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The Effect of Town of Greece v. Galloway on the Use and Display of Religious Symbols on Public Property

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The interpretation of the Establishment Clause by the Court in *Galloway v. Town of Greece*[1] more readily allows for governments to maintain religious symbols on public property.[2] The Court's holding in *Town of Greece* did so by loosening the restrictions on government "endorsement" and as such, has paved the way for a broader showing, use, and maintenance of religious symbols by governmental entities, without regard to the locale of the symbols. Though *Town of Greece* did not involve religious symbols, the Court's analysis of the claim set a path for the Court to follow in *American Legion v. American Humanist Association*[3] and ultimately led to this broader acceptance of religious symbols.

Section I will discuss the history and case law of legislative prayer. Section II will discuss the history of religious symbols maintained by government entities. Section III will discuss the effect *Town of Greece* had on the Court's most recent decision in *American Legion*. Section IV will explore the intricacies of the new interpretations of the Establishment Clause and examine whether – through *Town of Greece* and *American Legion* – the Court has paved the way for a broader showing, use, and maintenance of religious symbols by governmental agencies.

I. History of Legislative Prayer

Government and religion have long stood as the two separate pillars of our nation. While separate, there have been times in which the two intertwine. The most obvious and continuous

[1] *Town of Greece v. Galloway*, 572 U.S. 565 (2014).
[2] U.S. CONST. amend. I, § 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").
[3] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

example is prayer in the beginning of a legislative session.[4] In *Marsh v. Chambers* this practice was challenged by a member of the legislature, claiming the practice violated the Establishment Clause of the First Amendment.[5] The practice in Nebraska was to open each session with a prayer performed by a chaplain, who was paid out of public funds.[6] The district court denied the motion for dismissal on the grounds of legislative immunity, but upheld the practice of the prayer, so long as the chaplain was not paid via public funds.[7]

The appellate court applied the three-part test which was formulated in *Lemon v. Kurtzman*, finding the practice to violate all three of the prongs.[8] The court found that by choosing the same chaplain for over sixteen years, the legislature's purpose was to promote the religious sect the chaplain was a part of.[9] Even if the purpose of the practice was in fact not to promote the chaplains particular sect, the primary effect of choosing the same chaplain for over sixteen years was promoting his religion.[10] As to the third prong, the appellate court found that the payments made to the chaplain constituted entanglement under the Establishment Clause, and thus enjoined the practice entirely.[11]

The Supreme Court reversed the decision. "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[12] Prayer has coexisted with disestablishment and religious freedom since colonial times.[13] Courts at all levels, including the Supreme Court, begin their sessions with a speech

[4] *Marsh v. Chambers*, 463 U.S. 783 at 784 (1983).
[5] *Id.* at 785.
[6] *Id.* at 784-85.
[7] *Id.* at 785.
[8] *Id.* at 786 (*citing Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).
[9] *Marsh*, 463 U.S. at 786.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

which concludes, "God save the United States and this Honorable Court."[14] While no prayers were offered at the constitutional convention, the First Congress quickly elected its first chaplain, and a statute was formulated to pay the chaplains as early as September 1789.[15] Three days after the statute to pay chaplains was passed, the Bill of Rights was completed.[16] "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayer as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."[17]

Historical practice is not enough alone to support the practice today, but in *Marsh* the historical evidence sheds light on the intentions of the draftsmen and how they thought the Establishment Clause should apply.[18] One does not have a protected right in violating the constitution by long use, "[y]et an unbroken practice . . . is not something to be lightly cast aside."[19] With an uninterrupted history of more than 200 years, it is clear the practice of opening legislative sessions with a prayer has become intertwined within the "fabric of our society."[20] With the decision in *Marsh*, the court set a precedent in which invoking "divine guidance" upon a group entrusted to make the laws is not considered establishment of religion, but "simply a tolerable acknowledgement" of the beliefs widely held as "[we] are a religious people who[] . . . presuppose a Supreme Being."[21]

Over thirty years later, the Supreme Court relied heavily on the *Marsh* decision and the historical continuity of historical prayer in deciding *Town of Greece*.[22] The town of Greece, New

[14] *Marsh*, 463 U.S. at 786.
[15] *Id.* at 787-88.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 790.
[19] *Marsh*, 463 U.S. at 790.
[20] *Id.* at 792 (*quoting Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).
[21] *Id.*
[22] *Town of Greece v. Galloway*, 572 U.S. 565 at 570 (2014).

