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American Atheists, Inc. v. Davenport: Endorsing a Presumption of Unconstitutionality Against Potentially Religious Symbols

I. INTRODUCTION

The Tenth Circuit's decision in *American Atheists, Inc. v. Davenport*[1] evinces the "hopeless disarray" of the Supreme Court's Establishment Clause jurisprudence.[2] In recent years, the analysis for determining the constitutionality of arguably religious symbols on public property has been in constant flux as the Supreme Court has inconsistently applied various Establishment Clause tests. A court applying the Supreme Court's Establishment Clause jurisprudence has available to it the *Lemon* test,[3] the coercion test,[4] the reindeer rule,[5] the endorsement test,[6] and "legal judgment."[7] The uncertainty of Establishment Clause jurisprudence led the Tenth Circuit to split 5–4 in *Davenport* on the question of whether to rehear en banc a case heard by a Tenth Circuit panel, *American Atheists, Inc. v. Duncan*,[8] in which the panel struck down a private organization's practice of honoring slain Utah Highway patrol officers by erecting crosses on public property as roadside memorials.[9] Two dissenting opinions

1. 637 F.3d 1095 (10th Cir. 2010), *cert. denied,* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

2. Bauchman *ex rel.* Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir. 1997) (citation omitted).

3. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (formulating a three-pronged test to determine if there is an Establishment Clause violation).

4. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("The Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

5. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that a crèche display did not violate the Establishment Clause because it was surrounded by other secular holiday symbols).

6. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (Blackmun, J., plurality opinion) (adopting the endorsement test as proposed by Justice O'Connor in her concurrence in *Lynch*, 465 U.S. at 688).

7. Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment) ("[I]n [borderline] cases, I see no test-related substitute for the exercise of legal judgment.").

8. 616 F.3d 1145 (10th Cir. 2010), *amended and rev'd*, Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010), *cert. denied,* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

9. *Id.* at 1150.

in *Davenport* highlight the issues with the endorsement test as applied by the *Duncan* court and signal that the decision furthers a circuit split on the issue of how to correctly apply, and even whether to apply, the endorsement test.[10]

This Note argues that the Tenth Circuit, by reaffirming its decision in *Duncan*, approved of an incorrect and incomplete application of the endorsement test. However, this Note also argues that the Tenth Circuit's decision is simply evidence of the need for clarification of Establishment Clause jurisprudence by the Supreme Court. Part II discusses the various Establishment Clause tests formulated by the Supreme Court. Part III discusses the facts, procedural history, and decisions of the Tenth Circuit in both *Duncan* and *Davenport*. Part IV argues that the Tenth Circuit incorrectly applied the endorsement test by presuming that the memorials were unconstitutional and by failing to consider constitutionally significant elements of the memorial at issue, including the names and badge numbers of the fallen officers, font size, and the purpose of the memorials. Additionally, Part IV argues that Supreme Court clarification of Establishment Clause jurisprudence is necessary to resolve a circuit split on the issues of whether to apply the endorsement test, and if so, how a proper endorsement test analysis should proceed. Part V concludes.

II. SIGNIFICANT LEGAL BACKGROUND

This Part describes the legal background of the Tenth Circuit's decisions in *Duncan* and *Davenport* and illustrates the complexity and confusion of Establishment Clause jurisprudence.

10. *See Davenport*, 637 F.3d at 1101 (Kelly, J., dissenting); *id*. at 1110 (Gorsuch, J., dissenting); *see also* Trunk v. City of San Diego, 629 F.3d 1099, 1106–07, 1125 (9th Cir. 2011) (holding that a war memorial that includes both a cross and purely secular symbols is unconstitutional under both the endorsement test and legal judgment test); ACLU of Ky. v. Mercer Cnty., 432 F.3d 624, 636 (6th Cir. 2005) (holding that a Ten Commandments display is constitutional under the endorsement test); ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 777–78 n.7 (8th Cir. 2005) (en banc) (holding that a Ten Commandments display is constitutional under the legal judgment test); Myers v. Loudoun Cnty. Pub. Schs., 418 F.3d 395, 408 (4th Cir. 2005) (holding that a public school's daily recitation of the Pledge of Allegiance is constitutional under the legal judgment test).

