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American Legion v. American Humanist Ass'n., 139 S. Ct. 2067 (2019)

Seth Bonilla

The separation of church and state is a key element of American democracy, but its interpretation has been challenged as the country grows more diverse. In *American Legion v. American Humanist Association*, the Supreme Court adopted a new standard to analyze whether a religious symbol on public land maintained by public funding violated the Constitution's Establishment Clause.

I. INTRODUCTION

In *American Legion v. American Humanist Association*, the American Humanist Association (“AHA”) sought the removal, alteration, or destruction of a 32-foot Latin Cross (“the Cross”) which served as a World War I memorial in Prince George’s County, Maryland.¹ Although the Cross had stood uncontested for nearly a century, the AHA asserted it was a religious symbol built on public land and maintained by local government, thereby violating the Establishment Clause.² The Court found that while the Cross was a religious symbol, it did not depart from the history and tradition of the founding fathers and was therefore constitutional under a new evaluation of the Establishment Clause.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1925, a committee of residents from Prince George’s County, Maryland constructed the Cross to commemorate forty-nine local men and women who died in World War I.⁴ The Latin cross had become a symbol for the war, and the committee began raising funds for the project through local events and donations.⁵ The committee eventually ran out of funding, however the American Legion intervened and completed construction.⁶

Over the next ninety years, the cross became surrounded by development, including multiple memorials to other wars as well as a busy intersection.⁷ The bustling intersection prompted the Maryland-National Capital Park and Planning Commission, (the “Commission”), a state entity, to purchase the Cross and the land on which it stood.⁸

In 2012, the AHA, joined by three local residents, sued the Commission in U.S. District Court, alleging that the Cross and the

1. *American Legion v. American Humanist Ass'n.*, 139 S. Ct. 2067, 2078 (2019) (plurality).
2. *Id.*
3. *Id.*
4. *Id.* at 2074
5. *Id.* at 2075.
6. *Id.* at 2077.
7. *Id.* at 2077-78.
8. *Id.* at 2078.

Commission's maintenance of it violated the Establishment Clause.⁹ The AHA requested the Cross be removed, demolished, or altered to form an obelisk.¹⁰ The district court granted summary judgment for the Commission, finding its ownership and maintenance of the Cross satisfied the three-prong test established in *Lemon v. Kurtzman*¹¹ because it (1) had a secular purpose; (2) did not promote or condemn a religion; and (3) did not constitute an excessive intermingling of church and state.¹² On appeal, the Fourth Circuit rejected the district court's application of the *Lemon* test, ruling that the Cross indeed failed each prong.¹³

III. ANALYSIS

In a plurality opinion delivered by Justice Alito, the Court found for the American Legion and uniformly rejected the *Lemon* test, however the Justices differed in their reasoning.¹⁴

A. Plurality Opinion

The Court began by recognizing the *Lemon* test's ambitious attempt to better define the relationship between government and religion.¹⁵ Nevertheless, the Court noted that on numerous occasions it had "either expressly declined to apply the test or [had] simply ignored it" because the test could not explain the endorsement of religious symbols or government practices.¹⁶

The Court specified four reasons to avoid the *Lemon* Test.¹⁷ First, monuments were often established so long ago that their original purposes were difficult to identify.¹⁸ Second, the purposes associated with established monuments, symbols, or practices multiply over time.¹⁹ Third, the message of a monument may evolve over time. And fourth, removing such a monument may be viewed as hostile to religion rather than neutral.²⁰

9. *Id.* See U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). NOTE: I'm not sure if this is necessary, but I thought it might be good to include the clause somewhere in the piece. I'll leave it up to you whether to keep or not thought.

10. *Id.*

11. 403 U.S. 602 (1971).

12. *American Legion*, 139 S. Ct. at 2078-79 (plurality); *Lemon*, 403 U.S. at 612-13.

13. *American Legion*, 139 S. Ct. at 2079 (plurality).

14. *American Legion*, 139 S. Ct. at 2090 (plurality).

15. *Id.* at 2080.

16. *Id.*

17. *Id.* at 2081.

18. *Id.* at 2082.