York, had a practice of beginning the monthly board meetings with a moment of silence, but in 1999, the new town supervisor, Mr. Auberger, installed a prayer practice replicated from his time in county legislation.[23] In Greece, the invocation would take place following roll call and the Pledge of Allegiance, after which, the speaker would be awarded a plaque for serving as "chaplain for the month."[24]

The speakers at these meetings were unpaid volunteers, and would be selected by a board member calling all congregations in the town until one agreed, eventually compiling a list of those who had agreed to return for a future session.[25] While a majority of the congregations in town were Christian – and all participating speakers as well – the town had a policy not to exclude or deny an interested speaker their opportunity.[26] Invocations given at the meetings were not reviewed and most included a mixture of civic and religious themes while some were heavily religious. A pair of respondents attended meetings and exclaimed to several members of the board "that she found the prayers 'offensive,' . . . and an affront to a 'diverse community.'"[27]

The town responded by inviting a Jewish layman, the chairman of the local Baha'i Temple to deliver prayers, as well as granting the request of a Wiccan Priestess.[28] The district court found that there was no impermissible preference for any particular religion, reasoning that the high frequency of Christian speakers represented the population of the town, and there is no requirement for the town to seek out clergy from congregations outside its own borders.[29]

[23] *Town of Greece*, 572 U.S. at 570.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 571.
[27] *Id.* at 572.
[28] *Town of Greece*, 572 U.S. at 572.
[29] *Id.* at 573.

The Appellate Court, on the other hand, found some aspects of the program "conveyed the message that Greece was endorsing Christianity."[30] Further, the Appellate Court found that the phrase "let us pray" and other invitations to join the clergy in the prayer "placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating . . . or appearing to show disrespect for the invocation."[31] The Appellate Court found the practice unconstitutional because of the "interaction of facts . . . rather than any single element."[32]

The Supreme Court was to decide (1) if *Marsh* permitted prayer that sectarian language or themes, and (2) whether the setting and conduct of the invocations coerce people into feigning participation.[33]

In the opinion delivered by Justice Kennedy, the Supreme Court held that the practice used in the town did not violate the constitution.[34] The prospect of generic and nonsectarian invocations is irreconcilable with the facts, holding, and reasoning of *Marsh*, which has no suggestion that the constitutionality of this practice is based on the neutrality of the invocation itself.[35] The Court felt a nonsectarian requirement for all invocations before legislative sessions would force legislatures to act as supervisors and censors – a far greater degree of involvement than the current practice of allowing the speaker to write their own speech without legislative oversight and criticism.[36] When prayer is invited to public space by government, it must permit the speaker to "address his or her own God or gods as conscience dictates, unfettered by what an

[30] *Town of Greece*, 572 U.S. at 574.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 577.
[34] *Id.* at 581.
[35] *Id.* at 580.
[36] *Town of Greece*, 572 U.S. at 581.

administrator or judge considers to be nonsectarian."[37] In spite of the large majority of Christian speakers, the town of Greece was held to not have contravened the Establishment Clause because the board made reasonable efforts to contact all congregations within the town limits and represented [publicly] a welcoming nature towards any person who wished to speak – regardless of their faith [or lack thereof].[38] When a single congregation or faith amounts to a large majority of the group's speakers, it could show bias, but is presumed to be constitutional so long as the town retains a nondiscriminatory speaker selection process.[39]

While legislative prayer was upheld in *Marsh*, the respondents in *Town of Greece*, attempting to distinguish *Marsh* and *Town of Greece*, argue that a town meeting, which is always open to the public, is different from a legislative meeting in which people are entrusted to establish laws of the people. The key difference is the regular appearance of citizens in the town meetings – many of whom will be hoping to get favorable votes that night, and thus may feel pressured to conform in front of the members of the board.[40] Through the First Amendment's religious clauses it is essential that the government "not coerce its citizens 'to support or participate in any religion or its exercise.'"[41] The Court denied this argument, finding no evidence of state compulsion in participation of the prayer, but maintaining that coercion "remains a fact-sensitive" inquiry with consideration on the setting and audience of the prayer.[42]

The conduct practiced in *Town of Greece* is also supported by the long-standing history of our nation which has included prayer before legislation since the First Congress; however the Court must still consider "both the setting in which the prayer arises and audience to whom it is

[37] *Town of Greece*, 572 U.S. at 582.
[38] *Id.* at 585.
[39] *Id.* at 585-86.
[40] *Id.*
[41] *Id. See also County of Allegheny v. ACLU*, 492 U.S. 573, at 659 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (*quoting Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).
[42] *Town of Greece*, 572 U.S. at 587.

directed."[43] For this matter, the Court had to evaluate the prayer opportunity against the backdrop of the historical practice. This practice has lasted throughout our nation's history, becoming "part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance" or the announcement of "God save the United States and this honorable Court" prior to the beginning of each court session.[44]

As for the audience, while members of public may hear it, the Court – beginning with the *Marsh* decision – have held that prayer itself is "an internal act" intended for the ears of the lawmakers to set their minds for the higher purpose and ease of governance, "rather than an effort to promote the particular religious values.[45] While the invocations were given, board members stood and bowed their heads, and some even made the sign of the cross; however there was never an attempt by the board members to solicit any member of the audience to participate or make similar gestures.[46] On a few occasions, regular citizens were asked to stand during the invocation, but these requests would come from the guest ministers who most likely performed their invocations in this manner on an assumption of inclusiveness and not coercion.[47]

Under the totality of the facts, it becomes clear the prayer at the beginning of these sessions is not a constitutional violation. The prayer was intended for the legislative law makers in the audience and not the members of the public who happened to be attending the meeting, which is well within the historical precedent set by the First Congress and the Supreme Court's decisions starting with *Marsh*. The prayer comes at a time when political moves are not being made, but during the ceremonial portion.[48]

