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The Constitutionality of Holiday Displays on Public Property (Or How the Court Stole Christmas)

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The Constitutionality of Holiday Displays on Public Property (Or How the Court Stole Christmas)

By Andrew C. Spiropoulos

I. Introduction

The song says that Christmas is the happiest time of year, but local governments and the attorneys that represent them would strongly disagree. Every year, Americans are treated to the spectacle of judicial warfare between cities, the American Civil Liberties Union, and religious groups over whether cities may or must allow religious displays on public property. Unfortunately, when cities, wanting to avoid the trouble and expense of these court fights, turn to the Supreme Court for guidance, they find a mishmash of plurality opinions laying out a variety of legal rules. Even those rules (using the term generously) endorsed by a majority of the Justices, are devised so that their application is dependent upon the particular context presented in a case, making it difficult to predict how the rule will apply in a specific circumstance. Given both this legal confusion and the raw passions exhibited by the parties in these religious conflicts, it is no wonder that all municipal attorneys want for Christmas is a vacation or at least a bottle of aspirin.

In this article, I will attempt, by analyzing both Supreme Court opinions and selected circuit opinions, to draw a legal map to help attorneys and other interested observers through the holiday season. I will demonstrate that the best way to think about the constitutional issues raised by holiday displays on public property is to first distinguish between those displays which are publicly sponsored and those which are paid for by private groups.

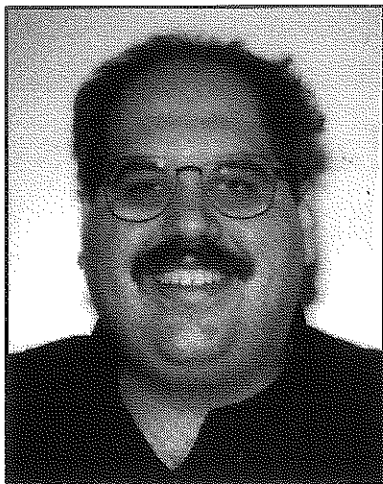
This distinction is important for two reasons. First, while both kinds of displays raise poten-

tial problems under the Establishment Clause of the First Amendment, a proposed private display also may involve the constitutionally protected free speech rights of the organization that wishes to sponsor the display. Thus, there are circumstances in which the city **must** allow the religious display to be exhibited on public property. Second, some members of the Court, in deciding Establishment Clause issues regarding religious displays, have articulated different standards for privately sponsored displays on public property and those which are publicly sponsored. Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist, for example, maintain that, given certain circumstances, the exhibition of a privately sponsored religious display on public property can never be an Establishment Clause violation. Other Justices apply the same standards to both private and public sponsorship.

After I explain the legal standards for both publicly and privately sponsored displays, I will conclude by compiling a checklist for municipal attorneys and other citizens who are interested in these issues.

II. The Problems of Public Sponsorship

I will first address the problem of publicly sponsored religious displays. These issues often arise when a city or town places a Christmas display such as a tree, lights, or a creche in city hall, the courthouse, or a public park. Potential litigation arises when adherents of other faiths or non-believers are offended by the apparent public sponsorship of the religious display. These plaintiffs claim that the public sponsorship of a Christian display constitutes an establishment of the Christian reli-



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gion in violation of the First Amendment of the Constitution.

Since 1971, in deciding whether a publicly sponsored display such as a creche or a Christmas tree constitutes an establishment, the Court has applied a three part test. This test was established in *Lemon v. Kurtzman*¹ and, despite many attacks on it², a majority of the Court appears to continue to use the *Lemon* test as its guiding framework.³ A state action implicating the Establishment Clause will pass constitutional muster if the state demonstrates that the action: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion. If a state fails on any one of these prongs, it loses.

