First Amendment — Establishment Clause — Government Display of Religious Symbols — American Legion v. American Humanist Ass'n

The beginning of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] After unceremoniously incorporating these provisions against the state governments in 1947,[2] the Supreme Court struggled to develop any judicially manageable doctrine for assessing what state action qualifies as "an establishment of religion."[3] Several decades later, Chief Justice Burger attempted to reconcile the Court's Establishment Clause cases into a three-part test in *Lemon v. Kurtzman*.[4] Yet, ever since, the Court's application of the *Lemon* test has been notoriously inconsistent.[5] Recently, in *American Legion v. American Humanist Ass'n*,[6] the Court held that a cross-shaped World War I memorial owned and maintained by the Maryland-National Capital Park and Planning Commission did not violate the Establishment Clause.[7] In reaching this holding, the Court (and all nine Justices) again refused to apply the *Lemon* test — and even went a step further by dedicating a substantial part of the Court's opinion to identifying *Lemon*'s shortcomings.[8] But the Court failed to provide any new guidance for Establishment Clause cases going forward. With *Lemon* shelved, *American Legion* missed an opportunity to bring clarity to Establishment Clause jurisprudence by emphasizing that clause's connection to the related Free Exercise Clause. Although tethering the religion clauses together at equal levels of strength would not provide a comprehensive new method of analysis, doing so would be a step in the right direction because it would accord with the text and original understanding of the First Amendment, provide much-needed doctrinal

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[1] U.S. CONST. amend. I.

[2] *See* Everson v. Bd. of Educ., 330 U.S. 1, 14–18 (1947).

[3] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 666–72 (1970); Bd. of Educ. v. Allen, 392 U.S. 236, 242–44 (1968).

[4] 403 U.S. 602 (1971). Under the *Lemon* test, to withstand an Establishment Clause challenge, "government conduct (1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 382 (D. Md. 2015) (quoting Moss v. Spartanburg Cty. Sch. Dist. Seven, 683 F.3d 599, 608 (4th Cir. 2012)). "[A] violation of even one prong . . . results in a violation of the Establishment Clause." Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 206 (4th Cir. 2017).

[5] *See, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685–86 (1992); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 800–19 (1993).

[6] 139 S. Ct. 2067 (2019).

[7] *Id.* at 2074.

[8] *See id.* at 2080–85.

stability to Establishment Clause jurisprudence, and promote ideological neutrality in this divisive area of constitutional law.

The facts leading to this case began over 100 years ago. In 1918, residents of Prince George's County, Maryland, began raising funds for a memorial to commemorate the county's soldiers who died in World War I.[9] The residents designed the memorial in the shape of a cross, but the local chapter of the American Legion eventually took over the project.[10] Once completed, the thirty-two-foot-tall Latin cross stood on a large pedestal, inscribed with the American Legion's emblem, words such as "Valor" and "Endurance," and a plaque listing the names of local men who died in the war and stating that the memorial was dedicated to them.[11] In the years after the cross's completion, a busy intersection sprang up around the cross.[12] In 1961, the Maryland-National Capital Park and Planning Commission (Commission) took over "the Cross and the land on which it [sat]" because of the new "traffic-safety concerns."[13] Since acquiring the cross, the Commission had spent $117,000 to maintain the memorial, and had budgeted an additional $100,000 for repairs.[14] In 2014, the American Humanist Association and three residents of Washington, D.C., and Maryland brought suit against the Commission under 42 U.S.C. § 1983 in the United States District Court for the District of Maryland.[15] The complaint alleged that the Commission's "ownership, maintenance, and . . . display of the cross on public property violate[d] the Establishment Clause."[16] The American Legion intervened to defend the cross.[17]

The district court granted summary judgment to the defendants.[18] Analyzing the First Amendment claim under both the three-part *Lemon* test and the "legal judgment" test developed in Justice Breyer's concurrence in *Van Orden v. Perry*,[19] the court concluded that the cross did not violate the Establishment Clause. Under *Lemon*, the Commission's maintenance of the cross had secular purposes of traffic safety and honoring "our Nation's fallen soldiers,"[20] it did not have the primary effect

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[9] *Id.* at 2076.

