

CONSTITUTION BANS RELIGIOUS EFFECT IN PUBLIC HOLIDAY DISPLAYS

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Does your agency's holiday display violate the First Amendment of the U.S. Constitution? As illustrated by the *Allegheny* decision described below, the quantity and physical setting of any religious symbolism will determine whether a particular display is constitutional. This recent opinion by the Supreme Court of the United States is the latest in a series of decisions which have considered challenges to the display of a "crèche" or nativity scene on public property. (See the June 1985 NRPA Law Review, "A Christmas Carol in the Park from the Supremes" for a review of *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984). This earlier "crèche" decision from the Supreme Court provided precedent for the *Allegheny* opinion described herein.)

SECULAR OR RELIGIOUS EFFECT?

In the case of *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, ___ U.S. ___, slip opinion (1989), the Supreme Court of the United States considered "the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh." Specifically, the two displays included "a crèche placed on the Grand Staircase of the Allegheny County Courthouse" and "a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty." The facts of the case were as follows:

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a crèche in the County Courthouse during the Christmas holiday season... The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"

During the 1986-1987 holiday season, the crèche was on display on the Grand Staircase from November 26 to January 9. It had a wooden fence on three sides and bore a plaque stating: "This Display Donated by the Holy Name Society." Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. The county also placed a small evergreen tree, decorated with a red bow, behind each of the two endposts of the fence... No figures of Santa Claus or other decorations appeared on the Grand Staircase.

The county uses the crèche as the setting for its annual Christmas-carol program. During the 1986 season, the county invited high school choirs and other musical groups to perform during weekday lunch hours from December 3 through December 23. The county dedicated this program to world peace and to the families of prisoners-of-war and of persons missing-in-action in Southeast Asia.

Near the Grand Staircase is an area of the County Courthouse known as the "gallery forum" used for art and other cultural exhibits. The crèche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum...

For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance [of the City-County Building]. Following this practice, city employees on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. A few days later, the city placed at the foot of the tree a sign bearing the Mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated:

"During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."

At least since 1982, the city has expanded its Grand Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday [commemorating the rededication of the Temple of Jerusalem after recapturing it from the Greeks]... usually occurs in December, and thus Chanukah is the annual Jewish holiday that falls closest to Christmas day each year. In 1986, Chanukah began at sundown on December 26...

Chanukah, like Christmas, is a cultural event as well as a religious holiday. Indeed, the Chanukah story always has had a political or national as well as religious dimension: it tells of national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice. Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and as a cultural or national event, rather than as a specifically religious event...

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah of an abstract tree-and-branch design. The menorah was placed next to the city's 45-foot Christmas tree... The menorah is owned by the Chabad, a Jewish group, but is stored, erected, and removed each year by the city. The tree, the sign, and the menorah were all removed on January 13.

The Greater Pittsburgh Chapter of the American Civil Liberties Union (ACLU) filed suit to enjoin the display of the crèche and the menorah on the basis that "each violate the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment." The federal district court found that "the crèche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon." In addition, the district court found that the menorah was "an insignificant part of another holiday display." As a result, the district court concluded that "the displays had a secular purpose and did not create an excessive entanglement

of government with religion." On appeal, however, the Third Circuit ruled that "each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing religion."

[T]he Court of Appeals... determined that the crèche and the menorah must be understood as endorsing Christianity and Judaism... The court observed: "Each display was located at or in a public building devoted to core functions of government." The court also stated: "Further, while the menorah was placed near a Christmas tree, neither the crèche nor the menorah can reasonably be deemed to have been subsumed by a larger play of non-religious items."

The U.S. Supreme Court granted review of this decision. Justice Blackmun delivered the majority opinion of the Court. The Establishment Clause of the U.S. Constitution appears in the following language from the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." As noted by Blackmun, "this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." In determining "whether a government practice violates the Establishment Clause," the Court would apply the following three "tests":

[A] statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster excessive entanglement with religion.

In applying these tests, Blackmun noted that the Court has "refined the definition of governmental action that unconstitutionally advances religion" as follows:

[P]rohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*... Moreover, the term "endorsement" is closely linked to the term "promotion," and this Court long since has held that government may not promote one religion or religious theory against another or even against the militant opposite...