A. The Lemon *Test*

The *Lemon* test is a three-part test for analyzing Establishment Clause issues.[11] Although *Lemon* is the "touchstone for Establishment Clause analysis,"[12] the test has been repeatedly maligned[13] and has generated much confusion.[14] Nonetheless, the three-part *Lemon* test provides the starting point for analyzing Establishment Clause issues. The first part of *Lemon* requires that the government's action "have a secular legislative purpose."[15] Second, the "principal or primary effect [of the government's action] must be one that neither advances nor inhibits religion."[16] Finally, the governmental action "must not foster an excessive government entanglement with religion."[17] *Lemon* analysis requires that all three prongs of the test be met for the government to avoid an Establishment Clause violation.[18]

B. The Reindeer Rule

As a gloss over the *Lemon* test, the Supreme Court has found that public displays, even those that are clearly religious and have a sectarian message, may be constitutional if they are a part of a setting that "changes what viewers may fairly understand to be the purpose of the display . . . [and] negates any message of [governmental] endorsement of that content."[19] This rule, termed here the "reindeer

11. *Duncan*, 616 F.3d at 1156.

12. *Id.* (citations omitted).

13. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment and dissenting in part) ("Persuasive criticism of *Lemon* has emerged"); Edwards v. Aguillard, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting) ("Abandoning *Lemon*'s purpose test . . . [which] has no basis in the language or history of the [First] Amendment . . . would be a good place to start [clarifying Establishment Clause jurisprudence]."); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part [*Lemon*] test has simply not provided adequate standards for deciding Establishment Clause cases.").

14. *See* Van Orden v. Perry, 545 U.S. 677, 685–86 (2005) (discussing the confusion caused by the *Lemon* test).

15. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

16. *Id.*

17. *Id.* at 613 (internal quotation marks omitted).

18. *See* Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1156 (10th Cir. 2010), *amended and rev'd*, Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010), *cert. denied,* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

19. Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

rule,"[20] allows the government to avoid an establishment of religion by including "purely secular symbols" in a religious display.[21]

C. The Endorsement Test

The case law underpinning the Establishment Clause became even more uncertain when the Supreme Court began applying the *Lemon* test through the lens of an endorsement test. The endorsement test asks whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[22] In essence, the endorsement test modifies the *Lemon* test by asking "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."[23] The key concern underlying the endorsement test is that government be precluded from making citizens feel like civic outsiders; that is, "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[24]

The endorsement test, although commendable in purpose, has been frequently maligned because it allows for subjective analysis by judges and thus leads to unpredictability.[25] The subjectivity stems

20. The term "reindeer rule" stems from the Supreme Court's decision in *Lynch v. Donnelly* where the Court held that a crèche display that was surrounded by secular decorations such as a Santa Claus house, reindeer, and a sleigh was constitutional. *Id.* at 671, 687 (majority opinion). Courts and commentators ridiculed *Lynch* by suggesting it created a rule whereby "the state [could] temper the religious elements of a display with secular symbols" such as plastic reindeer. David Spencer, Note, *What's the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1095 (2011); *see also* ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) ("[A] city can get by [an Establishment Clause challenge] with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too.").

21. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

22. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (Blackmun, J., plurality opinion) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

23. *Id.* at 592.

24. *Id.* at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (emphasis omitted)).

25. *See* Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMB. L. REV. 1, 12 (2006–07) ("[T]he test calls for judges to speculate about the perceptions that unknown people may have about various religious speech or symbols, its application is inherently uncertain."); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 901 (2005) (Scalia, J., dissenting) ("[E]ven if a government could show that its actual purpose was not to advance

from the test's use of a "reasonable observer" to determine whether the display at issue has the purpose or effect of endorsing religion.[26] What this "reasonable observer" thinks of the constitutionality of a given display is left up to a judge's subjective determination of what is reasonable. Various Justices have noted that the reasonable observer takes into account, among other things, "the values underlying the Free Exercise Clause,"[27] "cultural diversity,"[28] "all the facts and circumstances surrounding a challenged display,"[29] and "the history and context of the community and forum in which the religious display appears."[30]

D. The Coercion Test

A majority of the Supreme Court has never relied solely on the coercion test to decide a case involving potentially religious displays. However, several members of the Court have indicated that they would prefer to apply the coercion test in religious display cases.[31] The coercion test holds "that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a religion or religious faith, or tends to do so.'"[32]

E. The Exercise of Legal Judgment

Two recent Establishment Clause cases decided by the Supreme Court seem to turn on Justice Breyer's "legal judgment." In *McCreary County v. ACLU*, the Court held, 5–4, that a display of

religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.").

