No More (Old) Symbol Cases

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Almost no one admires the Supreme Court's decisions on the constitutionality of government-sponsored religious symbols. In its first foray into this field, *Lynch v. Donnelly*, the Court voted 5-4 to sustain the constitutionality of a nativity scene in a municipal holiday display, apparently on the ground that it was surrounded by Santa's house and sleigh, a cut-out clown, candy-striped poles, and (most memorably) a talking wishing well. Many believers found the rationale insulting. The four dissenters called the decision "a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority." Outside observers derided the Court for creating a "three-plastic-animal rule." Lower courts did not know what to do.[1]

The Court's second symbols case, *County of Allegheny v. ACLU*, approved a menorah displayed in close proximity to a taller Christmas tree, but disapproved a nativity scene. This nativity scene was bereft of any talking wishing wells, Santas, or other kitsch. Fully six of the justices disagreed with one half or the other of the decision and only one justice, the author Harry Blackmun, agreed fully with the reasoning.[2] Several years later, a 5-4 majority voted not to uproot an old Ten Commandments monument, while a different 5-4 majority voted to require the removal of a newly erected Ten Commandments monument.[3] In the latter case, eight of the nine justices disagreed with the rationale, but they split in two equal-but-opposite camps,

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[1] Lynch v. Donnelly, 465 U.S. 668 (1984).

[2] County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[3] Van Orden v. Perry, 545 U.S. 677 (2005); McCreary County v. ACLU of Ky., 545 U.S. 844 (2005).

leaving the cases to be decided with only one justice, Stephen Breyer, in the majority in both cases. In its most recent symbols case prior to this term, the Court hopelessly fractured over a wooden cross erected as a World War I memorial 40 miles down a dirt road in the Sonoran Desert.[4]

To commentators of a secularist persuasion, the justices were wrong to condone any government endorsement of sectarian symbols, which they believe brand people of different faiths or no faith as outsiders and second-class citizens. To commentators of the opposite persuasion, many of these decisions seem to bristle with hostility toward traditional religion, which should instead be viewed as a legitimate part of our pluralistic culture. Other commentators simply think the Court's religious-symbol cases have been inconsistent and incoherent.

Arguably, the Court's attempts to reduce the "divisiveness across religious lines" that can be caused by governmental endorsement of religious symbols have stirred up more religious divisiveness than the symbols themselves. The justices are the oracles and umpires of American culture. If they say a religious symbol must be dismantled, this is a victory for atheists, agnostics, and other dissenters from the religious mainstream. If the justices say a religious symbol is consistent with the American constitutional tradition, this is a victory for the believers. It is not so much the crosses, nativity scenes, menorahs, and Ten Commandments that get the juices of sectarian tension flowing; it is the prospect of Supreme Court affirmation of one's side in the culture conflict, and—better yet—defeat for the other side.

Finally, in *American Legion v. American Humanist Association*, the Supreme Court put an end to it.

I. The Court's Decision

American Legion involved a 94-year-old war memorial in Bladensburg, Maryland. Inspired by the military cemeteries for American soldiers in Europe, with their dramatic rows of white crosses, the memorial takes the form of a large Latin cross with various patriotic inscriptions. It towers above the surrounding countryside. It was designed by a local citizens' commission shortly after World War I in honor of the community's fallen soldiers and was

[4] Salazar v. Buono, 559 U.S. 700 (2010).

completed by the efforts of the American Legion, a private veterans' group. The property is now owned and maintained by the state.

Applying the so-called "*Lemon* test," which proscribes government action that (1) lacks a "secular purpose," (2) has a "primary effect" that "advances or inhibits religion" (including "endorsement" of a religious message), or (3) entails "excessive entanglement" between religion and government,[5] the U.S. Court of Appeals for the Fourth Circuit concluded that the Bladensburg monument violates the Establishment Clause, largely because of the "inherent religious meaning" of the cross. The court ordered that the cross be dismantled or—remarkably—that its arms be chopped off.[6]

From the moment the Supreme Court granted the petition for certiorari, it was evident that the Court would likely reverse. But what would the Court's legal rationale be? Would the Court repudiate the *Lemon* test, which was the legal framework for the Fourth Circuit's decision? Would it go still further, and hold that the plaintiffs, whose only injury was being offended by observing the passive symbol, lacked standing to sue in federal court? Or would it base its decision on the details of the facts of the case: on the evident secular purpose for the memorial, on its long history as an accepted part of community life, on the secular appurtenances of the memorial, and the lack of controversy (until the filing of the lawsuit)?

If the Court merely reversed the Fourth Circuit on the basis of the particular facts, without changing legal doctrines, there would be no respite from this kind of litigation. The facts of the Bladensburg case were too easy. If the Court reversed on the facts, it would be child's play for lower courts to distinguish the decision with respect to symbols with a shorter history, a less impeccable secular purpose, fewer secular appurtenances, more controversy, or less association with fallen soldiers. Moreover, because of the costs and uncertainties of litigation, including the one-sided obligation on the part of defendants to pay the attorneys' fees of victorious plaintiffs, we might expect that cash-strapped cities would often cave in to demands, however unreasonable, to dismantle any symbols with a religious connotation that plaintiffs' groups might seek to target.

[5] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[6] Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n, 874 F.3d 195, 202, n.7 (4th Cir. 2017).

But eliminating the *Lemon* test, or, more conspicuously, cutting back on standing to sue, would give credence to crazy hypotheticals about monuments that are not likely to be a realistic possibility in tolerant America and would spark angry dissents that would feed the flames of the religious-secular culture war: the very problem that the Court is presumably trying to lessen.

As it happened, the Court took an approach that solved the practical problem without taking any theoretical steps that would enflame the situation. Moreover, it avoided the 5-4 split that so often characterizes culture-warish cases these days. In an opinion written by Justice Samuel Alito and joined by Chief Justice John Roberts and Justices Stephen Breyer, Elena Kagan, and Brett Kavanaugh, the Court distinguished between "retaining established, religiously expressive monuments, symbols, and practices" and "erecting or adopting new ones," and held that the "passage of time gives rise to a strong presumption of constitutionality" of the already-established symbols.[7] The meaning is clear: lower courts may no longer apply the nebulous *Lemon* factors to overturn religiously expressive monuments, symbols, or practices that were created in the past.

