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NC YMCA Youth & Government 2021
Court of Appeals Case 1
VAN ORDEN v. PERRY

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North Carolina
YMCA YOUTH &
GOVERNMENT

Van Orden v. Perry

Argued: March 2, 2005

Decided: June 27, 2005

Facts

The Texas state capitol and its surrounding 22 acres were dedicated on May 16, 1888. Since that time, 17 monuments have been erected on the capitol grounds, a protected National Historic Landmark maintained by the State Preservation Board.

Early in 1961, the Fraternal Order of Eagles gave a granite monument of the Ten Commandments, approximately six-feet high and three-and-a-half feet wide, to the state. In accepting the monument, the Texas House and Senate passed a joint resolution to "recognize and commend a private organization for its efforts to reduce juvenile delinquency." In the center of the monument a large panel displays the text of the Commandments, and above the text are depictions of two small tablets with ancient Hebrew script. The monument also has an etching of an American eagle grasping the American flag. Just below the text are two small Stars of David, as well as a symbol representing Christ: two Greek letters, Chi and Rho superimposed on each other. The monument also bears the inscription: PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.

The expenses of placing the monument on the capitol grounds were borne completely by the Eagles; the monument requires virtually no maintenance. This monument is located on a line between the state's supreme court and the capitol rotunda, approximately halfway between the two buildings (about 100 feet from each building).

The plaintiff in this case, Thomas Van Orden, asked the federal district court to order the State of Texas to remove the monument from the grounds of the state capitol. After a bench trial the court rejected Van Orden's claim and entered judgment for the state. The United States Court of Appeals for the Fifth Circuit affirmed. The Supreme Court of the United States has also granted review in a similar case from Kentucky in which the Sixth Circuit held that two counties had to remove framed copies of the Ten Commandments from their courthouse walls (*McCreary County v. ACLU*).

Issue

Does the placement of the Ten Commandments monument on state property between the Texas state capitol and Texas supreme court violate the Establishment Clause of the First Amendment?

Supreme Court Tests to Evaluate an Alleged Establishment Clause Violation

- **The Lemon Test – Lemon v. Kurtzman (1971)**

To survive an Establishment Clause challenge under this test, a policy:

1. Must have a secular purpose;
2. Must have a principal or primary effect that doesn't advance or inhibit religion; and
3. Must not foster excessive government entanglement with religion.

- **The Endorsement Test – Lynch v. Donnelly, (1984) & County of Allegheny v. ACLU, (1989)**

1. In *Lynch*, where the Court allowed a nativity scene to be included in a city's multifaceted holiday display, Justice O'Connor proposed a modified version of the *Lemon* test, focusing on whether the government is advancing or endorsing religion.
2. This approach was adopted by a majority of the Court in *Allegheny*, where the Court prohibited the display of a nativity scene at a county courthouse.
3. The endorsement test does not prevent government from taking religion into account in making law or policy, but it precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.

- **The Coercion Test – Lee v. Weisman (1992)**

The Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way that establishes state religion or religious faith.

In *Lee*, the Court held that a prayer that was not specific to any religion was unduly coercive at a public school's graduation ceremony because it put pressure on students from the public and their peers to participate in, or at least show respect during, the prayers.

- **The Neutrality Test – Zelman v. Simmons-Harris (2002)**

Government may promote a neutral policy that has the indirect effect of aiding religion.

In *Zelman*, the Court upheld a voucher program for public school students, despite the fact that many students would use the government aid to attend religious schools. According to the majority, the government distributed the funds on a neutral basis.

- **The Traditional/Historical Approach – Marsh v. Chambers (1983)**

This approach uses tradition and historical practice to define the scope of the Establishment Clause, asserting that it should not be interpreted to void practices that have long been accepted parts of social custom.

In *Marsh*, the Court upheld a state's authority to pay a chaplain to open sessions of the legislature with a prayer.

Precedents

- **Lemon v. Kurtzman (1971)**

Lemon serves as a point of departure for determining whether state displays of symbols and writings with a religious message are contrary to the First Amendment. While often criticized, sometimes ignored, and recently modified during its 32-year existence, the *Lemon* case has never been overruled by the Supreme Court of the United States. *Lemon* created a three-prong test. As originally formulated, a challenged activity must survive each prong to pass constitutional scrutiny:

1. The government activity in question must have a secular purpose (a display has the purpose of endorsing religion when it conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred);
2. The activity's primary effect cannot advance or inhibit religion (to determine effect the Court asks whether a viewer would reasonably believe the purpose of the display to be endorsement of a religious view); and
3. The government activity cannot foster an excessive entanglement with religion.