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[43] *Id.*
[44] *Id. See Lynch v. Donnelly*, 465 U.S. 668, 693 (1984).
[45] *Town of Greece*, 572 U.S. at 587.
[46] *Id.* at 588.
[47] *Id.*
[48] *Id.* at 591

II. Religious Symbols in a Public Setting

While religious prayer was held to be outside the purview of the *Lemon* test, the Court had no issue applying the test to the new string of cases aimed at religious symbols. Without a precise and formulaic test to determine the validity of the statutes in question, the Court focused on the "three main evils" the Establishment Clause was intended to protect against – "sponsorship, financial support, and an active involvement of the sovereign in religious activity" – and developed a three-pronged test.[49] This three-pronged test analyzes whether (1) the statute has a secular legislative purpose, (2) the primary effect of the statute "neither advances nor inhibits religion," and (3) the statutes fosters "an excessive government entanglement with religion."[50]

In *Lynch v. Donnelly,* residents of Pawtucket, Rhode Island, brought claims against the city including a creche in the annual holiday display – an aspect of the display for more than forty years.[51] The display in Pawtucket was held annually during the winter holiday season and was situated inside a park near the "heart of the shopping district."[52] The display included "a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such figures as a clown, elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and the creche at issue here."[53] The creche featured the traditional figures, "including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals."[54]

[49] *Id.*
[50] *Lemon I,* 403 U.S. at 612.
[51] *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).
[52] *Id.*
[53] *Lynch*, 465 U.S. at 671.
[54] *Id.*

The District Court held the inclusion of the creche in the display violates the Establishment Clause because the city's purpose is attempting to "endorse and promulgate religious beliefs" and further had the effect of "affiliating the city with the Christian beliefs that the creche represented."[55] The statue effectively gave an "appearance of official sponsorship" to the Christian religion and confers upon Christians "more than a remote and incidental benefit" on members of the sect.[56]

The Supreme Court's majority utilized the *Lemon* test to analyze the governmental action in the town but further maintained its hesitance in committing to the *Lemon* test, or any other single test, in this sensitive area.[57] Under the three-pronged *Lemon* test, the Court found that the city did not violate the Establishment Clause.

The Court identified that while the creche is religiously based, when viewed in the context of the Christmas Holiday season, the creche depicts the traditional origins of the holiday that are widely recognized.[58] Analyzing the second prong, the Court found that such a display may advance a religion in some ways, but held that such advancements in this matter were "indirect, remote, and incidental," garnishing no more advancement than Congressional recognition of the Holiday itself, "Christ's Mass" or exhibition of religious paintings in government sponsored museums.[59] Finally, the Court found there to be no administrative entanglement – there was no evidence of contact between church and state officials during design or construction of the creche, no expenditures for maintenance of the creche, and due to the low value (now $200) of the creche, any tangible material contributed by the state is *de minimis*.[60]

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[55] *Lynch*, 465 U.S. at 671.
[56] *Id.* at 672.
[57] *Id.* at 679.
[58] *Id.*
[59] *Id.* at 683.
[60] *Id.*

With the Court's unwillingness to commit to particular test, Justice O'Connor wrote her own concurrence attempting to establish a singularized test for Establishment Clause cases. Justice O'Connor focuses on two main ways government can "run afoul" of the Establishment Clause, either through excessive entanglement or by way of government endorsement or disproval of religion.[61] Justice O'Connor recognizes the *Lemon* test, but reiterates the lack of clarity derived from the analysis of the test, failing to see how the three-prongs tie into the principles enshrined in the Establishment Clause, and urges the Court to utilize the Endorsement Test and focus on the intended message was and what the actual message perceived was – the purpose and effect prongs of *Lemon*.[62]

While *Lemon* requires a secular purpose, that secular purpose must not be insufficient and as such dominated by the religious purposes of the government action.[63] Further, if a statute violates any prong of the *Lemon* test, "it must be struck down under the Establishment Clause."[64] When privately funded postings of the Ten Commandments appeared in every public school class room in Kentucky, the Court found "no secular legislative purpose", thus failing the first prong of the *Lemon* test and making the practice unconstitutional.[65] While a school might have a secular purpose for posting Ten Commandment's in classrooms – teaching a moral code, introduction to a legal system – the Court was not persuaded by these arguments holding that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[66] Under O'Connor's Endorsement Test, the Court would analyze whether the government act was

[61] *Lynch*, 465 U.S. at 687-88 (O'Conner, J. concurring in judgment).
[62] *Id.*
[63] *Id.*
[64] *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).
[65] *Id.* at 41.
[66] *Id.*

intended to convey a message of endorsement and whether such endorsement "make[s] religion relevant, in reality or public perception, to status in the political community."[67]

Following Justice O'Connor's analysis, the governmental action in this case would not violate the Establishment Clause. Under the factors O'Connor proposed, the purpose of the creche was not to promote religion, but a "celebration of the public holiday through its traditional symbols" and further states the "celebration of public holidays, no matter the religious aspects, is a legitimate secular purpose."[68] Justice O'Connor warns that analysis on the effect of an act should not be judged on whether or not the act promotes or inhibits religion, but whether the effect makes religion relevant in the political community.

