



SEASONAL RELIGIOUS EXPRESSION

November 2011

Christmas is one of the most celebrated holidays of the American people. Each year, the Christmas season seems to begin earlier and earlier, as festive decorations bedeck stores, homes, and churches. Throughout our nation's history, many celebrate Christmas as the birth of Christ in the public and private sector by displaying nativity scenes, singing religious Christmas carols, giving gifts, and sharing with others the story of the first Christmas.

In recent years, misconceptions about the legalities of the celebration of Christmas have led government officials to remove Christ from Christmas in public places such as schools, parks, libraries, and government offices. As a result, school calendars, which once announced "Christmas Vacation," now read "Winter Vacation," and religiously themed decorations featuring nativity scenes have been replaced by snowmen and reindeer.

The U.S. Constitution requires none of these things. No court has ever ruled that the Constitution demands that government officials censor Christmas carols, eliminate all references to Christmas, or silence those who celebrate Christmas. These efforts to suppress Christmas celebrations demonstrate that many public officials mistakenly believe that allowing seasonal religious expression would violate the so-called "separation of church and state" – a doctrine often cited in connection with the Establishment Clause of the First Amendment. As a result, public officials across our nation have denied citizens their constitutional rights of religious speech and expression under the guise that it is constitutional. While many public officials are merely misinformed, others have purposefully sought to eradicate the celebration, observance, or even the acknowledgement of the religious aspects of Christmas from the public square.

To dispel this notion, it is important to realize that the Constitution does not "require complete separation of church and state."¹ The Establishment Clause of the First Amendment merely requires the state to be neutral in its relations with religious believers and non-believers; it does not require the state to be their adversary.² In fact, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."³ "State power is no more to be used to handicap religions, than it is to favor them."⁴

¹ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the display of a nativity scene by a city was constitutional because the city's conduct was supported by a legitimate secular purpose).

² *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

³ *Lynch*, 465 U.S. at 673.

⁴ *Everson*, 330 U.S. at 18.

Importantly, the Establishment Clause restricts state action; it does not apply to private religious expression. The U.S. Supreme Court has noted that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”⁵ Therefore, it is unconstitutional for public officials to deny individuals the right to religious speech and expression by imposing on them a limitation intended for the government.

The Framers of our Constitution established a boundary between religion and government to prevent the government from establishing a state religion. Opponents of religious freedom have transformed this boundary into a sliding concrete barrier, which is rapidly encroaching on the territory of people of faith. The following examples demonstrate how individuals who take a stand for their faith put an end to the constitutional violations by the government.

I. Unconstitutional Attempts to Silence Seasonal Religious Expression

Oklahoma City Government Employees Told: “No Christmas This Year”

In November 2008 in Oklahoma City, Oklahoma, city department and division heads received a memo from the city manager. The memo informed them that city employees were forbidden to display in the workspace “nativity scenes, troparia, cherubs, angels, crosses, or any other symbols of clear religious significance.” The memo added that “appropriate” displays included “evergreen trees, snowflakes, reindeer, snowmen, and Santa Claus.”

The policy also extended to a yearly Christmas party that was organized by a city employee. At the party, employees would present gifts to a family in financial need, and then enjoy a shared Christmas dinner. The employee was told that the party would have to be relocated to an offsite location and that employees who chose to attend would have to use vacation time to do so. The memo also resulted in the removal of an employee’s Bible from a break room where the city had allowed non-religious literature.

ADF attorneys filed suit to halt the unconstitutional ban on the celebration of Christmas. The city quickly settled and issued new guidelines that respected the First Amendment-protected rights of their employees, and it no longer restricts free speech and religious expression in the workplace.⁶

No Room in the Library...

Bartlett, Tennessee, resident Brandi Chambliss wanted to advertise her church’s Christmas show on the community shelves at her local public library. The shelves had traditionally been open to groups and individuals for displays of announcements and other items as a means of providing information to the community.

⁵ *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249-50 (1990).

⁶ *Spencer v. City of Oklahoma City*, U.S. District Court for the Western District of Oklahoma, filed December 17, 2007. Settled February 20, 2008.

Library officials accepted the announcement, but told her that she would have to “remove” the “inappropriate” figures of the baby Jesus, Joseph, Mary, and the wise men from her accompanying nativity scene and limit it to farm animals and a shepherd boy. Brandi said: “Now we’ve got a bunch of barnyard animals on display. We’ve got a sheep, a goat, and a cow. We just think it’s the most ridiculous thing.”⁷

An ADF attorney sent a letter to the library explaining that displays such as Brandi’s did not violate the U.S. Constitution. The mayor ultimately intervened and asked the staff of the local library to display the full nativity so that Jesus, Joseph, and Mary would have room in the inn.

II. Questions and Answers about Religious Speech in Public Places

Does the “separation of church and state” require government officials to silence someone for talking about his faith in God and his religious beliefs?

No. To the contrary, it is well established that the U.S. Constitution protects the religious speech of private individuals under the First Amendment.⁸ Because of this, the Constitution prohibits governmental entities from suppressing or excluding the speech of private individuals solely because their speech is religious or contains a religious perspective.⁹

Do individuals have the right to private religious expression on public property?

