INTRODUCTION:

When it comes to religion on public college and university campuses, the First Amendment giveth, and the First Amendment taketh away. While public entities, including public colleges and universities, may not take steps to establish religion or a specific religion, neither may they take steps to infringe upon an individual’s free exercise of his or her religious beliefs. As the Supreme Court wrote, “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.” [1] This NACUANOTE will examine current issues in First Amendment jurisprudence that affect public institutions, and will provide guidance to help institutions thread the First Amendment needle. [2]

DISCUSSION:

I. Holiday Displays Placed by Private Persons on Public School Campuses

As sure as the seasons change, holiday displays pop up on public college campuses, bringing with them constitutional questions. [3] Indeed, the Second Circuit Court of Appeals wrote that “[n]o holiday season is complete, at least for the courts, without one or more First Amendment challenges to public holiday displays.” [4] Resolving these questions often requires consideration of both the Establishment and Free Exercise Clauses of the First Amendment. [5]

The Establishment Clause, [6] which applies equally to the states, [7] prohibits the government from taking actions which tend to favor a single religion over others or the idea of religion over no religion. [8] Questions of establishment are ostensibly analyzed under the test in Lemon v. Kurtzman. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’” [9] The Free Exercise Clause, [10] which applies equally to the states, [11] limits the ability of government to prevent individuals from exercising their religious beliefs or, when analyzed with the Speech Clause, [12] from speaking out about religious issues.

As the Court’s membership has changed over time, use and application of the Lemon test has also shifted [13] along with the membership. [14] The takeaway point should be that, with Establishment and Free Exercise Clause questions, we can make educated forecasts as to the constitutionality of specific situations, but we can never be truly sure, as the legal and factual standards are not firmly set in stone.

The Endorsement Test: Context Is Key

In the context of holiday displays placed by private persons on government property, the seminal case is County of Alleghany v. A.C.L.U. [15] There the Court applied a modified version of the
test referred to as the “Endorsement” test. This test considers (1) whether the government has a secular purpose for the action, and (2) whether the primary effect of the action endorses religion. The second prong of the test considers whether a “reasonable observer,” informed by history and context, would consider the governmental action to endorse religion. [16] The Alleghany court found that the display of holiday symbols is not constitutional if it has the effect of telling a reasonable passer-by that the government is endorsing religion generally or a specific religion. [17] The Court found that a crèche (manger scene) is “capable of communicating a religious message” [18] and found it unconstitutional where it was at the dominant entrance to a county courthouse, where all were not free to place their displays, was accompanied by an overtly religious message (“Glory to God in the Highest!”), and was not accompanied by secular holiday displays. [19] As to a separate menorah display, the Third Circuit found that it presented a closer constitutional question since the menorah is a religious item capable of conveying a religious message, but is not exclusively religious. [20] In reviewing that decision, the Supreme Court found the display constitutional where a menorah was placed at a different location on city property next to a Christmas tree and a sign saluting “liberty.” [21] The Court wrote that the “display of a menorah next to a crèche on government property might prove to be constitutionally invalid” [22] and suggested that if the nativity scene had been closer in proximity to the Christmas tree, then it could have been constitutional. [23] Government displays including religious and secular items in recognition of a winter holiday season or even “Christmas” do not violate the Establishment Clause. [24] In other words, context is the key, and a reviewing court will make a decision based on the individual facts of the display. [25] As noted above, the standard measure used by courts is whether a reasonable person (not an easily offended or hypersensitive person) [26] would feel that the display reflects a government endorsement of religion. [27] The more it seems that a display on public property is funded by a private or student organization, is temporary in nature, [28] and does not support a single religion to the detriment of all others, the easier it becomes to defend the display. The best advice is for such displays to have a genuine [29] secular purpose, such as the cultural celebration of the holidays or maintaining civic respect for the religious observance of others, [30] but no primary or preeminent religious purpose. While displays may be paid for by state funds, [31] this factor may tip the balance towards unconstitutionality, unlike when private organizations pay for religious symbols. Overtly religious symbols as stand-alone displays should be avoided, though they may be placed in displays if not predominant and accompanied by secular holiday displays, or if a proper disclaimer is included. [32] Disclaimers should be noticeable, and may name the sponsoring organization and state that the display is not paid for with public funds. [33] They may also assert that the display is a celebration of the season and not an endorsement of religion or any specific religion.

