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## The Establishment Cross: Analyzing American Legion v. American Humanist Association Under an Expanded Establishment Clause Test

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**THE ESTABLISHMENT CROSS: Analyzing *American Legion v. American Humanist Association* Under an Expanded Establishment Clause Test**

Sydney V. Griffiths

**I. INTRODUCTION**

In the Summer of 2019, the Supreme Court of the United States decided *American Legion v. American Humanist Association*<sup>1</sup> to determine the fate of a 32-foot-tall Latin cross in Bladensburg, Maryland. The cross, known as the Peace Cross, is dedicated to those who died in World War I, but the monument's shape has garnered accusations that it violates the Establishment Clause, which prohibits the government from establishing, promoting, or disparaging a religion. When it comes to evaluating whether symbols violate the Establishment Clause, the Supreme Court has used a mix of tests to inform their analysis. These tests include the Lemon Test, the Endorsement Test, and a history-and-tradition test. However, no bright line rules have formally established when each test should be used, leading to confusion for the lower courts. Lower courts have heavily relied on the Lemon Test in their own analyses but have also employed a combination of all of the above tests to determine Establishment Clause violations.

In *American Legion* the Supreme Court decided to rely primarily on the history-and-tradition test.<sup>2</sup> This paper posits the theory that this was the incorrect test to rely on in the case of religious monuments on government property. The correct test should be an amalgamation of all tests previously relied on. When one takes into account all factors assessed through each test, it provides a clearer picture of whether or not the Establishment Clause has been violated. The correct test must evaluate the purpose of the monument or display, the effect of the monument or display on the public, whether the monument or display causes excessive entanglement between the

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<sup>1</sup> 139 S. Ct. 2067 (2019).

<sup>2</sup> See id. at 2087.

government and religion, the history and tradition behind the monument and the display, and the context of the monument or display's location and position in society.

This paper will move through a history of decisions in the Supreme Court and the lower courts which led to the decision in American Legion and highlight each factor and test that are a key part of that court's decision. Section II (A) will outline the prevailing tests used by the Supreme Court for evaluating Establishment Clause violations. Section II (B) will then move through different Supreme Court cases and analyze how the tests have been applied to holiday and creche displays, monuments or displays of the Ten Commandments, and monuments of crosses. Section III will then move through how the lower courts have applied the tests. Finally, Section IV will discuss the American Legion decision and posit the different outcome it would have had if a better Establishment Clause Test had been used.

## **II. CONSTITUTIONAL FRAMEWORK FOR RELIGIOUS SYMBOLS ON GOVERNMENT PROPERTY**

“Congress shall make no law respecting an establishment of religion . . .” is the very first clause contained in the First Amendment of the United States Constitution.<sup>3</sup> This clause is known as the Establishment Clause, and it is one of two of the First Amendment's religion clauses. The other religion clause is the Free Exercise Clause.<sup>4</sup> While the Free Exercise clause protects a person's right to practice their religion without government interference, the Establishment Clause is known for guaranteeing that the government will not establish a religion of its own. This also guarantees that the government will not promote or disparage a religion that would be an equivalent of establishing a government religion. The Establishment Clause, therefore, requires a sort of government-neutrality when it comes to religion. To assess whether the government's action violates the Establishment Clause, the Supreme Court of the United States has created tests to

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<sup>3</sup> U.S. Const. amend. I.

<sup>4</sup> Id.

analyze whether the government's action advances or inhibits a particular religion. Two of the most frequently applied tests are the Lemon Test and the Endorsement Test.

## **A. The Tests—Constitutional Tests for Evaluating Establishment Clause Violations**

### **1. The Lemon Test**

The Lemon Test was first announced in Lemon v. Kurtzman.<sup>5</sup> Lemon concerned some state statutes that provided state aid to church-related elementary schools. These schools taught religious materials but would use state aid to purchase school supplies.<sup>6</sup> The Court stated that the main evils the Establishment Clause was meant to protect against were sponsorship, financial support, and active involvement of the sovereign in religious activity.<sup>7</sup> The Court thus announced the Lemon Test to assess whether a state action, or state statute as was the case in Lemon, has violated the Establishment Clause. The Lemon Test is comprised of three prongs: (1) the statute must have a secular legislative purpose; (2) the statute's primary or principal effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion.<sup>8</sup> Under this test, the statutes in Lemon were found to violate the Establishment Clause because although the state statutes had the secular purpose of enhancing education and funding to schools, the statutes also caused excessive entanglement with religion.<sup>9</sup> The states would have to enact excessive measures to ensure that the teachers were not using state aid for religious teaching in order to avoid violating the second prong.<sup>10</sup> In deciding this, the Court stated that the test was created to draw the line between church and state; government must be

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<sup>5</sup> Lemon v. Kurtzman, 403 U.S. 602 (1971).

<sup>6</sup> Id at 607.

<sup>7</sup> Id at 612.

<sup>8</sup> Id at 612.

<sup>9</sup> See id at 617.

<sup>10</sup> Lemon, 403 U.S. at 619.

entirely excluded from the area of religious instruction, and churches must be entirely excluded from the affairs of government.<sup>11</sup>

Since its adoption, the Lemon Test has garnered significant criticism. The consensus is that the Lemon Test is one blanket test that cannot effectively be applied in every circumstance that arises in conflict with the Establishment Clause.<sup>12</sup> Justice Kavanaugh’s concurrence in American Legion outlines five distinct areas of conflict where the Lemon Test is inapplicable and cannot be used to rationalize the Court’s decisions.<sup>13</sup> Yet despite all of the criticism against the Lemon Test, it has never been overruled, nor have any Supreme Court decisions explicitly outlined the precise instances where the test is applicable. Therefore, when the Lemon Test is used remains an uncertain question and has caused general confusion among the lower courts.

