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ESSAY

Judge Gorsuch and the Establishment Clause

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Introduction

The proper meaning of the Establishment Clause has sharply divided the Court for decades. Nowhere is this more obvious than in cases dealing with the constitutionality of religious displays. The Court has held that it is unconstitutional, for example, for a city to display a holiday crèche (a Nativity scene) if it stands alone.[1] But a crèche display flanked by Santa's house, his reindeer, and a "talking wishing well"[2] passes constitutional muster.[3] Commentators have referred to these holdings as "the three-plastic animals rule."[4]

Even more confounding than the results of these cases, however, is the patchwork of approaches taken by the various Justices. Some Justices believe that the government violates the Establishment Clause when it endorses religion; others think the government violates the Establishment Clause only when it coerces religious practice or belief. Justice Breyer has given up on finding an administrable test altogether, preferring instead to use "legal judgment" to decide on a case-by-case basis whether Establishment Clause concerns are implicated.[5] And confusingly, there is disagreement even within the endorsement and coercion factions about what "endorsement" and "coercion" mean.[6]

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1. County of Allegheny v. ACLU, 492 U.S. 573, 598, 601-02 (1989).
2. Lynch v. Donnelly, 465 U.S. 668, 695 n.1 (1984) (Brennan, J., dissenting).
3. *Id.* at 671, 687 (majority opinion).
4. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992).
5. *See* Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment); *see also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1841 (2014) (Breyer, J., dissenting) (quoting *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment)).
6. *Compare, e.g.*, Lee v. Weisman, 505 U.S. 577, 592, 599 (1992) (Kennedy, J.) (holding that a prayer at high school graduation was invalid because of "subtle coercive pressure"), *with*

While it is unclear whether a Justice Gorsuch would clarify this muddle, his opinions in two recent religious display cases provide some guidance.[7] This Essay describes those opinions and then discusses how a Justice Gorsuch might interpret the Establishment Clause.

I. *Green v. Haskell County Board of Commissioners*

In *Green*, a Tenth Circuit panel struck down a county board's decision to erect a Ten Commandments monument on the lawn of its county courthouse.[8] The panel explained that even though the Supreme Court's decisions in *McCreary County v. ACLU*[9] and *Van Orden v. Perry*[10] had sent "scattered signals"[11] about the proper test to apply, the panel felt "obliged" to apply the "endorsement test" under Tenth Circuit precedent.[12] The endorsement test, which the Supreme Court has sporadically applied through the years,[13] asks whether a reasonable observer would conclude that the government, in erecting the display, had either (1) the purpose or (2) the effect of conveying a message of endorsement or disapproval of religion.[14]

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id. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*").

7. Am. Atheists, Inc., v. Davenport, 637 F.3d 1095, 1107 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of rehearing en banc); Green v. Haskell Cty. Bd. Of Comm'rs, 574 F.3d 1235, 1243 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

8. 568 F.3d 784, 787-88 (10th Cir. 2009).

9. 545 U.S. 844, 850, 881 (2005) (holding that Kentucky's Ten Commandments display was unconstitutional).

10. 545 U.S. 677, 681 (2005) (plurality opinion) (holding that Texas's Ten Commandments monument was constitutional).

11. *Green*, 568 F.3d at 796 (quoting Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1030 (10th Cir. 2008)). Indeed, in *McCreary County*, five Justices (Justices Souter, Stevens, O'Connor, Ginsburg, and Breyer) applied the endorsement test to hold that Kentucky's monument was unconstitutional. 545 U.S. at 848, 860, 881. But in *Van Orden*, which was decided on the same day, five Justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Breyer) expressly *eschewed* the endorsement test to hold that Texas's monument was constitutional. 545 U.S. at 686-90 (plurality opinion); *id.* at 698-700 (Breyer, J., concurring in the judgment).

12. *Green*, 568 F.3d at 796-97.

13. *See, e.g.*, *McCreary County*, 545 U.S. at 862, 881 (striking down a Ten Commandments display because a reasonable observer would have found that the officials had the purpose of endorsing religion); County of Allegheny v. ACLU, 492 U.S. 573, 598, 602 (1989) (holding that a crèche display, standing alone, is unconstitutional under the endorsement analysis); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (noting the "Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice" (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment))).

14. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

Applying the endorsement test, the *Green* panel concluded that a reasonable observer would view the monument as having the effect of communicating a message of government endorsement of religion.[15] That is because a reasonable observer would find it difficult to discern "a unifying, cohesive secular theme"[16] from the monument's setting—as required by the "three-plastic animals rule"—even though the monument was placed alongside a monument honoring local citizens who died in World Wars I and II.[17]

The Tenth Circuit denied a petition for rehearing en banc,[18] and Judge Gorsuch dissented.[19] Judge Gorsuch first made clear that he "prefer[red] to rehear this case to determine whether and how [the endorsement test] applies" at all.[20] He noted that the endorsement test "has been criticized by many members of the Court, and a variety of legal scholars."[21] Because five Justices in *Van Orden* "seemed to eschew" the endorsement test, it was unclear, according to Judge Gorsuch, whether it applied.[22]