Yes. The First Amendment protects the right of individuals to private religious expression on public property. In analyzing free speech cases involving religious speech or expression, the result of the case will probably depend upon the nature of the forum. The U.S. Supreme Court has recognized the following speech forums: 1) traditional public forum, 2) limited or designated public forum, and 3) nonpublic forum.¹⁰ The forum that is at issue in the case determines the degree of deference that courts will extend to the governmental entity’s regulation of speech.

Do individuals have the right to express their religious beliefs with others in a public park, on a street corner, or sidewalk?

Yes. Streets, sidewalks, and public parks are traditional public fora, and private religious speech in those places is constitutionally protected.¹¹ In fact, the U.S. Supreme Court has held that the government may not prohibit all communicative activity within a traditional public forum.¹² The Supreme Court has noted that “from ancient times” the use of public places, such as parks, has

⁷ *The O’Reilly Factor*, Fox News, December 6, 2005.

⁸ *See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

⁹ *Id.*

¹⁰ *Board of Airport Comm’ns v. Jews for Jesus*, 482 U.S. 569, 572 (1987).

¹¹ *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

¹² *Perry Educ. Ass’n v. Perry Local Educ’s Ass’n*, 460 U.S. 37, 45 (1983).

“been a part of the privileges, immunities, rights, and liberties of citizens.”¹³ Public parks are held in trust for the use of the public “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁴

As a result, private religious expression within public parks is constitutionally protected speech.¹⁵ In *Doe v. Small*, the Seventh Circuit held that the First Amendment protected the religious speech rights of private parties who sought to display paintings of Christ in a public park.¹⁶ The court held that “the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.”¹⁷ As a concurring opinion further explained:

Government may not discriminate against private speech in a public forum on account of the speaker’s views. The Free Exercise Clause assures speakers whose message is religious no less access to public forums than that afforded speakers whose message is secular or sacrilegious.¹⁸

“For the state to enforce a content-based exclusion it must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹⁹ Therefore, in a traditional public forum, individuals have the right to private religious expression.

Do individuals have the right to private religious expression in a limited public forum, such as a public school opened for meetings of community groups on evenings and weekends?

Yes. When public property is utilized by the government as a limited or designated forum, the First Amendment protects the right to private religious expression. A limited or designated forum means that “the state has opened [the property] for use by the public as a place for expressive activity.”²⁰ According to the U.S. Supreme Court, a limited or designated public forum is created only by “purposeful governmental action.”²¹ As a result, the high court has stated that government officials do not create a limited forum merely “by inaction or by permitting limited discourse.”²²

Once a forum has been opened, “[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”²³ Therefore, government may not discriminate against individuals based on their desire to use a generally open forum to engage in religious speech, such as

¹³ *Id.*

¹⁴ *Hague*, 307 U.S. at 515-16.

¹⁵ 964 F.2d 611, 618 (7th Cir. 1992) (en banc).

¹⁶ *Id.*

¹⁷ *Id.* at 619.

¹⁸ *Doe*, 964 F.2d at 629 (Easterbrook, J., concurring) (citations omitted).

¹⁹ *Perry Educ. Ass’n*, 460 U.S. at 45.

²⁰ *Id.*

²¹ *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1998).

²² *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

²³ *Id.*

exhibiting a religious display, without meeting the constitutional standard.²⁴ In order to justify discrimination based on the religious content of speech, the government must demonstrate that the restriction is necessary to further a compelling state interest, and that the restriction is narrowly tailored to achieve that interest.²⁵

The Supreme Court has outlined additional guidelines for the operation of a limited or designated public forum. First, the high court has explained that “a state is not required to indefinitely retain the open character of the facility, [but] as long as it does so it is bound by the same standards as apply in a traditional public forum.”²⁶ In addition, government officials may continue to place reasonable time, place, and manner restrictions on the use of the limited public forum without offending the Constitution.²⁷

May municipalities sponsor religious displays in public parks?

Yes. Public officials may display religious symbols such as a crèche or nativity scene without offending the U.S. Constitution. To determine the constitutionality of municipal religious displays, lower courts evaluate whether the religious display passes the U.S. Supreme Court’s three-prong *Lemon* test.²⁸ Under the *Lemon* test, courts will inquire “whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”²⁹ In addition to the *Lemon* test, courts often look to the endorsement test, which asks whether a reasonable observer would believe that the municipal display constitutes an endorsement of religion by the government.³⁰

Employing the *Lemon* test, the Supreme Court has held that the display of a nativity scene is constitutional if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday.³¹ While the majority decision in *Lynch* centered on the *Lemon* test, Justice O’Connor’s concurrence in *Lynch* has served as the standard for municipal seasonal displays.³² It was her concurrence as the swing vote in the *Lynch* decision that created what has been known euphemistically as “The Three Reindeer Rule.” The legal name for the test is the “endorsement” test because Justice O’Connor stated that she believed the “central issue” in the *Lynch* case was whether the city “endorsed Christianity by its display of the crèche.”³³ Answering the question in the negative, Justice O’Connor found the contextual setting of the crèche amongst the other secular objects to be sufficiently secular to pass constitutional muster.³⁴

²⁴ *Widmar*, 454 U.S. at 269-70.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 276.