While cases will vary based on context, years of litigation over this issue have provided us with a number of examples to draw from when considering the constitutionality of particular displays either by government or on government property outside of a limited public forum: [34]

? The crèche displayed on its own is considered a religious symbol, [35] but may be allowed if it is a small part of a larger seasonal display with secular elements in close proximity. [36]

? The menorah [37] is considered to be a religious symbol, although not exclusively so, [38] and may be integrated into a display on government property that has an overall secular purpose. [39]

? The Ten Commandments are likely a religious symbol, [40] as is a portrait of Jesus. [41] However, both the Ten Commandments in the context of a historical display [42] and an overtly religious painting in a museum can withstand a constitutional challenge. [43]

? The star and crescent is likely a religious symbol, although it has not yet been definitively determined by a court to be so. [44]

? Christmas and holiday trees, [45] reindeer, candy canes, tinsel, assorted holiday-themed decorations and poinsettia plants are not overtly religious.

? A cross illuminated on its own is also a religious symbol. [46] A stand-alone cross displayed
in a public park, a traditional public forum, during the Christmas season by a private organization was found to be constitutional.

Again, the key is for a reasonable and objective passer-by with knowledge of the history and context of the display not to think that the state is attempting to establish religion by means of the display.

Time, Place, and Manner Restrictions

It is also important to note that despite what some students and community members may believe, there is no blanket First Amendment right of private citizens to use public college or university property (apart from classic “public fora” such as public streets and sidewalks) for religious, political, or other expressive displays. Indeed, courts have noted that “[w]hile displays of religious and political symbols are unquestionably forms of protected speech under the First Amendment . . . it is well-settled that this fundamental guarantee does not translate into unlimited access to government property for expressive purposes.”

That said, if an institution has opened certain areas – such as quads or squares – to private expressive purposes (creating what are known as “limited public fora”), the institution cannot treat religious expression differently than other types of expression.

What does this mean as a practical matter? Institutions may draw reasonable time, place and manner restrictions on holiday displays. Content-based restrictions, however, should be treated with caution, and viewpoint-based restrictions must be avoided. In other words, if a display about a social or political issue or a political candidate was allowed in a certain space, it could be an unconstitutional content-based determination to forbid a religious display in the same place, even if the overtly religious display concerned a religious holiday and had no secular component. Moreover, it could be unconstitutional viewpoint discrimination for a public entity to allow private secular expression while censoring or denying access to the forum for private religious expression.

At the same time, if the campus does not ordinarily allow displays of a certain type or in a certain area, it could be an equal protection violation to make a content-based determination that a religious display is allowed when no other display would be allowed. To resolve this, institutions may choose to allow holiday or other religious displays in the same location and manner that other displays of speech are allowed and use the same process to review and issue permits that is used for other types of speech. An example of an acceptable restriction is a time, place and manner restriction stating that all displays may be placed in certain areas but not others, must be reasonable in size, must not be a tripping hazard or composed of flammable materials, must be for a limited duration, or must have a permit for placement.

Establishment Clause Chart

As the cases and discussion above demonstrate, there is no single right answer as to which holiday displays are constitutionally permissible in a limited public forum. Instead, public colleges and universities must balance the interests protected by the First Amendment. To that end, the chart below lists factors that courts have cited in determining whether a holiday display is constitutional.

<table>
<thead>
<tr>
<th>More likely to be allowed under the First Amendment</th>
<th>Less likely to be allowed under the First Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>On private land</td>
<td>On government property</td>
</tr>
<tr>
<td>Display purchased with private or student organization funds</td>
<td>Display purchased with government funds</td>
</tr>
<tr>
<td>Maintenance or electricity (if applicable)</td>
<td>Maintenance or electricity (if applicable)</td>
</tr>
<tr>
<td>provided by private donors</td>
<td>provided by or paid for with government funds</td>
</tr>
<tr>
<td>----------------------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td>Part or all of the display is created, sponsored, and/or maintained by students or faculty who seek to exercise their right to religious speech</td>
<td>The display is created, sponsored and/or maintained by the public institution to advance a religious purpose</td>
</tr>
<tr>
<td>Secular or partially secular holiday symbols such as reindeer, a Christmas tree, wreaths, candy canes, a menorah, candles, lights, streamers, toys, tinsel or other neutral holiday displays, even when presented alongside religious symbols</td>
<td>A stand-alone crèche, cross, menorah, star and crescent, or picture of Jesus or other religious figures or a display with such religious elements dominating in a group setting</td>
</tr>
<tr>
<td>Signs invoking general happy holiday or seasonal phrases</td>
<td>Signs invoking solely religious-based messages</td>
</tr>
<tr>
<td>Signs stating that the display is donated, funded or maintained by a private or student group or disclaiming any government sponsorship or endorsement</td>
<td>No sign denoting how the display is funded, maintained or sponsored and no government endorsement disclaimer</td>
</tr>
</tbody>
</table>

