

LATIN CROSS IN PUBLIC PARK VIOLATES FEDERAL & STATE CONSTITUTION

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On the same day in 1996 (August 20), the United States Circuit Court of Appeals for the Ninth Circuit issued two opinions described below which addressed the issue of whether a large cross in a public park is unconstitutional. In each instance, the federal appeals court held this type of structure in a public park violated either the federal constitution or state constitution. In so doing, the court found a large cross in a public park was unconstitutional because it implied a governmental preference or endorsement of a particular religious symbol and message.

ESTABLISHMENT CLAUSE ANALYSIS

In the case of *Separation of Church and State Committee v. City of Eugene*, 93-35094 (9th Cir. 1996), the issue before the federal circuit court of appeals was "whether the City of Eugene, Oregon violates the Establishment Clause of the United States Constitution by its ownership and display of a fifty-one foot concrete Latin cross in a public park on Skinner's Butte." The facts of the case were as follows:

The City of Eugene ("City") maintains a public park on and around Skinner's Butte, a hill cresting immediately north of the City's downtown business district. The land was donated to the City and has been maintained as a public park for many years. From the late 1930s to 1964, private individuals erected a succession of wooden crosses in the park, one replacing another as they deteriorated. In 1964, private individuals erected the cross at issue in this litigation. It is a fifty-one foot concrete Latin cross with neon inset tubing, and it is located at the crest of Skinner's Butte. The parties who erected the cross did not seek the City's permission to do so beforehand; however, they subsequently applied for and received from the City a building permit and an electrical permit.

Since 1970, the City has illuminated the cross for seven days during the Christmas season, five days during the Thanksgiving season, and on Memorial Day, Independence Day, and Veteran's Day.

The cross has been the subject of litigation since the time it was erected. In 1969, the Oregon Supreme Court held that the cross violated both the federal and the Oregon Constitutions because it was erected with a religious purpose and created the inference of official endorsement of Christianity.

Soon after, the City held a charter amendment election, and on May 26, 1970, the

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voters, by a wide margin, approved an amendment to the City Charter designating the cross a war memorial. Pursuant to that amendment, the cross was deeded to the City as a gift, and a bronze plaque was placed at the foot of the cross dedicating it as a memorial to war veterans. The Eugene City Charter provides that the "concrete cross on the south slope of the butte shall remain at that location and in that form as property of the city and is hereby dedicated as a memorial to the veterans of all wars in which the United States has participated."

After the election, the parties who erected the cross brought suit to have the Oregon state supreme court set aside its earlier decision. The Oregon Supreme Court did so on the basis of the "changed circumstances " that had occurred since its earlier decision was decided and held that "the cross no longer violated the state and federal constitutions."

The Separation of Church and State Committee ("Separation") then brought suit in federal district court alleging a violation of the Establishment Clause of the United States Constitution. The federal district court granted summary judgment in favor of the City. In so doing, the district court held that "the cross has a secular purpose, does not advance religion, and does not foster an excessive entanglement with religion." Separation appealed.

As noted by the federal appeals court, the Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." In determining "whether governmental practice has the effect of endorsing religion," the federal appeals court cited the following "Establishment Clause analysis" enunciated by the United States Supreme Court:

Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over non-religion), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another...

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices... [T]he "effect" prong of [Establishment Clause] test asks whether, irrespective of government's actual purpose, the practice in fact conveys a message of endorsement or disapproval.

Applying this analysis to the facts of the case, the federal appeals court found "[t]he fifty-one foot Latin cross located in a public park on Skinner's Butte clearly represents governmental endorsement of Christianity":

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The maintenance of the cross in a public park by the City of Eugene may reasonably be perceived as providing official approval of one religious faith over others....In the present case, the City urges that the cross is no longer a religious symbol but a war memorial. This argument, however, fails to withstand Establishment Clause analysis... There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause. Because the cross may reasonably be perceived as governmental endorsement of Christianity, the City of Eugene has impermissibly breached the First Amendment's "wall of separation" between church and state.

Accordingly, the federal appeals court reversed the summary judgment in favor of the City and remanded (i.e., sent back) this case to the federal district court for further proceedings consistent with this opinion.

