

Utah Highway Patrol Association v. American Atheists, Inc.

2011 U.S. LEXIS 7919 (October 31, 2011)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Opinion Below: *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. Utah, 2010)

OPINION

Petitions for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles. A sharply divided Court of Appeals for the Tenth Circuit has declared unconstitutional a private association's efforts to memorialize slain police officers with white roadside crosses, holding that the crosses convey to a reasonable observer that the State of Utah is endorsing Christianity. The Tenth Circuit's opinion is one of the latest in a long line of "religious display" decisions that, because of this Court's nebulous Establishment Clause analyses, turn on little more than "judicial predilections." See *Van Orden v. Perry*, 545 U.S. 677, 696, 697 (2005) (THOMAS, J., concurring). Because our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess, I would grant certiorari.

I

The Utah Highway Patrol Association (Association) is a private organization dedicated to supporting Utah Highway Patrol officers and their families. In 1998, the Association began commemorating officers who died in the line of duty by placing memorials, in the form of 12-by 6-foot white crosses, at or near locations where the officers were killed. The fallen officer's name, rank, and badge number are emblazoned across the full length of the horizontal beam of each memorial. The vertical beam bears the symbol of the Utah Highway Patrol, the year of the officer's death, and a plaque displaying the officer's picture, his biographical information, and details of his death. To date, the Association has erected 13 cross memorials.

The Association chose the cross because it believed that crosses are used both generally in cemeteries to commemorate the dead and specifically by uniformed services to memorialize those who died in the line of duty. The Association also believed that only the cross effectively and simultaneously conveyed the messages of death, honor, remembrance, gratitude, sacrifice, and safety that the Association wished to communicate to the public. Surviving family members of the fallen officers approved each memorial, and no family ever requested that the Association use a symbol other than the cross.

The private Association designed, funded, owns, and maintains the memorials. To ensure that the memorials would be visible to the public, safe to view, and near the spot of the officers' deaths, the Association requested and received permission from the State of Utah to erect some

of the memorials on roadside public rights-of-way, at rest areas, and on the lawn of the Utah Highway Patrol office. In the permit, the State expressed that it "neither approves or disapproves the memorial marker."

Respondents, American Atheists, Inc. sued state officials, alleging that the State violated the Establishment Clause of the First Amendment, as incorporated by the Fourteenth Amendment, because most of the crosses were on state property and all of the crosses bore the Utah Highway Patrol's symbol. The Association, a petitioner along with state officials in this Court, intervened to defend the memorials. The District Court granted summary judgment in favor of petitioners.

A panel of the Tenth Circuit reversed. As an initial matter, the panel noted that this Court remains "sharply divided on the standard governing Establishment Clause cases." The panel therefore looked to Circuit precedent to determine the applicable standard and then applied the so-called "*Lemon*/endorsement test," which asks whether the challenged governmental practice has the actual purpose of endorsing religion or whether it has that effect from the perspective of a "reasonable observer." The court concluded that, even though the cross memorials had a secular purpose, they would nonetheless "convey to a reasonable observer that the state of Utah is endorsing Christianity." This was so, the court concluded, because a cross is "the preeminent symbol of Christianity," and the crosses stood alone, on public land, bearing the Utah Highway Patrol's emblem. According to the panel, none of the other "contextualizing facts" sufficiently reduced the memorials' message of religious endorsement.

The Tenth Circuit denied rehearing en banc, with four judges dissenting. The dissenters criticized the panel for presuming that the crosses were unconstitutional and then asking whether contextual factors were sufficient to rebut that presumption. Instead, the dissenters argued, the panel should have considered whether the crosses amounted to an endorsement of religion in the first place in light of their physical characteristics, location near the site of the officer's death, commemorative purpose, selection by surviving family members, and disavowal by the State. The dissenters also criticized the panel's "unreasonable 'reasonable observer,'" describing him as "biased, replete with foibles, and prone to mistake."

II

Unsurprisingly, the Tenth Circuit relied on its own precedent, rather than on any of this Court's cases, when it selected the *Lemon*/endorsement test as its governing analysis. Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases. Some of our cases have simply ignored the *Lemon* or *Lemon*/endorsement formulations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Marsh v. Chambers*, 463 U.S. 783 (1983). Other decisions have indicated that the *Lemon*/endorsement test is useful, but not binding. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Most recently, in *Van Orden*, 545 U.S. 677, a majority of the Court declined to apply the *Lemon*/endorsement test in upholding a Ten Commandments monument located on the grounds of a state capitol. Yet in another case decided the same day, *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 859-866 (2005), the Court selected the *Lemon*/endorsement test with nary a word of explanation and then declared a display of the Ten Commandments in a courthouse to be unconstitutional. Thus,

the *Lemon*/endorsement test continues to "stal[k] our Establishment Clause jurisprudence" 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." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (SCALIA, J., concurring in judgment).

