

CASE NOTE – FREEDOM FROM RELIGION – AMERICAN LEGION, ET AL V AMERICAN HUMANIST ASSOCIATION, ET AL 588 US (2019)

*Stephen Pitt-Walker**

ABSTRACT

The case note, *Freedom from Religion: American Legion, et al. v. American Humanist Association, et al.* by Stephen Pitt-Walker, critiques the U.S. Supreme Court’s 2019 decision that upheld the presence of a Latin cross war memorial on public land, arguing it undermines the First Amendment’s establishment clause. The case revolved around whether the display of a religious symbol on government property violated the principle of government neutrality toward religion. The Court’s majority justified its decision through a “contextual historical justification,” framing the cross as a secular symbol of World War I remembrance rather than a Christian emblem.

Pitt-Walker contends that this reasoning abandons the long-established “neutrality principle,” which had guided previous court rulings to ensure governmental impartiality in religious matters. He argues that the decision unfairly favours the Christian (cultural) majority, discriminating against religious minorities and non-religious groups, ultimately eroding pluralistic values. The dissenting opinion by Justice Ruth Bader Ginsburg is discussed extensively, as she criticized the Court’s departure from neutrality and warned of the discriminatory consequences.

The case note locates the case within broader legal and philosophical frameworks, particularly exploring the tensions between rights theory and utilitarianism. Pitt-Walker proposes that the decision represents a form of “tyranny of the majority,” where the rights of minority groups are overshadowed by majoritarian interests. He concludes that the ruling sets a troubling precedent for future interpretations of the establishment clause, weakening constitutional protections for religious freedom in the U.S.

Keywords: first amendment, establishment clause, neutrality principle, religious freedom, tyranny of the majority, rights theory, utilitarianism, liberty, democracy, discrimination

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INTRODUCTION

This Case Note examines issues arising out of the judgment of the United States (US) Supreme Court ('the Court') in *American Legion, et al. v American Humanist Association, et al*, No 17-1717, 588 US (2019) ('the *Cross* case').¹ The judgment is analysed applying concepts including the tyranny of the majority, utilitarianism versus rights theory, freedom of religion, and the neutrality principle, addressing moral questions arising from the judgment, specifically regarding interpretation of the First Amendment right to freedom from the establishment of any religion. It examines whether the Court effectively balanced the competing rights and social utility concerns implicated in the case. Themes raised in Justice Ginsberg's dissenting opinion are explored, especially her criticism of the Court's departure from the 'neutrality principle'.²

The Case Note demonstrates that the Court abandoned the 'neutrality principle', thereby untethering the decision from the developed meaning and interpretation it had given to the 'establishment clause' over time. Ultimately, by doing this, and utilising what might be called a 'contextual historical justification' as *ratio decidendi*, the Court did not give appropriate weight to the various rights and interests at stake in the case. Rather, the Court discriminated against religious and non-religious minorities, inappropriately favouring the current and historically dominant Christian majority in the US.

FACTS AND CONTENTIONS ARISING IN THE *CROSS* CASE

The material facts in the *Cross* case were that a Latin cross was placed prominently in a publicly visible location, on land later purchased with the public purse, as a memorial to the soldiers who lost their lives in World War 1. The cross remained there until a lawsuit was brought 89 years later, arguing that its presence on public land together with the expenditure of public funds on its maintenance was in violation of the 'establishment clause' in the First Amendment to the US Constitution. Proposing that this violation was discriminatory, the plaintiffs argued that the cross should be demolished or removed.

On appeal, the majority of the Supreme Court overturned the Fourth Circuit Court's decision that the memorial was unconstitutional. That decision had relied largely upon the Fourth Circuit Court's application of the neutrality principle as

¹ *American Legion, et al v American Humanist Association, et al* No. 17-1717, 588 US (2019).