26. *See Cnty. of Allegheny*, 492 U.S. at 620 (Blackmun, J., plurality opinion).

27. *Id*. at 632 (O'Connor, J., concurring in part and concurring in judgment).

28. *Id*. at 636.

29. Van Orden v. Perry, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

30. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

31. *See Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (arguing that the Establishment Clause prohibits only "actual legal coercion"); *Cnty. of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part) (stating that the crèche display did not violate the Establishment Clause because "[t]here is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way").

32. Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (additions in quotation omitted).

the Ten Commandments in a county courthouse violated the Establishment Clause.[33] The Court emphasized that the history of the display would lead a reasonable observer to think "that the [government] meant to emphasize and celebrate the Commandments' religious message."[34] Justice Breyer voted with the majority in *McCreary County*, but did not write either for the majority or separately.

On the very same day that the Court handed down *McCreary County*, it also decided *Van Orden v. Perry*.[35] In *Van Orden*, the Court held, 5–4, that a Ten Commandments display located near the Texas State Capitol building did not violate the Establishment Clause. Chief Justice Rehnquist, writing for a plurality, focused on the Ten Commandments' "undeniable historical meaning."[36] Justice Breyer concurred with the plurality as to the judgment, but wrote separately to explain his views on why this display was constitutional. Justice Breyer explained that for "borderline cases" he saw "no test-related substitute for the exercise of legal judgment."[37] Justice Breyer offered the following explanation of what is meant by legal judgment:

> [Legal] judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the [Religion] Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.[38]

Justice Breyer's legal judgment in *Van Orden* led him to focus on several factors, including: (1) that the display was donated, (2) that the display had a long history, 40 years, of being unchallenged, and (3) the context of the display, namely that it was near other monuments. In the end, Justice Breyer's "legal judgment" led him to find the *Van Orden* display constitutional and the *McCreary County* display unconstitutional.

33. 545 U.S. 844, 881 (2005).
34. *Id.* at 869.
35. 545 U.S. 677 (2005).
36. *Id.* at 690.
37. *Id.* at 700 (Breyer, J., concurring in judgment).
38. *Id.* (citations omitted).

III. THE COURT'S DECISION

A. Facts of the Case

The Utah Highway Patrol Association (Association) is a private organization that supports the Utah Highway Patrol (UHP).[39] In 1998, the Association began a project intended to honor UHP troopers killed in the line of duty.[40] The project consisted of placing twelve-foot crosses near the locations where individual UHP troopers died.[41] The Association used white crosses because "only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety."[42] The crosses also display a painting of the name, rank, and badge number of the trooper being honored, the UHP's beehive symbol, a picture of the deceased trooper, and a plaque showing biographical information of the trooper.[43]

The Association took care to ensure that the memorials would convey the intended message to passersby, whom the Association recognized would be passing the memorials at, or above, fifty-five miles per hour.[44] The Association painted the officer's name and badge number in large, black lettering.[45] Additionally, the Association placed each memorial where it was "(1) visible to the public; (2) safe to stop and view; and (3) as close to the actual spot of the trooper's death as possible."[46] The State of Utah does not officially "approve[] or disapprove [of] the memorial markers" but has allowed

39. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1102 (10th Cir. 2010) (Kelly, J., dissenting), *cert. denied,* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

40. *Id.*; *see also* Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1150 (10th Cir. 2010) (stating that the UHPA asserted four purposes for erecting the memorials, including "(1) [to] stand as a lasting reminder . . . that a . . . trooper gave his life in service to [the State of Utah]; (2) [to] remind highway drivers that a trooper died . . . to make the state safe for all citizens; (3) [to] honor the trooper and the sacrifice he and his family made for the State of Utah; and (4) [to] encourage safe conduct on the highways"), *amended and rev'd, Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied, Utah Highway Patrol Ass'n*, 132 S. Ct. 12.

41. *Davenport*, 637 F.3d at 1102 (Kelly, J., dissenting).

