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Is it unconstitutional to display a religious monument, memorial, or other item on public property?

The temporary or permanent placement of monuments, memorials, and other items on public property, including some that are religious or that have some connection to religion, has long been a practice in the United States. There are two primary categories of such displays: the government opening up its property for numerous private individuals and groups to display a variety of items of their choosing (often on a seasonal basis), and the government creating or selecting the particular monuments or memorials to be displayed (often on a permanent basis). Within both categories, questions often arise concerning the legality of the government's policies and practices, such as whether the government has violated the Free Speech or Establishment Clauses of the First Amendment to the United States Constitution.

This paper outlines the rights of citizens and the government to erect displays, including religious displays, on public property, as well as some limitations on the practice.

I. Applicable law when the government opens its property for displays selected by a variety of private individuals and groups.

The Supreme Court has held that the extent to which individuals have a right to use a particular public property for speaking, distributing literature, etc. depends on the type of property involved; for instance, public sidewalks and parks are traditional public forums where free speech rights are the strongest.¹ In addition, the government can choose to create a forum for private expression on a particular property,² for example, by allowing individuals or groups to display holiday-themed items or advertisements for events of interest to the community on public property during the Christmas season.

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¹ *United States v. Grace*, 461 U.S. 171, 177 (1983); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–50 (1983).

When the government opens up a forum for a particular type of expression, free speech principles apply and the ability of governing authorities “to limit expressive activities [is] sharply circumscribed.”³ Public officials cannot censor religious speakers from these places unless they demonstrate a compelling government interest for such an exclusion.⁴ The “separation of church and state”—a phrase that does not appear anywhere in the Constitution—does not require the exclusion of religious speakers from a public forum on government property. As the Supreme Court has noted,

if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

. . . [T]here 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

In *Capital Square Review & Advisory Board v. Pinette*, the Supreme Court held that a private group could erect a cross in a public park during the holiday season since the government allowed other groups to display items of their own choosing.⁶ The Court noted:

Respondents’ religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.⁷

In sum, giving equal access to public property to citizens for expressive purposes, regardless of their viewpoints, is a hallmark of a free society. When the government opens up a forum for the display of items chosen by a variety of private individuals and groups, those items represent and reflect the private viewpoints of the people who chose to display them, not the official viewpoints of the government. In this setting, the government often posts a sign or other disclaimer to reiterate that the displays are sponsored by private citizens and that the government is not endorsing their message. Therefore, individuals or groups seeking to include religious items within a forum opened up by the government cannot be discriminated against due to their religious viewpoint, but should be treated the same as other individuals or groups who have been permitted to display items of their choosing.

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³ *Id.* at 45.

⁴ *Carey v. Brown*, 447 U.S. 455, 461, 464 (1980).

⁵ *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 248–50 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)).

⁶ 515 U.S. 753, 760 (1995).

⁷ *Id.* (internal citations omitted).

II. Applicable law when the government selects particular monuments and memorials to display on its property.

When the government selects its own monuments or memorials for display, and does not open up a forum for expression by a variety of groups or individuals, the display is typically viewed as conveying a government-endorsed message. The First Amendment does not give individuals or groups the right to force the government to accept and display monuments of their choosing when the government is seeking to speak its own message through the display of items on its property.

In *Pleasant Grove City v. Summum*,⁸ a case argued by ACLJ Chief Counsel Jay Sekulow, the ACLJ secured a unanimous decision protecting the government's ability to select and display permanent monuments of their choosing – including Ten Commandments monuments – in public parks. Pleasant Grove displayed numerous items with historical significance (including a Ten Commandments monument) in a local park, most of which had been donated by private groups or individuals. The City was sued after it refused a local group's demand that the City permanently display a monument that stated the group's principles, and a federal court of appeals held that the decision violated the group's freedom of speech. The Supreme Court unanimously ruled in favor of the City, however, noting that the government retains the ability to craft its own message, through public displays or otherwise, without having to become the mouthpiece of any and every member of the community. The decision ensured that public parks and other government properties would not become a dumping ground for whatever items individuals and groups would like to have displayed, which would, in turn, prompt many government officials to decide to not allow any items to be displayed on public property.

