

Findings

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Celebrating the Birth of Christ

In Public School and Public Square

By The Alliance Defense Fund



Is it still acceptable to wish each other a “Merry Christmas?” Can students distribute religious greeting cards at a school? Is it constitutional to display a nativity scene on government property? These are just some of the questions that seem to surface every year during the Christmas season. Too often, the answers come from individuals or groups who are either misinformed about the constitutional rights of Americans to express their religious beliefs, or by those who are hostile to any form of religious expression. To help citizens respond to the confusion that exists over this issue, the following edited version of a document by the Alliance Defense Fund will provide constitutional answers to some of the most common questions about religious expression at Christmastime.

Many Americans approach Christmas with great eagerness: fancifully decorating houses, attending glistening church buildings, setting up live nativity scenes, and enjoying 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.”

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“Christmas Vacation” now read “Winter Vacation,” and religiously-themed decorations featuring nativity scenes have been replaced by snowmen and rein-

deer. School officials have reprimanded children for sharing the story of Christ’s birth with classmates, censored religious Christmas carols from school concerts, and banned students from uttering the words, “Merry Christmas.”

America’s founders and writers of the Constitution could not envision these acts of suppression. And this explains why 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. But these ef-

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orts to suppress Christmas celebrations demonstrate that many public officials mistakenly believe that allowing seasonal religious expression on public property would violate the so-called “separation of church and state”—a mantra often cited in reference to 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 on the mistaken plea that the constitution requires them to do so.

Some public officials are merely misinformed; others have purposefully sought to eradicate the celebration, observance, or even the acknowledgment of the religious origins of Christmas from the public square. But the Establishment Clause is

not a tool to root out religious expression. It merely requires the state to be neutral in its relations with religious believers and nonbelievers, not to act as their adversary. In fact, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” As Supreme Court Justice Black wrote in *Everson v. Board of Education*, “State power is no more to be used so as to handicap religions than it is to favor them.”

And as early as 1833, Justice Story was reminding government officials that the First Amendment prohibited them from treating religion with hostility and indifference:

[A]t 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 . . . 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.

The Establishment Clause is a limitation on government speech and action. The Supreme Court has highlighted the “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.” These provisions protect the individual’s right to speech and expression regardless of the content or viewpoint. Therefore, the Constitution prohibits governmental entities from suppressing or excluding the speech or expression of private individuals solely because their speech or expression is religious or contains a religious perspective.

The Framers of our Constitution established a boundary between religion and government to prevent the government from creating a state denomination, not to eradicate religious acknowledgement, tradition, and expression from public life. But opponents of religious liberty have transformed this boundary into a moving line that steadily pushes religious history, tradition and expression out of the public square.

Religious Expression at School

For two years, school officials in Westfield, Massachusetts, repeatedly denied the requests of student members of the Westfield High School Life and Insight for Eternity Club (“LIFE Club”) to distribute candy canes with an attached religious message. The front of the message read “Merry Christmas” in large lettering and contained information about LIFE Club meetings and a Bible passage. The inside of the message contained the story behind the creation of the candy cane and a prayer. Following school policy, LIFE Club members approached the school principal in 2001 to review the content of their religious message. The principal told the LIFE Club members that they could not distribute their “offensive” message unless they changed the message to something non-offensive, such as “Seasons Greetings” or “Happy Holidays.” To distribute the candy canes, club members agreed to change the wording in the message to read “Happy Holidays from the Bible Club.”

Then in 2002, a LIFE Club member asked the school principal, and eventually the superintendent, for permission to distribute the candy canes with the religious message. After the principal and the superintendent repeatedly denied the request, LIFE Club members proceeded to distribute about 450 candy canes to fellow students during the school day and during non-instructional time between classes and during lunch. After the school’s “Winter Break,” the principal summoned LIFE 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.”

