

## RELIGIOUS DISPLAYS AT CITY HALL

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City officials should use caution when placing or allowing religious displays of any type on public property. Although this topic can be troublesome all year long, the issue always seems to come to the forefront during the holiday season. Even well-intentioned religious displays may run afoul of the Establishment Clause of the U.S. Constitution, which reads in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” This prohibition against governmental advancement or inhibition of religion is more commonly known of as the “separation of church and state,” and it applies to all governmental entities: federal, state, and local.

This does not mean that government agencies are completely barred from recognizing or celebrating holidays or events that have church connections. Municipal holiday displays that are limited to more secular images, like Santa Claus and Christmas trees, will generally survive constitutional challenge. According to the Supreme Court in *Allegheny County v. Greater Pittsburgh ACLU*, the government may acknowledge Christmas as a cultural phenomenon, but it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. Thus, a snowman and an angel displayed at a city park can more readily be justified as signals that Christmas is a time for peace on earth and good will toward men.

It is unclear whether a religious symbol, like Nativity scene, can lawfully be displayed by a city or on city property. There is no federal or state statute covering this topic. And the case law is, at best, unclear and provides very few hard and fast rules for such displays. Therefore, it is difficult to formulate a specific set of rules to ensure that a given display is constitutionally permissible if it has religious symbols in it.

The Supreme Court has held that a Hanukkah menorah has both religious and secular connotations and may properly be displayed if the context presented is an overall holiday setting rather than the endorsement of religion. In *Allegheny County*, the Supreme Court found constitutionally permissible a holiday display that consisted of a menorah next to a larger Christmas tree, which was the “predominant element” of the display, and less significantly, a sign saluting liberty.

Part of the difficulty in determining whether a given holiday display will survive an Establishment Clause challenge is that the United States Supreme Court has adopted a very fact-specific approach to dealing with this issue. The best way to summarize the Court’s approach is that if the dominant theme of a holiday display seems to be an endorsement of a particular religion, or if someone could believe that the dominant theme of the display is religious, then the display might not survive a challenge. For instance, a manger scene mixed in with a Santa figure, a snowman, a menorah, and a Christmas tree will be more likely to survive an Establishment Clause challenge than will a manger scene alone. However, if the manger scene is the centerpiece of the larger display, and the other figures are much smaller than the manger or placed in such a way that the manger scene is clearly the dominant theme of the display, then the display will probably not survive a challenge.

In what has been described as the leading case on the topic of municipal Christmas displays, the U.S. Supreme Court upheld the authority of a Rhode Island municipality to erect a Christmas display in a park owned by a nonprofit organization, including such objects as a Santa Claus house, a Christmas tree, a banner that reads “Seasons Greetings,” and a Nativity scene. *Lynch v. Donnelly*, 465 U.S. 668 (1984). Focusing on the context of the Christmas season, the Court found that the city had a secular purpose for including the Nativity scene as one component of its holiday display, which did not impermissibly advanced religion or created an excessive entanglement between religion and government. According to the Court, any benefit to one faith or religion or to all religions inclusion of the Nativity scene in the display effects, is *indirect, remote, and incidental*, and is no more an advancement or endorsement of religion than the exhibition of religious paintings in governmentally supported museums.

If a private entity wishes to place a holiday display on public property, it may do so with the city’s consent. These displays may be religious in nature. However, the city should consider placing a sign disclaiming any endorsement or participation in the display or views depicted by the display. In addition, a city should not allow one group to place its religious imagery on public property while denying another group.

In 2005, the U.S. Supreme Court decided two cases that provide further guidance for city officials. Both cases concerned the display of the Ten Commandments on public property. The cases applied the same law, but yielded contrary results. In *Van Orden v. Perry, et al.*, the Texas Capitol was allowed to keep a large stone monument bearing the Commandments. On the other hand, in *McCreary County, Kentucky, et al. v. ACLU*, two Kentucky county courthouses lost their framed copies of the mandates entrusted to Moses. In both cases, the Supreme Court was asked to decide the legality of nearly identical texts erected on government property. Both cases forced the Court to review previous cases in an effort to balance the *religious* and *historical* significance of the Commandments. So, why different outcomes?

