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Supreme Court Update: American Legion v. American Humanist Association (No. 17-1717) and Gundy v. United States (No. 17-6086)

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Greetings, Court fans!

The Court was back today with another four decisions (still leaving a modest twelve for next week). In ***Flowers v. Mississippi (No. 17-9572)*** the Court vacated (by a vote of 7-2) the conviction and death sentence of Curtis Flowers, a black defendant, based on Mississippi prosecutors' repeated use of peremptory strikes to remove black jurors in Flower's sixth trial. In ***Knick v. Township of Scott, Pennsylvania (No. 17-647)***, the Court's more conservative Justices voted to overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, a 1985 decision that generally required plaintiffs who wish to sue state governments for taking their property (in violation of the Fifth Amendment) to first seek compensation in state courts. In ***Rehaif v. United States (No. 17-9560)***, the Court held, again by a vote of 7-2, that a defendant charged with "knowingly violating" a federal law that criminalizes the possession of firearms by aliens illegally in the United States can only be convicted if it is shown that the defendant knew both that he possessed the firearm *and* that he was in the country illegally. And in ***North Carolina Department of Revenue v. Kimberly Rice Kaestner 1992 Family Trust (No. 18-457)***, a unanimous Court held that the presence of a beneficiary of a trust within a state does not alone give that state the power to tax undistributed trust income.

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We'll summarize these latest decisions next week. But for now we have reports on the two big decisions handed down yesterday: ***American Legion v. American Humanist Association*** **(No. 17-1717)** and ***Gundy v. United States*** **(No. 17-6086)**.

American Legion v. American Humanist Association (No. 17-1717), presented a challenge to an allegedly religious monument on public land under the First Amendment's Establishment Clause. In a 7-2 decision, the Court found the monument constitutional. Although the Court splintered into *seven* opinions and achieved majority support for only fairly narrow holdings, the Court is clearly continuing its trend of whittling away its secularist twentieth-century Establishment Clause jurisprudence. As to one precedent in particular, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its infamous three-prong test, it may be more than whittling. Although the specific criticisms of *Lemon* found in the lead opinion were adopted by only four Justices, *American Legion* makes clear that a majority of the Court believes *Lemon* should either freely be ignored, especially in religious-symbol cases (Chief Justice Roberts and Justices Breyer and Alito), no longer be considered good law (Justices Gorsuch and Kavanaugh), or expressly be overruled (Justice Thomas).

The facts of *American Legion* fit a familiar Establishment Clause mold. Following World War I, a committee of residents in Prince George's Country, Maryland, built a giant cross on public land to commemorate fallen soldiers' sacrifice (the "Bladensburg Cross"), and for nearly ninety years the Cross was the site of patriotic civic events. In 2014, the American Humanist Association and others sued to remove the Cross from public land, claiming that it violated the Establishment Clause. The American Legion intervened to defend the Cross. The humanists prevailed before the Fourth Circuit, but the Supreme Court reversed.

Although seven Justices voted to reverse, not all portions of the lead opinion had majority support. A bare majority coalition comprising Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Kavanaugh signed on to Parts I, II-B, II-C, III, and IV of the lead opinion by Justice Alito. The majority began by describing the history of the cross as a symbol and the many examples of its use in secular contexts, including the common practice of memorializing the fallen soldiers of World War I with wooden crosses. In that context, the Court found, crosses had become a "cultural symbol" rather than a religious one. Consistent with that tradition, the Bladensburg Cross was erected in 1925 to honor fallen soldiers and for decades was the site of secular, patriotic events. Of particular importance to the Court was the age of the Bladensburg Cross. When dealing with monuments and symbols established long ago, the Court wrote, it is difficult to identify the original motivations of those who established them, and courts should not simply presume that the choice of a cross was intended to promote Christianity. In addition, monuments and symbols take on new purposes and meanings as time passes and can become part of a broader "cultural heritage" and a "community's landscape and identity" even if they were originally envisioned as religious. And once a symbol is embedded in the community's landscape, removing it could be divisive and itself be seen as hostile to religion. For those reasons, "[t]he passage of time gives rise to a strong presumption of constitutionality." The Court found that all of these factors applied here: the Cross began with secular purposes, developed an even more-secular meaning as time passed, and had become a part of the community.