In more recent cases, the *Lemon* test has been modified; however, these alterations have been in cases involving parochial education and not religious displays in public places. The Court has not made it clear whether the alterations apply to display cases or whether the original *Lemon* test is still applicable in such cases.

- **Stone v. Graham (1980)**

The Supreme Court dismissed a state legislature's claimed secular purpose for requiring schools to post a copy of the Ten Commandments and held the policy unconstitutional.

- **County of Allegheny v. American Civil Liberties Union (1989)**

This case established that a state may not have a single religious display (such as a crèche), but may have a display of multi-religious symbols along with secular symbols. In *County of Allegheny*, the display of the Christmas tree and the menorah was permitted because a Christmas tree was considered a secular symbol of a religious holiday and because the display as a whole symbolized the lights of freedom.

U.S. Supreme Court

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Lemon v. Kurtzman

No. 89

Argued March 3, 1971

Decided June 28, 1971

403 U.S. 602

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Syllabus

Rhode Island's 1969 Salary Supplement Act provides for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. A three-judge court found that about 25% of the State's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. The court found that the parochial school system was "an integral part of the religious mission of the Catholic Church," and held that the Act fostered "excessive entanglement" between government and religion, thus violating the Establishment Clause. Pennsylvania's Nonpublic Elementary and Secondary Education Act, passed in 1968, authorizes the state Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and instructional materials. Reimbursement is restricted to courses in specific secular subjects, the textbooks and materials must be approved by the Superintendent, and no payment is to be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Contracts were made with schools that have more than 20% of all the students in the State, most of which were affiliated with the Roman Catholic Church. The complaint challenging the constitutionality of the Act alleged that the church-affiliated schools are controlled by religious organizations, have the purpose of

propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. A three-judge court granted the State's motion to dismiss the complaint for failure to state a claim for relief, finding no violation of the Establishment or Free Exercise Clause.

Held: Both statutes are unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Pp. 403 U. S. 611-625.

(a) The entanglement in the Rhode Island program arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspects of elementary education in such schools. These factors require continuing state surveillance to ensure that the statutory restrictions are obeyed and the First Amendment otherwise respected. Furthermore, under the Act, the government must inspect school records to determine what part of the expenditures is attributable to secular education, as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools. Pp. 403 U. S. 615-620.

(b) The entanglement in the Pennsylvania program also arises from the restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular, as distinguished from religious, education. In addition, the Pennsylvania statute has the further defect of providing continuing financial aid directly to the church-related schools. Historically, governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state. Pp. 403 U. S. 620-622.

(c) Political division along religious lines was one of the evils at which the First Amendment aimed, and in these programs, where successive and probably permanent annual appropriations that benefit relatively few religious groups are involved, political fragmentation and divisiveness on religious lines are likely to be intensified. Pp. 403 U. S. 622-624.

(d) Unlike the tax exemption for places of religious worship, upheld in *Walz v. Tax Commission,* 397 U. S. 664, which was based on a practice of 200 years, these innovative programs have self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion. Pp. 624-625.

No. 89, 310 F. Supp. 35, reversed and remanded; Nos. 569 and 570, 316 F. Supp. 112, affirmed.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in

writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to have the Rhode Island Salary Supplement Act declared unconstitutional and its operation enjoined on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court was convened pursuant to 28 U.S.C. §§ 2281, 2284. It found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date, some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition, two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." 316 F. Supp. 112. We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program that has some, but not all, of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education. . . ."

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools. Under the "contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must

maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on July 1, 1968, and the first reimbursement payments to schools were made on September 2, 1969. It appears that some $5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils -- more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute. The organizational plaintiffs appellants are associations of persons resident in Pennsylvania declaring belief in the separation of church and state; individual plaintiffs appellants are citizens and taxpayers of Pennsylvania. Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track, and thus had paid the specific tax that supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants appellees.

A three-judge federal court was convened pursuant to 28 U.S.C. §§ 2281, 2284. The District Court held that the individual plaintiffs appellants had standing to challenge the Act, 310 F. Supp. 42. The organizational plaintiffs appellants were denied standing under *Flast v. Cohen,* 392 U. S. 83, 392 U. S. 99, 101 (1968).

