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The Replacement Campaign: Monuments and Symbols

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THE REPLACEMENT CAMPAIGN: MONUMENTS AND SYMBOLS

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The U.S. Supreme Court's decision in American Legion v. American Humanists Association *ends the campaign to remove public religious monuments and symbols and*

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replace them with a secularized public square. The replacement campaign grew on the momentum of the Court's separationist church and state decisions. In cases challenging religious symbols, arguments about religious minority status succeeded in the Supreme Court, which opened the door wider to a field that previously had been ignored by the professional separationist groups. Particularly in the area of monuments and symbols, the Court's Establishment Clause doctrine was incoherent and led to unpredictable results. The decisions were fractured and the divisions heated. The unstable nature of the doctrine made it a ripe area for continued litigation, leaving communities uncertain of constitutional limits. Now, American Legion *provides that older symbols are no longer vulnerable to Establishment Clause challenges except in unusual cases. Using the logic of the Court's earlier decisions and concerns about divisiveness, the Court recognizes a presumption in favor of longstanding monuments, symbols, and practices.* American Legion *is a consensus decision that explicitly recognizes tolerance, respect, and citizens living harmoniously as aims of the Religion Clauses, informed by history and tradition.* American Legion *should simplify the task of lower courts in symbols cases. A few legal questions remain, however, as the center of gravity for disputes is likely to move from separationist groups challenging old symbols to governments introducing new ones. Overall, this is a welcome development that rejects the idea that religion must be purged from the public square. Although the* American Legion *decision puts an end to the replacement campaign, it does not provide a robust justification for why public religion is something to be preserved. Nonetheless, the Court was right to recognize that the campaign of lawsuits over symbols has sown deep social divisions. The doctrine is now more evenhanded in its treatment of citizens, and respectful of history and tradition. It is also more salient in light of the present divisions in the country over the removal of monuments, historical names, and symbols.*

I. INTRODUCTION

In Detroit, Michigan, locals and tourists enjoy a large bronze-cast sculpture of a giant man holding a family in one hand, and an orb in the other.[1] The orb represents God and all things spiritual, the divine influence over man and his affairs; the family represents human relationships.[2] The sculpture was commissioned by the Detroit-Wayne Building Authority in 1955.[3] It is old, but not ancient. The artist was a renowned sculptor whose work appears around the globe. He named his work "The "Spirit of Liberty," taken from the New Testament scripture quoted on the marble wall behind the statue.[4] At its unveiling, city officials dubbed the sculpture "The Spirit of Detroit," its official name today.[5] The

1. The family consists of a man, woman, and child. The artist had the bronze statue rubbed in acid to accelerate the aging process, turning it green. *See Spirit of Detroit*, DETROIT HIST. SOC'Y, https://detroithistorical.org/learn/encyclopedia-of-detroit/spirit-detroit (last visited July 4, 2020); *see* Appendix for image.

2. *See Spirit of Detroit*, *supra* note 1.

3. *See id*.

4. 2 Corinthians 3:17 ("Now the Lord is that Spirit, and where the spirit of the Lord is, there is liberty.").

5. *See* Branden Hunter, *Spirit of Detroit Statue Celebrates 60 Years*, MICH. CHRON. (Sept. 23, 2018), https://michiganchronicle.com/2018/09/23/spirit-of-detroit-statue-celebrates-60-years/#/?playlistId=0&videoId=0.

statue is large, some forty-feet high—an imposing feature of the downtown Detroit landscape. Because of its green patina, it is sometimes referred to as the "green giant." At the time that the statue was commissioned, city officials wanted a sculpture that would capture the city's intangible attributes. In designing the statue, the artist invited thirty religious leaders to examine the proposed sculpture and opine whether the orb would be considered an acceptable reference to the deity within their respective traditions.[6] In its current use, the giant sometimes dons the jerseys of local sports teams when they make the playoffs.

What is the constitutional status of monuments like the Spirit of Detroit? Before the U.S. Supreme Court's decision in *American Legion v. American Humanists Association*,[7] a case involving an Establishment Clause challenge to a World War I memorial cross on public land, that question would have been a close one. But *American Legion* makes clear that the Spirit of Detroit and other monuments like it, conceived long ago as the product of both religious and secular imagination, with no apparent exclusionary motive in the past and secular use in the present, do not violate the Establishment Clause. *American Legion* upholds the constitutionality of the World War I memorial cross, but Justice Alito's majority opinion is not limited to war memorials, crosses, or Christian symbols. Instead, the opinion states broad propositions that apply to "religiously expressive monuments, symbols, and practices."[8] *American Legion* adds another case to the Court's recent line of accommodationist Religion Clause decisions.[9]

American Legion provides a framework for determining whether a symbol violates the Establishment Clause. Longstanding symbols, that case teaches, carry a presumption of constitutionality when they have become embedded within the community and are associated with purposes that are not exclusively religious.[10] This presumption in favor of longstanding monuments can be overcome only with a showing of religious animus or a specific intent to promote religion for religion's sake.[11] This aspect of the holding reinforces the distinction between the older Ten Commandments monument upheld in *Van Orden v. Perry* and the newer display struck down in *McCreary County v. ACLU*, and turns that distinction into a presumption. (More on that later, *see infra* pt. III.). It follows a trend of requiring an intent to harm before finding a violation of the Establishment Clause. In addition, *American Legion* relies heavily on diffuse meaning and the disruption caused by tearing down historical monuments and symbols. These explanations respond

6. At the unveiling of the statue, a Protestant minister, a Catholic monsignor, and a rabbi each offered a prayer. For a short, contemporaneous film on the creation of the monument and its dedication, see *The Spirit of Detroit (1959)*, YOUTUBE (July 8, 2016), https://www.youtube.com/watch?time_continue=804&v=nTizpBHrMqs&feature=emb_logo.

7. Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067 (2019). For an image of the statue at issue in this case, see *infra* p. 277.

8. *Am. Legion*, 139 S. Ct. at 2085.

9. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018). During the October 2019 term, the Court decided *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), and *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020).

10. *Am. Legion*, 139 S. Ct. at 2085.

11. *Id.* at 2089.

directly to older, separationist decisions.[12] The *American Legion* plurality dismisses the *Lemon* test in this area, and levels harsh criticism of that test just short of overruling it.[13]

With a few qualifications, it can be said that *American Legion* is a landmark Establishment Clause decision bringing the Court's current approach under that Clause much closer to a history and tradition-based doctrine. No more will lower courts be in the business of invalidating longstanding religious symbols or monuments. Future cases challenging "In God We Trust" on the coinage and religious imagery on county seals, for example, are not likely to be won. *American Legion* marks out a modest role for the Establishment Clause going forward. At the same time, it marks the end of a sometimes successful and often influential litigation campaign to remove longstanding religious symbolism, language, and monuments from the public square.

American Legion does not hold that plaintiffs challenging religious symbols lack standing to sue under the Establishment Clause. While it leans on history and tradition, the opinion in *American Legion* is decidedly not originalist in either its method or aspirations. Justice Thomas, on the other hand, followed a historical approach that would foreclose all such Establishment Clause challenges. Justice Gorsuch, together with Justice Thomas, would have ruled against the American Humanist Association on justiciability grounds. By contrast, the majority signals support for Religion Clause values and does not presume to foreclose such lawsuits altogether. Instead, the opinion sets the rules of engagement going forward by narrowing significantly the range of considerations.

Likewise, the *American Legion* majority opinion does not make a robust case for accommodation of religion under the Establishment Clause. This was a missed opportunity to articulate the basis for the Court's decision beyond just a correction of past decisions. A fully articulated theory of accommodation would eliminate any lingering confusion in the lower courts about the proper standard to apply in Establishment Clause cases. It would begin to undo the effects of past decisions which may have created the impression that religious symbols and monuments are inherently suspect.

Nonetheless, the decision itself contains some observations about religion that certainly support an accommodationist interpretation of the Establishment Clause. The majority opinion also is informed by the history of Establishment Clause litigation featuring arguments about the offense given by religious symbols. Perhaps for that reason, *American Legion* was not the best vehicle for articulating a robust vision of accommodation. It is also likely that the conservative and liberal justices in the majority could not agree on the sort of propositions that would form the basis of a theory of accommodation.[14] The 7-2 decision reflects a consensus with only a few, amicable

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12. *See, e.g.*, Lisa Shaw Roy, Pleasant Grove City v. Summum*: Monuments, Messages, and the Next Establishment Clause*, NW. L. REV. COLLOQUY (2010), https://scholarlycommons.law.northwestern.edu/nulr_online/201 (explaining government speech decision in *Pleasant Grove City v. Summum* in light of Establishment Clause decisions).

13. *Am. Legion*, 139 S. Ct. at 2080–82.

14. Consider, for example, Justice Alito's answer to a question about writing opinions in cases in which the justices are divided: " . . . [I]f the Court is not entirely of one mind, not just on the results but on the reasoning, there is the problem if you're drafting a majority opinion, of writing something that will get five votes, six votes, seven votes, whatever the number is. There may be certain things that you can't say and certain things that you have to put in a particular way. You have to think about not just what you would like to say if you were writing just for yourself, but what the majority as a group wants to say." THE SUPREME COURT: A C-SPAN BOOK

fractures in the majority.[15] Ironically, it was one of the liberal justices, Justice Breyer, who hinted at just such a theory of accommodation during oral argument, and he used it to justify an age-based approach that would immunize old monuments but not new ones.[16]

Part II of this article situates *American Legion* within the history of Establishment Clause litigation, particularly in the area of symbols. Part III parses the decision in *American Legion* and applies it to recent controversies. Part IV evaluates the approach taken in *American Legion* and argues that a fully-articulated principal of accommodation best supports religious liberty.