[10] *Id.* at 2076–77.

[11] *Id.* at 2077.

[12] *Id.* at 2078.

[13] *Id.*

[14] *Id.*

[15] *See id.*; Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 380 (D. Md. 2015).

[16] *Am. Humanist Ass'n*, 147 F. Supp. 3d at 380.

[17] *See id.*

[18] *Id.* at 375–76.

[19] 545 U.S. 677 (2005).

[20] *Am. Humanist Ass'n*, 147 F. Supp. 3d at 385 (quoting Salazar v. Buono, 559 U.S. 700, 715 (2010)).

of endorsing religion,[21] and it avoided any excessive entanglement between government and religion.[22] Under Justice Breyer's *Van Orden* "legal judgment" test, the cross's context and history indicated that it did not violate the Establishment Clause's basic purpose of preserving a healthy separation of church and state.[23] Therefore, the district court determined that, under either test, the defendants should prevail.[24]

The Fourth Circuit reversed.[25] Writing for the panel, Judge Thacker[26] chose to apply the *Lemon* test.[27] She determined that the cross satisfied the secular purpose prong,[28] but failed both the primary effect and excessive entanglement prongs. The cross failed the primary effect prong because a reasonable observer would perceive the cross, the "preeminent symbol of Christianity," as a government endorsement of Christianity.[29] The cross failed the excessive entanglement prong because the Commission spent government funds to maintain the cross, and because the Commission was displaying the "hallmark symbol of Christianity in a manner that dominates its surroundings."[30] Therefore, the cross violated the Establishment Clause.[31]

The Supreme Court reversed.[32] Writing for the Court, Justice Alito[33] began by identifying four reasons the Court generally declines to apply *Lemon* to cases involving "longstanding monuments, symbols, and practices."[34] First, since these monuments, symbols, or practices were "established long ago," "identifying their original purpose" under the first *Lemon* prong is "especially difficult."[35] Second, the passage of time may create multiple, overlapping purposes that make the first *Lemon* prong even more difficult to evaluate.[36] Third, the passage of time might also embed a religious monument, symbol, or practice into a community's

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[21] *Id.* at 387.

[22] *See id.* at 388.

[23] *See id.* at 388–89.

[24] *Id.* at 389.

[25] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 200 (4th Cir. 2017).

[26] Judge Thacker was joined by Judge Wynn and joined in part by Chief Judge Gregory.

[27] *Am. Humanist Ass'n*, 874 F.3d at 204–05. The panel also rejected an argument that the plaintiffs lacked standing. *See id.* at 203–04.

[28] *See id.* at 206.

[29] *Id.* at 206 (quoting Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004)); *see id.* at 206–11.

[30] *Id.* at 211–12.

[31] *Id.* Chief Judge Gregory dissented from this part of the opinion — he found all three *Lemon* prongs satisfied. *Id.* at 215 (Gregory, C.J., concurring in part and dissenting in part).

[32] *Am. Legion*, 139 S. Ct. at 2074.

[33] Justice Alito was joined in full by Chief Justice Roberts and Justices Breyer and Kavanaugh, and joined in part by Justice Kagan.

[34] *Am. Legion*, 139 S. Ct. at 2082; *see id.* at 2081–85.

[35] *Id.* at 2082; *see id.*

[36] *See id.* at 2082–83.

secular "landscape and identity."[37] This embedding phenomenon makes the *Lemon* primary effect analysis particularly challenging.[38] And fourth, the removal of longstanding religious monuments, symbols, or practices can appear "aggressively hostile to religion."[39] Thus, Justice Alito concluded that the *Lemon* test does not apply to "established, religiously expressive monuments, symbols, and practices."[40] Instead, these traditions enjoy "a strong presumption of constitutionality."[41]