## **2. The Endorsement Test**

The Endorsement Test is another commonly-applied test to assess violations of the Establishment Clause. A creation of Justice O’Connor, the Endorsement Test was first announced in her concurrence in Lynch v. Donnelly.<sup>14</sup> In Lynch, the city regularly displayed a Christmas display in the city’s shopping district around the holiday in December. The display included several symbols of Christmas, including a Santa Claus and several wooden and live Christmas trees, as well as non-Christian elements, including a teddy bear, a “talking” wishing well, candy striped poles bearing garlands, and a banner that read “Season’s Greetings.”<sup>15</sup> The display was problematic, however, because of the inclusion of a creche—a Christian nativity scene. Justice O’Connor concurred with the holding that the creche did not violate the Establishment Clause and used the Endorsement Test to justify her reasoning. Justice O’Connor enumerated two prongs to

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<sup>11</sup> Id at 625.

<sup>12</sup> See Bd. of Educ. v. Grumet, 512 U.S. 687, 718 (1994).

<sup>13</sup> Am. Legion, 139 S. Ct. at 2092 (Kavanaugh, J., concurring).

<sup>14</sup> Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

<sup>15</sup> Donnelly v. Lynch, 525 F. Supp. 1150, 1151 (D.R.I. 1981).

the Endorsement Test: (1) purpose; and (2) effect.<sup>16</sup> The purpose prong evaluated whether the government’s actual purpose was to endorse or disapprove of a religion. The effect prong evaluated whether, irrespective of actual purpose, the practice in fact conveys a message of endorsement or disapproval.<sup>17</sup> Justice O’Connor said that the purpose of the creche in Lynch was not to convey a message of endorsement or disapproval of Christianity and neither was its effect. The creche, as part of the display, merely celebrated a public holiday through traditional symbols.<sup>18</sup>

Justice O’Connor created the Endorsement Test because she believed that government endorsement (or disapproval) of a religion was tantamount to creating political outsiders in a community.<sup>19</sup> Government endorsement of a religion would mean, on the flip side, that the government disapproves of other religions, creating the impression that adherents to non-favored religions are not an equally valued part of the political community.<sup>20</sup> However, political divisiveness alone is not enough to run afoul of the Establishment Clause, so the focus of the Endorsement Test, in Justice O’Connor’s eyes, should be on the government actions that caused the resulting political divisiveness.<sup>21</sup> The main sentiment of the test is that a person’s political standing in the community should not be determined based on their religion.

In a similar vein, Justice O’Connor thinks that a “State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.”<sup>22</sup> For this reason, Justice O’Connor states that the Endorsement Test should not center around the perception of the government actions by individual observers, but rather the perception by a reasonable observer.<sup>23</sup> Reasonable observers are not those with idiosyncrasies who

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<sup>16</sup> Lynch, 465 U.S. at 690 (O’Connor, J., concurring).

<sup>17</sup> Id at 690.

<sup>18</sup> Id at 691.

<sup>19</sup> Id at 692.

<sup>20</sup> Id at 692.

<sup>21</sup> Id at 692.

<sup>22</sup> Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772 (1995) (O’Connor, J., concurring).

<sup>23</sup> Id at 779.

would be one of a few who might be offended by the government action. Reasonable observers, rather, are those who hold common societal ideals and possess knowledge of the history and context of the religious display itself as well as the display's surroundings.<sup>24</sup> By evaluating religious displays through these specific lenses, Justice O'Connor thinks that Establishment Clause violations can be analyzed more easily than under the Lemon Test.<sup>25</sup>

## **B. The Cases—Supreme Court of the United States Cases that Define Establishment Clause Violations**

In making decisions about whether or not the government violated the Establishment Clause, the Supreme Court has considered a great number of cases. In this paper, I will focus on three main areas where the analyses are most relevant in leading up to American Legion. First, I will discuss cases with holiday displays created or displayed by the government. Next, I will discuss monuments or displays of the Ten Commandments on government grounds. Finally, I will move into a discussion of crosses on government property. Throughout each of these topic areas, the Court has gotten closer to defining the exact parameters of the Establishment Clause and what types of contexts and religious symbols violate the Clause. Without ever overruling the Lemon Test or adhering strictly to the Endorsement Test, the Court has repeatedly taken into account several factors that have never been formally included into an Establishment Clause test. These factors, including context, history, and tradition, are outlined below in each different type of religious display and should be incorporated into a more comprehensive Establishment Clause test. Having a more comprehensive test that routinely takes these factors into account would have changed the outcome of American Legion.<sup>26</sup>

### **1. Holiday Displays and Creches**

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<sup>24</sup> Id. at 780.

<sup>25</sup> Id. at 780.

<sup>26</sup> Am. Legion, 139 S. Ct. 2067.

Several of the Court’s decisions that have outlined the limits of the Establishment Clause have involved cases of Christian holiday displays that include inherently religious symbols, often a creche. As noted above, a creche is a Christian tableau depicting a nativity scene—when Jesus Christ, the Son of God in the Christian religion, was born. Creches show a baby Jesus Christ in a manger, typically surrounded by his parents, Mary and Joseph, and occasionally others who the Christian faith believes were present for the birth of Jesus. This display is a hallmark Christian symbol that is frequently displayed around Christmas, the holiday that celebrates the birth of Jesus. When governments decide to display such scenes around the holidays, viewers have brought lawsuits alleging that the government is promoting Christianity and violating the Establishment Clause.

As touched on briefly earlier, Lynch is one of the cases concerning the government placement of a creche.<sup>27</sup> The inclusion of this creche among other holiday symbols was alleged to have violated the Establishment Clause.<sup>28</sup> The Supreme Court held that the inclusion of the creche did not violate the Establishment Clause because the Court read the Establishment Clause to mandate accommodation, not just tolerance, of all religions.<sup>29</sup> To make sure that this mandate is carried out, the Court applied the Lemon Test. The Court took into consideration the creche’s context in the Christmas display during the holiday season, because taking the creche outside of this context would be a clear violation of the Establishment Clause. However, in the context of the holiday season, surrounded by other secular seasonal figures, the secular purpose of the creche is clear. The display’s purpose is to recognize a national holiday using traditional figures from that holiday, and the promotion or advancement of Christianity was not the purpose of the inclusion of the creche.<sup>30</sup> Further, the Court held that there was no promotion or advancement of a religion

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<sup>27</sup> Lynch, 465 U.S. at 671.

<sup>28</sup> Id. at 671.

<sup>29</sup> Id. at 673.