In applying *Lemon* to Establishment cases, including those involving religious displays, the Court has infrequently struck down state actions because they have a religious purpose. The Court is reluctant to apply the purpose prong because it is difficult to determine the motivation of any party, let alone a government entity. As with any swearing match, the government entity involved will almost always be able to articulate some kind of secular reason for its action; it can say, for example, that it was just trying to accommodate the religious beliefs of its citizens. In addition, the very difficulty of a motive inquiry makes such an inquisition an intrusive one, requiring a court to discover and question the veracity of the motive of the challenged party. Courts are

naturally reluctant to question the word of other government actors. Thus, they prefer to presume that there is a sufficient secular motive and move to the next part of the test.⁴

Courts applying the *Lemon* test also infrequently reach the third, or excessive entanglement, prong of the test. This result should not be surprising; in Establishment Clause cases, a government action will come under scrutiny because some litigant is concerned that the government is directly or indirectly assisting religion. If this is true, the action will be struck down on the first or second prong. If religion is not benefited by the government action, then chances are that there is little relationship between religion and government. The state in this case, then, will probably pass the third prong of the test and win. Only in unusual circumstances, such as when the monitoring of the state program necessary to prevent the assisting of religion involves the detailed scrutiny of the operations of a religious organization, will the state action fail the excessive entanglement prong.⁵

Thus, in Establishment cases, particularly those involving religious displays on public property, the Court has reserved its most extensive analysis for the second, or effects, prong of the *Lemon* test. In other words, the Court attempts to ascertain whether the principal or primary effect of the religious display is to benefit religion. In recent years, in deciding these religious display cases, the members of the Court that have provided the decisive votes in Establishment cases⁶ have characterized

their application of the effects prong as an "endorsement" test.⁷ This approach, in determining whether the state has maintained an unconstitutional establishment, asks whether the state's action has the effect of endorsing religion.⁸

The underlying theory of this test is that government may not, directly or indirectly, purposely or by accident, show any favoritism toward religion. If the non-believer or adherent to a minority creed, the argument goes, believes that government favors a particular religion, these non-adherents will receive the message that "they are outsiders, not full members of the political community" while adherents will receive the message that "they are insiders, favored members of the political community."⁹

The effect portion of the endorsement test, therefore, centers on the perspective of the receiver of the message, rather than the intent of the sender. Courts must determine whether the message sent to the public is one of endorsement of religion. In order to determine what message the public is receiving, one must first determine who that public is. Justice O'Connor, the philosophical progenitor of the endorsement test, posits that courts must examine the display from the perspective of the "reasonable, informed observer."¹⁰

Who is this reasonable, informed observer? Justice O'Connor compares him (or her) to the reasonable person in tort law, not the reasonable non-believer or an actual observer of the display. Rather than being someone with a particular bias or someone subject to the mistakes of judgment of a particular human being, this reasonable observer is the embodiment of the collective notion of reasonable judgment.¹¹ This hypothetical observer is not a casual or ignorant observer of the display, but is instead a person who is "deemed aware of the history and the context of the community and forum in which the religious display appears."¹²

This assumption that the reasonable observer is aware of both the actual history and context of the placement of the religious display in this particular public space is crucial because it is by a careful, detailed examination of the display and the factual context in which it appears that the Court will decide if the display constitutes an endorsement of religion. For example,

if a religious display includes a Christian symbol such as a creche, but it is surrounded by secular symbols of the holiday season such as a Christmas tree¹³, reindeer, or colored lights, the Court is likely to find that the display as a whole communicates the secular message of celebration of the holiday season rather than the prohibited message of endorsement of Christianity.¹⁴ If the Court did not require the reasonable observer to be an informed one, challengers of the religious display could argue that a reasonable observer could be unaware of the existence or the meaning of the context of the display and instead concentrate on the religious portion of the display. Under the Court's formulation, however, assuming that the secular symbols were appropriately displayed, a court would have to presume that the reasonable observer would understand the meaning of the context of the display.¹⁵

We can best understand the Court's application of the endorsement test by examining *County of Allegheny v. American Civil Liberties Union*. This case involved two holiday displays in Pittsburgh, Pennsylvania. The first display was a creche placed inside the Allegheny County courthouse.¹⁶ The creche was displayed on the "Grand Staircase" of the courthouse, the most public and beautiful area of the courthouse.¹⁷ The display included some red and white poinsettia plants placed around the creche, as well as two small evergreen trees that were located behind the fence that surrounded the creche.