The court granted appellees' motion to dismiss the complaint for failure to state a claim for relief. 310 F. Supp. 35. It held that the Act violated neither the Establishment nor the Free Exercise Clause, Chief Judge Hastie dissenting. We reverse.

II

In *Everson v. Board of Education,* 330 U. S. 1 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There, MR. JUSTICE BLACK, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. *Id.* at 330 U. S. 16. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is, at best, opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion, but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 397 U. S. 668 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U. S. 236, 392 U. S. 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 397 U. S. 674.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in

all schools it allows to operate. As in *Allen,* we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen,* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were, in fact, instrumental in the teaching of religion. 392 U.S. at 392 U. S. 248. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract, we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission, and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions, and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

III

In *Walz v. Tax Commission, supra,* the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine, rather than enlarge, the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson,* 343 U. S. 306, 343 U. S. 312 (1952); *Sherbert v. Verner,* 374 U. S. 398, 374 U. S. 422 (1963) (HARLAN, J., dissenting). Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was, in fact, being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from

being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. MR. JUSTICE HARLAN, in a separate opinion in *Walz, supra,* echoed the classic warning as to "programs, whose very nature is apt to entangle the state in details of administration. . . ." *Id.* at 397 U. S. 695. Here we find that both statutes foster an impermissible degree of entanglement.

(a) Rhode Island program

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises, since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools, rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings, the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of

the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen,* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

In our view, the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969, lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system. The schools are governed by the standards set forth in a "Handbook of

School Regulations," which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools:

"The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher. . . ."

The Handbook also states that: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential, if not actual, hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably, some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions, such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious belief from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion -- indeed, the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only

those texts and materials that are found in the public schools. In addition, the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools, and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz v. Tax Commission, supra,* at 397 U. S. 675, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) Pennsylvania program

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular, as distinguished from the religious, instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen,* for, in both those cases, the Court was careful to point out that state aid was provided to the student and his parents -- not to the church-related school. *Board of Education v. Allen, supra,* at 392 U. S. 243-244; *Everson v. Board of Education, supra,* at 330 U. S. 18. In *Walz v. Tax Commission, supra,* at 397 U. S. 675, the Court warned of the dangers of direct payments to religious organizations:

"Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ."

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular, the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare, and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv.L.Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. *Walz v. Tax Commission, supra,* at 397 U. S. 695 (separate opinion of HARLAN, J.). *See also Board of Education v. Allen,* 392 U.S. at

392 U. S. 249 (HARLAN, J., concurring); *Abington School District v. Schempp,* 374 U. S. 203, 374 U. S. 307 (1963) (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz,* "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." *Walz v. Tax Commission, supra,* at 397 U. S. 670. We could not expect otherwise, for religious values pervade the fabric of our national life. But, in *Walz,* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

V

In *Walz,* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches.

Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that, in constitutional adjudication, some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. A certain momentum develops in constitutional theory, and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE MARSHALL took no part in the consideration or decision of No. 89.

* Together with No. 569, *Earley et al. v. DiCenso et al.,* and No. 570, *Robinson, Commissioner of Education of Rhode Island, et al. v. DiCenso et al.,* on appeal from the United States District Court for the District of Rhode Island.

U.S. Supreme Court

Stone v. Graham, 449 U.S. 39 (1980)

Stone v. Graham

No. 80-321

Decided November 17, 1980

449 U.S. 39

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF KENTUCKY

Syllabus

Held: A Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the State has no secular legislative purpose, and therefore is unconstitutional as violating the Establishment Clause of the First Amendment. While the state legislature required the notation in small print at the bottom of each display that

"[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States,"

such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. The preeminent purpose of posting the Ten Commandments, which do not confine themselves to arguably secular matters, is plainly religious in nature, and the posting serves no constitutional educational function. *Cf. Abington School District v. Schempp,* 374 U. S. 203. That the posted copies are financed by voluntary private contributions is immaterial, for the mere posting under the auspices of the legislature provides the official support of the state government that the Establishment Clause prohibits. Nor is it significant that the Ten Commandments are merely posted, rather than read aloud, for it is no defense to urge that the religious practices may be relatively minor encroachments on the First Amendment

Certiorari granted; 599 S.W.2d 157, reversed.

PER CURIAM.