<sup>30</sup> Lynch, 465 U.S. at 681.



regardless of the intent, because viewing the display was no different than the incidental effects that similarly come from viewing religious paintings in government museums.<sup>31</sup> These effects are not large enough to demonstrate an actual benefit caused by government endorsement of one religion. Finally, the Court held that there was no excessive government entanglement with religion because the display was planned by the city and there has been no money spent on the maintenance of the creche.<sup>32</sup> Therefore, the creche passed the Lemon Test and was not violative of the Establishment Clause.

In Justice O'Connor's concurrence, she evaluated the same creche under the Endorsement Test because she believed that the Lemon Test would be a clearer tool if its three prongs were consolidated into two for analyzing the purpose and effect of the government's actions.<sup>33</sup> Analyzing under the Endorsement Test would make it easier to spot if the government improperly endorsed Christianity here in a way that would create divisiveness in the political community.<sup>34</sup> Under the Endorsement Test, Justice O'Connor states that the city's purpose for including the creche did not intend to endorse Christianity because the inclusion of the numerous other symbols show that the intent was to merely celebrate a public holiday. Further, the effect of the display did not convey a message of government endorsement of Christianity because the display was celebrating a holiday and few people, she reasoned, would consider celebration of a holiday to be an endorsement of a religion.<sup>35</sup>

A mere five years later, the Court decided County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, which both followed as well as diverged from Lynch.<sup>36</sup> In County of Allegheny, another government placed a creche in its holiday display. This one was

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<sup>31</sup> Id at 683.

<sup>32</sup> Id at 684.

<sup>33</sup> Lynch, 465 U.S. at 687 (O'Connor, J., concurring).

<sup>34</sup> Id at 689.

<sup>35</sup> Lynch, 465 U.S. at 692 (O'Connor, J., concurring).

<sup>36</sup> Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

different than the display in Lynch, however, because the creche was placed prominently at the top of the grand staircase of a courthouse surrounded by poinsettias, Christmas trees, and a banner exclaiming “Gloria in Excelsis Deo.” Meanwhile, a menorah, a sign saluting liberty, and a Christmas tree were located separately outside of the City-County building.<sup>37</sup> The constitutionality of both displays was challenged, with the Court holding that one was constitutional and the other was not.

Rather than evaluating the displays under the Lemon Test, the Court used the Endorsement Test to hold that the creche display was unconstitutional while the display with the Christmas tree and the menorah were constitutional.<sup>38</sup> Under the Endorsement Test, although the creche display may have had a non-religious purpose, the effect was to overwhelmingly convey a message of Christianity. The placement of the display inside the courthouse, coupled with several other items with very strong ties to Christianity but excluding any items referring to other religions or non-religions, exuded a potentially Christian endorsement.<sup>39</sup> On the other hand, the outside display with the menorah and the Christmas tree was decided to be permissible under the Endorsement Test because the effect of this display was not exclusively religious. The Court stated that Hannukah was both a religious holiday as well as a cultural holiday, so the menorah took on a non-religious meaning. By placing it next to the Christmas tree, the menorah emphasized the cultural aspect of the Christmas tree and made the whole display exude a mainly secular message, thus passing the Endorsement Test.<sup>40</sup>

Although Lynch and County of Allegheny used different tests to assess very similar displays, the unspoken star of each case was the context of the display. In Lynch, it was highly relevant that other items were included in the display and that those items were not religious. Similarly, in

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<sup>37</sup> Id at 580.

<sup>38</sup> Id at 597.

<sup>39</sup> Id at 600.

<sup>40</sup> Cty. of Allegheny, 492 U.S. at 618.

County of Allegheny, the biggest deciding factor was that each display was, or was not, surrounded by additional secular objects. This is explicitly spelled out in neither the Lemon Test nor the Endorsement Test, yet each test takes this factor largely into account when deciding Establishment Clause violations. Given that the Lemon Test has been sharply criticized for years and the Endorsement Test has never gained a majority support as the prevailing test, perhaps a fuller test is needed to properly give guidance to lower courts on how to evaluate alleged Establishment Clause violations. Using the Lemon or Endorsement Test to assess the purpose and effect of the government action, there should be additional clarification to take into account additional factors when assessing these test prongs. One such consideration should be the context of the display, especially the locational context. Adding this factor into consideration would make a fuller test, provide more guidance to lower courts, and would not stray too far from the considerations the Court already takes into account without explicitly stating so.

## **2. Displays of the Ten Commandments**

Another display that often finds itself the subject of cases is the Ten Commandments. The Ten Commandments are ten rules that those of the Jewish and Christian faiths adhere to.<sup>41</sup> According to the Christian religion, the Ten Commandments were handed down to Moses, a prophet figure, from God himself.<sup>42</sup> God gave the Commandments to Moses on top of Mount Sinai and proclaimed that the Israelites were to live their lives in accordance with these moral laws.<sup>43</sup> By doing so, Israel would fulfill its role as a holy nation.<sup>44</sup> The story goes that the Commandments were later inscribed onto stone tablets, and the monuments depicting the Commandments often resemble these stone tablets.<sup>45</sup>

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<sup>41</sup> See generally Michael Coogan, The Ten Commandments: A Short History of an Ancient Text (2014).

<sup>42</sup> Id. at 10.

<sup>43</sup> Id. at 10.

<sup>44</sup> Id. at 13.

<sup>45</sup> Id. at 10.

In McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, two counties in Kentucky decided to put large, gold-framed copies of the King James Bible version of the Ten Commandments in their respective courthouses.<sup>46</sup> Second displays were made with eight additional documents containing Christian religious themes and excerpts. These second displays were enjoined by a lower court, and the counties erected a third display in response. The third display contained an expanded version of the Ten Commandments, along with several historical American documents, including the Declaration of Independence, the National Anthem, and the Bill of Rights. All of the documents in this third display had statements describing their significance to the history of Kentucky. The display was in a high traffic area of the courthouse where people went to pay taxes, register to vote, and get driver's licenses, amongst other activities.<sup>47</sup>

The Court upheld the District Court's finding of a predominantly religious purpose behind the third display which warranted an injunction of the display.<sup>48</sup> The Court focuses on the principal of neutrality that led to the Establishment Clause. The majority states that there is evidence that the Framers of the Constitution intended the Establishment Clause to require government neutrality in matters of religion. Government cannot favor one religion over another, or even religion over no religion, because religious choice is a right that is left up to individuals under the Free Exercise Clause.<sup>49</sup> Therefore, it is not the government's place to choose to endorse a certain religion. They must remain neutral. In addition, the government neutrality cannot be a sham. In McCreary, the counties erected the third display with the pretense of it being secular. However, the Court determined that this was not true and that the primary purpose of the third display was religious.