II. THE OLD REGIME: MONEY, PRAYER, AND RELIGIOUS SYMBOLS

A. Funding Cases

The Court's twentieth century separationist Establishment Clause decisions tended to take a dim view of organized religion. In the Court's telling, religion was strong in its authoritarian ambitions, yet weak in its tendency to succumb to government attempts to corrupt it. In the funding decisions, religion tended to win only if the state could separate its goals, priorities, and funding decisions from the most religious or "sectarian" aspects of religious schools. Religion often was characterized in those decisions as tending to divide citizens and fuel persecution of minorities.

The Establishment Clause doctrine that began in 1947 with *Everson v. Board of Education*[17] created the mold for discussing religion in terms of the history of religious persecution. In *Everson* the Court upheld a bus transportation reimbursement program for students attending private religious schools, but the majority and dissent agreed on the principles of separation. Because the benefit in that case was reimbursement to parents of transportation payments that merely helped the children get to school, the state's reimbursement did not breach Jefferson's wall of separation. For the *Everson* majority, the history it recounted, and the principles of separation derived from that history, did not require the Court to strike down the bus transportation payments. Though the wall of separation must be kept "high and impregnable," the *Everson* majority set limits on what can be taken from religion in the name of nonestablishment: for a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[18] Notice Justice Black's language: *individual* Catholics, *individual* Lutherans, and so on. Excluding individual believers would go too far and repeat the same mistake. Religion in general, perhaps

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FEATURING THE JUSTICES IN THEIR OWN WORDS 156 (Brian Lamb, Susan Swain & Mark Farkas eds., 2010) (Interview with Justice Samuel Alito).

15. Justice Kagan did not join in the plurality's description of the failures of the *Lemon* test or its discussion of *Town of Greece's* historical approach to the Establishment Clause. *See American Legion*, 139 S. Ct. at 2080–82, 2087–89 (plurality opinion, Parts II.A (failures of *Lemon*) and II.D. (*Town of Greece*)). Justice Kagan refused to join Part II.D. "out of perhaps an excess of caution," but praised the tone of the plurality nonetheless. *Id.* at 2094 (Kagan, J., concurring).

16. *See infra* discussion in Part IV.A.

17. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

18. *Everson*, 330 U.S. at 16.

institutional religion, on the other hand, would be kept safely behind the wall.

Everson and later opinions vividly described religious persecution in the eighteenth century, but, as some have noted, the litigants and the Justices were more likely to have been influenced by the religious conflicts of the late nineteenth and early twentieth centuries in which they lived.[19] Early twentieth century church-state battles involved fights between Protestants and Catholics over funding for Catholic schools. As the Catholic presence in public schools increased, Catholic children were subjected to Protestant prayers and Bible reading which conflicted with their beliefs. Catholics wanted their own schools to preserve the transmission of the faith to their children.[20] Various Protestant groups, on the other hand, viewed Catholics as a threat to the dominant Protestant consensus who would shelter a generation from inculcation in the "American" way of life. The Protestant groups who sued to prevent Catholics from obtaining public funds clung to the separation of church and state as an almost religious ideal. Much of the rhetoric employed to denounce Catholics' pursuit of school funding sounded in rank bigotry that would offend American sensibilities today.[21]

Secularists joined Protestants in their opposition to funding for Catholic schools. The secularists who challenged Catholics' pursuit of funds also championed separation as a means to prevent religion from gaining dominance over the secular aspects of public life. Secularists perceived a rival system of religious schools as a threat to the public schools.[22] Philip Hamburger's work on the origins of the idea of separation of church and state include nativists like the Klu Klux Clan, as well as the Masons, in the varied groups that opposed public funding for Catholic schools.[23] Jewish groups also opposed public funds for religious schools in those years and would play a larger role in later Establishment Clause challenges.[24] The funding cases carry the baggage of anti-Catholicism; even some of the opinions of the Justices feed on the anti-Catholic rhetoric and stereotypes of the era.[25] Within the separationist coalition, however, Jewish groups' advocacy could be

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19. *See, e.g.*, DONALD DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 79–82 (2010) (quoting Justice Rutledge's memo after the conference in *Everson*: "We all know that this [law] is really a fight by Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale.")

20. Much of this history is recounted in John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001–2002).

21. Justice Alito's concurrence in *Espinoza* covers this well-known ground. *See Espinoza*, 591 S. Ct. at 2269–74 (Alito, J., concurring). On the influence of anti-Catholicism on the Justices during the *Everson* era, see Justice Thomas's discussion of Justice Hugo Black in his separate *Espinoza* concurrence. *See Espinoza*, 591 S. Ct. at 2266 (Thomas, J., concurring).

22. For one example, see Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917, 927 (1941) ("The neighborhood common school, cutting across the lines of class, sect, race, and ability is a fundamental ideal of democratic society not lightly to be abandoned. A regard for the American constitutional principle of religious liberty has for a hundred years exacted of that ideal a sacrifice, and four million Catholic children are free to forsake the public school for the classrooms of their church.")

23. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

24. HAMBURGER, *supra* note 23, at 391–96; SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW 58 (2010) ("Given the importance of Jews and Jewish organizations to the law of religion in the 1960s and beyond, these first conflicts are remarkable for the relative lack of Jewish voices.")

25. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 829 (2000) (Thomas, J., plurality) (discussing the "pervasively sectarian" distinction) ("This doctrine, born of bigotry, should be buried now."); *see also* Bd. of Educ. v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (referring to advocates for textbook loan program as "the same powerful sectarian religious propagandists" who would seek "complete domination and supremacy of their particular brand of religion"); Lemon v. Kurtzman, 403 U.S. 602, 635–36 (Douglas, J., concurring); *see also*

understood as something other than religious bigotry.[26] As Jeffries and Ryan put it in their article covering the contemporaneous history of *Everson* and later cases: "Their prominence in these debates sprang not only from their position in society and from their commitment to the issue, but also from the special weight given Jewish views on religious freedom in the aftermath of the Holocaust."[27]

Beginning with *Everson* and growing in later years, federal challenges to parochial school funding programs provided a series of cases for decision by the Supreme Court. In turn, the Court's funding docket yielded a haphazard array of decisions that could best be explained by their specific facts—bus rides, books, teacher salaries, building grants—rather than the larger principles of separation or neutrality, likely reflecting the priorities and incremental litigation agendas of the groups involved in those cases. At the same time, the Justices were struggling to find a unifying principle for the Court's growing body of Establishment Clause decisions. Within an area that was often confused and incoherent, the funding cases became a prime example of the Establishment Clause's doctrinal morass. The Court's decision in *Lemon v. Kurtzman*,[28] setting forth a test for Establishment Clause cases, became the symbol for the Court's separationist funding decisions and the subsequent criticisms of the Court's Establishment Clause doctrine.

The separationist decisions of that era, viewed in hindsight with a contemporary focus on the implications for religious groups, have a twin legacy of anti-Catholicism and a concern for the plight of religious minorities.[29] Strict separationism in the funding cases also served another purpose. In the aftermath of *Brown v. Board of Education*, the Court's Establishment Clause decisions limited the extent to which government funds could flow to segregated schools.[30]

B. School Prayer

In the term following *Everson*, the Court struck down a release time program in which the Illinois public schools permitted children to leave classes to receive religious instruction on campus.[31] The program itself included instruction from Protestant, Catholic, and Jewish religious leaders. The challenger in that case was Vashti McCollum, an agnostic who opposed all religious references in schools. In a short opinion by Justice

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Espinoza, 140 S. Ct. at 2267 (Thomas, J., concurring).

26. *See, e.g.*, GREGORY IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE (1995).

27. *See* Jeffries & Ryan, *supra* note 20, at 307–08.

28. *See Lemon*, 403 U.S. 602.

29. *See, e.g.*, Thomas J. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 163 (2001):

> The stricter separationism of these decades therefore reflected a general distrust of any majority position on matters of religion, not simply a distrust of Catholicism (which sometimes was, but sometimes was not, a majority faith). The 1960s and 1970s separationism reflected a desire to protect minority faiths from the majority's power—a position that, at least for the Warren Court, coincided with the Court's overall concern for protecting minorities.

30. *See* Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's A Lot More Than Just Republican Appointments*, 2008 B.Y.U. L. REV. 275, 285–86 (2008); *see also Lemon*, 403 U.S. 602 (disposing of plaintiff Alton Lemon's equal protection claim alleging race discrimination by private religious schools).

31. Ill. *ex rel.* McCollum v. Bd. of Ed., 333 U.S. 203 (1948).

Black, and a concurrence by Justice Frankfurter, the Court accepted McCollum's challenge as required by the absolute separation of church and state.[32] Although the Court would later allow off-campus release time programs in an accommodationist decision that was rare for that era,[33] *McCollum* paved the way for the Court's school prayer decisions several years later.[34]

The earliest challenges to prayer and Bible reading in public school were brought under state constitutional provisions.[35] Students and their parents challenged the Protestant character of prayer and Bible reading in public schools as a violation of their religious freedom. Early cases striking down prayer practices noted that Catholic parents were required to support with their taxes public school education that included readings from the King James rather than the Douay versions of the Bible.[36] After incorporation of the Establishment Clause against the States in *Everson* in 1947, secularists and others sued to end prayer and Bible reading in various states. One such challenge to prayer and Bible reading reached the Court in the early 1950s, but the Court held that the taxpayer challenger lacked standing.[37]

When the issue of public school prayer finally reached the Court in *Engel v. Vitale*,[38] the Court struck down a state-composed Regents prayer, and much of the country reacted strongly in opposition to the decision. *Engel* revealed a sharp division between popular and elite opinion, with elites, including some religious leaders, giving the decision modest praise. Notable among religious leaders who expressed support for the Court's ruling was the Reverend Martin Luther King, Jr.[39] After the *Engel* decision and in response to both *Engel* and the case striking down prayer and Bible reading in the following term, *School District of Abington v. Schempp*,[40] religious leaders and lawmakers failed in several attempts to obtain a constitutional amendment backing school prayer.

