

“Seasonal Religious Expression on Public Property”



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SEASONAL RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

Many American people approach Christmas with great eagerness: fancifully decorating houses, attending glistening church buildings, setting up live nativity scenes, and downing a few glasses of eggnog while listening to the warm sounds of merry carolers. In both the public and private sectors, millions commemorate the birth of Christ through enjoyably joyous events. And rightfully so, for on the day of His birth the angels proclaimed: “Glory to God in the highest, and on earth peace, good will toward men with whom His favor rests.”¹

This joyous event, however, has been clouded in recent years by misconceptions and controversies concerning the legality of many Christmas celebrations. School calendars that once announced “Christmas Vacation” now read “Winter Vacation,” and religiously themed decorations featuring nativity scenes have been replaced by snowmen and reindeer. School officials have reprimanded children for sharing the story of Christ’s birth with classmates, have censored religious Christmas carols from school concerts, and have banned students from uttering the words “Merry Christmas.”

None of these actions was envisioned by America’s founders and writers of the Constitution. No court has ever ruled that the Constitution requires government officials to censor Christmas carols, eliminate all references to Christmas, or silence those who celebrate Christmas. These efforts to suppress Christmas celebrations demonstrate that many public officials mistakenly believe that allowing seasonal religious expression would violate the so-called “separation of church and state”—a doctrine often cited in connection with the Establishment Clause of the First Amendment. As a result, public officials across our free nation have improperly denied citizens their constitutional rights of religious speech and expression under the mistaken guise that the constitution requires them to do so. Although many public officials are merely misinformed, others have purposefully sought to eradicate the celebration, observance, or even the acknowledgment of the religious aspects of Christmas from the public square.

To dispel this notion, it is important to realize that the Constitution does not “require complete separation of church and state.”² The Establishment Clause of the First Amendment merely requires the state to be neutral in its relations with religious believers and nonbelievers; it does not require the state to be their adversary.³ In fact, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”⁴ As Supreme Court Justice Black once penned, “State power is no more to be used to handicap religions than it is to favor them.”⁵

Here is what Justice Story had to say in 1833 about the First Amendment:

¹ Luke 2:14 (K.J.V.).

² *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the display of a nativity scene by a city was constitutional because the city’s conduct was supported by a legitimate secular purpose).

³ *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

⁴ *Lynch*, 465 U.S. at 673.

⁵ *Everson*, 330 U.S. at 18.

It is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.

There will probably be found persons in this or any other Christian country, which would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. Every American colony, from its foundation down to the revolution, with the exception of Rhode Island, did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. This has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty. In a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty.

At the time of the adoption of the constitution, and of the amendment to it, the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape. The future experience of Christendom and chiefly of the American states, must settle this problem, as yet new in the history of the world, abundant, as it has been, in experiments in the theory of government.

But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires.⁶

The Establishment Clause has no applicability to private religious expression. The Supreme Court has noted that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”⁷ Therefore, it is

⁶ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

⁷ *Mergens v. Board of Educ. of Westside Cmty. Sch.*, 496 U.S. 226, 249–50 (1990).

unconstitutional for public officials to deny individuals the right to religious speech and expression by imposing on them a limitation intended for the government.

The Framers of our Constitution established a boundary between religion and government to prevent the government from establishing a state denomination. Opponents of religious liberty have transformed this boundary into a concrete barrier that is rapidly encroaching on the territory of people of faith. The following examples demonstrate how individuals who take a stand for their faith can put an end to the constitutional violations by the government.

I. Unconstitutional Attempts to Silence Seasonal Religious Expression

A. A Soldier Can't Say "God Bless America"?

For many years, the state of Wisconsin has had a tradition of celebrating the Christmas season by displaying a 40-foot Wisconsin-grown balsam fir in the rotunda of the state Capitol.⁸ The "Capitol Holiday Tree" is decorated each year with 1,400 handmade ornaments donated by Wisconsin residents across the state.⁹

In preparation for the annual festivities in 2001, the Wisconsin Municipal Clerks Association solicited ornaments for the Christmas tree.¹⁰ The guidelines that they distributed, however, prohibited ornaments of a religious nature.¹¹ Although the state of Wisconsin did not have a written policy on tree ornaments, an unwritten policy banning religious ornaments had existed since the 1980s.¹²

