

**7 McQuillin Mun. Corp. § 24:446 (3d ed.)**

McQuillin The Law of Municipal Corporations July 2017 Update  
Chapter 24. Municipal Police Power and Ordinances  
VIII. Political, Labor, Social, and Religious Activities, Speech, and Literature  
D. Religious Literature, Solicitation, and Activities

§ 24:446. Display of signs, symbols, and the like

**West's Key Number Digest**

- West's Key Number Digest, [Constitutional Law](#) 🔑84.5(16)
- West's Key Number Digest, [Constitutional Law](#) 🔑90
- West's Key Number Digest, [Constitutional Law](#) 🔑90.1(4)
- West's Key Number Digest, [Municipal Corporations](#) 🔑701

**Legal Encyclopedias**

- [Am. Jur. 2d, Constitutional Law § 435](#)

The carrying and display of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information and opinion,<sup>1</sup> and, hence, unqualified municipal prohibition of this practice in religious activities whether on the streets, in parks, or elsewhere, is unconstitutional as impairment of freedoms of religion, speech and the press,<sup>2</sup> unless the restriction reasonably is designed, operates, or is applied to prevent the obstruction of traffic or danger to the public health, safety, morals or welfare.<sup>3</sup> There are numerous cases every year litigating First Amendment cases based on the display of religious signs, symbols and displays on governmental property.<sup>4</sup>

A charter amendment approved by the voters of a city accepting a cross, located in a municipal park as a memorial to war veterans, may satisfy the requirement of a secular purpose so that the display of such a cross is not a violation of constitutional restraints against establishment of religion despite the fact that a cross is a religious symbol,<sup>5</sup> but it has been held that a city's 30-year practice of arranging the window blinds, or illuminating the windows, of its city hall tower in the form of a cross on certain religious holidays constituted proscribed action respecting an establishment of religion subject to injunction.<sup>6</sup> Similarly, a county seal bearing a Latin cross and the Spanish motto, "Con Esta Vencemos," violates the First Amendment's guarantee of the separation of church and state.<sup>7</sup> In another example, a steel cross recovered from the wreckage of the World Trade Center that was placed at the National September 11 Memorial and Museum had a secular purpose of demonstrating how those at the World Trade Center during the attack coped with the devastation they witnessed during the rescue and recovery effort.<sup>8</sup> A municipality does not violate the Establishment Clause by displaying a Ten Commandment monument donated to it by a secular organization that also contains other nonsectarian symbols.<sup>9</sup> However, with other symbols it is not so clear as to whether or not it constitutes a religious symbol for purposes of an Establishment Clause analysis.<sup>10</sup> Adding nonsecular items to a religious display does not cleanse the display of its sectarian qualities.<sup>11</sup> In determining whether the Establishment Clause has been violated, courts have generally applied the Lemon test.<sup>12</sup> Under Lemon, the Establishment Clause is violated if: the governmental action in question does not have a secular purpose; its principal or primary effect advances or inhibits religion; or

the action fosters an excessive government entanglement with religion.<sup>13</sup> A county board's decision to authorize the inscription of "In God We Trust" on the facade of a county government center was held to have a legitimate and non-pretexual secular purpose, namely to depict national motto.<sup>14</sup> In determining whether government endorses religion, the following variables have been considered:

- (1) the location of the display;
- (2) whether the display is included in a larger setting with other nonreligious items;
- (3) the religious intensity of the display;
- (4) whether it is shown in connection with a secular holiday;
- (5) the degree of public participation in the ownership and maintenance of the display; and
- (6) the existence of disclaimers of public sponsorship of the display.<sup>15</sup>

The test a court applies to these factors is whether they would convey the message of government endorsement to a "reasonable observer."<sup>16</sup>