19. *Id.*

20. *Id.*

The Court found the Cross perfectly illustrated these four reasons.²¹ Although the Latin cross was clearly a religious symbol, the Court determined it had no way to deduce the builders' intent and could not tell whether the Cross was primarily intended to represent the war.²² Additionally, the purposes for maintaining the Cross since its construction may have multiplied to include historic preservation and traffic-safety concerns.²³ The Cross' significance may have also changed with time, as surrounding development introduced other monuments and a busy intersection.²⁴ Finally, removing the Cross may not be seen as neutral because it had become a familiar part of the physical and cultural landscape.²⁵

In light of the *Lemon* test's impracticalities, the Court noted that it had subsequently adopted a different approach to the Establishment Clause that focused on a particular issue and looked to history and tradition for guidance.²⁶ In *Town of Greece v. Galloway*, the Court found that opening a town council meeting with prayer was constitutional because it mirrored Congress' historical use of prayer at the start of each session.²⁷

While historical use alone would not validate unconstitutional practices, the Court nevertheless looked at the surrounding context.²⁸ Notably, the First Congress made efforts to include different sects of Christianity in its prayers.²⁹ The *Town of Greece* Court determined this reflected the inclusive nature of legislative prayer as "a benign acknowledgment of religion's role in society."³⁰ Because the town council had made similar efforts to recognize religious diversity, the Court found it did not depart from the history and tradition of the First Congress and therefore was not in violation of the Establishment Clause.³¹

Drawing on this approach, the *American Legion* Court adopted a new standard for determining Establishment Clause violations: where categories of monuments, symbols, and practices follow the history and traditions of the Framers, the practices are constitutional.³²

The Court then applied this standard to the Cross.³³ It reasoned that the Cross, while a religious symbol, had become synonymous with World War I.³⁴ As time progressed, the Cross also acquired historic significance as a reminder of the actions and sacrifice of the area's

21. *Id.* at 2085.

22. *Id.*

23. *Id.*

24. *Id.* at 2086.

25. *Id.*

26. *Id.*

27. 572 U.S. 565, 576 (2014).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 591-92.

32. *American Legion*, 139 S. Ct. at 2089.

33. *Id.*

34. *Id.*

predecessors.³⁵ Moreover, the memorial included the names of both Jewish and African-American soldiers, which reflected the inclusive tradition of the Founding Fathers.³⁶ Finally, as a symbol for World War I, the Cross commemorated the deaths of diverse individuals not as a representation of their religion but as a symbol of the cause for which they died.³⁷ Accordingly, the Court concluded that the Cross did not depart from national tradition and was therefore constitutional.³⁸

B. Concurring Opinions

Justice Kavanaugh agreed with the Court in full, but wrote separately to emphasize two points.³⁹ First, he noted the Court had avoided using the *Lemon* over the past several decades, which indicated that it was no longer good law.⁴⁰ Instead, Justice Kavanaugh suggested that Establishment Clause cases should examine whether a government practice is coercive in addition to the history and tradition of the practice.⁴¹ Second, Justice Kavanaugh noted that while the Court had found the Cross constitutional, the ruling did not mandate that Maryland continue to keep and maintain the statue.⁴² Rather, he reasoned that the AHA could turn to Maryland's Court of Appeals to determine whether the Cross violated the state's constitution.⁴³ Further, the AHA could turn to the state legislature to either amend the Maryland Constitution or pass legislation to remove the Cross or transfer the land.⁴⁴ Accordingly, Justice Kavanaugh emphasized that the United States Constitution allowed alternate avenues beyond the Supreme Court for the AHA to seek relief.⁴⁵

Justice Gorsuch, joined by Justice Thomas, sought to expand on the Court's opinion.⁴⁶ The Justices agreed with the Court's decision to follow *Town of Greece* in light of *Lemon*'s limitations; however, they focused on the AHA's lack of standing.⁴⁷ The Justices noted that *Lemon* gave the false perception that an offended reasonable observer had standing.⁴⁸ To increase judicial economy and provide lower courts with better guidance, Justices Gorsuch and Thomas argued that courts should apply *Town of Greece* to determine whether a party has standing to assert

35. *Id.*
 36. *Id.* at 2089-90.
 37. *Id.* at 2090.
 38. *Id.*
 39. *Id.* at 2092 (Kavanaugh, J., concurring).
 40. *Id.* at 2092-93.
 41. *Id.* at 2093.
 42. *Id.*
 43. *Id.* at 2094
 44. *Id.*
 45. *Id.*
 46. *Id.* (Gorsuch, J., with Thomas, J., concurring).
 47. *Id.* at 2098.
 48. *Id.*

a claim under the Establishment Clause.⁴⁹ Under this approach, plaintiffs would be required to show a practice departed from the national tradition.⁵⁰

