



RELIGIOUS DISPLAYS AND THE COURTS

JUNE 2007



Over the last three decades, government displays of religious symbols have sparked fierce battles, both in the courtroom and in the court of public opinion. Indeed, disputes over seasonal religious displays have themselves become an annual holiday tradition. Each year as the winter holidays approach, Americans across the country debate the appropriateness of the government sponsoring, or even permitting, the display of Christmas nativity scenes, Hanukkah menorahs and other religious holiday symbols on public property.

Polls show that a large majority of Americans support this type of government acknowledgment of religion. In a 2005 survey conducted by the Pew Research Center, 83 percent of Americans said displays of Christmas symbols should be allowed on government property. In another 2005 Pew Research Center poll, 74 percent of Americans said they believe it is proper to display the Ten Commandments in government buildings.

The Supreme Court first addressed the constitutionality of public religious displays in 1980 when it reviewed a Kentucky law requiring public schools to display the Ten Commandments in classrooms. The court determined that the Kentucky measure amounted to government sponsorship of religion and was therefore unconstitutional. According to the court, the law violated the First Amendment's Establishment Clause, which prohibits government from establishing a religion and from favoring one religion over another, or from favoring religion generally over nonreligious beliefs.

Four years later, the court took up its first case that specifically involved holiday displays. In that case, the court ruled that a Christmas nativity scene that the city of Pawtucket, R.I., had placed in a municipal square was constitutionally acceptable. The court stated that the nativity scene simply recognized the historical origins of the holiday, one that has secular as well as religious significance. In those circumstances, the justices concluded, the

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nativity scene did not reflect an effort by the government to promote Christianity.

Since these two decisions in the 1980s, the Supreme Court and lower federal courts have issued somewhat unpredictable rulings, approving some religious displays while ordering others to be removed. For instance, five years after approving the Pawtucket nativity scene, the Supreme Court ruled that a nativity scene on the staircase of a Pittsburgh, Pa., courthouse was unconstitutional. In that instance, the court concluded that, unlike the situation in Pawtucket where the crèche was shown together with more secular symbols, the Pittsburgh crèche was prominently displayed on its own and thus amounted to a government endorsement of religion.

In 2005, the court ruled divergently in two cases involving permanent displays of the Ten Commandments. In one instance, the court decided that the relatively recent placement of the Ten Commandments in courthouses in two Kentucky counties violated the Establishment Clause because a “reasonable observer” would conclude that the counties intended to highlight the religious nature of the document. In the other case, however, the court ruled that a display of the Ten Commandments that had stood for more than 40 years on the grounds of the Texas state Capitol did not violate the Establishment Clause because a reasonable observer would not see the display as predominantly religious.

In reaching these decisions, the Supreme Court has relied heavily on a close examination of the particular history and context of each display and has largely sidestepped setting clear rules that would assist lower courts in deciding future cases. One result is a great deal of uncertainty about whether and how communities can commemorate religious holidays or acknowledge religious sentiments.

The lack of clear guidelines reflects deep divisions within the Supreme Court itself. Some justices are more committed to strict church-state separation and tend to rule that any government-sponsored religious display violates the Establishment Clause. These same justices also believe that, in some circumstances, the Establishment Clause may forbid private citizens from placing religious displays on public property.

Other members of the court read the Establishment Clause far more narrowly, arguing that it leaves ample room for religion in the public square. In recognition of the role that religion has played in U.S. history, these justices have been willing to allow government to sponsor a wide

variety of religious displays. In addition, they have ruled that the Establishment Clause never bars private citizens from placing religious displays in publicly owned spaces that are generally open to everyone.

The Supreme Court has relied heavily on a close examination of the particular history and context of each display and has largely sidestepped setting clear rules that would assist lower courts in deciding future cases.

A third set of justices has held the middle ground, so far, controlling ground. This group takes the view that a religious display placed in a public space violates the Establishment Clause only when it conveys the message that the government is endorsing a religious truth, such as the divinity of Jesus. For these justices, this same principle applies whether the display is sponsored by the government or by private citizens.

These divisions and occasional shifts have led to what many observers say are conflicting or inconsistent decisions on displays that are strikingly similar. Whether the appointments to the Supreme Court of Chief Justice John Roberts and Justice Samuel Alito will clarify the picture remains to be seen. Regardless, the struggles over public religious displays have confirmed Justice Oliver Wendell Holmes' observation in 1890: "We live by symbols." He might have added that we fight over them too.