In some cases, courts must draw fine distinctions.<sup>17</sup> One such distinction is whether the area of controversy is a traditional public forum. Generally speaking, for First Amendment purposes, the court looks to whether the area has physical characteristics of traditional public forum, whether its use was eminently compatible with expressive activity, and whether it has historically been used for expressive activity.<sup>18</sup> The court also looks to whether the area is a combination of three prototypical examples of traditional public fora, streets, sidewalks, and parks.<sup>19</sup> A display of a creche inside a county courthouse may, given its particular setting, have the effect of endorsing religious beliefs and thus be impermissible.<sup>20</sup> However, a menorah that is displayed in front of a municipal building next to a Christmas tree and a sign saluting liberty does not, viewed in this context, endorse any particular religious belief and thus, such a display is permissible.<sup>21</sup> In sum, in determining whether or not the display's primary effect advances or inhibits religion, the second prong of the Lemon test discussed above, the court focuses on the physical setting of the display at issue.<sup>22</sup> Government promotes religion as effectively when it fosters a close identification of its powers and responsibility with those of any, or all, religious denominations, as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.<sup>23</sup> Accordingly, a government practice that has the effect of impeding individuals from making free choices in religious matters by appearing either to embrace or reject a particular religion violates the Establishment Clause.<sup>24</sup> Although the Federal Constitution does not forbid a display of a creche along with other holiday symbols in a park adjoining city hall, even though the city is consequently closely associated in the public mind with such display, the Constitution does forbid a city to display a creche as a centerpiece of a display located inside city hall since the display of such an isolated religious symbol at the center of government unavoidably demonstrates the city's support for that particular religion in violation of the Establishment Clause.<sup>25</sup> The proper court approach is to look at the context of the ensemble, and more important, the context of the secular holiday the government observes, which is the controlling consideration. Details that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality. Thus, where the display was outdoors, and passersby would see a grouping of symbols, most of which are secular, such a nativity scene display on the lawn of the village hall during the Christmas season does not violate the Establishment Clause.<sup>26</sup> A municipal taxpayer has standing to challenge the constitutionality under the Establishment Clause of a municipally authorized Christmas display.<sup>27</sup>

In the case of a traditional public forum, a municipality may regulate the content of expression only if such a restriction is necessary, and narrowly drawn to serve a compelling state interest. Consequently, a religious symbol may be displayed in a public forum if no compelling state interest is implicated.<sup>28</sup>

Regulations of speech in nonpublic or limited public fora are subject to the more deferential reasonableness standard under First Amendment analysis.<sup>29</sup> Although a speaker may be excluded from a nonpublic forum if he or she wishes to address a topic not encompassed within the purpose of a forum, or if he or she is not a member of the class of speakers for whose benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view that he or she espouses on an otherwise includible subject.<sup>30</sup> Problems arise when the government allows some private speech on the property. If the government permits secular displays on nonpublic fora, it cannot ban displays discussing otherwise permissible topics from a religious perspective.<sup>31</sup>

In one case, a county's restriction on use of a mall for county residents was held to serve no compelling interest and was not narrowly tailored to achieve significant state interest. This non-resident wanted to erect a creche on the mall property.<sup>32</sup> The

exclusion from a traditional public forum on basis of speaker-identity is valid only where exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.<sup>33</sup>

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Footnotes

<sup>1</sup> **U.S.**  
[Carlson v. People of State of Cal.](#), 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, 6 L.R.R.M. (BNA) 705, 2 Lab. Cas. (CCH) ¶ 17060 (1940); [Stromberg v. People of State of Cal.](#), 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931)