II. Religious Displays in Faculty and Staff Offices

Holiday season or not, religious displays in faculty and staff offices on public school campuses can raise complicated constitutional issues requiring analysis of the First Amendment’s Establishment and Free Exercise Clauses, academic freedom, and speech rights under what is known as the *Pickering* line of cases. [55]

Under *Pickering*, public employee speech is subject to a balancing “between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” [56] Because public employees, like all other citizens, enjoy the First Amendment right to free speech on matters of public concern, [57] employers must tread carefully. They may only limit that right if the employee’s speech or display causes a disruption or has the potential to cause disruption, sufficient to outweigh the value of the speech. [58] The Court has stressed the value of the public’s “interest in having free and unhindered debate on matters of public importance.” [59] However, where a government employee’s private workplace display is positioned such that members of the public with full knowledge of the context would nevertheless reasonably perceive the display to violate the Endorsement test, the government employer has an obligation to require the display to be removed or altered so as to not violate the Establishment Clause. [60]

It is important to note that actions against employees for religious displays might also implicate Title VII of the Civil Rights Act. [61] Title VII prohibits employment discrimination based on religion, including all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that it is unable to reasonably accommodate an employee’s religious observance or practice without undue hardship to the employer’s business. [62] Instructions and prohibitions that disproportionately impact the ability of religious employees to place religious holiday displays or religious icons where secular holiday displays (or other personal displays or decorations) are routinely permitted may be considered evidence of a religiously-hostile workplace, disparate treatment or failure to reasonably accommodate. [63] The level of hardship that can be found will be a case by case determination and depend on the individual workplace and duties of the employees in question. Evidence of employee complaints, client complaints, religious polarization or some other disruption in the workplace is typically required for employers to refuse to accommodate employee religious expression. [64] When the employee’s message would be reasonably construed as the employer’s message, however, the employee’s Title VII rights are trumped by the private employer’s First Amendment free speech rights and trumped by the government employer’s Establishment Clause responsibilities. [65]
In light of the above considerations, public college and university employers should articulate clear, simple standards or policies that are viewpoint-neutral and are fairly enforced with respect to holiday or religious displays in the workplace. The policy should take into consideration the difference between public-facing work spaces, such as reception areas, where religious or holiday displays may be seen as an endorsement by the institution, versus private staff or faculty offices, where displays are more likely to be understood as personal expression. Policies also should focus on factors that have the potential to disrupt the workplace, like the size or volume of material displayed, as opposed to the content or the viewpoint of those materials. The University of Iowa’s Religious Guidelines, found in the Resources section below, provide a good example of such a policy, and highlight the University’s respect for the right of its employees to express their religious beliefs in a manner that does not suggest institutional support.

As with any policy, institutions should enforce these policies in a fair, neutral manner that ensures complaints are not being unfairly lodged against persons based solely on their viewpoint or religion. Complaints should be evaluated on the individual facts of each situation, to determine if the facts warrant asking the faculty or staff member to alter or remove the display.

CONCLUSION:

In parsing these First Amendment questions on a college campus, context is key. Institutions should provide flexible guidelines to policy makers to help them thread the First Amendment needle, while preserving the constitutionality of the actions of our faculty, staff and students.

FOOTNOTES

AUTHORS: [66]

Joseph Storch, Associate Counsel, State University of New York Office of General Counsel
Brendan Venter, Third-Year Student, Albany Law School

RESOURCES:

NACUA Resources

- Lynn A. Kappelman & Leslie Van Houten, New Developments and Hot Topics in Religious Discrimination (NACUA March 2009 CLE Workshop)

Institutional Policies

- Cornell University, Guidelines for Holiday Displays (2010)

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