O'Connor finds that while the creche does have religious significance, it is offset by the entirety of the display within which it is displayed.[69] Finding no clear intent to promote religion on account of the government action and that the effect of the creche did not make religion relevant in political status, the city of Pawtucket did not violate the Establishment Clause by endorsing Christian beliefs represented by the creche included in its Christmas display.[70]

Five years later, the Court addressed another religious symbol display in *County of Allegheny v. ACLU*.[71] When the county of Allegheny placed a creche inside the Courthouse atop the Grand Staircase and an eighteen-foot Chanukah menorah outside the building, next to the forty-five-foot Christmas tree, the Court decided to uphold one and invalidate the other. The creche in this case was placed atop the grand staircase, the "main," "most beautiful," and "most public" area of the courthouse, and is used as the background during the annual Christmas-carol program.[72] The

[67] *Lynch*, 465 U.S. at 691-92.
[68] *Id.*
[69] *Lynch*, 465 U.S. at 692 (O'Conner, J. concurring in judgment).
[70] *Id.*
[71] *County of Allegheny v. ACLU*, 492 U.S. 573, 579-81 (1989).
[72] *Id.* at 579-81.

menorah, on the other hand, was placed a few blocks away from the courthouse, in a public display next to the Christmas tree.[73] The menorah and Christmas tree were also accompanied by a sign that bore the Mayor's name and an inscription that read "Salute to Liberty."[74] The Court discussed its' distaste for the *Lynch* opinion because it fails to provide guidance for the analysis of future cases, and praises Justice O'Connor's concurrence for providing "a sound analytical framework for evaluating governmental use of religious symbols."[75]

After further analyzing the *Lynch* opinion, the Court decided to once again stray from *Lemon* and use Justice O'Connor's framework of the Endorsement Test.[76] While recognizing both the religious and secular purposes behind the inclusion of the creche, following the Court's holding in *Lynch*, the effect of the creche is subjective and is influenced by the surrounding elements, thus a creche placed near a church will be more religious than if placed in a park.[77]

While *Lynch* and the present case both involved the display of a creche, the display in the Allegheny courthouse is different because it lacks other symbols and messages to discount the religious purposes of the creche.[78] With no other symbols around the creche, the Court also declined to accept the accompanying floral decoration as more than a frame used to draw attention to the message within – and the message within that frame is that of the creche.[79] The Christmas carol program also does not offset the religious message for two reasons; first, the lack of time the program was around the creche, and second because the carols performed are mostly religious in nature.[80] Finally, because of the location, in the "most public" area of the courthouse,

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[73] *Id.* at 581.
[74] *Id.* at 582.
[75] *Id.* at 594-95.
[76] *Id.* at 597.
[77] *Lynch*, 465 U.S. at 598.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 599 (the carol program is only around roughly three weeks per year; the religious nature of the carols will only further the religious message of the creche, not counter it by any means).

a viewer of the display could not reasonably think the display was erected in such a place "without the support and approval of the government."[81] Because of the county's failure to include some nonreligious method with their display of the creche, the display was enjoined for "endorsing a patently Christian Message."[82]

The placement of the menorah is upheld even though it is an overtly religious symbol. The menorah "serves to commemorate the miracle of the oil" that burned for eight days and nights.[83] However, like the Christmas tree, the menorah is much more than a religious symbol, and is the primary visual symbol for a holiday with both religious and secular meaning.[84] The close proximity between the menorah and Christmas tree does not end the inquiry – if both are celebrated religiously, by the city, they will both violate the Establishment Clause.[85] If both Chanukah and Christmas are celebrated secularly then there would be no violation, bringing the court to determine whether the tree, menorah, and sign – all together – have the effect of endorsing both Christian and Jewish faiths, or simply recognizes their prominence in the holiday season and the secular significance of each to the people of this country.[86]

When analyzing the menorah, we must look to its surroundings again. Here, the menorah (strictly religious) was placed in close proximity to the Christmas Tree (secular symbol of Christmas), and since the tree is larger and more central to the display, the proper analysis of the menorah is in light of the tree, and not the tree in light of the menorah.[87] "In the shadow of the tree, menorah is readily understood" to be a reminder that Christmas is not the only traditional

[81] *Id.* at 599-600.
[82] *Id.* at 601.
[83] *Lynch*, 465 U.S. at 613.
[84] *Id.* at 614.
[85] *Id.*
[86] *Id.* at 616.
[87] *Id.* at 616-17.

way to celebrate the winter-holiday season.[88] As such, a reasonable non-adherent could not view the menorah and Christmas tree as a dual endorsement of Christian and Jewish beliefs.[89]

