



Legal Q & A

Holiday Decorations on Public Property

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As the Holiday Season approaches, it is time for municipalities to begin preparing for what has become a recent American holiday tradition—litigation over seasonal religious displays in public places.

The placement of crèches¹, menorahs², kinaras³, and other holiday decorations in public places has often sparked heated debates over the role of local governments in recognizing holidays that have a religious context. On the one hand, some argue that local governments should be allowed to acknowledge the religious nature of what are, fundamentally, religious holidays. But others argue that, by promoting a particular religious viewpoint, the government makes second-class citizens out of those who do not follow that religion. On either hand, municipalities are frequently caught in the middle.

Q: *Under the Constitution, is it legal for municipalities to sponsor or allow religious holiday decorations on public property?*

A: Yes, it's legal for municipalities to sponsor or allow religious holiday decorations on public property...**except in those cases when it's not.**

Unfortunately, the guidance from the courts on this issue has been less than consistent. There is no bright-line rule to determine whether a holiday display violates the Constitution. Instead, the U.S. Supreme Court has designed an extremely subjective standard, and the legality of any display will hinge almost entirely on the specific facts surrounding that display.

1. THE ESTABLISHMENT CLAUSE:

At the heart of this issue is the Establishment Clause of the First Amendment of the U.S. Constitution. Under that clause, "Congress shall make no law respecting an establishment of religion..."⁴

While the language of the clause explicitly mentions Congress, the clause also applies to state and local governments. Originally, the freedoms guaranteed by the Bill of Rights applied only to the federal government, and they did not restrict the actions of the states.⁵ That began to change, however, in the early 20th Century as the Court began to use the due-process language of the 14th Amendment to apply provisions of the Bill of Rights to state as well as federal law.⁶ The Establishment Clause is one of those provisions that has been incorporated to state and local governments.⁷

The language of the clause prohibits the establishment of a religion. But courts have read that language in a broader context to prohibit the government from preferring one

religion to another or from preferring religion to nonreligion.⁸ In the disputes concerning holiday displays, the central issue is usually concentrated on whether the local government is giving preferential treatment to a particular religious viewpoint.

2. THE CRÈCHE CASES:

In the 1980's the U.S. Supreme Court heard two seminal cases concerning holiday displays. Those cases are *Lynch v. Donnelly*⁹ and *County of Allegheny v. ACLU*.¹⁰ These cases are often called the "Crèche Cases".

The *Lynch* case, concerned a holiday display that was sponsored by the City of Pawtucket, Rhode Island. The display included a crèche, a Santa Clause, a reindeer, a Christmas tree, and cut-out figures of a clown, an elephant, a robot, and a teddy bear.¹¹ A group of citizens sued claiming that, by including the crèche in the display, the city was endorsing Christianity over other religious viewpoints, which would violate the Establishment Clause.

In a 5-4 decision, the Supreme Court held that the crèche display was constitutional. In writing the majority opinion, Chief Justice Burger stated that, due to the historical role of religion in American life, the Establishment Clause does not require that religion be totally excluded. He also stated that Christmas has a significant secular importance, and the inclusion of the crèche in the display merely depicted the historical origins of the holiday.

It was Justice O'Connor's concurring opinion, however, that set forth the standard that would be used in deciding future religious-display cases. According to Justice O'Connor:

the Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions ...The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.¹²

Therefore, the test in these cases is whether a reasonable person would view the government's actions as an endorsement of a particular religion.¹³ This is often referred to as the "Endorsement Test."

Justice O'Connor then went on to note that the crèche was only one of a number of items that were included in the display. And the other items, such as the robot, clown and elephant, were hardly traditional religious symbols. In this context, a reasonable person would not view the crèche as an endorsement of Christianity but, rather, as one of a number of holiday symbols.¹⁴

Five years later, the Court decided the case of *County of Allegheny v. ACLU*.¹⁵ It involved two different displays located in Pittsburgh, Pennsylvania.