The prayer cases represented the culmination of separationists' litigation agenda up to that point, minus one important part of the funding coalition—Protestants. Protestant groups such as Protestants and Other Americans United for the Separation of Church and

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32. *McCollum*, 333 U.S. at 211; *Id.* at 231–32 (Frankfurter, J., concurring).

33. Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); *see also, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1962) (Sunday closing laws do not violate the Establishment Clause); Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) (upholding property tax exemption for churches) (decided the term before *Lemon*).

34. In deciding whether to file an amicus brief in the *McCollum* case, there was some trepidation on the part of Jewish groups who did not want to be associated with McCollum's atheism or statements in her brief that religion "is the opiate of the masses." *See* IVERS, *supra* note 26, at 75–77.

35. *See, e.g.*, Herold v. Parish Bd. of Sch. Dirs., 68 So. 116 (La. 1915); Church v. Bullock, 109 S. W. 115 (Tex. 1908).

36. *See, e.g.*, People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910).

37. Doremus v. Bd. of Educ., 342 U.S. 429 (1952).

38. Engel v. Vitale, 370 U.S. 421 (1962).

39. *See* Address Delivered to the National Press Club and Question and Answer Period, THE PAPERS OF MARTIN LUTHER KING, JR., vol. VIII (Jan. 1961–Dec. 1962) (answering a question about the school prayer decision in *Engel*) ("I know that this decision has received a great deal of criticism. I would say simply that this decision was a sound and good decision reaffirming something that is basic in our constitution, namely separation of church and state."). Though beyond the scope of this article, King's praise of the decision might be explained on the ground that maintaining the institutional legitimacy of the Supreme Court was critical to the larger goal of achieving civil rights through the courts.

40. Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

State ("POAU") (later known as Americans United for the Separation of Church and State) perceived a threat from the prospect of separate Catholic schools, but generally did not object to largely Protestant practices in the public school. Over time, the Protestant separationist groups came to accept the school prayer decisions as consistent with, and perhaps even required by, the principles of separation.[41] The prayer cases were fully consistent with the aims of atheists, agnostics, and other individuals who objected to religious observances in public schools. Justice Stewart dissented in *Engel* and *Schempp*. He worried that the Court's "mechanistic" invocation of the separation principle was unfaithful to the entirety of the Religion Clauses, including free exercise, but Stewart was a lone voice in the wilderness.[42] With few exceptions at the Court, the separation principle was in full swing, particularly after the Court's decision in *Lemon*.[43] These results likely reflected the Court's composition as well as the sophistication of the separationists' litigation efforts.[44]

School prayer consumed the energies of lawmakers, but not the Court again, until the 1993 graduation prayer case, *Lee v. Weisman*. In *Lee*, the Court held that a middle school policy of clergy-led prayer coerced non-participating students in violation of the Establishment Clause.[45] The Court's school prayer cases were decided under the Establishment Clause, but those cases can be justified on free exercise grounds.[46]

The school prayer cases did not control the outcome of the Court's decision upholding state legislative prayer in *Marsh v. Chambers*.[47] As support, the majority in *Marsh* pointed to the Continental Congress's approval of the Congressional chaplaincy

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41. *See* GORDON, *supra* note 24, at 84–86; HAMBURGER, *supra* note 23, at 476–78. According to Hamburger, the Baptists represented by the Baptist Joint Committee were at best ambivalent about all of the implications of separation, but eventually came to align with and accept the more secular version of separation advanced by the atheist and agnostic wing of the coalition for separation. *See* HAMBURGER, *supra*, note 23, at 476–78.

42. *See Engel*, 370 U.S. at 445 (Stewart, J., dissenting); *see also Schempp*, 374 U.S. at 310 (Stewart, J., dissenting). The conference notes from *Murray v. Curlett* suggest that Justice Stewart would have undone *Engel* to allow for school prayer from many religious traditions ("I am inclined to remand [*Schempp* and *Murray*] so that the states can give every sect a chance to have religious exercises in schools—including atheists."). THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 426 (Del Dickson ed., 2001).

43. *See, e.g.*, Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 992–96 (2011).

44. *See, e.g.*, FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 204 (1976) (surveying church-state litigation from 1951–1971) (discussing the accommodationist response) (" . . . In general there was nothing approaching the interest group division of effort—the "system"—one could find in the separationist camp. As a result of all of this, the battle over church-state issues in American courts was a very unequal one."). For a discussion of accommodationist litigation during that period, see Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV 1 (2017).

45. *See also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding prayer at football game policy unconstitutional).

46. *Cf., e.g.*, Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 283 (1968) ("It seems clear that prayer and Bible-reading practices have been held invalid not simply because they violate the neutrality principle but because this particular breach of neutrality has involved the states so deeply in religious matters as to have a coercive effect on the liberty of dissenters and nonconformists. *Schempp* can thus be viewed as a case protecting the freedom of the minority.").

47. *See* Marsh v. Chambers, 463 U.S. 783 (1983); *cf., e.g.*, *Town of Greece*, 572 U.S. at 590 (distinguishing *Lee v. Weisman* from prayer before town board on the basis of students' age and impressionability).

and the tradition in Congress and in state legislatures ever since.[48] The Court reaffirmed *Marsh* in *Town of Greece v. Galloway*, a case involving a rotating volunteer chaplaincy that led prayer before town board meetings.[49] *Town of Greece* resolved sub-issues that had been the subject of litigation in the years following *Marsh*, and importantly, refocused the Court's Establishment Clause doctrine on history.[50] In many ways, *Town of Greece* laid the groundwork for the Court's decision in *American Legion*.[51]

In the thirty years between its legislative prayer decisions in *Marsh* and *Town of Greece*, the Court decided a number of cases involving symbols and monuments.

C. Ceremonies, Traditions, and Religious Symbols

In the early days of separationist litigation, challenges to cultural references to God, or what is often referred to as ceremonial deism, such as "In God We Trust" on the coinage or "under God" in the Pledge of Allegiance, enjoyed the least success in the courts. Lawsuits challenging ceremonial deism also tended to be dismissed as reflecting the concerns of the "lone agnostic" or the "the atheist curmudgeon."[52]

Within the professional separationist groups, few showed early interest in bringing such lawsuits. One of the leading Protestant separationist groups, POAU, focused largely on funding challenges involving the Catholic Church. During the 1950s, when "under God" was added to the Pledge and "In God We Trust" was identified as the National Motto, the American Civil Liberties Union reportedly was not interested in the "religion area."[53] Likewise, dominant players such as the American Civil Liberties Union and the American Jewish Congress apparently did not want to tarnish the principle of separation or jeopardize their success with even less popular causes than challenges to parochial school funding and prayer.[54] Leo Pfeffer, the famed American Jewish Congress attorney who won several Establishment Clause cases in the Supreme Court, distanced himself and his work from atheist Madeline Murray's activities, including a challenge to the words "So help me God" in judicial oaths, referring to her as "evangelical" and on a "crusade against God."[55] Similarly, a 1975 Baptist Joint Committee publication warned its donors about

48. *Marsh*, 463 U.S. at 787–89.

49. *See generally Town of Greece*, 572 U.S. 565.

50. *See Town of Greece*, 572 U.S. at 576.

51. *See, e.g.*, Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 ALB. L. REV. 877 (2017) (applying legislative prayer decision in *Town of Greece v. Galloway* to a hypothetical future case involving a religious symbol).

52. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 182–85 (2005).

53. KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 122–23 (2015). Later Kruse notes that "Protestants, Catholics, and Jews had all played a part" in the changes to the Pledge and the National Motto, as had "members of both political parties from across the ideological spectrum." *Id.* at 124.

54. *See* SORAUF, *supra* note 44, at 104 (referring to POAU, the ACLU, and the AJC) ("None was willing, despite the pleas of would-be plaintiffs, to test references to the Deity in the national motto or the pledge of allegiance to the flag.") The issue of "under God" in the Pledge of Allegiance finally reached the Court through litigation by Plaintiff Michael Newdow in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (disposing of the case on standing grounds).

55. Leo Pfeffer, *The Deity in American Constitutional History*, *in* JAMES E. WOOD, JR., ED., RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 140–41 (1985). Madeline Murray, whose repeated lawsuits attracted much negative attention, also gained allies through her notoriety and made a living by contributions

rumors of Murray's activities.[56]

According to Frank Sorauf, a social scientist writing in the late 1970s, the national ACLU had not prioritized church-state litigation for over a decade; instead it allowed the local affiliates to find and seek permission to bring Establishment Clause cases.[57] Two such cases reached the Court in the 1980s: *Lynch v. Donelly* and *County of Allegheny v. ACLU*.[58]

i. Symbols in the Supreme Court

In *Lynch*, a majority of the Court upheld the constitutionality of a city's display of a crèche along with several other figures including carolers, reindeer pulling Santa's sleigh, a large Christmas tree, a Santa's house, and a banner with the words "Season's Greetings."[59] For the majority, the crèche represented a passive reminder of the celebration of Christmas and the nation's religious past and present. Justice O'Connor joined the majority upholding the city's crèche, but she wrote separately to apply her no-endorsement test. In her view, the crèche in *Lynch* did not send an endorsement message because of its context in the "overall holiday setting" of the display.[60]

Lemon was the most commonly used doctrinal rubric at the time, but it led to unpredictable results.[61] Justice O'Connor offered the endorsement test as an improvement: endorsement would refine *Lemon* to focus on the most important, even if subtle, ways that the government might violate the Establishment Clause. Although the term "endorsement" had been used by the Supreme Court on several occasions, Justice O'Connor's concept of endorsement was novel because it defined establishment in terms of expressive harm to nonadherents: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[62] She later explained that the perspective to be employed with the endorsement test is that of a hypothetical "reasonable observer" who is familiar with the history and context of the government's actions.[63]

A majority of the Court adopted Justice O'Connor's endorsement test in *County of*

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from donors sympathetic to her cause. *See, e.g.*, WILLIAM J. MURRAY, MY LIFE WITHOUT GOD 97–98 (2012) (Murray's son and plaintiff in *Murray v. Curlett*, the companion case to *Schempp*). Murray founded American Atheists. *Id.*

56. BAPTIST JOINT COMM., "REPORT FROM THE CAPITAL," 75TH ANNIVERSARY EDITION 8 (2011) (quoting a 1975 report by the BJC General Counsel) (available at http://bjconline.org/wp-content/uploads/2014/03/75th-RFTC_Final-Version.pdf (last visited July 13, 2020)).