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<sup>46</sup> McCreary Cty. v. ACLU, 545 U.S. 844 (2005).

<sup>47</sup> Id at 852.

<sup>48</sup> McCreary, 545 U.S. at 858.

<sup>49</sup> See id at 859.

The Court clarified the Lemon Test by detailing that the requirement of a secular purpose means a genuinely secular purpose.

The decision in McCreary does not seem particularly noteworthy as a decision on its own. The concept of government neutrality in the face of religion is in line with the concepts outlined in Lemon v. Kurtzman that led to the Lemon Test, while elaborating that a secular purpose cannot be a sham or pretense to hide a primarily religious objective.<sup>50</sup> However, McCreary becomes more interesting when contrasted with Van Orden v. Perry, which was a second Ten Commandments case decided by the Court on the same day.<sup>51</sup>

Van Orden v. Perry involved another display of the Ten Commandments on government grounds. The Texas state capitol contained numerous monuments and markers commemorating Texas's identity as a state, one of which was a statue of the Ten Commandments. This monument was presented by the Fraternal Order of Eagles of Texas and the form of the Ten Commandments was chosen in an effort to promote good values regardless of religion and decrease juvenile delinquency in the area. The monument is maintained by a state organization and the Fraternal Order of Eagles of Texas paid the costs of erecting the monument.<sup>52</sup> A Texan lawyer, who would visit the state capitol often and would frequently pass by the monument, sued state officials alleging that the monument violated the Establishment Clause and seeking an injunction requiring the monument's removal.<sup>53</sup>

The Court held that the monument did not violate the Establishment Clause. In deciding this, the Court placed a heavy importance on the role that Christianity has played in the nation's history and tradition.<sup>54</sup> The Court reasoned that this display just recognized the American tradition of

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<sup>50</sup> Id at 865.

<sup>51</sup> Van Orden v. Perry, 545 U.S. 677 (2005).

<sup>52</sup> Van Orden, 545 U.S. at 682.

<sup>53</sup> Id at 682.

<sup>54</sup> See id at 683.

recognizing religion, rather than acting as a government establishment of a religion. To support this, the Court notes that even the Supreme Court's own building and courtyard have depictions and carvings of the Ten Commandments and Moses.<sup>55</sup> Thus, the Ten Commandments monument here do not violate the Establishment Clause because of their passive use and their significance to both the government and religion.

Comparing McCreary and Van Orden, one begins to wonder why McCreary was decided as it was. If displays of the Ten Commandments are generally permissible because of their significance entwined with the history and traditions of America, then why were the Commandment displays in McCreary, which were connected to the history of Kentucky, found to violate the Establishment Clause? The main reasons that jump out appear to be the motivation behind the building of the monument and the history behind the monument, including the length of time the monument has existed.

The motivation behind the monument came into play in both McCreary and Van Orden, but this seems like a different way to phrase the 'purpose' prong of both the Lemon Test and the Endorsement Test. McCreary acknowledges Lemon and focuses on how the motivation or purpose behind religious displays must be neutral towards religion.<sup>56</sup> In McCreary, the Court accepted the lower court's factual determination that the purpose behind the display was decidedly not neutral. The original ceremony to unveil the first display was also presented by the pastor of one of the local judge's church, who gave a speech that detailed how hanging the Ten Commandments was one of the greatest things that a judge could ever do.<sup>57</sup> The third display was created after the first display was enjoined and the second display was pending injunction.<sup>58</sup> The third display was an expanded text version of the Ten Commandments, as well as copies of the Magna Carta, the

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<sup>55</sup> Id at 689.

<sup>56</sup> Lemon, 403 U.S. at 616.

<sup>57</sup> McCreary, 545 U.S. at 851.

<sup>58</sup> Id at 854.

Declaration of Independence, the Preamble to the state's Constitution, and even the lyrics of the National Anthem.<sup>59</sup> Given the circumstances leading up to the third display at issue in McCreary, it is clear that the motivation and purpose behind the display was more retaliatory and clearly religious, disguised by a sham secular purpose of "education." The motivation and purpose of the monument in Van Orden was different though because it was meant to promote moral values contained in the Ten Commandments rather than the actual religion of Christianity. The Van Orden monument was built to deter juvenile delinquency and commemorate the Fraternal Order of Eagles. This purpose was not related at all to the advancement of a particular religion, so it did not violate the Establishment Clause where the McCreary Commandments did. The analysis of this factor is completely in line with the Lemon Test and the concepts behind the Test.

A second reason these two cases seem to vary so greatly despite a near-identical issue is the history of the Van Orden statue. While the McCreary displays were put up and immediately objected to, the Van Orden statue was erected in 1961 and the lawsuit was brought nearly 40 years later. Over time, this statue had become historically and traditionally significant to the state it was located in. Removing the statue 40 years after it had been built for no reason other than its religious form would be an act of hostility toward Christianity. This analysis of the history and tradition of an object reappears fourteen years later in American Legion, where it becomes a key part of the analysis of religious monuments and the Establishment Clause.<sup>60</sup> It varies greatly from key considerations established in the Lemon Test decades earlier, which focused on the purpose of the monument, the effect of the monument, and an excessive government entanglement with religion. Just like in the previous section, the Court does not signal a break from the Lemon Test, but the outcome of Van Orden relying so heavily on the history and tradition of the monument indicates

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<sup>59</sup> Id. at 856.

<sup>60</sup> See Am. Legion, 139 S. Ct. at 2087.

that this may be an additional factor to add to Establishment Clause evaluations, along with the context factor.