The Court was tasked with analyzing two separate Ten Commandment displays in *McCreary County v. ACLU*. When two Kentucky counties posted versions of the Ten Commandments on the walls of their courthouses, the ACLU filed charges alleging the postings violated the Establishment Clause leading to multiple changes in the makeup of the displays, which were in plain view of any citizen who used either building.[90] The displays each involved the copies of the Ten Commandments and various other documents with religious themes or an excerpted religious element.[91] The district courts' analysis followed the three-pronged *Lemon* test, finding the displays to violate the Establishment Clause.[92]

The displays failed the first prong because of the "distinctly religious" nature of the original display – featuring just the King James Version of the Ten Commandments – which "lacked any secular purpose," while also finding the second iteration to violate the clause due to a lack of secular purpose as the counties 'revised' displays were "narrowly tailored" to incorporate only Christian-referencing foundational documents.[93] A primary injunction was placed on the display; leading to a third edition of the display, in which the counties argued they were attempting to show history and educate their citizens, but the court enjoined the third edition of the displays in each county.[94]

The Supreme Court once again returned to the *Lemon* test and affirmed, referencing *Stone v. Graham*, and identified that the purpose prong of the *Lemon* test is important to the analysis but

[88] *Id.*
[89] *Lynch*, 465 U.S. at 619-20.
[90] *McCreary County v. ACLU*, 545 U.S. 844, 851-52 (2005).
[91] *Id.* at 853-54.
[92] *Id.*
[93] *Id.* at 854-55
[94] *Id.* at 856-67

noted that the secular purpose requirement is rarely a determinative factor.[95] The county argued that "true 'purpose' was unknowable," and a search for such was a procedural shield for courts to "selectively and unpredictably" find evidence of intent; and as such, the counties asked the Court to abandon *Lemon*'s purpose test.[96] The court did not find the argument persuasive, highlighting numerous examples of courts "examination of purpose."[97]

The Court also denied the counties' arguments which suggested only the final iteration of the display be considered in the analysis, finding no case law in support of their position and precedent that "sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose'."[98] Ultimately, the Court found a "predominately religious purpose" behind the counties' evolution of the display while also upholding the preliminary injunction, determining the district court did not abuse its discretion.[99]

The Court then heard and decided *Van Orden v. Perry*, this time upholding the presentation of the Ten Commandments on the grounds of the Texas State Capital.[100] The grounds encompass twenty-two acres and house "seventeen monuments and twenty-one historical markers commemorating the 'people, ideals, and events that compose Texan history.'"[101] The monolith in question prominently displays the Ten Commandments, but also consists of an eagle with the American Flag, "an eye inside of a pyramid," small tablets with possibly ancient text, "two Stars of David, and the superimposed Greek letters Chi and Rho, which represent Christ."[102] The State

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[95] *Id.* at 858-59. *See generally*; *Stone v. Graham,* 449 U.S. 39 (1980).
[96] *McCreary,* 465 U.S. at 861
[97] *Id.* The purpose is "staple of statutory interpretation." *See General Dynamics Land Systems, Inc. v.Cline*, 540 U.S. 581 (2004). And the examination of governmental purpose is a key element in constitutional doctrine. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).
[98] *McCreary*, 465 U.S. at 866; *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000).
[99] *Id.* at 881.
[100] *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).
[101] *Id.* (*quoting* Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001)).
[102] *Van Orden*, 545 U.S. at 681.

accepted the monument from the Fraternal Order of Eagles of Texas and selected the placement "based on the recommendation of the state organization responsible for maintaining Capitol grounds.[103]

When Thomas Van Orden brought claim that the monument violated the Establishment Clause, the District Court was not convinced. Finding "the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency" and that a reasonable viewer "would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion."[104] Neither the Court of Appeals, nor the Supreme Court could be persuaded to reverse the District Courts' decision.[105]

The Supreme Court did not follow the *Lemon* test and focused on "the nature of the monument and by our Nation's history."[106] In this light, the Court found the display to be constitutional, noting the commonality of similar displays across the country as well as the Supreme Court itself.[107] "Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital."[108] While the Court acknowledged the religious nature of the Ten Commandments, it also recognized an "undeniable historical meaning" behind them due to Moses' position as a lawgiver, and noted that containing religious content or promoting a message parallel to religious ideals does not *per se* violate the Establishment Clause.[109] The grounds of the Texas State Capitol have been decorated with monuments which represent the

[103] *Id.* at 682.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 686.
[107] *Van Orden*, 545 U.S. at 688 (stating that Moses and the Ten Commandments are located inside and outside of courtroom as well as outside of the building).
[108] *Id.* at 689.
[109] *Id.* at 690. *See Lynch v. Donnelly*, 465 U.S., at 680, 687; *Marsh v. Chambers*, 463 U.S., at 792.

several strands in the State's political and legal history – giving the Ten Commandments monument the dual purpose of both religion and government.[110]

Justice Breyer focused his analysis on the context of the display in an attempt to understand the message it conveys.[111] Justice Breyer held that the religious message of the Ten Commandments was outweighed by the secular message of the monument.[112] Justice Breyer also considered the monument's placement which suggested nothing sacred as it was one of seventeen monuments and twenty-one historical markers located on the twenty-two acre property.[113] Finally, Justice Breyer was swayed by the forty year history of the monument before this single complaint was filed.[114] Justice Breyer could not settle on a single test to use, and instead considered the "basic principles of the First Amendments Religion Clauses" where upholding the practice may be an endorsement, but a holding against the display could lead the Court to be hostile to religion in the future.[115]