Since *Van Orden* and *McCreary*, lower courts have understandably expressed confusion. See *American Civil Liberties Union of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) (after *McCreary* and *Van Orden*, "we remain in Establishment Clause purgatory").¹ This confusion has caused the Circuits to apply different tests to displays of religious imagery challenged under the Establishment Clause. Some lower courts have continued to apply the *Lemon*/endorsement test.² Others have followed *Van Orden*.³ One Circuit applied both tests.⁴

¹ See also *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) ("Confounded by the ten individual opinions in [*McCreary* and *Van Orden*] courts have described the current state of the law as both 'Establishment Clause purgatory' and 'Limbo'"); *id.*, at 1023-1024 (Fernandez, J., concurring) (applauding majority's "heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials" and lamenting the "still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time"); *Skoros v. New York*, 437 F.3d 1, 13 (2d Cir.) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and Justices who "have rarely agreed--in either analysis or outcome--in distinguishing the permissible from the impermissible public display of symbols having some religious significance").

² See *American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011) (applying *Lemon*); *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 797-798, and n. 8 (10th Cir. 2009) ("While the Supreme Court may be free to ignore *Lemon*, this court is not. Therefore, we cannot . . . be guided in our analysis by the *Van Orden* plurality's disregard of the *Lemon* test"); *Skoros, supra*, at 17, and n. 13 ("The *Lemon* test has been much criticized over its twenty-five year history. Nevertheless, the Supreme Court has never specifically disavowed *Lemon's* analytic framework. . . . Accordingly, we apply *Lemon*"); *American Civil Liberties Union of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) ("Because *McCreary County* and *Van Orden* do not instruct otherwise, we must continue to" apply "*Lemon*, including the endorsement test").

³ See *Card, supra*, at 1018 (applying JUSTICE BREYER's concurring opinion in *Van Orden*, which "carv[ed] out an exception" from *Lemon* for certain displays); *ACLU Neb. Foundation v. Plattsmouth*, 419 F.3d 772, 778, n. 8 (8th Cir. 2005) (en banc) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test"); see also *Trunk v. San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (JUSTICE BREYER's controlling opinion in *Van Orden* "establishes an 'exception' to the *Lemon* test in certain borderline cases," but "we need not resolve the issue of whether *Lemon* or *Van Orden* control" because "both cases guide us to the same result").

⁴ See *Staley v. Harris Cty.*, 461 F.3d 504 (2006), *dism'd as moot on rehearing en banc*, 485 F.3d 305 (5th Cir. 2007) (applying *Lemon*/endorsement and JUSTICE BREYER's

Respondents assure us that any perceived conflict is "artificial," because the lower courts have quite properly applied *Van Orden* to "the distinct class of Ten Commandments cases" indistinguishable from *Van Orden* and have applied the *Lemon*/endorsement test to other religious displays. But respondents' "Ten Commandments" rule is nothing more than a thinly veiled attempt to attribute reason and order where none exists. Respondents offer no principled basis for applying one test to the Ten Commandments and another test to other religious displays that may have similar relevance to our legal and historical traditions. Indeed, that respondents defend the purportedly uniform application of one Establishment Clause standard to the "Ten Commandments' realm" and another standard to displays of other religious imagery speaks volumes about the superficiality and irrationality of a jurisprudence meant to assess whether government has made a law "respecting an establishment of religion." But even assuming that the lower courts uniformly understand *Van Orden* to apply only to those religious displays "factually indistinguishable" from the display in *Van Orden*, that understanding conflicts with JUSTICE BREYER's controlling opinion. JUSTICE BREYER's concurrence concluded that there is "no test related substitute for the exercise of legal judgment" or "exact formula" in "fact-intensive," "difficult borderline cases." Nothing in his opinion indicated that only Ten Commandments displays identical to the one in *Van Orden* call for a departure from the *Lemon*/endorsement test.

