Bad Reasoning of Activist Judges Allows Religious Symbols on Public Land

*Should Religious Symbols Be Allowed on Public Land?*, 2011

Bob Ritter is a staff attorney and legal coordinator for the Appignani Humanist Legal Center of the American Humanist Association, a progressive organization that believes people can lead ethical lives and promote the betterment of humanity without theism or other supernatural beliefs.

Some judges misapply the reasoning of US Supreme Court decisions in order to allow religious symbols on public land. Although a concurring Supreme Court opinion in *Van Orden v. Perry* held that the US Constitution's establishment clause does not compel hostility to religion, the Court did not give governments the authority to allow private groups to put Christian symbols on public land. Higher courts should condemn a lower court case that misapplies the Supreme Court's reasoning in order to rule that Christian crosses placed on public highways to honor fallen officers have a secular, not religious purpose. The US Constitution expressly forbids such government support of religion.

There is a new breed of judicial activism that ignores the prohibitions of the First Amendment and applies bogus reasoning to justify pro-religious rulings.

And it keeps getting worse.

For example, if I were to ask, "what do Xerox, Kleenex, and the Latin (Christian) cross have in common?" most people would probably struggle to find an answer. However, if you happen to be a federal judge, you may decide that each has become a common term—Xerox for photocopying, Kleenex for facial tissue, and the Christian cross for highway safety.

Haven't heard about the Christian cross-highway safety connection? You're not alone.

A federal district judge recently ruled in *American Atheists v. Duncan* that the state of Utah did not violate the establishment clause of the First Amendment when it permitted a private association to erect a number of twelve-foot-high Christian crosses with the Utah Highway Patrol beehive logo on them, on state-owned property to memorialize Highway Patrol officers who had died in the line of duty.

Most of the thirteen Christian crosses erected by the Utah Highway Patrol Association are located on government property—on highway rights-of-way, at rest stops, and a state office parking lot. These places are nonpublic forums and Utah law specifically prohibits persons from putting structures or objects within rights-of-way. Nevertheless the state of Utah, through its Division of Facilities and the Utah Department of Transportation, granted the private association permission to erect its memorial crosses.

There is a new breed of judicial activism that ignores the prohibitions of the First Amendment and applies bogus reasoning to justify pro-religious rulings.
Identifying Secular Purposes

In order to find that the Christian crosses did not violate the establishment clause, U.S. District Court Senior Judge David Sam had to find that the Christian crosses served a secular purpose.

Recognizing that "safety is a paramount concern to the people of Utah," Judge Sam evidently thought that the large Christian crosses rang a little safety bell in drivers' heads whenever motorists passed by. Had Judge Sam consulted the Utah Driver Handbook, he would have found that it doesn't show the Christian cross as one of Utah's traffic signs, signals, or road markings. It's safe to assume that the Christian cross is not a recognized symbol for highway safety.

There's more to Judge Sam's activism. He likens the so-called secularization of the Christian cross to the secularization of the Christmas tree. He's wrong on this one too. The Christmas tree has its roots [in] pre-Christian Teutonic religion. And the tree's religiosity is strictly dependent upon the addition of religious ornamentation. The "holiday" tree is, itself, secular. No religion owns the intellectual property rights to pine trees, red and green balls, or silver tinsel.

Judge Sam also said that the Christian cross "has attained a secular status as Americans have used it to honor the place where fallen soldiers and citizens lay buried" and that "Cemeteries throughout the United States, including cemeteries in Utah, display row upon row of crosses to mark the burial spot of those who served their community and their country." Not so. Brian Barnard, the attorney who is handling the case for the plaintiff, told me that it's neither true of cemeteries in Utah nor other cemeteries in the United States.

The fact of the matter is that the Christian cross is simply not a universal symbol. Judge Sam himself noted that 57 percent of Utah residents are members of the Church of Jesus Christ of Latter-day Saints and that they don't use the Christian cross "as a symbol of their religion or in their religious practices." Moreover, the U.S. Department of Veterans Affairs officially recognizes thirty-nine emblems of belief for placement on government headstones and markers.

The bad news is that there is an upswing of poorly reasoned decisions favoring government participation in religion.

Untangling Government and Religion

What this lawsuit is about, as so many are these days because of the frequent entanglement of governments into religious affairs, is ensuring that government—in this case the state of Utah—abides by the U.S. Constitution, which forbids government sponsorship of religion.

Our heritage is one of separation of government and religion. The Bill of Rights, ratified in 1791 prohibits governments from favoring one religion over another, or religion over nonreligion. Thomas Jefferson called this separation of church and state and the principle has served the United States well for over two hundred years.

Finally, Judge Sam misapplies the rulings of Van Orden v. Perry and McCreary County v. ACLU [American Civil Liberties Union], companion 2005 Supreme Court decisions. Quoting Justice Breyer's concurring opinion in Van Orden that "[T]he Establishment Clause does not compel a government to purge from the public's sphere all that in any way partakes of the religious." Judge Sam apparently sees Van Orden as a green light for governments to
allow private groups to put Christian paraphernalia on public property under the bizarre reasoning that enforcing the establishment clause would constitute an impermissible hostility toward religion. Again, Judge Sam is wrong. It would appear that the *McCreary* decision—which involved a standalone Ten Commandments monument—would apply to Judge Sam’s case.

While the bad news is that there is an upswing of poorly reasoned decisions favoring government participation in religion, the good news is that Judge Sam's decision isn't final, American Atheists plan to appeal the decision. And the Appignani Humanist Legal Center intends to file a friend of the court brief in support of the positions that the Christian cross is an exclusively religious symbol and the state of Utah endorsed religion and violated the First Amendment by permitting the crosses to be erected on public property.

---

**Further Readings**

**Books**

**Periodicals and Internet Sources**
- Center for Religion and Public Affairs, Wake Forest University School of Divinity "Religious Expression in

- Will Connaghan "What in God's Name Is Happening?" Daily Record (St. Louis, MO), December 15, 2006.