Without announcing any formal test to be applied to longstanding monuments, Justice Alito conducted a historical analysis to determine whether the cross embodied "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."[42] In concluding that the cross did meet these criteria, Justice Alito explained that the cross "carries special significance" relating to World War I due to the crosses that "marked the graves of American soldiers killed in the war."[43] Thus, the World War I historical context allowed the cross to "take on an added secular meaning."[44] Furthermore, the cross acquired historical importance for the Bladensburg community through the passage of time. Justice Alito explained that the cross spoke to "the deeds of their predecessors," "the sacrifices they made . . . in the name of democracy," and what the community "felt at the time."[45] Lastly, the fact that the cross was a memorial to commemorate "the death of particular individuals," many of whose graves were marked by the same symbol, made it "natural and appropriate" to use the shape of the cross.[46] In sum, the cross's history and context rendered it sufficiently secular to withstand Establishment Clause attack.

Justice Breyer concurred.[47] He emphasized that each Establishment Clause case must determine whether government conduct violates the "basic purposes" of the religion clauses: "assuring religious liberty," avoiding religious conflict, and allowing church and state each to "flourish in its 'separate spher[e].'"[48] He noted that "[t]he case would be different" if the organizers had "deliberately disrespected . . . minority

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[37] *Id.* at 2084 (referencing the recent Notre-Dame Cathedral fire in Paris, France, as an example).
[38] *See id.*
[39] *Id.* at 2085; *see id.* at 2084–85.
[40] *Id.* at 2085.
[41] *Id.*
[42] *Id.* at 2089.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 2090.
[47] *Id.* (Breyer, J., concurring). Justice Breyer was joined by Justice Kagan.
[48] *Id.* at 2090–91 (alteration in original) (quoting Van Orden v. Perry, 545 U.S. 677 (2005) (Breyer, J., concurring in the judgment)).

faiths or if the Cross had been erected only recently."[49] Justice Breyer also disclaimed any adoption of a formal "history and tradition test" — asserting instead that a particular monument's "long-held place in the community" controls, not general practices of prior generations.[50]

Justice Kavanaugh concurred.[51] He stressed two points. First, he asserted that *Lemon* no longer applies in any context[52] and proposed a new Establishment Clause test:

> If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation."[53]

Second, he explained that the Court's holding merely *allowed* the cross memorial — it did not *require* it.[54]

Justice Kagan concurred in part.[55] Although she "fully agree[d] with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is," she explained that she was not prepared to make any determination regarding *Lemon*'s applicability to other cases.[56]

Justice Ginsburg dissented.[57] Without mentioning *Lemon*, Justice Ginsburg applied a neutrality test. "The Establishment Clause essentially instructs: '[T]he government may not favor one religion over another, or religion over irreligion.'"[58] She argued that a cross displayed on public property is presumptively not neutral and therefore presumptively violates the Establishment Clause.[59] The government may overcome the presumption, Justice Ginsburg argued, if the context suggests that the government has not embraced the religious meaning.[60] She concluded that the cross could not overcome the presumption of

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[49] *Id.*

[50] *Id.*

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

[52] *See id.* at 2092–93.

[53] *Id.* at 2093.

[54] *Id.* at 2094.

[55] *Id.* (Kagan, J., concurring in part).

[56] *Id.* Additionally, Justice Thomas and Justice Gorsuch each filed concurrences in the judgment only. Justice Thomas would have held that the Establishment Clause was not even applicable to the states. *Id.* at 2095 (Thomas, J., concurring in the judgment). Even if it were, he would have applied it only to state legislatures. *Id.* And even if the Clause applied to the Commission, he would have "overrule[d] the *Lemon* test in all contexts." *Id.* at 2097. Justice Gorsuch would have dismissed the case for lack of standing, *id.* at 2098 (Gorsuch, J., concurring in the judgment), but also disowned the *Lemon* test in all contexts, *id.* at 2102.

[57] *Id.* at 2103 (Ginsburg, J., dissenting). Justice Ginsburg was joined by Justice Sotomayor.

[58] *Id.* at 2105 (alteration in original) (quoting McCreary County v. ACLU of Ky., 545 U.S. 844, 876 (2005)).

[59] *See id.* at 2106.