Moreover, the lower courts have *not* neatly confined *Van Orden* to similar Ten Commandments displays. In *Myers v. Loudoun County Pub. Sch.* 418 F.3d 395, 402, and n. 8 (2005), the Fourth Circuit applied the *Van Orden* plurality opinion and JUSTICE BREYER's concurring analysis to resolve an Establishment Clause challenge to a statute mandating recitation of the Pledge of Allegiance. In *Staley v. Harris Cty.*, 461 F.3d 504, 511-512 (2006), dismissed as moot on rehearing en banc, 485 F.3d 305 (2007), the Fifth Circuit applied *Van Orden* to a monument displaying an open bible. And, in *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 796-797 (2009), the Tenth Circuit applied the *Lemon*/endorsement test to hold unconstitutional a Ten Commandments monument located on the grounds of a public building and surrounded by other secular monuments, facts materially indistinguishable from those in *Van Orden*.

Respondents further suggest that any variation among the Circuits concerning the Establishment Clause standard for displays of religious imagery is merely academic, for much like the traditional *Lemon*/endorsement inquiry, JUSTICE BREYER's opinion in *Van Orden* considered the "context of the display" and the "message" it communicated. I do not doubt that a given court could reach the same result under either test. See *ACLU Neb. Foundation v. Plattsmouth*, 419 F.3d 772, 778, n. 8 (8th Cir. 2005) (en banc) (upholding the constitutionality of a display of the Ten Commandments under either standard); *Trunk v. San Diego*, 629 F.3d 1099, 1107, 1125 (9th Cir. 2011) (concluding that the display of a cross was unconstitutional under either standard). The problem is that both tests are so utterly indeterminate that they permit different courts to reach inconsistent results. Compare *Harris v. Zion*, 927 F.2d 1401 (7th Cir. 1991) (applying *Lemon*/endorsement to strike down a city seal bearing a depiction of a cross),

concurrency in *Van Orden* after concluding that the objective observer standard of the endorsement test was "implicit" in JUSTICE BREYER's opinion).

with *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991) (applying *Lemon*/endorsement to uphold a city seal bearing a depiction of a cross). As explained below, it is "the very 'flexibility' of this Court's Establishment Clause precedent" that "leaves it incapable of consistent application." *Van Orden*, *supra*, at 697 (THOMAS, J., concurring).

III

In *Allegheny*, a majority of the Court took the view that the endorsement test provides a "sound analytical framework for evaluating governmental use of religious symbols." 492 U.S. at 595 (opinion of Blackmun, J.); *id.* at 629 (O'Connor, J., concurring in part and concurring in judgment) ("I . . . remain convinced that the endorsement test is capable of consistent application"). That confidence was misplaced. Indeed, JUSTICE KENNEDY proved prescient when he observed that the endorsement test amounted to "unguided examination of marginalia," "using little more than intuition and a tape measure." *Id.* at 675-676 (opinion concurring in judgment in part and dissenting in part).

Since the inception of the endorsement test, we have learned that a crèche displayed on government property violates the Establishment Clause, except when it doesn't. Compare *id.* at 579-581 (opinion of Blackmun, J.) (holding unconstitutional a solitary crèche, surrounded by a "fence-and-floral frame," bearing a plaque stating "This Display Donated by the Holy Name Society," and located in the "main," "most beautiful," and "most public" part of a county courthouse, with *Lynch*, 465 U.S. at 671 (upholding a crèche displaying 5-inch to 5-foot tall figures of Jesus, Mary, Joseph, angels, shepherds, kings, and animals, surrounded by "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing a clown, an elephant, and a teddy bear, [and] a large banner that rea[d] 'SEASONS GREETINGS,'" situated in a park in the "heart of the shopping district").

Likewise, a menorah displayed on government property violates the Establishment Clause, except when it doesn't. Compare *Kaplan v. Burlington*, 891 F.2d 1024, 1026, 1030 (2d Cir. 1989) (holding unconstitutional a solitary 16- by 12-foot menorah, bearing a sign stating "'Happy Chanukah'" and "'Sponsored by: Lubavitch of Vermont,'" located 60 feet away from City Hall, and "appear[ing] superimposed upon City Hall" when viewed from "the westerly public street"), with *Allegheny*, *supra*, at 587, 582 (opinion of Blackmun, J.) (upholding an "18-foot Chanukah menorah of an abstract tree-and-branch design," placed next to a 45-foot Christmas tree, bearing a sign entitled "'Salute to Liberty,'" and located outside of a city-county building).