² *American Legion, et al* (n1).

expressed in the so-called '*Lemon test*'.³ The neutrality principle and the *Lemon* test were applied prior to the *Cross* decision, inter alia, to determine whether government actions or legislation endorsed or tended to endorse a particular religion and, if so, such action or legislation was deemed unconstitutional in respect of the accepted interpretation of the 'establishment clause'.⁴

The reasons given for the Court's reversal of the Federal Court of Appeal's decision were:

1. The monument ought to be viewed in its historical context vis-à-vis the ideals for which those memorialised had fought.
2. Removal or radical alteration of the monument would be seen by many not as a 'neutral' act but as an act hostile towards religion.
3. The Latin cross, as a symbol, has been secularised and, while a Christian symbol, is also a generic symbol of World War I remembrance, rather than a symbol particular to Christianity.
4. Application of the *Lemon* test, with respect to the establishment clause, is problematical regarding its presumption of constitutionality with respect to long-standing monuments, symbols, and practices. Notably, the issue of prayer meetings at the beginning of town Council sessions was viewed as an analogous non-discriminatory practice under the establishment clause.⁵

In combination, the first three elements of the above *ratio* constitute the 'contextual historical justification' addressed in this Case Note. The fourth element, neutrality, will be examined as a separate issue.

In the context of the argument presented here, the salient features of the dissenting opinion in the *Cross* case are:

1. The principle of neutrality with respect to the establishment clause is eroded by the majority judgment.
2. Precedent designed to preserve individual liberty and civic harmony, based on pluralism has been diminished.
3. By placing an indirect coercive pressure upon religious minorities to conform to the majority view, the decision is discriminatory.
4. With respect to the secularisation of the Latin cross, the majority decision supports a majoritarian rather than pluralistic view.

³ *Lemon v Kurtzman* 403 US 602, 612–3 (1971).

⁴ *Lemon* (n3).

⁵ *American Legion, et al* (n1).

5. The remedy is relatively simple and does not require destruction or radical alteration, but only transferring ownership of the land upon which the monument stands to private hands.
6. Longstanding and pluralist ‘neutrality principle’ was derogated from, if not abrogated.⁶

An inference that may be drawn from the dissent, as discussed below, is that the *Lemon* test and other formalistic tools (although at times presenting difficulties in hard cases) contributed significantly to the development of a coherent, if imperfect, framework for determining whether the establishment clause had been violated.

WHAT COMPETING RIGHTS AND INTERESTS WERE AT STAKE IN THE CASE?

The competing rights and interests represented in the case are those of the Christian majority (utilitarian) and those of minority religious and non-religious (rights) views in the US. This is a question relating to ‘freedom of religion’. Fundamentally, rights theory needs to be balanced against utilitarian philosophy in this case. The view of one of the most eminent rights theorists in jurisprudence, Ronald Dworkin,⁷ is that rights trump all other interests, especially utilitarian or social utility interests (‘the Dworkinian view’).⁸ On the opposing side of the argument is the utilitarian view. Utilitarianism can be extreme and absolute as represented by ‘act utilitarianism’,⁹ but may also be tempered and more nuanced as seen in ‘rule’ and ‘indirect’ utilitarianism.¹⁰ In practice, courts seek to weigh the two competing theoretical perspectives in a proportional, moral way to achieve a reasonable and appropriate balance between the advantages afforded and harms caused by each.¹¹

Most specifically, the *Cross* case raises the question of government neutrality towards religion, and the constitutional obligation not to respect the establishment of any religion. In other words, the government’s obligation to refrain from actions that coerce, either directly or subtly, its citizens to conform to a majority (indeed

⁶ American Legion, et al (n1).

⁷ Rolf Sartorius, ‘Dworkin on Rights and Utilitarianism’ (1981) *Utah Law Review* 263.

⁸ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

⁹ Donald C Emmons, ‘Act vs. Rule-Utilitarianism’ (1973) *Mind*, vol 82 (326) 226.

¹⁰ Emmons (n9); Eric Wiland, ‘How Indirect Can Indirect Utilitarianism Be?’ (2007) *Philosophy and Phenomenological Research*, vol 74 (2) 275.

¹¹ Jeremy Waldron, ‘Rights’ in Robert, E Goodin, Philip Petit and Thomas Pogge (eds), *A Companion to Contemporary Philosophy* (Blackwell Publishing, 2nd ed, 1993) 746.

any) religious view. Accordingly, more broadly, questions arise with respect to arguments involving individual rights (from the liberal philosophical perspective) versus the utilitarian perspective and its consequentialist predicates regarding social utility.