### STATE CONSTITUTION ANALYSIS

In the case of *Carpenter v. City and County of San Francisco*, 92-16767 (9th Cir. 1996), the issue before the federal appeals court was "whether the City and County of San Francisco violates the No Preference Clause of the California Constitution by its ownership and display of a 103-foot concrete and steel Latin cross in Mount Davidson Park (the "Mount Davidson Cross")." The facts of the case were as follows:

Mount Davidson Park is a roughly 40-acre public park atop Mount Davidson located in and owned by the City and County of San Francisco. Within the Park is a large, unadorned concrete and steel cross which stands 103-feet tall and 39-feet across. A copper box inside the foundation of the Cross contains a number of items including newspapers, telephone directories, two Bibles, two rocks from the Garden of Gethsemane, and a jug of water from the Jordan River. A plaque at the base of the Cross is inscribed with the words "Sunrise Easter Cross/Mount Davidson/First Service 1923." There are no signs identifying the owner of the Cross.

In 1923, prior to the creation of the Park, the first Easter Sunrise service was held on Mount Davidson. Several wooden crosses were erected for the service, but they were all subsequently destroyed by fire, wind or vandals. In 1932, the City gained title to the land and established Mount Davidson Park. In 1933, the City's Board of Park Commissioners voted to authorize the allocation of public funds to build a permanent cross. The commissioners also authorized the installation of floodlights to illuminate the Cross during Easter... Construction of the Cross was completed in 1934.

In a dedication ceremony held that year, President Franklin D. Roosevelt pressed a golden telegraph key sending a signal from Washington, D.C. through a special direct circuit to illuminate the permanent Mount Davidson Cross. Fifty thousand people

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attended the event in the Park which took place on the eve of Palm Sunday in order to illuminate the Cross for Easter Week.

Between 1934 and 1987, the Cross was at times illuminated during the week before Easter and during the Christmas season. At other times, it was illuminated nightly. On February 15, 1990, the Board of Park Commissioners passed a resolution halting illumination of the Cross.

Various local religious leaders and citizens of San Francisco (collectively called "Carpenter") brought this suit against the City of San Francisco, its Recreation and Park Commission, and its Manager (collectively called "City"). The suit challenged the City's ownership and maintenance of the Mount Davidson Cross as violating the No Preference Clause and the Ban on Aid to Religion Clause of the California Constitution and the Establishment Clause of the United States Constitution.

The federal district court entered summary judgment for the City. Carpenter appealed. On appeal, Carpenter raised both federal and state constitutional issues. The federal appeals court, however noted that "federal constitutional issues should be avoided when the alternative ground is one of state constitutional law." As a result, the court stated it would rely upon "the California Constitution to decide this case."

As noted by the court, the No Preference Clause of the California Constitution guarantees the "free exercise and enjoyment of religion without discrimination or preference." In its entirety, Article I S 4 of the California Constitution provides as follows:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

The court noted further that "the religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution":

[I]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion than that found in the "no preference" clause, and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee.

In determining the applicability of the No Preference Clause to a "challenged religious display on public property," the federal appeals court found cases on point had "stress[ed] the importance of the historical and physical context" of the display's surroundings. In particular, the court noted that the following factors were "relevant to determining whether a display violates the California Constitution":

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(1) the religious significance of the display, (2) the size and visibility of the display, (3) the inclusion of other religious symbols, (4) the historical background of the display, and (5) the proximity of the display to government buildings or religious facilities.

Applying the first of these five factors to the Mount Davidson Cross, the federal appeals court found the display had religious significance:

First, the Mount Davidson Cross is a Latin cross. The Latin cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.

Christian relics, such as Bibles, rocks from the Garden of Gethsemane, and a jug of water from the River Jordan, are embedded in the Cross' base. Easter Sunrise services and other Christian rituals have long been held at the Cross. In short, the Mount Davidson Cross carries great religious significance. Indeed, to suggest otherwise would demean this powerful religious symbol.

Second, in considering the size and visibility of the display, the federal appeals court noted the following "ample evidence that the Cross is visible to a substantial number of people":

The declaration of defendant Mary Burns, the General Manager of the City's Recreation and Park Department, states that the Cross "has become a familiar structure in the San Francisco landscape."

An historical study submitted by the City states: "Clearly visible for miles around the Bay Area,[the Cross] is a prominent feature of the San Francisco landscape. "

The City submitted a report dated March 18, 1989, prepared by the San Francisco Landmarks Preservation Advisory Board, which states: "[T]he cross on Mount Davidson prominently identifies it not only in the south and west parts of the city but also from locations elsewhere both within and beyond the confines of the city."