The Court did not state what "test" will apply to the erection of new monuments, but it appears likely that the key question will be whether the monuments communicate a message not just of "endorsement" but of superiority or official privilege, or disparagement of minority religious views. The Court was probably wise to wait until such a case arises in actuality than to speculate about what it would do in the hypothetical future. There should be no presumption *against* new religiously expressive monuments.

A. The Limit of the Holding to Already-Established Symbols

The opinion wrestled thoughtfully with the reasons why the *Lemon* test, and its endorsement variant, is especially problematic in the context of cases where the sole injury claimed by the plaintiffs is symbolic, giving four reasons. First, because the cases often involve monuments or symbols established long ago, it is difficult to identify their "purpose," which is the first "prong" of the *Lemon* test. Actual purposes are lost in the mists of time. Second, over the course of time, the purposes or connotations of a monument symbol change and

[7] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

multiply. "Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment."[8] The Court did not cite *McGowan v. Maryland*, but it would have provided support. In *McGowan*, the Court recognized that Sunday closing laws had an unmistakably religious purpose when they were enacted centuries ago, but in recent years they have been supported more effectively by the labor movement, which favors a uniform day of rest in which working families can be united.[9] Third, symbols are not static. Their message may "evolve" over time. In particular, religious symbols can become "embedded features of a community's landscape and identity."[10] The outpouring of grief over the burning of Notre Dame Cathedral is a recent and ready example. So too are the many religious place names scattered across America. And fourth, once a religiously expressive symbol has been established, "removing it may no longer appear neutral."[11] Accordingly, *Lemon*'s focus on purposes and on messages of endorsement or disapproval are especially likely to be misleading in the context of already-established symbols.

The Court's distinction between old and new symbols tacitly presupposes that the sweep of American cultural history has been in compliance with the values of the Establishment Clause, at least close enough that efforts to cure the defects will cause more divisiveness than litigation can remove. This, it seems, is the real brunt of the Ginsburg dissent: there is more work to be done to bring America into full compliance with our constitutional values of religious neutrality. The Court's approach will prevent future backsliding into a higher degree of government-approved sectarianism, but it will do nothing to root out entrenched vestiges of symbolic establishmentarianism, if any exist. *American Legion* is thus a status quo decision, neither attempting to cure the alleged sins of the past nor greenlighting future actions.

B. The Virtues of the Opinion: Near-Consensus

There is much to praise in the *American Legion* opinion. As already noted, cases about religiously expressive monuments and symbols

[8] *Id.* at 2083.

[9] McGowan v. Maryland, 366 U.S. 420 (1960).

[10] Am. Legion, 139 S. Ct. at 2084.

[11] *Id.*

in the past decades have been a minefield. The Court's opinions have tended to be sharply divided and unclear. The product of those cases has been continual litigation in the lower courts with unpredictable results, heightening rather than dampening the sectarian divide between religious and nonreligious, Christian and non-Christian. Justice Alito's opinion in *American Legion* is the first to break from that unfortunate model. Despite the failure to grapple with the deep theoretical issues lurking in the case, and perhaps because of that, the opinion promises to calm the waters.

Notably, the key holding of the Court was joined by two of the more liberal justices, Breyer and Kagan. This gives the holding a welcome sense of nonpartisanship and stability, which is especially important in culturally fraught cases. Breyer joined the Alito opinion in full.[12] Kagan joined much of the Alito opinion, including the "strong presumption" of constitutionality for established symbols, holding back—"in perhaps an excess of caution"—only from the sections that repudiated *Lemon* more broadly.[13] Only two justices, Ruth Bader Ginsburg and Sonia Sotomayor, dissented. Justice Kavanaugh, while joining the Alito opinion in full, wrote a separate opinion that would have gone farther and repudiated the *Lemon* test in all cases.[14] Justice Clarence Thomas did not join the Alito opinion on the ground that it did not go far enough, reiterating his long-held view that the Establishment Clause was not incorporated by the Fourteenth Amendment against the states except possibly insofar as it involves coercion against dissenters. He expressly stated his agreement with the Alito opinion regarding *Lemon*'s inapplicability in symbol cases and stated that he would "take the logical next step and overrule *Lemon* in all contexts."[15] Justice Neil Gorsuch did not join the Alito opinion on the ground that the plaintiffs did not have standing to sue, but explicitly agreed with its criticism of *Lemon* and with its treatment of the Bladensburg cross.[16] Thus, in spite of the appearance of a fractured Court, the justices broke 7-2 on the narrow question of already-established symbols and 6-3 on the broader question of *Lemon*.

[12] *Id.* at 2075.

[13] *Id.* at 2094 (Kagan, J., concurring).

[14] *Id.* at 2092 (Kavanaugh, J., concurring).

[15] *Id.* at 2094.

[16] *Id.* at 2098 (Gorsuch, J., concurring).

That supermajority, including two of the liberal justices, will go far to legitimate the decision in the eyes of the public and to insulate it against future challenge and from nitpicking by lower courts.

C. The Virtues of the Opinion: Moderation

By narrowly focusing on already-established symbols, the decision was able to situate itself in the moderate middle of the religious-symbol culture wars. It expressly departs from the constitutional vision, still held by the two dissenting justices, that seeks to purify the nation of perceived vestiges of establishmentarianism from the past, at least as a judicially enforceable constitutional matter. (People offended by religiously expressive symbols are, of course, free to pursue remedies in the political sphere, just as those offended by symbols reflecting the racial prejudice of the past are doing, with considerable success.) It allows religiously expressive sleeping dogs to lie. But it does not green-light attempts by present and future officeholders to interject new religious symbols as a type of religious-identity politics. (The erection by Alabama Judge Roy Moore of a marble Ten Commandments monument in the rotunda of the state courthouse, and refusal to remove it on court order, is the obvious example.) Such efforts are offensive to religious believers because they politicize religion—or, as James Madison wrote, "employ Religion as an engine of Civil policy [which is] an unhallowed perversion of the means of salvation."[17] And they deliberately seek to ostracize those whose religious conscience differs from majority sentiment.