42. *Id.* (quoting *Duncan*, 616 F.3d at 1151).

43. *Id.*

44. *Duncan*, 616 F.3d at 1151.

45. *Davenport*, 637 F.3d at 1102 (Kelly, J., dissenting).

46. *Duncan*, 616 F.3d at 1151 (citation omitted).

the Association to erect thirteen markers on public property throughout Utah.[47]

B. Procedural History

American Atheists, Inc. (American Atheists) and three of its members living in Utah challenged the legality of the Association's memorials as violating the Establishment Clause of the United States Constitution.[48] As relief, American Atheists sought both an injunction ordering that the UHP beehive logo be removed from all Association memorials and also a declaration stating that Utah violated American Atheists members' constitutional rights by allowing the UHP logo to be placed on the memorials.[49] The district court held that the memorials did not violate the Establishment Clause.[50] American Atheists appealed to the Tenth Circuit.[51]

C. American Atheists, Inc. v. Duncan

On appeal to the Tenth Circuit, American Atheists argued that the memorials violated the Establishment Clause—specifically that the memorials violated the first and second prongs of *Lemon*.[52] The Tenth Circuit noted that although *Lemon* has been questioned, it remains the "touchstone for Establishment Clause analysis" and should provide the analytical framework.[53] Additionally, the court stated that it must interpret the first and second prongs of *Lemon* "in light of Justice O'Connor's endorsement test."[54] The court stated that "Justice O'Connor's modification of the *Lemon* test makes our inquiry very case-specific, as it asks this court to examine carefully the

47. *Davenport*, 637 F.3d at 1102 (Kelly, J., dissenting) (quoting *Duncan*, 616 F.3d at 1151).

48. *Duncan*, 616 F.3d at 1150.

49. *Id.* at 1152.

50. *Id.* (additionally, the district court rejected state constitutional claims brought by American Atheists).

51. *Id.*

52. *Id.* at 1156. American Atheists did not argue that the memorials violated the third prong of *Lemon*. *Id.*

53. *Id.*

54. *Id.* at 1156–57 (quoting Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1030 (10th Cir. 2008)).

particular context and history of these displays before concluding what effect they would likely have on the reasonable observer."[55]

1. Applying prong one of Lemon

In applying prong one of *Lemon*, the court stated that "[i]n deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act."[56] Using this standard, the court held that "[it could] discern a plausible secular purpose."[57] In reaching this conclusion, the court found two considerations relevant. First, the Association consistently maintained that its purpose in erecting the memorials was entirely secular, specifically, to honor fallen highway patrol troopers and to promote safety on Utah's highways.[58] Second, the Association's secular purpose was enhanced "by the fact that the memorials were designed by two individuals who are members of the Mormon faith[,] . . . a religion that does not use the cross as a religious symbol."[59] In light of these considerations, the court was willing to attribute the independent Association's motivation to the State and hold that the memorials did not violate prong one of *Lemon*.[60]

2. Applying prong two of Lemon

Next, the court applied prong two of *Lemon*, which asks whether the governmental action has "the effect of communicating governmental endorsement or disapproval" of religion.[61] The court stated that it would answer this question "through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol" and "presume[d] that the court-created 'objective observer' is aware of information 'not limited to the information gleaned simp-

55. *Id.*

56. *Id.* (quoting *Weinbaum*, 541 F.3d at 1030).

57. *Id.*

58. *Id.*

59. *Id.* at 1157.

60. *Id.*

61. *Id.* at 1158 (quoting Green v. Haskell Cnty. Bd. of Comm'rs, 568 F. 3d 784, 799 (10th Cir. 2009)).

ly from viewing the challenged display.'"[62] To determine whether the memorials at issue had the effect of endorsing religion, the court focused on two aspects: (1) the government's purpose and (2) the context and history of the memorials.[63]

Although the court found that the memorials did not violate the purpose prong of *Lemon*, it stated that "[s]eparate from *Lemon*'s first test, courts also consider the Government's purpose in undertaking the challenged conduct as illustrative of the effect that conduct conveys."[64] The court then briefly restated that the government's purpose was "to incorporate the UHP symbol into the memorials and to place the crosses on public land."[65] Even though the government had a valid secular purpose, the court noted that "the State's secular purpose is merely one element . . . we consider . . . to determine whether these memorial crosses would have an impermissible effect on the reasonable observer."[66]