The second challenged display was a menorah that was placed outside the city-county office building. This 18 foot menorah, which was owned by Chabad, a Jewish group, but was stored, erected, and removed by the city, was placed next to the city's 45 foot Christmas tree. The tree was decorated with lights and ornaments. In addition, the city placed a sign on the foot of the tree. This sign bore a message from the mayor of the city stating that "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of liberty."¹⁸

The members of the Court applying the endorsement test found that a reasonable observer would conclude that the creche constituted an endorsement of Christianity. The

reasons for this conclusion were rooted in the context of the display. First, despite the token inclusion of the poinsettia plants and the trees, the creche was, the Court believed, displayed on its own, unlike the menorah which was displayed with secular symbols such as the tree and the sign. Thus, the creche was a purely religious display. This case, thus, the Court concluded, differed from *Lynch v. Donnelly* where the Court allowed the city of Pawtucket, Rhode Island to sponsor the display of a creche. There the religious message of the creche was transformed into a secular message of celebration of the holidays because it was displayed alongside secular symbols such as Santa Claus, reindeer, colored lights, and candy striped poles.

Second, unlike in *Lynch*, where the creche was displayed in a private park, this display was placed in the most public of locations. Furthermore, this display was not located in a place, such as a public park, where a reasonable observer might believe that it was just one of many expressions of private opinion. Instead, it was placed in the courthouse where, in general, private displays were disallowed and where core functions of government were conducted. The placement of this Christian symbol, untempered by any secular symbol, in the most prominent setting of the building which housed one of the most central functions of government sent "an unmistakable message the [city] supports and promotes the Christian praise to God that is the creche's religious message."¹⁹

The menorah, on the other hand, would not have been perceived by the reasonable observer as an endorsement of Judaism. Unlike the creche, which stood alone, the menorah was situated next to two prominent secular displays, the decorated Christmas tree and the sign praising liberty. These secular symbols transformed what would otherwise be a purely religious display into one, when taking all the symbols together, that does not endorse religion. Whether the message of the display is described as either the secular one of holiday celebration or as the importance of the expression of a plurality of views and of liberty in America,²⁰ it is not one of endorsement of religion.

Allegheny, therefore, teaches us that whether a city sponsored (or one that appears to be city

sponsored) holiday display containing religious symbols can be exhibited consistent with the Establishment Clause depends on the context of the entire display. If a religious symbol is displayed by itself in a prominent public space, where no other speech is generally allowed, it will not withstand constitutional scrutiny. If on the other hand, it is accompanied by equally prominent secular symbols, the religious message of the symbol will be transformed into a different message, one that does not endorse religion. It is particularly helpful, as was the case with the menorah, if a plaque or a sign is affixed to the display explaining the non-endorsement content of the message. This kind of direct guidance will make it clear to the reasonable observer that the city does not wish to endorse religion.²¹

Lower federal courts considering the constitutionality of publicly sponsored displays of religious symbols have followed this endorsement approach. The Ninth Circuit, for example, in *Separation of Church and State v. City of Eugene*,²² held that a 51 foot concrete Latin cross in a public park that served as a war memorial constituted an endorsement of religion. This cross was illuminated during holiday seasons, including Christmas. The court found that the maintenance by the city of a Christian symbol, even though it bore a plaque stating that it was a war memorial, "may reasonably be perceived as governmental endorsement of Christianity."²³

In sum, under the endorsement analysis currently prevailing on the Court and applied by the lower federal courts, publicly sponsored displays of religious symbols, if they stand alone, will be found unconstitutional. If the religious symbols are surrounded by secular symbols that are sufficient to transform the message of the entire display to one that does not constitute an endorsement of religion, then the display will be allowed.²⁴

III. Private Speech in Public Fora

Another, in many ways more complex, circumstance in which local governments must worry about the constitutionality of religious displays involves the request of a religious group to place a religious display on public property. The complexity of the constitutional issues triggered by such a request arises from

the need both to protect the free speech and free exercise rights of the religious group involved and to avoid an Establishment Clause violation. In other words, if a city denies the request of a religious group to put up a display, it will be sued for denying the group's First Amendment rights. If the city grants the group's request, those offended by the display will allege that their First Amendment rights have been violated.