III. Was *American Legion* Only Possible Because of *Town of Greece v. Galloway*?

After these four symbol cases – *Lynch*, *Allegheny*, *McCreary*, and *Van Orden* – the Court then decided *Town of Greece*. During the analysis, the Court did not use *Lemon*, nor did it use Justice O'Connor's Endorsement Test, but instead relied on the historical tradition precedent set in *Marsh*. Effectively, *Town of Greece* enables religious leaders to give prayers so long as the selection process is fair and open to anyone who may desire to do so.

[110] *Id.* at 691-92.
[111] *Id.* at 701 (Breyer, J. concurring in judgment).
[112] *Van Orden*, 545 U.S. at 701.
[113] *Id.* at 702.
[114] *Id.*
[115] *Id.* at 704.

Four years after *Town of Greece* was decided, the Court granted certiorari in *American Legion v. American Humanist Association.*[116] The Bladensburg Peace Cross stood tribute to local soldiers who fell fighting for The United States of America during World War I.[117] Being erected in 1925, the monument cross stood for eighty-nine years before a lawsuit was filed, "claiming that they are offended by the sight of the memorial on public land" and the expenditure of public funds on public land violates the Establishment Clause.[118] The project was initiated in 1918 buy the residents of Prince George's County, Maryland, and the committee selected the plain Latin Cross had become an unofficial symbol of war.[119] Safe on this side of the Atlantic, Americans were bombarded with images of white-crosses lining war graves, giving the committee the basis for their decision.[120]

The monument was to stand along the National Defense Highway, which stretched from Washington, D.C. to. Annapolis, Maryland, but when the committee ran out of funding, the project was taken on by the local American Legion, which finished the monument – complete with their logo and a plaque naming the fallen soldiers.[121]

The lawsuit was based on the historical significance of a cross as a Christian symbol as early as the fourth century and remains so till this day.[122] As time has passed, the cross has attained numerous secular meanings.[123]

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[116] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).
[117] *Id.* at 2074.
[118] *Am. Legion*, 139 S. Ct. at 2074.
[119] *Id.* at 2068.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 2074.
[123] *Am. Legion*, 139 S. Ct. at 2074 (numerous secular organizations utilize the cross; Blue Cross Blue Shield, the Bayer Group, some Johnson & Johnson products, the International Committee of the Red Cross (ICRC)).

The images from the war, rows and rows of graves marked with white crosses helped to turn the religious cross into a "central symbol of the conflict."[124] The idea of the crosses marking fallen soldiers had been solidified in the minds of Americans so deeply that a War Department plan to replace them with marble slabs was met with public outcry.[125] "These wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed . . . and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with theses World War Graves."[126] Along with the American Legion logo and names of the forty-nine fallen local soldiers, the cross was inscribed "Valor," "Endurance," "Courage," and "Devotion" further adding to the secular message of the monument.[127] As time has passed, the "Cross has served as a site of patriotic events to honor veterans of World War I and other days of importance – Veterans Day, September 11, and Independence Day – and even began a monument locale for future wars.[128]

After eighty-seven years, the American Humanist Association (AHA) filed their complaint seeking "declaratory and injunctive relief requiring 'removal or demolition of the Cross, or removal of the arms'" to form a non-religious obelisk.[129] The district court found the Cross satisfied both the three-pronged *Lemon* test and Justice Breyer's analysis in *Van Orden*. Under the Lemon test, the district court found the Cross to have a clearly defined secular purpose in commemorating the fallen soldiers of World War I, while also finding a "reasonable observer aware of the Cross' history . . . would not view the Monument as having the effect of impermissibly endorsing religion."[130] For the third prong, the court held that maintenance of the

[124] *Id.*
[125] *Id.* at 2076
[126] *Id.*
[127] *Am. Legion*, 139 S. Ct. at 2077.
[128] *Id.* at 2078.
[129] *Id.*
[130] *Id.* at 2079.

Cross did not rise to a level that would create the "continued and repeated government involvement" to constitute excessive entanglement.[131]

The appellate court found the cross to fail the second prong of the *Lemon* test because the reasonable observers would view the Committee's maintenance and ownership as an endorsement of Christianity.[132] While acknowledging many secular meanings associated with the Cross, the appellate court felt the size of the monument overshadowed those secular meanings because the placement made it impractical for passers-by to read or examine the intricacies of the Monument.[133] After *Marsh*, the argument was made that the monument should be allowed simply for standing for ninety years, a long continuous practice, but the Fourth Circuit rejected the argument as "too simplistic."[134]