The Court also avoided the temptation to uphold the symbol on the ground that it has lost its religious meaning—as the Court seemed to do in the Allegheny County menorah case and maybe the Pawtucket crèche case.[18] The idea of whitewashing religious symbols as meaningless relics of "ceremonial deism" neither takes seriously the reactions of dissenters who see in those symbols a message of exclusion, nor pleases the proponents, who value the symbols precisely because of their sacred character. In *American Legion*, the second paragraph of the opinion recognizes that "the cross has long

[17] James Madison, Memorial and Remonstrance against Religious Assessments [1785], reprinted in McConnell, Berg & Lund, Religion and the Constitution 43, 45 (3d ed. 2016).

[18] County of Allegheny, 492 U.S. at 611–15; Lynch, 465 U.S. at 684–87.

been a preeminent Christian symbol" and nowhere does the opinion suggest that its other meanings detract in the slightest from that role.

D. The Virtues of the Opinion: Relative Clarity

Among the virtues of the opinion are its clarity and moderation, which it achieves in part by its narrow focus on "established" religiously expressive symbols, not attempting to resolve the broad and miscellaneous range of church-state issues with a single "test." Indeed, that was the Court's primary critique of the *Lemon* test: that it was too ambitious and wide-ranging, with the result that it was not helpful in resolving actual legal problems. Nor did the Court take refuge in a highly fact-sensitive analysis, as is often true of judicial minimalism, and as plagued Justice Sandra Day O'Connor's jurisprudence in the area. When faced with a challenge to an already-established monument, symbol, or practice, a lower court will know what to do. It will reject the challenge, absent some extraordinary feature that would warrant departure from the presumption.

Already there is evidence that lower courts have understood the holding. In the first post–*American Legion* circuit court decision, a unanimous Third Circuit panel tossed an Establishment Clause challenge to a longstanding county seal containing the image of a cross, honoring early German settlers who came to Pennsylvania to worship in freedom. The court held that the *Lemon* test did not apply, and, armed with the "strong presumption of constitutionality," easily dismissed the plaintiffs' arguments against the seal. This decision is proof of the significance of the *American Legion* decision: the district court had reluctantly concluded that the seal was invalid under *Lemon*.[19]

To be sure, the Court's holding leaves wiggle room in two respects, which may detract from its clarity of application. First, it does not legitimize all established symbols, but merely creates a "strong presumption of constitutionality." Presumably, there could exist already-established symbols somewhere in the country that are so sectarian and so offensive that they could be held unconstitutional even under this standard. As Justice Breyer commented, "The case would be different . . . if there were evidence that the organizers had

[19] Freedom from Religion Found. v. Cty. of Lehigh, No. 17-3581, 2019 U.S. App. LEXIS 23681 (3d Cir. Aug. 8, 2019).

'deliberately disrespected' members of minority faiths."[20] But this is unlikely. Plaintiffs have been bringing challenges to religiously expressive symbols for the last 50 years, and one would guess they have been targeting the most offensive. An unqualified approval of *all* established symbols would have left the decision open to attacks based on wild hypotheticals. (What if there were a crucifix in the middle of the National Mall? What if Utah pasted images of the Angel Moroni on every driver's license?) Far-fetched criticism may not matter to life-tenured justices, but it would unnecessarily undermine the broad consensual effect of the Court's more cautious holding.

Second, the holding applies only to "established" monuments, symbols, and practices. That may give rise to uncertainties on the margin. As Justice Gorsuch asks, rhetorically: "How old must a monument, symbol, or practice be to qualify for this new presumption?"[21] The Court provides no definition of what it means, but presumably the term "established" refers to monuments or practices that were erected without significant controversy and remained in place for some period of time—not necessarily lengthy—before the litigation started to generate controversy (absent evidence that the lack of opposition was due to intimidation). It is impossible to predict how many cases, if any, will fall close to that line.

As an aside, the word "established" was perhaps an unfortunate choice, since "establishment" is the word used by the First Amendment to describe what is forbidden. But the Court evidently intentionally used the term in lieu of alternatives like "old" or "long-established," which would have given truck to arguments about how old is old enough.

E. The Opinion's Odd Organization

The analytical section of the Court's opinion, Section II, is divided into four parts. The first part is a general critique of the *Lemon* test. The second is a more focused critique of *Lemon* as applied to religious-symbol cases. The third is a discussion of the complicated role of the cross in World War I memorials. The fourth discusses precedents in which the Court declined to apply *Lemon* and instead "look[ed] to

[20] Am. Legion, 139 S. Ct. at 2091 (Breyer, J., concurring).

[21] Id. at 2102 (Gorsuch, J., concurring).

history for guidance" in Establishment Clause cases.[22] Section III of the opinion, joined by a majority, then analyzes the particular facts surrounding the Bladensburg Cross itself, concluding that maintenance of the memorial does not violate the Establishment Clause.

This organization is in some respects puzzling and suggests that the opinion may have been the product of internal dispute and compromise. Sections II-A, B, and D are about the *Lemon* test, moving from the general to the specific to the alternatives. Sections II-C and III are about the use of the cross as a memorial, moving again from the general to the specific. It is not clear how II-C and III logically relate to II-A, II-B, and II-D. If all established symbols are entitled to a strong presumption of constitutionality, there was no need for a detailed analysis of memorial crosses in general or the Bladensburg cross in particular. Perhaps II-C and III were included to reassure readers that even absent a presumption, the Bladensburg cross should not be regarded as a sectarian endorsement of a religious belief. Why the five sections are intermingled the way they are is simply a mystery. Why not put the *Lemon* test discussion in one section and the discussion of memorial crosses in another?[23]

F. Avoiding "Hostility" toward Religion

The opinion ends with a brief and eloquent statement:

> The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.[24]

[22] *Id.* at 2087.

[23] One tiny, presumably insignificant detail is that the subject paragraph of Section II-B was cut off and appears at end of Section II-A. Not only is this confusing to the reader, but it means that the summary subject paragraph of a section commanding majority status is placed in a section commanding only a plurality. This is evidence that the subsections of Part II were reorganized at the last minute.