After following the school appeal process, LIFE Club members and their parents filed a lawsuit, which alleged “that the school’s policies deny them their statutory and constitutional rights to free speech.” A federal district court agreed and required the school district to stop enforcing their unconstitutional policies.

This is just one example of an attempt to unconstitutionally suppress religious expression at a public school, and leads

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many to ask, “What forms of religious expression are permissible in public schools?”

Constitutionally Protected Speech

Student Speech: Generally, the First Amendment protects the private religious speech of students on and off the school campus. The Supreme Court has determined that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The High Court also 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” School officials can only restrict student speech that creates a material and substantial disruption to the school’s ability to fulfill its educational goals. But mere fear or apprehension of a disruption is not sufficient to enable the school to prohibit speech.

Printed Information: The First Amendment also protects the right to express ideas through the distribution of literature. And because students’ constitutional rights accompany them to school, students have the right to express ideas through the distribution of literature while at school. Students may distribute religious materials at school on the same

terms as they are permitted to distribute other material. The Supreme Court has noted that First Amendment rights must be “applied in light of the special characteristics of the school environment.” Therefore, school officials may “establish reasonable time, place, and manner regulations” on the exercise of students’ free speech rights.

Expression in Assignments: The Supreme Court also has held that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” First Amendment rights of free expression accompany each student throughout the school day both inside and outside the classroom. School officials must permit students to convey religious sentiments through their school assignments, selection of reading materials, and clothing that conveys a religious message through words or symbols.

Speech During Christmas

Christmas Carols: Religious Christmas carols may be sung in public schools. 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. In *McGowan v. Maryland*, the United States Supreme Court held that government involvement in an activity of unquestionably religious origin does not violate the Establishment Clause if it also has a secular purpose and effect.

“Christmas Vacation:” School officials may refer to the school break in December as “Christmas Vacation.” Government has long recognized holidays with religious significance such as Christmas. In fact, Congress has proclaimed Christmas to be a legal public holiday. School officials also do not violate the Constitution by closing on religious holidays such as Christmas and Good Friday. States have successfully defended attacks on holiday closures by showing compliance with current Supreme Court Establishment Clause decisions. Currently, the Court uses the test set out in *Lemon v. Kurtzman* to review Establishment Clause claims. 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.”

Other Religious Holidays: 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. Government recognition of a holiday that incidentally coincides with a religious holiday is not unconstitutional.

“Merry Christmas:” 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.” Under the direction of 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.” Teachers also have the right to greet students with the words “Merry Christmas,” in spite of their role as agents of the state. To violate the establishment Clause, a teacher would have to use his or her authority to promote religion to impressionable youth. Saying a simple greeting that people commonly use in December does not rise to an Establishment Clause violation.

Studying the Birth of Christ: The religious origins of Christmas may be studied in the classroom. The Supreme Court held in *Stone v. Graham*, that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” 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.” 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. Moreover, the Supreme Court has noted “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.” 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.

Display of Religious Symbols: Public school officials may display religious

symbols such as a crèche or nativity scene, if they have a clear educational reason for doing so. The Supreme Court has held that a nativity scene display is constitutional if displayed for legitimate secular purposes, such as to celebrate the holiday and to depict the origins of the holiday. Lower federal courts have also allowed public schools to include religious and Christian symbols in Christmas displays, school calendars, and holiday programs.

Student Exemption: 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. 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. Schools may not force “any person to participate in an activity that offends his religious or nonreligious beliefs.” 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), he cannot censor the expression or block the activity. The Constitution permits the student to opt out of participation, but not to silence others.

Religious Expression in Public

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. The “Capitol Holiday Tree” is decorated each year with 1,400 handmade ornaments donated by Wisconsin residents across the state. In preparation for the annual festivities in 2001, the Wisconsin Municipal Clerks Association solicited ornaments for the Christmas tree. The guidelines that they distributed, however, prohibited ornaments of a religious nature. 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.