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions or religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community... [This Court] recognizes any endorsement of religion as "invalid" because it sends a message to non-adherents 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. [*Emphasis of Court.*]

Further, the Court would apply the following "method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion":

The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears: a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content... [Constitutionality depends] upon its "particular physical setting"... Every government practice must be judged in its unique circumstances to determine whether it endorses religion...

[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of government's use of religious symbolism depends upon its context... [W]hen evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.

Applying these principles to the facts of this particular case, the Court found the specific issue was "whether the display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs." The Court analyzed the physical setting of the crèche as follows:

There is no doubt, of course, that the crèche itself is capable of communicating a religious message... Indeed the crèche in this lawsuit uses the words, as well as the picture of the nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the crèche - Glory to God because of the birth of Jesus. This praise to God in Christian terms is undisputably religious - indeed sectarian - just as it is when said in the Gospel or in a church service...

[T]he effect of a crèche display turns on its setting... [N]othing in the context of the display detracts from the crèche's religious message... [T]he crèche stands alone: it is the single element of display on the Grand Staircase...

The floral decoration surrounding the crèche cannot be viewed as... secular symbols in the overall... display. The floral frame, like all good frames, serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the

season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention the traditional Christmas greens negate the endorsement effect of the crèche fares no better.

Nor does the fact that the crèche was the setting for the county's annual Christmas carol-program diminish its religious meaning. First, the carol program in 1986 lasted only from December 3 to December 23 and occupied at most two hours a day. The effect of the crèche on those who viewed it when the choirs were not singing - the vast majority of the time - cannot be negated by the presence of the choir program. Second, because some of the carols performed at the site were religious in nature those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the crèche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the display of the crèche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise of God that is the crèche's religious message.

The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter its conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations... Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

In addition, the Court considered the county's argument that "it is sufficient to validate the display of the crèche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday." The Court rejected this argument.

The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus... [G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here Allegheny County has transgressed the line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ... [N]othing more is required to demonstrate a violation of the Establishment Clause.

The Court, therefore, concluded that "the display of the crèche in this context... must be permanently enjoined."

Having found the crèche display in this instance to be unconstitutional, the Court then considered the constitutionality of the menorah within its "particular physical setting." In the opinion of the Court, "the display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question."

The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah's display. The necessary result of placing a menorah next to a Christmas tree is to create an "overall holiday setting" that represents both Christmas and Chanukah - two holidays, not one.

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.

Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause. Because the government may celebrate Christmas as a secular holiday, it follows that the government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city's acknowledgement of Chanukah as a contemporaneous cultural tradition.

Based upon this analysis, the Court noted that "the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or simply recognizes that both Christmas and Chanukah are part of the same winter holiday season, which has attained a secular status in our society." Under the circumstances of this case, the Court found that primary effect of the menorah in this particular context was secular, rather than religious.

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in

front of the City-County Building, it is not considered an endorsement of Christian faith... The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than *vice versa*. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative tradition...

The Mayor's sign further diminishes the possibility that the tree and menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links the theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. Here, the Mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.

Given all these considerations, it is not sufficiently likely that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an endorsement or disapproval of their individual religious choices. While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a reasonable observer... When measured against this standard, the menorah need not be excluded from this particular display. The Christmas tree alone in the Pittsburgh location does not endorse Christian belief; and, on the facts before us, the addition of the menorah cannot fairly be understood to result in the simultaneous endorsement of Christian and Jewish faiths. On the contrary, for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.

As a result, the Supreme Court concluded that "the display of the menorah in front of the City-County Building" did not have an unconstitutional "effect, given its particular setting." The Supreme Court, therefore, affirmed the judgment of the circuit court which found the crèche display unconstitutional, but reversed the circuit court judgment which found the menorah display unconstitutional. The Supreme Court, however, remanded this case back to the lower court to consider whether this menorah display unconstitutionally advanced or inhibited religion or fostered an excessive entanglement with religion.