

LONGSTANDING HISTORIC CROSS CONSTITUTIONAL CHALLENGE

James C. Kozlowski, J.D., Ph.D.

© 2019 James C. Kozlowski

In the case of *American Legion v. American Humanist Association*, 204 L. Ed. 2d 452, [2019 U.S. LEXIS 4182](#), 139 S. Ct. 2067 (U.S. 6/20/2019), the issue before the Supreme Court of the United States was whether a Latin Cross war memorial located on land owned and maintained by a public park agency violated the Establishment Clause of the First Amendment. The Establishment Clause of the First Amendment in the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion.”

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. The monument is a 32-foot tall Latin Cross that sits on a large pedestal. The American Legion’s emblem is displayed at its center, and the words “Valor,” “Endurance,” “Courage,” and “Devotion” are inscribed at its base, one on each of the four faces.

The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is “Dedicated to the heroes of Prince George’s County, Maryland who lost their lives in the Great War for the liberty of the world.” The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson’s request for a declaration of war: “The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives.”

In late 1918, county residents formed a committee "for the purpose of erecting a memorial for the county’s fallen soldiers." The committee decided that the memorial should be a cross, adopting a symbol "so widely associated with the wrenching event" of World War I. The Cross was to stand at the terminus of another World War I memorial—the National Defense Highway, which connects Washington to Annapolis

The committee hired a sculptor and architect to design the cross and began community fundraising events that included a form which read as follows:

We, the citizens of Maryland, trusting in God, the Supreme Ruler of the Universe, Pledge Faith in our Brothers who gave their all in the World War to make the World Safe for Democracy. Their Mortal Bodies have turned to dust, but their spirit Lives to guide us through Life in the way of Godliness, Justice and Liberty.

With our Motto, "One God, One Country, and One Flag" We contribute to this Memorial Cross Commemorating the Memory of those who have not Died in Vain.

The community gathered for a joint groundbreaking ceremony for both World War I memorials on September 28, 1919; the mother of the first Prince George’s County resident killed in France broke ground for the Cross. By 1922, however, the committee had run out of funds, and

SEPTEMBER 2019 LAW REVIEW

progress on the Cross had stalled. The local post of the American Legion took over the project, and the monument was finished in 1925.

As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (MNCPPC or Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns.

The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. Over the next five decades, the Commission spent approximately \$117,000 to maintain and preserve the monument. In 2008, it budgeted an additional \$100,000 for renovations and repairs to the Cross.

The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. Over the next five decades, the Commission spent approximately \$117,000 to maintain and preserve the monument. In 2008, it budgeted an additional \$100,000 for renovations and repairs to the Cross.

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after MNCPPC acquired it, the American Humanist Association lodged a complaint with MNCPPC, alleging the Cross's presence on public land and MNCPPC's maintenance of the memorial was offensive and a violation of the First Amendment Establishment Clause.

The American Humanist Association, along with three residents of Washington, D. C., and Maryland (AHA) subsequently sued MNCPPC in the federal district court, making the same Establishment Clause claim. The AHA sought declaratory and injunctive relief requiring "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." The American Legion intervened in the lawsuit against MNCPPC to defend the Cross.

LEMON TEST APPLICATION

The federal district court granted summary judgment to MNCPPC and the American Legion. In so doing, the district court found the Cross satisfied the "three-pronged test" announced by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Under the "Lemon" test, to overcome an Establishment Clause challenge, federal courts have had to determine whether a government action satisfied the following criteria:

- (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.

In this particular instance, the federal district court found MNCPPC had a "secular purposes for acquiring and maintaining the Cross—namely, to commemorate World War I and to ensure traffic safety." Moreover, the court found: "a reasonable observer aware of the Cross's history, setting, and secular elements "would not view the Monument as having the effect of

impermissibly endorsing religion.” Further, the court found MNCPPC's "maintenance of the memorial" did not "create the kind of continued and repeated government involvement with religion that would constitute an excessive entanglement." As a result, the federal district court held "the Cross is constitutional."

The federal appeals court reversed the judgment of the federal district court. While recognizing MNCPPC had acted for a "secular purpose," the appeals court held: "the Bladensburg Cross failed *Lemon*'s 'effects' prong because a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity." In so doing, the appeals court emphasized "the cross's inherent religious meaning as the preeminent symbol of Christianity." In the opinion of the appeals court, the secular elements of the monument were "overshadowed by the Cross's size and Christian connection."

In particular, the appeals court found the Cross's location and condition would make it difficult for passers-by to read or otherwise examine the plaque and American Legion emblem. Further, the appeals court rejected as "too simplistic" an argument "defending the Cross's constitutionality on the basis of its 90-year history." On the contrary, the appeals court noted: "the longer a violation persists, the greater the affront to those offended." Also, in the opinion of the appeals court, MNCPPC "had become excessively entangled with religion by keeping a display that "aggrandizes the Latin cross" and by spending more than *de minimis* [i.e. trivial, insignificant] public funds to maintain it."

SECULAR CROSS HISTORY

The Supreme Court of the United States granted a petition by MNCPPC and the American Legion to review the decision of the federal appeals court. While recognizing "the cross has long been a preeminent Christian symbol," the Supreme Court found "the Bladensburg memorial has a special significance" which must be viewed in its "historical context." As characterized by the Supreme Court: "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."