Justice Breyer, joined by Justice Kagan, criticized the Court for adopting a presumption of constitutionality based on a monument's history.⁵¹ Justices Breyer and Kagan argued the new standard would put recently-constructed monuments at risk of being declared unconstitutional for no other reason than their youth.⁵² As an alternative, the Justices proposed that if a government practice "(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 generally applicable law," the Establishment Clause has not been violated.⁵³

Writing separately, Justice Kagan applauded the Court's sensitivity and respect for American pluralism but cautioned against the decision's broad language.⁵⁴ She agreed with the use of history and tradition to analyze Establishment Clause complaints but argued the Court should adopt a "case-by-case" analysis.⁵⁵

Justice Thomas found the Cross constitutional but argued that the Court failed to determine whether this case in fact concerned the Establishment Clause.⁵⁶ In Justice Thomas' view, the Establishment Clause applies to laws only.⁵⁷ Because the AHA did not challenge a law, the Cross could not violate the First Amendment.⁵⁸ Further, he stated that even if the Establishment Clause did apply, the AHA failed to demonstrate the Cross was an attempt by the Commission to coerce religious orthodoxy or force financial support for a particular religion.⁵⁹ Finally, Justice Thomas declared that *Lemon* should be overruled because it lacked a constitutional basis and required manipulation to fit the Court's conclusions, ultimately creating confusion.⁶⁰

C. Dissent

Justice Ginsburg, joined by Justice Sotomayor, stated that a religious symbol prominently displayed on public land is presumed to violate the Establishment Clause.⁶¹ Accordingly, the Cross' status as a Christian symbol and its prominent display on public land created a

49. *Id.* at 2102.

50. *Id.* at 2103.

51. *Id.* at 2091 (Breyer, J., with Kagan, J., concurring).

52. *Id.*

53. *Id.* at 2093.

54. *Id.* at 2094 (Kagan, J., concurring in part).

55. *Id.*

56. *Id.* at 2095 (Thomas, J., concurring).

57. *Id.*

58. *Id.*

59. *Id.* at 2096.

60. *Id.* at 2097.

61. *Id.* at 2106 (Ginsburg, J., with Sotomayor, J., dissenting).

presumption that the Commission endorsed Christianity.⁶² However, the dissent noted that such a presumption could be overcome if a monument “‘plausibly indicates’ that the government has not sought ‘either to adopt [a] religious message or to urge its acceptance by others.’”⁶³

To determine whether the Cross could overcome this presumption, the dissenting Justices examined its nature and historical context.⁶⁴ The dissent noted the long history and symbolism behind marking Christian graves with crosses, newspaper headlines announcing the Cross’ completion, and the keynote speaker’s message at its dedication, all of which indicated an underlying religious nature.⁶⁵ Additionally, the dissent stated that the War Department’s decision to mark overseas Jewish graves with the Star of David and Christian graves with crosses reflected the sectarian nature of headstones.⁶⁶ Further, the dissent observed that, contrary to the Court’s statements, the Latin cross was not prominently used in World War I memorials.⁶⁷ Indeed, the military actively avoided incorporating the Latin cross into its memorials due to the sensitive, sectarian nature of such memorials.⁶⁸ Therefore, the dissent rejected the Commission’s argument that the Cross is secular.⁶⁹

Although the dissent found the Cross unconstitutional, it did not consider its removal appropriate or necessary.⁷⁰ Rather, the Justices identified two alternatives: relocation or transfer to a private party.⁷¹

IV. CONCLUSION

American Legion illustrates the difficulty of interpreting the Establishment Clause. While ultimately adopting a new standard, many Justices expressed misgivings in their respective opinions. Whether the standard proves to be an improvement over *Lemon* remains to be seen, but for now, when determining Establishment Clause cases, courts will examine whether a practice departs from the history and tradition of the Founding Fathers.

62. *Id.*

63. *Id.* (quoting *Van Orden v. Perry*, 545 U.S. 677, 737 (2005) (Souter, J., dissenting)).

64. *Id.* at 2107-11.

65. *Id.* at 2108-09.

66. *Id.* at 2111-12.

67. *Id.* at 2111.

68. *Id.* at 2111-12.

69. *Id.* at 2112.

70. *Id.*

71. *Id.*