

SERPENT STATUE IN CITY PARK: UNCONSTITUTIONAL RELIGIOUS SYMBOL?

As illustrated by the *Alvarado* decision described herein, the constitutionality of governmental activities under the Establishment Clause depends on whether the challenged conduct “would lead the reasonable observer to infer an endorsement of religion” on the part of the government. In *Alvarado*, the federal appeals court found the constitutional definition of “religion” was not so broad to include “any symbol or belief to which an individual ascribes ‘serious or almost-serious’ spiritual significance.” In this particular instance, the federal circuit court found the city’s installation and maintenance of the “Plumed Serpent” sculpture in a public park would not lead a reasonable observer to infer an implied governmental endorsement of ancient or “New Age” religious beliefs.

QUETZALCOATL AKA KULKULCAN?

In the case of *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), Raquel Alvarado (“Alvarado”) and others alleged, in part, that the City’s installation and maintenance of the “Plumed Serpent” sculpture in a city park violated the Establishment Clause of the First Amendment. The federal district court acknowledged that the statue had some “religious significance.” The district court, however, found the statute “did not promote or endorse religion in violation of either the state or federal constitutions.” As a result, the federal district court granted summary judgment in favor of the City. Alvarado appealed this decision. As described by the federal appeals court, the facts of the case were as follows:

In 1991, an art committee (“the Committee”) formed by the City of San Jose approached renowned Hispanic artist Robert Graham (“Graham”) regarding the commission of a sculpture to commemorate Mexican and Spanish contributions to the City’s culture. The Graham piece was the second of six different pieces the City intended to install as part of its program to reflect the City’s diverse heritage.

Graham proposed a sculpture representing Quetzalcoatl, or the “Plumed Serpent,” of Aztec mythology. The Committee chairman, City Council member Blanca Alvarado, responded enthusiastically to Graham’s proposal, declaring the Plumed Serpent to be a symbol “universal in its celebration of ancient people,” drawing on “mythology and history to link the essence of the past to the strength of the present Mexican American community.” The Committee agreed that the City should commission the piece.

The Art in Public Places Advisory Panel (“the Panel”) found the proposed work to be of significant artistic and cultural value and unanimously endorsed the Committee’s recommendation. On September 8, 1992, the Visual Art Committee held a public hearing, received input from the community, and concurred in the Panel’s endorsement of the sculpture. The Parks and Recreation Commission also reviewed the project as to its appropriateness for location within San Jose’s Plaza Park. On September 15, 1992,

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the Urban Design Review Board considered and unanimously approved the staff recommendation for the location of the statue... [On December 10, 1992], the City agreed to pay the artist not more than \$400,000 and to pay for the transportation and installation of a bronze and concrete sculpture, in the form of a coiled serpent, projected to weigh about 10 tons, to stand about 20' to 25' high, and to measure about 15' to 20' in diameter.

In the fall of 1993, the City Council ("the Council") held meetings to discuss renaming Plaza Park "Cesar Chavez Park." Around this time, controversy over the sculpture was heating up in the community. According to an article in the San Jose Mercury News, submitted by plaintiffs, the piece was initially opposed by certain Christians who associated the statue with the serpent from the Garden of Eden and by persons of Mexican ancestry who associated Quetzalcoatl with human sacrifice. Several members of the public, including three of the named plaintiffs, spoke out at one of the Council meetings in opposition to the Plumed Serpent project.

Contrary to some of its detractors, defenders of the sculpture maintain that Quetzalcoatl, or a priest by that name, was responsible for stopping the practice of human sacrifice. Disputants and historians agree that Quetzalcoatl was originally a Mesoamerican creator-deity represented by the Plumed Serpent, among other symbols, as early as 1200 B.C.; that Quetzalcoatl, also known as Kulkulcan, was worshiped in Aztec and Mayan cultures from about 100-300 A.D. until the time of the Spanish conquest; that in the tenth (some say the twelfth) century A.D., a fair-haired Aztec priest or ruler named Topiltzin adopted the name Quetzalcoatl and urged his followers to abandon the practice of human sacrifice; that five centuries later, some Aztecs took the fair-haired Spanish conquistador Fernando Cortes to be the reincarnation of Topiltzin-Quetzalcoatl; and that the Aztecs and their religion died out in the sixteenth century with the Spanish conquest of what is now Mexico. In dispute here is the current religious significance, if any, of Quetzalcoatl or the Plumed Serpent. Plaintiffs submit "New Age" and Mormon writings to support their claim that worship of this ancient deity is a going concern.