57. SORAUF, *supra* note 44, at 36–37.

58. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989). Both cases involved local ACLU affiliates.

59. *Lynch*, 465 U.S. 688. And a talking wishing well!

60. *Id.* at 692 (O'Connor, J., concurring).

61. *Lemon*, 403 U.S. 602.

62. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). As she explained it, "[d]isapproval sends the opposite message." *Id.* For support, Justice O'Connor cited one of the school prayer cases, and implicit in those cases are concerns about religious minorities. *See, e.g.*, *Schempp*, 374 U.S. 203.

63. Capitol Square Advisory Bd. v. Pinette, 515 U.S. 753, 780–82 (1995) (O'Connor, J., concurring). As the arbiter of endorsement, the reasonable observer's perception is informed by "the history and context of the community . . . in which the religious display appears." *Pinette*, 515 U.S. at 780–82 (O'Connor, J., concurring).

Allegheny v. ACLU, a case involving a crèche inside a county courthouse and a Hanukkah menorah next to a Christmas tree on the steps of a city-county building.[64] In a fractured decision, a majority found the crèche in the courthouse unconstitutional, with Justices O'Connor and Blackmun joining the crèche dissenters to uphold the menorah.[65] The Court praised Justice O'Connor's endorsement test as a "sound analytical framework for evaluating governmental use of religious symbols."[66] The Court interpreted O'Connor's *Lynch* endorsement analysis to depend on the physical setting of the display and the presence and proximity of secular symbols.[67] Applying that analysis, the Court invalidated the crèche because it was not surrounded by any other symbols that would detract from its religious message.[68] Justice Kennedy dissented from the crèche holding with an extended critique of the endorsement test.[69] He would have upheld the constitutionality of both displays under a coercion test.[70] The no-endorsement purists, on the other hand, missed the opportunity to recognize the pluralism reflected in the large menorah next to the Christmas tree.

Taken together, *Lynch* and *County of Allegheny* made the application of the endorsement test in religious symbols cases heavily dependent on context. Lower courts applied this fact-intensive inquiry to cases involving religious holiday displays, city and county seals, monuments, and crosses, with a dizzying array of results.[71] For challengers, cases that were at the fringes now were far more likely to be won, particularly in the lower courts.[72] Here, too, concerns about religious minorities were often at the forefront. Judges who addressed the issue felt obliged to point out their sensitivity to the fact that members of minority religions may be offended by Christian symbols.[73]

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64. Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

65. *Id.*

66. *Id.* at 595.

67. *Id.* at 596.

68. *Id.* at 598.

69. *Cty. of Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in judgment and dissenting in part).

70. *Id.* (Kennedy, J., concurring in judgment and dissenting in part).

71. Utah Highway Patrol Ass'n v. Am. Atheists, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (discussing disparate results in lower courts); *see also* Smith, *supra* note 43, at 1004.

72. *Compare, e.g.*, symbol cases prior to *Lynch* and *Cty. of Allegheny*: Citizens Concerned for Separation of Church & State v. City & Cty. of Denver, 481 F. Supp. 522, 529 (D. Colo. 1979) (struck down creche near city hall); Fox v. City of L.A., 22 Cal. 3d 792 (1978) (struck down illumination of cross through windows on city hall for Christmas and Easter holidays); Lowe v. City of Eugene, 451 P.2d 117 (Or. 1969) (struck down cross in hilltop park); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976) (upheld same cross after designated as a war memorial); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (upheld Ten Commandments monument near courthouse); Meyer v. Okla. City, 496 P.2d 789 (Okla. 1972) (upheld fifty-ft cross at public fairgrounds); Paul v. Dade Cty., 202 So. 2d 833 (Fla. Dist. Ct. App. 1967) (upheld lights in the shape of a cross on courthouse); Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (upheld inclusion of creche in national Pageant of Peace); Lawrence v. Buchmueller, 243 N.Y.S.2d 87 (1963) (upheld creche on school grounds).

73. One dissenting district judge in a symbols case explained his reasoning with respect to the groups he believed to be most affected by the decision:

> It would not worry me unduly if a "fastidious atheist or agnostic" found the City of Birmingham's nativity scene offensive on aesthetic or philosophical grounds, or if a modern day Puritan objected to it on religious grounds. I might be able to sympathize with such a point of view, but I would consider it largely irrelevant from a legal standpoint; not everything that gives offense in this world is unconstitutional. The situation of Birmingham's Jewish citizens, however, calls for special comment; if anyone has a legitimate basis for objecting to the nativity scene, it is they. (It may be appropriate to

ii. Age and Divisiveness

The next religious monument cases, *McCreary* and *Van Orden*, involved public display of the Ten Commandments.[74] What developed from those cases was another pairing, with one monolith upheld and the other display struck down. In *McCreary*, a majority of the Court avoided use of the endorsement test in favor of *Lemon*'s purpose prong, albeit through the lens of the reasonable observer, to strike down a relatively recent posting of the Ten Commandments in a county courthouse.[75] By contrast, the Ten Commandments monument outside the Texas capitol in *Van Orden* had existed for forty years without challenge. A plurality upholding the monument did not apply the *Lemon* or endorsement tests but relied on the nation's history of acknowledgement of religion and the Ten Commandment's place within that history.[76]

Justice Breyer, the decisive vote in both cases, concurred in the result in *Van Orden* but did not confine his analysis to any particular test; rather, he found the case to be a borderline one in which no particular test could substitute for the exercise of "legal judgment."[77] Justice Breyer justified his vote as an effort to avoid the religious divisiveness that might result from a ruling to dismantle the monument.[78] This represents an inversion of an assumption underlying the success of the replacement campaign—that removal of a religious symbol is required to achieve civil peace. The argument reflects a pragmatism about current realities that can be difficult to ignore. Even for those who, presumably like Justice Breyer in some cases, believe that public display of religious symbolism borders on establishment, to dismantle the old could disturb the fragile consensus that exists in favor of the current state of affairs.[79]

In a later case involving a Latin cross in the desert, a plurality of justices echoed this view. *Salazar* involved a government land transfer to preserve a Latin cross that served as a war memorial.[80] The plurality's discussion in *Salazar* previews the decision in *American Legion*. The plurality directed the district court to consider whether the land transfer to preserve the cross in private hands could be deemed a policy of accommodation to avoid

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> note, at this point, that there is no Jewish plaintiff in this case.)… I understand that concern, and am less certain of the correctness of my position in this case because of it. When I examine the "social facts" as dispassionately as I can, however, and try to apply the law I am sworn to uphold as I am given to understand it, I cannot find any constitutional infirmity in what the city has done. I see no anti-Jewish animus in Birmingham's observance of Christmas, and I know of no basis for any claim that the federal courts are empowered, under the First and Fourteenth Amendments, to prohibit Birmingham from observing Christmas in any manner reasonably appropriate to the season.

ACLU v. Birmingham, 791 F.2d 1561, 1572 (6th Cir. 1986) (Nelson, J., dissenting).

74. McCreary Cty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

75. *McCreary* followed an earlier case, *Stone v. Graham*, a per curiam opinion striking down the posting of the Ten Commandments in a schoolhouse under *Lemon*. Stone v. Graham, 449 U.S. 39 (1980).

76. *Van Orden*, 545 U.S. at 687–92.

77. *Id.* at 700 (Breyer, J., concurring) ("I see no test-related substitute for the exercise of legal judgement [in this sensitive area]"). Some lower courts have referred to Justice Breyer's concurrence as the legal judgment test.

78. *Id.* at 699, 704 (Breyer, J., concurring).

79. *Id.* at 699, 704 (Breyer, J., concurring); *but see* Andrew Koppelman, *The New American Civil Religion: Lessons for Italy*, 41 GEO. WASH. INTL. L. REV. 861, 866 (2010) (arguing an alternative rationale, that "[n]ew sponsorship of religious practices is far more likely to represent a contemporaneous effort to intervene in a live religious controversy than the perpetuation of old forms.").

80. Salazar v. Buono, 559 U.S. 700 (2010). Because of the procedural posture of the case, the Court did not decide the merits of the constitutionality of the cross on federal land.

the divisive spectacle of dismantling the cross.[81] The existence of a secular purpose[82] and the passage of a significant amount of time[83] also mattered. *Salazar* was the last memorial cross case to reach the Court before *American Legion*, though others attracted the Justices' attention.[84] By the time *American Legion* was decided, cases involving symbols and monuments represented a significant number of cases in the lower courts.

