To Display or Not to Display?

The constitutionality of religious displays

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Over the years, government displays of holiday and religious symbols have sparked many debates.

So, while the holiday season is a time of joy and cheer filled with family gatherings and jubilation, for local officials, it can be a time of unease as they consider whether to display religious decorations or hold religious activities on municipal property.

Faced with annual decisions such as whether to allow tree lighting ceremonies, Easter egg hunts, menorah displays, or any other religious or quasi-religious events on municipal property, many local government officials find themselves ill-equipped to answer questions that implicate the "Establishment of Religion" clause of the United States Constitution.

To complicate matters further, these issues, and the decisions that local governments make to address them, are usually not brought before state court judges. Rather, litigation pertaining to municipal religious displays is more commonly instituted in federal court where the law may allow for legal fees to be awarded, a substantial motive for a claimant seeking to bring a claim. Since the stakes are high, it is best to exercise caution if you receive a request to allow, or pay for, a religious display on land or buildings owned or controlled by the borough. This article provides a primer on what you should know about the Constitution and how the courts have decided cases challenging the permissibility of religious displays.

The First Amendment was ratified on Dec. 15, 1791 as part of the first 10 Amendments of the Constitution. In part, it states that "Congress shall make no law respecting an establishment of religion. . . ." Known as the Establishment Clause, this portion of the First Amendment generally prohibits the government from establishing a state religion and requires that government maintain a separation of church and state.

As for what this prohibition means . . . the devil is in the details. Given the frequency with which this constitutional provision has been applied, we might expect that a universal standard to have been developed that provides a clear-cut answer as to what constitutes a violation of the Establishment Clause. But the U.S. Supreme Court and the lower appellate courts have not been able to agree on a single "test." To the contrary, the Courts have articulated three different tests for determining whether governmental action violates the Establishment Clause.

The test used in *Lemon v. Kurtzman* is considered the predominant test for determining the constitutionality of a challenged governmental action under the Establishment Clause.

The Lemon test asks the following questions: (1) whether the challenged action has a secular purpose; (2) whether its principal or primary effect advances or inhibits religion; and (3) whether it excessively entangles government with religion.

However, the Court has also applied two other tests, identified as the "endorsement test" (which asks whether a reasonable observer would view the display as a disapproval of his or her particular religious choices) and the "coercion test" (which asks whether the display coerced citizens into supporting or participating in religious activities). Because the Court has not stated that a single one of these three tests is the only proper test to use when deciding Establishment Clause cases, the lower federal courts have been without clear guidance as to how to decide religious display claims.

The use of these different tests makes it difficult to predict the outcome of litigation regarding the permissibility of religious displays on public property. As recently as 2003, the Third Circuit (the appellate court for cases brought in Pennsylvania) recognized that determining "the appropriate legal framework to use when analyzing" religious display cases is "an inquiry that is somewhat murky. . . ." The Third Circuit's sentiments have been echoed by several district courts, which have described the appellate court's religious display case law as not providing "clear guidance." Even members of the U.S. Supreme Court have taken shots at their own case law.

For instance, Justice Clarence Thomas has written:

[W]e have learned that a crèche displayed on government property violates the Establishment Clause, except when it doesn't . . . Likewise, a menorah displayed on government property violates the Establishment Clause, except when it doesn't . . . . A display of the Ten Commandments on government property violates the Establishment Clause, except when it doesn't . . . Finally, a cross displayed on government property violates the Establishment Clause . . . , except when it doesn't.

Likewise, Justice Anthony Kennedy has written that the Court's decisions have the potential to create a "jurisprudence of minutiae" in which the courts would be able to hand down contrary rulings in cases with seemingly identical factual backgrounds.

Justice Kennedy's remarks have proven to be clairvoyant. The courts have indeed issued a number of seemingly contrary decisions on similar factual issues:

- A city did not violate the Establishment Clause when it included a nativity scene among a number of other decorations, such as reindeer, candy canes, a wishing well, and a Jewish menorah, in a public park.
- A county did violate the Establishment Clause when it displayed a nativity scene inside a county courthouse but separate and apart from any other displays.
- A township did violate the Establishment Clause when it displayed a Jewish menorah and a nativity scene on township property.
- A city did not violate the Establishment Clause when it displayed a nativity scene in a public place along with a number of other decorations, including a Jewish menorah and non-religious symbols.

With these decisions in mind, borough officials are cast into the deep waters in deciding whether a tree lighting ceremony, Easter egg hunt, menorah display, nativity scene, or religious or quasi-religious event or display should be allowed.

So what should you take away from all of this? One important point is that there is no concrete, easily identified answer for determining whether the use of public land for a religious display is permissible. Rather, there are multiple tests that utilize fact-specific inquiries to arrive at seemingly contradictory results.

Another important point is that while not an all-inclusive list, the following general factors should be considered when you are faced with the question of whether your borough should display a religious decoration or host a religious activity this holiday season.

- **Historical context:** Does the display or activity have a historical context? If so, that historical context may be found to have a secular purpose that does not violate the Constitution.

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- **Equal access:** Is your municipality actively displaying religious symbols and messages or is it merely allowing others to display on an equal basis? If your municipality is allowing others to display equally, the displays may not be found to a violation of the Constitution.
- **Contribution level:** To what extent has your municipality expended municipal resources on the display or activity? If your municipality has expended significant resources, it may be found to have acted to promote religion in violation of the Constitution.
- **Secular purpose:** Do the symbols have a secular purpose separate and apart from their religious meaning (e.g., Frosty the Snowman, Santa Claus and his reindeer, and, arguably, the Christmas tree). If so, the symbols may be found not to violate the Constitution.

So, the question of whether religious displays are constitutional is not a settled area of the law. For that reason, the factors listed above are not determinative and should be reviewed in conjunction with consulting legal counsel. If you need help with religious displays and activities in your borough, please contact the attorneys at Siana, Bellwoar & McAndrew, LLP.

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Establishment Clause

In *Tearpock-Martini v. Shickshinny Borough*, the U.S. District Court for the Middle District of Pennsylvania applied both the endorsement and *Lemon* tests to decide the constitutionality of a municipal directional sign displaying the words "Bible Baptist Church Welcomes You!," together with a directional arrow, cross, and Bible.

Concluding that the sign passed both tests, the court concluded it did not violate the Establishment Clause and was, therefore, constitutional. Similarly, the U.S. District Court for the Western District of Pennsylvania, in *Freedom from Religion Foundation v. Connellsville Area School District*, applied a modified *Lemon* test when it determined the display of the Ten Commandments on a monument located on public school property was unconstitutional because it had no secular purpose and would be perceived by a reasonable observer as promoting religion.

Finally, the U.S. District Court for the Eastern District of Pennsylvania, in *Busch v. Marple Newtown School District*, applied the *Lemon* test when it decided that a public school did not violate the Establishment Clause by prohibiting a student's mother from reading the King James Bible during a school show-and-tell because the school policy had the secular purpose of preventing a constitutional violation, did not promote or inhibit religion, and did not foster an excessive entanglement with religion.