That ban was tested as Sergeant Wayne Bird, with the Air National Guard, was preparing to leave for overseas duty in an F-16 fighter group. Before he left, Sergeant Bird, along with seven others, wanted to display religiously themed ornaments with messages such as “God Bless America.” Even though these ornaments were privately donated, Sergeant Bird and the others were not permitted to display them because they bore a religious

message. 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. After a lawsuit was filed, the state changed its policy and agreed to hang up to 2,000 ornaments without regard to any ornament’s religious expressive content.

Protected Speech in Public

Expression on Public Property: 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 may depend on the nature of the place where the speech takes place. The Supreme Court has recognized the following speech fora: 1) the traditional public forum, 2) the limited or designated public forum, and 3) nonpublic forum. The forum at issue in the case determines the degree of deference that courts will extend to the governmental entity’s regulation on speech. Speech receives more protection in a traditional public forum than in a nonpublic forum.

Streets, sidewalks, and public parks are traditional public fora, and private religious speech in those places is constitutionally protected. In fact, the Supreme Court has held that the government may not prohibit all communicative activity within a traditional public forum. 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.” Public parks are held in trust for the use of the public “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

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.” According to the Supreme Court, a limited or designated public forum is created only by “purposeful governmental action.” As a result, the Court has stated that government officials do not create a limited forum merely “by inaction or by permitting limited discourse.”

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.” In addition, government officials may continue to place reasonable time, place, and manner restrictions on the use of the limited public forum.

Religious Displays at Public Parks:

Public officials may display religious symbols such as a crèche or nativity scene. To determine the constitutionality of municipal religious displays, lower courts evaluate whether the religious display passes the Supreme Court’s three-prong test established in *Lemon v. Kurtzman*. 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.” In addition to the *Lemon* test, courts often look to the “endorsement test,” when reviewing municipal displays with religious components. This test asks whether a reasonable observer would believe that the municipal display constitutes an official endorsement of religion by the government.

Employing the *Lemon* test, the Supreme Court has held that the governmental 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. Justice O’Connor’s concurrence in *Lynch*, found that the display did not violate the Establishment Clause by asking whether the city “endorsed Christianity by its display of the crèche.” This “endorsement test” has become the standard of review for municipal seasonal displays. Known as “The Three Reindeer Rule,” it requires the inclusion of secular objects with the religious to pass constitutional muster.

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. 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 and communicate to

the reasonable observer that the government is not endorsing religion.

The *Lemon* test and the endorsement test have proven to be burdensome to government authorities seeking to exhibit Christmas displays. To avoid the burden, some municipalities leave the matter of erecting seasonal displays to private individuals or groups who are not required to “neutralize” the religious aspect of their display with the inclusion of secular figures or objects.

Government Sponsored Displays:

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.” 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 the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.”

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. But in *Van Orden v. Perry* in 2005, the Supreme Court instructed that government should not make itself an indifferent adversary to religion but should respect the peoples’ spiritual nature and needs:

[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 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.

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. The *Stone* court noted, “This is not a case in which the Ten Commandments are integrated into the school curriculum.” Relying on *Stone*, a lower federal court held that “a school’s permanent display of religious symbols is constitutionally suspect.”

Conclusion

Although the *Lemon* test, the endorsement test, and time-based factors provide a measure of guidance for lower courts, inconsistent decisions reached by some lower courts and misinformation from anti-religious groups have caused confusion concerning governmental exhibition of religious displays inside and around governmental buildings. The Constitution, however, does not require government officials to obliterate religious observances and expression from public schools or the public square.

**The Alliance Defense Fund (ADF), online at www.telladf.org, is a Christian legal alliance dedicated to the defense of religious freedom, the sanctity of human life and traditional values. The full footnoted version of the above article is available online at: www.ncfamily.org/FNC/0711SF.html.*

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(Please Note: This article provides general legal information and is not intended as specific legal advice. If you have a question regarding your legal rights to religious speech or expression, please consult an attorney.)

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