The "Christmas Wars"

Holiday Displays and the Federal Courts

Heated disputes over seasonal religious displays in public spaces have become an American holiday tradition. Indeed, each year, as Christmas and Hanukkah approach, Americans across the country contest the appropriateness of the government sponsoring or even permitting the placement of nativity scenes, menorahs and other holiday decorations on public property.

The "Christmas wars," as these debates are known, have become a front in a much wider culture war. On one side, social conservatives argue that local governments have every right to recognize and acknowledge the religious nature of what are, after all, religious holidays. Civil libertarians and others counter that government should not be in the business of promoting religion, and that doing so is discriminatory and in violation of the First Amendment's prohibition on religious establishment.

What is and is not allowed when it comes to religious displays is still, to a large degree, open to debate. Some legal experts blame this uncertainty on the Supreme Court. The high court, they argue, has crafted a standard for judging the constitutionality of displays that is too subjective and thus leads to inconsistencies when applied by the lower courts.

Judicial efforts to determine whether various holiday displays violate the Constitution are part of a larger series of cases involving public religious displays. Since the early 1980s, courts have considered the constitutionality of a variety of religious displays, from Ten Commandments monuments on public property to religious symbols on government seals. While the holiday cases involve a unique set of contextual issues, all display cases ultimately involve the same basic constitutional questions.

The Supreme Court first addressed the issue of government sponsorship of seasonal religious displays in *Lynch v. Donnelly* (1984), which involved an annual display of holiday decorations sponsored by the city of Pawtucket, Rhode Island. The city's display featured a crèche (a manger scene portray-

THE FORUM IS A PROJECT OF THE PEW RESEARCH CENTER

NOVEMBER 2006

LEGAL BACKGROUNDER

ing the birth of Jesus) as well as an array of other items including Santa, reindeer, a Christmas tree and cutout figures of a clown and an elephant. The group of residents that brought suit argued that the Christmas display, and especially the crèche, constituted government sponsorship of religion and thus violated the Establishment Clause.

In a 5-to-4 ruling, the Supreme Court decided that Pawtucket's display did not violate the Constitution. Writing for the majority, Chief Justice Warren Burger emphasized the long history of official acknowledgment of the role of religion in American life. This history, he wrote, suggests that the Establishment Clause does not require a total exclusion of religious images and messages from government sponsored displays.

Burger further argued that the Christmas holiday had sufficient secular importance to justify Pawtucket's support for the display, and that the city had included the crèche to "depict the historical origins of this traditional event" rather than to express official support for any religious message the crèche might convey.

Although Burger wrote for the court's majority, it was Justice Sandra Day O'Connor's concurring opinion that set out the standard used in subsequent cases to judge the constitutionality of displays. Her influence in *Lynch* was a reflection of her position as the fifth and deciding vote in a closely divided court.

In her opinion, Justice O'Connor wrote that "the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Official endorsement of religion, she argued, elevates some persons to special status because their beliefs have been officially recognized, and denigrates those who do not hold the sanctioned beliefs. Thus, O'Connor concluded, courts should ask whether a reasonable person would view the government's actions as an endorsement of a particular religion.

Justice O'Connor noted that in Pawtucket, the crèche was featured with Santa and other secular holiday displays. In such a context, she determined, a reasonable person would not see the presence of a crèche as an endorsement of Christianity, but rather as one of a number of relevant holiday symbols.

The most potent dissent came from Justice William J. Brennan, who argued that the city of Pawtucket had failed to demonstrate a "clearly secular purpose" for including the crèche. The other, non-religious objects were more than sufficient, he argued, to achieve the city's legitimate goals of encouraging goodwill and commerce during the holidays; the crèche was added because city officials desired to "keep Christ in Christmas." The court, he concluded, could not then say that "a wholly secular goal predominates" in the city's holiday display.

Five years after *Lynch*, the Supreme Court returned to the question of government-sponsored religious displays. The new case, *County of Allegheny v. ACLU* (1989), involved two different displays in downtown Pittsburgh. One featured a crèche donated by a Roman Catholic group and placed on the "Grand Staircase" of the county courthouse. The other was a broader display outside a city-county office building that included a menorah owned by a Jewish group, a Christmas tree and a sign proclaiming the city's "salute to liberty." In a notably splintered decision, the Court found the display of the crèche to be unconstitutional, but approved the outdoor exhibit. The decision included nine distinct opinions, which reflected the shifting majorities.

