Opinion Brief: Religious Displays are Constitutional During the Holiday Season

The Impact of the Kennedy Decision

The Christmas season marks the return of twinkling lights, festive gatherings, gifts, cards, and holiday music. For decades of American history, the nativity scene depicting the birth of Jesus Christ was traditionally part of public holiday displays. Many town squares across the nation prominently displayed nativities and the U.S. Capitol and White House have both traditionally displayed a nativity scene as part of their holiday decor as well.

While the United States has a rich and celebrated history of religious displays in public spaces, unfortunately, some choose to attack the honored tradition. But the Supreme Court's decision in Kennedy v Bremerton overturned 50 years of horrible legal precedent surrounding public expressions of faith like nativities and menorahs during the holiday season, and because of that Americans should confidently return them to public displays across the country.

How Did We Get Here?

Through much of the 20th century, Americans generally accepted nativity scenes as an appropriate and festive part of celebrating the season. But the debate over nativity scenes in public places began in the later part of the century, rooted in a fundamental misinterpretation of what the Founders intended in the text of the Establishment Clause of the U.S. Constitution.
Anti-religious groups seeking to purge the public square of religious imagery weaved a false narrative to accomplish their mission. Such displays were an endorsement of one religion, they argued. In 1971, the U.S. Supreme Court provided these zealots a legal gift, in Lemon v. Kurtzman, holding that, when it came to public expressions of faith, government action must have a secular purpose, must not promote or inhibit religion, and must not create excessive entanglement between the government and religion. The strict test became the foundation for removing religious displays from the public square.

The nativity purge began soon after. In the 1980s, the ACLU set its sights on the town of Birmingham, Michigan, suing the city for its long-held tradition of placing a nativity scene on the lawn of city hall during the Christmas season. Unfortunately, the U.S. Court of
Appeals for the Sixth Circuit ruled in favor of the ACLU, determining that the nativity scene's placement on public property violated the Establishment Clause. The court reasoned, based on Lemon, that the nativity scene sent a message that the government was endorsing Christianity.
Shortly thereafter, the ACLU sued the city of Pittsburg, Pennsylvania, for having a nativity scene displayed inside the Allegheny County Courthouse, as well as a large menorah, Christmas tree, and sign saluting liberty displayed outside on the courthouse grounds. The ACLU challenged both displays as violating the Establishment Clause for promoting religious imagery on government property.

In a 5-4 decision, the Supreme Court of the United States concluded that, because of Lemon, the placement of the stand-alone nativity scene inside the courthouse amounted to government endorsement of Christianity, thus requiring its removal. However, in a separate 6-3 decision, the outdoor display with the menorah and Christmas tree was seen as neutral and inclusive of diverse traditions—factors that allowed it to remain. In other words, displaying a nativity by itself: unconstitutional. Displaying a menorah, plus a Christmas tree: constitutional. This was the illogical outcome of Lemon.

As secularists asserted similar claims of government endorsement of religion over the years, many towns and cities began removing religious displays from the public square, often to avoid a lawsuit. In one Virginia city, to get around Lemon, the town allowed local Satanists to add a display to the town square at Christmas – a skeleton in a Santa costume.

The Supreme Court ended this ridiculousness a few years ago when it finally interred Lemon once and for all and provided a proper understanding of the First Amendment.

In 2019 and 2022, the Court decided two pivotal cases: American Legion v. American Humanist Association and Kennedy v. Bremerton School District. These cases paved the way for religious displays to return to the public square.

Kennedy put an end to a four-decade old precedent, the Lemon Test, that gave the government the power to purge the public landscape of symbols that were deemed too religious. As the majority held, "This Court long ago abandoned Lemon and its endorsement test offshoot… In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"

Before that, the Court, in The American Legion v. American Humanist Association, concluded that, "Where monuments, symbols, and practices with a longstanding history follow in the tradition of the First Congress…and recognizing the important role religion plays in the lives of many Americans, they are likewise constitutional."

Religious Displays Are Constitutional

Today, because the Lemon test is dead, courts now must consider the "history and tradition" of symbols, monuments, or displays when reviewing Establishment Clause claims related to public displays of religious imagery. Such religious displays now enjoy a "presumption of constitutionality for longstanding monuments, symbols, and practices."

Given that nativities – and the menorah – were a staple of the holiday public square for the better part of a century, states, towns and cities are free to add them back to their holiday displays.