Supreme Court Partially Junks a Lemon

American Legion Cross Case May Make It Harder to Sue Schools over Religion

by JOSHUA DUNN

IT'S HARD TO THINK OF A MORE APTLY NAMED legal doctrine than the U.S. Supreme Court's *Lemon* Test. Created in *Lemon v. Kurtzman* (1971), it is meant to determine when government action violates the establishment clause of the First Amendment. The test's three prongs require government programs to 1) have a secular legislative purpose, 2) primarily neither advance nor inhibit religion, and 3) not create an "excessive entanglement" with religion. It has been the subject of almost universal scorn ever since its birth.

The first prong is vague and easily sidestepped. One can divine a secular purpose for almost any law, and legislators who *are* religiously motivated can simply dissemble. It's also not clear why or even how government officials should shed their deepest beliefs when making policy. For instance, if a Catholic legislator voted to increase welfare benefits because of her faith, that would in theory violate the secular-purpose prong. But it's the second and third prongs that truly make the test incoherent. The only way to tell if a government program's primary effect is to advance religion is to closely monitor participants, thereby creating an excessive entanglement. The court has further said that a program can violate the effects prong if a "reasonable observer" believes that the program endorses religion—a standard that legal scholars have ridiculed as the "two Rudolphs and a Frosty rule." Essentially, to avoid being successfully sued, public officials such as school superintendents and principals must make sure that any religious display is surrounded by a sufficient number of secular symbols and icons from other faiths.

The American Humanist Association sued the American Legion, claiming that its cross at a busy public intersection violated "the founding principle of separation of church and state."

The *Lemon* Test's manifold infirmities have led the court to ignore it when it is inconvenient but invoke it when it suits their purposes. This led Justice Antonin Scalia to mock the test as a "ghoul from a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." The doctrine is particularly frightening, Scalia noted, for school officials, who can never be certain if they have violated such an ambiguous and malleable standard. To take one common example, school officials can never be sure if their celebration of the winter solstice is sufficiently diverse and secular to avoid litigation.

School officials may now be able to rest a bit easier, as this term, in its decision in *American Legion v. American Humanist Association,* the Supreme Court partially scrapped the test. In 1925, the American Legion erected a 40-foot-high Latin cross on private land to honor 49 men from Prince George's County, Maryland, who had died during World War I. In 1961, the state acquired the cross and the land it sits on because they were at the middle of a busy intersection.

All was fine until 2014, when the American Humanist Association and three avowed atheists sued, claiming that the cross violated "the founding principle of separation of church and state." The trial court used the *Lemon* Test to deny this claim, saying that the purpose of the cross was to honor veterans and that the state's ownership and maintenance of the land was primarily intended to maintain traffic safety. In a 2–1 decision, however, a panel of the U.S. Court of Appeals for the Fourth Circuit disagreed. That court ruled that the cross violated all three prongs of the Lemon Test. The cross as a Christian symbol did not have a secular purpose; was so large that it overwhelmed other memorials at the same intersection, thus advancing religion; and created an entanglement because the state maintained the cross on public property.

When the Supreme Court heard the case in February, oral argument signaled that the cross was safe. Even the liberal Justice Stephen Breyer indicated that, with so much history under the bridge, tearing down the cross would be unjustified. But other justices wanted to go farther, targeting the *Lemon* Test itself. Justice Neil Gorsuch called *Lemon* a "dog's breakfast" and Justice Brett Kavanaugh pointed out that the court's intermittent use of the test indicated that it was time to simply abandon it.

The court came close to doing so in its 7–2 decision on June 20. Writing for the majority, Justice Samuel Alito said *Lemon* should not apply in cases that "involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." The opinion did not explicitly overturn *Lemon* but clearly sought to confine it sufficiently to

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The World War I memorial cross in Bladensburg, Md., pictured in 2014. The Supreme Court this year ruled the cross can stay there.

make it unclear where it could still apply. Breyer wrote a concurring opinion, joined by Justice Elena Kagan. And Kagan wrote an opinion concurring in part but explicitly declining to sign on to the sections of the decision most critical of *Lemon.* The ever-cautious Chief Justice John Roberts joined Alito's opinion in full but was otherwise silent. One suspects that his minimalism was at work in the case. By not explicitly overturning *Lemon,* the court preserved a robust majority, perhaps lending the 2019 decision more authority. At the end of the day, however, only Justices Kavanaugh, Gorsuch, and Clarence Thomas clearly indicated they would abandon the *Lemon* Test.

Since the court did not explicitly overturn *Lemon,* its status for establishment clause cases involving education is uncertain. However, for school officials, this decision should be a welcome development. It should now be far more difficult for them to be sued under *Lemon,* particularly when they can claim that the displays or ceremonies in question have historical significance. To the extent that *Lemon* still applies, it is most likely to be invoked in cases involving government financial support for religious schools. But other free-exercise issues currently under review by the court may soon erode whatever bite *Lemon* still has in that arena.

In short, as Gorsuch put it, the *Lemon* Test appears to have been "shelved." As Scalia once pointed out, however, *Lemon* has been a "docile and useful monster" and that explains why it has so often been resurrected. It is unlikely that there are five justices on the court willing to invoke it to strike down a government program bearing on religion. But absent a public execution, one can't be confident that it will not come to life again.

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