That ban was about to be disturbed as Sergeant Wayne Bird, with the Air National Guard, was preparing to leave for overseas duty in an F-16 fighter group.¹³ Before he left, Sergeant Bird, along with seven others, wanted to display religiously themed ornaments with messages such as "God bless America."¹⁴ Even though these ornaments were privately donated, Sergeant Bird and the others were not permitted to display them because they bore a religious message.¹⁵ Sergeant Bird remarked that although he was prepared to fight against terrorists, he would first have to fight his own government for the right to hang an ornament on the state holiday tree.¹⁶

With the assistance of an ADF-trained volunteer attorney, these Wisconsin citizens challenged the state policy.¹⁷ Soon after the suit was filed, a settlement was reached, and the

⁸ Capitol Tour, Wisconsin State Capitol Rotunda, *available at* http://www.wisconsin.gov/state/capfacts/rotunda_c.html (last visited Oct. 5, 2005).

⁹ *Id.*

¹⁰ Dennis Chapman, *8 Citizens File Suit to Display Religious Ornaments on State Tree*, MILWAUKEE J. SENTINEL (Nov. 5, 2001), *available at* <http://www.jsonline.com/news/state/nov01/tree06110501.asp>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

state agreed to hang up to 2,000 ornaments without regard to any ornament’s religious expressive content. With this victory, the Constitution prevailed, and citizens of Wisconsin are again free to express their faiths through religiously themed ornaments on the tree in the rotunda of the Capitol.

B. Candy Canes Are Unconstitutional?

For two years, school officials in Westfield, Massachusetts, have repeatedly denied the requests of student members of the Westfield High School Life and Insight For Eternity Club (“L.I.F.E. Club” or “Club”) to distribute candy canes with an attached religious message.¹⁸ “The front of the message read ‘Merry Christmas’ in large lettering on the left side, and the right side contained information about L.I.F.E. Club meetings and a Bible passage.”¹⁹ The inside of the message contained the story behind the creation of the candy cane and a prayer.²⁰

Following school policy, L.I.F.E. Club members approached the school principal in 2001 to review the content of their religious message.²¹ The principal told the L.I.F.E. Club members that they could not distribute their “offensive” message unless they changed the message to something nonoffensive, such as “Season’s Greetings” or “Happy Holidays.”²² In order to distribute the candy canes, club members agreed to change the wording in the message to read “Happy Holidays from the Bible Club.”²³

Then in 2002, a L.I.F.E. Club member asked the school principal, and eventually the superintendent, “for permission to distribute the candy canes with the religious message.”²⁴ After the principal and the superintendent repeatedly denied the request, L.I.F.E. Club members proceeded to distribute about “450 candy canes to fellow students during the school day and during noninstructional time between classes and during lunch.”²⁵ After the school’s “Winter Break,” the principal summoned L.I.F.E. Club members to his office at which time he “informed the members that each would have to serve a one-day in-school suspension for insubordination . . . for distributing the candy canes with the religious message after the Club was denied permission to do so.”²⁶

After following the school appeal process, L.I.F.E. Club members and their parents filed a lawsuit—backed with ADF funding and ADF-allied attorneys—against the city, the principal, and the superintendent, which alleged “that the school’s policies deny them their statutory and constitutional rights to free speech.”²⁷ A federal district court agreed with the L.I.F.E. Club, noting that students “enjoy the right to free personal intercommunication with other students.”²⁸

¹⁸ Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 104–106 (D. Mass. 2003).

¹⁹ *Id.* at 104.

²⁰ *Id.* at 105.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 106.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 106–107.

²⁷ *Id.* at 107.

²⁸ *Id.* at 123.