[24] Am. Legion, 139 S. Ct. at 2090.

As this conclusion exemplifies, the *American Legion* Court recognized the important point that in a complex, pluralistic society, neutrality and secularism are not the same thing. The baseline for evaluating neutrality is not a secular blank slate to which any addition of a religiously expressive element is a sectarian intrusion. Rather, the Court must be sensitive to the effects of court-ordered change from the status quo, which itself is a reflection of centuries of cultural development. "[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance," the Court observed, "removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[25] In the most striking statement in the opinion, the Court stated that 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."[26] Perhaps the point is that the government should not use its control over public space either to increase or to decrease the religiosity of the culture, or to shift the culture in favor of, or against, any particular religious tradition. The baseline of neutrality is set by the culture itself, as manifested in the nation's historical traditions and practices. The Establishment Clause is all about reducing the government's power to influence the national religious culture—not about reducing (or increasing) the role of religion. The best way for government's role to be minimized is for the governmental sphere to conform, in general, to the public culture as it has developed over time. That sphere is a mixture of the secular and the religious.

This theme of the opinion has inspired sharp criticism. One essayist in *Slate* wrote that the idea that dismantling religious symbols could show "hostility" to religion has been "repeatedly rejected" by the Supreme Court, even attributing the idea to "a severe persecution complex on the part of Justice Samuel Alito."[27] But in fact the concern about hostility has long been a part of the Court's jurisprudence.

[25] *Id.* at 2084.

[26] *Id.* at 2084–85.

[27] Andrew Seidel, Alito Says Moving a Big Cross Would Be Like a Reign of Anti-Religious Terror. Really?, Slate (June 21, 2019), https://slate.com/news-and-politics/2019/06/alito-big-bladensburg-cross-french-reign-of-terror.html.

In the first school prayer decision, Justice Arthur Goldberg (the nation's fourth Jewish justice) warned that

> untutored devotion to the concept of neutrality can lead to . . . results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[28]

In the first religious-symbols case, the liberal giant William J. Brennan Jr., wrote that "intuition tells us that some official 'acknowledgment' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people," and that "government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture."[29] It is one thing not to erect a cross as a memorial; it is quite another to tear one down. As the opinion drolly notes, "an alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross—would be seen by many as profoundly disrespectful."[30]

II. The *Lemon* Test and Its Alternatives

The *American Legion* opinion thus accomplished a lot. But it avoided most of the theoretical issues raised by the case, preferring instead to issue a narrower, more practically focused opinion with greater consensual support across the ideological divide of the Court. It is worth commenting on those, and where they stand.

A. The Lemon *Test*

A great deal of the speculation about the *American Legion* case had to do with whether it would finally put the *Lemon* test to rest. It has

[28] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

[29] Lynch, 465 U.S. at 714–16.

[30] Am. Legion, 139 S. Ct. at 2086.

been a quarter of a century since the late Justice Antonin Scalia issued his famous diatribe:

> Like 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 once again. . . . Its most recent burial, only last Term, was, to be sure, not fully six-feet under: Our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart[,] and a sixth has joined an opinion doing so.
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, see, e.g., *Aguilar v. Felton*; when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh v. Chambers*. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[31]

The American Legion petitioners expressly asked that *Lemon* be overruled and replaced with a "coercion" test. (The other petitioner, connected to the State of Maryland, argued for a reversal based solely on the factual details.) My amicus curiae brief, on behalf of the Becket Fund for Religious Liberty, urged that *Lemon* be replaced with a comparison of the challenged government action to historical practices in America, and especially to the elements of an historical establishment of religion as it was known to the Framers. The Court almost took the advice. If you put together the Alito plurality and the Thomas and Gorsuch concurrences, it did.

Three of the four subsections in Part II, the analytical part of the Alito opinion, are devoted to *Lemon*. Part II-B decisively eliminates the *Lemon* test from the decisionmaking calculus for cases involving established symbols. The first and the fourth sections—II-A and II-D—strongly suggest that the *Lemon* test should no longer be used

[31] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (Scalia, J., concurring) (1993) (internal citations omitted).

in other areas, and that instead the courts should decide cases largely on the basis of historical practice. The opinion notes that "[a]s Establishment Clause cases involving a great array of laws and practices came to the Court" in the years after *Lemon*, "it became more and more apparent that the *Lemon* test could not resolve them."[32] It also notes that the *Lemon* test "has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."[33] The Court does not utter the magic words, that the *Lemon* test is "repudiated" or "abandoned" (outside the narrow category of established symbols), but it comes close enough that lower courts should take the hint. Moreover, although Justices Gorsuch and Thomas do not join the Alito opinion, their separate concurrences go out of their way to join in the criticism of the *Lemon* test. Using the standard methodology for identifying the holding of a case where there are multiple opinions but no majority, it is clear that, despite Justice Kagan's choice "out of perhaps an excess of caution" not to join Sections II-B and II-D, the Alito opinion commands a solid majority of six votes. I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law.

The Court did not get into any of the theoretical debates about *Lemon*—what precisely is meant by a "secular purpose," what is the baseline for determination of "advancement or inhibition" of religion, what kinds and degrees of "entanglement" between church and state are forbidden in a world where religion and government have constant and unavoidable interactions, where government coercion fits into the calculus, and what kind of neutrality among religions or neutrality between religion and nonreligion (whatever that means) is required. Scholars have spent buckets of ink on all these questions. Instead, the Court focused on its practical experience in trying to apply the three *Lemon* factors to the multifarious questions that arise under the Establishment Clause. In case after case, the *Lemon* test was either indeterminate or misleading, and the Court used some other approach. A remarkable number of the Court's early decisions based on *Lemon* later had to be overruled in substantial part.[34]

[32] Am. Legion, 139 S. Ct. at 2080.

[33] *Id.* at 2081.

[34] See Agostini v. Felton, 521 U.S. 203 (1997) (overruling Sch. Dist. v. Ball, 473 U.S. 373 (1985) and Aguilar v. Felton, 473 U.S. 402 (1985)); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality) (overruling Wolman v. Walter, 433 U.S. 229 (1977) and Meek v. Pittenger, 421 U.S. 349 (1975)).