The coalition, however, lost Justice Kagan's fifth vote for Parts II-A and II-D. In those portions of the lead opinion, the remaining four-Justice plurality opined that the *Lemon* test was not an effective universal framework for Establishment Clause decisions and was especially ill-suited to cases involving symbols with religious associations. They pointed out that the Court's recent precedents had essentially ignored *Lemon* and instead "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."

For her part, Justice Kagan wrote separately to clarify that although she agreed that "rigid application of the *Lemon* test does not solve every Establishment Clause problem . . . the test's focus on purposes and effects is crucial." She agreed with the lead opinion's "emphasis on whether longstanding monuments . . . reflect respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." But she "prefer[ed] at least for now" to evaluate each case individually, "rather than to sign on to any broader statements about history's role in Establishment Clause analysis."

Justice Kagan also joined Justice Breyer's concurring opinion. He stated that the case would be different "if there were evidence that the organizers had deliberately disrespected members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I." He did not understand the Court to be "adopt[ing] a 'history and tradition' test that would permit any newly constructed religious memorial on public land." Rather, it was permitting this specific memorial "only after considering its particular historical context and its long-held place in the community." As Justices Breyer and Kagan were both necessary to achieve the majority opinion and both offered narrowing interpretations of the Court's decision, their concurring opinions will likely be given weight by lower courts tasked with extracting a precedential holding from the Court's splintered opinions.

Justice Kavanaugh, another member of the five-Justice majority, took a broader view. In his concurring opinion, he opined that the Court "no longer applies the old test articulated in *Lemon*," which "is not good law," and instead "applies a history and tradition test." After cataloguing many of the Court's Establishment Clause precedents, Justice Kavanaugh discerned some general principles: the Establishment Clause is not violated "if the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law." Though Justice Kavanaugh was alone in offering that approach to the Establishment Clause, it remains to be seen whether it will influence lower courts or gain future adherents among his colleagues.

Justices Thomas and Gorsuch concurred in the judgment, declining to join the lead opinion. Justice Thomas reiterated his view that the Establishment Clause is not incorporated against the states. But even if it is, he concluded that the Bladensburg Cross was obviously constitutional because it involved no "actual legal coercion." He also would go further than the plurality and explicitly overrule the *Lemon* test in all contexts.

Justice Gorsuch, joined by Justice Thomas, wrote to explain his view that merely being an "offended observer" of symbols does not give someone Article III standing to bring an Establishment Clause claim. He blamed the development of "offender observer" standing on the "reasonable observer" standard that grew out of the *Lemon* test, which "was a misadventure" that "not a single Member of the Court even tries to defend." "With *Lemon* now shelved," he wrote, "little excuse will remain for the anomaly of offended observer standing." Justice Gorsuch also criticized the Court for holding that old symbols and monuments are presumptively constitutional by virtue of their age. In his view, the history-and-tradition test the Court adopted is not actually about a symbol's age but rather about "its compliance with ageless principles."

And finally, Justice Ginsburg, joined by Justice Sotomayor, dissented. She accused the Court of eroding the principles of neutrality and non-endorsement developed over decades of precedent and was "startl[ed]" by Justice Gorsuch's rejection of offended observer standing. She would uphold the principle that the government "may be presumed to endorse [a cross's] religious content" when placing it on public property but may rebut that presumption if the setting negates the message of endorsement. The Latin cross, she noted, is "the foremost symbol of the Christian faith," and "using the cross as a war memorial does not transform it into a secular symbol"; rather, it is merely a large-scale application of the practice of "mark[ing] Christian deaths" by signifying that "a Christian is buried here." Her reading of the historical record was that grave markers for the war dead following World War I were understood at the time to be sectarian markers, that both crosses and Stars of David were used, and that crosses were hardly a universal symbol of World War I sacrifice. By her reckoning, fewer than one percent of U.S. monuments to World War I were freestanding cross memorials. Prohibiting monuments like the Bladensburg Cross, Justice Ginsburg explained, would not lead to destroying all cross-shaped memorials, since many are permissibly designed in a way that honors specific fallen soldiers' faith and beliefs without appearing to endorse them.