The court required the school district to stop enforcing their unconstitutional policies, prevented the school district from punishing the L.I.F.E. Club members, and required the school district to stop prohibiting the L.I.F.E. Club from distributing literature to students during noninstructional time.²⁹

C. Religious Valentines Violate the Heart of the Constitution?

On Valentine's Day in a Milwaukee-area public school, children waited full of anticipation for their teacher's announcement that they could put away their books and pass out valentines and candy. Students eagerly delivered their Valentine's Day mail into the boxes that each of their classmates had creatively decorated. In preparation for the Valentine's Day party at her school, second-grader Morgan Nyman designed Valentine's Day cards with her mother on their home computer.³⁰ Some of the cards had Morgan's name and a cross on them, while others had the message "F.R.O.G.—Fully Rely on God."³¹

Before taking the valentines to school, "Morgan and her parents asked permission from the principal to distribute valentine cards that contained religious messages."³² They sought permission because of an incident on Halloween in which Morgan passed out classroom treats but was forced to "go around the classroom and collect the tracts and candy from the other students."³³ School officials required her to do this "because the candy was attached to a religious tract that also featured the words: 'Costumes are cool but heaven is awesome.'"³⁴ According to Morgan's mother, the incident upset Morgan so much that she was crying when she got off the bus and continued to do so the entire night until she eventually vomited.³⁵

The school refused Morgan's request to distribute religiously themed valentines.³⁶ School officials stated that "distributing religious literature during class time is not allowed because it violates the separation of church and state."³⁷ During class, however, other students were allowed to exchange cards featuring Britney Spears, 'N Sync, Star Wars, Harry Potter, and Scooby-Doo.³⁸

The school's conduct offended Morgan's parents because they knew that none of the other students "had to ask permission to hand out their valentines."³⁹ Understanding that Morgan had the right to distribute materials along with the other students, Morgan and her parents filed an ADF-backed lawsuit against the elementary school and school board.⁴⁰

²⁹ *Id.* at 129.

³⁰ Amy Hetzner, *School Rejected Girl's Religious Cards, Suit Says*, MILWAUKEE J. SENTINEL (Mar. 21, 2001), available at <http://www.jsonline.com/news/wauk/mar01/relig22032101a.asp>.

³¹ *Student's Parents May Sue School Over Cards*, Beloit Daily News (Mar. 22, 2001).

³² Press Release, Liberty Counsel, *Distraught Second Grader Sues School After She Was Publicly Humiliated For Distributing Religious Literature* (Mar. 21, 2001).

³³ Hetzner, *supra* note 30.

³⁴ *Id.*

³⁵ *Id.*

³⁶ BELOIT DAILY NEWS, *supra* note 31.

³⁷ *Id.*

³⁸ Hetzner, *supra* note 30.

³⁹ *Id.*

⁴⁰ Liberty Counsel, *supra* note 32.

Morgan’s mother stated that their goal for filing the lawsuit was to educate people, not to “bash” anyone.⁴¹ Later, the school board agreed to a settlement that required the school to permit Morgan to hand out religious cards and to publicly apologize to Morgan through a statement in the local newspaper.⁴²

These needless acts of censorship violate the Constitution and hurt little children who sincerely want to share their faith with their friends. The following questions and answers spell out what the federal courts have said regarding Christmas questions and dispel the extremist myths that have sadly prompted school officials and others to suppress religious expression as is demonstrated in the previously described examples.

II. Questions and Answers about Religious Speech in Public Places

Public school and other governmental officials can avoid similar violations if they understand a few basic rules about religious speech. The following questions and answers explain those basic rules.

A. Activities of Public Schools and Other Governmental Bodies

1. May public schools have students sing religious Christmas carols?

Yes. Religious Christmas carols may be sung in public schools without offending the Constitution. Religious Christmas carols may be sung by individual students or by a group of students during school activities such as choir, Christmas programs, and other events. Although challenges have been brought, public schools have successfully defended against constitutional challenges to the singing of Christmas carols by their students.⁴³

Courts often look to whether the school had a secular purpose for initiating religious expression in determining whether the school’s conduct is constitutional. For example, the Eighth Circuit Court of Appeals focused its attention on the policy and rules adopted by the board of education. The court approved the school’s stated purpose of advancing “the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama. . . .”⁴⁴ Other courts have reached similar results concerning singing religious songs in public schools.⁴⁵ These decisions are supported by prior Supreme Court rulings concerning religious expression.⁴⁶

⁴¹ Hetzner, *supra* note 30.

⁴² *Wisconsin School Board: Girl May Hand Out Religious Cards*, ASSOCIATED PRESS (Aug. 29, 2001).

⁴³ *See, e.g.*, *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1319 (8th Cir. 1980).