[60] *Id.* at 2106–07 (offering the example of religious artwork displayed in a museum).

unconstitutionality.[61] She argued that holding the cross unconstitutional would not necessarily require removal of other cross monuments because they might overcome the presumption.[62]

Given the apparent consensus on the Court to reject or ignore *Lemon* (at least for longstanding monuments), *American Legion* missed an opportunity to begin advancing a clearer understanding of the Establishment Clause for future cases. If the *Lemon* test is truly dead, the project of rehabilitating Establishment Clause doctrine into a comprehensive and judicially manageable set of standards will be long and complex — and could not possibly occur in a single case. But *American Legion* should have begun the expedition with a step in the right direction by tethering the Establishment Clause to the related free exercise doctrine for support. Recrafting Establishment Clause doctrine in the context of the Free Exercise Clause — in part by utilizing a rule for the Establishment Clause that mirrors that of the Free Exercise Clause, when the original meaning or purpose of the clauses is elusive — would benefit this area of constitutional law for at least three reasons. First, the clauses are textually connected and were originally understood to have related meanings. Second, tethering together the clauses could provide much-needed doctrinal stability in Establishment Clause cases. And third, it would promote ideological neutrality in constitutional law. Ultimately, these considerations demonstrate why *American Legion* missed an important opportunity to begin clarifying Establishment Clause doctrine by including the Free Exercise Clause in the analysis.

First, the *American Legion* Court would have more faithfully conformed to the text and original understanding of the First Amendment if it had read the Establishment Clause and the Free Exercise Clause together. Even though identifying the precise original meaning of the religion clauses may be difficult, scholars have at least agreed that the two religion clauses are connected and serve a unified purpose.[63] Yet the *American Legion* majority did not mention the Free Exercise Clause at all in interpreting the Establishment Clause. This omission aligns with the Court's usual practice of analyzing each clause in isolation and with only passing references to one another.[64] Textually, this practice is surprising considering the clauses' juxtaposition and syntax. Jurists

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[61] *See id.*

[62] *See id.* at 2112.

[63] *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381–84, 398–402, 424 (2002); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856 (1986); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 849–52 (1984); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 88–90 (2005).

[64] *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 876–82 (1990); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630–42 (1943).

commonly recognize that adjacent clauses dealing with similar subjects should usually be read together and must be understood in context with each other.[65] The Court's practice is also surprising considering the clauses' related original understanding. The Founding generation understood the religion clauses as serving one purpose — to protect individual religious exercise[66] — but in two different ways.[67] As understood in the state ratification debates, the Free Exercise Clause served that purpose directly by preventing government from *prohibiting or burdening* religious activity.[68] But the Founding generation understood the Establishment Clause as serving that same purpose in an inverse way — by preventing government from *mandating or compelling* religious activity that could conflict with citizens' chosen religious activities.[69] These observations may fall short of revealing a discernible, comprehensive original meaning of the clauses. But they at least demonstrate the oddity of reading the clauses in isolation when considering text and original understanding. *American Legion* would have helped First Amendment law by instructing future courts to consider this textual context.

Second, mirroring Free Exercise Clause jurisprudence in the Establishment Clause context could provide a useful interpretive rule to improve doctrinal stability when original meaning or purpose is not clear.[70] As exemplified by the large number of opinions in *American Legion*, the Court has long struggled to answer the primary constitutional interpretation questions regarding precise original meaning or purpose of the religion clauses.[71] When these primary inquiries fail, the Court could default to an assumption that the Free Exercise Clause and the Establishment Clause have equal strength. Under such a rule, the Court could look to what the Free Exercise Clause prevents the government from *prohibiting or burdening* to craft an equal and opposite doctrine regarding what the Establishment Clause prevents the government from *mandating or compelling*. This default rule would be helpful

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[65] *See, e.g.*, Smith v. United States, 508 U.S. 223, 229 (1993) ("The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed [with] the terms that surround it.").

[66] *See* sources cited *supra* note 63; *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1438–39 (1990).

[67] *See* sources cited *supra* notes 63, 66; *see also* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 617 (2006).