How can you avoid being caught on the horns of this dilemma?

First, you need to determine where the religious group wants to place their display. If the public space is not one that has been traditionally reserved for public assembly and speech and thus instead has been reserved by government for official uses, the Court has classified this space as a non-public forum.²⁵ Government may regulate speech in a non-public forum as long as its regulation is reasonable and does not discriminate on the basis of viewpoint.²⁶ The reasonableness of the restriction must be assessed in light of the purpose of the forum and all the surrounding circumstances.²⁷ The government discriminates on the basis of viewpoint when it denies a speaker access to a particular forum solely to suppress the point of view the speaker espouses.²⁸

Thus, if we are dealing with a non-public forum, government has wide discretion to regulate. If for example, the religious groups wish to place their display in the lobby of a government building, such as city hall or a courthouse, where no private speakers have been allowed to engage in speech, the government will most likely be able to deny the request of the religious group without any constitutional problem. All the government will have to show, since it is acting with viewpoint neutrality by refusing all speakers, is that its regulation is reasonable. A city could, for example, argue that it does not want speech displays in the courthouse lobby because they will disrupt government business. This kind of rationale, as long as it is clear that the policy has been enforced regarding requests of speakers of all viewpoints, will usually be sufficient to meet the reasonableness test.

Problems, however, often arise, even in the non-public forum, when cities have allowed

some speech in that forum.²⁹ In *Grossbaum v. Indianapolis-Marion Bldg. Authority*, for example, a Jewish group wished to place a menorah in the lobby of a city-county office building.³⁰ The government refused to allow the display and adopted a policy that it would not permit any religious displays or symbols in the building because the permitting of these displays would have the effect of endorsing religion in violation of the Establishment Clause.

The Seventh Circuit, in agreement with the government, found that the building was a non-public forum but also determined that the government had allowed speech displays in the building, including secular holiday displays such as a Christmas tree.³¹ It would be one thing if the government had banned all holiday displays because they were inconsistent with the purposes of the non-public forum. The government could not, however, consistent with the Constitution, allow secular holiday displays and ban religious ones. This difference in treatment constituted discrimination against speakers with a religious viewpoint.³²

The lessons to be drawn, then, regarding requests to place religious displays in a forum that has not been opened fully to the public is, first, that if the government wishes to ban holiday displays, it must ban both secular and religious displays. One must, however, be careful, even when banning all holiday displays, to not impose such a ban where similar kinds of displays (e.g., where other private groups have routinely used the proposed forum for non-religious speech displays) have been allowed in the forum. The government is on the safest ground in denying a request to erect a display where it has consistently refused to allow any speech displays in the designated area.

The legal calculus changes when the religious group requests access to a public forum. A public forum is one in that by long tradition or government order has been devoted to public assembly and debate.³³ Streets and parks, for example, are generally considered traditional public fora. The right to access to a public forum cannot be denied unless the government can demonstrate both a compelling interest and that the regulation is both necessary and narrowly drawn to achieve that interest.³⁴ Thus, if government wishes to ban speech with

particular content—such as religious speech—from a public forum, it must provide the highest justification required by law. Indeed, one can safely presume that a group seeking access to a public forum, using the normal procedures provided by the government to obtain access, is entitled to a permit for its speech.³⁵

Cities have argued that they can provide the high justification necessary to deny religious groups access to a public forum. They argue that their need to avoid an Establishment Clause violation justifies their refusal to allow religious groups access to a public forum.