The main reason that rights are enshrined in Constitutions (such as the US) or legislation is to ensure that individual freedoms in certain instances (especially with respect to democratic theory and rights theory) are provided, ensuring that rights are given *substantial protection* and priority over unqualified social benefit or collective interest. As such, when individual rights are protected in this manner they cannot be merely balanced against collective interests, and thus may be infringed only in exceptional circumstances. This follows even when, on a simple calculation, a collective or public interest would be served by infringing a right. It is for this reason that ‘bills of rights’ enshrine individual rights, protecting them from capricious or unqualified legislative or other governmental infringement.

The tendency of democratic legislatures to favour majority interests over minority rights was recognised by Alexis De Tocqueville in his ground-breaking work, *Democracy in America* (1831).¹² While observing many virtues of American democracy Tocqueville also noted certain problems. One of the most crucial was the tendency for the ‘majority’ to dominate and form an unfair hegemony that impedes the application of the liberal view of individual rights in terms of positive and negative freedoms, to use the language that J. S. Mill would later use in, *On Liberty* (1859).¹³ Tocqueville called this phenomenon the tyranny of the majority.

DOES THE DECISION IN THE *CROSS* CASE REFLECT A TYRANNY OF THE MAJORITY?

Donald Maletz re-examines Tocqueville’s classic conception of ‘majority tyranny’ in democratic government.¹⁴ He agrees with Tocqueville that aspects of majority rule are advantageous, but that there are also significant issues arising out of majoritarian ‘dominance’ over minorities. The most influential of these is the effect of modern majoritarianism on the mind of the body politic.¹⁵ In Maletz’s words, Tocqueville was concerned with the effects of ‘soft tyranny’¹⁶ on the mind of the

¹² Alexis De Tocqueville, *Democracy in America* (1831).

¹³ John S Mill, *On Liberty* (1859).

¹⁴ Donald J Maletz, ‘Tocqueville’s Tyranny of the Majority Reconsidered’ (2002) *The Journal of Politics* vol 64 (3) 741.

¹⁵ Maletz (n14).

¹⁶ Maletz (n14) 755–8.

polis.¹⁷ Maletz argues that if majority rule¹⁸ remains unconstrained via constitutional means, and absent commensurate active criticism that demonstrates that majority power may manifest itself as ‘absolute’, it may become omnipotent and, *ipso facto*, tyrannical.¹⁹ Maletz proposes that Tocqueville’s argument was a ‘brilliant warning’ as to the latent harms subsisting in an unqualified commitment to democracy. In the instance of the *Cross* case, it may be argued that the Court majority exercised exactly the behaviour with which both Tocqueville and Maletz are concerned.

In taking the decision it did, arguably the US Supreme Court abrogated the principal of neutrality, overturning a valid decision of a Federal appeals court by using a majoritarian, unprecedented, and tenuous historical justification. The Court’s *ratio* in the *Cross* decision thus demonstrates that Tocqueville’s and Maletz’s concerns about majority tyranny were well founded.

There are several reasons for this, but most significantly, in agreement with Justice Ginsburg’s view as enunciated in her dissenting opinion, I contend that the Latin cross may not be viewed as a secular symbol despite its sometimes-secular use. Further, as Maletz points out and Tocqueville implies, the mind of the polity is likely to be significantly influenced by governmental support and public funding for the maintenance of a symbol specific to a particular (majority) religion, thereby excluding those who hold other religious and nonreligious views. Supporting that argument, such actions have no reasonable basis or ‘contextual historical justification’ (despite the majority’s attempt in *Cross* to provide such justification) and, it follows, they are discriminatory. Accordingly, such actions ought to fall foul of the establishment clause. Therefore, on a moral basis, and in respect of pluralist democratic philosophy, the majority decision in the *Cross* case is discriminatory, tenuous, and unjustifiable. It violates the individual right to religious freedom and places constitutional democratic freedoms at significant risk vis-à-vis ‘majority tyranny’ in the future. In the following section the notion of religious freedom is examined in conjunction with the politico-legal conception of non-discrimination.

THE DEVELOPMENT OF RELIGIOUS FREEDOM, NON-DISCRIMINATION, AND NEUTRALITY AS DOCTRINE IN THE US

The legal and political ideals of religious freedom and non-discrimination that are central issues in the *Cross* case have become as much a part of rights theory and

¹⁷ Maletz (n14).

¹⁸ That is, that which is deemed authoritative within democratic states.