[68] *See* Feldman, *supra* note 63, at 403 n.321.

[69] *See* sources cited *supra* notes 63, 66, 67; *see also* Paulsen, *supra* note 5, at 798.

[70] "Closure rules" or interpretive "tiebreakers" are commonly used in cases of interpretive uncertainty. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1111 (2017); Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1665–71 (2010).

[71] *Compare* Lynch v. Donnelly, 465 U.S. 668, 674–79 (1984) (emphasizing the centrality of religious practice in American political history), *with* McCreary County v. ACLU of Ky., 545 U.S. 844, 874–81 (2005) (arguing that our history also reveals a commitment to a secular politics).

because, compared to the notoriously scattered Establishment Clause jurisprudence,[72] the Court's free exercise doctrine has been relatively stable.[73] Thus, the Court could use the relatively stable free exercise doctrine — defining prohibited religious *burdens* — as a template for Establishment Clause doctrine — defining prohibited religious *benefits*.

Current free exercise doctrine provides several examples of how this technique could provide a useful conceptual tool for identifying where to draw the line in difficult Establishment Clause cases. For example, under the Free Exercise Clause, government cannot facially discriminate against citizens based on their religious status.[74] An analogous restriction under the Establishment Clause could be that government cannot grant subsidies or privileges based expressly on recipients' religious affiliations. Similarly, under the Free Exercise Clause, government cannot act purely on a "masked" intent to prevent religious practice.[75] A mirror-image restriction under the Establishment Clause could be that government cannot act purely on a veiled intent to compel religious observances. If the Free Exercise Clause prevents government officials from "disparag[ing]" a person's religion in judicial proceedings,[76] the Establishment Clause could bar them from praising it as evidence of innocence or as a mitigating factor. If under the Free Exercise Clause the government cannot prevent churches from considering certain factors in hiring and firing ministers,[77] the Establishment Clause could prevent it from requiring churches to consider certain factors. The list goes on.

As applied to *American Legion*, the mirror-image rule could have supported the Court's holding. In the free exercise context, the Court has established that neutral and generally applicable regulations usually must satisfy only rational basis review,[78] with strict scrutiny applying only if the government acted with "masked" hostility toward religion.[79] Absent masked hostility, the Court upholds generally applicable government regulations so long as the government has a rational nonreligious

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[72] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray . . . .").

[73] *See* Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 250 (1986). *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); McDaniel v. Paty, 435 U.S. 618 (1978).

[74] *See McDaniel*, 435 U.S. at 626 (plurality opinion).

[75] *Lukumi*, 508 U.S. at 534; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[76] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[77] *Hosanna-Tabor*, 565 U.S. at 196.

[78] *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79, 883–84 (1990). *Smith* acknowledged exceptions for "hybrid situation[s]," *id.* at 882, when additional constitutional rights are implicated and for government action involving individualized assessments. *See id.* at 881–85.

[79] *Lukumi*, 508 U.S. at 534.

reason for the regulation — even if it knowingly burdens religion.[80] Applying this well-established doctrine as an analogy to *American Legion*, the majority might have viewed a World War I memorial in the shape of a cross as a monument generally applicable, or generally available, to all citizens to visit and venerate for nonreligious reasons — such as honoring fallen soldiers from the community. Even though the Commission presumably knew the cross would have the effect of promoting Christianity, free exercise doctrine is usually unconcerned with mere knowledge (as opposed to intent) of how government action impacts religion.[81] And under *Employment Division v. Smith*,[82] general applicability is not voided just because government action disproportionately impacts a particular religious group.[83] Thus, the primary inquiry for *American Legion* would be whether the Commission's intent in maintaining the cross was truly to promote traffic safety and to venerate WWI soldiers, or whether its intent was to promote Christianity. Absent a finding of "masked" intent to promote religion, the cross's promotion of Christianity would be merely "incidental" to the government's nonreligious motive, given that the government had a rational secular explanation regarding the significance and symbolism of cross-marked graves in World War I. Just as the Free Exercise Clause creates a strong but not insurmountable presumption of government validity, the Establishment Clause would do the same under this approach.