<sup>2</sup> **U.S.**  
[American Civil Liberties Union of New Jersey v. Schundler](#), 104 F.3d 1435 (3d Cir. 1997) (Applying the endorsement test, a holiday display containing a creche and menorah on city property was held to have violated the Establishment Clause even though nonsecular items such as Frosty, Santa and a red sled were on display.)  
[Cabral v. City of Evansville, Ind.](#), 958 F. Supp. 2d 1018 (S.D. Ind. 2013), appeal dismissed, 759 F.3d 639 (7th Cir. 2014) (city's approval of church's planned two-week display of up to 31 six-foot crosses on public riverfront property would convey a message of city's endorsement of Christianity to the reasonable observer, and thus, would violate the Establishment Clause); [Eagon Through Eagon v. City of Elk City, Okl.](#), 72 F.3d 1480 (10th Cir. 1996) (teen republican club sign unconstitutionally prohibited from city park); [Congregation Lubavitch v. City of Cincinnati](#), 923 F.2d 458 (6th Cir. 1991) (display of menorah in public square); [McCreary v. Stone](#), 739 F.2d 716 (2d Cir. 1984), judgment aff'd, 471 U.S. 83, 105 S. Ct. 1859, 85 L. Ed. 2d 63 (1985); [Grutzmacher v. Public Bldg. Com'n of Chicago](#), 700 F. Supp. 1497 (N.D. Ill. 1988) (city without power to prohibit religious exhibitions in public forum)  
[American Humanist Ass'n, Inc. v. City of Ocala](#), 127 F. Supp. 3d 1265 (M.D. Fla. 2015) (county residents' claims that city's police department posted on its social media webpage a letter on its own letterhead and signed by police chief, stating that there was a community crisis requiring fervent prayer, and that city's mayor sent e-mail communications refusing to cancel prayer vigil at downtown square and taking ownership in the event, were sufficient to allege government endorsement of religion, as well as sufficient to allege that city had a policy or practice of endorsing religion, as required to state a claim against city under § 1983 for violation of the Establishment Clause); [Tearpock-Martini v. Borough](#), 98 F. Supp. 3d 697 (M.D. Pa. 2015) (property owner's claims that township placed sign for church on right-of-way bordering her property, that sign included religious themes such as a cross and bible, and that township did not place signs for other religious denominations on right-of-ways, were sufficient to allege government endorsement of religion, as required to state a claim against township under § 1983 for violation of the Establishment Clause)

**Ga.**

[Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.](#), 266 Ga. 393, 467 S.E.2d 875 (1996)

**Mass.**

[Com. v. Anderson](#), 308 Mass. 370, 32 N.E.2d 684 (1941); [Com. v. Pascone](#), 308 Mass. 591, 33 N.E.2d 522 (1941)

**Mich.**

[In re Frazee](#), 63 Mich. 396, 30 N.W. 72 (1886)

**N.Y.**

[People v. Kieran](#), 6 Misc. 2d 245, 26 N.Y.S.2d 291 (County Ct. 1940)

[First Amendment Challenges to Display of Religious Symbols on Public Property](#), 107 A.L.R.5th 1.

<sup>3</sup> **U.S.**  
[Congregation Lubavitch v. City of Cincinnati](#), 923 F.2d 458 (6th Cir. 1991) (prohibition of all religious symbols in public square unconstitutional); [Grutzmacher v. Public Bldg. Com'n of Chicago](#), 700 F. Supp. 1497 (N.D. Ill. 1988) (city without power to prohibit religious exhibitions in public forum)

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[Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.](#), 266 Ga. 393, 467 S.E.2d 875 (1996)

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[Com. v. Anderson](#), 308 Mass. 370, 32 N.E.2d 684 (1941)

<sup>4</sup> [First Amendment Challenges to Display of Religious Symbols on Public Property](#), 107 A.L.R.5th 1.

**U.S.**

[Trunk v. City of San Diego](#), 629 F.3d 1099 (9th Cir. 2011); [Cabral v. City of Evansville, Ind.](#), 958 F. Supp. 2d 1018 (S.D. Ind. 2013), appeal dismissed, 759 F.3d 639 (7th Cir. 2014) (city's approval of church's planned two-week display of up

to 31 six-foot crosses on public riverfront property would convey a message of city's endorsement of Christianity to the reasonable observer, and thus, would violate the Establishment Clause)

**Utah**

[Summum v. Pleasant Grove City, 2015 UT 31, 2015 WL 404367 \(Utah 2015\)](#) (religious liberty clause of the Utah Constitution did not require city to install a proposed religious monument in a public park where a Ten Commandments monument was already situated; requiring city to erect a second religious monument would not render the allocation of public property and money to the two monuments neutral, displaying monuments that communicate the beliefs of only two religious viewpoints would not amount to an impartial distribution of public property among the spectrum of religious views held by Utah citizens, and because allocation of public money or property to a permanent religious monument was per se not neutral, the appropriate remedy for monument constituting "religious worship, exercise or instruction" would not be the forced installation of a second monument)