The Supreme Court formulated serious doubts in the near thirty year-old test developed in *Lemon*, noting numerous examples of the Court declining to apply it or ignoring it outright.[135] This developing pattern made it apparent the *Lemon* test was not sufficient to handle the challenge of Establishment Clause cases, and led to the Court abandoning the *Lemon* test (in this case) for four reasons: (1) the cases often concern monuments, symbols and practices that were first established long ago, making it increasingly difficult to discern the original purpose and intent, and allowing Justices to draw their own interpretations; (2) as time passes, the purposes associated can multiply and change – such is the case with the Ten Commandments which are

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[131] *Id*.
[132] *Id*.
[133] *Am. Legion*, 139 S. Ct. at 2079.
[134] *Id*.
[135] *Id.* at. 2080 (See *Zorbest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Board of Ed. Of Kiryas Joel Village School Dist. V. Grumet*, 512 U.S. 687 (1994); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. V. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

heavily religious with Jewish and Christian believers, but also have a secular meaning as the basis of most modern legal systems; (3) the message conveyed by the monument or symbol may change, like the Statue of Liberty which was "a monument to the solidarity of friendship" between the U.S. and France, but is now a "beacon welcoming immigrants" to the country; and (4) when a symbol with religious ties has stood for so long, it may appear as an attack on that religion to remove it.[136]

Following World War I, the Cross became a worldwide symbol for fallen soldiers, and the United States Military adopted them for service awards for Army and Navy personnel.[137] Today, it is impossible to detect the true reasons behind the choice of the cross, whether it was religious or simply a continuation of the imagery that the people had been subjected too from the war in Europe.[138] While contesting the Cross as it sits now, the AHA concedes that there are instances in which a cross in unobjectionable, but they would have all cross based designs located in or near cemeteries such that passers-by could easily make the connection.[139] However, the court did not buy that argument. The court felt a memorial need not be placed in or near a cemetery for such a connection to be established – many soldiers bodies' were not recovered and never brought home and these monuments take place of gravesites for family members of fallen warriors.[140] Ultimately, the Court also considered whether the removal or reconfiguration of the Monument, after standing for so long, would be seen as a hostile action against the religion – the type of act prohibited by the Establishment Clause.[141] The Supreme Court agreed with the appellate court that a long standing tradition is not enough to warrant a constitutional violation,

[136] *Am. Legion*, 139 S. Ct. at 2082-84.
[137] *Id.* at 2085.
[138] *Id.*
[139] *Id.* at 2086.
[140] *Id.*
[141] *Id.* at 2086-87.

but must be viewed through a historical lens.[142] Important to the Court was the inclusion of individual names of fallen warriors, for fear of incompleteness without the names, and feel it natural and appropriate for survivors to honor fallen family members with symbols that signify their life.[143] While historically a Christian symbol, we should not be blind to the symbolic resting place of which the Bladensburg Cross had come to represent, and as such, the cross does not violate the Constitution.[144]

Factually distinct from *Marsh* or *Town of Greece*, both of which revolved around legislative prayer, the Court did call on those cases more definitively than any others – certainly more so than *Lemon*. The Court never fully bought the argument that the time the monument had been standing should have been enough to win the case, but by leaning on *Marsh* and *Town of Greece*, the court was able to reconcile the "history and tradition test" within the rest of the opinion – it is unknown if that will become the standard bearer for Establishment Clause cases.

All the Justices were quick to discount *Lemon* but could not identify a singular test for future Establishment Clause cases. Justices Breyer and Kagan joined in concurrence but maintained there should not be a singular test for Establishment Clause cases and each case should be judged on the facts in the light of the purpose of the Religion Clauses – assurance of religious liberty and tolerance to all.[145] Breyer and Kagan believed the cross to be constitutional because: (1) the organizers were undeniably secular in deciding to honor fallen soldiers; (2) the values inscribed on the Cross were strongly secular; and (3) the Cross was up in the same spot for ninety-four years before one complaint was filed.[146] Breyer and Kagan, however, do seem to feel the

[142] *Am. Legion*, 139 S. Ct. at 2087
[143] *Id.* at 2090.
[144] *Id.*
[145] *Id.* at 2091 (Breyer, J. and Kagan, J. concurring in judgement).
[146] *Id.*

majority has adopted a "history and tradition test" with this case, but feel that is the wrong path to take, fearing new monuments would be subjected to removal simply because it has not been around long enough to establish the history.[147]

Justice Kavanaugh concurred wholeheartedly with the majority but wished to further highlight the flaws of the *Lemon* test.[148] As in depth as the Court was on this matter, the *Lemon* test does not address the Court's findings in one area let alone all five.[149]

Under the first category the court has established and relied on a history and tradition test to uphold religious symbols and speech on government property – upholding legislative prayer in *Marsh* and *Town of Greece*.[150]

Highlighting the Courts refusal to apply *Lemon* in a string of cases: *Marsh, Town of Greece, Van Orden*, and *American Legion,* Justice Kavanaugh is urging the court to abandon *Lemon* for a more simplistic test. Kavanaugh proposes to follow the overarching principles set forth by the court: If a challenged 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 the act is presumably constitutional and does not violate the Establishment Clause.[151] Under the formula proposed by

[147] *Id*.
[148] *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J. concurring in judgement) (recognizing five distinct categories of Establishment Clause cases (1) religious symbols of government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable law; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums.
[149] *Id*.
[150] *Id*.
[151] *Id*.