Some jurists may object that a mirror-image rule of *Smith* in cases like *American Legion* would be too lenient on government and open absurd possibilities for government endorsement of religion.[84] But jurists should note that a mirror-image rule would not require leniency — it would require only that the two clauses have equal strength. Furthermore, even if this rule results in too much leniency in cases like *American Legion*, that problem would only reveal an underlying problem in free exercise doctrine. Religious groups have frequently complained that *Smith*'s rule renders the Free Exercise Clause virtually meaningless.[85] If the application of the same rule to the Establishment Clause were to

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[80] For example, in *Smith*, the Court upheld Oregon's prohibition on peyote despite the government's knowledge that citizens primarily used peyote as "a sacrament of the Native American Church." *See Smith*, 494 U.S. at 903 (O'Connor, J., concurring in the judgment).

[81] *See supra* note 80.

[82] 494 U.S. 872.

[83] *See supra* note 80. Thus, although the *American Legion* dissent would have disagreed that the memorial was neutral based on its "effect of 'endorsing' religion," *Am. Legion*, 139 S. Ct. at 2105 (Ginsburg, J., dissenting) (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989)), the majority might have responded that no analogous "effect of *discouraging* religion" rule of testing neutrality exists under free exercise doctrine.

[84] *Cf.* Transcript of Oral Argument at 20, *Am. Legion*, 139 S. Ct. 2067 (Nos. 17-1717, 18-18) (Justice Kagan questioning whether a weak Establishment Clause would permit cities to erect crosses merely to promote the values of Christianity).

[85] *See, e.g.*, David French, *Against Conservative Cultural Defeatism*, NAT'L REV. (June 4, 2019, 1:18 PM), https://www.nationalreview.com/2019/06/against-conservative-cultural-defeatism/ [https://perma.cc/43ZX-AYMB] (claiming *Smith* was a "terrible free-exercise opinion").

cause secularist groups to have the same complaint, this would indicate that *both* clauses should be given new life. Thus, this objection addresses only the substantive doctrine, not the tethering of the clauses together at equal levels of strength.

Third, if *American Legion* had begun tethering the Establishment Clause and Free Exercise Clause together, it would have promoted ideological neutrality in several ways. Initially, insisting on similar levels of scrutiny would help eliminate double standards that occur when religious or secularist groups argue for high scrutiny under one clause but low scrutiny under the other. Analyzing the clauses in isolation obscures these double standards because they are not displayed side by side. But if jurists argue for a weak Free Exercise Clause, they should not be surprised when they end up with a weak Establishment Clause, too. And if jurists want a strong Free Exercise Clause, they should prepare to recognize a strong Establishment Clause. Discussing the clauses in concert with one another would expose arguments that exploit incongruent levels of scrutiny. Additionally, if parties bringing challenges under one clause understand that their preferred holding will have analogous but opposite implications for the other clause, they may hesitate before reflexively arguing for the highest scrutiny possible. In many cases, this may lead would-be challengers to forgo bringing a constitutional challenge at all, which would serve the goals of at least some of the opinions expressed in *American Legion*.[86] The Court would surely welcome these benefits as it moves beyond *American Legion* in recrafting Establishment Clause doctrine.

Thus, having rejected the *Lemon* test, *American Legion* missed a prime opportunity to begin stabilizing Establishment Clause doctrine by failing to place it in its proper context alongside the Free Exercise Clause. While the Court was right to reject *Lemon*, bringing the Free Exercise Clause into the discussion would have been more faithful to the text of the First Amendment and its original understanding. The Court also missed the opportunity to use the Free Exercise Clause cases to bring doctrinal stability to future Establishment Clause cases. And finally, the Court missed the chance to promote ideological neutrality in this area of constitutional law. The next time the Court takes up the issue, it would do well to add this important piece to the rebuilding of Establishment Clause doctrine.

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[86] *See Am. Legion*, 139 S. Ct. at 2102–03 (Gorsuch, J., concurring in the judgment) (arguing against general standing for "offended observers," *id.* at 2100).