The Court, in *Capitol Square Review and Advisory Board v. Pinette*, recently rejected this argument. In *Pinette*, the governing board of the square outside of the state capitol in Columbus, Ohio refused to permit the Ku Klux Klan to erect a cross in a public forum where it had already allowed a Christmas tree and a menorah.³⁶ The Board believed that allowing the placement of such a cross would constitute an endorsement of Christianity. The Court found that, first, the Klan had a First Amendment right to access to the public forum and, second, that allowing this cross would not violate the Establishment Clause.

The various members of Court, not surprisingly, supplied different reasons for the judgment. The four Justices (Kennedy, Rehnquist, Scalia, and Thomas, speaking through Justice Scalia) who have never accepted the endorsement approach pioneered by Justice O'Connor, articulated a firm rule regarding the Establishment Clause implications of allowing religious groups permission to erect religious displays in a public forum. These Justices maintained that providing religious groups equal access to a public forum can **never** constitute a violation of the Establishment Clause, even if a reasonable observer would conclude from observing the display that the state had endorsed religion.³⁷ The plurality reasoned that permitting religious groups less access to a public forum than provided to other groups in the name of avoiding favoritism towards religion was clear, unconstitutional discrimination against religious views.

Justices O'Connor, Souter, and Breyer, however, concurred in the judgment, but opined that the endorsement test should apply to these

private religious displays in public fora just as it applied to publicly sponsored displays. If a reasonable observer would, they argued, conclude from the display that government endorsed religion, it should be disallowed.

To be sure, Justice O'Connor explained in her concurring opinion, it was highly unlikely that the reasonable observer, who after all must be deemed to know the history and context of the community and forum involved, would conclude that use of a public forum by a private religious group would constitute an endorsement of religion.³⁸ The opening of the forum to a wide variety of speech, the use of a neutral permitting process to obtain access, and the history and ubiquity of speech in the particular forum all would cause a reasonable observer to conclude that no endorsement takes place when a religious group is granted equal access to a public forum.³⁹ One, however, cannot absolutely dismiss, as did the plurality, the relevance of any apparent endorsement of religion.

Both Justices O'Connor and Souter concluded that the government in *Pinette*, while allowing the display, should have taken steps to demonstrate that it did not endorse the message of the cross. First of all, it should have required the Klan to place a disclaimer on the display.⁴⁰ Justice Souter also observed that the most troublesome aspect of the display was that it was a large, unattended object near important government buildings. He argued that "[w]hen an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost to the speaker, while an unattended display . . . can naturally be viewed as belonging to the owner of the land on which it stands."⁴¹ He concluded both that it would have been better for the government if such unattended displays were limited to a particular corner of the square, marked with a permanent disclaimer, and that the Board could have banned all unattended displays from the Square.

Just as we saw earlier, then, the Justices who supplied the decisive votes for the Court's judgment in Establishment Clause litigation applied the endorsement test. Given this reality, lower federal courts have chosen to follow the endorsement test when dealing with these problems. While these courts, as did Justice O'Connor, will most likely find that equal

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access to a public forum does not constitute an endorsement of Christianity, it still pays to take the precautionary measures recommended by Justices O'Connor and Souter, including ordering the use of a disclaimer and the consideration of neutral time, place, and manner regulation of unattended displays. In sum, a city should, in almost all cases, allow a religious group who has applied for permission, through the normal channels, to use a public forum to do so, while doing what it can to disclaim any endorsement of the religious message.

IV. Conclusion

Instead of attempting to reach heights (or lows) of eloquence, I will conclude by trying to boil down the analysis of this paper into a series of concrete recommendations for attorneys facing the variety of problems that can arise from religious displays on public property.

First, if you represent a city that wishes to sponsor its own religious display on public property (or it will appear that the display is publicly sponsored because, for example, it is located in an area where speech is not generally allowed), you must, in order to pass the endorsement test, make sure that:

1. The religious symbols displayed do not stand alone, particularly if the display is located in a core area of government (such as a courthouse lobby.)

2. The display must include sufficient secular symbols (or symbols from another religion) so that the message of the display is transformed from a religious one into a non-endorsing one, such as celebration of the holiday season or pluralism. It will be easier to argue in favor of the constitutionality of the display if it is a display that has been used for many years.

