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CHAPTER 2

FREEDOM OF SPEECH—MODES OF REGULATION AND STANDARDS OF REVIEW

SECTION 3. OVERBREADTH, VAGUENESS AND PRIOR RESTRAINT

Insert after *Matal v. Tam*, p.417

Iancu v. Brunetti, 588 U.S. ___ (2019), raised an issue similar to that in *Matal v. Tam*: Could the Patent and Trademark Office refuse registration to a mark that it found “scandalous” or “immoral” under the Lanham Act? At issue was a clothing line seeking to register its brand name, “FUCT.” Writing for the Court, Justice KAGAN found *Tam* controlling: “[The] mark (which functions as the clothing’s brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. [To] determine whether a mark [is scandalous or immoral under the Lanham Act], the PTO asks whether a ‘substantial composite of the general public’ would find the mark ‘shocking to the sense of truth, decency, or propriety’; ‘giving offense to the conscience or moral feelings’; ‘calling out for condemnation’; ‘disgraceful’; ‘offensive’; ‘disreputable’; or ‘vulgar.’ [The] Board stated that the mark was ‘highly offensive’ and ‘vulgar,’ and that it had ‘decidedly negative sexual connotations.’” Under *Tam*, Justice Kagan held, “the key question becomes: Is the ‘immoral or scandalous’ criterion in the Lanham Act viewpoint-neutral or viewpoint-based? It is viewpoint-based. [The] Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them. [Here] are some samples. The PTO rejected marks conveying approval of drug use (YOU CAN’T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to ‘inappropriately glamorize drug abuse.’ But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it “suggests that people should engage in an illegal activity in connection with worship” and because ‘Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use.’ [But] the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. [The] Government basically asks us to treat decisions like those described above as PTO

examiners' mistakes. [The] Government's idea, abstractly phrased, is to narrow the statutory bar to 'marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express.' More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are 'vulgar'—meaning 'lewd,' 'sexually explicit or profane.' a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it. [Even] assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. [The] statute as written does not draw the line at lewd, sexually explicit, or profane marks."

Justice ALITO concurred, offering a recommendation to Congress: "[In] many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. [Our] decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force."

Chief Justice Roberts concurred in part and dissented in part, suggesting a compromise between the majority and dissent: "I agree with the majority that the 'immoral' portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias. [However,] the 'scandalous' portion of the provision is susceptible of such a narrowing construction. Standing alone, the term 'scandalous' need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Tam*. I agree with Justice Sotomayor that such a narrowing construction is appropriate in this context. [Refusing] registration to obscene, vulgar, or profane marks does not offend the First Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does

not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression.”

Justice BREYER, concurred in part and dissented in part, suggesting a proportionality approach as he did in *Reed v. Gilbert*: “I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of ‘viewpoint discrimination,’ ‘content discrimination,’ ‘commercial speech,’ ‘government speech,’ or the like. [I] believe we would do better to treat this Court’s speech-related categories not as outcome-determinative rules, but instead as rules of thumb. After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly viewpoint discriminatory or that is subject to strict scrutiny, we sometimes find the regulation to be constitutional after weighing the competing interests involved. Unfortunately, the Court has sometimes applied these rules—especially the category of ‘content discrimination’—too rigidly. [This] case illustrates the limits of relying on rigid First Amendment categories, for the statute at issue does not fit easily into any of these categories. [The] trademark statute does not clearly fit within any of the existing outcome-determinative categories. Why, then, should we rigidly adhere to these categories? Rather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does the regulation at issue work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives? Based on this proportionality analysis, I would conclude that the statute at issue here, as interpreted by Justice Sotomayor, does not violate the First Amendment.

Justice Sotomayor, joined by Justice Breyer, concurred in part and dissented in part: “The Court’s decision today will beget unfortunate results. With the Lanham Act’s scandalous-marks provision struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks—and the Government’s immediate powerlessness to say no—is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision’s bar on the registration of “scandalous” marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term “scandalous” and accordingly reject petitioner Erik Brunetti’s facial challenge.