III. THE NEW REGIME: MONUMENTS, SYMBOLS, AND PRACTICES

A. American Legion v. American Humanists Association

In 1925, residents of Prince George's County, Maryland erected the Bladensburg Peace Cross to commemorate the area's World War I veterans who died overseas. The monument consists of a thirty-two-foot high Latin cross inscribed with the names of forty-nine men who died in the war, the American Legion symbol, and the words: Valor, Endurance, Courage, and Devotion.[85] The cross sits in the middle of an intersection in the town of Bladensburg, roughly seven miles from Washington, D.C. Since 1960, the cross has been maintained by the Maryland-National Capital Park and Planning Commission.[86] In 2012 the American Humanist Association sued to remove the cross on the basis of the county's ownership, maintenance, and display of the cross on public land.[87] The district court ruled against the American Humanist Association on summary judgment, but the Fourth Circuit found that the cross endorsed Christianity in violation of the Establishment Clause.[88]

Justice Alito authored a majority opinion for five Justices—himself, Chief Justice Roberts, Justice Kavanaugh, and notably, Justices Breyer and Kagan—upholding the constitutionality of the Bladensburg Cross. In two subsections of the opinion, a plurality of the Court, minus Justice Kagan, addressed the weaknesses of the *Lemon* test, and the merits of the historical approach in *Town of Greece*.[89] Justice Kagan authored a concurrence explaining her decision not to join the plurality; she joined Justice Breyer's concurrence applying a fact-intensive approach to new monuments. Justice Kavanaugh

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81. At one point in the litigation, the cross was covered with a plywood box to comply with the district court's order of removal. *See* Buono v. Kempthorne, 502 F.3d 1069, 1072 (9th Cir. 2007).

82. *Salazar*, 599 U.S. at 715 (plurality opinion) ("Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message.").

83. *Id.* at 716 (plurality opinion) ("Time also has played a role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness.").

84. *See, e.g.*, Mt. Soledad Memorial Ass'n v. Trunk, 567 U.S. 944 (2012) (statement of Alito, J., respecting the denial of certiorari); *Utah Highway Patrol Ass'n*, 565 U.S. 994 (Thomas, J., dissenting from denial of certiorari).

85. The plaque containing the names of soldiers states that the monument is "[d]edicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world." *Am. Legion*, 139 S. Ct. at 2077. The plaque also contains a quote from Woodrow Wilson's request for a declaration of war: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." *Id.*

86. *Id.*

87. *Id.* at 2078. As an alternative to removal, the American Humanist Association suggested that the court could order the Cross's arms be removed to create an obelisk. *Id.*

88. *Id.* at 2079.

89. *Id.* at 2080–82, 2087–89 (plurality opinion, Parts II.A. and II.D.).

joined the majority opinion in full, but wrote separately to criticize *Lemon* and substitute a categorical approach to Establishment Clause cases. Justice Kavanaugh's concurrence focused on state and local governments' ability to respond to citizens' objections to monuments. Justice Thomas concurred in the judgment, advocating a historical approach to the Establishment Clause that "resists incorporation" against the states.[90] Justice Gorsuch, joined by Justice Thomas, would have disposed of the case on standing grounds.[91] Justice Ginsburg authored a dissent joined by Justice Sotomayor.[92]

i. The Court Confronts *Lemon*

Justice Alito's opinion for the majority described the history of the monument, from the 1918 fundraising campaign to erect it and its use over the years as the site of veterans' rallies, to its current status as a familiar landmark for local residents.[93] The Court also discussed the history of the cross as a symbol for the Swiss, and the Latin cross, in particular, as a war memorial.[94] Much of this was reminiscent of *Salazar v. Buono*, but in *American Legion*, the Court was prepared to end the campaign of lawsuits against longstanding religious monuments.[95] A plurality of the Justices, excluding Justice Kagan, explained why *Lemon* and the endorsement test have not aged well, particularly in the area of symbols. Instead of applying *Lemon*, both the plurality and the Court set forth a presumption of constitutionality for longstanding "religiously expressive monuments, symbols, and practices."[96] Justices Thomas and Gorsuch wrote concurrences supporting the plurality's repudiation of *Lemon* in symbols cases.[97] Justice Kagan wrote a separate concurrence holding onto *Lemon*, which she believed could be applied to reach the same decision in the case.[98] The opinion, like *Town of Greece*, rejects the view that the Christian nature of the cross itself is exclusionary.[99]

The Court offered four considerations to explain why longstanding monuments are entitled to a presumption of constitutionality. In a later section of the opinion, the Court applied these considerations to the Bladensburg Cross, noting that all four justified the

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90. *Am. Legion*, 139 S. Ct. at 2095 (Thomas, J., concurring). Justice Thomas first advanced this view in *Newdow* and has repeated it on several occasions. *See, e.g.*, *Newdow*, 542 U.S. at 49–51 (Thomas, J., concurring).

91. *Id.* at 2098–101 (Gorsuch, J., concurring) (rejecting the concept of "offended observer" standing in symbols cases). Justice Gorsuch offered praise for the majority opinion he did not join, describing it as "compelling." *Id.* at 2098.

92. *Id.* at 2103–13 (Ginsburg, J., dissenting).

93. *Id.* at 2076–78. Justice Alito has authored a growing body of religion decisions. *See, e.g.*, Hein v. Freedom From Religion Found., 551 U.S. 587 (2007) (taxpayer standing); Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (permanent monuments as government speech); Hobby Lobby v. Burwell, 573 U.S. 682 (2014) (RFRA challenge to contraceptive mandate); Holt v. Hobbs, 574 U.S. 352 (RLUIPA challenge to prison no-beard policy); *Am. Legion*, 139 S. Ct. 2067; *Morrissey-Berru*, 140 S. Ct. 2049 (Free Exercise and Establishment Clause ministerial exception).

94. *Am. Legion*, 139 S. Ct. at 2074–76.

95. *See id.* at 2087 (" . . . a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.").

96. *Id.* at 2085.

97. *Id.* at 2097 (Thomas, J., concurring); *Id.* at 2101 (Gorsuch, J. concurring).

98. *Id.* at 2094 (Kagan, J., concurring) (explaining her view that *Lemon*'s purpose and effect prongs are "crucial" in symbols cases).

99. *Am. Legion*, 139 S. Ct. at 2090; *see also* Roy, *Unexplored Implications*, *supra* note 51.

Court's holding.[100] First, the original purposes of a monument may be lost to time, or at least difficult to detect.[101] Second, over the years purposes can multiply; a symbol that was once religious may take on a secular meaning in a particular community.[102] Third, the message associated with a given monument may change over time.[103] With longstanding monuments and symbols, the majority recognized the possible coexistence of both pluralism and common culture: "As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage."[104] This offers a more nuanced view of symbols than the Court's sometimes more rigid requirement under *Lemon* that religious symbols serve a "primarily secular purpose."[105] It acknowledges that a religious symbol may be a part of a common heritage rather than an exclusionary intrusion into modern life.

By contrast, Justice Ginsburg's dissent applied the no-endorsement test applied in *County of Allegheny*. The dissent focused on the cross as a war memorial and the fact that the cross is the preeminent symbol of Christianity, rather than a universal symbol of all faiths.[106] The dissent found that symbols like the Bladensburg Cross make nonadherents into outsiders whose standing in the political community has been diminished.[107] As possible alternatives to tearing down the monument, the dissent noted the possibility of relocating the cross or transferring the land to private hands.[108]

ii. "A government that roams the land . . ."

The Court's fourth consideration directly addresses the replacement campaign and the oft-noted charge that the Court's Establishment Clause decisions reflect hostility to religion. In the case of a longstanding monument that has taken on cultural and historical significance, the Court agreed that removal of the monument may be viewed as hostility to religion:

> A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.[109]

This observation marks a departure from the sweep of the Court's symbols cases

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100. *Am. Legion*, 139 S. Ct. at 2089–90.

101. *Id.* at 2082.

102. *Id.* at 2082–83.

103. *Id.* at 2084. Here, the Court relied on *Summum*, 555 U.S. 460.

104. *Am. Legion*, 139 S. Ct. at 2083.

105. *McCreary*, 545 U.S. 844, 864.

106. *Am. Legion*, 139 S. Ct. at 2107 (Ginsburg, J., dissenting). This point is answered by the majority: "The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent." *Id.* at 2090.

107. *Id.* at 2106 (Ginsburg, J., dissenting) ("To non-Christians, nearly 30% of the population of the United States . . . the State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they 'are outsiders, not full members of the political community.'").

108. *Id.* at 2112 (Ginsburg, J., dissenting).

109. *Id.* at 2084–85.

after *Lynch*. Under Justice O'Connor's endorsement test, courts focused on the experience of the observer who is offended by the monument. That others in the community might be offended by the monument's removal stands to reason, and has been noted before, but this passage recognizes the volume and intensity of the lawsuits aimed at removing religious monuments.[110] It notes the hole in the cultural fabric once the symbol is removed, and it contrasts our society with "militantly secular" ones, like post-revolutionary France. The specter of removal is "evocative, disturbing, and divisive," not just to veterans, their families, or persons who identify with a particular religion.[111]

iii. The Unified and Thematic First Amendment

In *American Legion*, avoiding divisiveness is a theme that pervades the entire opinion. "The Religion Clauses," the opinion begins, "aim to foster a society in which people of all beliefs can live together harmoniously . . . ."[112] The First Amendment embodies "the ideals of respect and tolerance."[113] Even the plurality's historical approach under *Town of Greece* is inflected with concerns about pluralism.[114] Justice Alito explained the Court's legislative prayer decisions in *Marsh* and *Town of Greece* in terms of the historical pedigree of the practice and the extent to which it is inclusive:

> The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.[115]

Justice Kagan praised this part of the plurality opinion, noting that "[there], as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands."[116]

If one reads, perhaps too closely, the language of the Court's opinion, it becomes apparent that civic unity is not the only value. The opinion aims for a doctrinal unity and coherence within the First Amendment. The opening description of the Court's holding mentions the "Religion Clauses," not the Establishment Clause. Likewise, the closing sentence mentions the "First Amendment."[117] The only time the Establishment Clause is acknowledged in the Court's opinion is in its discussion of the history of the case, and the Court's own precedent.[118] *American Legion* undertakes to fix some of the problems with the Court's Establishment Clause doctrine, at least in the area of symbols, and from that perspective the Court's broader focus makes sense. The First Amendment is held in high

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110. *See infra* discussion in Part IV.