But even if the endorsement test did control, the panel was still wrong, Judge Gorsuch explained, because its reasonable observer was decidedly "*un* reasonable."[23] Judge Gorsuch criticized the panel for concocting an observer who was "something of an art critic" that could sink the constitutionality of the display due to his inability to discern "a unifying, cohesive secular theme."[24] "Rather than focusing on the aesthetic qualities of [the] display," Judge Gorsuch argued, "it should be enough that there is no indication that county officials had any sort of policy by which they discriminated among proposed monuments based on the message they communicate."[25] Haskell County did not officially prefer one religion over another; nor did it prefer religious displays to secular ones. "If the class of 1955 wanted to donate a bench," Judge Gorsuch analogized, "so be it; . . . it doesn't mean the county dislikes the class of 1956."[26]

15. 568 F.3d at 799, 809.

16. *Id.* at 806 n.16.

17. *Id.* at 791.

18. *See* Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1235 (10th Cir. 2009).

19. *Id.* at 1243 (Gorsuch, J., dissenting from the denial of rehearing en banc).

20. *Id.* at 1249.

21. *Id.* at 1244 (footnote omitted).

22. *Id.* at 1244-45.

23. *Id.* at 1246.

24. *Id.* at 1247 (quoting Green v. Haskell Cty. Bd. of Comm'rs, 568 F.3d 784, 806 n.16 (10th Cir. 2009)).

25. *Id.* at 1248.

26. *Id.*

II. *American Atheists, Inc. v. Davenport*

Roughly one year later, another Tenth Circuit panel faced a similar question: whether Utah state officials violated the Establishment Clause by permitting the highway patrol association to erect crosses on public roadsides to memorialize fallen troopers.[27] The panel, applying the endorsement test, concluded that the officials did violate the Establishment Clause because "the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity."[28] Here, like the crèche display in *Allegheny*, the crosses stood alone rather than as part of an overarching secular display.[29] Moreover, because *all* of the fallen troopers were memorialized with a cross, the panel concluded that a reasonable observer might think that "there is some connection between the [highway patrol] and Christianity."[30] A reasonable observer may therefore fear, the panel speculated, "that Christians are likely to receive preferential treatment" in hiring and when stopped by officers.[31]

Here, too, the Tenth Circuit denied rehearing en banc,[32] and Judge Gorsuch dissented.[33] As in his *Green* dissent, Judge Gorsuch took the opportunity to note that "whether . . . the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear."[34] And as in his *Green* dissent, he took issue with the panel's application of the reasonable observer test.[35]

But perhaps most notably, Judge Gorsuch also joined Judge Kelly's dissent from the denial of rehearing en banc.[36] Judge Kelly believed the panel's approach created a presumption that the crosses were unconstitutional, therefore requiring the state to "secularize the message" of the memorial crosses.[37] This, Judge Kelly argued, the state need not do.[38] Indeed, requiring so would "evince hostility towards religion, which the First Amendment unquestionably prohibits."[39]

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27. Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See* Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1101 (10th Cir. 2010).
33. *Id.* at 1107 (Gorsuch, J., dissenting from the denial of rehearing en banc).
34. *Id.* at 1110.
35. *Id.* at 1107 ("Our court has now *repeatedly* misapplied the 'reasonable observer' test . . . .").
36. *See id.* at 1101 (Kelly, J., dissenting from the denial of rehearing en banc).
37. *Id.* at 1103 (quoting Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010)).
38. *Id.*; *see also id.* at 1106 (explaining that the Establishment Clause "does not require the government to strip religious symbols of all religious significance as a condition precedent for display on public property").
39. *Id.* at 1103.

Moreover, in Judge Kelly's view, it was of no moment that *all* of the memorials happened to be crosses. While Utah might violate the Establishment Clause if it limited memorials to *only* crosses, Judge Kelly concluded that was not this case.[40] Here, every family agreed to memorialize its fallen trooper with a cross, and there was simply no indication how the officials would have reacted had the highway patrol requested permission to erect other religious symbols.[41] It was enough that the state did not formally foreclose the possibility of erecting other religious symbols as memorials.

III. Implications

What lessons can we draw from these cases? First, quite clearly, Judge Gorsuch is unlikely to think that the government violates the Establishment Clause by merely endorsing religion. Indeed, in both *Green* and *Davenport*, Judge Gorsuch expressly questioned the utility of the endorsement test.

But beyond those opinions, there are other reasons to suspect that Judge Gorsuch would hesitate to apply the endorsement test. One of the hallmarks of Judge Gorsuch's jurisprudence, after all, is his commitment to the idea that judges should be particularly careful "not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best."[42] And one of the most frequent criticisms of the endorsement test is that judges will imbue the "reasonable observer" with their own personal predilections.[43] As one commentator has explained, government action almost always coveys some sort of message, and when it comes to something as nebulous as "endorsement," it is no surprise that reasonable observers from different religious backgrounds might come to different conclusions about whether a particular message endorses.[44] Indeed, that Judge Gorsuch thinks the reasonable observers concocted by the panels in *Green* and *Davenport* were decidedly "*un* reasonable"[45] is good evidence of this.