RELIGIOUS HOLIDAY DISPLAYS

RELIGIOUS HOLIDAY DISPLAYS AND THE SUPREME COURT

The Lynch Decision

A Christmas nativity scene in downtown Pawtucket, R.I., brought the issue of holiday displays to the Supreme Court for the first time. The case, *Lynch v. Donnelly* (1984), involved the city's sponsorship of an annual display of holiday decorations, which included a crèche (a manger scene portraying the birth of Jesus) as well as a Santa Claus, reindeer and other figures. 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 5-4 decision, the Supreme Court ruled that Pawtucket's display did not violate the Constitution. Writing for the majority, Chief Justice Warren Burger emphasized that government has long had the authority to acknowledge the role that religion has played in U.S. history. This authority suggests, he said, that the Establishment Clause does not require a total exclusion of religious images and messages from government-sponsored displays. He concluded that the local government had included the crèche to "depict the historical origins of this traditional event" rather than to express official support for any religious message.

Although Burger wrote for the court's majority, it was Justice Sandra Day O'Connor's concurring opinion that ultimately proved more influential,

SUPREME COURT CASE

LYNCH v. DONNELLY (1984)

MAJORITY:
BURGER
O'CONNOR
POWELL
REHNQUIST
WHITE

MINORITY:
BLACKMUN
BRENNAN
MARSHALL
STEVENS

establishing the test that courts have relied upon in later cases. O'Connor declared that the Establishment Clause prohibited government from allowing religious belief or membership to impact a person's position in "the political community." Government endorsement of religion, she argued, elevates some persons to special status because their beliefs have been officially recognized and denigrates others who do not hold the sanctioned beliefs.

For O'Connor, government *endorsement* was the key factor. Courts, she argued, should ask whether a "reasonable person" would view the government's actions as an endorsement of particular religions. But while endorsement is prohibited, she argued, mere acknowledgement of religion, or of religion's role in the nation's history, is not.

O'Connor noted that in Pawtucket, the crèche was featured with a Santa Claus figurine and other secular holiday images. In such a context, she concluded, a reasonable person would not see the crèche as a government endorsement of Christianity but rather as one of a number of symbols that were relevant to a holiday that has secular as well as religious significance.

The strongest dissent came from Justice William J. Brennan, who argued that the city of Pawtucket had failed to demonstrate a "clearly secular pur-

pose" for including the crèche. The other, nonreligious objects were more than sufficient, he reasoned, to reach the city's legitimate goals of encouraging goodwill and commerce. The crèche was added, he concluded, because city officials desired to "keep Christ in Christmas," and therefore the court could not say that "a wholly secular goal predominates" in the city's holiday display.

The Allegheny County Decision

Five years after *Lynch*, the Supreme Court returned to the question of seasonal religious displays sponsored by the government. The new case, *County of Allegheny v. ACLU* (1989), involved two different displays in downtown Pittsburgh, Pa. One featured a crèche that was donated by a Roman Catholic group and was placed on the main 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"; it did not include a crèche.

SUPREME COURT CASE

COUNTY OF ALLEGHENY v. ACLU (1989)

In Allegheny County, the court addressed the constitutionality of two displays as separate questions, producing two different majorities of justices. Only Justices O'Connor and Blackmun were in both majorities

BOTH DISPLAYS
PERMISSIBLE:
KENNEDY
REHNQUIST
SCALIA
WHITE

BOTH DISPLAYS
UNCONSTITUTIONAL:
BRENNAN
MARSHALL
STEVENS

UPHOLD OUTSIDE DISPLAY,
STRIKE DOWN INSIDE DISPLAY
BLACKMUN
O'CONNOR

For the court, the case proved unusually divisive. In a notably splintered decision that included nine separate written opinions, the court found the display of the crèche inside the courthouse to be unconstitutional but approved the outdoor exhibit.

One group of justices (William Rehnquist, Antonin Scalia, Byron White and Anthony Kennedy) found both *Allegheny County* displays permissible. Echoing Burger's opinion in *Lynch*, the four justices argued that the Establishment Clause needs to be viewed through the lens of history, which has allowed for substantial government acknowledgment of religion. They argued that although government may not coerce someone to support religion, it should have significant latitude to passively acknowledge religious holidays. In *Allegheny County*, the four justices concluded, all of the displays, including the crèche, involved only that kind of passive recognition and therefore did not violate the Establishment Clause.

