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KKK CROSS ON CAPITOL SQUARE NOT STATE ENDORSEMENT OF RELIGION

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A public park or square is considered a "quintessential" public forum for the exercise of First Amendment free speech rights. As a result, time, place and manner restrictions on free speech activities must be reasonable and content neutral. As illustrated by the *Capitol Square* decision described below, such content neutrality extends to the use of religious symbolism by private groups in a public forum. As a result, the issuance of permits to private groups and individuals for displays in public parks and places must walk a fine line between the endorsement or entanglement with religious symbols in violation of the Establishment Clause and discrimination against religious symbols in violation of the Free Speech and Free Exercise of Religion Clauses. (See also the October 1989 NRPA Law Review column entitled "Constitution Bans Religious Effect in Public Holiday Displays" which described a constitutional challenge to the display of a "creche" or nativity scene on public property. Similarly, see the June 1985 NRPA Law Review, "A Christmas Carol in the Park from the Supremes.")

Government or Private Speech?

In the case of *Capitol Square Review and Advisory Board. v. Pinette,* 115 S.Ct. 2440, 132 L.Ed.2d 650, 63 USLW 4684, (U.S.Ohio, Jun 29, 1995) (NO. 94-780) the State of Ohio would not issue a permit for the Ku Klux Klan to display a cross in a public square. In the opinion of the State, permitting the private display of a religious symbol on the grounds of the state capitol would violate the Establishment Clause of the First Amendment. Accordingly, the specific issue before the United States Supreme Court was "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." As described by the Court, "The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment, provides that government "shall make no law respecting an establishment of religion." The facts of the case were as follows:

> Capitol Square is a 10-acre, state-owned plaza surrounding the Statehouse in Columbus, Ohio. For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. 128-4-02(A) (1994) makes the square available "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose," and Ohio Rev. Code Ann. 105.41 (1994), gives the Capitol Square Review and Advisory Board responsibility for regulating public access. To use the square, a group must simply fill out an official application form and meet several criteria, which concern primarily safety, sanitation, and non-interference with other uses of the square, and which are neutral as to the speech content of the proposed event. Ohio

> Admin. Code 128-4-02 (1994).
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> It has been the Board's policy "to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square." Such diverse groups as homosexual rights organizations, the Ku Klux Klan and the United Way have held rallies. The Board has also permitted a variety of unattended displays on Capitol Square: a State-sponsored lighted tree during the Christmas season, a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival.
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> In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from respondent Donnie Carr, an officer of the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993. The Board denied that application on December 3, informing the Klan by letter that the decision to deny "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts."

The Ohio Klan, through its leader Vincent Pinette, filed suit in federal district court seeking an injunction requiring the Board to issue the requested permit. The Board defended on the ground that the permit would violate the Establishment Clause. The federal district court found that "Capitol Square was a traditional public forum open to all without any policy against free-standing displays." Further, the district court found that "the Klan's cross was entirely private expression entitled to full First Amendment protection; and that the Board had failed to show that the display of the cross could reasonably be construed as endorsement of Christianity by the State." The district court, therefore, issued an injunction against the Board's action and the Board permitted the Klan to erect its cross. The Board then received, and granted, several additional applications to erect crosses on Capitol Square during December 1993 and January 1994. The federal circuit court of appeals affirmed the district court's decision.

Could have Banned All Displays

The Supreme Court of the United States then granted the Board's petition to review the determination of the lower courts. The Court stated, however, that it would limit its decision to the Establishment Clause issue upon which the lower courts based their determinations. In so doing, the Court rejected the Klan's contention that this was "a case in which freedom of speech (the Klan's right to present the message of the cross display) was denied because of the State's disagreement with that message's political content, rather than because of the State's desire to distance itself from sectarian religion."

On appeal, the Board did not dispute that the KKK, "in displaying their cross, were engaging in constitutionally protected expression." Rather, the Board contended that "the constitutional protection does not extend to the length of permitting that expression to be made on Capitol Square." The Court, however, acknowledged that "we have not excluded from free-speech protections religious proselytizing, or even acts of worship."

> The Klan's religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

On the other hand, the Court stated that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." Rather, the Court found that "[t]he right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." When the government property at issue is a public forum, the Court found "a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions." Although it was not used in this particular instance, the Court indicated that "a ban on all unattended displays" might be one such restriction.

In restricting free speech activities, the Court found government "may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest."

