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COURT: DISPLAY HAS SECULAR MEANING: Erected in the aftermath of World War I, the 40-foot Peace Cross in Bladensburg, Md., northeast of Washington, D.C., has acquired a secular meaning over time. *Adelle Banks / Religion News Service.*

COURT DECISION: THE AMERICAN LEGION v. AMERICAN HUMANIST ASSOCIATION

Note: The U.S. Supreme Court has decided The American Legion v. American Humanist Association, previewed in The National Standard No. 15 (Fall-Winter 2018). The National Standard is pleased to present the Oyez Project's summary of the court's decision.

The American Legion v. American Humanist Association, 588 U.S. ____ (2019) (Docket No. 17-1717). Decided June 20, 2019.

Facts of the Case

In Bladensburg, Maryland, as part of a memorial park honoring veterans is a 40-foot tall cross, which is the subject of this litigation. Construction on the cross began in 1918, and it was widely described using Christian terms and celebrated in Christian services. In 1961, Maryland-National Capital Park and Planning Commission acquired the cross and the land, as well as the responsibility to maintain, repair, and otherwise care for the cross. The Commission has spent approximately \$117,000 to maintain and repair the cross, and in 2008, it set aside an additional \$100,000 for renovations.

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REPORT: FLAG, SYMBOL, OR RELATED LEGISLATION INTRODUCED IN THE 86TH TEXAS LEGISLATURE

This report lists selected measures related to flags, symbols, or related rituals and observances introduced in the Legislature for consideration during the 86th regular session. Searches for legislation may be considered at Texas Legislature Online: *capitol.state.tx.us*. Names of Republicans are in roman text; Democrats in *italic text*.

Flags:

Referred to the House Committee on Ways & Means:

H.B. 1727 by *Meza*, et al., relating to a sales and use tax exemption for United States flags and Texas state flags.

Referred to Senate Committee on Education:

S.B. No. 1277 by Campbell, relating to guidelines for the proper care and display of the United States and Texas flags by public schools.

Abolishing or redesignating Confederate Heroes Day:

Left pending after a public hearing by the House Committee on State Affairs:

H.B. 1183 by *J. Johnson of Harris* et al., relating to abolishing Confederate Heroes Day.

Restricting monument removal, relocation, or alterations:

Referred to the House Committee on Culture, Recreation & Tourism

H.B. 2648 by Biedermann et al., relating to maintaining certain monuments and memorials and the names of certain public institutions; providing civil penalties.

Reported favorably as substituted by the House Committee on Culture, Recreation & Tourism after Senate passage:

S.B. 1663 by Creighton, Fallon, Hall, Hughes, and Schwertner (Sponsored in the House by White, Toth, Hefner, et al.), relating to the removal, relocation, alteration, or construction of certain monuments or memorials located on public property; providing civil penalties.

House Companion: H.B. 3948 by Toth: *referred to the House Committee on Culture, Recreation & Tourism*

Similar House Bill: H.B. 583 by White, Toth, Hefner: Reported favorably as substituted by the House Committee on *Culture, Recreation & Tourism*.

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SUMMARY:**THE AMERICAN LEGION v. AMERICAN HUMANIST ASSOCIATION***continued from page 1*

Several non-Christian residents of Prince George's County, Maryland, expressed offense at the cross, which allegedly amounts to governmental affiliation with Christianity. American Humanist Association is a nonprofit organization advocating for separation of church and state. Together, AHA and the individual residents sued the Commission under 42 U.S.C. § 1983, alleging that the Commission's display and maintenance of the cross violates the Establishment Clause. Applying the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the district court found that the Commission did not violate the Establishment Clause because (1) the cross has a secular purpose, (2) it neither advances nor inhibits religion, and (3) it does not have a primary effect of endorsing religion. The Fourth Circuit reversed and remanded.

Questions

1. Is the display and maintenance of the cross unconstitutional?
2. Under what test should the constitutionality of a passive display incorporating religious symbolism be assessed?
3. Does the expenditure of funds to maintain the cross amount to the government's excessive entanglement with religion?

Conclusion

The Bladensburg Cross does not violate the Establishment Clause.

Summary of Opinions

Justice Samuel Alito authored the opinion of the Court, joined by Chief Justice John Roberts and Justices Stephen Breyer and Brett Kavanaugh. Justice Elena Kagan joined the majority opinion in part.

The Court explained that although the cross originated as a Christian symbol, it has also taken on a secular meaning. In particular, the cross became a symbol of World War I as evidenced by its use in the present controversy. The *Lemon* test, which the Court first articulated in 1971 as a way to discern Establishment Clause violations, does not serve its intended purpose, particularly as applied to religious symbols or monuments. Thus, when the question arises whether to keep a religious monument in place (as opposed to a question whether to put up a new one), there should be a presumption that the monument is constitutional.

Applying this presumption rather than the *Lemon* test, the Court found the Bladensburg Cross does not violate the Establishment Clause because it has historical importance beyond its admittedly Christian symbolism.

Justice Breyer joined Justice Alito's opinion in full but wrote a separate concurrence joined by Justice Kagan to highlight his belief that there is no single test for Establishment Clause violations. Rather, a court asked to resolve such questions must consider "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."

Justice Kavanaugh also joined Justice Alito's opinion in full and also wrote his own concurring opinion. He even more harshly criticized the *Lemon* test, arguing that "the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of" five categories, which he enumerated.

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HISTORICALLY IMPORTANT: Detail of the Peace Cross. *Md. Office of the Governor.*

SUMMARY: AMERICAN LEGION

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Justice Kagan joined most of Justice Alito’s opinion but wrote a separate concurrence to note that, although “rigid application of the *Lemon* test does not solve every Establishment Clause problem,” courts should still focus on the purpose and effect of government action in deciding whether it violates the Constitution.

Justice Clarence Thomas wrote a separate opinion concurring in the judgment, but based on entirely different reasoning. Justice Thomas does not believe the Establishment Clause applies to state and local governments, and even if it did, it applies only to prevent coercive action by the government. Justice Thomas would overrule the *Lemon* test in all contexts.

Justice Neil Gorsuch wrote a separate opinion concurring in the judgment, in which Justice Thomas joined. Justice Gorsuch would dismiss the lawsuit for lack of standing, arguing that simply being offended by the cross’s presence is insufficient to meet the injury requirement of Article III standing.

Justice Ruth Bader Ginsburg wrote a dissenting opinion, in which Justice Sonia Sotomayor joined. Justice Ginsburg argued that the cross “is the foremost symbol of the Christian faith,” and using it as a war memorial doesn’t change that. Maryland’s decision to maintain that Christian symbol on public land “elevates Christianity over other faiths, and religion over nonreligion.” Justice Ginsburg additionally pointed out that an appropriate remedy for an Establishment Clause violation is not necessarily to destroy the memorial, as the majority suggests, but to transfer title to the land on which it sits to a private entity—in fact, a private entity owned the land when the cross was first erected.

The Oyez Project, <https://www.oyez.org/cases/2018/17-1717>.