

Cross or Crossroads?

In an Opinion so split between the Justices of the United States Supreme Court that it takes a chart to figure out what the majority said, *American Legion vs. American Humanist Association*, 2019 U.S. LEXIS 4182, ruled that a cross long existing on public property did not need to come down. The Bladensburg Peace Cross has stood since 1925 as a tribute to 49 local soldiers who died in the First World War. As Justice Alito, the writer of the majority Opinion, was quick to point out, the cross stood for 89 years after its dedication before a lawsuit was filed claiming that the sight of it on public land was offensive to Humanist. The expenditure of public funds to maintain the cross violated, said Humanist, the Establishment Clause of the First Amendment.

The Establishment Clause of the First Amendment prohibits Congress from making laws respecting an establishment of religion. Initially the Establishment Clause was applied only to the Federal Government. The quintessential case wrestling with the Establishment Clause is the oft-cited decision of *Lemon vs. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). Under the so-called *Lemon* test, the court must ask whether a challenged governmental action: (1) has a secular purpose; (2) has a “principal or primary effect” that “neither advances nor inhibits religion”; and (3) does not foster “an excessive government entanglement with religion.” Like so many legal decisions, the *Lemon* test proved difficult to apply and the exceptions almost outnumber the rule.

Justice Alito, and those who joined him, adopted the logic that monuments, symbols or practices established “long ago” were more likely to be acceptable. Noted the Court, “As time goes by, the purposes associated with an established monument, symbol or practice often multiply.” At slip Opinion 12 of 35.

The Court had many Ten Commandment cases to examine for comparison. The Court also seemed to find comfort in the fact that with “sufficient time, religiously expressive monuments, symbols, and practices can become imbedded features of a community’s landscape and identity.” at 13 of 35. In other words, time, as I often tell my clients, is the best healer. The Court analogized the 90-year old cross to cities and towns across the United States that bear religious names. Somehow, reasoned the Court, the cross may have taken on a secular purpose. Whether secularization of a serious religious symbol is a good reason to avoid the Establishment Clause of the Constitution is an issue largely avoided by the court. Justice Alito waxed eloquent concerning the fact that World War I monuments “have endured through the years and become a familiar part of the physical and cultural landscape....” At slip Opinion 15 of 35.

It is clear reading Section III of the Opinion that Justice Alito found it necessary to strip the cross of its Christian symbolism in order to justify rejecting an Establishment Clause challenge. The Justice reasoned that the deeds of the citizens of Bladensburg and their sacrifices were represented by the cross which was therefore stripped of its religious significance. The Justice did acknowledge that more than 3,500 Jewish soldiers gave their lives for the United States in World War I. The Court noted, without stating the significance of its observation, that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran.

Finally, in Part IV of the Opinion, the Justice admitted that the cross is "undoubtedly" a Christian symbol. Religion, in the view of the majority, was subjugated to symbolism for ancestors, a community gathering place and historical landmark.

The ultimate issue is whether it is intellectually honest to permit religious symbols erected and maintained by the government, on government property, by removing the religious significance from the symbol at issue. Justices Bryer and Kagan concurred. Those Justices agreed with the Court that the Peace Cross "poses no real threat to the values that the Establishment Clause serves." At 19 of 35.

Justice Kavanaugh also concurred. Justice Kavanaugh questioned whether the *Lemon* test applies at all. The Justice would go further than his colleagues in claiming that the *Lemon* test is not good law at all and does not apply to the Establishment Clause. The Kavanaugh test is that "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 is no Establishment Clause violation." Such a loose test would result in the Establishment Clause being eviscerated.

Justice Kagan concurred in part. Justice Kagan attempted to straddle. She argued for a case-by-case analysis rather than signing on to any broader statements about Establishment Clause analysis.

Justice Thomas concurred in the judgment. Thomas also believed that without "coercion" any Establishment Clause challenge must fail.

Justice Gorsuch would not join the Court's Opinion because he believed it did not adequately clarify the appropriate standard for Establishment Clause cases. Therefore Justice Gorsuch only concurred in the judgment. The Justice's frustration is understandable. The majority Opinion so undermines the *Lemon* test, intended to create a robust defense of the Establishment Clause, that today there is almost no understanding of what government action would violate the First Amendment. Justice Gorsuch took a different tact, questioning whether the complainants about the cross even had standing to bring a case. The Justice seemed to adopt the position that

simply being offended was not enough to mount an Establishment Clause challenge. “Offended observer” standing, argued the Judge, is not sufficient.

Justice Ginsburg along with Justice Sotomayor dissented without reservation. Those Justices argued “...using the cross as a war memorial does not transform it into a secular symbol....” at slip Opinion 28 of 35. The dissenters argued that the Star of David is not suitable to honor Christians who died serving their country. Likewise, goes the logic, a cross is not suitable to honor those of other faiths who died defending their nation. Christianity is offended by turning the cross into a non-religious display, utilizing the trail walked by the dissenters. The Latin cross is the “defining symbol” of Christianity. At slip Opinion 30 of 35. The dissenters addressed directly the question as to whether the cross could be secularized in order to save it from a First Amendment challenge.

At the end of the day, it seems clear that the *Lemon* test has been so eroded that the court will sooner or later need to come up with a better definition as to when religious symbols and activities violate the Establishment Clause of the First Amendment to the United States Constitution. The Founders of this county were unquestionably guided by Judeo-Christian principals, but at the same time they were jealous in their defense of a nation that would not slide into the abyss of religious coercion. We certainly have not heard the end of the looming Crossroads in connection with the “right” to promote religion and the argument by others to defend against its intrusion.

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