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40. *Id.* at 1106.

41. *Id.*

42. Judge Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 CASE W. RES. L. REV. 905, 906 (2016).

43. *See* Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections."); Harris v. City of Zion, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting) ("Line drawing in this area will be erratic and heavily influenced by the personal views of the judges.").

44. *See* McConnell, *supra* note 4, at 150.

45. Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc); *see also Am. Atheists*, 637 F.3d at 1108

What is more, if Justices Scalia and Thomas—the Court's other avowed originalists—are correct, the endorsement test has little support in the history of the Establishment Clause.[46] If Judge Gorsuch agrees, one might expect him to follow Justices Scalia and Thomas and adopt the view that government compulsion is the touchstone of establishment.[47] It remains to be seen, however, whether Judge Gorsuch would, like Justices Scalia and Thomas, embrace a strict coercion test—which requires coercion "by force of law and threat of penalty"[48]—or whether he believes, like Justice Kennedy, that subtler forms of government pressure to conform to majoritarian beliefs may violate the Establishment Clause.[49]

A second takeaway is that Judge Gorsuch believes there is no violation of denominational neutrality—the requirement that government remain neutral between religious sects—so long as the government remains *formally* neutral. As Judge Gorsuch explained in *Green*, the government does not impermissibly favor one religion over another simply by displaying a religious symbol of one faith.[50] There is no violation of neutrality so long as there is no formal policy of discrimination.[51] He explained: "If the class of 1955 wanted to donate a bench, so be it; . . . it doesn't mean the county dislikes the class of 1956."[52] This view of denominational neutrality tracks the current majority view of the Court, which recently held in *Town of Greece* that a town could constitutionally open board meetings with sectarian prayers from Christian ministers so long as it

(Gorsuch, J., dissenting from the denial of rehearing en banc) ("Yet, our observer continues to be biased, replete with foibles, and prone to mistake.").

46. *See, e.g.*, Town of Greece v. Galloway, 135 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring in part and concurring in the judgment) ("[T]here is no support for the proposition that . . . the Establishment Clause is violated whenever the 'reasonable observer' . . . perceives governmental 'endors[ement].'" (last alteration in original) (quoting *id.* at 1818 (majority opinion)); *see also* McConnell, *supra* note 4, at 154-55 (arguing that there is no historical support for the endorsement test). *But see* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 41-48 (1991) (arguing that noncoercive endorsements of religion were thought to constitute establishments at the time of the Founding).

47. *See, e.g.*, *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

48. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting) (emphasis omitted) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."); *see also Town of Greece*, 135 S. Ct. at 1837 (Thomas, J., concurring) (quoting the same language with approval).

49. *See Town of Greece*, 134 S. Ct. at 1824-27 (Kennedy, J.) (plurality opinion) (leaving open the possibility that legislative prayers may be unconstitutionally coercive due to "subtle pressure"); *Lee*, 505 U.S. at 592, 599 (Kennedy, J.) (holding that a prayer at a high school graduation was invalid because of its "subtle coercive pressure").

50. Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1248 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc).

51. *Id.*

52. *Id.*

maintained an official policy of welcoming prayer by any minister who wished to give one.[53]

What is more, Judge Gorsuch likely rejects the alternative approach suggested by Justice Kagan's *Town of Greece* dissent, which would have required the town to either instruct its ministers to deliver *nonsectarian* prayers or to make an affirmative effort to invite clergy of other faiths to serve as chaplains.[54] By signing onto Judge Kelly's dissent from denial of rehearing en banc in *American Atheists*, Judge Gorsuch seemingly endorsed the idea that requiring the government to "strip religious symbols of all religious significance as a condition precedent for display on public property"[55] or otherwise "secularize the message"[56] of such displays would "evince hostility towards religion, which the First Amendment unquestionably prohibits."[57] This echoes Justice Kennedy's concerns that forcing the government to act as "supervisors and censors of religious speech" would undesirably "involve government in religious matters."[58]

Judge Gorsuch's views on forced secularization and his views on neutrality suggest that he may believe that the best way to make religious minorities feel included is not to censor displays of mainstream symbols or to control the content of religious expression, but to protect the fair treatment of alternative faiths.[59] Under such an approach, government need not "make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each" to ensure that all faiths feel included.[60] So long as government remains formally neutral—that is, it allows the class of 1956 to donate a bench too—religious freedom, Judge Gorsuch seems to think, is guaranteed for all faiths.

53. 134 S. Ct. at 1823-24.

54. *Id.* at 1851 (Kagan, J., dissenting).

55. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1106 (Kelly, J., dissenting from the denial of rehearing en banc).

56. *Id.* at 1103 (quoting Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010)).

57. *Id.*

58. *Town of Greece*, 134 S. Ct. at 1822.

59. For a discussion on Judge Gorsuch's Free Exercise views, see Sean R. Janda, *Judge Gorsuch and Free Exercise*, 69 STAN. L. REV. ONLINE 118 (2017).

60. *See Town of Greece*, 134 S. Ct. at 1824 (alteration in original) (quoting Lee v. Weisman, 505 U.S. 577, 617 (1992) (Souter, J., concurring)).