⁴⁴ *Id.* at 1314.

⁴⁵ *See* *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1998); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

⁴⁶ *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (holding that government involvement in an activity of unquestionably religious origin does not violate the Establishment Clause if its present purpose and effect are secular).

2. Do school officials violate the Constitution by calling a school break “Christmas Vacation”?

No. School officials may refer to the school break in December as “Christmas Vacation” without offending the Constitution. The Supreme Court has acknowledged with approval that government has long recognized holidays with religious significance such as Christmas.⁴⁷ For example, Congress has proclaimed Christmas to be a legal public holiday.⁴⁸

3. May public schools close on religious holidays, such as Christmas and Good Friday?

Yes. School officials do not violate the Constitution by closing on religious holidays such as Christmas and Good Friday. Although constitutional challenges have been brought against state recognition of religious holidays, a state may successfully defend its conduct by demonstrating that its actions pass the Supreme Court’s three-prong *Lemon* test.⁴⁹ Under the *Lemon* test, courts will inquire “whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”⁵⁰

In *Bridenbaugh v. O’Bannon*, the state of Indiana successfully defended its recognition of Good Friday as a legal holiday by asserting that its purpose was to provide state employees with a three-day spring weekend.⁵¹ The Supreme Court explained that “the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day.”⁵²

4. If a public school recognizes Christmas, must it then recognize all religious holidays?

No. It is a common misconception that it is only permissible to celebrate one religious holiday if equal time is allowed for celebration of all other religious holidays. The Supreme Court has explained that governmental action is not unconstitutional merely because it confers an indirect, remote, and incidental benefit to one faith or religion, or to all religions.⁵³ Because the Court has held that a state must have a secular purpose in recognizing a religious holiday, government recognition of a holiday that incidentally coincides with a religious holiday is not unconstitutional.⁵⁴

⁴⁷ *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

⁴⁸ 5 U.S.C. § 6103(a) (2005).

⁴⁹ *Bridenbaugh v. O’Bannon*, 185 F.3d 796, 802 (7th Cir. 1999).

⁵⁰ *Lynch*, 465 U.S. at 679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971)).

⁵¹ *Bridenbaugh*, 185 F.3d at 798.

⁵² *Id.* at 801.

⁵³ *Lynch*, 465 U.S. at 683.

⁵⁴ *Bridenbaugh*, 185 F.3d at 801.

5. May school districts ban the saying of “Merry Christmas”?

No. School districts may not ban teachers and students from saying “Merry Christmas.” The Supreme Court has stated that teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁵ Under the direction of former President Clinton, U.S. Secretary of Education Richard Riley issued guidelines concerning religious discussion of students that stated, “Students therefore have the same right to engage in . . . religious discussion during the school day as they do to engage in other comparable activity.”⁵⁶ Teachers also have the right to greet students with the words “Merry Christmas,” in spite of their role as agents of the state. In order to violate the Establishment Clause, a teacher would have to use her authority to promote religion to impressionable youth.⁵⁷ Saying a simple greeting that people commonly use in December does not rise to an Establishment Clause violation.

6. May public schools have students study the religious origins of Christmas and read the biblical accounts of the birth of Christ?

Yes. The religious origins of Christmas may be studied in the classroom without offending the Constitution. The Supreme Court has stated that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”⁵⁸ A federal appeals court has defined “the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.”⁵⁹ Therefore, school officials may constitutionally present Christmas passages from the Bible, such as Matthew 1:18–2:22 and Luke 2:1–20, with a variety of teaching methods.

In addition, the Supreme Court has noted, “It might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”⁶⁰ The Supreme Court has explained that the “study of the Bible or of religion, when presented objectively as part of a secular program of education,” is constitutional under the First Amendment.⁶¹

7. May public schools display religious symbols?

Yes. Public school officials may display religious symbols such as a crèche or nativity scene without offending the Constitution if they have a clear educational reason for doing so. The Supreme Court has held that the display of a nativity scene is constitutional if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the

⁵⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that the wearing of armbands by students to show disapproval of Vietnam hostilities was constitutionally protected speech).