Another interesting point of contrast between these two cases is where Justice Breyer stood in each decision. In McCreary, Justice Breyer joined in the majority opinion which held the Ten Commandments display to be primarily religious and thus violative of the Establishment Clause.<sup>61</sup> However, in Van Orden, Justice Breyer wrote a separate concurrence on why the display was constitutional due to the location of the monument and the extensive length of time that the monument had existed in that location without issue.<sup>62</sup> Justice Breyer wrote that, while the monument had both a secular and religious message, the placement on government property swayed the message from religious to secular, and the 40-year history of the tablets on government property without complaint before the current case suggested that the secular message was the prevailing message. Further, based on this 40-year history, Justice Breyer wrote that removing it could be seen as a hostile act towards religion, because it would appear as disapproval solely based on religion over an object that had never before warranted disapproval. This echoes the later holding in American Legion that primarily relies on this similar analysis of history and perceived hostility.<sup>63</sup>

### 3. Cross Displays and Monuments

Monuments that take the form of a cross also often run into constitutional complaints. The cross has been a traditional symbol of Christianity since the beginning of the religion. The symbol is meant to represent the cross that Jesus Christ was crucified on.<sup>64</sup> The cross invokes the ideas of salvation, forgiveness of sins, and the ease of suffering by the Christian God.<sup>65</sup> Since the cross has

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<sup>61</sup> McCreary, 545 U.S. at 881.

<sup>62</sup> Van Orden, 545 U.S. 677, 698 (Breyer, J., concurring).

<sup>63</sup> Id at 699.

<sup>64</sup> See generally Harris Athanasiadis, George Grant and the Theology of the Cross: The Christian Foundations of His Thought (2001).

<sup>65</sup> Id at 33.



been so closely tied with Christianity for centuries, having one placed on government property can elicit strong messages of government endorsement of Christianity.

In Salazar v. Buono, a Latin Cross was erected at the top of Sunrise rock, an outcrop in the middle of the Mojave Desert Federal Preserve.<sup>66</sup> The cross was built in 1934 by the Veterans of Foreign Wars and stands at around eight feet tall. The cross is bolted into the rock and is visible from the road over 100 yards away, with no plaque indicating that it is a war memorial. A National Park Service employee wanted to place a Buddhist stupa shrine near the cross and their request was denied, so a fellow employee brought this lawsuit alleging a clear endorsement of Christianity over other religions.<sup>67</sup> During litigation in the lower courts, Congress passed legislation allowing the land to transfer to the Veterans of Foreign Wars' possession, and injunctions were requested to halt the land transfer.<sup>68</sup>

The Court held that the lower courts were incorrect to grant these injunctions on the land transfer because the lower courts took into their analysis the prior history with the cross rather than assessing the land transfer on its own.<sup>69</sup> The lower courts saw the land transfer as a government attempt to prevent the removal of the cross. However, the land transfer here, when assessed on its own apart from the inference of the lower courts, is simply a way to resolve a controversy concerning their land.<sup>70</sup> The Court says that the legislative branch is the appropriate entity to make such determinations on how to resolve controversies involving policy considerations like this.<sup>71</sup>

In holding that the injunction was incorrect, the Court determines whether this cross would violate the Establishment Clause and does so by taking into account the history of the cross. The cross had been in place for 70 years before this lawsuit challenged it, and it had gained its own

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<sup>66</sup> Salazar v. Buono, 559 U.S. 700 (2010).

<sup>67</sup> Salazar, 559 U.S. at 707.

<sup>68</sup> Id at 709.

<sup>69</sup> Id at 715.

<sup>70</sup> Id at 717.

<sup>71</sup> Id at 717.

history in the eyes of the public during those 70 years.<sup>72</sup> This fact makes it less likely that this cross is a government endorsement of Christianity. Similarly, the Court discusses that the placement of the cross was not set to imply a government endorsement. Rather, the purpose behind the cross was to honor the nation's fallen soldiers.<sup>73</sup> Given this purpose and history, the cross was not violative of the Establishment Clause, despite the lower court's determination that it was.

Out of Salazar, we see the same recurring elements of purpose, history, and tradition informing an Establishment Clause analysis. It highlights the same elements as the cases above, although neither of these elements are contained in one test together. The Court here chooses which elements it will apply to the analysis. However, what is most interesting is the relief that the Court suggests through this case. In upholding a land transfer, the Court recognizes the transfer of land to a private entity and the posting of signs identifying it as private property as appropriate remedies. The availability of alternative remedies rather than keeping the monument or removing it is not frequently discussed in many cases and is definitely not in the mainstream of the Court's later decisions. In American Legion, Justice Kavanaugh's Concurrence brings up this idea, but no other Justices joined in his concurrence, signifying that it is not fully accepted by the majority of the Court.<sup>74</sup> This is relevant to an Establishment Clause analysis, however, because a lack of alternative remedies weighs in favor of keeping the monument in its location on government property. Alternative remedies should be another consideration the Court makes in their Establishment Clause determinations.

### **III. LOWER COURTS APPLICATIONS OF ESTABLISHMENT CLAUSE TESTS TO CROSSES**

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<sup>72</sup> Id. at 716.

<sup>73</sup> Id. at 716.

<sup>74</sup> Am. Legion, 139 S. Ct. at 2094 (Kavanaugh, J., concurring).

When it comes to the lower courts, approaches vary on which test to follow. Some courts follow the Lemon Test because of the Supreme Court’s clear instructions that the case has not been overruled and should be followed despite sharp criticism of it. Other courts look at all of the tests the Supreme Court has used and measure their own decision against the decisions of their sister courts.