**U.S.**

[Separation of Church and State Committee v. City of Eugene of Lane County, State of Or., 93 F.3d 617 \(9th Cir. 1996\)](#)

**Or.**

[Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 \(1976\)](#)

**Cal.**

[Fox v. City of Los Angeles, 22 Cal. 3d 792, 150 Cal. Rptr. 867, 587 P.2d 663 \(1978\)](#)

**U.S.**

[Friedman v. Board of County Com'rs of Bernalillo County, 781 F.2d 777 \(10th Cir. 1985\)](#); [Separation of Church and State Committee v. City of Eugene of Lane County, State of Or., 93 F.3d 617 \(9th Cir. 1996\)](#)

**U.S.**

[American Atheists, Inc. v. Port Authority of NY and NJ, 936 F. Supp. 2d 321 \(S.D. N.Y. 2013\)](#), *aff'd*, [760 F.3d 227 \(2d Cir. 2014\)](#) (during holiday season predominated over any secular decorative purpose)

**U.S.**

[Summum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#)

**U.S.**

[Summum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#); [Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#); [Brooks v. City of Oak Ridge, 222 F.3d 259, 2000 FED App. 0243P \(6th Cir. 2000\)](#) (friendship bell in city park not a religious symbol); [Alvarado v. City of San Jose, 94 F.3d 1223 \(9th Cir. 1996\)](#), as amended, (Sept. 19, 1996) (symbol of New Age)

**U.S.**

[American Civil Liberties Union of New Jersey v. Schundler, 104 F.3d 1435 \(3d Cir. 1997\)](#) (Applying the endorsement test, a holiday display containing a creche and menorah on city property was held to have violated the Establishment Clause even though nonsecular items such as Frosty, Santa and a red sled were on display.)

[Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#)

**U.S.**

[Lambeth v. Board Of Commissioners Of Davidson County, NC, 407 F.3d 266 \(4th Cir. 2005\)](#)

[Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 \(1971\)](#); [Summum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#); [Books v. City of Elkhart, Indiana, 235 F.3d 292 \(7th Cir. 2000\)](#); [Brooks v. City of Oak Ridge, 222 F.3d 259, 2000 FED App. 0243P \(6th Cir. 2000\)](#); [Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#); [Friedman v. Board of County Com'rs of Bernalillo County, 781 F.2d 777 \(10th Cir. 1985\)](#)

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[Friedman v. Board of County Com'rs of Bernalillo County, 781 F.2d 777 \(10th Cir. 1985\)](#) (A county seal containing a Spanish motto that translated to read "With this we conquer" arched over a golden Latin cross covering nearly half of the seal had the principal or primary effect of advancing Christianity and its official use by the county and therefore violated the Establishment Clause.)

Municipal corporate seals' validity under the Establishment Clause and Free Exercise Clause of the federal constitution, see § 6:1.

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**U.S.**

[Lambeth v. Board Of Commissioners Of Davidson County, NC, 407 F.3d 266 \(4th Cir. 2005\)](#)

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**U.S.**

[Sumnum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#); [Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#) (city policy of prohibiting unattended private displays on steps of city building was content neutral); [Books v. City of Elkhart, Indiana, 235 F.3d 292 \(7th Cir. 2000\)](#) (display of 10 commandments on city property); [Brooks v. City of Oak Ridge, 222 F.3d 259, 2000 FED App. 0243P \(6th Cir. 2000\)](#) (friendship bell in city park found to comport with Establishment Clause); [American Jewish Congress v. City of Beverly Hills, 90 F.3d 379 \(9th Cir. 1996\)](#); [American Civil Liberties Union of Kentucky v. Wilkinson, 895 F.2d 1098 \(6th Cir. 1990\)](#) (maintenance of stable as not amounting to endorsement of Christianity as accompanied by disclaimer); [Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#)

