



In Rare Burst of Writing, Seven Justices Explain ‘Cross’ Ruling

Kimberly Strawbridge Robinson

June 20, 2019

There was broad agreement among the justices in their church-state ruling allowing a World War I memorial in the shape of a cross to stand, but you wouldn't know it based on the amount of ink spilled to explain it.

In addition to the 31-page majority opinion allowing the 40-foot “Peace Cross” to continue standing in Maryland where it's been for nearly a century, there were five concurring opinions and one dissent.

Justice Samuel Alito joked that he and his colleagues were “quite prolific in our writings” while announcing the court's 7-2 decision in the Establishment Clause case from the bench.

The rare plethora of opinions is due in part to the fact that the court's jurisprudence in this area—dealing with the Constitution's prohibition on the government's endorsement of religion—is “hopelessly muddled,” said high court veteran Ilya Shapiro, of the Cato Institute, a libertarian think tank.

There “really hasn't been five votes for a particular method of evaluating these sorts of cases in a long, long time,” he said.

Indeed, much of the discussion in the concurrences was whether to jettison the oft-maligned “Lemon test,” created in 1971 to decipher when government actions rise to the level of an unconstitutional endorsement of religion.

Late Justice Antonin Scalia wrote in 1993 that the test was like “some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad.” After “being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again.”

And while the current justices successfully avoided that issue again, it’s likely to be resurrected.

Through their separate opinions, the justices might hope to sway public opinion or even “set the stage for later cases,” said Supreme Court expert and Vanderbilt law professor Suzanna Sherry.

Let It Go

“Justices often write separately to make clear that the reasons for their votes might differ from those of other justices,” said the ACLU’s Daniel Mach, who filed an amicus brief in the case.

Multiple opinions are more likely in high-profile cases, especially those dealing with the Constitution’s religion clauses.

Each “justice has his or her own sensitivities about this area of law, with a particular compulsion to get their nuance in,” Shapiro said.

In lower-profile cases, the justices might just let it go, he said.

“In this case, it’s notable that the more extreme portions of Justice Alito’s main opinion did not garner a five-justice majority,” Mach said.

Alito noted that the court has often “expressly declined to apply the test or has simply ignored it.”

“This pattern is a testament to the *Lemon* test’s shortcomings,” he said, urging that the court move even further away from it.

But “several of the justices were not willing to go as far as Justice Alito, and so the actual holding of the case is far narrower,” Mach said.

“Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere,” Justice Elena Kagan wrote in her concurring opinion.

Great Dissenters

And while the subject area might influence a justice’s decision to write separately, so, too, does the individual justice’s proclivities.

Different justices just “write more dissents or concurrences than others,” Sherry said.

“The first Justice Harlan, and Justice Thurgood Marshall, for example, were both known as frequent dissenters,” she said.

On the current court, Justice Clarence Thomas is known for his frequent concurring and dissenting opinions.

So far this term he’s written 10 concurrences and five dissenting opinions.

In contrast, Chief Justice John G. Roberts and Kagan have only written separately twice this term.

Thomas, and Kagan were among the seven justices to write an opinion in the cross case. Justices Stephen Breyer, Neil Gorsuch, and Brett Kavanaugh also filed concurring opinions.

Justice Ruth Bader Ginsburg filed the court’s lone dissenting opinion, which was joined by Justice Sonia Sotomayor. Only Sotomayor and the Chief Justice didn’t write separately to explain their votes.

Political Outsiders

In addition to the number of separate cases, another signal that the justices are passionate about the Establishment Clause is that Ginsburg read part of her dissent from the bench.

Occurring only a few times each term, Sherry said justices “usually read dissents from the bench when they think the case is especially important or the majority is especially wrong.”

Despite the lopsided vote, Ginsburg said from the bench that the court’s decision erodes the principle of the separation of church and state.

By maintaining the cross on public lands “the state places Christianity above other faiths and conveys a message of exclusion to non-Christians, nearly 30% of the U.S. population, telling them they are outsiders, not full members of the political community.”