Since Capitol Square was a "traditional public forum," the Court found that these "strict standards apply."
Further, the Court found that the Board did "not claim that their denial of the Klan's application was based upon a content-neutral time, place, or manner restriction." On the contrary, the Court found the Board had conceded as "the essence of their case" that "the Board rejected the display precisely because its content was religious." On appeal, the Board had argued that it was justified for "closing Capitol Square to the Klan's cross" based upon "the State's interest in avoiding official endorsement of Christianity, as required by the Establishment Clause."

> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation,

> and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content...
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> [In one case] a school district allowed private groups to use school facilities during off-hours for a variety of civic, social and recreational purposes, excluding, however, religious purposes. We held that even if school property during off-hours was not a public forum, the school district violated an applicant's free-speech rights by denying it use of the facilities solely because of the religious viewpoint of the program it wished to present.
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> We rejected the district's compelling-state-interest Establishment Clause defense (the same made here) because the school property was open to a wide variety of uses, the district was not directly sponsoring the religious group's activity, and "any benefit to religion or to the Church would have been no more than incidental."
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> [In another case] we examined a public university's exclusion of student religious groups from facilities available to other student groups. There also we addressed official discrimination against groups who wished to use a "generally open forum" for religious speech. And there also the State claimed that its compelling interest in complying with the Establishment Clause justified the content-based restriction. We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion. We stated categorically that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."

Full-Fledged Public Forum

Under the circumstances of this case, the Court found the same reasoning and determinative Establishment Clause factors should be applied to government property which the Court characterized as "a full-fledged public forum."

> The State did not sponsor the Klan's expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

On appeal, the Board had argued that "the forum's proximity to the seat of government" might "produce the perception that the cross bears the State's approval." As a result, the Board urged the Court to "apply the so-called 'endorsement test'." Specifically, the Board urged the Court to hold "the State's content-based restriction is constitutional... because an observer might mistake private expression for officially endorsed religious expression."

According to the Court, there was "not really an 'endorsement test' of any sort, much less the 'endorsement test' which appears in our more recent Establishment Clause jurisprudence, that the Board urges upon us." On the contrary, the Court found recent cases had "categorically rejected the State's Establishment Clause defense" once the Court determined that "the benefit to religious groups from the public forum was incidental and shared by other groups."

> The test the Board proposes, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test... [G]iven an open forum and private sponsorship, erroneous conclusions do not count...
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> "Endorsement" connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.
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> Where we have tested for endorsement of religion, the subject of the test was either expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity...
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> 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.

Under the circumstances of this case, the Board had argued that the distinction between government speech endorsing religion and private speech endorsing religion "disappears when the private speech is conducted too close to the symbols of government." The Court rejected this argument in situations "where, as here, the government has not fostered or encouraged the mistake."

> Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate. But those situations, which involve governmental favoritism, do not exist here.
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> Capitol Square is a genuinely public forum, is known to be a public forum, and has been

> widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none...
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> If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such. That would be a content-neutral "manner" restriction which is assuredly constitutional. But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.

Only Words & Acts of Government

According to the Court, by its terms, the Establishment Clause "applies only to the words and acts of government." As a result, the Court found that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum."

In the opinion of the Court, adoption and application of the Board's "transferred endorsement" principle "cannot possibly be restricted to squares in front of state capitols." Further, the Court found adoption of a "transferred endorsement" test would "disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause." To do so, the Court found would put policy makers "in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other."

> To require (and permit) access by a religious group, it was sufficient that the group's activity was not in fact government sponsored, that the event was open to the public, and that the benefit of the facilities was shared by various organizations.
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> The Board's rule would require school districts adopting similar policies in the future to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be advocating a religious viewpoint. Similarly, state universities would be forced to reassess our statement that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." Whether it does would henceforth depend upon immediate appearances...
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> Every proposed act of private, religious expression in a public forum would force officials to weigh a host of imponderables. How close to government is too close? What kind of building, and in what context, symbolizes state authority? If the State guessed wrong in one direction, it would be guilty of an Establishment Clause violation; if in the other, it would be liable for suppressing free exercise or free speech (a risk not run when the State restrains only its own expression).

Accordingly, the Court held that "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." Having found "[t]hose conditions are satisfied here," the Court determined that "the State may not bar the Klan's cross from Capitol Square." The Supreme Court, therefore, affirmed the judgment of the lower courts.