The *Lemon* test was intended to "bring order and predictability to Establishment Clause decisionmaking" across a range of problems,[35] but each of its three "prongs" turned out to entail ambiguous and subjective judgments, with no predictability and little hope of order.

This line of reasoning—reminiscent of John Dickinson's statement at the Constitutional Convention that "[e]xperience must be our only guide. Reason may mislead us"[36]—presumably made it easier for the justices to reach a consensus to abandon the test. Reason might not have misled them, but it likely would have generated a wealth of disagreements. The experiential ground for abandoning *Lemon* was what John Rawls might have called an "overlapping consensus"—consensus about the answer without any consensus about the reasons. In any event, it is clear that *Lemon* is no longer the governing standard, even if there has been no judicial declaration regarding the errors of each of its parts.

In truth, as a matter of Supreme Court jurisprudence, the abandonment of *Lemon* in *American Legion* is no big deal. *Lemon* was already in tatters. The Supreme Court had not relied on the test in 13 years, despite large numbers of Establishment Clause cases. Tellingly, not even the dissenters in *American Legion* invoked *Lemon* in support of their view that the cross must come down. That speaks volumes. As the Alito opinion noted, in every recent Establishment Clause case the Court "has either expressly declined to apply the test or has simply ignored it."[37] In a variety of contexts, the Court has crafted more specific doctrinal frameworks, based on historical practice and precedent. For example, when evaluating inclusion of religiously affiliated organizations in public-benefit programs—the original context in which the *Lemon* test was announced—the Court now asks whether the program distributes benefits to a broad class of recipients "on the basis of neutral, secular criteria."[38] When evaluating statutory religious accommodations, where application of

[35] Am. Legion, 139 S. Ct. at 2080.

[36] 2 Records of the Federal Convention of 1787, at 278 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937).

[37] Am. Legion, 139 S. Ct. at 2080.

[38] Zelman v. Simmons-Harris, 536 U.S. 639, 652–54 (2002) (quoting Agostini, 521 U.S. at 231).

the *Lemon* test was categorically fatal,[39] the Court now asks whether the statute "alleviates exceptional government-created burdens on private religious exercise," is denominationally neutral, and does not impose disproportionate burdens on individual third parties.[40] When evaluating statutes that explicitly discriminate between religious denominations, the Court applies traditional equal protection strict scrutiny.[41] When evaluating prayers or other religious exercises in public-school settings, the Court asks whether the practice "has the improper effect of coercing those present to participate in an act of religious worship."[42] There is an absolute bar on government interference with a religious organization's internal governance, such as choice of clergy.[43] And so on. None of these subtests adverts to purpose, effect, or entanglement.

The problem was not at the Supreme Court level. The *Lemon* "ghoul" was thoroughly tamed at that level. The problem was in the lower courts, which do not have the luxury of ignoring or declining to follow Supreme Court precedent until the high court itself has said to stop.[44] The lower courts therefore felt obliged to continue to trudge through the three *Lemon* factors long after the justices had ceased to pay any attention to them. This was a waste of time at best, and—to the extent that the *Lemon* test had any actual effect on decisionmaking—misled the lower courts into erroneous judgments. No wonder the vast majority of Supreme Court cases under the Establishment Clause resulted in reversals of lower court decisions. How could it be otherwise, if the lower courts were applying a different substantive analysis than the one that would be applied by the Supreme Court?

B. Historical Practice as a Guide

The death of *Lemon* is therefore welcome. The main question is what will take its place. In many specific areas, already noted, the

[39] See Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

[40] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[41] Larson v. Valente, 456 U.S. 228, 246–47 (1982).

[42] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (citing Lee v. Weisman, 505 U.S. 577, 594 (1992)).

[43] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[44] Agostini, 521 U.S. at 237; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

answer has already been given: lower courts will apply the more specific tests for benefits programs, accommodations, public school religious exercises, explicit denominational discrimination, and interference with internal church governance, with no need to give lip service to *Lemon*. And thanks to *American Legion*, we now know that already-established religious monuments, symbols, and practices enjoy a "strong presumption of constitutionality." That will make such cases easy to decide, and presumably will discourage plaintiffs from bringing them.

Beyond those more specific tests, the *American Legion* plurality (of four justices) states that instead of seeking "a grand unified theory of the Establishment Clause" on the model of the *Lemon* test, the Court has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[45] That is nothing new. Long before the *Lemon* test was announced, in the school prayer decision, *Abington Township v. Schempp*, Justice Brennan declared that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[46] The Court's cases are studded with explorations of Establishment Clause history. This has often been faulty history, to be sure, leading to some grievous errors. But history has always played a more prominent role in Establishment Clause jurisprudence than in most other fields of constitutional law.

What does the history say about the use of religious symbology?

No one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment. Quite the contrary. For example, a committee formed on July 4, 1776, that included Benjamin Franklin and Thomas Jefferson—both religiously unorthodox and disestablishmentarian—was tasked by the Continental Congress with designing a seal for the new nation. They chose a scene from the Bible—Moses leading the Jewish people across the Red Sea—with the words "Rebellion to Tyrants Is Obedience to God."[47] There is no difference, in principle, between

[45] Am. Legion, 139 S. Ct. at 2087.

[46] Schempp, 374 U.S. at 294 (Brennan, J., concurring).

[47] James H. Hutson, Religion and the Founding of the American Republic 50–51 (1998).

justifying the Revolution by use of a biblical reference on the national seal and honoring the war dead with a cross in Bladensburg.

The seal that was officially adopted in 1782 likewise had religious imagery: an eye representing "the Eye of Providence" surrounded by "Glory" above the motto *Annuit Coeptis*—"He [God] has favored our undertakings."