The sole point upon which all nine justices agreed was that the Ten Commandments communicate both a secular *moral* message, and a Judeo/Christian *religious* message. The Court reminded us that the purposes of the Constitution’s “Religion Clauses” are to ensure religious liberty and tolerance for all, to avoid religious divisiveness, and to maintain the separation of church and state. The Court wrestled with two competing principles for applying the Establishment Clause:

- (a) the strong role religion and religious traditions have played throughout our nation’s history; and
- (b) that government intervention in religious matters can itself endanger religious freedom.

The Court stated that our country’s institutions presuppose a Supreme Being, yet these institutions must not press religion on the people. To that end, the Court continues to rely on the three-part test of *Lemon v. Kurtzman*, a 1971 decision that questioned whether:

- (1) the government activity in question has a secular purpose;
- (2) the activity’s primary effect advances or inhibits religion; and

(3) the government activity fosters excessive entanglement with religion.

In both the Texas and Kentucky cases, the Court focused on the “secular purpose” part of the test by looking at the *context* of the displays. Were the Commandments there to communicate a religious message? Or did they merely show a moral and historical basis for our governments?

Although the Court did not specifically organize its analysis in the following manner, these were the factors carefully considered by the justices in both the Texas and Kentucky cases:

- **Initiative:** Erection of the monument in Texas was initiated by the Fraternal Order of Eagles, a national civic, social, and patriotic organization that strives to reduce juvenile delinquency. The courthouse displays in Kentucky were initiated by county officials.
- **Funding:** The Texas monument was donated by the Fraternal Order of Eagles. The Eagles also paid the cost of erecting the monument. The displays in Kentucky were paid for by the counties.
- **Approvals:** The legislative journal entries in Texas evidence acceptance of the donation by the state legislature. The actual site for the monument was recommended by the Historic Preservation Commission, which is responsible for maintaining the grounds. The displays in the Kentucky courthouses were ordered to be installed by each county’s judge and later ratified by the legislative body of each county. The Court has also looked for evidence of governmental contact with church authorities concerning the content or design of the exhibit prior installation.
- **Ceremonies:** The dedication of the monument in Texas was presided over by two state legislators. The ceremony opening the display in one Kentucky county was presided over by the county judge and included a clergyman who “testified to the certainty of the existence of God.”
- **Location:** The Texas monument is located outside on twenty-two acres. According to the state’s brief, its “location and orientation make it one of the least conspicuous monuments on the grounds.” The displays in Kentucky were located inside on the walls of high-traffic hallways frequently used by the public on a daily basis.
- **Surroundings:** The monument in Texas is one of twenty-two monuments and seventeen historical markers, including tributes to soldiers and peace officers. Initially, the Commandments in Kentucky were alone. After suit had been filed against the counties, the display was expanded twice - first to include similarly framed county resolutions stating that the Commandments were “the precedent legal code” and referring to Jesus Christ as the “Prince of Ethics,” and second (after the counties changed lawyers) to include framed copies of the Magna Carta, Mayflower Compact, Bill of Rights, Declaration of Independence, and the lyrics of the Star Spangled Banner.
- **Intensity:** The placement of the monument on the Texas State Capitol grounds was found to be “far more passive” than other examples previously considered by the Court. The displays in Kentucky were posted in the courthouses in a “high traffic area,” those being hallways “readily visible to... county citizens who use the courthouse to conduct their civic business, to obtain or

renew driver's licenses and permit, and to register cars, to pay local taxes, and to register to vote.”

• **Duration:** The Texas monument had existed at that location for over forty years before being challenged by the plaintiff, who had first encountered the monument six years prior to filing suit. The courthouse displays in Kentucky were erected in the summer of 1999 and suit was brought that fall.

The differing results handed down by the Court came down to context. Despite the fact that in Kentucky other historic documents hung on the two county courthouse hallways separate from and in addition to the display at issue, the majority of the Supreme Court characterized the display (as a whole) as a “solo exhibit,” and stated that when “the government initiates an effort to place this [religious] statement *alone* in public view, a religious object is unmistakable. Thus, when determining a secular purpose, context is crucial.

Because the law in this area is not black-and-white, the only way to ensure safety from litigation would be for cities to make sure their holiday displays are strictly secular in nature. Of course, many cities will decide to include certain religious imagery as a part of their holiday or other displays. In these cases, remember that these religious symbols should not generally form the main theme of the display and be sure to contact your city attorney to determine if the display will run afoul of the Establishment Clause.