A second group of justices (John Paul Stevens, Brennan and Thurgood Marshall) concluded that both displays violated the Establishment Clause. They argued that the standard that should apply was O'Connor's test in *Lynch* – namely, whether a reasonable person would view the government's action as an endorsement of religion. In their view, both *Allegheny County* displays failed that test. Whether the displays include symbols representing one, some or all religions, the three justices reasoned, the Establishment Clause bars such endorsement. Religious symbols, they concluded, should be excluded from public displays unless the symbols are fully integrated into a clearly secular message.

O'Connor, along with Justice Harry Blackmun, represented the swing votes in the case. Applying the endorsement test she had introduced in *Lynch*, O'Connor cited both the particulars of the crèche

RELIGIOUS DISPLAYS AND THE COURTS: SIGNIFICANT SUPREME COURT RULINGS

Stone v. Graham (1980)

The court ruled that a Kentucky statute requiring public schools to post a copy of the Ten Commandments in every classroom was unconstitutional.

Lynch v. Donnelly (1984)

The court ruled that a Pawtucket, R.I., Christmas display, which included a crèche as well as more secular symbols of Christmas, such as a Santa Claus and reindeer, was permissible.

County of Allegheny v. ACLU (1989)

The court struck down a Christmas crèche displayed alone inside a courthouse in Pittsburgh, Pa., but upheld the same city's broader holiday display that included a Christmas tree and menorah.

Capitol Square Review Board v. Pinette (1995)

The court ruled that Ohio officials were wrong to deny the Ku Klux Klan the right to place a large cross on a public plaza where displays by private citizens were permitted.

McCreary County v. ACLU of Kentucky (2005)

The court ruled that the placement of framed copies of the Ten Commandments in courthouses in two Kentucky counties was unconstitutional.

Van Orden v. Perry (2005)

The court ruled that a monument inscribed with the Ten Commandments on the Texas state Capitol grounds was permissible.

as well as its setting to conclude that it represented an unconstitutional endorsement of Christianity. She 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 that 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.

In contrast, O’Connor said, the outside display, which included the menorah, Christmas tree and “salute to liberty” sign, did not represent an endorsement of religion. Although she acknowledged the religious character of the menorah and the partial religious character of the Christmas tree, she determined that a reasonable observer 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.

RELIGIOUS HOLIDAY DISPLAYS AND THE LOWER COURTS

While *Allegheny County* is the Supreme Court’s most recent word on seasonal religious displays, the lower federal courts have remained very engaged in the issue. The courts’ application of O’Connor’s endorsement test has led to different outcomes. In deciding whether a reasonable observer would view a particular display as an endorsement of religion or of a holiday’s religious meaning, courts have had to consider the smallest details of each display. The significant factors have included the precise location of the display; the extent to which it includes secular symbols, such as a Christmas tree; the exact placement of the more religious symbols, such as a crèche or a

menorah; and the extent to which the display reflects the religious diversity of the community. In these lower federal court cases, different judges have frequently reached very different conclusions based on very similar facts.

In deciding whether a reasonable observer would view a particular display as an endorsement of religion or of a holiday’s religious meaning, courts have had to consider the smallest details of each display.

For example, in *ACLU v. City of Chicago* (1987), a divided panel of the 7th U.S. Circuit Court of Appeals found unconstitutional a Christmas display in Chicago’s City Hall. The display included a nativity scene as its centerpiece, surrounded by a Christmas tree, a Santa Claus figure and other secular symbols of the holiday. The court, emphasizing the display’s location within the seat of government, determined that a reasonable observer would conclude the city was endorsing the holiday’s religious significance. In his dissent, the court’s chief judge, Frank Easterbrook, complained that the endorsement test required “scrutiny more commonly associated with interior decorators than with the judiciary.”

The 3rd Circuit reached a different conclusion in 1999 when it upheld a holiday display on property in front of City Hall in Jersey City, N.J. From 1965-1995, the city had marked the December holiday season by displaying a crèche, a Christmas tree and

a menorah. After a U.S. district court ruled that the display was an impermissible endorsement of both Christianity and Judaism, city officials added a Santa Claus, a Frosty the Snowman, a sled, Kwanzaa symbols on the Christmas tree and a sign announcing the city's intention to "celebrate the diverse cultural and ethnic heritages of its people." After several trips through the courts, the case came before an appeals court panel that included future Supreme Court Justice Alito.