A display of the Ten Commandments on government property also violates the Establishment Clause, except when it doesn't. Compare *Green*, 568 F. 3d at 790 (holding unconstitutional monument depicting Ten Commandments and Mayflower Compact on lawn of county courthouse, among various secular monuments and personal message bricks, with sign stating "'Erected by Citizens of Haskell County'"), and *American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424, 435 (6th Cir. 2011) (holding unconstitutional poster of Ten Commandments and "seven secular 'Humanist Precepts'" in courtroom, with "editorial comments" that link religion and secular government), with *Van Orden*, 545 U.S., at 681-682 (plurality opinion) (upholding monument depicting Ten Commandments, the Eye of Providence, an eagle, and the American flag and bearing sign stating that it was "'Presented . . . by the Fraternal Order of Eagles,'" among various secular monuments, on the grounds of state capitol,

Plattsmouth, 419 F. 3d at 778, n. 8 (same, in city park), and *Mercer Cty.*, 432 F. 3d at 633 (upholding poster of Ten Commandments, along with eight other equally sized "American legal documents" and an explanation of the Commandments' historical significance, in a courthouse).

Finally, a cross displayed on government property violates the Establishment Clause, as the Tenth Circuit held here, except when it doesn't. Compare *Friedman v. Board of Cty., Comm'rs of Bernalillo Cty.*, 781 F.2d 777, 779 (10th Cir. 1985) (holding unconstitutional county seal displaying Latin cross, "highlighted by white edging and blaze of golden light," under the motto "'With This We Conquer'" written in Spanish), *Harris*, 927 F. 2d, at 1404 (holding unconstitutional one city seal displaying cross on a shield, surrounded by dove, crown, scepter, and banner proclaiming "'God Reigns,'" and another city seal displaying cross surrounded by one-story building, water tower, two industrial buildings, and leaf), and *Trunk*, 629 F.3d 1099 (holding unconstitutional 29- by 12-foot cross atop 14-foot high base on top of a hill, surrounded by thousands of stone plaques honoring military personnel and the American flag), with *Murray*, 947 F.2d 147 (upholding Latin cross, surrounded by pair of wings, in city insignia), and *Weinbaum v. Las Cruces*, 541 F.3d 1017, 1025 (10th Cir. 2008) (upholding "three interlocking crosses," with white, slightly taller center cross, surrounded by sun symbol, in city insignia, as well as cross sculpture outside of city sports complex and mural of crosses on elementary school wall). See also *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality opinion) ("A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs").

One might be forgiven for failing to discern a workable principle that explains these wildly divergent outcomes. Such arbitrariness is the product of an Establishment Clause jurisprudence that does nothing to constrain judicial discretion, but instead asks, based on terms like "context" and "message," whether a hypothetical reasonable observer of a religious display could think that the government has made a law "respecting an establishment of religion." Whether a given court's hypothetical observer will be "*any* beholder (no matter how unknowledgeable), or the *average* beholder, or . . . the '*ultra-reasonable*' beholder," *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 769, n. 3 (1995) (plurality opinion), is entirely unpredictable. Indeed, the Tenth Circuit stated below that its observer, although not "omniscient," would "know far more than most actual members of a given community," and then unhelpfully concluded that "[h]ow much information we will impute to a reasonable observer is unclear." But even assuming that courts could employ observers of similar insight and eyesight, it is "unrealistic to expect different judges . . . to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think."

IV

It comes as no surprise, then, that despite other cases holding that the combination of a Latin cross and a public insignia on public property does not convey a message of religious endorsement, the Tenth Circuit held otherwise. And, of course, the Tenth Circuit divided over what, exactly, a reasonable observer would think about the memorial cross program.

First, the members of the court disagreed as to what a reasonable observer would *see*. According to the panel, because the observer would be "driving by one of the memorial crosses at 55-plus miles per hour," he would not see the fallen officer's biographical information, but he

would see that the "cross conspicuously bears the imprimatur of a state entity . . . and is found primarily on public land." According to the dissenters, on the other hand, if the traveling observer could see the police insignia on the cross, he should also see the much larger name, rank, and badge number of the fallen officer emblazoned above it. The dissenters would also have employed an observer who was able to pull over and view the crosses more thoroughly and would have allowed their observer to view four of the memorials located on side-streets with lower speed limits.