[As] for the word ‘immoral,’ I agree with the majority that there is no tenable way to read it that would ameliorate the problem. [It] is with regard to the word ‘scandalous’ that I part ways with the majority. Unquestionably, “scandalous” can mean something similar to ‘immoral’ and thus favor some viewpoints over others. But it does not have to be read that way. To say that a word or image is ‘scandalous’ can instead mean that it is simply indecent, shocking, or generally offensive. [Here,] Congress used not only the word ‘scandalous,’ but also the words ‘immoral’ and ‘disparage, in the same block of statutory text—each as a separate feature that could render a mark unregistrable. [What] work did Congress intend for ‘scandalous’ to do? A logical answer is that Congress meant for ‘scandalous’ to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. [The] most obvious ways—indeed, perhaps the only conceivable ways—in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity. Obscenity has long been defined by this Court’s decision in *Miller v. California*. As for what constitutes ‘scandalous’ vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and potentially promulgate guidance to clarify) the small group of lewd words or ‘swear’ words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings. [If] a word, though not exactly polite, cannot be said to be ‘scandalous’—e.g., ‘shocking’ or ‘extremely offensive,’ 8 *Century Dictionary* 5374—it is clearly not the kind of vulgarity or profanity that Congress intended to target. Everyone can think of a small number of words (including the apparent homonym of Brunetti’s mark) that would, however, plainly qualify. [Properly] narrowed, “scandalous” is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.” Justice Sotomayor then sought to distinguish *Cohen v. California*: “Cohen arose in the criminal context: Cohen had been arrested and imprisoned under a California criminal statute targeting disturbances of the peace because he was wearing a jacket bearing the words ‘F[***] the Draft.’ The Court held that applying that statute to Cohen because of his jacket violated the First Amendment. But the Court did not suggest that the State had targeted Cohen to suppress his view itself (*i.e.*, his sharp distaste for the draft), such that it would have accepted an equally colorful statement of praise for the draft (or hostility toward war protesters). Rather, the Court suggested that the State had simply engaged in what later courts would more precisely call viewpoint-neutral content discrimination—it had regulated the form or content of individual expression. Cohen also famously recognized that ‘words are often chosen as much for their emotive as their cognitive force,’ and that ‘one man’s vulgarity is another’s lyric.’ That is all consistent with observing that a plain, blanket restriction on profanity (regardless of the idea to which it is attached) is

a viewpoint-neutral form of content discrimination. The essence of Cohen’s discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message—without the profanity, the message is not quite the same. But those statements merely reinforce that profanity is still properly understood as protected First Amendment content. Cohen’s discussion does not also go further to declare [that] a provision that treats all instances of profanity equally is nevertheless by nature an instance of the government targeting particular views taken by speakers on a subject. To be sure, such a restriction could have the incidental effect of tamping down the overall volume of debate on all sides. But differential effects alone [do] not render a restriction viewpoint (or even content) discriminatory. [Yes,] Brunetti has been, as Cohen was, subject to content discrimination, but that content discrimination is properly understood as viewpoint neutral. And whereas even viewpoint-neutral content discrimination is (in all but the most compelling cases, such as threats) impermissible in the context of a criminal prosecution like the one that Cohen faced, Brunetti is subject to such regulation only in the context of the federal trademark-registration system.”

CHAPTER 4

THE RELIGION CLAUSES: FREE EXERCISE AND ESTABLISHMENT

SECTION 4. THE ESTABLISHMENT CLAUSE

Insert on p. 765 at the end of Section 4:

The American Legion v. American Humanist Association

[After World War I, residents of Prince George’s County, Maryland, formed a committee to erect a memorial for the county’s soldiers who fell in World War I. The local American Legion completed the project in 1925: a 32-foot tall Latin cross on the highway in Bladensburg, Maryland, outside Washington DC that displays the American Legion’s emblem at its center and sits on a large pedestal bearing, *inter alia*, a bronze plaque that lists the names of the 49 county soldiers who had fallen in the war. In 1961, the Maryland-National Capital Park and Planning Commission acquired the Cross and the land where it sits, now a busy crossroads. It uses public funds for upkeep. The American Legion reserves the right to continue using the site for ceremonies. The monument was challenged in 2014. The district court upheld it; the Fourth Circuit reversed.]

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, and an opinion with respect to Parts II–A and II–D, in which THE CHIEF JUSTICE, Justice BREYER, and Justice KAVANAUGH join.

[Although] the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community’s grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of “a hostility toward religion that has no place in our Establishment Clause traditions.” *Van Orden v. Perry*, 545 U.S. 677, 704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). [There] is no evidence of

discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

I.

The cross came into widespread use as a symbol of Christianity by the fourth century,¹ and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular. A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products. [The] familiar symbol of the Red Cross—a red cross on a white background—shows how the meaning of a symbol that was originally religious can be transformed. [The] image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I. “During and immediately after the war, the army marked soldiers’ graves with temporary wooden crosses or Stars of David”—a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. G. Piehler, *Remembering War the American Way* 101 (1995). The vast majority of these grave markers consisted of crosses, and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross “developed into a ‘central symbol’ ” of the conflict. *Ibid.* Contemporary literature, poetry, and art reflected this powerful imagery. [After] the 1918 armistice, the War Department announced plans to replace the wooden crosses and Stars of David with uniform marble slabs like those previously used in American military cemeteries. But the public outcry against that proposal was swift and fierce. [When] the American Battle Monuments Commission took over the project of designing the headstones, it responded to this public sentiment by opting to replace the wooden crosses and Stars of David with marble versions of those symbols. [This] national debate and its outcome confirmed the cross’s widespread resonance as a symbol of sacrifice in the war.

[Since] its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the

Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road.

II.A

[If] the Lemon Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. This pattern is a testament to the Lemon test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the Lemon test could not resolve them. [The] Lemon test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.¹⁶ Together, these considerations counsel against efforts to evaluate such cases under Lemon and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

B

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. [*Second*,] as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. [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. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. 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. *Third*, just as the purpose for maintaining a monument, symbol, or practice may evolve, the message conveyed may change over time. [With] sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots. Familiarity itself can become a reason for preservation. *Fourth*, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. 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. These four considerations show that retaining established, religiously expressive monuments, symbols, and

practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

C

The role of the cross in World War I memorials is illustrative of each of the four preceding considerations. [This] is not to say that the cross's association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here.