The first display featured a crèche that was donated by a Roman Catholic organization and that was placed on the Grand Staircase of the county courthouse. The Grand Staircase is the "main," "most beautiful," and "most public" part of the courthouse.¹⁶ The crèche had a wooden fence on three sides and bore a plaque stating: "This Display Donated by the Holy Name Society." The display included the figure of an angel carrying a banner with the Latin phrase meaning "Glory to God in the Highest".¹⁷ The display was also accompanied by poinsettia plants around the fence and a small evergreen tree, decorated with a red bow, behind each of the two end posts of the fence. No figures of Santa Claus or other decorations appeared on the Grand Staircase.¹⁸

The second display was located outside of the City-County Building. The display consisted of an 18-foot menorah, a 45-foot Christmas tree, and a sign announcing the city's "Salute to Liberty."¹⁹

The decision in this case was complex and fragmented—the decision included nine separate opinions. Ultimately, the Court found that the crèche display violated the Constitution but the outdoor display was permissible.

One group of justices²⁰ found that both of the displays should be permitted. Following the majority opinion in the *Lynch* case, they argued that the Establishment Clause should be viewed through the lens of history and that, historically, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. The justices concluded that both the crèche and the outdoor display constituted nothing but a passive acknowledgment of religion.²¹

A second group of justices²² found that neither of the displays should be permitted. They concluded that both of the displays constituted government recognition of religious symbols. Because neither of the displays were integrated into a clearly secular message, a reasonable person would conclude that, by allowing the displays, the government was endorsing religion.²³

The final result in the case came down to the swing votes of two justices, O'Connor and Blackmun. Following the endorsement test that O'Connor had developed in the *Lynch* case, the justices split the proverbial baby. They held that the courthouse crèche was unconstitutional but the outdoor display was permissible.

According to O'Connor, the overtly religious nature of the crèche, the dearth of other symbols, and the prominent place in which it was displayed would lead a reasonable observer to perceive that the display was an endorsement by the city of the religious message that the birth of Jesus was a significantly religious event.²⁴ Conversely, the outside display did not represent an

endorsement of religion. By consisting of the menorah, Christmas tree, and liberty sign, the display did not convey a singular religious message. Despite the religious nature of the menorah and (possibly) the Christmas tree, a reasonable observer would view the display, in its totality, as a message of religious tolerance and diversity rather than as a particular endorsement of Judaism or Christianity.²⁵

3. POST-CRÈCHE CASES:

The *Allegheny County* case is the last seasonal religious display case that the U.S. Supreme Court decided. But lower courts have been struggling with the issue. These lower court rulings often lack consistency. Much of the controversy stems from the subjective nature of O'Connor's endorsement test. One lower court judge complained that the test required scrutiny that is "more commonly associated with interior decorating than with the judiciary."²⁶

Since the *Lynch* case was decided in 1986, the Seventh Circuit, which includes Illinois, has heard a number of holiday display cases:

- A city-endorsed display of paintings that depicted events in the life of Jesus Christ that were placed in a public park during the Christmas season violated the Establishment Clause's prohibition of state endorsement of religion.²⁷
- A display on the lawn of the village hall that consisted of lights, a Christmas tree, a crèche, snowmen, and carolers did not violate the Establishment Clause because the display included the crèche in the context of other seasonal symbols, which represented support for the holiday season and not support for one particular religion.²⁸
- A crèche that was placed in city hall that was separate from other nearby secular decorations was unconstitutional because it conveyed an impression that the city tacitly endorsed Christianity.²⁹
- A lighting of a cross as part of a Christmas display on public property violated the Establishment Clause because the cross is a sectarian symbol of Christianity.³⁰

The courts in other circuits have decided a number of cases both for³¹ and against³² the legality of religious holiday displays on public property.

4. FREE EXERCISE CONSIDERATIONS:

This discussion has revolved around religious displays that are sponsored by local governments. The rules change somewhat if the municipality creates a public forum in which all private parties are free to present their own views. If, for instance, a municipality opens up a public square where the public is invited to post displays, then the question becomes one of equal access.

The Free Exercise Clause prohibits local governmental entities from prohibiting the free exercise of religion in a traditional public forum. Any regulation or policy to the contrary must be a proper content-neutral, time, place, and manner restriction.³³ Where the regulation or policy is on a limited public forum, the restriction may not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum.³⁴ In short, the municipality may not

discriminate in granting access to these public places, and it may not be able to block the unwanted expression or speakers with opinions that some may find offensive.³⁵

5. FACTORS TO CONSIDER:

In deciding the holiday display cases, the Courts have left us with a number of factors to consider:

A. Aesthetics matter: After the Crèche Cases, the courts have given great attention to the entire context of the display. In particular, the courts have looked to the total symbols in the display. If all of the symbols are from one religious viewpoint, then the display is more likely to be unconstitutional than a display that mixes religious and secular items.