The court next considered the context and history of the memorials. At the outset, the court stated that the Latin cross "is unequivocally a symbol of the Christian faith."[67] Because of this, "these displays . . . can only be allowed if their context or history avoid the conveyance of a message of governmental endorsement of religion."[68] The court concluded that the context and history of the memorials could not save them from unconstitutionality and held that the memorials had the impermissible effect of conveying to a reasonable observer that the State was endorsing Christianity.[69] The court reasoned that the fact that the cross also displayed the deceased trooper's biographical information did not overcome the government's message of endorsement.[70] This was especially true, the court reasoned, where most viewers of the monument would see it while going fifty-five or more miles per hour.[71] Additionally, the court rea-

62. Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1031 (10th Cir. 2008) (quoting O'Connor v. Washburn Univ., 416 F.3d 1216, 1228 (10th Cir. 2005)).

63. *Duncan*, 616 F.3d at 1159.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (quoting *Weinbaum*, 541 F.3d at 1022).

68. *Id.* at 1160.

69. *Id.*

70. *Id.*

71. *Id.*

soned that "the fact that . . . the fallen UHP troopers are memorialized with a Christian symbol conveys the message that there is some connection between the UHP and Christianity."[72] Because of this, a reasonable observer may fear that the UHP would give preferential treatment to Christians.[73] Finally, because of the message they would convey to a non-Christian walking into the UHP office, the court noted that it was "deeply concerned about" the two memorial crosses located outside the UHP office.[74]

The court's analysis also rejected four contextual arguments raised by the State, including: (1) that the displays were clearly intended as memorials; (2) that the displays "are located in areas where similar memorials have been displayed;" (3) that the designers of the displays "do not revere the cross;" and (4) that the majority of the State's citizens "do not revere the cross."[75] Even admitting "that some of these contextual elements may help reduce the message of religious endorsement," the court nevertheless held "that these displays nonetheless have the impermissible effect of [endorsement]."[76]

As to the State's argument that the displays were intended as memorials, the court stated that although "a reasonable observer would recognize these memorial crosses as symbols of death[,] . . . there is no evidence . . . that the cross has been universally embraced as a marker for the burial sites of non-Christians."[77] Additionally, the court ultimately rejected the argument that it should "treat memorial crosses in . . . the same way as the Supreme Court has treated Christmas trees and . . . the Ten Commandments."[78] Consequently, "[u]nlike Christmas, which has been widely embraced as a secular holiday . . . there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death."[79] Additionally, the court concluded that the memorials were unlike a Ten Commandments display that is a part of a historical presentation because the memorials here "stand alone, adorned with the state

72. *Id.*
73. *Id.*
74. *Id.* at 1160 n.13.
75. *Id.* at 1161–64.
76. *Id.* at 1161.
77. *Id.*
78. *Id.*
79. *Id.* at 1162.

highway patrol insignia and some information about the trooper who died there."[80]

The court rejected the State's second argument—that the cross is a fairly common symbol used in roadside memorials—because the State failed to provide "evidence that non-Christians have embraced the use of crosses as roadside memorials."[81] Moreover, the court claimed that even if the roadside cross was a secular symbol of death, "the memorial crosses . . . in this case appear to be much larger than the crosses typically found on the side of public roads."[82]

The court rejected the State's third argument—that the designers of the memorial did not revere the cross—because the memorials may have impermissibly affected a reasonable observer, regardless of the creator's intent.[83] The court stated that "the intended and perceived significance of [the State's] conduct may not coincide with the thinking of the monument's donor or creator."[84]

Finally, the court rejected the State's fourth argument—that only a minority of Utah citizens reveres the cross as a religious symbol.[85] The court noted that "it is [not] implausible, as a general matter, for a [government] . . . to endorse a minority faith."[86] Based on this principle, the court held that "the fact that most Utahns do not revere the cross as a symbol of their faith does not mean that the State cannot violate the Establishment Clause by conduct that has the effect of promoting the cross."[87]

D. Denial of Rehearing Duncan *En Banc*

Just over four months after deciding *Duncan*, a five-judge majority refused to rehear the case en banc.[88] The majority did not elaborate on the *Duncan* opinion, except only to amend one word.[89] Four

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1163.