In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby. [Similar] reasoning applies to other memorials and monuments honoring important figures in our Nation's history. When faith was important to the person whose life is commemorated, it is natural to include a symbolic reference to faith in the design of the memorial. For example, many memorials for Dr. Martin Luther King, Jr., make reference to his faith. [Finally,] as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be viewed by many as a neutral act. [A] campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.

D

While the Lemon Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

III

[Due] in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. [As] long as it is retained in its original place and form, it speaks as well of the community that erected the monument nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community.

The monument would not serve that role if its design had deliberately disrespected area soldiers who perished in World War I. More than 3,500 Jewish soldiers gave their lives for the United States in that conflict, and some have wondered whether the names of any Jewish soldiers from the area were deliberately left off the list on the memorial or whether the names of any Jewish soldiers were included on the Cross against the wishes of their families. There is no evidence that either thing was done, and we do know that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran.

IV

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. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

Justice BREYER, with whom Justice KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its separate sphere.

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. [The] case would be different, in my view, if there were evidence that the organizers had deliberately disrespected members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. [Nor] do I understand the Court's opinion today to adopt a "history and tradition test" that would permit any newly constructed religious memorial on public land. The Court appropriately looks to history for guidance," but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place

in the community. A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach. Justice KAVANAUGH, concurring.

[Consistent] with the Court’s case law, the Court today applies a history and tradition test. [As] this case again demonstrates, this Court no longer applies the old test articulated in *Lemon*. [The] opinion identifies five relevant categories of Establishment Clause cases: (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums. The *Lemon* test does not explain the Court’s decisions in any of those five categories.

[I] have great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

Justice KAGAN, concurring in part.

[Although] I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows. [I] prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history’s role in Establishment Clause analysis.

Justice THOMAS, concurring in the judgment.

[The] text and history of [the Establishment] Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to “law[s]” enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did, this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the Cross is clearly constitutional. [The] *sine qua non* of an establishment of religion is actual legal coercion. [Here,] respondents briefly suggest that the government’s spending their tax dollars on maintaining the Bladensburg Cross represents coercion, but they have not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of

religion. Regrettably, I cannot join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases. Therefore, I concur only in the judgment.

Justice GORSUCH, with whom Justice THOMAS joins, concurring in the judgment.

The American Humanist Association wants a federal court to order the destruction of a 94 year-old war memorial because its members are offended. [This] "offended observer" theory of standing has no basis in law. [Imagine] if a bystander disturbed by a police stop tried to sue under the Fourth Amendment. Suppose an advocacy organization whose members were distressed by a State's decision to deny someone else a civil jury trial sought to complain under the Seventh Amendment. Or envision a religious group upset about the application of the death penalty trying to sue to stop it. Does anyone doubt those cases would be rapidly dispatched for lack of standing?

Proceeding on these principles, this Court has held offense alone insufficient to convey standing in analogous—and arguably more sympathetic—circumstances. [An] African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks *that* could be the law? In fact, this Court has already expressly rejected "offended observer" standing under the Establishment Clause itself. Valley Forge. [With] *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close. Nor does this development mean colorable Establishment Clause violations will lack for proper plaintiffs. By way of example only, a public school student compelled to recite a prayer will still have standing to sue. So will persons denied public office because of their religious affiliations or lack of them. And so will those who are denied government benefits because they do not practice a favored religion or any at all. On top of all that, States remain free to supply other forms of relief consistent with their own laws and constitutions.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

[The] Latin cross is the foremost symbol of the Christian faith, embodying the "central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae*. Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol. [Just] as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation.

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion.

[As] I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. [A] presumption of endorsement, of course, may be overcome. [The] typical museum setting, for example, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. Lynch (O'Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

[At] the dedication ceremony, the keynote speaker analogized the sacrifice of the honored soldiers to that of Jesus Christ, calling the Peace Cross "symbolic of Calvary," where Jesus was crucified. Local reporters variously described the monument as "[a] mammoth cross, a likeness of the Cross of Calvary, as described in the Bible"; "a monster [C]alvary cross," and "a huge sacrifice cross." The character of the monument has not changed with the passage of time.

[Calling] up images of United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, the Commission overlooks this reality: The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity. [Throughout] the headstone debate [after World War I,] no one doubted that the Latin cross and the Star of David were sectarian gravemarkers, and therefore appropriate only for soldiers who adhered to those faiths. [The] overwhelming majority of World War I memorials contain no Latin cross. In fact, the "most popular and enduring memorial of the [post-World War I] decade" was "[t]he mass-produced *Spirit of the American Doughboy* statue." Budreau, *Bodies of War*, at 139. [Like] cities and towns across the country, the United States military comprehended the importance of paying equal respect to all members of the Armed Forces who perished in the service of our country, and therefore avoided incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb.

