

Expression is Not Coercion

✖ (WNS)—While the nation watches to see how the new House leadership flexes its Tea Party-enhanced muscles, the legal campaign to strip the public square of any reminders of America's Christian heritage continues apace.

On Jan. 4, a three-judge panel of the 9th U.S. Circuit Court of Appeals ruled that the 57-year-old cross atop the Mount Soledad Veterans Memorial in San Diego is unconstitutional. The decision runs counter to a 2010 U.S. Supreme Court ruling in a similar case at the Mojave National Preserve, as well as a district court ruling that said the Mount Soledad cross was not unconstitutional because it “communicates the primarily non-religious messages of military service, death and sacrifice.”

In finding the cross unconstitutional, Judge Mary Margaret McKeown, a 1998 Clinton appointee, wrote: “The history and absolute dominance of the Cross are not mitigated by the belated efforts to add less significant secular elements to the Memorial.”

Perhaps the memorial keepers should have erected a 40-foot Frosty the Snowman next to the cross. Oops. That applies only to Nativity scenes and Christmas trees on public land. I'm getting the sops to secular bullies mixed up.

The problem seems to be that the cross is just too big and obvious. That makes it ipso facto offensive. The 43-foot concrete structure can be seen from Interstate 5, for instance. It's a wonder that the American Civil Liberties Union, which brought the suit, hasn't claimed that the cross has caused multiple accidents as atheist, Wiccan, Buddhist, Jewish and Muslim motorists clutch their hearts and keel over their steering wheels upon spying it. Given that the hillside

has sported a highly visible cross since 1913, it's safe to conclude that millions of motorists have made it through that scary stretch without incident. It's probably less safe to claim this in areas with noxious billboards for "adult" services, but I haven't checked accident statistics, so let's not go there.

The key aspect that the court ignored in its tortured finding of the First Amendment's secret intent to wipe out Christian symbols on public land is the element of coercion. Allowing mere expression is quite different from using government power to force observance.

As American Civil Rights Union General Counsel Peter Ferrara points out in his friend of the court brief in *Jewish War Veterans v. the City of San Diego*, "With a clear, simple standard rooted in the text of the Constitution and its surrounding history, this case is easily resolved. The cross at the federal Veterans' Memorial atop Mt. Soledad does not involve an unconstitutional establishment of religion because it does not involve coercion of any sort. It just sits there, without any specified message.

"Each visitor to the memorial is free to decide what the cross, and the memorial overall, means to them. They can take the cross as an expression of reverence for the nation's veterans, including those who suffered the supreme sacrifice. They can take it as an expression of hope that these lost loved ones will be seen again in some unknown future. They can take it as an expression of some religious message. However each visitor interprets the cross, they are also free to then accept or reject the message that they each discern."

Ferrara also notes that in 1776, Thomas Jefferson led the adoption of Virginia's Declaration of Rights and that the religious freedom clause in that Declaration states, "That religion, or the duty we owe to our creator, and the manner of

discharging it can be directed only by reason or conviction, not by force or violence;and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience."

It's been tough sledding for public crosses. Even after the Supreme Court in April refused to order the removal of a 7-foot cross made of metal pipe at the Mojave National Preserve, where veterans had maintained a cross since 1934, vandals cut it down. In May, a court ordered a replacement also torn down pending further appeals. Previously, a court had ordered the cross covered in a plywood box, an apt expression of the death wish that secularists have for public religious symbols.

In Arizona, at the behest of an atheist group, a three-judge panel of the 10th U.S. Circuit Court of Appeals ruled in August that 14 roadside crosses, each 12 feet high and memorializing fallen Arizona Highway Patrolmen, are unconstitutional. On Jan. 6, the full court issued a stay of the order, giving the state 90 days in which to appeal.

The common thread in these cases is the confusion of expression with coercion. It would be nice if the new Congress found some way to coerce federal judges into living up to their oaths. The jurists should be upholding real constitutional rights instead of twisting the Constitution into a battering ram against any public edifice with religious underpinnings.

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