

# THE NEIGHBOR

## War over 'Peace Cross' puts Supreme Court in crosshairs of debate over government involvement with religion

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WASHINGTON – The Supreme Court will be on trial itself next week when it weighs the fate of a 40-foot Latin cross honoring World War I dead that has reignited the nation's never-ending battle between church and state.

"Murky," "muddled" and "morass" are some of the terms used by judges, lawyers and constitutional scholars to describe the court's rules for government involvement with religion. Also "unclear," "unsound" and "unworkable." Not to mention "inconsistent," "irreconcilable" and "incoherent."

Some high court justices have even admitted to being "bedeviled" by the sum total of their decisions in this arena. By their own admission, the court's interpretations of the First Amendment's Establishment Clause have left the law in "chaos," "disarray" and "shambles."

Into this "hot mess," as a federal appeals court recently described it, steps a 93-year-old memorial that towers over the small town of Bladensburg, Maryland. Conceived in 1919 by bereaved mothers of the fallen and completed by the American Legion six years later, it's now owned and operated by a government agency.

The question before the Supreme Court seems simple: Does the monument violate the First Amendment, which prohibits government establishment of religion?

The answer is complicated by the court's multitude of opinions. In 1971, it said any government role must have a secular purpose, cannot favor or inhibit religion, and cannot excessively entangle church and state. Years later, it outsourced part of the decision-making process to a so-called "reasonable observer."

In 2005, the justices created exceptions to their original test for passive religious displays, such as nativity scenes or the Ten Commandments. And in a 2014 case upholding legislative prayer, they incorporated history and tradition into the mix.

All of which led Associate Justice Clarence Thomas to conclude last year that "this court's Establishment Clause jurisprudence is in disarray."

"We don't have a real strong sense of what the rules are, and this has been true for a while," says Richard Garnett, founding director of Notre Dame Law School's Program on Church, State, and Society.

The Trump administration agrees. It joined dozens of religious, municipal and veterans groups defending the "Peace Cross" and complaining that the court's mixed messages force legal battles to be decided "display by display." The Justice Department says that turns the purpose of the Establishment Clause on its head by creating even more disputes.

The case stands out on the court's humdrum docket this term as a likely win for the conservative majority, bolstered by Associate Justice Brett Kavanaugh's 2018 confirmation. Even before his elevation, the court had ruled in favor of many religious groups and causes. When it did not, several conservative justices usually complained.

In 2014, the court ruled that corporations with religious objections do not have to include free coverage of contraceptives in health insurance policies. In 2017, it said religious institutions can receive public funds for secular purposes, such as playground renovation. Last year, it absolved a Colorado baker of discrimination for refusing on religious grounds to serve a same-sex wedding.

Against that backdrop, the American Humanist Association will have a hard time convincing the justices that the Maryland war memorial should be moved or redesigned, perhaps as a slab or obelisk. Nevertheless, it argues vociferously that religion, not commemoration, is what most observers see in a 40-foot Latin cross.

"This is the most intensely religious and most intensely sectarian symbol that there is," says Douglas Laycock, a leading scholar on religious liberty and law professor at the University of Virginia and University of Texas.

As for the difficult church-state divide, he says, "All the justices, left to right, have a problem trying to draw lines."

### Squeezing the 'Lemon'

The attack on the cross has mobilized the religious right like few issues before. Its wrath mostly is focused not on the challengers, but the court itself.

For nearly a half century, the court's seminal doctrine has been the "Lemon test," named after the 1971 decision that was intended to define what government could and could not do when it comes to religion. But over the years, the justices have ignored the very rules that lower courts continue to follow.

Shortly after joining the high court in 1986, Associate Justice Antonin Scalia said contemporaneous decisions on the subject "leave the theme of chaos securely unimpaired." Around the same time, Associate Justice Anthony Kennedy called the test "flawed in its fundamentals and unworkable in practice."

Associate Justice Sandra Day O'Connor was responsible for adding the "reasonable observer" test for determining where the line is drawn between government and religion. But when his federal appeals court in 2010 ruled that 12-foot crosses honoring fallen state troopers on the side of Utah highways were unconstitutional, now-Associate Justice Neil Gorsuch said the fictional observer turned out to be "biased, replete with foibles, and prone to mistake."

Associate Justice Stephen Breyer – one of three Jews on the high court – swung his colleagues in both directions on the same day in 2005. A Ten Commandments display in a Kentucky

courthouse was unconstitutional, he said, but a Ten Commandments monument outside the Texas State Capitol was not.

"This case is an opportunity for the court to clean up Establishment Clause jurisprudence," says David Cortman, senior counsel with the conservative group Alliance Defending Freedom, who successfully argued the 2017 Supreme Court case for a Lutheran church seeking public funds for playground repairs.

Adds the libertarian Cato Institute: "The court should now squeeze Lemon out of its jurisprudence."

In the Peace Cross case, a federal district court judge ruled in 2015 that the monument was OK under the Lemon test. But in 2017, a federal appeals court panel ruled 2-1 that the cross failed to pass the test, calling it the "preeminent symbol of Christianity." The full U.S. Court of Appeals for the Fourth Circuit voted 8-6 not to reconsider that ruling.

Now the high court is poised to overrule that decision. Despite urging from some 40 groups defending the war monument, however, the justices may not issue a sweeping decision with clear rules for future church-state disputes. Those who favor more church-state separation hope the Bladensburg cross, at best, will be given a pass because it's been standing for so long.

#### Arlington to Ground Zero

Watching what the court does with the "Peace Cross" will be state and local governments across the country that have their own monuments to worry about. The Veterans of Foreign Wars and municipal groups claim hundreds could be affected, from the steel beams that form the Ground Zero cross in New York City to a Taos, N.M., memorial commemorating the Bataan Death March.

Two of the most prominent rise above Arlington National Cemetery: the 13-foot Argonne Cross, erected in 1923 and dedicated to "our men in France," and the 24-foot Canadian Cross of Sacrifice, donated in 1927 to honor U.S. citizens who served abroad in the Canadian Army. Another is the Ground Zero Cross in the National September 11 Memorial and Museum in New York.

A group of 30 states led by West Virginia listed dozens of war monuments large and small that could be challenged if the Supreme Court rules against the Peace Cross, from Gettysburg National Military Park in Pennsylvania and Georgia's Chickamauga Battlefield to La Mesa, California, and Coos Bay, Oregon.

The appeals court decision "puts at risk hundreds, and perhaps thousands, of similar monuments," Fourth Circuit Judge Paul Niemayer said.

The American Humanist Association disputes those numbers and says very few crosses or monuments are in jeopardy. The group won a federal appeals court ruling last summer that threatens a 34-foot cross towering over a city park in Pensacola, Florida.

Senior counsel Monica Miller says the Bladensburg war memorial is unique because of its size and location. Even so, she says the dispute could be resolved by transferring the land to private ownership and incorporating a disclaimer sign on the property.

"The cross being physically removed is not necessary." she says. "We've never said 'rip it to shreds, bulldoze it.'"

At the same time, Miller acknowledges that in her view, "There's no principled way to uphold this cross.... It's imposing on every driver who goes through that intersection, whether they want to see it or not."

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