3. The display should include some statement indicating the non-religious message.

Second, if a city faces a request from a private group to place a religious display on public property, the attorney for the city should think through the problem in the following way:

1. If the requested forum is a non-public forum and no other speakers have been allowed to use the forum, then the city most likely

can safely deny the request. If other speakers have been allowed to use the forum in a way similar to that requested by the religious speaker (e.g., to enact a Christmas tree), the religious group must receive the same permission.

2. If, however, the forum requested is a public forum, the city has a duty to grant equal access to religious groups. It must allow the group, assuming that the group has followed the structured permitting process all cities should possess in allocating use of the public forum, to use the public forum.

3. In granting the access, however, the city (assuming that it does not wish to ban all unattended displays from the public forum) should consider restricting unattended displays to a particular, and, hopefully, less centrally located part of the public forum.

4. The city should require all religious groups granted permission to place a display in the public forum to include a visible disclaimer of public endorsement of religion. The history and ubiquity of the religious practice will also help the practice pass scrutiny.

If you follow this general approach, I don't promise you more gifts for Christmas, but you might have fewer headaches.

1. 403 U.S. 602 (1971).

2. See *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141, 2149-50 (1993) (Scalia, J., concurring) ("Like some ghoul in a late night horror movie . . . *Lemon* stalks our Establishment Clause jurisprudence . . ."). *Lemon* has come under attack principally because the application of the test has led to wildly disparate results in seemingly similar cases. Compare, for example, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (holding that the provision of tuition rebates and tax deductions for religious education violates the Establishment Clause) and *Mueller v. Allen*, 463 U.S. 388 (1983) (finding tax deductions for religious education constitutional under the Establishment Clause). I could list many other, equally contradictory, decisions.

I believe that the reason for these contradictory results is that a majority of the Court has never been willing to faithfully apply the *Lemon* test. If the Court did apply *Lemon* as it is written, no government program or action that led to any state interaction with religious institutions would withstand scrutiny. The test is designed to prevent, in a systematic fashion, any form of significant government involvement with religion. If the legislation is *intended* to benefit the religious, it is struck down. If the action has the *effect*, without any intent, of benefiting the religious, it is struck down. Finally, even if the action does not have the intent or the primary effect of benefiting religion, the government action must be struck down if religious institutions become involved with government. This systematic elimination of any form of cooperation between religious institutions and government goes much farther toward the establishment of a purely secular state than most Americans, including Supreme Court Justices, are willing to accept. The Court, then, in applying *Lemon*, despite its literal meaning, refuses to strike down what it considers to be benign cooperation between religion and government. Hence, the Court's occasional accommodation of religion often does not square with either its rhetoric or its previous decisions.

3. *Board of Educ. of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2495 (1994) (Blackmun, J., concurring) (noting that the opinion of the Court relied on decisions utilizing the *Lemon* framework).

4. But see *Edwards v. Aguillard*, 482 U.S. 578 (1987).

5. See *Aguilar v. Fenton*, 473 U.S. 402 (1985).

6. The Court has been severely split on its approach to Establishment issues for at least the last 15 years. One faction of the Court, including Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and retired Justice White would abandon the *Lemon* test, including the endorsement portion of it, and give government much more leeway in acknowledging the role of religion in public life. Other

justices, including retired Justices Brennan and Marshall, argued for a strict application of *Lemon*. The Justices providing the decisive votes, best represented by Justice O'Connor, have adopted the endorsement approach. The Court's latest decisions, such as *Capitol Square*, show some indication that the endorsement approach may have won over a clear majority of the Court.

7. The Court has also applied this "endorsement" concept to the purpose prong, asking whether the challenged practice was instituted for the purpose of endorsing religion. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down state moment of silence law because it was enacted for the purpose of endorsing religion.)

8. *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3100 (1989).

9. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

10. *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440, 2452 (1995) (O'Connor, J., concurring).

11. *Id.* at 2455 (O'Connor, J., concurring).