Using O'Connor's endorsement test, Alito's majority opinion concluded that the addition of the new items sufficiently changed the display into a celebration of seasonal religious pluralism rather than an endorsement of Christmas and Hanukkah. Dissenting Judge Richard Nygaard, on the other hand, emphasized the size and centrality of the crèche and the menorah, and concluded that the display's unconstitutionality could not be cured by "the addition of a few small token secular objects."

PERMANENT RELIGIOUS DISPLAYS

PERMANENT RELIGIOUS DISPLAYS AND THE SUPREME COURT

A second category of Supreme Court decisions focuses on permanent, rather than seasonal, religious displays that involve some form of government sponsorship. Most of these cases involve displays of the Ten Commandments.

The *Stone* Decision

The court's first such decision came in *Stone v. Graham* (1980), a case that focused on a Kentucky statute requiring public schools to post a copy of

SUPREME COURT CASE

STONE v. GRAHAM (1980)

| MAJORITY: | MINORITY: |
|-----------|-----------|
| BRENNAN | BLACKMUN |
| MARSHALL | BURGER |
| POWELL | REHNQUIST |
| STEVENS | STEWART |
| WHITE | |

the Ten Commandments in every classroom. The state of Kentucky argued that the statute was designed to show students the secular importance of the Ten Commandments as "the fundamental legal code of Western civilization and the common law of the United States." But the court overturned the statute, concluding that the state lacked a plausible secular purpose for posting what the court saw as "undeniably a sacred text." An important factor in the court's decision was the public school setting. Courts have been especially wary of religious activity in the classroom because children are a captive audience and also are more impressionable than adults.

The Supreme Court returned to the issue of government display of the Ten Commandments in two cases decided on the same day in 2005. Rather than leading to clear, consistent rules, however, the sharply divided decisions in these cases further underscored the difficulty of the issues for local and state governments as well as for the courts.

The McCreary County Decision

The first case, *McCreary County v. ACLU of Kentucky*, involved two Kentucky counties that had posted framed copies of the Ten Commandments in their courthouses. When a lawsuit was filed demanding that the Ten Commandments be removed, the counties expanded the displays to

SUPREME COURT CASE

MCCREARY COUNTY v. ACLU OF KENTUCKY (2005)

MAJORITY: MINORITY:

| | |
|----------|-----------|
| BREYER | KENNEDY |
| GINSBURG | REHNQUIST |
| O'CONNOR | SCALIA |
| SOUTER | THOMAS |
| STEVENS | |

include several additional documents, each of which emphasized the important role of religion in American history and law. After a federal district court ordered the counties to remove the modified displays, the counties added even more documents along with a label: "The Foundations of American Law and Government Display." The displays included the lyrics to *The Star-Spangled Banner* as well as the texts of the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta and the preamble to the Kentucky Constitution, plus documents explaining the displays.

Justice David Souter, writing for a 5–4 majority, stated that the two Kentucky counties had a religious purpose in posting the Ten Commandments in the courthouses, thus violating the Establishment Clause. Souter emphasized the principle of government neutrality among religions, and between religion generally and nonreligious beliefs. That principle, he wrote, ensures that religion does not ultimately cause political divisiveness and civic exclusion. The threats of divisiveness and exclusion are especially acute, he said, when government permanently and prominently displays a text that is unquestionably religious.

Souter argued that courts must determine the predominant purpose of the display as it would be

seen and understood by a reasonable observer. In this case, he said, a reasonable observer would conclude that the two Kentucky counties wanted to highlight the religious nature of the Ten Commandments. Souter stated that although the counties attempted to mask this religious purpose by surrounding the Ten Commandments with other documents, those documents failed to create a genuine secular context.

Rather than leading to clear, consistent rules, however, the sharply divided decisions in these cases further underscored the difficulty of the issues for local and state governments as well as for the courts.

Justice Scalia wrote the dissenting opinion in the case, asserting that the display of the Ten Commandments had a clearly secular purpose – namely, to demonstrate the role of religious teachings in the development of American law. The Establishment Clause, he stated, did not preclude government from recognizing the civic importance of religion. Moreover, he argued, the state should not be prohibited from acknowledging, and even favoring, the widespread belief in a single Creator.

