

# Court weighs competing arguments in Peace Cross case

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WASHINGTON, D.C.—Advocates on both sides of a case involving a 40-foot cross on government land agreed the Supreme Court appears open to considering different tests to recognize unconstitutional government establishment of religion.

However, they drew different conclusions about whether the high court would create a new doctrine to guide lower courts' interpretation of the First Amendment clause, "Congress shall make no law respecting an establishment of religion."

The Supreme Court listened to oral arguments Feb. 27 related to [\*The American Legion v. American Humanist Association\*](#), a case focused on the Peace Cross in Bladensburg, Md. The Latin Cross was dedicated in 1925 to honor veterans from Prince George's County who died in World War I.

The Fourth Circuit U.S. Court of Appeals ruled the cross is an unconstitutional endorsement of Christianity, but appellants argued it should be viewed as a war memorial that does not constitute government establishment of religion.

An often-cited test regarding the Establishment Clause draws from the Supreme Court's 1971 opinion in *Lemon v. Kurtzman*. The so-called "Lemon test" says a law must have a secular purpose, not primarily promote or restrict religion, and not create "excessive entanglement" with religion.

# ‘Coercion test’ proposed

The American Legion, arguing in support of the Bladensburg cross, asserted the Supreme Court instead should apply a coercion test—asking whether a challenged act involving the state coerces citizens into supporting or participating in religious activity. As a “passive display,” the Bladensburg cross does not coerce behavior, the attorney asserted.

[Baptist Press reported](#) Kelly Shackelford, president and chief counsel of the First Liberty Institute, asserted the coercion test is consistent with the Constitution and the intent of the nation’s founders.



Russell Moore

The founders “didn’t want the government coercing anyone with regard to their religion,” Shackelford told Baptist Press. “They wanted people to be free in exercising their faith, and that should be the guiding principle.”

Russell Moore, president of the Southern Baptist Convention’s Ethics & Religious Liberty Commission, sounded a similar note, calling the effort to remove the Bladensburg cross an “attempt to amend the Establishment Clause to mean what (James) Madison did not write.”

“As we submitted in our brief to the court, maintaining a nearly century-old memorial is hardly an official declaration in law for Christianity.”

## ‘A hot bench’

In a [podcast](#), Baptist Joint Committee for Religious Liberty Executive Director Amanda Tyler and General Counsel Holly Hollman discussed their impressions based on oral arguments in the cross case.



Holly Hollman

“It was a hot bench from the very beginning,” Hollman said, explaining members of the Supreme Court asked frequent and penetrating questions to lawyers who presented arguments.

Hollman acknowledged many people—including some judges—critique the Lemon Test as “unworkable or complicated or confusing.”

“That’s part of why, I think, the bench was so aggressive” in its questioning, she said. “They were trying to figure out: Do we need a new test? Is there a new test? Under what test should this cross stay or go? And what will be the effect on all the other cases?”

At one point, Justice Neil Gorsuch asked if it is “time for this court to thank Lemon for its services and send it on its way.” Justice Brett Kavanaugh noted the court has not applied the Lemon test in some of its most important First Amendment rulings, and he asserted that “the lower courts need some clarity.”

However, while the justices questioned the Lemon Test, Tyler added, “They didn’t seem to be gravitating toward any better alternative.”

Shackelford agreed the justices were looking carefully at which test or tests could be applied, but he voiced hope the court would provide a more definitive answer.

“One thing that was probably the most clear of the day is how confused and troubled the law is right now, and that the justices are all aware of that, and that they’re ready to do something about that,” he told Baptist Press.

“They obviously were going back and forth with how to do that, but I think it’s clear they know something needs to be done and the law needs to be clarified.

“That gives us a lot of hope, because No. 1, if we clear things up, we can stop a lot of these attacks upon veterans memorials and religious symbols across the country.”

## **Can the cross lack religious content?**

In their podcast, Hollman and Tyler disputed the assertion that removal of the Bladensburg cross from public land would endanger crosses on graves in military cemeteries or result in the wholesale scouring of religious symbols from every public place.

They focused primarily on the danger of the assertion that Christianity’s most prominent and sacred symbol could be viewed as a secular display—and they pointed out at least some members of the Supreme Court acknowledged that argument.

When Neal Katyal, former principal deputy solicitor general in the U.S. Department of Justice, argued a 40-foot cross lacked religious content and had an objectively secular meaning, Justice Sonia Sotomayor immediately

raised questions, Hollman noted.

Sotomayor quoted from a [brief](#) the Baptist Joint Committee filed in conjunction with the American Jewish Committee, Central Conference of American Rabbis, Evangelical Lutheran Church in America, General Synod of the United Church of Christ and the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.).

[The brief](#), written by Douglas Laycock, who holds endowed chairs both at the University of Texas and the University of Virginia, argued that Christians view the cross as the most sacred symbol of their faith.

## **‘Deeply offensive’ assertion**

In a public statement issued after the oral arguments, Hollman expanded on that topic.

“The cross matters to us as Christians. It has a powerful, specific meaning that is central to our faith. Non-Christians also recognize the specific meaning of the cross, which is why we stand with them in saying *no*, the cross is *not* a universal symbol of sacrifice,” she said.

“The cross symbolizes the story of the resurrection of Jesus Christ, a story not shared outside of Christianity. ...

“Whatever its intentions, the government’s claim that the cross simply stands for valor to commemorate war dead does not ring true. For Christians who think seriously about the events and message that the cross represents, the government’s claim is deeply offensive. Christians should reject that claim and the short-term perceived gain of preserving a prominent government-sponsored symbol of our faith.”