On July 8, 1994, a private organization called the United States Justice Foundation wrote to the City Attorney demanding that it terminate the Plumed Serpent project as an unconstitutional promotion of religion.

On November 9, 1994, nine days before the scheduled dedication and unveiling of the sculpture, plaintiffs filed suit to enjoin the installation, dedication, and maintenance of the artwork on the grounds that it promotes religion in violation of the federal and state constitutions. Following a hearing, the district court denied the motion for a preliminary injunction on the basis of its finding that "the Plumed Serpent is an artistic representation of an ancient civilization and is not a religious object."

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The statue was unveiled and dedicated two days later in a ceremony which included speeches by local dignitaries and performances by traditional Aztec dance and drum groups. Local elementary school students participated in the ceremonial procession to the sculpture. According to the plaintiffs, some observers laid offerings of flowers and food at the base of the statue, while others "made obeisance" to the statue and burnt incense. One of the plaintiffs found a business card left at the base of the statue bearing the handwritten words: "O Dei Quetzalcoat/ May your many feathers loft our/ diverse (?) souls across the chasm of religious artifice."

According to the appeals court, "[a]ttempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task." The appeals court, however, found a review of "traditional and contemporary legal definitions of religion" yielded the following "three helpful indicia":

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

The "formal and external signs" listed by the court include: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions."

Applying this test to the facts of the case, the district court had found the religious significance of the statute by itself was insufficient to prove a constitutional violation of the Establishment Clause. While acknowledging that "Quetzalcoatl was at one time a religious figure," the City had similarly contended the "Plumed Serpent does not involve current religious beliefs." As a result, the City asserted that the Plumed Serpent was not "in fact a religious symbol for First Amendment purposes."

CURRENT RELIGIOUS SIGNIFICANCE?

According to the federal appeals court, "[b]efore turning to the issue of whether the statue violates the Establishment Clause," the initial issue was "whether the object in question can be defined as 'religious' for establishment purposes." In so doing, the appeals court agreed with the City that "a symbol must have current religious adherents to be considered religious" for First Amendment purposes. As a result, the specific issue was, therefore, "whether Quetzalcoatl or the Plumed Serpent has current religious significance."

As cited by the appeals court, plaintiffs had pointed to the following collection of New Age and Mormon writings to support their contention that belief in the Plumed Serpent symbol had current

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religious significance among these groups:

Some New Agers emphasize spiritual healing. Others are among the most ardent environmentalist. Finally, there are the mystics of the movement, whose beliefs include ideas drawn from every religious tradition.. As the amazing variety shows, the New Age is a very flexible, amorphous, spontaneous movement.

There is no national organization, no hierarchy, no clearinghouse for information. People become part of the movement by studying books, visiting small institutes, joining study groups, attending seminars, and working with the thousands of New Age therapists, teachers, healers, and gurus scattered around the country. A typical believer draws on these different interests to create his own, personal way of thinking about himself and the world around him.

The New Age is large and complex and filled with millions of seekers. If they were somehow brought together in a church-like organization, these serious and almost-serious New Agers would constitute the third largest religious denomination in America. The New Age represents social, political, economic, psychological, and spiritual efforts to recognize and include all that our modern society has tended to exclude.

The picture of the New Age that emerges is one of individual efforts to "find" or heal oneself, physically and spiritually, with the help of symbols drawn from an infinite store of texts, visual sources and "beliefs drawn from every religious tradition." (Citations omitted.)

After reviewing these materials submitted by plaintiffs concerning New Age beliefs, the appeals court concluded that there was no "cognizable religious interest at issue."

The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. In other words, anyone's in and "anything goes."

The texts... refer specifically to Quetzalcoatl and the Plumed Serpent, from which they derive spiritual sustenance, but it is clear that the experience they describe is subjective, however much they may wish to share it. They refer to Quetzalcoatl in the past tense and describe him as a deity belonging to an ancient tradition.

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As noted by the appeals court, such "religious convictions" and "personal," "isolated" convictions, do "not rise to the demands of the Religion Clauses" in the Constitution. Moreover, the appeals court found itself "hard put to imagine a more unworkable definition of religion or religious symbol or believer for purposes of the Establishment Clause or Free Exercise than that which is offered here."

Few governmental activities could escape censure under a constitutional definition of "religion" which includes any symbol or belief to which an individual ascribes "serious or almost-serious" spiritual significance. If anything can be religion, then anything the government does can be construed as favoring one religion over another, and the government is paralyzed.

While the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions, it loses its sense and thus its ability to protect when carried to the extreme proposed by the plaintiffs...