The Van Orden Decision

The second case, *Van Orden v. Perry*, involved a challenge to the presence on the Texas state Capitol grounds of a stone monument inscribed with the Ten Commandments. The Fraternal

SUPREME COURT CASE
VAN ORDEN v. PERRY (2005)

| MAJORITY: | MINORITY: |
|------------------|------------------|
| BREYER | GINSBURG |
| KENNEDY | O'CONNOR |
| REHNQUIST | SOUTER |
| SCALIA | STEVENS |
| THOMAS | |

Order of Eagles, a primarily secular group that erected similar monuments in other states and cities during the 1950s and 1960s, donated the display to Texas in 1961. It stood on the 22-acre Capitol grounds along with 16 other statues or memorials commemorating significant people and events in Texas history.

In *Van Orden*, a splintered court ruled that the Establishment Clause did not require Texas to remove the monument inscribed with the Ten Commandments from the grounds of its state Capitol. No single opinion received support from a majority of the court, but Chief Justice Rehnquist, in an opinion for a plurality of the justices, restated a common theme in cases involving the Establishment Clause. In deciding such cases, the chief justice wrote, courts must maintain a proper division between church and state, yet do so without “evinc[ing] a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”

In the chief justice’s analysis, the display of the Ten Commandments on the grounds of the Texas Capitol was acceptable because the display constituted only a “passive” recognition of the country’s religious heritage. The stone monument did not compel people seeing it to read the text, he said. Rehnquist also noted the monument’s setting. Because the monument stood outside the Capitol,

he wrote, there was little or no risk the state would use the text “to press religious observance upon [its] citizens.”

Justice Stephen Breyer provided the fifth vote for the majority in *Van Orden*, but he did not join Rehnquist’s opinion and chose to base his conclusion on narrower grounds. This is important because over the years, the court has consistently ruled that when no single opinion represents a majority of the court, the narrowest opinion that supports the court’s decision is the controlling one. Because Breyer qualified his approval of the Texas monument with a set of limiting conditions, his opinion is narrower than that of the plurality and thus is the most significant guide for the lower courts.

In explaining his vote, Breyer did not focus on the government’s authority to acknowledge religion’s historical role in public life. Instead, he stressed the link between civic tranquility and government neutrality on religion. Breyer wrote that the Free Exercise Clause, which protects the right of religious belief and practice, as well as the Establishment Clause are intended to prevent religion from producing the kind of social conflict that would weaken both religion and government. To guard against such divisiveness, he argued, the government should neither favor nor disfavor any particular religion, or religion generally. But even some versions of neutrality can cause divisiveness, he wrote, as would happen if government sought to be “neutral” by completely banishing religion from public life. Neutrality must be tempered with tolerance for some religious practices that might run counter to an absolutist view of church-state separation. Such tempering, Breyer wrote, cannot be reduced to a simple, clear test; it requires the “exercise of legal judgment.”

Applying such legal judgment to the Texas monument, Breyer acknowledged the religious character of the Ten Commandments text but then

evaluated the text's religious character in light of the setting and the monument's origins. A primarily secular organization had donated the monument as part of a campaign against juvenile delinquency, and, as already noted, the display was part of a larger, outdoor setting that included other commemorative markers.

Another key factor in Breyer's opinion was that the Texas monument had generated little controversy during the 40 years it had stood on the Capitol's grounds. Breyer reasoned that an order to remove the Texas monument – and dozens of similar monuments across the country – would inevitably generate clashes and “thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”

Together, however, the two [Ten Commandments] cases suggest that it is the intent of those who put up a permanent religious display – rather than the display's effect – that determines if it is permissible.

In dissenting opinions, Justices Stevens, Souter, O'Connor and Ruth Bader Ginsburg argued that a reasonable observer would see the monument's text – with its large heading, “I am the Lord Thy God” – as an endorsement of religion by the state. They contended that the Texas monument was little different from the Kentucky courthouse displays that the court held unconstitutional in *McCreary County*. In both cases, they argued, the

government failed to demonstrate a predominantly secular motive for the displays.

The court's decisions in these two cases are not easily reconciled. Together, however, the two cases suggest that it is the intent of those who put up a permanent religious display – rather than the display's effect – that determines if it is permissible. If the evidence points to a predominantly religious purpose, a display is likely to be found unconstitutional. If little or no such evidence is available – as may occur when displays have stood for decades – the courts are more likely to permit them.

PERMANENT RELIGIOUS DISPLAYS AND THE LOWER COURTS

Before the Supreme Court issued its decisions in the 2005 Ten Commandments cases, the lower federal courts took their cues from earlier high-court rulings that emphasized the context of the displays and the perceptions of a reasonable observer.