Next, the members of the court disagreed about what a reasonable observer would *feel*. The panel worried that the use of a Christian symbol to memorialize fallen officers would cause the observer to think the Utah Highway Patrol and Christianity had "some connection," leading him to "fear that Christians are likely to receive preferential treatment from the [patrol]--both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways." The dissenters' reasonable observer, however, would not take such a "paranoid," "conspiratorial view of life," "conjur[ing] up fears of religious discrimination" by a "'Christian police,'" especially in light of the more plausible explanation that the crosses were simply memorials. The panel also emphasized that the "massive size" of these crosses would heighten the reasonable observer's fear of discrimination and proselytization, unlike the "more humble spirit of small roadside crosses." The dissenters, by contrast, insisted that the size of the crosses was necessary to ensure that the reasonable observer would "take notice of the display and absorb its message" of remembrance and to ensure that the crosses could contain all of the secular facts necessary to assuage the reasonable observer's fears.

Finally, the members of the court disputed what the reasonable observer would *know*. The panel acknowledged that the reasonable observer would recognize that the crosses commemorated death, but he would see only that the symbol "memorializes the death of a *Christian*." That the designers of the cross memorials were Mormons, or that Christians who revere the cross are a minority in Utah, would have no effect on him. Conversely, the dissenters' reasonable observer would have known that the crosses were chosen by the fallen officer's family and erected by a private group without design approval from the State, and that most Utahns do not revere the cross.⁵

To any truly "reasonable observer," these lines of disagreement may seem arbitrary at best. But to be fair to the Tenth Circuit, it is our Establishment Clause jurisprudence that invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property. These cases thus illustrate why "[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges."

V

Even if the Court does not share my view that the Establishment Clause restrains only the Federal Government, and that, even if incorporated, the Clause only prohibits "actual legal coercion," the Court should be deeply troubled by what its Establishment Clause jurisprudence

⁵ Approximately 57 percent of Utahns are members of the Church of Jesus Christ of Latter-day Saints. Neither the Church nor its members use the cross as a symbol of their religion or in their religious practices.

has wrought. Indeed, five sitting Justices have questioned the *Lemon*/endorsement test's continued use. (KENNEDY, J., ROBERTS, C. J., ALITO, J., SCALIA, J., and THOMAS, J.).

And yet, six years after *Van Orden*, our Establishment Clause precedents remain impenetrable, and the lower courts' decisions--including the Tenth Circuit's decision below--remain incapable of coherent explanation. It is difficult to imagine an area of the law more in need of clarity, as the 46 *amici curiae* who filed briefs in support of certiorari confirm. Respondents tell us there is no reason to think that a case with facts similar to this one will recur, but if that counsels against certiorari here, this Court will never again hear another case involving an Establishment Clause challenge to a religious display. It is *this* Court's precedent that has rendered even the most minute aesthetic details of a religious display relevant to the constitutional question. We should not now abdicate our responsibility to clean up our mess because these disputes, by our own making, are "factbound." This suit, which squarely implicates the viability and application of the *Lemon*/endorsement test,⁶ is as ripe a suit for certiorari as any.⁷

⁶ That the petition of the Association presents the question whether the cross memorials in this suit are government speech is no obstacle to certiorari. The Court need not grant certiorari on that question, and the state petitioners only ask this Court to resolve the viability and application of the endorsement test.

⁷ Respondents argue that this suit would be a poor vehicle to explore the contours of a coercion-based Establishment Clause test because the State has raised the specter of a preference for one religion over others. In this regard, respondents point out that the State took the position before the lower courts that it would not be able to approve the Association's memorials "in the same manner" if the Association, as it indicated it would, allowed an officer's family to request a symbol other than a cross.

Because no such situation has ever arisen, and because the State has only indicated it could not approve a different marker *in the same manner* as the roadside crosses, respondents distort the record by claiming that the State has put families to the choice of "a Latin cross or no roadside memorial at all." Moreover, it is undisputed that the State's position stemmed from its belief that "if [the Association] were to change the shape of the memorial to reflect the religious symbol of the fallen trooper, rather than the shape of the cross, the memorial would no longer be a *secular* shape recognized as a symbol of death." That position is entirely consistent with the Tenth Circuit's conclusion that the purposes of the State and Association in permitting and implementing the memorial program were secular. In any event, that the State and Association, both defending the memorial program's constitutionality, took conflicting positions about whether it was impermissibly religious to use only crosses, or impermissibly religious to use other symbols reflective of the deceased's religious preference, only highlights the confusion surrounding the Establishment Clause's requirements.