⁵⁶ U.S. Department of Education, *Religion and Public Schools*, Archived Information, Guidelines (May 1998), available at <http://www.ed.gov/Speeches/08-1995/religion.html> (last modified Jan. 26, 2000).

⁵⁷ See *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

⁵⁸ *Stone v. Graham*, 449 U.S. 39, 42 (1981).

⁵⁹ *Florey*, 619 F.2d at 1316.

⁶⁰ *Schempp*, 374 U.S. at 225.

⁶¹ *Id.*

holiday.⁶² Lower federal courts have also allowed public schools to include religious and Christian symbols in Christmas displays, school calendars, and holiday programs.⁶³ In a recent case, a court held that the school’s holiday display and song program, which contained religious symbols, books, and songs, did not violate the Establishment Clause.⁶⁴ The court noted that the display “sends a message of inclusion and celebrates freedom to choose one’s own beliefs.”⁶⁵

8. Do students have a constitutional right to be exempt from activities with a religious component?

Yes. All students have a constitutional right to opt out of activities, such as a Christmas program or a concert with a religious song, that conflict with the individual beliefs of the students or their parents.⁶⁶ When the religious activity does not violate the Establishment Clause, as explained above, the school is not required to prohibit the activity even though it creates conflict with some students.⁶⁷ However, the school may not force “any person to participate in an activity that offends his religious or nonreligious beliefs.”⁶⁸ If a student has an objection to some school activity containing religion (e.g., a school concert containing a religious song or a field trip to a museum containing religious art), this does not empower the student to censor the expression or block the activity. The Constitution permits the student to opt out of participation, but not to silence others.

B. Rights of Students and Other Individuals to Religious Expression

1. Does the “separation of church and state” require government officials to silence someone for talking about his faith in God and his religious beliefs?

No. To the contrary, it is well-established that the Constitution protects the religious speech of private individuals under the First Amendment.⁶⁹ Therefore, the Constitution prohibits governmental entities from suppressing or excluding the speech of private individuals solely because their speech is religious or contains a religious perspective.⁷⁰

⁶² *Lynch*, 465 U.S. at 681.

⁶³ *See, e.g., Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 2000); *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993).

⁶⁴ *Sechler*, 121 F. Supp. 2d at 453.

⁶⁵ *Id.*

⁶⁶ *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents and guardians have a constitutional right to direct the upbringing and education of their children).

⁶⁷ *Florey*, 619 F.2d at 1318.

⁶⁸ *Id.*

⁶⁹ *See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

⁷⁰ *Id.*

2. Do students have a constitutional right to express their faith and religious ideas in a public school?

Yes. The private religious speech of students is protected under the First Amendment.⁷¹ Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁷² The Supreme Court has stated that a student’s free-speech rights apply “when [they are] in the cafeteria, or on the playing field, or on the campus during the authorized hours. . . .”⁷³ The Supreme Court has warned school officials not to trample the rights of students in public schools, stating:

State-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligation to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.⁷⁴

3. Must school officials permit disruptive speech when it is religious?

No. Although the First Amendment protects students’ religious speech rights, school officials may prevent student speech that creates a material and substantial disruption to the school’s ability to fulfill its educational goals.⁷⁵ This is a narrow limitation, however, because the mere fear or apprehension of a disruption is not sufficient to enable the school to prohibit speech.⁷⁶

4. Do students have the right to distribute religious materials in public schools, such as Christmas cards containing Bible verses?

Yes. The First Amendment protects the right to express ideas through the distribution of literature.⁷⁷ Because the Supreme Court has stated that the constitutional rights of students accompany them throughout the school day, students have the right to express ideas through the distribution of literature while at school.⁷⁸ Specifically, students have a right to distribute religious materials at school on the same terms as they are permitted to distribute other

⁷¹ *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a university that has opened its facilities for use by student groups cannot exclude groups because of the religious content of their speech).

⁷² *Tinker*, 393 U.S. at 506.

⁷³ *Id.* at 512–513.

⁷⁴ *Id.* at 511.

⁷⁵ *Id.*

⁷⁶ *Id.* at 508.

⁷⁷ *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (holding that a city ordinance prohibiting the distribution of literature without city permission violated the rights of freedom of speech and the press).