12. *Id.* at 2455 (O'Connor, J., concurring).

13. It is understandable that one might believe that a Christmas tree is a religious, not a secular symbol. The Court, however, has treated it as a secular symbol. See *Allegheny*, 109 S.Ct. at 3113.

14. *Id.* at 3103-04.

15. This point, as I will discuss, is especially important when analyzing private religious displays placed in public fora, such as in the *Capitol Square* case.

16. This creche, unlike the one in *Lynch v. Donnelly*, was not owned by the city or county, but rather was owned by the Holy Name Society, a Roman Catholic group. (Indeed, it bore a plaque stating that it was donated by the society.) Its placement, however, not in a public forum, but in a public space in which private speech was not generally allowed, gave it the characteristics of a publicly sponsored display.

17. *Allegheny*, 109 S.Ct. at 309.

18. *Id.* at 3095.

19. *Id.* at 3104.

20. Justices Blackmun and O'Connor, both of whom applied the endorsement analysis, while agreeing that the message was secular, disagreed on the content of the message. Justice Blackmun concluded that the menorah, in the context of the display, conveyed the secular message of celebration of the holiday season. Justice O'Connor, worried that Justice Blackmun had implied that the religious content was drained from the menorah, argued instead that the religious significance of the menorah was still present, but that it did not constitute an endorsement of religion because the reasonable observer would conclude that the menorah was displayed in order "to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or non-belief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 3123 (O'Connor, J., concurring).

21. Let me make clear, however, that a simple disclaimer of any intent to endorse religion attached to an untempered religious symbol in a prominent public space will not be sufficient to remove the message of endorsement.

22. 1996 U.S. App. LEXIS 20990 (August 20, 1996).

23. *Id.* at 7.

24. The Tenth Circuit's decision in *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1996), involving a cross on the Edmond city seal, demonstrates that even if a religious symbol is surrounded by secular symbols, the reasonable observer would still perceive that the seal constituted an endorsement of Christianity. The city attempted to argue that the inclusion of the cross was meant only to express the secular message of the historic importance of Christianity, but the court concluded that the reasonable observer of the seal would perceive only the message of the endorsement of Christianity.

25. *Capitol Square*, 115 S.Ct. at 2446.

26. *Grossbaum v. Indianapolis-Marion Bldg. Authority*, 63 F.3d 581, 587 (7th Cir. 1995).

27. *Id.* at 587.

28. *Id.* at 587.

29. The Court has created the category of the "limited public forum" when government decides to open a forum (almost always one that is not a traditional public forum to some forms of speech, but does not open it sufficiently to make it into a public forum. In other words, the government has decided to allow only particular categories of speech in the forum. The government may restrict the use of such a forum in order to preserve it for the use for which it was dedicated. *Lamb's Chapel*, 113 S.Ct. at 2146.

30. *Grossbaum*, 63 F.3d at 582-83.

31. *Id.* at 589.

32. *Id.* at 590 ("[T]he policy challenged here was constructed to prevent one thing: seasonal holiday displays of a religious character.")

33. *Id.* at 586.

34. *Capitol Square*, 115 S.Ct. at 2446. If government wishes to regulate, however, the time, place, and manner of speech, it can do so if it demonstrates that the regulation is narrowly tailored to achieve a significant government interest and that ample channels of expression have been left open.

35. It is vital, however, that if a city permits a religious group to use a public forum for a religious display, it must grant that permission on the same basis that it grants it to other speakers. If a city treats a religious group more favorably than it does other speakers by, for example, the use of an ad hoc process in granting permits to favored groups, the city will be found to have violated the Establishment Clause. *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 385 (9th Cir. 1996).

36. *Capitol Square*, 115 S.Ct. at 2445.

37. *Id.* at 2449-50.

38. *Id.* at 2453 (O'Connor, J., concurring).

39. *Id.* at 2452-56 (O'Connor, J., concurring).

40. *Id.* at 2453 (O'Connor, J., concurring) ("To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community.")

41. *Id.* at 2458 (Souter, J., concurring).

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