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**U.S.**

[Americans United For Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 \(6th Cir. 1992\)](#) (The majority held that a reasonable observer is a resident of the community who is reasonably informed about the public places devoted to free speech; this standard prevents the operation of an “ignoramus’s veto.”) See [Doe v. Small, 964 F.2d 611, 630 \(7th Cir. 1992\)](#) (concurring opinion discussing “obtuse observer’s veto”) [Sumnum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#); [Books v. City of Elkhart, Indiana, 235 F.3d 292 \(7th Cir. 2000\)](#) (display of Ten Commandments on city property); [Brooks v. City of Oak Ridge, 222 F.3d 259, 2000 FED App. 0243P \(6th Cir. 2000\)](#) (friendship bell in city park found to comport with Establishment Clause); [American Jewish Congress v. City of Beverly Hills, 90 F.3d 379 \(9th Cir. 1996\)](#)

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**U.S.**

[Books v. City of Elkhart, Indiana, 235 F.3d 292 \(7th Cir. 2000\)](#); [Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#)

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**U.S.**

[Sumnum v. City of Ogden, 297 F.3d 995 \(10th Cir. 2002\)](#); [Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#); [Warren v. Fairfax County, 196 F.3d 186 \(4th Cir. 1999\)](#)

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**U.S.**

[Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#); [Warren v. Fairfax County, 196 F.3d 186 \(4th Cir. 1999\)](#)

**N.Y.**

[Chabad of Mid-Hudson Valley v. City of Poughkeepsie, 76 A.D.3d 693, 907 N.Y.S.2d 286 \(2d Dep’t 2010\)](#)

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**U.S.**

[American Jewish Congress v. City of Beverly Hills, 90 F.3d 379 \(9th Cir. 1996\)](#); [Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#)

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**Wis.**

[King v. Village of Waunakee, 175 Wis. 2d 300, 499 N.W.2d 237 \(Ct. App. 1993\)](#), judgment aff’d, [185 Wis. 2d 25, 517 N.W.2d 671 \(1994\)](#)

22

**U.S.**

[Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#); [Wells v. City and County of Denver, 257 F.3d 1132 \(10th Cir. 2001\)](#)

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[American Civil Liberties Union of New Jersey v. Schundler, 104 F.3d 1435 \(3d Cir. 1997\)](#); [Smith v. County of Albemarle, Va., 895 F.2d 953 \(4th Cir. 1990\)](#); [American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 \(6th Cir. 1986\)](#)  
[Hewitt v. Joyner, 940 F.2d 1561 \(9th Cir. 1991\)](#) (County which acquired title to tourist attraction consisting of a park full of religious statues violated Establishment Clause.)

- 24           **U.S.**  
Smith v. County of Albemarle, Va., 895 F.2d 953 (4th Cir. 1990)  
American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986) (A display of a creche that was unaccompanied by any nonreligious symbol of the holiday that was in a prominent position on the lawn of a city hall violated the Establishment Clause of the First Amendment.)
- 25           **U.S.**  
Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984); American Civil Liberties Union of New Jersey v. Schundler, 104 F.3d 1435 (3d Cir. 1997); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987)
- 26           **U.S.**  
Mather v. Village of Mundelein, 864 F.2d 1291 (7th Cir. 1989)  
**Wis.**  
King v. Village of Waunakee, 175 Wis. 2d 300, 499 N.W.2d 237 (Ct. App. 1993), judgment aff'd, 185 Wis. 2d 25, 517 N.W.2d 671 (1994)
- 27           **U.S.**  
Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984); Smith v. County of Albemarle, Va., 895 F.2d 953 (4th Cir. 1990) (county taxpayers and residents)  
**Wis.**  
King v. Village of Waunakee, 175 Wis. 2d 300, 499 N.W.2d 237 (Ct. App. 1993), judgment aff'd, 185 Wis. 2d 25, 517 N.W.2d 671 (1994)
- 28           **U.S.**  
Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995); Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001)
- 29           **U.S.**  
Sumnum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002); Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001); Sumnum v. Callaghan, 130 F.3d 906 (10th Cir. 1997)
- 30           **U.S.**  
Sumnum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002)
- 31           **U.S.**  
Sumnum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002); Sumnum v. Callaghan, 130 F.3d 906 (10th Cir. 1997)
- 32           **U.S.**  
Warren v. Fairfax County, 196 F.3d 186 (4th Cir. 1999) (case contains detailed discussion of public forum analysis)
- 33           **U.S.**  
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