President George Washington's 1789 Thanksgiving Day Proclamation recommended "a day of public thanksgiving and prayer"

for the "Supreme Being['s]" role in "the foundations and successes of our young Nation."[48] The same Congress that approved the Establishment Clause "provided for the appointment of chaplains" to open its sessions with often "decidedly Christian" prayer.[49] A church service was part of Washington's first inaugural, but no member of Congress refused to attend because of separationist concerns. Washington's personal addition to the oath of office—"So Help Me God"—was controversial in some quarters, but not because it was a religious reference. It was because that was the way the king ended his oath.[50] The Constitution was dated "the Year of our Lord" and exempted Sunday from the count of days for the president to sign legislation. Today, every state constitution likewise refers to "God" or an equivalent term.[51] Churches across America doubled as town meetinghouses and schools.[52] And no less disestablishmentarian a president as Jefferson allowed various denominations to use the Capitol and other federal buildings for weekly worship services—which he even attended.[53] School prayer, financial aid to religious schools, chaplains, and Thanksgiving Day proclamations all sparked constitutional conflict early in the 19th century. Religious symbols never did. To the best of my research, the first time anyone suggested that the display of symbols raises a constitutional problem was in the 1950s. All these historical practices are inconsistent with the notion, apparently entertained by the two dissenters, that any symbolic recognition of religion that can be seen as an "endorsement" violates the Constitution. To be sure, early leaders such as Washington were generally scrupulous to use broad, nonsectarian language, but this was a matter of statesmanship and civility, not of constitutional law.

[48] George Washington, Thanksgiving Proclamation [Oct. 3, 1789], reprinted in McConnell, Berg & Lund, *supra* note 17, at 491.

[49] Town of Greece v. Galloway, 572 U.S. 565, 576–80 (2014).

[50] See Martin J. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. Church & St. 573, 585–87 (1982).

[51] Aleksandra Sandstrom, God or the Divine Is Referenced in Every State Constitution, Pew Research Center (Aug. 17, 2017), https://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/.

[52] Edmund W. Sinnott, Meetinghouse & Church in Early New England 23 (1963).

[53] Hutson, *supra* note 47, at 84–94.

C. The Endorsement Test

In rejecting the *Lemon* test as a guide to cases involving already-established symbols that are religiously expressive, the Court—without calling attention to the fact—also rejected the endorsement test. Indeed, the Alito opinion treats the "effects" prong of *Lemon* as essentially congruent to the endorsement test, explaining that the Court "later elaborated that the 'effect[s]' of a challenged action should be assessed by asking whether a 'reasonable observer' would conclude that the action constituted an 'endorsement' of religion," citing Justice O'Connor's classic formulation of the endorsement test from the *Allegheny County* opinion.[54] The logic of the endorsement test is this: "Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[55] Operationally, according to Justice O'Connor, "[t]he effect prong asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval"—what she elsewhere calls the "objective" meaning of the statement, whether intended or not, as evaluated by an "objective observer, acquainted with the text, legislative history, and implementation of the statute."[56]

The *American Legion* Court did not discuss the logic of the endorsement test but dismissed it along with the rest of *Lemon* on the ground that it has not worked in practice. In my opinion, the disutility of the endorsement test is traceable to two flaws in its logic: one psychological and one semiotic. Psychologically, I do not think it is true that endorsements necessarily send a message to outsiders that they are somehow excluded from the political community. The government

[54] Am. Legion, 139 S. Ct. at 2080. This is a mistake. In many religion cases, the effect of the government action is concrete: creating an exception to a generally applicable law, extending (or denying) a financial benefit on a nonneutral basis, coercing a religious practice like school prayer, and so on. It is only in the context of symbols, which by definition are purely symbolic and have no concrete effect, that the endorsement test has any real purchase. The Court's reframing of the effects "prong" of *Lemon* as congruent with endorsement is therefore accurate only in a subset of Establishment Clause cases.

[55] Lynch, 465 U.S. at 688.

[56] Wallace, 472 U.S. at 56 n.42, 76 (O'Connor, J., concurring).

speaks approvingly of many things, and this is not usually thought to stigmatize attachment to things not mentioned. The federal government maintains a spectacular Museum of African American History and Culture in a prominent location on the National Mall, right next to the Washington Monument. The presence of this museum must surely convey a message of affirmation to African Americans, but it would be a mistake to think that it sends any messages that Americans of other races are "outsiders, not full members of the political community." Congress passes hundreds of resolutions every year praising various people, products, activities, and events—some of them religious—which no doubt make persons affiliated with those things feel good, which is why representatives bother to sponsor them. But do these endorsements carry a message of disapproval for everything else? If Congress declares National Pickle Day—November 14, by the way[57]—are olive eaters demoted to second-class citizens? It is possible to endorse any number of beliefs, practices, people, places, or things, without casting aspersions on others.

To make sense, the endorsement test ought to focus not on whether a particular symbol, monument, or practice "endorses" religion, but on whether it conveys disrespect for others. That was the focus of Justice Breyer's concurrence and much of the Alito opinion. As Breyer stated, "No evidence suggests that [those who designed the Bladensburg memorial] sought to disparage or exclude any religious group."[58] He declared that "[t]he case would be different . . . if there were evidence that the organizers had 'deliberately disrespected' members of minority faiths."[59] The majority went out of its way to point out that the monument would not serve its intended role if it had disrespected Jewish soldiers and devoted a page of its opinion to refuting the respondents' "strain[ed]" attempts to connect the Bladensburg cross with anti-Semitism and the Ku Klux Klan.[60] Similarly, the Court (in the plurality part of its opinion) noted that

[57] See National Pickle Day—November 14, NationalDayCalendar.com, https://nationaldaycalendar.com/national-pickle-day-november-14/. I choose this example because in elementary school I happened to be assigned to give a talk on November 14 on a subject of my choice. I discovered that this was National Pickle Day—and that answered the question of what my topic would be.

[58] Am. Legion, 139 S. Ct. at 2091 (Breyer, J., concurring).

[59] *Id.*

[60] *Id.* at 2089–90.

the legislative prayers of the First Congress were "inclusive rather than divisive," and that the practice of congressional prayer ever since "stands out as an example of respect and tolerance for differing views."[61] If we are concerned—as we should be, culturally if not legally—about messages that treat some Americans as outsiders, we should worry not about "endorsements" but about disparagements.