For example, in *Friedman v. Board of Commissioners of Bernalillo County* (1985), the 10th U.S. Circuit Court of Appeals upheld a New Mexico county's use of a seal that included a cross and the phrase, “With This We Conquer.” The court concluded that the seal represented the heritage, history and cultural pride of the county and therefore did not endorse Christianity. In *Freethought Society v. Chester County* (2003), the 3rd Circuit upheld a Pennsylvania county courthouse's front-and-center display of a bronze plaque containing the Ten Commandments. In that case, the court stated that a reasonable observer would conclude the plaque did not endorse religious sentiments. The court also stressed the plaque's significance as a symbol of law, and noted both the plaque's small size and the near illegibility of the text.

After the Supreme Court's pair of 2005 decisions in the Ten Commandments cases, however, lower courts changed their focus. They have started considering more closely whether the displays have a predominantly religious purpose – the approach the Supreme Court used in *McCreary County*. They also are examining more closely the context of the displays and their potential for political divisiveness – as Breyer emphasized in *Van Orden*.

In 2006, for instance, a panel of the 5th Circuit ruled that a Texas county's display of an open Bible in a glass-topped case near the entrance of the county courthouse was constitutionally unacceptable. A major factor in the court's decision in this case, *Staley v. Harris County*, was the county's rededication of the monument in 1995, when it was refurbished thanks to efforts by a locally elected judge who had campaigned on the promise of restoring Christian principles to government. The court concluded that those circumstances demonstrated that the Bible display was intended to promote Christianity. In April 2007, after the full 5th Circuit reheard *Staley*, it dismissed the county's appeal as moot because the courthouse had been closed for renovations and the Bible monument had been placed temporarily in storage. However, the full court also ruled that the original order barring the display should remain in force, and that the original order's terms would govern any future display of the monument by the county.

In contrast, in 2005, the 6th Circuit upheld a Ten Commandments display in Kentucky's Mercer County courthouse. In *ACLU of Kentucky v. Mercer County*, the court emphasized that the exhibit included 10 other historical documents, including copies of the Magna Carta and the Bill of Rights, all displayed with prominence equal to that given to the Ten Commandments. The court found that the county had established a predominantly secular rather than religious purpose for the display.

In a 2005 case originating in Nebraska, a federal district court as well as the 8th Circuit initially found unacceptable the city of Plattsmouth's display of a Ten Commandments monument that was donated by the Fraternal Order of Eagles in the 1960s and situated in a public park 10 blocks from City Hall. After the Supreme Court's decision in *Van Orden*, however, the Court of Appeals granted a rehearing. By a vote of 9–2, the full appeals court reversed itself, this time approving the Plattsmouth monument.

Adding another level of complexity, some cases challenging government religious displays involve state constitutional issues.

The 8th Circuit's opinion in *ACLU v. City of Plattsmouth* emphasized that similar monuments can be found elsewhere in the United States, and that the Plattsmouth monument had been standing for 35 years before suit was filed. It also noted that the monument is considerably further from any public building than the comparable monument in *Van Orden*. As a result, the court concluded, the Plattsmouth monument was a “passive acknowledgment of the roles of God and religion in our Nation’s history,” not a government endorsement of religion. Federal district courts have reached a similar conclusion in every subsequent challenge to a monument that was donated by the Fraternal Order of Eagles during the 1960s. In every instance, the district courts followed the principles laid out in *Van Orden*.

Adding another level of complexity, some cases challenging government religious displays involve state constitutional issues. One such challenge focused on a large Latin cross marking a veterans' memorial on public property in San Diego. In 15 years of litigation, state and federal courts found the cross to be a violation of the California Constitution, which prohibits religious preferences by the state. In 2002, in *Paulson v. City of San Diego*, the 9th Circuit ordered authorities to remove the cross. However, the U.S. Congress transferred ownership of the site to the Interior Department in 2006. Therefore, the issue now must be considered only under the U.S. Constitution rather than under the California Constitution. As a result, the Supreme Court blocked the 9th Circuit's order to remove the cross. Federal courts will now have to consider the original purpose for placing the cross on the site and weigh its religious character against the potential divisiveness of removing it.

PRIVATE RELIGIOUS DISPLAYS IN PUBLIC AREAS

Officials encounter a different set of constitutional issues when the government creates a public forum, such as a public square open to all, where private parties can present their own views. Federal courts have ruled that government may not discriminate in granting access to these public spaces. As a result, government may not be able to block displays that some find offensive, such as a cross erected by the Ku Klux Klan.