⁷⁸ *Tinker*, 393 U.S. at 506; *see, e.g., Westfield High School L.I.F.E. Club*, 249 F. Supp. 2d at 114.

material.⁷⁹ The Supreme Court has noted that First Amendment rights must be “applied in light of the special characteristics of the school environment.”⁸⁰ Therefore, school officials may continue “to establish reasonable time, place, and manner regulations” on the exercise of students’ free-speech rights.⁸¹

5. Do students have the right to express religious viewpoints in school assignments, reading materials, and clothing?

Yes. The Supreme Court has held that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”⁸² As noted previously, First Amendment rights, such as the rights of freedom of speech and expression, accompany each student throughout the school day both inside and outside the classroom.⁸³ Consequently, school officials must permit students to convey religious sentiments through their school assignments,⁸⁴ selection of reading materials, and clothing that conveys a religious message through words or symbols.

6. Do individuals have the right to private religious expression on public property?

Yes. The First Amendment protects the right of individuals to private religious expression on public property. In analyzing free-speech cases involving religious speech or expression, the result of the case will probably depend on the nature of the forum. The Supreme Court has recognized the following speech forums: 1) traditional public forum, 2) limited or designated public forum, and 3) nonpublic forum.⁸⁵ The forum that is at issue in the case determines the degree of deference that courts will extend to the governmental entity’s regulation of speech. Speech receives more protection in a traditional public forum than in a nonpublic forum.

7. Do individuals have the right to express their religious beliefs with others in a public park, on a street corner, or on a sidewalk?

Yes. Streets, sidewalks, and public parks are traditional public fora, and private religious speech in those places is constitutionally protected.⁸⁶ In fact, the Supreme Court has held that the government may not prohibit all communicative activity within a traditional public

⁷⁹ See *Mergens*, 496 U.S. 226, 247–249; *contra Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279 (3d Cir. 2003) (holding that the First Amendment was not violated when school prevented elementary school student from distributing candy canes with attached religious message *in the classroom* because school had valid educational purpose).

⁸⁰ *Tinker*, 393 U.S. at 506.

⁸¹ *Widmar*, 454 U.S. at 276.

⁸² *Lynch*, 465 U.S. at 673.

⁸³ *Tinker*, 393 U.S. at 512–513.

⁸⁴ Compare *Tinker*, 393 U.S. at 512–513, with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns).

⁸⁵ *Board of Airport Comm’ns v. Jews for Jesus*, 482 U.S. 569, 572 (1987).

⁸⁶ *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

forum.⁸⁷ The Supreme Court has noted that “from ancient times” the use of public places such as parks has “been a part of the privileges, immunities, rights, and liberties of citizens.”⁸⁸ Public parks are held in trust for the use of the public “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁸⁹

As a result, private religious expression within public parks is constitutionally protected speech.⁹⁰ In *Doe v. Small*, the Seventh Circuit Court of Appeals held that the First Amendment protected the religious speech rights of private parties who sought to display paintings of Christ in a public park.⁹¹ The court held that “the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.”⁹² As a concurring opinion further explained:

Government may not discriminate against private speech in a public forum on account of the speaker’s views. The Free Exercise Clause assures speakers whose message is religious no less access to public forums than that afforded speakers whose message is secular or sacrilegious.⁹³

“For the state to enforce a content-based exclusion it must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁹⁴ Therefore, in a traditional public forum, individuals have the right to private religious expression.

8. Do individuals have the right to private religious expression in a limited public forum, such as a public school opened for meetings of community groups on evenings or weekends?

Yes. When public property is utilized by the government as a limited or designated forum, the First Amendment protects the right to private religious expression. A limited or designated forum means that “the state has opened [the property] for use by the public as a place for expressive activity.”⁹⁵ According to the Supreme Court, a limited or designated public forum is created only by “purposeful governmental action.”⁹⁶ As a result, the Court has stated that government officials do not create a limited forum merely “by inaction or by permitting limited discourse.”⁹⁷

Once a forum has been opened, “the Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the

⁸⁷ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁸⁸ *Id.*

⁸⁹ *Hague*, 307 U.S. at 515–516.

⁹⁰ 964 F.2d 611, 618 (7th Cir. 1992) (en banc).

⁹¹ *Id.*

⁹² *Id.* at 619.