Second is the semiotic problem: how to identify the "meaning" of symbols like the Bladensburg cross. This question has inspired an entire field of study. Justice O'Connor's classic statement of the endorsement test treats the meaning of a symbol as an "objective" fact to be assessed by an omniscient "reasonable observer." This is a misunderstanding: the meaning conveyed by a symbol is utterly and completely a product of perspective. There is no "objective fact" involved. For a familiar example, ask people of different ideological perspectives if the *New York Times* is a liberal newspaper, or if Fox News is fair and balanced. Those who share the *Times*'s general orientation will almost always regard it as fair and balanced; those who dislike Fox will regard it as biased in a right-wing direction. The answer to the question will reveal little about the two media companies, but much about the ideology of the responder. The question of "endorsement" and "disapproval" necessarily will be relative to the subjective preferences of the person making the assessment. Thus, when Justice O'Connor in the first case in which she put forward the endorsement test approved a nativity scene in a municipal holiday display, it was widely derided as the product of a "reasonable Episcopalian" test.

John Locke wrote that "the religion of every prince is orthodox to himself."[62] So also every judge will regard himself as the impeccably reasonable observer of which the endorsement test speaks. Some years ago, I presented a series of controversial fact patterns about religious conflict to a group of about 30 federal judges, along with about half a dozen possible "tests" for what counts as an establishment of religion. I also asked the judges separately to state how they thought each of the fact patterns should be resolved, based on their personal beliefs rather than any legal tests. It turned out

[61] *Id.* at 2088–89.

[62] John Locke, A Letter Concerning Toleration and Other Writings 38 (Mark Goldie ed., Liberty Fund 2010) (1689).

that, for every judge, the "endorsement test" came out the same way as their personal beliefs—the only one of the "tests" with that outcome. The endorsement test is the First Amendment equivalent of the Rorschach test. It is difficult but possible for people to put themselves in the shoes of others and guess whether they think a symbol is an endorsement. But if the question is what the symbol means, objectively, to a reasonable observer, the answer is whatever the particular observer happens to think.

Maybe there is nothing wrong with this. The law is full of subjective tests based on reasonableness; the effect is to judge human conduct against the baseline of community norms. But there is something perverse about incorporating this approach into the Establishment Clause. The point of the Establishment Clause is that there is no community norm—or perhaps that the community norm must be given no legal weight. The endorsement test has the effect of telling the individuals who are outside the mainstream not just that they are outvoted, but that their view is unreasonable—outside the range of reasonable belief. It seems to me that this is more stigmatizing than any symbol.

D. The Kavanaugh Proposal

Justice Kavanaugh, in his first encounter with the Establishment Clause as a justice, went bold. While joining the Alito opinion in its entirety, he was more forthright and insistent in his rejection of the *Lemon* test. Unlike the plurality, though, he is not disillusioned with the ambitious project of finding an alternative "grand unified theory" of the Establishment Clause. The plurality was content with following a "history and tradition" test, which might lead in different directions. Kavanaugh instead distills from the cases "an overarching set of principles":

> If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[63]

[63] Am. Legion, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

He thus embraces a kind of coercion test, but not one that treats coercion as a necessary element in all Establishment Clause claims. Rather—and correctly, I think—he treats coercion as sufficient but not necessary to establish a violation. If the government coerces religious practice, it is unconstitutional. If the challenged government action is not coercive, that does not necessarily make it permissible.

Noncoercive action, according to Kavanaugh, may be sustained if it falls within one of three permissible headings: it is rooted in history and tradition, it is neutral between religion and comparable secular activities, or it is a permissible accommodation. This seems almost right, but it is nothing more than stringing together the holdings of the Court's cases in three of the specific areas of Establishment Clause contention. Why only three? Why not all five of the categories he lists in his opinion, or all six of the categories in the Alito opinion? For example, suppose that the government makes an explicit distinction among religious denominations, as in *Larsen v. Valente*.[64] Does that not affect the constitutional analysis? Or suppose the government interferes with internal church governance, perhaps through application of the anti-discrimination laws, as in *Hosanna-Tabor*.[65] Or it vests governmental power to regulate the lives or property of other people in religious organizations, as in *Grendel's Den*?[66] To be true to the Court's cases, we would have to contrive a five- or six-part "test," with some of the parts conjunctive and some of them disjunctive. That would be rhetorically unwieldy, and it would not provide any more clarification than the Court's cases in these areas already have.

E. Coercion, Standing, and Incorporation

There are three remaining theoretical positions at play in *American Legion*, which the opinion for the Court simply ignored. The American Legion petitioners urged the Court to replace the *Lemon* test with a "coercion test": "that the Establishment Clause is not violated absent government actions that . . . coerce belief in, observance of, or

[64] 456 U.S. 228 (1982).

[65] Hosanna-Tabor, 565 U.S. at 177–81.

[66] Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

financial support for religion."[67] Justice Thomas reiterated his long-held belief that the Establishment Clause should not be incorporated against the states through the Fourteenth Amendment.[68] And Justice Gorsuch took the view that plaintiffs lack standing to bring this sort of claim, where the only alleged injury from government action is a feeling of offense. These appear to be three entirely different sorts of argument: the American Legion argument is based on interpretation of the substantive meaning of the First Amendment; the Thomas argument is based on the scope of application of the First Amendment; and the Gorsuch argument is jurisdictional. Yet all have the same insight at their core.

This is not the occasion for a full-bore interpretation of the Establishment Clause. But let us assume, contrary to the American Legion argument, that the Establishment Clause is, at least in some respects, a structural provision analogous to a separation-of-powers provision; it bars the federal government from making law on a particular topic, namely the establishment of religion. That is not to say that "coercion" is irrelevant to establishment. There is little doubt that, as a historical matter, coercion was at the core of religious establishment. When describing the meaning of the amendment on the floor of the First Congress, Madison, the sponsor of the amendment, stated "that he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law." He also explained that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[69] In his *Memorial and Remonstrance*, which is generally taken to be an authoritative statement of the philosophic basis for the Establishment Clause, Madison began with the principle that religion "can be directed only by reason and conviction, not by force or violence."[70] The notion that coercion is relevant only to free exercise and not to

[67] Brief for the American Legion Petitioners at 23, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (No. 17-1717).