Second, in ***Gundy v. United States (No. 17-6086)***, the Court rejected a challenge to the Sex Offender Registration and Notification Act ("SORNA"), holding that the Act's delegation of authority to the Attorney General to determine how to apply the Act's sex offender registration requirements to individuals convicted before SORNA's enactment was not an unconstitutional delegation of legislative authority. But perhaps more interesting than the result is that the decision seems to set the stage for a renewed effort by the Court's more conservative Justices to give the non-delegation doctrine a bit more teeth than it has had since 1935 (it's one good year—among 211 bad ones—as Cass Sunstein once quipped). Justice Kavanagh did not participate, because the case was argued before his confirmation, leaving the Court with only eight Justices. Justice Alito provided the tie-breaking vote (the only time this term he has joined the Court's liberal wing as the median vote). But he concurred only in the result, in the process making it clear that he was open to strengthening the non-delegation doctrine if a majority of the Court were willing to do so.

The petitioner, Herman Gundy, was convicted of a sex offense and released from prison before SORNA was enacted. He was subsequently arrested and convicted for failing to register as a sex offender under SORNA. He argued that the statute's delegation to the Attorney General to "specify the applicability" of SORNA's registration requirements to individuals who were convicted before SORNA was enacted was unconstitutional, an argument rejected by the district court and the Second Circuit.

Justice Kagan, writing for Justices Ginsburg, Breyer, and Sotomayor, noted that every one of the other eleven circuits that had addressed this issue had agreed with the Second Circuit. She emphasized that, under longstanding Court precedent, all Congress must do is set forth "an intelligible principle" that the executive branch can follow in exercising delegated authority. SORNA does that. Considering the Act as a whole, as well as its purpose and history, Kagan found the delegation to the Attorney General to be quite limited. Read in context, the provision at issue does not permit the Attorney General to determine *whether* to apply SORNA's registration requirements to previous sex offenders; it merely authorizes the Attorney General to determine how best to apply the registration requirements to pre-Act offenders, while mandating that registration take place "as soon as feasible."

Given that interpretation of the statute, the majority found the constitutional question "easy." Congress provided an "intelligible principle": it delegated to the Attorney General temporary, limited authority to determine how to apply to SORNA to previous sex offenders in an administratively feasible way and to do so "as soon as feasible." That is more than enough to pass constitutional muster, as evidenced by the fact that the Court has not struck down a congressional delegation of authority as excessive since 1935. That history is consistent with the reality of how modern government operates, according to Justice Kagan. To function effectively, Congress must have broad discretion to delegate authority to the executive branch to implement its programs. As Justice Kagan warned, "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."

Justice Alito concurred in the result only. Given the Court's long history of rejecting non-delegation challenges, he concluded it would be "freakish to single out the provision here for special treatment." But at the same time, he made clear that he would be willing to revisit the constitutional standard for non-delegation challenges if "a majority of this Court were willing to reconsider the approach we have taken for the past 84 years."

Justice Gorsuch, writing for the Chief Justice and Justice Thomas, "would not wait." His dissent rested in large part on a very different understanding of just what authority SORNA delegated to the Attorney General. Specifically, while SORNA has extraordinarily detailed provisions regarding the registration of sex offenders, it says virtually nothing about how SORNA's registration requirements should be applied to pre-Act offenders. That's because Congress couldn't agree on what to do about that critical legislative policy issue, so it punted the question to the Attorney General. That, Justice Gorsuch thought, is precisely what the separation of powers prohibits. And as further evidence that SORNA provides little guidance to the Attorney General, Justice Gorsuch noted that the

Attorneys General in different administrations have applied SORNA's requirements to pre-Act offenders in widely differing ways, with "profound consequences" for the people affected.

Justice Gorsuch would therefore discard the "intelligible principle" standard, which allows legislative unaccountability. The dissenters thought that standard, one that has since taken on a "life of its own," was never intended to be a constitutional test for permissible delegation. Rather, Justice Gorsuch maintained, Congress could historically delegate authority to the executive branch only in certain discreet situations: to "fill up the details" of an otherwise clear legislative policy; to have a legislative rule triggered by a finding of specific facts by the executive branch; and to delegate responsibilities that already lie within executive power. He would return the test for the constitutionality of a delegation of authority to those standards. Since SORNA's delegation of authority to the Attorney General falls into none of the permissible categories, it is constitutionally infirm. Having drawn the battle lines, Justice Gorsuch awaits "a future case with a full panel," (i.e., one where Justice Kavanaugh can participate) when the Court can put an end to "the intelligible principle misadventure" and make it clear that Congress "may never hand off to the nation's chief prosecutor the power to write his own criminal code."

We'll be back to summarize the rest of the outstanding cases next week, as well as the new cases the Court is expected to hand down on Monday (the first day of the last week of the term). Until then.