⁹³ *Id.* at 629 (Easterbrook, J., concurring) (citations omitted).

⁹⁴ *Perry Educ. Ass’n*, 460 U.S. at 45.

⁹⁵ *Id.*

⁹⁶ *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1998).

⁹⁷ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

forum in the first place.”⁹⁸ Therefore, government may not discriminate against individuals based on their desire to use a generally open forum to engage in religious speech, such as exhibiting a religious display, without meeting the constitutional standard.⁹⁹ In order to justify discrimination based on the religious content of speech, the government must demonstrate that the restriction is necessary to further a compelling state interest and that the restriction is narrowly tailored to achieve that interest.¹⁰⁰

The Supreme Court has outlined additional guidelines for the operation of a limited or designated public forum. First, the Court has explained that “a state is not required to indefinitely retain the open character of the facility, [but] as long as it does so it is bound by the same standards as apply in a traditional public forum.”¹⁰¹ In addition, government officials may continue to place reasonable time, place, and manner restrictions on the use of the limited public forum without offending the Constitution.¹⁰²

9. May municipalities sponsor religious displays in public parks?

Yes. Public officials may display religious symbols such as a crèche or nativity scene without offending the Constitution. To determine the constitutionality of municipal religious displays, lower courts evaluate whether the religious display passes the Supreme Court’s three-prong *Lemon* test.¹⁰³ Under the *Lemon* test, courts will inquire “whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”¹⁰⁴ In addition to the *Lemon* test, courts often look to the endorsement test, which asks whether a reasonable observer would believe that the municipal display constitutes an endorsement of religion by the government.¹⁰⁵

Employing the *Lemon* test, the Supreme Court has held that the display of a nativity scene is constitutional if it is displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday.¹⁰⁶ While the majority opinion in *Lynch* centered on the *Lemon* test, Justice O’Connor’s concurrence in *Lynch* has served as the standard for municipal seasonal displays.¹⁰⁷ It was her concurrence as the swing vote in the *Lynch* decision that created what has been known euphemistically as “The Three Reindeer Rule.” The legal name for the test is the “endorsement” test because Justice O’Connor stated that she believed the “central issue” in the *Lynch* case was whether the city “endorsed Christianity by its display of the crèche.”¹⁰⁸ Answering the question in the negative, Justice O’Connor found the contextual

⁹⁸ *Id.*

⁹⁹ *Widmar*, 454 U.S. at 269–270.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 276.

¹⁰³ *Bridenbaugh*, 185 F.3d at 802.

¹⁰⁴ *Lynch*, 465 U.S. at 679 (citing *Lemon*, 403 U.S. at 612–613).

¹⁰⁵ See *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002).

¹⁰⁶ *Lynch*, 465 U.S. at 681.

¹⁰⁷ See, e.g., *Freethought Soc’y of Greater Phila. v. Chester County*, 334 F.3d 247, 262 (3d Cir. 2003).

¹⁰⁸ *Lynch*, 465 U.S. at 690.

setting of the crèche amongst the other secular objects to be sufficiently secular to pass constitutional muster.¹⁰⁹

The endorsement test has been cited in many other cases and has gained a wide degree of acceptance as the determining factor for municipal religious displays.¹¹⁰ Thus, a crucial consideration for municipal seasonal displays is the secular context in which the crèche is placed. Simply stated, “The Three Reindeer Rule” requires a municipality to place a sufficient number of secular objects in close enough proximity to the crèche to render the overall display sufficiently secular.

The *Lemon* test and the endorsement test have proven to be burdensome restrictions on governmental authorities who seek to exhibit religious displays. The government can avoid the requirement that a religious display include a sufficient number of secular figures if private individuals, who are not subject to religious speech restrictions, initiate the religious display.¹¹¹

10. May the government sponsor religious displays inside and around governmental buildings?

Yes. The Supreme Court has noted that there are countless illustrations of the “Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”¹¹² For example, the Court pointed out that the Supreme Court chamber “is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.”¹¹³

In spite of our heritage of governmental religious expression, federal courts across the country are currently grappling with cases concerning the constitutionality of governmental exhibition of religious displays inside and around governmental buildings. Even though courts have relied on similar factors in analyzing these cases, courts have inconsistently decided factually similar cases.¹¹⁴

The Supreme Court recently reaffirmed that

[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a

¹⁰⁹ *Id.* at 691.