For example, the Northern District of California decided Lions Club of Albany v. City of Albany only one year before the Supreme Court decided American Legion, yet the District Court strongly relied on the Lemon Test for its analysis of the Establishment Clause claims.<sup>75</sup> In Lions Club, a twenty-foot-tall Latin cross stood on a hill in Albany since 1971 on land that was privately owned by Herbert and Ruth Call. Herbert Call was a member of the Lions Club of Albany and allowed the Lions Club to illuminate the cross during the Christmas and Easter seasons each year by granting the Lions Club an easement to the land the cross sat on. The hill the cross sat on overlooked the intersection of Interstates 80 and 580, and the cross’ stature made it highly visible in the nearby area.<sup>76</sup> A developer decided that it wanted to purchase the Call’s land to make into a high-rise condominiums and a park that it would later deed to the City of Albany government. The Call’s land was sold to the developer with an easement for the cross included. When the developer later deeded the land to the City of Albany, however, the easement was never recorded and the City later disregarded the easement.<sup>77</sup> The Calls were upset at the City’s later ignorance of the easement, so they brought suit alleging an Establishment Clause violation as a way to protest the City of Albany’s acceptance of the deed from the developer. The sale and deed were held to be valid in court and the Trial Court held that there was no Establishment Clause violation, but higher courts avoided the question. In the decades following, the cross continued to be lit up during the

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<sup>75</sup> Lions Club of Albany v. City of Albany, 323 F. Supp.3d 1104 (N.D. Cal. 2018).

<sup>76</sup> Id. at 1107.

<sup>77</sup> Id. at 1108.

holiday seasons until atheist citizens began to criticize the cross. Unrelatedly, during the same period of time, power was shut down to the cross for 106 days due to electrical safety concerns. The Lions Club claimed that these were part of a larger campaign to force the cross off the hill, which led to the lawsuit currently at issue.

The District Court upheld the deeding of the land from the developer to the City of Albany, reaffirming the decision of the Trial Court in the previous litigation decades ago.<sup>78</sup> The District Court first noted that the easement of the land containing the cross from the Calls to the Lions Club was perfectly valid because private landowners have the right to use their land as they wish. The landowners were allowed to erect the cross and were free to establish an easement for this cross when they sold their property to the developer.<sup>79</sup> By going through with the purchase of the land which was encumbered by the easement to the Lions Club, the City brought an Establishment Clause claim upon themselves.

The Court moves on to examine whether there was an Establishment Clause violation in the City's ownership of the land containing the cross. The Court uses the Lemon Test to assess the primary effect of the cross here.<sup>80</sup> In assessing the primary effect, the Court looks at the symbol used, the use of the monument as anything other than religious, and the history and context of the community. Since the cross here was only ever used as a religious symbol to advance religion, the City violates the Establishment Clause by owning land burdened with the religious monument.<sup>81</sup> The Court points out that there is no historic significance contained in the cross here unlike the Ten Commandments in Van Orden because there is no history of the cross tied closely to the history of the United States as there is with the Ten Commandments. Therefore, the history and

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<sup>78</sup> Lions Club of Albany, 323 F. Supp.3d at 1111.

<sup>79</sup> Id at 1111.

<sup>80</sup> Id at 1113.

<sup>81</sup> Id at 1114.

tradition of the cross cannot save it from violating the Establishment Clause.<sup>82</sup> To remedy its violation, the Court states that the City must either sell the parcel of land containing the cross to a private party or condemn the easement through the City's power of eminent domain.<sup>83</sup> Although the Court never expands upon what exactly it would define as a condemnation of the cross, these remedy options mirror the approach taken in Salazar, which was seen as an acceptable remedy by the Supreme Court.

In contrast to this stands Gonzales v. North Twp. Of Lake County from the 7th Circuit Court of Appeals in 1993.<sup>84</sup> Gonzales concerned a memorial honoring servicemen who died. The monument was an 18-foot-tall crucifix with an inscription on top that translates to "Jesus of Nazareth, King of the Jews." The monument's location was at the edge of a public park next to a busy traffic intersection, so that the monument was visible to all of those who drove through the intersection. The crucifix monument was erected by the Knights of Columbus, a Catholic organization, for the purpose of reminding motorists of the importance of religion in everyday life, as well as to honor war heroes.<sup>85</sup> The crucifix included a small plaque that denoted the crucifix as a war monument, but the plaque was often covered and was later stolen and remained missing for ten years.<sup>86</sup>

In evaluating whether this crucifix violated the Establishment Clause, the Court relied on a version of the Lemon Test. Looking at several prior decisions of sister courts who evaluated Establishment Clause claims under the Lemon Test, the history-and-tradition test, and the compelling interest test of strict scrutiny, the Court uses all three of these to determine whether the crucifix here had a religious or secular purpose.<sup>87</sup> The Court determines that the crucifix was

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<sup>82</sup> Id at 1115.

<sup>83</sup> Id at 1117.

<sup>84</sup> Gonzales v. N. Twp. of Lake Cty., 4 F.3d 1412 (7th Cir. 1993).

<sup>85</sup> Id at 1414.

<sup>86</sup> Id at 1414.

<sup>87</sup> See id at 1418.

planned with the purpose of spreading Christianity, no evidence shows that the crucifix was ever used for non-religious purposes during its history, and there were no signs or plaques that explained the meaning of the monument.<sup>88</sup> Even the one plaque that existed was covered up before it was stolen and entirely missing, and the Court notes that just a sign is not even enough to exempt the monument from constitutional requirements. The crucifix was a solitary religious symbol in a public park visible to many with no readily apparent secular meaning, thus failing the purpose prong of the Lemon Test after considering additional factors.<sup>89</sup>

These two cases show that even the lower courts mostly try to apply Lemon, but often occasionally apply additional factors in making their assessments under Lemon. The lower courts are applying the test proposed in this paper without formally adopting such an expanded test—using all of the Supreme Court precedents and tests available to them to inform a more rounded discussion of Establishment Clause violations. There is no need for multiple different Supreme Court tests when the lower courts are already taking into account all of the factors from each test. Solidifying one expanded test like this would give more clarity for how lower courts should proceed too, because they will have only one test to choose from, rather than choosing to evaluate under the Lemon Test simply because it is the oldest and most prevalent, like happened in Lions Club.

#### **IV. AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION**

##### **A. The Case—How American Legion was Decided**

American Legion v. American Humanist Association is the latest ruling from the Court on religious symbols on government property and it was decided with the intent to put this issue to bed. American Legion concerns a monument that stands in Bladensburg, Maryland at the center

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<sup>88</sup> Gonzales, 4 F.3d at 1418.

<sup>89</sup> See id at 1423.

of a busy intersection.<sup>90</sup> The monument is 32 feet tall and was erected as a monument to the people of Bladensburg who died in World War I.<sup>91</sup> The problem with the monument, however, is that it is an enormous cross and the land that it sits on is owned and maintained by the county in Maryland.