Moreover, the Court found the Cross had become a "prominent community landmark" whose "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." Further, the Court found "no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it."

According to the Court, the "Religion Clauses" of the First Amendment (i.e., Freedom of Religion and the Establishment Clause) "aim to foster a society in which people of all beliefs can live together harmoniously." In the opinion of the Court, "the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim" in the Constitution.

While the cross has retained widespread use as a symbol of Christianity since the fourth century, the Court found "many contexts in which the symbol has also taken on a secular meaning,"

noting "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. Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular.

Similarly, the Court found: "The image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I" to reflect a "central symbol" for "all those who understand the meaning of the great conflict," i.e., "a symbol of the sacrifice in war" marked by the image of World I cemetery "crosses row on row." According to the Court, this secular recognition of "the cross's symbolism extended to local communities across the country, including Prince George's County, Maryland":

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, the Court noted memorials honoring the veterans of other conflicts had been added to the surrounding area, which is now known as Veterans Memorial Park. These memorials included: 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. The Court found the closest of these other monuments is about 200 feet away in a park across the road because the Cross is "located on a traffic island with limited space."

LEMON FRAMEWORK INADEQUATE

According to the Supreme Court, "pinning down the meaning of a law respecting an establishment of religion has proved to be a vexing problem" which the "Lemon test" was designed to "bring order and predictability to Establishment Clause decisionmaking." As characterized by the Court, the Lemon test "called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail." Specifically, federal courts would assess the "effects of a challenged action" and "ask whether a reasonable observer would conclude that the action constituted an endorsement of religion."

In the opinion of the Court, however, the Lemon test had not created a framework for deciding all future Establishment Clause cases. On the contrary, the Supreme Court found: "this Court has either expressly declined to apply the test or has simply ignored it." Moreover, in the opinion of the Court, the Lemon test "could not explain numerous examples of the Establishment Clause's tolerance, including prayers that open legislative meetings; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings" and "the attention paid to the religious objectives of certain

holidays, including Thanksgiving.”

In this particular instance, the Court found application of the *Lemon* test presented "particularly daunting problems" for cases that involved "the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." In such instances, the Court decided not apply the *Lemon* test, but evaluate these cases "toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices."

PASSAGE OF TIME FACTORS

Accordingly, as a more practical alternative approach to the *Lemon* test, the Supreme Court adopted the following four considerations for "retaining established, religiously expressive monuments, symbols, and practices ":

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.

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, the "message" conveyed may change over time.

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.

While the "passage of time gives rise to a strong presumption of constitutionality" for such longstanding monuments, the Court cautioned that these considerations would be "quite different" when government is "erecting or adopting" new monuments which contain religious symbols.

In distinguishing new monuments from longstanding monuments, the Court found the passage of time might obscure the original sentiment and purpose of monument infused with religion. Moreover, according to the Court, 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":

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.

Further, in the opinion of the Court: "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." Similarly, in the case of World War I monuments that have "endured through the years and become a familiar part of the physical and cultural heritage," the Court found "a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront."

As noted by the Court: "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." Regardless of "the original purposes for the erection of a monument," the Court acknowledged "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." Further, the Court found "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." In this particular instance, the Court found such changes over time were relevant because "the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby."

On appeal, the AHA had acknowledged "there are instances in which a war memorial in the form of a cross is unobjectionable," particularly on public grounds in a military cemetery like Arlington National Cemetery where there is "a closer association with individual gravestones and interred soldiers." The Court rejected the notion that a memorial's placement was necessary to create such a connection. In the opinion of the Court, "a World War I cross remains a memorial in the fallen" whether its "in a cemetery or a city park."

In addition, the Court found an examination of historical context would also apply to "other memorials and monuments honoring important figures in our Nation's history" which might include a natural "symbolic reference to faith in the design of the memorial." The Court cited the example of "the Martin Luther King, Jr. Civil Rights Memorial Park in Seattle, which contains a sculpture in three segments representing both the Christian Trinity and the union of the family." The Court also noted that "National Statuary Hall in the Capitol honors a variety of religious figures" in which the monuments include religious symbols acknowledging "the centrality of faith to those whose lives are commemorated."

Having found "World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape," the Court reiterated its concern that "a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront."

GUIDANCE OF HISTORY

While the Lemon test "ambitiously attempted to find a grand unified theory of the Establishment Clause," the Court found later cases had "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." Specifically, the Court acknowledged the trend has been to find constitutional "categories of monuments, symbols, and practices with a longstanding history" and cultural tradition.

Applying these principles, to the facts of this particular case, the Supreme Court held the Bladensburg Cross did not violate the Establishment Clause. According to the Court, the design of the Bladensburg Cross must be understood in light of its background and special significance as a symbol commemorating the sacrifice of American soldiers killed in World War I. While "the cross originated as a Christian symbol and retains that meaning in many contexts," the Court found this "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. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. 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.

Further, the Court noted "the monument commemorates the death of particular individuals," and it was, therefore, "natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized." While acknowledging the cross is "undoubtedly a Christian symbol," the Court once again noted "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.

As a result, by a vote of 7 to 2, the Supreme Court reversed the judgment of federal appeals court that had found a violation of the Establishment Cause and remanded (i.e., sent back) the case for further proceedings to enter a judgment upholding the constitutionality of the existing Bladensburg Peace Cross.

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Fairfax, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>