¹¹⁰ *See, e.g., Adland*, 307 F.3d 471; *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997); *Mather v. Village of Mundelein*, 864 F.2d 1291 (2d Cir. 1989).

¹¹¹ *See Mergens*, 496 U.S. at 250.

¹¹² *Lynch*, 465 U.S. at 677.

¹¹³ *Id.*

¹¹⁴ *See e.g., King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Adland*, 307 F.3d 471; *Sumnum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766 (7th Cir. 2001); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).

callous indifference to religious groups[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.¹¹⁵

In *Van Orden v. Perry*, the Supreme Court found that a display of the Ten Commandments on the grounds of the Texas state capitol did not violate the Establishment Clause of the First Amendment because the display was part of the political and legal history of the state.¹¹⁶ However, in a sister case, *McCreary County v. A.C.L.U.*,¹¹⁷ the Supreme Court found that a county's display of the Ten Commandments was unconstitutional because the county did not have a secular purpose in erecting the display. The county intended to celebrate the religious significance of the Ten Commandments, which when "viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction."¹¹⁸

Van Orden and *McCreary* have added little clarity to the constitutionality of government's sponsoring religious displays on public property. Nevertheless, as discussed previously, courts look to the Supreme Court's three-prong *Lemon* test and the endorsement test to determine whether there has been an impermissible establishment of religion. An additional factor that courts may consider is whether the government's religious display is permanent or temporary. In the public school context, courts tend to favor temporary displays rather than permanent displays. In *Stone v. Graham*, the Supreme Court held that a state law requiring the permanent posting of the Ten Commandments in public school classrooms was unconstitutional.¹¹⁹ The *Stone* court noted, "This is not a case in which the Ten Commandments are integrated into the school curriculum."¹²⁰ Relying on *Stone*, a lower federal court held that "a school's permanent display of religious symbols is constitutionally suspect."¹²¹

However, in the context of religious displays in other governmental buildings, the length of time the symbol has been in use or the length of time the display has been exhibited often weighs in favor of the government. In *King v. Richmond County, Georgia*, the Eleventh Circuit Court noted that the clerk's seal, which included an outline of stone tablets, had been in use for at least 130 years.¹²² The court noted that this fact arguably supported the county under the effect prong of the *Lemon* test.¹²³ Relying on the *King* decision, the Third Circuit Court held in another case that the age and history of a Ten Commandments plaque, which was displayed by itself, "provide[d] a context which changes the effect of an otherwise religious plaque."¹²⁴ In reaching its decision, the Third Circuit Court looked to the Supreme Court decision in *County of Allegheny v. ACLU*, in which Justice O'Connor in her concurrence stated:

¹¹⁵ *Van Orden v. Perry*, 125 S.Ct. 2854, 2859 (2005).

¹¹⁶ *Id.* at 2864.

¹¹⁷ 125 S.Ct. 2722 (2005).

¹¹⁸ *Id.* at 2739.

¹¹⁹ 449 U.S. 39, 41 (1981).

¹²⁰ *Id.* at 42.

¹²¹ *Clever*, 838 F. Supp. at 929, 937.

¹²² 331 F.3d 1271, 1286 (11th Cir. 2003).

¹²³ *Id.*

¹²⁴ *Freethought Soc'y of Greater Phila.*, 334 F.3d at 264.

The “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.¹²⁵

Although the *Lemon* test, the endorsement test, and time-based factors provide a measure of guidance for lower courts, the abundance of inconsistent decisions reached by lower courts indicates that these tests have not always provided clear answers to the constitutional questions secular groups are raising in response to governmental exhibition of religious displays inside and around governmental buildings. However, the Alliance Defense Fund and its allies stand ready and willing to defend the right to display religious messages on public property.

Conclusion

The Constitution does not require government officials to obliterate religious observances and expression from public schools or the public square. It is the hope of the Alliance Defense Fund that this booklet will help dispel the extremist myths about the Establishment Clause that have prompted tragic and unnecessary acts of government censorship of religious expression. And to all, we wish you a Merry Christmas!

¹²⁵ *Id.* (citing *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 630 (1989)).

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