

Legal Sidebar

Government Speech, Religious Displays, and Finding Balance in the First Amendment

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In April, Arkansas [enacted legislation](#) directing the Secretary of State to facilitate the placement of a monument of the Ten Commandments on the ground of the State Capitol. The legislature cited U.S. [Supreme Court precedent](#) to justify the authorization, which has garnered national attention. In August, the Secretary of State [denied a request](#) to place a Hindu statue on the Capitol grounds as well. Both displays were to be funded entirely by private sources, eliminating at least some constitutional concerns about funding of religious messages. However, the controversy over the displays has highlighted once again the nuances of [First Amendment](#) law. At issue is the tension between the permissible bounds of displaying religious symbols on government property under the Establishment Clause and the government's ability to choose its message under the Free Speech Clause.

Religious Displays Under the Free Speech Clause

Under a [2009 Supreme Court decision](#), displays of religious markers on government property are considered the speech of the government. In [Pleasant Grove City v. Summum](#), a religious organization asked a local government to place a monument depicting the "Seven Aphorisms of Summum" in a public park which also displayed a number of other monuments, including one of the Ten Commandments. The Court held that privately donated monuments displayed in the city's public park were a form of government speech, not the speech of the respective private donors.

As government speech, the monuments are not subject to limitations imposed by the Free Speech Clause, but are subject to other restraints such as the Establishment Clause. The challenge was brought solely under the Free Speech Clause, meaning that the Court was not asked to decide whether the government's speech when selecting one religious symbol but not another would violate the Establishment Clause's [prohibition on showing preference](#) to one religion over another.

Religious Displays Under the Establishment Clause

Under a [separate line of precedent](#), the Court has clarified some parameters of when a religious display on government property may be permissible under the Establishment Clause. Displays of religious symbols are not prohibited entirely under the Establishment Clause. The Court has [upheld a display](#) of the Ten Commandments on Texas state capitol grounds as recently as 2005. That monument was set among dozens of other markers related to state history and had been displayed for many decades before its significance was challenged under the First Amendment. In the same year, however, the Court [held that recently erected displays](#) of the Ten Commandments in Kentucky county courthouses violated the Establishment Clause's mandate on government neutrality toward religion. The Court noted that the counties had an impermissible purpose in promoting the religious value of the displays without any broader theme. Furthermore, [other earlier](#) Court decisions permitted public holiday displays to include religious symbols if the religious symbols were set among a diverse group of holiday markers. Read together, these cases have indicated that the history of the display as well as the diversity of other surrounding symbols are critical factors to the constitutional analysis of public displays of religious symbols.

Considerations for Display of the Ten Commandments on Arkansas State Capitol Grounds

Recent actions by Arkansas' legislature and Secretary of State appear to raise the unanswered question of *Summum*: Must the government represent all interested religions in its chosen speech? On one hand, requiring the government to follow an "all-comers" policy for religious messages and displays poses potential challenges in logistically including all interested viewpoints. On the other hand, allowing the government to pick and choose which religious viewpoints will be represented raises traditional problems of [endorsement](#) of particular religious views and [entanglement](#) with religion, both prohibited by the Establishment Clause.

Notably, the Arkansas legislature relied on the Texas case as justification for its decision to display the Ten Commandments. However, that was the case in which the Court cited the decades long history of the display and the plurality of other symbols also included on the state capitol grounds under a broader secular theme when upholding the monument. It is unclear which other symbols might be displayed along with the Ten Commandments in Arkansas, although the legislation directs that the display be placed among "other monuments." Furthermore, the legislation authorizing the Ten Commandments monument identifies religious purposes for the display, creating the appearance that the Arkansas display can be more likely analogized to the displays held unconstitutional in Kentucky if challenged in the courts under the Establishment Clause.

For additional analysis of Free Speech issues and public displays of religious symbols under the Establishment Clause, see [RS22223, Public Display of the Ten Commandments and Other Religious Symbols](#) and [95-815, Freedom of Speech and Press: Exceptions to the First Amendment](#).

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