84. *Id.* (quoting Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 476 (2009)).

85. *Id.*

86. *Id.* (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 616 n.64 (1989) (Blackmun, J., concurring)).

87. *Id.* at 1163–64.

88. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1101 (10th Cir. 2010), *cert. denied*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

89. *Id.*

judges dissented from the decision not to rehear the case en banc, and two judges wrote dissenting opinions expressing their views.[90]

1. Judge Kelly's dissent

Judge Kelly dissented and focused his argument on what he saw as the court's "increasing[] hostil[ity] to religious symbols in the public sphere"[91] in contravention of the Supreme Court's recent statement that "the Establishment Clause does not require us to 'purge from the public sphere all that in any way partakes in the religious.'"[92] Judge Kelly argued that the *Duncan* court's reasonable observer analysis was problematic in three important ways. First, the court's analysis employed a presumption against constitutionality in contravention of precedent.[93] Under this newly created presumption, the cross is viewed as a religious symbol, unless contextual elements are sufficient to overcome that presumption.[94] Second, the court's reasonable observer failed to properly consider the appearance, context, and history of the memorials.[95] Finally, Judge Kelly found it problematic that "the court equates the religious nature of the cross with a message of endorsement."[96]

2. Judge Gorsuch's dissent

Judge Gorsuch wrote a dissenting opinion in which he agreed with much of Judge Kelly's reasoning, but also wrote to add two additional disagreements with the *Duncan* court.[97]

First, Judge Gorsuch disagreed with *Duncan*'s application of the reasonable observer test.[98] Judge Gorsuch argued that the *Duncan* observer "starts with the biased presumption that Utah's roadside crosses are unconstitutional" and that the observer "disregards the . . . secularizing details—such as the fallen trooper's name in-

90. *Id.*

91. *Id.* (Kelly, J., dissenting).

92. *Id.* (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment) (emphasis omitted).

93. *Id.* at 1102–03.

94. *Id.*

95. *Id.* at 1101–02.

96. *Id.* at 1102.

97. *Id.* at 1107 (Gorsuch, J., dissenting).

98. *Id.* at 1107–08.

scribed on the crossbar—that might allow him to change his mind."[99] Additionally, Judge Gorsuch noted that "[i]t seems we must also take account of our observer's selective and feeble eyesight"[100] because the *Duncan* observer seems unable to see the deceased trooper's name on the cross even though the same text size is used to paint the name as is used "for posting the words 'SPEED LIMIT' alongside major . . . highways."[101] Judge Gorsuch summed up his argument by stating that "[the Tenth Circuit] will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion."[102]

Judge Gorsuch's second point was that the reasonable observer test may itself be "constitutionally problematic."[103] Judge Gorsuch noted that in this case it was "undisputed that the state actors here did not act with any religious purpose," and thus "the court strikes down Utah's policy only because it is able to imagine a hypothetical 'reasonable observer' who could think Utah means to endorse religion—even when it doesn't."[104] Judge Gorsuch took the *Duncan* court to task for choosing not to apply the approach taken by other courts, including a plurality in *Van Orden*, who declined to apply the endorsement test and questioned its application in Establishment Clause cases.[105]

IV. ANALYSIS

This Note critiques the Tenth Circuit's application of the endorsement test and suggests that the court failed to consider important contextual elements that could lead a reasonable observer to conclude that the memorials did not have the impermissible effect of endorsing religion. Additionally, this Note argues that the Supreme Court should clarify Establishment Clause jurisprudence with regard to potentially religious displays.

99. *Id.* at 1108.
100. *Id.*
101. *Id.* at 1109.
102. *Id.* at 1110 (emphasis omitted).
103. *Id.*
104. *Id.* (emphasis omitted).
105. *See id.*