When government speech is at issue, as opposed to a forum for the expression of private viewpoints, the legal framework shifts from free speech principles to the question of whether the government has acted in accordance with Supreme Court and other cases dealing with the Establishment Clause, which, among other things, prohibit the government from acting with a predominantly religious or anti-religious purpose or endorsing a particular religious or anti-religious viewpoint. Numerous cases recognize that a display consisting of a variety of symbols and items, such that the overall message of the display is not primarily religious, is more likely to be upheld if challenged in court than a display consisting primarily or exclusively of sectarian religious items. This particular area of the law is, unfortunately, finely nuanced and fact-sensitive.

A. Holiday displays

In *Lynch v. Donnelly*,⁹ the Supreme Court upheld the constitutionality of a government-erected holiday display because its Nativity scene was a part of a larger holiday display in which there were a variety of secular symbols, such as a Santa Claus house, reindeer, candy canes, a Christmas tree, carolers, and toys.¹⁰

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⁸ 555 U.S. 460, 464–65.

⁹ 465 U.S. 668 (1984).

¹⁰ *Id.* at 671, 687.

On the other hand, in *County of Allegheny v. ACLU*,¹¹ citizens erected a Nativity scene inside a government office building with the exhortation *Gloria in excelsis Deo* (“Give Glory to God in the Highest”). The location of the Nativity scene was not open to a variety of speakers, and the Court noted that no public forum was at issue. This display was held unconstitutional in part because the private speaker’s message was communicated in a context in which government sponsorship of the speech was readily apparent. It was also found unconstitutional because the display focused only on explicitly Christian elements of Christmas. A separate display that was upheld in *County of Allegheny* contained a menorah and a Christmas tree.¹²

In *Pinette*, the Court distinguished *County of Allegheny* by noting that the Nativity scene in that case was not located a public forum; if it had been part of a public forum, however, the religious message of the display would not have been attributable to the government.¹³

B. Displays that include the Ten Commandments or commemorative crosses

The ACLJ has represented local governments and officials in numerous lawsuits across the country involving the Ten Commandments. In 2005, the Supreme Court issued a pair of decisions concerning such displays on the same day.

In one case, *Van Orden v. Perry*,¹⁴ the Court upheld a display of monuments and historical markers near the Texas State Capitol which included the Ten Commandments. The *Van Orden* plurality decision reiterated the *Lynch* Court’s statement that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”¹⁵ The Court recognized that the Ten Commandments “have an undeniable historic meaning.”¹⁶

In the other case, *McCreary County v. ACLU of Kentucky*,¹⁷ the Court declared a courthouse display of historical documents that included the Ten Commandments unconstitutional. The Court analyzed the purpose, context, and history of the display, noting that it began as the Ten Commandments standing alone. The Court explained that the “First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.” The Court stated that, if the government acts with the predominant purpose of advancing religion, “it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”

Applying similar principles, courts have considered whether veterans memorials that include a cross, kneeling soldier, etc. are consistent with Establishment Clause case law, considering factors such as whether the government acted with a predominantly religious purpose and

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¹¹ 492 U.S. 573 (1989).

¹² *Id.* at 582.

¹³ *Pinette*, 515 U.S. at 764 (internal citations omitted).

¹⁴ 125 S. Ct. 2854 (2005).

¹⁵ *Id.* at 2861 (Rehnquist, C.J., plurality) (quoting *Lynch*, 465 U.S. at 674); *see also id.* at 2863.

¹⁶ *Id.* at 2857.

¹⁷ 545 U.S. 844, 860 (2005).

whether a reasonable person would view the memorial, taken as a whole, as endorsing religion or a particular religious faith.

A key issue in these cases is often the extent to which a cross that is intended to honor all veterans should be viewed as a secular, commemorative symbol, as opposed to an exclusively Christian symbol.

Conclusion

Those who claim that items having any religious connotation are categorically prohibited from public property are incorrect. Although individuals do not have a First Amendment right to force the government to open up its property for religious or other monuments, memorials, and items to be displayed, it is clear that, when the government chooses to open a forum on its property for a variety of displays, it cannot exclude religious items due to their religious character. Rather, the government must apply the same religion-neutral criteria to all groups and individuals. Additionally, the government may include Nativity scenes, Ten Commandments monuments, etc. within larger, secular displays that are consistent with the Establishment Clause principles referenced above (*e.g.*, the display has a predominantly secular purpose, and a reasonable person would view it as conveying a historical or other non-religious message).