¹⁹ Maletz (n14).

models of democratic governance as any.²⁰ In his article ‘Religious Freedom and Non-discrimination’, Thomas Berg investigates the connection between freedom of religion and equality, and non-discrimination.²¹ Berg, who investigates these concepts in the US context, mainly focuses on the ‘free exercise’ clause. Frequently the two so-called religion clauses in the First Amendment are dealt with separately. However, Berg argues (and this Case Note accepts and adopts as logical), that the religion clauses (‘free exercise’ and ‘establishment’) ought to be read as one.

When the clauses are read together it is impossible not to extrapolate principles from cases regarding each to the other. Berg discusses ‘neutrality’ with respect to discrimination in the case law, as well as the notion of hostility, especially regarding religion being used as ‘a cover for bigotry’. Berg’s examination and distinguishing of several cases, including *Lukumi*²² and *Trump v Hawaii*²³ is particularly instructive in this regard.²⁴ These cases disclose an interpretation of ‘partiality’ that is also present in the *Cross* decision.²⁵ When comparing the *ratio* in *Cross* to Berg’s construction of partiality it closely resembles the veiled discriminatory justifications found in the above cases.

On this basis, the Court’s view that upholding the Federal Appeals Court ruling would be hostile to religion is fundamentally flawed.²⁶ Contrary to the Court’s view, declining to uphold the decision of the Fourth Circuit Court is not only hostile to the idea of religious freedom, but also to religions other than Christianity as well as the non-religious. It is, therefore, discriminatory and anti-pluralist. Berg’s theory also assists in analysing and assessing the role of the judiciary and justifications for judicial activism regarding ‘equality’ and ‘non-discrimination’. In all instances, it is the constitutional role of the judiciary to hold the other branches of the US government to account. As suggested by Tocqueville, the US Court system is the interlocutor that tempers the tyrannical, majoritarian propensity of the other branches of government.²⁷ However, in *Cross*, such requisite and legally justifiable activism is utterly lacking.

²⁰ Waldron (n11).

²¹ Thomas C Berg, ‘Religious Freedom and Non-discrimination’ (2018) *Loyola University Chicago Law Journal* vol 50 (1) 18.

²² *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* 508 U.S. 520, 532 (1993).

²³ *Trump v Hawaii* 138 S. Ct 2392 (2018).

²⁴ Berg (n21) 189.

²⁵ Berg (n21) 190.

²⁶ *American Legion, et al* (n1).

²⁷ Alexis De Tocqueville, *Recollections* (translated by J. P. Mayer and A. P. Kerr eds., Macdonald, London, 1970).

Another significant point made by Berg that supports the argument here is his proposition regarding the ‘tethering’ and maintaining the use of the ‘neutrality principle’ in line with precedent.²⁸ In this regard, he suggests that this is of utmost importance to the coherence and logical fabric of the law, and to rule of law principles, in that once tethered to an ideal and precedent the judicature is obliged to develop the law along the same logical trajectory unless and until it has undeniable reason to modify that precedent and/or principle.²⁹ In the *Cross* case, I propose such reason was lacking. As Berg would agree, the bounds of religious protection, that is the balancing of religious freedoms against what may otherwise appropriately be seen as discriminatory vis-à-vis the establishment clause, is mandatory.³⁰

UNTETHERING THE RELIGIOUS CLAUSES FROM THE NEUTRALITY PRINCIPLE

In his work, *The Rise and Decline of American Religious Freedom*,³¹ Steven Smith complements the foregoing arguments. Smith examines the intention of the US Constitution’s framers with respect to the First Amendment’s religion clauses. He argues that the framers did not, by design, import the commitment to the ‘separation of church and state’ or other pluralist ideals by adopting these clauses. The view that the Constitution was an expression of lofty notions and political morality, as Dworkin would have it,³² is rejected by Smith.³³

He establishes that proponents of the ‘neutrality’ and ‘secular government’ principles typically ignore the historical evidence in favour of a more romantic notion of the framer’s intentions.³⁴ However, most significantly in support of this article’s central argument, Smith observes that in reality it is an accomplished fact that the US Supreme Court projected this ‘preferred view onto the Constitution’.³⁵ He suggests that the interpretation of the religion clauses was driven by the idealistically inspired imagination of the Court,³⁶ opining that the major issue over

²⁸ Berg (n21)192.