Justice Kavanaugh, the Cross at question in *American Legion* would be held permissible because it is not coercive and is deeply rooted in history and tradition.[152]

IV. Has *Town of Greece* Opened the Doorway for a Broader Acceptance of Religious Symbols in Public Space?

The Court's holding in *American Legion* compounded with the holdings of *Marsh* and *Town of Greece* have moved the court away from the dreaded *Lemon* test. With the focus on history and tradition highlighted in the three cases, we are definitively moving toward a broader acceptance of religion and religious symbols in public places. The question is which formula to move forward with, and in my belief, it is the idea formulated by Justice Kavanaugh in his concurring opinion in *American Legion*. It provides for easy termination of any coercive practices as well as multiple avenues to prove constitutionality of the challenged practice.

How would the Court handle these situations moving forward? What if this Thanksgiving, November 28, 2019, the mayor of Newark, Ras Baraka, called for all religious denominations within the city limits to donate a sign or symbol to a city-wide holiday celebration? What if December comes and there is a menorah, a creche, and a kinara all sitting in Lincoln Park? How would the Court handle a complaint regarding these three symbols? Would the analysis change if the symbols were not in Lincoln Park, but say inside the city courthouse?

How would they change if the symbols were not for a holiday season, what if the City of Boston erected a cross-like monument on Boylston Street – where the bombers attacked the marathon? Would the city of Boston be enjoined from doing so, simply because the cross would not have been around for long enough to establish a tradition?

If the Mayor of Newark called for such a display, I believe it would have to be upheld or enjoined in its entirety as allowing some symbols and denying others would be viewed as the

[152] *Id*.

government advancing the religions with the symbols approved and an attack on the symbols denied. Without a proper test, there is no way to isolate the individual symbols donated. What if some denominations provide these religious yet secular symbols, while others are solely religious? Could some of them be enjoined yet some be allowed? A partial injunction that allows for some symbols but not others could be viewed as an attack on those religious as well as a promotion of the ones the injunction allows – both effects would be impermissible by the Establishment Clause. If there is no *Lemon* test anymore, would the court look back to *Town of Greece*? The Court in *Town of Greece* would most likely uphold the practice in Newark. The practice in *Town of Greece* was upheld because it was inclusive and open to anyone whom wished to participate, just as the request from Mayor Baraka. He would be attempting to bring all people together, to share their beliefs, and learn from each other.

Under this proposal from Mayor Baraka no persons, symbols, or displays would be banned – as banning one and upholding others would possibly be viewed as an attack on the religion of the symbol that is struck down. The locale of such a grand display would not matter as much as in *County of Allegheny* because of the volume and variety of symbols that would be displayed together. The display inside the courthouse in *County of Allegheny* was held to be unconstitutional primarily due to the isolated nature and prominent display of the Creche inside the courthouse. The county placed the creche alone at the top of the main staircase in order to virtually assure any visitor to the building would witness the display – a borderline coercive tactic. Further, the county added framing materials, plants, lights, etc. to the display in order to draw more attention to the creche. These elements would be absent from the Newark display as Mayor Baraka would want to unify the city and bring all people and faiths together in celebration of the holiday season.

As for the City of Boston, what if a citizen challenges it immediately? Would they have to find another way to honor the fallen? Now if it goes unchallenged for over ninety years, could it stay just because of its tradition and historical relevance? If it is not the city trying to raise it, but the family members of fallen victims, could the city deny the construction permits, or would that be an attack on religion?

Under the Courts' decision in *American Legion* it is uncertain and further, under Justice Kavanaugh's approach, the Boylston Street Cross could go either way. Justice Kavanaugh focused on the historical relevance and tradition of the Peace Cross in *American Legion*, and the ninety-year history of the Cross helped him uphold the practice. With a new cross, such as the Boylston Street Cross, there would not be decades upon decades of history surrounding the Cross itself; but there is a National tradition of memorializing fallen citizens with similar monuments.

When applying the history and traditions test, do you take into account the practice as a whole – memorializing fallen citizens with a Cross, or just the individual practice – the particular cross at hand? The court set precedent to consider the entire history of the display in *McCreary County* when the court analyzed all three iterations of the display in order to ascertain the purpose of the Ten Commandment displays. On the other hand, the Court strayed from relying on a history of commemorating American citizens in this manner when deciding *American Legion*.

When looking at the practice as a whole, there is no reason to think the City of Boston would be enjoined from erecting the Boylston Street Cross in remembrance of those who lost their lives as a result of the Boston Marathon Bombing that occurred on April 15, 2013. If just the individual practice is considered, however, the City of Boston will have a near impossible task to

prove the tradition and historical precedent surrounding the Cross, especially if a complaint is filed within the first fifty-years of the Cross' existence.

As you can see, the Courts' decisions in *Town of Greece v. Galloway* and subsequently *American Legion v. American Humanist Association* left us without a proper guideline with regards to Establishment Clause questions, opening the door for a rampant rise in the governmental involvement in the display of religiously linked symbols.