B. Location, location, location: Closely related to the question of aesthetics is the question of location. In the *Allegheny County* case, the Supreme Court was careful to note that the location of the display was in the prominent and ceremonial portion of the courthouse. The prestigious nature of the real estate on which the display is located is a factor to consider when determining the government's intent behind the display. While no court has stated as much, in the cases that this article examines, the outdoor displays were constitutional while the indoor displays were struck down.

C. The Reasonable Observer Test: The Endorsement Test developed by the Supreme Court asks whether a "reasonable observer" of the display would conclude that the government is endorsing a particular religion or religion in general. Who is this reasonable observer? Ultimately, it is the person wearing the black robe sitting behind the bench. When deciding these cases, the court must assume the mantle of reasonable observer. As we have seen with the nine separate opinions filed in the *Allegheny County* case, judges differ greatly as to what is reasonable. In the end, the constitutionality of your display may depend on the opinion or personality of the judge or judges who review it. ■

This monthly column examines issues of general concern to municipal officers. *It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney.* As always, when confronted with a legal question, contact your municipal attorney because certain unique circumstances may alter any conclusions reached in this article.

1 A crèche is a nativity scene displaying the birth of Jesus.
 2 A menorah is a nine-branched candelabrum used on Hanukkah.
 3 A kinara is a seven-branched candelabrum used in Kwanzaa celebrations in the United States.
 4 US Const. Amend. 1.
 5 See *Barron v. Baltimore*, 32 U.S. 243 (1833); *United States v. Cruikshank*, 92 U.S. 542 (1875).
 6 See *Everson v. Board of Education*, 330 U.S. 1 (1947).
 7 See *id.*
 8 See *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).
 9 See generally, *Lynch v. Donnelly*, 465 U.S. 668 (1984).
 10 See generally, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).
 11 Clowns, elephants, robots, and teddy bears are notably absent in the traditional Nativity narrative.
 12 *Lynch*, 465 U.S. 668 at 688.
 13 *Id.* at 691.
 14 *Id.* at 692-93.
 15 *County of Allegheny*, 492 U.S. at 573.

16 *Id.* at 579.
 17 *Gloria in Excelsis Deo.*
 18 *Id.* at 580-81.
 19 *Id.* at 581-87.
 20 Rehnquist, Scalia, Thomas, and Kennedy.
 21 See generally, *County of Allegheny*, 492 U.S. at 665-69.
 22 Brennan, Stevens, Marshall.
 23 See generally, *County of Allegheny*, 492 U.S. at 665-69.
 24 *Id.* at 623-37.
 25 *Id.*
 26 *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).
 27 *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991), vacated without op, reh, en banc, granted 947 F.2d 256 (7th Cir. 1991).
 28 *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989).
 29 *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987).
 30 *ACLU v. City of St. Charles*, 794 F.2d 265 7th Cir. 1986).
 31 See generally, *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992, Mich); *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999, NJ); *Skoros v. City of New York*, 437 F.3d 1 (2nd Cir. 2006, NY); *American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990, Ky); *Doe v. Clawson*, 915 F.2d 244 (6th Cir. 1990, Mich); *Elewski v. City of Syracuse*, 123 F.3d 51 (2nd Cir. 1997, NY); *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999, NJ); and *ACLU v. City of Florissant*, 186 F.3d 1095 (8th Cir. 1999, Mo).
 32 See generally, *Kaplan v. Burlington*, 891 F.2d 1024 (2nd Cir. 1989, Vt); *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2nd Cir. 1991, Vt); *ACLU v. Schundler*, 104 F.3d 1435 (3rd Cir. 1997, NJ); *American Civil Liberties Union v. Birmingham*, 791 F.2d 1561 (6th Cir. 1986, Mich); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990, Va); and *ACLU v. Schundler*, 104 F.3d 1435 (3rd Cir. 1997, NJ).
 33 *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37 (1983).
 34 *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
 35 *Chabad of Southern Ohio et al. v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004).



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