A. The Tenth Circuit's Misapplication of the Endorsement Test

As an initial matter, the Tenth Circuit misapplied the endorsement test by reversing traditional endorsement test analysis. The traditional endorsement test first analyzes the context, history, and appearance of a memorial before finding it unconstitutional.[106] For example, in *County of Allegheny v. ACLU*, the Supreme Court was presented with the question of whether a crèche display and a menorah display located outside a city building were unconstitutional.[107] The Court rejected the dissent's approach, which would have employed a presumption of unconstitutionality because the symbols were inherently religious and displayed on public property.[108] Rather, the Court employed the traditional endorsement test analysis by analyzing the appearance, history, and contextual elements of the displays.[109] The Tenth Circuit set the bar too high for the State by holding that because the cross is the "preeminent symbol of Christianity" it would only be permissible "if the[] context or history avoid[ed] the conveyance of a message of governmental endorsement of religion."[110] Rather than employ traditional endorsement analysis as the Court in *County of Allegheny* did, the Tenth Circuit reversed the analysis by presuming that the cross is a religious symbol and is therefore unconstitutional. Only after this presumption was in place did the court look to see if the context or history suggested otherwise.

Apart from the issue of the *Duncan* majority presuming the memorials were unconstitutional, the majority's version of the reasonable observer undervalues the effect a valid secular purpose has on the reasonable observer. A State's secular purpose is one contextual element that the Tenth Circuit factors into determining whether a religious symbol would have an impermissible effect upon a reasonable observer.[111] The *Duncan* majority frequently reasoned that the crosses were large and easily seen by passersby.[112] The large size of

106. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 598–600 (1989).

107. *Id*. at 578.

108. *Id*. at 650 (Stevens, J., dissenting).

109. *Id*. at 616–20 (Blackmun, J., plurality opinion).

110. Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010), *amended and rev'd*, Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

111. *Id*. at 1159.

112. *See, e.g.*, *id*. at 1162.

the crosses led the court to hold that the memorials had the impermissible effect of endorsing religion.[113] Yet, the court also found that the State's purpose in allowing the Association to erect the crosses was not impermissible.[114] One is left to wonder how the Association, and by implication the State, could effectively accomplish the permissible purpose of memorializing slain troopers and informing the public of the trooper's service without using a memorial that is big enough for the public to view as they pass by at fifty-five or more miles per hour. The court's analysis effectively puts the State in a catch-22 where it could either build crosses so small that they could not fulfill the State's valid secular purpose, or build the crosses as they were here but suffer the fate of unconstitutionality. One response to this argument is that the State could simply use something other than a cross to convey its valid secular purpose, and in the future it would seem prudent for the State to do so. However, it nonetheless seems illogical that the court could find that the State had a valid secular purpose for putting up the crosses, yet still hold that it acted unconstitutionally by putting up a memorial big enough to effectively carry out its purpose. A state's clearly secular purpose should be given more weight in analyzing the effect a memorial has on the reasonable observer.

The Tenth Circuit also erred in its reasonable observer analysis by failing to give sufficient weight to the contextual elements surrounding the crosses. For example, the court acknowledged that the contextual elements surrounding the crosses "may help reduce the message of religious endorsement," yet held that the crosses violated the second prong of *Lemon*.[115] This holding fails to "acknowledge the entirety" of the contextual elements surrounding the crosses.[116] For example, the *Duncan* court's reasonable observer fails to acknowledge that the officer's name, rank, and badge number are emblazoned in large writing on the cross in the same font size as the words "SPEED LIMIT" on interstate highway signs. A reasonable observer would certainly take this into account and would be more likely to find that the memorial is meant to honor the person whose

113. *Id.*

114. *Id.* at 1159.

115. *Id.* at 1161.

116. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1105 (10th Cir. 2010) (Kelly, J., dissenting), *cert. denied,* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011).

name is written on the cross than that it is meant to endorse religion. Further, the court noted that it has particular concern over the crosses in front of the UHP office.[117] This concern cuts against the court's argument that the memorials are especially troubling when the general public passes a majority of the monuments while traveling at fifty-five or more miles per hour. It could be true that the reasonable observer would "miss" seeing the contextual elements surrounding the cross when traveling at high speeds. But in the case of the memorials in front of the UHP office, this concern is not present. Rather, the reasonable observer would have plenty of time to observe and examine the memorials to determine their context and thus should be less likely, not more likely, to find that these memorials have the impermissible effect of endorsement. At any rate, even though the memorials at issue in this case should have satisfied the Tenth Circuit panel's reasonable observer because of the secularizing contextual factors, as Judge Gorsuch notes in his dissent, courts should not have to take account of a reasonable observer who is "biased, impaired, [or] distracted."[118]