²⁹ Berg (n21).

³⁰ Berg (n21) 205.

³¹ Steven D. Smith, ‘The Accidental First Amendment’ in *The Rise and Decline of American Religious Freedom* (Harvard University Press, 2014) 48–75.

³² Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

³³ Smith (n31).

³⁴ Smith (n31) 48, 55–65.

³⁵ Smith (n31) 65.

³⁶ Smith (n31) 66–74.

which the religious clauses have been contested, is not that which the framers had in mind but has indeed been religious pluralism.³⁷

Smith's views on the interpretation of the religion clauses and the neutrality principle are central to the argument that the Court ill-advisedly and immorally untethered the religious clauses from their erstwhile sound moorings. Having thus dispensed with the neutrality principle, the Court overturned a good legal decision of a lower court, creating bad law, and in a discriminatory fashion immorally balancing religious rights against majoritarian/utilitarian interests. This was also antithetical to pluralist principle and precedent.³⁸ This is clearly and justifiably expressed by Justice Ginsberg in her to the central argument in this Case Note are investigated further.

JUDICIAL REVIEW AS A CONSTRAINT ON THE TYRANNY OF THE MAJORITY

It may be argued that in certain instances, for courts to allow the tyranny of the majority to prevail may be reasonable, as Robert K. Fleck's and Andrew Hanssen's model demonstrates when analysing the role of judicial review in preventing tyrannies of the majority.³⁹ The Fleck-Hanssen model identifies circumstances under which a court's most efficacious role may be to allow the tyranny of the majority, such that a tyrannised minority will be better off as a result.⁴⁰ Accordingly, the model sometimes produces counterintuitive results and indicates the requirement for majoritarian court rulings to bring about socially beneficial outcomes. Fleck and Hanssen use a mixture of theoretical modelling and case analysis, applying their model to several US landmark cases to arrive at their conclusions.⁴¹ In this way, they demonstrate how their model may assist in distinguishing instances where judicial constraints on majority rule are socially beneficial and where they are socially harmful. However, the Fleck-Hanssen model does not apply in the context of the *Cross* case, as the decision was not related to more explicitly socio-economic policies as in the cases to which the model most readily applies.⁴² Given this, the Fleck-Hanssen model and conclusions are unsuitable as the foundation for any counterargument to the overarching argument presented in

³⁷ Smith (n31) 75.

³⁸ Smith (n31) 49–62.

³⁹ Robert K Fleck and F Andrew Hanssen, 'Judicial Review as a Constraint on Tyranny of the Majority' (2013) *Journal of Law, Economics & Organisation* vol 29 (2) 303, 306–19.

⁴⁰ Fleck and Hanssen (n40) 321–2.

⁴¹ Fleck and Hanssen (n40) 322–8.

⁴² Fleck and Hanssen (n40).

this Case Note, that is, that the decision in *Cross* was socially harmful, and that the US Supreme Court failed to give adequate weight to constitutional rights vis-à-vis harmful majoritarian tendencies.

JUDICIAL INTERPRETATION IN RESPECT OF THE NEUTRALITY PRINCIPLE AND ITS CONSEQUENCES

Frank Ravitch critically analyses the ‘neutrality principle’ as it was developed and applied by the US Supreme Court.⁴³ He opens with a Weberian criticism of the notion of neutrality as ‘value free’.⁴⁴ Ravitch emphasises that it is impossible to be neutral in the courts in line with Weber’s postulate, that it is impossible to objectively assess that which is subjectively meaningful.⁴⁵ With this acknowledged, Ravitch moves on to describe the normative construction of ‘neutrality’ as developed and applied by the Supreme Court in respect of the religion clauses in the US Constitution. He criticises ‘establishment clause jurisprudence’ for the fact that the traditional approach of the Court has been overly fact sensitive and formalistic, and that this ‘formalistic’ approach to neutrality is relatively ineffective in assessing the myriad situations to which it needs to be applied.⁴⁶

Ravitch argues that neutrality is problematic because what may seem ‘neutral’ to one person might seem (and be) discriminatory to another, and that there is no objective standard against which to evaluate neutrality, as exemplified in *Zelman*.⁴⁷ Thus, he identifies the difficulties related to the *Lemon* test⁴⁸ and other drawbacks of the formalistic approach formerly taken by the Court. He argues that these formalistic tools have masked value choices made by courts under a cloak of even handedness.⁴⁹ Nevertheless, within this lineage he identifies a beneficial form of neutrality, essentially developed by the Rehnquist Court, which he calls ‘benevolent neutrality’.⁵⁰

⁴³ Frank S. Ravitch, ‘Judicial Interpretation, Neutrality and the US Bill of Rights’ in Paul Babe and Neville Rochow (eds), *Freedom of Religion Under Bills of Rights* (Adelaide University Press, 2012) 253.