The Bladensburg World War I Memorial, also known as the Peace Cross, was erected in 1925. The committee who created the design chose to depict a Latin Cross for the monument in homage to the grave markers used to bury fallen soldiers overseas during the first World War.<sup>92</sup> When a soldier died abroad, they were buried and a simple, white Latin Cross marked their place of burial. For Jewish soldiers, a Star of David was used to mark their grave. Images of the rows of these graves became somber, iconic images to the public back home in America, and the committee erecting the memorial chose to use the Latin Cross as the monument's form in recognition of those photographs. The cross was built on public land, which is now located at the middle of a busy intersection in town.<sup>93</sup> Other monuments were added to the area over time to create the Veterans Memorial Park, but the Peace Cross is the only monument standing in the intersection. The other monuments honoring those who fought in other wars are located across the street in a park 200 feet away.<sup>94</sup>

In 2012, the American Humanist Association lodged a complaint that the Peace Cross's presence on public land violated the Establishment Clause of the First Amendment.<sup>95</sup> They sought removal of the Peace Cross from public land, demolition of the Peace Cross, or removal of the Peace Cross's arms to create a non-religious slab monument.<sup>96</sup> There was no issue with honoring

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<sup>90</sup> Am. Legion, 139 S. Ct. at 2077.

<sup>91</sup> Am. Legion, 139 S. Ct. at 2077.

<sup>92</sup> Id. at 2077.

<sup>93</sup> Id. at 2078.

<sup>94</sup> Id. at 2078.

<sup>95</sup> Id. at 2078.

<sup>96</sup> Id. at 2078.

the fallen soldiers of World War I. The issue was that this Peace Cross was an overtly Christian symbol on public land that constituted a government endorsement of Christianity.

The District Court held that the Peace Cross satisfied the Lemon Test and therefore did not violate the Establishment Clause.<sup>97</sup> The Court of Appeals reversed, finding that a reasonable observer would believe the Peace Cross to be an endorsement of Christianity given the symbol and the government's maintenance of the monument.<sup>98</sup> The case was appealed again, and it came down to the Supreme Court to decide whether this Peace Cross was constitutional or not. It reversed and firmly held that it was indeed constitutional.<sup>99</sup>

The Court declined to use either the Lemon Test or the Endorsement Test to evaluate the Peace Cross's constitutionality. In Justice Alito's majority opinion, he says that the Lemon Test would not work in situations involving religious monuments like the Peace Cross here because the monument was erected 70 years ago and there is no way to be certain what the motivations were of those who made it.<sup>100</sup> Justice Alito reasons that it would be inappropriate to apply the Lemon Test to an object that would require the Court to guess at the motivation that led to its creation. Additionally, there may be numerous meanings that the monument has now, besides a religious meaning, and these meanings multiply over time, causing the message conveyed by the monument to change over time as well.<sup>101</sup> The Court instead employs a sort of "history and tradition" test to find that the Peace Cross is not in violation of the Establishment Clause.

This history and tradition analysis employed by the Court here resembles that of Marsh v. Chambers.<sup>102</sup> In Marsh, the Court held that prayers before the opening of legislative sessions were permissible because such prayers had been going on since the country's founding. Such a long

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<sup>97</sup> Am. Legion, 139 S. Ct. at 2078.

<sup>98</sup> Id at 2079.

<sup>99</sup> Id at 2074.

<sup>100</sup> Id at 2082.

<sup>101</sup> Id at 2084.

<sup>102</sup> See generally Marsh v. Chambers, 463 U.S. 783 (1983).



tradition that was closely woven into the fabric of American history was held to not violate the Establishment Clause. Similarly, in American Legion, the Court takes into account that the Peace Cross is a longstanding monument with a history of over 70 years. The Peace Cross carries the special significance of commemorating World War One and so acquired a historical importance as a reminder of the war and as a memorial to veterans of all wars.<sup>103</sup> Because the Peace Cross has acquired this significant meaning over time, the monument does not violate the Establishment Clause. However, this part of the opinion is only a plurality, as it does not receive support from Justice Kagan. Justice Kagan notes in her concurrence that history and tradition like that detailed in Marsh is important in an Establishment Clause analysis, but that such an analysis should be made on a case-by-case basis rather than as playing a role in every Establishment Clause decision.<sup>104</sup> In her concurrence, Justice Kagan highlights a theme that echoes that of Justice O'Connor in prior cases, which is that no single existing test is applicable in every Establishment Clause context. This is further highlighted in Justice Kavanaugh's concurrence, which details all of the instances where the Lemon Test was inapplicable.<sup>105</sup> Although Justice Kavanaugh uses this to advocate for doing away with the Lemon Test and instituting a history-and-tradition test, his concurrence shines a light on the failings of all current tests to fully address each Establishment Clause situation as a blanket solution.<sup>106</sup>

Justice Alito's majority opinion later continues on to note that taking the monument down after this many years may even be a violation of the Establishment Clause because it would be an act of hostility towards a religion.<sup>107</sup> Removing the Peace Cross just because it is a Christian symbol would appear as though the government is showing particular prejudice against Christianity in

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<sup>103</sup> Am. Legion, 139 S. Ct. at 2087.

<sup>104</sup> Id. at 2094 (Kagan, J., concurring).

<sup>105</sup> Id. at 2092 (Kavanaugh, J., concurring).

<sup>106</sup> Id. at 2092 (Kavanaugh, J., concurring).

<sup>107</sup> Am. Legion, 139 S. Ct. at 2087.

general. Therefore, keeping the Peace Cross on the land where it is prevents the government from a hostile takedown that would violate the Establishment Clause.

**A. How American Legion Would be Different Under an Enhanced Version of the Lemon and Endorsement Tests**

If American Legion were to be assessed under a more enhanced version of the Lemon and Endorsement Tests, I believe that it would have likely come out differently. Under the Lemon Test, or under the similar Endorsement Test, the Court would have to show that the monument had a secular purpose, had a primary effect irrespective of actual purpose that neither advanced, endorsed, inhibits, or disapproves of religion, and did not foster excessive government entanglement with religion. When going through these prongs, the Court would look at the monument's purpose, effect, history, tradition, and context.