111. *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2085, 2087 (" . . . a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.").

112. *Id.* at 2074.

113. *Id.* at 2071, 2090.

114. *Id.* at 2087–88 (plurality opinion).

115. *Id.* at 2089 (plurality opinion).

116. *Am. Legion*, 139 S. Ct. at 2094 (Kagan, J., concurring) (discussing Part II.D.).

117. *Id.* at 2079–85.

118. *Id.*

regard as a bulwark of civil liberties. The Free Exercise Clause protects religious individuals and institutions from government intrusion. Likewise, the Court's free speech decisions promote tolerance for disagreeable ideas. Anchoring the decision in *American Legion* to the reputation of the First Amendment, rather than the Establishment Clause, adds legitimacy to the Court's opinion.

The Court's Establishment Clause decisions, on the other hand, have no such pedigree.[119] An early and consistent critique of those decisions since *Everson* has been that they do not take into account the Free Exercise Clause or free exercise values. At their worst, the Court's decisions seemed to say that the Establishment Clause is at war with the Free Exercise Clause. In recent cases on the Supreme Court's religion docket, however, the Court's doctrine appears to be moving toward a Religion Clause convergence.

The opinion in *American Legion* perhaps suggests that the symbols cases, prominent targets of those earlier critiques, have moved closer to the general nondiscrimination principles recognized in the Court's free exercise and free speech doctrines.[120] If so, this is an advance for the Court's often incoherent Establishment Clause doctrine. But free speech principles only help at the most abstract level of generality, since under that doctrine, even speech intended to harm is protected.[121] Importing free speech doctrine would also undermine an accommodationist approach to the Establishment Clause, because that doctrine, in particular, lacks the tools to explain what is good about religion.

American Legion provides doctrinal answers to questions that have plagued the Court's doctrine and frustrated lower courts. In the past, it was necessary to talk about the application of the Court's symbols doctrine in micro-categories: holiday display cases, Ten Commandments cases, memorial cross cases, and in the lower courts, city and county seals. Although the Court in *American Legion* rejected the idea of a "grand unifying theory" of the Establishment Clause, the majority opinion covers the full range of challenges to "religiously expressive monuments, symbols, and practices."[122] The Court's discussion of religiously-named places (San Diego and Providence, for example), which might have been vulnerable targets under an expansive reading of the Court's earlier doctrine,[123] fits historical names within the age-community-culture paradigm. These examples, together with the opinion's language, support a broad reading of *American Legion* to include all such cases, and not simply crosses or war memorials.

Unlike past religious symbols cases, *American Legion* was decided 7-2, the largest majority ever for the Establishment Clause symbols decisions. While there are several separate opinions in the case, the consensus and cohesion distinguish *American Legion* from older symbols cases.

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119. The district judge in *American Legion* called the Court's Establishment Clause decisions "a law professor's dream, and a trial judge's nightmare." Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373, 381 (D. Md. 2015).

120. *Cf., e.g.*, Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2022 (2017) ("Trinity Lutheran [church] is a member of the community too, and the State's decision to exclude it . . . must withstand the strictest scrutiny.").

121. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

122. *Am. Legion*, 139 S. Ct. at 2085; *see also, e.g.*, Perrier-Bilbo v. United States, 954 F.3d 413, 425 (1st Cir. 2020), *cert. denied*, No. 20-340, 2020 WL 6551790 (U.S. Nov. 9, 2020) (applying *American Legion* to uphold constitutionality of the phrase "so help me God" in the naturalization oath).

123. *Cf., e.g.*, Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008) (challenge to three crosses in City seal) (finding that "Las Cruces" refers to a valley of crosses where individuals were buried).

B. Monuments and Symbols: Remaining Questions

i. New Religious Monuments and Symbols

In its modesty and consensus, *American Legion* leaves some things undecided. Monuments, symbols, and practices that do not qualify as "longstanding" will not enjoy the presumption of constitutionality. Therefore, it will be up to courts to determine whether a newer religious symbol violates the Establishment Clause. In terms of the doctrine that a court is likely to use, Justice Gorsuch argued that courts should apply the history test of *Town of Greece*, regardless of the monument's age.[124] This avoids the difficulty of determining how old is "old enough" to withstand a lawsuit.[125] *Town of Greece* supports Justice Gorsuch's reading. The relevant tradition in that case was legislative prayer dating back to the framing of the First Amendment, not the specific town board policy which was only a decade or so old.[126] If courts choose this reading, then the attributes of inclusivity, nondiscrimination, and tolerance praised in the *American Legion* plurality might function as criteria for determining whether a new symbol or practice tethered to a tradition with a long history is consistent with the Establishment Clause.

Similarly, the majority opinion in *American Legion* provides four reasons to apply the presumption rather than *Lemon*.[127] It is not clear whether the Court's four considerations are merely dictum explaining the sub silentio overruling of *Lemon*, or whether they establish criteria which must be met in order for a longstanding symbol to qualify for the presumption.[128] Yet another reading suggests that the four considerations may provide criteria to determine whether a new symbol passes constitutional muster.[129] In a recent but now overruled symbols decision, however, a district court ignored the language in *American Legion* and *Town of Greece* on the ground that the Court did not provide lowers courts with a test to apply in place of *Lemon*.[130] If nothing else, this underscores the fact that the lower courts badly needed the Court to clarify its

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124. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring) (" . . . [W]hat matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.").

125. *Id.* (Gorsuch, J., concurring).

126. *Id.* at 2088.

127. *Id.* at 2093.

128. *See, e.g.*, Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1329 (11th Cir. 2020) (cross in city park does not violate the Establishment Clause under *American Legion*) (interpreting four considerations as additional constitutional criteria).

129. *Cf., e.g.*, *Am. Legion*, 139 S. Ct. at 2083 ("The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases.").

130. Woodring v. Jackson Cty., 458 F. Supp. 3d 1029, 1040 (S.D. Ind. 2020) (applying the *Lemon*, endorsement, and coercion tests to a twenty to thirty-year old nativity display) ("Although it frowns upon the *Lemon* test, *American Legion* does not offer its own test for dealing with these types of cases except to encourage the 'application of a presumption of constitutionality for longstanding monuments, symbols, and practices.'"), overruled by Woodring v. Jackson Cty., Indiana, No. 20-1881, 2021 WL 344797, at *14 (7th Cir. Feb. 2, 2021) ("We hold today that *American Legion* displaces the purpose and endorsement tests in the context of Establishment Clause challenges to nativity scenes in passive Christmas displays on government property."); *see also Kondrat'yev*, 949 F.3d at 1326 (*Lemon* no longer applies to "cases involving religious displays and monuments—including crosses").

Establishment Clause doctrine.[131] While the resolution in *American Legion* settles the constitutional status of many memorials and monuments around the country, it leaves open the possibility for litigation over newer symbols and practices.

Take the following example. In Los Angeles County, a Board of Supervisors voted to remove a Latin cross from a segment of the forty-seven-year-old county seal after being threatened with litigation.[132] The county redesigned the seal to include a depiction of the San Gabriel mission, which at the time was considered to be an acceptable nod to the historical influence of Christianity. The cross atop the actual San Gabriel mission had gone missing during an earthquake retrofitting, and the new seal likewise did not include a cross on the depiction of the mission. The mission's cross was replaced a few years later; thereafter, a new panel of supervisors voted to revise the seal, this time to add a small cross at the top of the mission.[133] In the last chapter of the ten-year fight over the seal, challengers sued to remove the cross from the new seal, and won.[134]

Under *American Legion*, the original cross on the county seal would not be vulnerable to constitutional challenge.[135] Government officials were free to remove it, as they did. But the addition of the cross by a majority of the new board of supervisors is a different matter. The county's argument—that the addition of the cross was necessary for an accurate depiction of the mission—fits within the types of considerations recognized in *American Legion*. The supervisors' decision must be understood in terms of the fight over the removal of the cross in the first place, which raises the specter of religious motivation and divisiveness, and counsels against the new seal's constitutionality. This seems wrong, though, under the logic of *American Legion*. That case teaches that many people, presumably not just religious people, may be alarmed by the erasure of religious symbolism from public life. The controversy around the seal arose from the cross's removal after having been in place for over forty years. Whether and how new efforts to restore old symbols or monuments will be treated under *American Legion* is an open question. Under a straightforward reading of the decision, however, these efforts do not enjoy a presumption of constitutionality.

ii. Disrespectful, Intolerant, or Exclusionary Monuments

American Legion's discussion of inclusivity and nondiscrimination raises the question of which types of monuments might not follow in that tradition. It is possible that, after *American Legion*, even a longstanding monument may violate the Establishment Clause in an extreme case. If, for example, it had been established that in designing the Bladensburg Peace Cross, the town had deliberately excluded certain veterans' names, that

131. *See, e.g.*, Michael W. McConnell, *No More (Old) Symbol Cases*, 2018–2019 CATO SUP. CT. REV. 91, 106 (reviewing *American Legion*) ("The problem was not at the Supreme Court level. [*Lemon*] was thoroughly tamed at that level. The problem was in the lower courts, which do not have the luxury of ignoring or declining to follow Supreme Court precedent until the high court itself has said to stop.").

132. Abby Sewell, *Christian cross has no place on L.A. County seal, judge rules*, L.A. TIMES (Apr. 7, 2016), https://www.latimes.com/local/lanow/la-me-ln-la-county-seal-cross-20160407-story.html.

133. *See id.*

134. *See* Davies v. L.A. Cty. Bd. of Supervisors, 177 F. Supp. 3d 1194, 1219 (C.D. Cal. 2016).