⁴⁴ Ravitch (n43) 259.

⁴⁵ John Rex, ‘Value-Relevance, Scientific Laws, and Ideal Types: The Sociological Methodology of Max Weber’ (1977) *The Canadian Journal of Sociology* vol 2 (2) 151.

⁴⁶ Ravitch (n43) 255–60.

⁴⁷ *Zelman v Simmons-Harris* 122 S Ct 2460, 2473 (2002).

⁴⁸ *Lemon v Kurtzman* 403 US 602, 612–3 (1971).

⁴⁹ Ravitch (n43) 256–9.

⁵⁰ Ravitch (n43) 260–7.

Benevolent or ‘substantive neutrality’ relies on the judiciary exercising an activist role, supplementing the formalistic with what Ravitch terms ‘separationism’ or ‘accommodationism’,⁵¹ to make value judgements, assisting in securing the ‘substantive’ rights of minorities.⁵² Albeit that this creates its own set of complexities, I propose that Ravitch’s conception of ‘benevolent neutrality’ significantly obviates the formalistic difficulties previously ascribed to the ‘neutrality principle’, evinced, inter alia, in the criticisms of *Lemon*. This would have enabled the majority in *Cross* to sustain a logical, coherent, and tethered position regarding neutrality.⁵³

By implication, Ravitch is critical of the Court’s departure from the normatively developed neutrality principle, a perspective consistent with this Case Note. Ravitch’s position supports the argument that there was no need for the Court to derogate from, or indeed abandon, neutrality⁵⁴ and adopt a ‘contextual historical justification’ as its *ratio decidendi*. This new *ratio* untethered legal reasoning from that developed previously by the Court to appropriately balance individual rights and public interests at stake in cases involving the religion clauses.

Additionally, the reasoning that supports the maintenance of monuments and memorials in accordance with their historical context has recently been called into question in responses to certain historical monuments after George Floyd’s death.⁵⁵ This is because historical interpretation is not fixed and changes with perception and understanding. Had the Court not needed to depart so completely from the principle of neutrality it had so assiduously constructed, it likely would have more effectively weighed the rights versus utilitarian interests in the *Cross* case. In that it did not do this, and chose a totally new, tenuous line of reasoning, I contend that it has ineffectively and inappropriately balanced the competing rights and public interest principles at stake in this case and, as argued in this Case Note, produced a majoritarian, discriminatory, socially harmful outcome.

CONCLUSION

Did the US Supreme Court’s decision in the *Cross* case effectively weigh the ‘rights’ protections guaranteed in the establishment clause of the First

⁵¹ Ravitch (n43) 259.

⁵² Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 2012) 41–67.

⁵³ Ravitch (n43) 257.

⁵⁴ Ravitch (n43) 254.

⁵⁵ Bill Wright, *Cities Want to Remove Toxic Monuments. But Who Will Take Them?* (The New York Times online, 18 July 2020). <<https://www.nytimes.com/2020/06/18/us/confederate-statues-monuments-removal.html>> accessed 4 April 2024.

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Amendment of the US Constitution, against a tyrannical, majoritarian form of utilitarianism? The foregoing arguments demonstrate why the Court's departure from the long-developed 'neutrality principle' was unjustified and inapt, given the more appropriate option for continuing to utilise a benevolent form of neutrality. This issue is emphasised by the Court's adoption of a tenuous 'contextual historical justification'. Along with the Court's overturning the Fourth Circuit Court's precedent-based decision in favour of a dominant, majoritarian perspective, together with accompanying arguments that minority religious, and non-religious, rights have been eroded, the decision was discriminatory. Accordingly, concurring with many of the premises in the dissenting opinion, the correct conclusion follows that the Court did not give proper weight to the various rights and interests at stake in the case.