40-Foot “Bladensburg Cross” Gets Reprieve From U.S. Supremes

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On June 20, 2019, in American Legion v. American Humanist Assn., the United States Supreme Court ruled in a 7-2 vote that a 40-foot-tall cross, which has stood along a public highway in the suburbs outside Washington, D.C., will remain standing. The cross, which local organizations erected to honor 49 local soldiers killed in World War I, rose to fame (or infamy depending on your view) when a group of local residents filed a 2012 lawsuit in federal court in which they argued that the cross violates the United States Constitution’s “establishment clause.”For context, the Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” As noted by Justice Alito in the Court’s decision, “[w]hile the concept of a formally established church is straightforward, pinning down the meaning of a ‘law respecting an establishment of religion’ has proved to be a vexing problem.” Over the years, the Court has faced cases regarding Bible reading in public schools, Engel v. Vitale, 370 U. S. 421 (1962); “Sunday closing” laws, McGowan v. Maryland, 366 U. S. 420 (1961); and state subsidies for church-related schools or the parents of students attending those schools, Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U. S. 236 (1968). To be sure, there are many others. And, after a series of published decisions on this score, in 1971, the Court established a three-part test to decide these cases, Lemon v.

Kurtzman, 403 U. S. 602 (1971). *No, this is not how "Lemon laws" came into existence*. Under the Lemon test, a court must examine whether a challenged government action respecting religion: (i) has a secular purpose; (ii) has a "principal or primary effect" that "neither advances nor inhibits religion"; and (iii) does not foster "an excessive government entanglement with religion." It is fair to say that the Lemon Court rightly endeavored to create a workable, one-size-fits-all approach to Establishment Clause cases.

A Federal District Court judge ruled in favor of the "Cross", relying on the Lemon test, as well as Justice Breyer's analysis in Van Orden v. Perry, 545 U. S. 677 (2005) (the Ten Commandments case); the Fourth Circuit Court of Appeals reversed, concluding that the Cross is the "preeminent symbol of Christianity." The Supreme Court granted certiorari.

Justice Alito opined (along with 5 concurring opinions), that the Cross did not violate the establishment clause. Justice Ginsburg dissented (joined by Justice Sotomayor). Justice Alito held that although the Court "ambitiously attempted" to create a framework for all Establishment Clause cases, over the years, the Court has taken a more "modest" approach decided on a case-by-case basis. He noted that: "[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional." Applying those principles, the Court concluded that the "Bladensburg Cross does not violate the Establishment Clause." The Court reached that conclusion because: (i) the Cross commemorates World War I; (ii) through the passage of time it has acquired historical importance – it has become a part of the community; and (iii) it commemorates the deaths of particular individuals. In conclusion, Justice Alito wrote: "*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 Ginsburg, in dissent, highlighted that "[i]n cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the effect of 'endorsing' religion." Citing to prior Supreme Court jurisprudence, she added

that a display fails this requirement "if it objectively 'convey[s] a message that religion or a particular religious belief is favored or preferred.'" Referring to Cross (the Latin Cross) as the "defining symbol" of Christianity and "not emblematic of any other faith," Justice Ginsburg concluded that "[t]he principal symbol of Christianity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy."

You can read the decision in its entirety here: https://casetext.com/case/american-legion-v-american-humanist-assn

You can read about the decision here: https://www.npr.org/2019/06/20/731824045/supreme-court-cross-can-stand-on-public-land-in-separation-of-church-and-state-c

For a different view, here: https://www.theatlantic.com/ideas/archive/2019/06/peace-cross-splits-supreme-court/592222/

And, for yet another viewpoint here: https://www.foxnews.com/opinion/kelly-shakelford-supreme-court-peace-cross-decision-religious-freedom