One group of justices (William Rehnquist, Antonin Scalia, Clarence Thomas, and Anthony Kennedy) found all the Allegheny County displays permissible. Echoing Burger's opinion in *Lynch,* the four justices argued that the Establishment Clause should be viewed through the lens of history, and that history shows that the clause has traditionally allowed for substantial government accommodation of religion. Although government cannot coerce someone to support religion, government should have significant latitude in providing passive acknowledgment of religion. In this case, the four justices concluded, all of the displays, including the crèche, involved only that kind of passive recognition and hence did not violate the Establishment Clause.

A well-placed Santa and reindeer could save a crèche from being removed from the village square by a federal court.

A second group of justices (Brennan, John Paul Stevens and Thurgood Marshall) concluded that both displays violated the Establishment Clause. They argued the proper standard to apply was O'Connor's test from *Lynch* – namely, whether a reasonable person would view the government's action as an endorsement of religion – and that both of the Allegheny County displays failed that test.

In the view of these three justices, the two displays shared the same flaw in that they constituted government recognition of religious symbols. Whether it touches on one, some, or all religions, the three justices reasoned, the Establishment Clause bars such recognition. They concluded that religious symbols should be excluded from public displays unless the symbols are fully integrated into a clearly secular message.

Justice O'Connor, who along with Justice Harry Blackmun represented the swing votes in the case, used her opinion to apply the "endorsement" test she had introduced in *Lynch.* In this case, citing both the particulars of the display as well as its setting, she concluded that the crèche represented an unconstitutional endorsement of Christianity. Justice O'Connor pointed out that the courthouse crèche included the figure of an angel bearing a banner with the Latin phrase meaning "Glory to God in the Highest," and the crèche was displayed by itself in the "most beautiful" part of the county building. Thus, she concluded, a reasonable observer would perceive the display as an endorsement by the city of the religious message that the birth of Jesus was an event of great religious significance.

By contrast, the outside display, which included the menorah, Christmas tree, and liberty sign, did not represent an endorsement of religion, according to Justice O'Connor. Although she acknowledged the religious character of the menorah and the partial religious character of the Christmas tree, a reasonable observer, she said, would see in those multiple symbols a message of religious tolerance and diversity. The display, in its particular setting, "conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs," she concluded.

Although *Allegheny County* is the Supreme Court's most recent word on seasonal religious displays, lower federal courts have remained actively engaged in the issue, handing down a number of decisions on holiday displays. As already noted, some legal commentators contend that these lower court rul-

ings lack consistency, and some judges involved in these cases agree with this criticism. One U.S. Circuit Court of Appeals judge, for instance, has complained that O'Connor's test in *Lynch* required "scrutiny more commonly associated with interior decorators than with the judiciary."

The various court decisions suggest at least one rule of thumb: the safest course for public officials planning a seasonal religious display is to surround it with more secular holiday symbols.

In short, a well-placed Santa and reindeer could save a crèche from being removed from the village square by a federal court.

The *Lynch* and *Allegheny County* cases involved religious displays sponsored by state or local governments. A different constitutional problem arises if a state creates a public forum, such as a public square open to all, in which private parties are free to present their own views. In such a forum, the views expressed are not attributable to the government and the government is not seen as "endorsing" those views. At the same time, the courts have ruled that the government may not discriminate in granting access to such public spaces, and it may not be able to block such unwanted expression as a cross erected by the Klu Klux Klan or a speaker with opinions that some find offensive.

These equal access principles have come into play in cases involving holiday displays. For example, in *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati* (2004) the Sixth U.S. Circuit Court of Appeals ruled that the city of Cincinnati could not exclude a religious group from placing a Hanukkah menorah on the city's main public square. Because the square was a public forum for private expression, the court concluded that the city had unconstitutionally attempted to exclude controversial displays, including those with religious content that might offend local citizens. The right of equal access to a public forum did not permit such an exclusion, the court ruled.

Released on December 12, 2006

This report was written by David Masci, a senior research fellow at the Pew Forum on Religion & Public Life, Ira "Chip" Lupu, the F. Elwood & Eleanor Davis Professor of Law at George Washington University, and Robert Tuttle, the David R. and Sherry Kirschner Berz Research Professor of Law & Religion at George Washington University.

1615 L STREET, NW SUITE 700 WASHINGTON, DC 20036–5610
202 419 4550 TEL 202 419 4559 FAX WWW.PEWFORUM.ORG