There is no text, creed or organized group... only a sculpture with which plaintiffs have associated a number of unrelated texts and statements of individual response to the work. [T]he New Age concepts presented by the plaintiffs, while they invoke "ultimate concerns," fail to demonstrate any shared or comprehensive doctrine or to display any of the structural characteristics or formal signs associated with traditional religions.

On appeal, plaintiffs had also argued that "the Plumed Serpent invokes Mormon religious beliefs." While noting that "Mormons are clearly a recognized religious group," the appeals court found "the evidence presented by the plaintiffs does not support a First Amendment argument."

The writings suggest that, according to certain Mormons, ancient worshipers of Quetzalcoatl were in fact worshipping Christ. Historically, Mormon missionaries taught that Christ had revealed himself to native Mesoamericans in the form of Quetzalcoatl or the Plumed Serpent long before he appeared to man in the human form known to Christians. This attribution of Christian or Christ-like qualities to ancient religious symbols and practices does not, however, create an inference that Mormons themselves worship Quetzalcoatl or the Plumed Serpent.

In addition, the appeals court found the speech given by Luis Valdez at the unveiling ceremony and statements of Council member Blanca Alvarado failed to establish the current religious significance of the Plumed Serpent. On the contrary, the court found Alvarado was simply "attesting to her own spiritual response to the piece and sharing her impressions of Aztec culture."

Review of these statements reveals that they were made not in a religious spirit, but in homage to the City's Mexican heritage, and to the contribution of indigenous peoples to Mexican culture. It is commonplace that a work of art may affect someone on an emotional or spiritual level, or even move her to tears. This does not imbue the work

with religious content.

APPARENT PROMOTION OF RELIGION?

The appeals court also considered testimony which suggested "the worship and cult of Quetzlcoatl is making a resurgence among the Zapatistas, who are Mayan and revolutionaries in southern Mexico." In so doing, the appeals court cited the following principles of "Establishment Clause jurisprudence":

According to the Supreme Court, the Establishment Clause has come to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs...

[A] statute or practice which touches upon religion must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.

As noted by the appeals court, the "primary effect" test under the Establishment Clause "concerns the government's alleged promotion of religion, whether apparent or intentional."

A government practice has the effect of impermissibly advancing or disapproving of religion if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by non-adherents as a disapproval, of their individual religious choices.

As characterized by the appeals court, plaintiffs maintained that "the Plumed Serpent statue has the effect of advancing religion because of its alleged association with or resemblance to New Age and Mormon beliefs." Once again, however, the appeals court found plaintiffs had "failed to raise an inference that the statue reflects Mormon beliefs or that the New Age, as characterized by plaintiffs, constitutes a discernible religion for purposes of Establishment Clause analysis."

Plaintiffs' strained attempt to characterize the statue as religious on these bases does not imbue the piece with religious significance or give it the effect of promoting these beliefs. Nor does any resemblance to the Zapatista's religious symbols or practices give the statue this impermissible effect. Mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of advancing religion... The Establishment Clause is not violated because government action happens to coincide or harmonize with the tenets of some or all religions.

In so doing, the appeals court further rejected plaintiffs' argument that "a reasonable observer might nevertheless perceive the statue to be a positive endorsement of religion." According to the court, in

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addition to being reasonable, the hypothetical reasonable observer is also informed and assumed to be “familiar with the history of the government practice at issue.” In this particular instance, the appeals court found no circumstances which “would lead the reasonable observer to infer an endorsement of religion on the part of the City.”

The reasonable observer in this case would presumably be aware that the Plumed Serpent represents an ancient Aztec deity, as publicized by the City, and that the City-sponsored dedication ceremony included a performance by a Native American Aztec dance group.

The ceremonial dedication of the statue was apparently intended to promote cultural awareness of Hispanic and Native American traditions. Such cultural events are not uncommonly sponsored by municipalities with Hispanic and Native American components, and cannot seriously be considered to violate the Establishment Clause. Plaintiffs do not argue that the City is promoting the long-dead Aztec religion commemorated by the statue and its dedication ceremony.

Moreover, the appeals court rejected plaintiff’s argument that “the informed observer would also be aware of the New Age and Mormon connections” cited by plaintiffs.

The reasonable observer is not an expert on esoteric religions, nor can he or she be turned into one by any publicity generated by plaintiffs’ lawsuit. Furthermore, a reasonable observer cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico.

[T]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent. The measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Having found “not even the shadow of a threat that the City has advanced religion here,” the appeals court held that “the statue does not violate the Establishment Clause of the United States Constitution.” Accordingly, the federal appeals court affirmed the judgment of the district court in favor of the City.