals/design-symbolism/> (last visited November 2, 2018) (discussing the history of the Medal of Honor in the United States).

<sup>93</sup> See *History & Culture*, NATIONAL PARK SERVICE, <https://www.nps.gov/wamo/learn/historyculture/index.htm> (last updated Apr. 16, 2018) (discussing the history of the Washington Monument).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Joshua J. Mark, *Egyptian Obelisk*, ANCIENT HISTORY ENCYCLOPEDIA (Nov. 4, 2016), [https://www.ancient.eu/Egyptian\\_Obelisk/](https://www.ancient.eu/Egyptian_Obelisk/) (explaining the history and symbolism of the obelisk).

<sup>97</sup> Larry Getlen, *The secret history of the Parthenon*, NY POST (Jan. 26, 2014), <https://nypost.com/2014/01/26/the-secret-history-of-the-parthenon/> (describing the history of the Parthenon and its influence in American architecture).

<sup>98</sup> *Second Bank of the United States*, NATIONAL PARK SERVICE, [https://www.nps.gov/parkhistory/online\\_books/butowsky2/constitution7.htm](https://www.nps.gov/parkhistory/online_books/butowsky2/constitution7.htm) (last modified August 30, 2000).

<sup>99</sup> See Getlen, *supra* note 97.

<sup>100</sup> Mark Cartwright, *Parthenon*, ANCIENT HISTORY ENCYCLOPEDIA (Oct. 28, 2012), <https://www.ancient.eu/parthenon/> (describing the history of the Parthenon).

<sup>101</sup> See *Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 874 F.3d 195-210 (4th Cir. 2017) (“[W]e conclude that the historical meaning and physical setting of the Cross overshadows its secular elements.”).

if not, (3)(b) has the display become long endured and part of our national heritage. If the answer to this analysis would lead an apolitical reasonable person to believe the display has become part of our National tradition, then the display is not a violation of the First Amendment's Establishment Clause and should remain intact. By using this analysis, these memorials, awards, and National monuments that have become long endured and part of our national heritage should not be purged from the public sphere merely because they have a religious undertone. Because "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."<sup>102</sup>

### **(b) No More Confusion in the Courts.**

Confusion has been known to be the welcome mat to the door of creativity,<sup>103</sup> but the dispute over the deciding governing test for public displays of religious symbols is anything but creative. Some circuit courts, like the Eleventh and the Eighth, have rejected the *Lemon* test in favor of a more historical approach.<sup>104</sup> Other circuit courts, like the Tenth and the Second, still apply the *Lemon* test to adjudicate cases even after *Van Orden* and *Town of Greece* were decided.<sup>105</sup> The Fifth Circuit has used both the *Van Orden* concurrence and the reasonable observer standard in their opinions,<sup>106</sup> while the Fourth and the Ninth Circuit have used both *Lemon* and *Van Orden* when deciding a case.<sup>107</sup>

Trickling even further down the judicial chain, at least one district court in Florida felt "bound to follow" the *Lemon* test after *Van Orden*, and hopes that the Supreme Court will one day revisit this area of Establishment Clause jurisprudence in order to clear up the confusion.<sup>108</sup> What is more telling, the district court in Maryland who first heard the Bladensburg cross case said, "Establishment Clause jurisprudence is. . . a trial judge's nightmare."<sup>109</sup> Even past Supreme Court Justices have voiced their concern over the growing confusion in Establishment Clause jurisprudence; specifically, the continuing application of the *Lemon* test. Justice Scalia has called our Establishment Clause "embarrassing"<sup>110</sup> and has gone so far to warn "[I]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence."<sup>111</sup> By striking down the application of the *Lemon* test and applying this comment's unifying historical

<sup>102</sup> See *Van Orden v. Perry*, 545 U.S. 677, 699 (2005).

<sup>103</sup> QUOTES, <https://www.quotes.net/quote/13271> (last visited Nov. 9, 2018) (quoting Michael J. Gelb "confusion is the welcome mat at the door of creativity).

<sup>104</sup> See *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276-77 (11th Cir. 2008) (explaining the 11th Circuit considered the historical practices to resolve cases under the Establishment Clause); see also *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (explaining that the decision in *Van Orden* is what governs this case).

<sup>105</sup> See *Felix v. City of Bloomfield*, 841 F.3d 848, 856-59 (10th Cir. 2016) (applying *Lemon* to a Ten Commandments display); see also *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 237-45 (2d. Cir. 2014) (applying the *Lemon* to the Ground Zero cross at the National September 11 Museum).

<sup>106</sup> See *Staley v. Harris Cnty.*, 461 F.3d 504, 513 (5th Cir. 2006).

<sup>107</sup> See *Am. Humanist Ass'n v. Md.-National Cap. Park & Plan. Comm'n*, 874 F.3d 195, 204 (4th Cir. 2017); see also *Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011).

<sup>108</sup> See *Kondrat'yev v. City of Pensacola*, No. 3:16cv195-RV/CJK, 2017 U.S. Dist. LEXIS 203588, at \*27 (N.D. Fla. June 19, 2017).

<sup>109</sup> *Am. Humanist Ass'n v. Md. Nat'l Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 381 (D. Md. 2015).

<sup>110</sup> *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987).

<sup>111</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).

analysis to the next challenged public display of a religious symbol, the Court could finally clear up any confusion and exorcise the “ghoul” that has been haunting Establishment Clause jurisprudence for decades.

### **III. Conclusion**

When deciding the next challenged public display of a religious symbol, the Supreme Court should apply a unified historical analysis. This analysis examines: (1) what is the history of the actual display; (2) what is our Nation’s history with this type of display; and (3)(a) is this a display of religion that would have been accepted by the Framers, and if not, (3)(b) has the display become long endured and part of our national heritage. If the answer to this analysis would lead an apolitical reasonable person to believe the display has become part of our National tradition, then the display is not a violation of the First Amendment’s Establishment Clause and should remain intact. This analysis will not only clear up any confusion that exists in the courts, but it will also preserve our Nation’s history and protect the memory of the fallen.