It is clear from the facts of the case that the original purpose behind the Peace Cross was to honor those who died in World War I. The Peace Cross was directly inspired by the grave markers used when soldiers died abroad. The Court talks a lot about the history of the Peace Cross and that it was created based on non-secular ideas of the War.<sup>108</sup> However, looking into the history and tradition of the Peace Cross, how far back does the analysis go, and when does the Court know when to stop? If one looks even further back, as suggested by Justice Ginsburg's Dissent, there is an entire history of why the Latin Cross was first used to mark graves that predates the War.<sup>109</sup> Crosses were used to mark the graves of Christians because it was symbolic of the dead's eternal life in heaven. Thinking along this line, crosses were used to mark the graves of Christian soldiers overseas to invoke the same ideas. As noted, the graves of Jewish soldiers were marked separately with markers bearing the Star of David.<sup>110</sup> The use of these grave markers was thus clearly meant

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<sup>108</sup> Id at 2075.

<sup>109</sup> Id at 2103 (Ginsburg, J., dissenting).

<sup>110</sup> Am. Legion, 139 S. Ct. at 2075.

to have a religious meaning to them. Forming the Peace Cross after these grave markers continues the line of religious purpose and motivation. The Court's decision to only consider the history of the monument without taking into account the religious history of the symbol and its use in the past ignores the very history that the Court purports justifies the Peace Cross.

Justice Alito's majority opinion places great significance on the fact that monuments like the Peace Cross adopt different meanings over time, based on the history the monument has gone through, its public perception, and its physical surroundings. The opinion goes on to explain that even monuments that were enacted with a religious intent can thus become secular over time. However, this theory can work in reverse as well. The Peace Cross may have been known originally as a monument honoring veterans, but that message may get lost over time as new generations are unaware of the reasons for the monument's erection and thus only see a large cross on public land. This is evidenced through Justice Kavanaugh's concurrence, which talks about the deep hurt that Jewish veterans expressed in their *amicus* brief. The original intent of the Peace Cross has changed over time to be perceived as exclusionary based on its use of a prominent Christian symbol.

Justice Kavanaugh's concurrence also recognizes that the Peace Cross is deeply religious in nature and goes so far as to say that it would "demean both believers and nonbelievers to say that the cross is not religious, or not all that religious." This puts into words how inherently religious the perception of a cross can be by itself, even with the added history that the Peace Cross has as a war memorial. The symbol of the cross invokes the Christian faith itself, just like the grave markers overseas were used to invoke the Christian faith. By being modeled after these religious grave markers, the Peace Cross cannot divorce itself from the religious intent embedded in its symbolism. Under this analysis, the Peace Cross violates the Establishment Clause.

Moving on to an analysis of the effects prong of the Lemon and Endorsement Tests, it becomes especially relevant to consider the context of the Peace Cross. Fully analyzing the context of the cross, geographically and socially, points to a violation of the Establishment Clause. It is true that the Peace Cross is part of a larger park with monuments to various wars and that it has gained a new history through the passage of time, making it a monument to those who died in other wars as well. However, those other monuments are across a busy intersection over 200 feet away in a separate park. The Peace Cross stands alone, separate from the others. The Peace Cross is also the only monument in the park that takes the form of a religious symbol. Taking these facts into account, the effect of the Peace Cross, regardless of its original intent, resembles that of the creche in County of Allegheny.<sup>111</sup> On first glance to the public, the Peace Cross appears as a massive Christian symbol alone in an intersection. No other faiths are represented, nor are there any non-religious symbols surrounding it to lessen its religious effect on the viewer. The message exuded by the Peace Cross thus appears to be a strong endorsement of Christianity.

Taking into account these additional factors, the Peace Cross does not pass the Establishment Clause assessment. The Peace Cross does not merely fail one prong of the test, but it actually fails each factor of the test. Under an expanded analysis of the Establishment Clause, the Peace Cross cannot possibly be held as constitutional as it stands now on government property.

## **V. CONCLUSION**

The Supreme Court has long held that the Lemon Test is the prevailing test for Establishment Clause violation assessments, despite consistently noting that the Lemon Test is insufficient or inapplicable in many cases. The Court is correct: the Lemon Test, by itself, is insufficient to analyze Establishment Clause claims in the topic of religious monuments on government property. The correct test should be an amalgamation of all tests the Court has applied in different instances,

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<sup>111</sup> Cty. of Allegheny, 492 U.S. 573.

using all factors to come to a more informed decision about whether the Establishment Clause was truly violated or not. This expanded test should include an assessment of the purpose of the religious monument, the effect of the monument on the public, the entanglement the monument causes between government and religion, the history of the monument and the symbol, and the context of the monument and its surroundings. Analyzing Establishment Clause claims under this test, American Legion should have ruled that the Peace Cross was a violation of the Establishment Clause. The Peace Cross's purpose was facially non-religious, but the history behind the purpose of using such symbols shows that using the cross carries with it an inherently religious meaning. The effect of the Peace Cross in the context of a busy intersection isolated from other monuments that would make it appear more secular, is also highly indicative of a government endorsement of religion. Lastly, the continuing payments of the government to renovate and maintain the monument show an excessive entanglement between the government and religion. For all of these reasons, the Court should have held that the Peace Cross violates the Establishment Clause.

This does not mean that the monument should be torn down, destroyed, or altered, however. Just as the alternatives suggested in Lions Club of Albany v. City of Albany and carried out in Salazar v. Buono,<sup>112</sup> Bladensburg has the option of selling the land to a private party. Selling the land would not be an act hostile to a religion because it would preserve the monument in its entirety. Those who have a special meaning associated with the monument can continue to visit it and honor veterans there, but the conflict between the government and religious endorsement would be removed from the equation. The government could also require that signs be placed to notify the public of the monument's private ownership, which would prevent any public confusion as to the ownership of the monument or what entities endorse its placement. These are all feasible

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<sup>112</sup> Lions Club of Albany, 323 F. Supp.3d at 1117; Salazar, 559 U.S. at 707.

options that could both preserve the significance of the monument as well as comply with the Establishment Clause.