[68] Am. Legion, 139 S. Ct. at 2094 (Thomas, J., concurring).

[69] 1 Annals of Congress 757–59, Aug. 15, 1789 (J. Gales ed., 1834).

[70] James Madison, Memorial and Remonstrance against Religious Assessments, *supra* note 17, at 43.

establishment, found in *Abington* and *Engel*, was a baseless fabrication.[71] But that does not necessarily mean that formal legal coercion is all that establishments of religion were about. For a relatively uncontroversial example, official discrimination in favor of one religious group and against another—denominational discrimination—is a species of establishment even if this has no discernible coercive effect. So let us take as established that there are some possible violations of the Establishment Clause that would not legally coerce any individual to practice or support religion against their will; the core of the clause protects personal liberty in much the same way as any other part of the First Amendment.[72]

How does this relate to incorporation and standing?

Incorporation: Although there are many differing verbal formulas, as well as disagreement over whether incorporation was accomplished through the Privileges or Immunities Clause or the Due Process Clause, the bottom line is that all the fundamental personal liberties in the Bill of Rights apply equally to the states.[73] Under that principle, at least those applications of the Establishment Clause that protect personal liberty, which includes all forms of coercion and discrimination, would seem to apply.

Standing: Plaintiffs have standing to sue in federal court to challenge government action that inflicts on them an injury in fact that is capable of judicial redress. Certainly, government action that coerces religious observance, or that discriminates on the basis of religious belief or status, qualifies as an injury in fact, and there is no reason to think such action would not be redressible by injunction or damages. Justice Gorsuch, joined by Justice Thomas, makes a powerful argument that mere psychological injury, such as a feeling

[71] See Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).

[72] The only theory under which the Establishment Clause does not extend even to coercive actions is that it is solely a protection for federalism: a guarantee that Congress will not pass laws meddling with state establishments, one way or the other. Even if that were the sole purpose at the time of adoption of the Bill of Rights, which is questionable, it was not the meaning by the time of the Fourteenth Amendment. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085 (1995).

[73] See generally McDonald v. City of Chicago, 561 U.S. 742 (2010); *id.* at 805 (Thomas, J., concurring). See generally Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986).

of offense, does not qualify under ordinary principles of standing jurisprudence.[74] The analogies to equal protection and separation-of-powers cases are persuasive. The Equal Protection Clause prohibits invidious discrimination by state action, but it has never been held to allow a plaintiff to challenge state action—such as flying a Confederate flag—that conveys a message of racial subordination. It seems strange that an atheist would have standing to challenge the flying of a Confederate flag on the ground that it contains a cross, but an African American would not have standing to challenge the same flag on the ground that it symbolizes slavery and Jim Crow. In separation-of-powers cases, individuals have standing to challenge infractions only if they suffer concrete injury as a result. Even if the Establishment Clause is in part a structural provision, as some scholars persuasively argue,[75] no one would have standing to sue to enforce them, absent particularized injury. It would seem to follow that only persons who have suffered coercion or discrimination, or some other nonpsychological injury, under the Establishment Clause would have standing to sue. The Court offers no response, even though courts have an obligation in every case to ascertain the basis of their jurisdiction.

The three arguments are thus based on precisely the same principle and logically should rise or fall together. If offense does not count as a legally cognizable harm, plaintiffs lack the standing to sue, the clause does not incorporate in that respect, and they have no substantive cause of action under the Establishment Clause.

All three lines of argument have powerful support, even if they are not ultimately correct. One might think they deserve an answer. Why did Justice Alito choose to ignore them? My guess is that he

[74] Am. Legion, 139 S. Ct. at 2098 (Thomas, J., concurring).

[75] See Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (1998). In more recent writing, Esbeck has defended what he calls "reduced rigor" in the rules for standing under the Establishment Clause on the ground that "the Court has long regarded the Establishment Clause as structural in nature with the task not of vindicating individual rights, but of keeping in proper order these two centers of authority we call church and state." Carl H. Esbeck, The World War I Memorial Cross Case: U.S. Supreme Court Takes a New Approach with the Establishment Clause (Aug. 13, 2019), Univ. of Mo. Sch. of Law Legal Studies Research Paper No. 2019-15. The premise is true, but the conclusion does not follow. The separation of powers provisions of the Constitution likewise are "structural in nature," but plaintiffs have standing to sue only when the violation of separation of powers affects their individual rights.

is not certain that the arguments are wrong, or that a majority of the Court would conclude they are wrong if forced to confront the issue. But any of the three arguments, if accepted, would explode the narrow, clear, moderate, largely consensual rationale on which Alito's majority-in-part, plurality-in-part opinion is based. At best, he would lose Justices Kagan and Breyer, and turn the case into yet another divisive 5-4 shouting match. At worst, the Court would fracture on various aspects of the three arguments, and there would be no clear resolution. Thus, I see the Court's decision not to grapple with the coercion argument in any of its three guises—substantive law, incorporation theory, or jurisdiction—as necessary to its considerable virtues of clarity, moderation, and consensus, rather than as any indication that the theoretical positions were found wanting.

Conclusion

Justice Alito's opinion in the *American Legion* case was a considerable achievement. By framing the question narrowly and not attempting to solve all the nation's Establishment Clause problems in a single opinion, he brought clarity and moderation to a highly charged subset of Establishment Clause cases that previously led to angry divisions, fractured Courts, and unpredictable results. He gained the vote of one liberal Justice, Breyer, on all points, and another, Kagan, on most—and even when she disagreed with two portions of the opinion, she had nice words to say about them. That is highly unusual. The Court also put to an end the strange and disruptive situation in which the lower courts were governed by one "test" for Establishment Clause violations, while the Supreme Court itself regularly ignored or decided to disregard that "test." All this was accomplished in an opinion that exudes a measured, calm reasonableness, despite the contentious nature of its subject matter.

This achievement was accomplished by ignoring serious and substantial theoretical arguments that would have pushed the judgment in a more radical direction. It was worth that price. Good work, Justice Alito.