135. The seal included a cross in a segment of the seal that contained stars and a rendering of the Hollywood Bowl. Other parts of the seal included the goddess Pomona, oil derricks, a cow, a tuna, and a Spanish Galleon.

would counsel against its constitutionality.[136] The Court's dictum is consistent with its focus on the inclusivity reflected in the development of the Bladensburg Cross. The 1925 monument included the names of both black and white veterans, a fact emphasized by the majority.[137]

This passage likely also casts doubt on newer monuments designed to antagonize one's perceived opponents. In one of the more visible controversies, the New York-based Satanic Temple proposed to erect a statue on the steps of the Oklahoma courthouse.[138] The statue was proposed at the same time that a Ten Commandments monument in the same location was being challenged in court.[139] The group proposing the satanic monument noted in the press that they wanted to attract "people of all ages," and offered a sketch rendering of the monument, a seated goat figure, Baphomet, with two children at the figure's left and right side.[140] The proposed monument received publicity but was never seriously contemplated by the commission. The purpose of the proposed monument, it seems, was to point up a double standard on the part of those favoring religious monuments, and perhaps make advocates of the Ten Commandments rethink their position.[141] If such a monument was to be displayed (not likely, I know), it might not run afoul of the *Lemon* or endorsement tests even if a challenger argued that it betrayed an anti-religious purpose on the part of government.[142] But the language in *American Legion* could nonetheless be read to suggest that such a monument is unconstitutional.[143]

Here, however, Justice Kavanaugh's position that such decisions should be left to local communities and elected officials counsels wisely.[144] In the case of a monument that

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136. *Am. Legion*, 139 S. Ct. at 2070; *see also Perrier-Bilbo*, 954 F.3d at 424 (inclusion of the phrase "so help me God" did not show "deliberate disrespect" of atheists).

137. *Id*. It can be inferred that the monument's creators, who decided to include black veterans in 1925, were not likely to have deliberately excluded Jewish or atheist veterans.

138. Denver Nicks, *Satanists Unveil Statue for Oklahoma Capitol*, TIME (Jan. 7, 2014), http://nation.time.com/2014/01/07/satanists-unveil-statue-for-oklahoma-capitol/. A similar statue was offered to Arkansas. *See* Avi Selk, *A Satanic Idol Goes to the Arkansas Capitol*, WASH. POST, (Aug. 17, 2018, 5:07 PM), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/17/a-satanic-idols-3-year-journey-to-the-arkansas-capitol-building/. Another was offered to a small town in Minnesota. *See Satanic Temple Sues Minnesota City Over Proposed Monument*, ASSOCIATED PRESS (Apr. 19, 2019), https://apnews.com/7ea2decdf9a24f44810404bcbe0e6968.

139. *See* Prescott v. Okla. Capitol Pres. Comm'n, 373 P.3d 1032 (2015) (monument violates state constitutional provision); Am. Atheists v. Thompson, 632 Fed. Appx. 522 (10th Cir. 2016) (federal challenge mooted after state court's decision to remove monument).

140. *See* Nicks, *supra* note 138.

141. A spokesman for the Satanist group said of the lawmaker who donated the Ten Commandments, "He's helping a satanic agenda grow more than any of us possibly could . . . You don't walk around and see too many satanic temples around, but when you open the door to public spaces for us, that's when you're going to see us." *Okla. Satanists seek monument by Statehouse steps*, USA TODAY, http://www.usatoday.com/story/news/nation/2013/12/08/satanists-oklahoma-statehouse/3908849/ (last updated Dec. 8, 2013, 4:10 PM). Under the Court's current doctrine, the Satanic Temple could not force Oklahoma to display its monument. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2008).

142. The *Lemon* test forbids a primary purpose of "advancing or inhibiting" religion. *Lemon*, 403 U.S. at 612. Likewise, Justice O'Connor's no-endorsement test would forbid a message of "disapproval" of religion. *Lynch*, 465 S. Ct. at 688 (O'Connor, J., concurring). In practice, however, *Lemon* seldom operates in the direction of striking down arguably anti-religious government action. *See, e.g.*, Vasquez v. L.A. Cty., 487 F.3d 1246, 1257 (9th Cir. 2007) (no Establishment Clause violation in county's removal of cross from county seal).

143. Given the publicized motive on the part of the monument's donor, it would seem to qualify as intentionally disrespectful to the religious. *See Am. Legion*, 139 S. Ct. at 2089 (plurality opinion).

144. *Am. Legion*, 139 S. Ct. at 2094 (Kavanaugh, J., concurring).

is intended to give offense to the religious, very little can be gained by using a lawsuit to tear it down, particularly after *American Legion*. The opinion espouses tolerance and civic unity as Establishment Clause values, and it is far from clear that using the Establishment Clause to attack such monuments is consistent with either tolerance or inclusivity. In a world where longstanding monuments in a community are no longer vulnerable simply because they have religious elements, it makes little sense to weaponize the Establishment Clause against anti-religious ones.

Such overtures are designed to close the public square to all monuments, and that would be a shame, especially for minority religions, whose symbols are more likely to be new rather than old. It would be a loss for the pluralism described in *American Legion*, which supports the display of minority religious symbols and monuments.

IV. ACCOMMODATION

The new accommodation represents a reorientation of the Establishment Clause away from the strict separationism of the replacement campaign. *American Legion*, in particular, rejects the premise of the earlier cases—that religion is divisive and offensive. It supports a positive vision of pluralism by addition, not subtraction. With its focus on nondiscrimination and inclusivity, this new framing is thoroughly informed by what has gone before. Even so, *American Legion* leaves behind some of the ideas from the Court's separationist decisions and replaces them with a modest accommodation.

A. A Tentative Theory of Accommodation

It is noteworthy that the fleshing out of a theory of Establishment Clause accommodation would fall to Justice Breyer. As the swing justice in the Ten Commandments cases, Justice Breyer's "legal judgment" about the Establishment Clause has become the grist of several lower court decisions. In his *Van Orden* concurrence, Justice Breyer's take on divisiveness provided a compromise framework to think about religious symbols. And in the oral arguments in *American Legion*, he asked the American Humanist Association's lawyer about the proposition that our civil liberties flow from religious liberty.[145] That, for Justice Breyer, would support a theory that old monuments should not be disturbed, while pluralism forbids new monuments.[146]

The insight from Justice Breyer's *Van Orden* concurrence, cited in the *Salazar* and *Town of Greece* opinions, that shows up in the *American Legion* majority opinion, is this: In light of the current disagreements that characterize our public life, the modern question is whether religious symbols are more divisive than the prospect of tearing them down. Maintaining the status quo in the area of public religion may be the move that is the least

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145. Here is Justice Breyer's question at oral argument:

> I'm saying, a very good book, the Law & Its Compass, Lord Radcliffe, all our liberties come from freedom of religion. You have your religion. I have mine. And we're not going to kill each other. Okay? So we say history counts. Now what [Justice Alito] raised is a problem. So what about saying past is past, if you go back 93 years, but no more. We're now 54 religions. We're now everything under the sun. And people will take offense. Now how do I do that? Is that sensible? Is it ridiculous? What do you think?

See Transcript of Oral Argument, Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067 (2019).

146. *See id*.

likely to trigger more division. This is a modest conclusion, which does not depend entirely on the merits of religion itself or its role in the public square. Not entirely. To a limited extent it does depend on the merits of religion, because if the justices truly deemed religion to be toxic, no grandfathering doctrine could save it. The presumption in favor of older monuments rests on an appreciation of religion in our nation's history. Religion's residual, historical value is described by Lord Radcliffe in the book Justice Breyer recommended:

> A thing that we forget is that political liberty is a product, almost a by-product, of religious liberty. The theory of civil rights that we know is common to the history of Europe and America . . . . Yet this theory is the direct outcome of the religious struggles of the seventeenth century . . . . What matters for us, the descendants of these founding fathers, who are accustomed to use their language and their formulas, without sharing their experience or, often, the background of their ideas, is that these liberties that form the ground pattern of our State assumed the shape that they did because there were men who believed with a passionate conviction that they were entitled to worship God in their own way and to teach their children and to form their characters in the way that seemed to them calculated to impress the stamp of the God-fearing man. Freedom is primarily a religious ideal: secondly it is an educational one. If it were to lose contact with the inspiration of these two impulses I do not know what value should be ascribed to the liberties that would remain.[147]

As Justice Breyer's question at oral argument perhaps reveals, there is at work in *American Legion* a form of accommodationism that values religion, at least at the margins. It is not a robust accommodation. Learning the lessons from the older separationist arguments that tended to harden the opposition, the majority opinion appears to accept the current reality that not everyone can be convinced about the merits of religion in society. The opinion assumes a historical, descriptive posture, about what religion was, what religion did, and how it forms the basis of our other liberties.[148]

It is this undercurrent of accommodation that needs to be articulated. Religious symbols serve as a reminder of religion's role in the country's history. In the present, such symbols may reflect a commitment to the religious liberty of its citizens.[149] The public display of religious symbols in a pluralistic society is consistent with respect for dissident religious beliefs.[150]

B. What Good Is Civil Religion?

The public display of a religious symbol such as the Bladensburg Cross in *American Legion* is offensive to some because it is said to dilute religion. Over the years, this particular concern was deployed to diffuse one of the main objections to strict separationism—its perceived hostility to religion. This justification for tearing down

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147. LORD RADCLIFFE, THE LAW AND ITS COMPASS 70–71 (1960).

148. *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2083 (noting that the Ten Commandments "have historical significance as one of the foundations of our legal system").

149. *Cf., e.g.*, Thomas C. Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty*?, 52 J. CATH. LEG. STUDIES 23, 38 (2013) ("Such displays are one way of communicating the public relevance of religion and by extension the right of all believers, including religious minorities, to exercise their faith in public settings.").