²⁸ *Bridenbaugh v. O’Bannon*, 185 F.3d at 802. (7th Cir. 1999).

²⁹ *Lynch*, 465 U.S. at 679 (citing *Lemon*, 403 U.S. at 612-13).

³⁰ *See Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002).

³¹ *Lynch*, 465 U.S. at 681.

³² *See, e.g., Freethought Soc., of Greater Philadelphia v. Chester Co.*, 334 F.3d 247, 262 (3d Cir. 2003).

³³ *Lynch*, 465 U.S. at 690.

³⁴ *Id.* at 691.

The endorsement test has been cited in many other cases and has gained a wide degree of acceptance as the determining factor for municipal religious displays.³⁵ Thus, a crucial consideration for municipal seasonal displays is the secular context in which the crèche is placed. Simply stated, “The Three Reindeer Rule” requires a municipality to place a sufficient number of secular objects in close enough proximity to the crèche to render the overall display sufficiently secular.

The *Lemon* test and the endorsement test have proven to be burdensome restrictions on governmental authorities who seek to exhibit religious displays. The government can avoid the requirement that a religious display include a sufficient number of secular figures if private individuals, who are not subject to religious speech restrictions, initiate the religious display.³⁶

May the government sponsor religious displays inside and around governmental buildings?

Yes. The U.S. Supreme Court has noted that there are countless illustrations of the “Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”³⁷ For example, the high court pointed out that the Supreme Court chamber “is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the U.S. Capitol for religious worship and meditation.”³⁸

In spite of our heritage of governmental religious expression, federal courts across the country are currently grappling with cases concerning the constitutionality of governmental exhibition of religious displays inside and around governmental buildings. Even though courts have relied on similar factors in analyzing these cases, courts have inconsistently decided factually similar cases.³⁹

As discussed above, courts look to the Supreme Court’s three-prong *Lemon* test and the endorsement test to determine whether there has been an impermissible establishment of religion. An additional factor that courts may consider is whether the government’s religious display is permanent or temporary. In the public school context, courts tend to favor temporary displays rather than permanent displays. In *Stone v. Graham*, the Supreme Court held that a state law requiring the permanent posting of the Ten Commandments in public school classrooms was unconstitutional.⁴⁰ The *Stone* court noted, “This is not a case in which the Ten Commandments are integrated into the school curriculum.”⁴¹ Relying on *Stone*, a lower federal court held that “[a] school’s permanent display of religious symbols is constitutionally suspect.”⁴²

³⁵ See, e.g., *Adland*, 307 F.3d 471; *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997); *Mather v. Village of Mundelein*, 864 F.2d 1291 (2d Cir. 1989).

³⁶ See *Mergens*, 496 U.S. at 250.

³⁷ *Lynch*, 465 U.S. at 677.

³⁸ *Id.*

³⁹ See e.g., *King v. Richmond Co.*, 331 F.3d 1271 (11th Cir. 2003); *Adland*, 307 F.3d 471; *Sumnum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766 (7th Cir. 2001); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).

⁴⁰ 449 U.S. 39, 41 (1981).

⁴¹ *Id.* at 42.

⁴² *Clever*, 838 F.Supp. at 929, 937 (1993).

However, in the context of religious displays in other governmental buildings, the length of time the symbol has been in use, or the length of time the display has been exhibited often weigh in favor of the government. In *King v. Richmond County, Georgia*, the U.S. Court of Appeals for the Eleventh Circuit noted that the clerk's seal, which included an outline of stone tablets, had been in use for at least 130 years.⁴³ The court noted that this fact arguably supported the county under the effect prong of the *Lemon* test.⁴⁴ Relying on the *King* decision, the Third Circuit held in another case that the age and history of a Ten Commandments plaque, which was displayed by itself, "provide[d] a context which changes the effect of an otherwise religious plaque."⁴⁵ In reaching its decision, the Third Circuit looked to the U.S. Supreme Court decision, *County of Allegheny v. ACLU*, in which Justice O'Connor in her concurrence stated:

[T]he "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.⁴⁶

While the *Lemon* test, the endorsement test, and time-based factors provide a measure of guidance for lower courts, the abundance of inconsistent decisions reached by lower courts indicate that these tests have not always provided clear answers to the constitutional questions secular groups are raising in response to governmental exhibition of religious displays inside and around governmental buildings. However, the Alliance Defense Fund and its allies stand ready and willing to defend the right to display religious messages on public property.

Conclusion

The U.S. Constitution does not require government officials to obliterate religious observances and expression from the public square. It is the hope of the Alliance Defense Fund that this information will help dispel the extremist myths about the Establishment Clause that have prompted tragic and unnecessary acts of government censorship of religious speech. And to all, we wish you a Merry Christmas!

⁴³ 331 F.3d 1271, 1286 (11th Cir. 2003).

⁴⁴ *Id.*

⁴⁵ *Freethought Soc'y, of Greater Philadelphia*, 334 F.3d at 264.

⁴⁶ *Id.* (citing *Co. of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989)).

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