B. The Need for Supreme Court Clarification of Establishment Clause Jurisprudence

While the Tenth Circuit arguably erred in its application of the endorsement test,[119] what *Duncan* and *Davenport* actually highlight most are not the errors of the Tenth Circuit, but rather the lack of guidance from the Supreme Court in Establishment Clause jurisprudence.[120] A consequence of the Supreme Court's "nebulous Establishment Clause"[121] jurisprudence is that lower courts rely more heavily on their own precedents, rather than face the daunting task of distilling into a workable rule the confusing and seemingly arbitrary Supreme Court Establishment Clause precedents. Indeed, this is exactly what the Tenth Circuit did in *Duncan*. Before applying the endorsement test, the Tenth Circuit noted that the Supreme Court

117. *Duncan*, 616 F.3d at 1161 n.13.

118. *Davenport*, 637 F.3d at 1110 (Gorsuch, J., dissenting).

119. *See supra* notes 106–18 and accompanying text.

120. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting from denial of certiorari) ("[O]ur Establishment Clause precedents remain impenetrable . . . [and] [i]t is difficult to imagine an area of the law more in need of clarity.").

121. *Id.* at 13.

remains "sharply divided on the standard governing Establishment Clause cases."[122] Because of this sharp divide, the Tenth Circuit turned to its own precedent to determine the controlling test for Establishment Clause challenges.[123] Yet, even though it relied heavily on its own precedent, uncertainty about how to apply the endorsement test still crept into the court's decision. For example, when discussing what the endorsement test's reasonable observer can be assumed to know the court noted that "[h]ow much information we will impute to a reasonable observer is unclear."[124] Uncertainty such as this is not the fault of lower courts. Justice Thomas recently stated as much when he said, "One might be forgiven for failing to discern a workable principle that explains these wildly divergent outcomes. . . . Whether a given court's hypothetical observer will be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or . . . the ultra-reasonable beholder, is entirely unpredictable."[125] In the end, courts will continue to disagree widely over core Establishment Clause jurisprudential issues, including whether the endorsement test or some other test controls in Establishment Clause religious symbol cases. And assuming the endorsement test does control, what does the reasonable observer see, feel, and know with respect to that religious display? The current circuit split suggests that these core disagreements are already taking place, and it is likely that the split will only widen in coming years unless the Supreme Court intervenes and clarifies Establishment Clause jurisprudence.[126]

V. CONCLUSION

The Tenth Circuit's opinions in *Duncan* and *Davenport* compound and perpetuate the confusion caused by the Supreme Court's Establishment Clause jurisprudence, specifically the endorsement test. Even assuming that the endorsement test is still the preferred Establishment Clause test, the *Duncan* court failed to properly apply

122. Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1156 (2010), *amended and rev'd*, *Davenport*, 637 F.3d 1095, *cert. denied*, *Utah Highway Patrol Ass'n*, 132 S. Ct. 12.

123. For a discussion of the Tenth Circuit's application of its own precedent see Steven M. Lau, Note, *Ignoring Purpose, Context, and History: The Tenth Circuit Court in* American Atheists, Inc. v. Duncan, 2011 BYU L. REV. 149.

124. *Id*. at 1159 (internal quotation marks omitted).

125. *Utah Highway Patrol Ass'n*, 132 S. Ct. at 19–20 (internal citations and quotation marks omitted).

126. *See supra* note 10.

the test because it did not properly consider all of the context, history, and purposes of the memorials. Unfortunately, this precedent will stand because the Supreme Court has rejected the opportunity to use *Duncan* to clear up the muddled Establishment Clause jurisprudential waters.[127]

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127. *Utah Highway Patrol Ass'n.*, 132 S. Ct. at 12 (denying certiorari); *id.* at 13 (Thomas, J., dissenting from denial of certiorari) (Justice Thomas noted that he would have granted certiorari "[b]ecause [the Court's] jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess."); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (holding that lower courts must "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions); Eugene Volokh, *A Possible Endorsement Test Case for the U.S. Supreme Court?*, THE VOLOKH CONSPIRACY (Dec. 21, 2010 6:02 PM), http://volokh.com/2010/12/21/a-possible-endorsement-test-case-for-the-u-s-supreme-court-2.

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