SUPREME COURT CASE

CAPITOL SQUARE REVIEW BOARD V. PINETTE (1995)

| MAJORITY: | MINORITY: |
|-----------|-----------|
| BREYER | GINSBURG |
| KENNEDY | STEVENS |
| O'CONNOR | |
| SCALIA | |
| SOUTER | |
| REHNQUIST | |
| THOMAS | |

In one such case, *Capitol Square Review Board v. Pinette* (1995), the Supreme Court addressed the rights of private speakers to place religious displays in a state-created forum. In this case, the court ruled that Ohio officials were wrong to deny the Ku Klux Klan the right to place a large cross on Capitol Square, a 10-acre state-owned plaza surrounding the Ohio Statehouse in Columbus.

Writing for a plurality of the court, Justice Scalia (joined by Justices Thomas, Kennedy and Rehnquist) argued that by excluding the cross, officials had violated the Ku Klux Klan's rights of free expression. Scalia concluded that such a display represented private speech in a public forum, and in such a forum, the speech can never reasonably be attributed to the state. Therefore, he wrote, the government could not cite a violation of the Establishment Clause as a reason to exclude the display from a public forum. In a concurring opinion, Justice O'Connor (joined by Justices Souter and Breyer) agreed that in this case the Ku Klux Klan's rights to free speech had been violated but disagreed on the question of whether private religious speech could ever be reasonably attributed to the government.

The disagreement in *Pinette* is reflected in a number of lower court cases. When government opens public space for the expression of competing views, the courts have ruled, it may not exclude religious views or discriminate in favor of or against certain faiths. If the space is open for private displays, then all parties are entitled to the same access. The rules of the forum must be the same for both religious and nonreligious displays.

Reconciling the need for government neutrality with the notion that public spaces should be open to at least some religious expression can be a difficult balancing act for the courts.

This principle of equal access has come into play in cases involving holiday displays. For example, in *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati* (2004), the 6th 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, an area that the court determined to be a public forum for private expression. The court thus 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.

More recently, the widows of two American combat veterans brought suit against U.S. government officials for refusing to permit a Wiccan symbol (a five-pointed star surrounded by a circle) on headstones in military cemeteries. The government has a list of approved headstone emblems, which includes nearly 40 symbols of religious faith, but the list did not include the Wiccan symbol. In a lawsuit filed in a U.S. district court in Wisconsin, *Circle Sanctuary v. Nicholson*, the widows argued that in this type of public space, the government may not favor some religious faiths over others. In April 2007, the U.S. Department of Veteran Affairs settled the suit by agreeing to allow the Wiccan symbol on grave markers.

If local governments do not want to be held responsible for the content of private displays on public property, they may forbid all such displays, whether religious or secular. For instance, in *Wells v. City & County of Denver* (2001), the 10th Circuit upheld the city of Denver's decision to ban all unattended displays at the entrance to the City and County Building. The ban did not apply to displays attended around the clock by their sponsors. The court found the distinction to be reasonable. With an attended display, the court concluded, there was no risk that the display's message would be attributed to the city, and a prohibition of all unattended displays – religious and nonreligious alike – was a reasonable, nondiscriminatory regulation.

LOOKING AHEAD

Given the important role religion plays in the lives of many Americans, it is all but certain that communities will continue to put up religious displays in public places. As a result, courts will continue to wrestle with the same two seemingly conflicting

principles that have arisen in past displays cases. On the one hand, the Establishment Clause clearly prohibits the government from favoring any one religious creed or denomination, or from favoring religion over nonreligious beliefs. On the other hand, the Constitution permits the government to acknowledge the historical significance of religion in the nation's history and culture.

Reconciling the need for government neutrality with the notion that public spaces should be open to at least some religious expression can be a difficult balancing act for the courts. As the Supreme

Court's decisions in the Ten Commandments cases illustrate, the ultimate outcome usually depends on the specific context of a display: its setting, language and history. Inevitably, however, contextual decisions lack the predictability that comes when courts apply rules that have clear, well-defined lines. But such rules might favor one core principle – government neutrality or acknowledgement of religion – at the expense of the other. Therefore, courts have largely focused – and likely will continue to focus – on the specific facts in each case, in the hope that their decisions honor both principles while still resolving the dispute at hand.

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