In its own proposed order submitted to the district court, the City describes the Cross as "a familiar part of the western San Francisco skyline."

Based upon such evidence, the federal appeals court found "the record shows that a significant number of people can see the Mount Davidson Cross," despite the City's assertions to the contrary:

It is questionable whether a religious display must be visible from a great distance beyond a public park in order to raise constitutional concerns. Whether the display is visible to users of the public park would seem to be the more relevant inquiry.

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The City's videotaped "Visibility Study" may show that spotting the Cross is difficult on a foggy day; however, constitutional guarantees should not depend on the weather, especially in San Francisco.

In considering the third factor, "the inclusion of other religious symbols," the court found "the display of the Mount Davidson Cross does not include other religious symbols":

[I]t is a solitary religious display. The fact that San Francisco may have other religious symbols in its art collection spread throughout the City does not minimize the Cross' effect... The California courts have not looked beyond the immediate area of the display in determining whether other religions are sufficiently represented.

In considering the fourth factor, "the historical background of the display," the federal appeals court acknowledged that 'a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events.'" However, under the circumstances of this case, the federal appeals court rejected City's contention that "the historical significance of the Mount Davidson Cross renders it a permissible religious display."

The district court commented that the Mount Davidson Cross "has stood for fifty-seven years [and] serves as a reminder of an empirical past." [The No Preference Clause], however, requires more than mere longevity; a display's historical significance must be independent of the display's religious content."

Rather than having a history independent of its religious significance, the Mount Davidson Cross' history is intertwined with its religious symbolism. The Cross was originally built by the City as a permanent replacement for the crosses that were erected in conjunction with the first Easter Sunrise service on Mount Davidson in 1923. The Cross has a long history as a site for Easter services and other Christian rituals. "This kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion."

San Francisco attempts to borrow the history of Mount Davidson and attribute it to the Cross. However, the Cross does not become imbued with the mountain's history merely because it was erected upon it. Mount Davidson will retain its historical significance with or without a cross atop it.

The only arguably non-religious historical event which relates to the Cross is the dedication ceremony in 1934 in which President Franklin D. Roosevelt took part in absentia. However, there is nothing about FDR's transcontinental contact that converts the Cross into an historical relic. Moreover, the secular nature of this event is questionable; the event took place on the eve of Palm Sunday in order to illuminate the

Cross for Easter Week.

In so doing, the appeals court rejected the view espoused by the City and adopted by the lower court that the Cross "has become well recognized as a cultural landmark similar to other notable San Francisco landmarks, like the Golden Gate Bridge, Coit Tower, the Windmill, and the Conservatory of Flowers."

This view seems to rest on the mistaken notion that the longer the violation, the less violative it becomes. The fact that the cross also stands as a prominent landmark and tourist attraction, does nothing to ameliorate a violation of the No Preference Clause. If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference.

The district court also observed that the Mount Davidson Cross can be properly viewed as one of the works of art in San Francisco's public art collection. The beauty of the Cross, however, has little bearing on its validity. It simply is an attempt to create an aesthetically pleasing religious symbol; it does not obviate its religious purpose... [T]he argument that a religious display is art or a tourist attraction will not protect the display from restrictions on government-sponsored religion which the people of California have put in their constitution.

Finally, in applying the fifth factor, "the proximity of the display to government buildings or religious facilities," the federal appeals court agreed with the lower court's observation that "the Mount Davidson Cross is not near City Hall or any other City-owned building, nor is it adjacent to any religious facilities." As a result, the appeals court found four of the five factors used to determine whether a display violated the California Constitution indicated "the Mount Davidson Cross violates the No Preference Clause."

The federal appeals court, therefore, concluded that "the Mount Davidson Cross' presence on public land violates the No Preference Clause of the California Constitution." Having found the cross violated the state constitution, the federal appeals court found it unnecessary to address "Carpenter's other claims under the California Constitution or the United States Constitution." The federal appeals court, therefore, reversed the summary judgment in favor of the City and remanded (i.e, sent back) this case to the district court "for fashioning of appropriate relief," i.e., a court order to remove the unconstitutional display from public land.