150. *Cf., e.g.*, New Hope Family Svs., Inc. v. Poole, 2020 WL 4118201, at *12 (2d Cir. July 21, 2020) ("'[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously,' not a society devoid of religious beliefs and symbols.") (quoting *Am. Legion*, 139 S. Ct. at 2074).

monuments posits that in such lawsuits religion is not targeted by hostile forces, but rescued by friendly ones, from the dilution and secularization that comes with the public display of religious symbols. Justice Blackmun, in his dissent in *Lynch*, for example, worried that the message of the nativity would be cheapened by a display meant to highlight the commercial aspects of the holiday season.[151] This particular objection does not appear in the *American Legion* majority opinion, though it is raised by the dissent.[152] The association of the cross with veterans' memorials, while not universal, is a long association that has not resulted in any apparent harm to the cross or to religion. Whatever currency this argument may have in other contexts such as funding,[153] it does not fit well with symbols. Consider again the example from the beginning of this article.

The green giant in Detroit uses scripture and religiously-themed imagery in an attempt to capture the city's ethos. Some might argue that the statue, as government speech, degrades religion, equates holy scriptures with sports contests, and attempts to distill distinct traditions into a one-size-fits-all civil orthodoxy. But the facts say otherwise. The artist's ecumenicism was acceptable to the religious leaders who viewed it at the time, and who apparently perceived the sculptural rendering to be inclusive.[154] The religious leaders' willingness to approve the sculpture makes sense in light of the purpose and necessary limits of such a monument, which is not designed to stake out a nuanced position on a disputed point of theology.

A sculpture like the green giant was never intended to do heavy theological lifting. Rather, the symbol is intended to punctuate the cultural aspiration to something higher, in a form just tangible enough to resonate. People can be expected to fill in the blanks with their own traditions. The symbolism reflects the artist's view of humanity as given by God and exemplified in the family.[155] It is a contested vision, to be sure, but it is not necessarily one lacking in depth. The sculpture, like any monument, communicates through its shape, its size, its referents, and its placement. It may be "loud"[156] or quiet, depending on the perspective of the viewer.

There is another reason that this argument does not quite fit into the frame of tolerance and inclusivity described in *American Legion*. The dilution argument exacerbates the high church-low church, liberal-conservative, traditionalist-progressivist divide. The barely concealed inference is that people who support public religious symbols are unstudied, lacking in true piety, or unable to think through the implications of such symbols for religion. It highlights and reinforces precisely the divide created by such

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151. *Lynch*, 465 U.S. at 727 (Blackmun, J., dissenting); *see also id.* at 711–12, 725 (Brennan, J., dissenting).

152. *See Am. Legion*, 139 S. Ct. at 2113 (Ginsburg, J., dissenting) (quoting Madison's Memorial and Remonstrance).

153. *Town of Greece* rejects the argument in the context of legislative prayer. *See Town of Greece*, 572 U.S. at 582–84; *see also* Roy, *Implications*, *supra* note 51. More recently, the Court in *Espinoza* rejects the argument in the context of funding exclusions. *Espinoza*, 140 S. Ct. at 2261 ("A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.").

154. *See Spirit of Detroit*, *supra* note 1.

155. *See supra* note 6.

156. *See* Transcript of Oral Argument, Am. Legion v. Am. Humanists Ass'n, 139 S. Ct. 2067 (2019) (lawyer for American Humanists describing the Bladensburg Cross).

lawsuits. This is not the type of conclusion a court should be making.

Avoiding the divisiveness Justice Breyer warned about in *Van Orden*, in which a court's decision to disturb the status quo makes things worse,[157] is a critical piece of the decision in *American Legion*.[158] Leaving behind the argument about dilution in this context is consistent with the goal of preserving civic unity.

C. Monuments and Symbols in the Community

i. Religious Symbols

American Legion allows communities to continue to include religion in their symbols, monuments and ceremonies. In that case the Court was writing against a backdrop of decisions that viewed such actions with skepticism. As Justice Thomas argued in a recent opinion, the Court's past decisions may have influenced public attitudes about religion's role in society.[159] It is fair to observe that if the historical approach to the Establishment Clause does not forbid religious symbols, then the Court's past decisions have yielded a more secular public square than would have existed otherwise.

A healthy accommodation, on the other hand, acknowledges religion's role in society, which is not foreign to our government or traditions. The Court's more recent opinions have highlighted George Washington's accommodationism; in his Farewell Address he referred to religion and morality as "indispensable supports" to "political prosperity."[160] It is reflected in the history of the Bladensburg Cross[161] and in the spirit of the interfaith era that produced monuments like the green giant. The religion that provided an ideological backdrop for the civil rights movement can remind society of its moral commitments.[162] Respect, tolerance, and inclusion are religious as well as secular precepts. *American Legion* gives the reader few reasons to agree that respect and tolerance are things to be pursued, apart from the desire to avoid social conflict. For many citizens, religion supplies those reasons.

To say that religion is a positive good is not to pine for establishment or backslide on society's commitment to pluralism. Nor does it assume that religion will, in this day and age, receive more than a place at the table alongside the community's other members,

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157. Polling data show that the Court's decisions striking down monuments were at odds with contemporaneous public opinion. *See* TRACEY L. COOK, FIRST AMENDMENT RELIGIOUS LIBERTIES: SUPREME COURT DECISIONS AND PUBLIC OPINION, 1947–2013, at 104–10 (2014).

158. For a critical assessment of divisiveness as a constitutional criterion, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

159. *Espinoza*, 591 U.S. at 2266 (Thomas, J., concurring) (arguing that some of the Court's decisions "communicat[e] a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion").

160. *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion); *see also Town of Greece*, 572 U.S. at 1853–54 (Kagan, J., dissenting).

161. The fundraising invitation stated: "We, the citizens of Maryland, trusting in God, the Supreme Ruler of the Universe, Pledge Faith in our Brothers who gave their all in the World War to make [the] World Safe for Democracy. Their Mortal Bodies have turned to dust, but their spirit Lives to guide us through Life in the way of Godliness, Justice and Liberty. With our Motto, 'One God, One Country, and One Flag' We contribute to this Memorial Cross Commemorating the Memory of those who have not Died in Vain." *Am. Legion*, 139 S. Ct. at 2076.

162. *Cf., e.g.*, CHARLES MARSH, THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY (2005).

ideas, and influences.

ii. Other Divisions

In the current moment, the prospect of religious division has been eclipsed by a public reckoning and re-appraisal of monuments in light of the country's past. Statues of Confederate soldiers and in some cases, even founders such as Jefferson, have been toppled by activists and spray-painted with epithets like "racist" and "murderer."[163] Apart from spasms of upheaval, there is a more nuanced reaction on the part of government officials, one hopes, to listen to communities and decide what to do with monuments and symbols that no longer reflect their constituents.[164] Litigation, though more desirable than vandalism, often bypasses that process, and has been an unsuccessful vehicle for objections based on equal protection or other constitutional provisions.

All that *American Legion* decides is whether challengers with religious objections to monuments will have success in the courts. Erecting monuments, and in effect, putting other human beings on a pedestal, is the stuff of communities and societies. *American Legion* holds that longstanding religious monuments and symbols do not violate the First Amendment. The tone of the opinion, however, with its rejection of religious iconoclasm and its elevation of "citizens living together harmoniously," certainly speaks to the current moment. Ultimately, extra-legal considerations will determine the outcome.

V. CONCLUSION

American Legion stands for the proposition that religious symbols can be a part of a shared culture without offending pluralism. The decision shows respect for individuals in history whose religion was central to their lives, and to those, like Washington, who believed that religion provides the necessary moral supports to uphold society. But *American Legion* does not weigh in on those assessments; it does not cast a broad accommodationist vision about the value of religion to society. This was a missed opportunity to correct some of the Court's older separationist decisions which contributed to the view that religion has no place in public life. Particularly now, the type of civil religion that is practiced in public might infuse the public ethos with a common, perhaps

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163. Annie Gowen, *As statues of Founding Fathers topple, debate rages over where protestors should draw the line*, WASH. POST, https://www.washingtonpost.com/national/as-statues-of-founding-fathers-topple-debate-rages-over-where-protesters-should-draw-the-line/2020/07/07/5de7c956-bfb7-11ea-b4f6-cb39cd8940fb_story.html (last visited Jan. 7, 2020). In some instances, religious icons and monuments have been permanently removed, vandalized, or hidden for protection. *See, e.g.*, Andrew J. Campa, *Junipero Serra statue to be moved away from Ventura City Hall*, L.A. TIMES (June 18, 2020, 10:23 PM), https://www.latimes.com/california/story/2020-06-18/statue-of-controversial-roman-catholic-saint-to-be-moved-away-from-ventura-city-hall; Cheryl Hurd, Christie Smith & Sergio Quintana, *Demonstrators Topple Statues in San Francisco Golden Gate Park*, NBC BAY AREA NEWS, https://www.nbcbayarea.com/news/local/san-francisco/demonstrators-topple-statues-in-san-franciscos-golden-gate-park/2312839/ (last updated June 22, 2020, 8:24 PM); Matt Fountain, *Catholic Church removes Junípero Serra statue from San Louis Obispo Mission*, THE TRIBUNE (June 22, 2020, 6:35 PM), https://www.sanluisobispo.com/news/local/article243718742.html.

164 A recent example is Mississippi's decision to remove the Confederate battle emblem from its state flag. *See* Emily Wagster Pettus, *Mississippi's new magnolia flag starting to fly after vote*, ASSOCIATED PRESS (Nov. 4, 2020), https://apnews.com/article/election-2020-religion-race-and-ethnicity-mississippi-elections-3e31d01e0e0b8c062ea202b7d8424ecf. Legislation required both the removal of the Confederate symbol from the state's new flag, and the inclusion of the national motto, "In God We Trust." *Id.*

more charitable, lens with which to approach some of those other divisions.

The "Spirit of Detroit"

The Bladensburg Peace Cross