Kentucky statute require the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State. Petitioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment, sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. App. to Pet. for Cert. 38-39. The Supreme Court of the Commonwealth of Kentucky affirmed by an equally divided court. 599 S.W.2d 157 (1980). We reverse.

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

"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.'"

Lemon v. Kurtzman, 403 U. S. 602, 403 U. S. 612-613 (1971) (citations omitted). If a statute violates any of these three principles, it must be struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments:

"The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky.Rev.Stat. § 158.178 (1980).

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." App. to Pet. for Cert. 37. Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District v. Schempp,* 374 U. S. 203 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as

"the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."

Id. at 374 U. S. 223.

The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20:1-11; Deuteronomy 5:6-15.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp, supra* at 374 U. S. 225. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits. 374 U.S. at 374 U. S. 222; *see Engel v. Vitale,* 370 U. S. 421, 370 U. S. 431 (1962). Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel,* for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Abington School District v. Schempp, supra,* at 374 U. S. 225. We conclude that Ky.Rev.Stat. § 158.178 (1980) violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution.

The petition for a writ of certiorari is granted, and the judgment below is reversed.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent. They would grant certiorari and give this case plenary consideration.

JUSTICE STEWART dissents from this summary reversal of the courts of Kentucky, which, so far as appears, applied wholly correct constitutional criteria in reaching their decisions.

The statute provides in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high."

"(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'"

"(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act."

1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky.Rev.Stat. § 158.178 (1980).

JUSTICE REHNQUIST, dissenting.

With no support beyond its own *ipse dixit,* the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," *ante* at 449 U. S. 41 (emphasis supplied), and that "[t]he preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *ibid.* This even though, as the trial court found, "[t]he General Assembly thought the statute had a secular legislative purpose, and specifically said so." App. to Pet. for Cert. 37. The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due. *See, e.g., Committee for Public Education v. Nyquist,* 413 U. S. 756, 413 U. S. 773 (1973) ("we need touch only briefly on the requirement of a *secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests"); Lemon v. Kurtzman, 403 U. S. 602, 403 U. S. 613 (1971) ("the statutes themselves clearly state they are intended to enhance the quality of the secular education"); Sloan v. Lemon, 413 U. S. 825, 413 U. S. 829-830 (1973); Board of Education v. Allen, 392 U. S. 236, 392 U. S. 243 (1968). See also Florey v. Sioux Falls School District, 619 F.2d 1311, 1314 (CA8) (upholding rules*

permitting public school Christmas observances with religious elements as promoting the articulated secular purpose of "advanc[ing] the student's knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization"), cert. denied, post, p. 987. The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional. As this Court stated in McGowan v. Maryland, 366 U. S. 420, 366 U. S. 445 (1961), in upholding the validity of Sunday closing laws,

"the present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals."

Abington School District v. Schempp, 374 U. S. 203 (1963), repeatedly cited by the Court, is not to the contrary. No statutory findings of secular purpose supported the challenged enactments in that case. In one of the two cases considered in *Abington School District,* the trial court had determined that the challenged exercises were intended by the State to be religious exercises. *Id.* at 374 U. S. 223. A contrary finding is presented here. In the other case, no specific finding had been made, and "the religious character of the exercise was admitted by the State," *id.* at 374 U. S. 224.

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text," *ante* at 449 U. S. 41. It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination. App. to Pet. for Cert. 38. *See also Anderson v. Salt Lake City Corp.,* 475 F.2d 29, 33 (CA10 1973) (upholding construction on public land of monument inscribed with Ten Commandments because they have "substantial secular attributes"). Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import. *See id.* at 34 ("It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era"). *See also Opinion of the Justices,* 108 N.H. 97, 228 A.2d 161 (1967) (upholding placement of plaques with the motto "In God We Trust" in public schools).

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government," *Abington School District, supra* at 374 U. S. 212, and that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale,* 370 U. S. 421, 370 U. S. 434 (1962). Kentucky has decided to make students aware of this fact by demonstrating the

secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum v. Board of Education,* 333 U. S. 203, 333 U. S. 235-236 (1948), merit quotation at length:

"I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared. "

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

U.S. Supreme Court

County of Allegheny v. ACLU, 492 U.S. 573 (1989)

County of Allegheny v. American Civil Liberties Union,

Greater Pittsburgh Chapter

No. 87-2050

Argued February 22, 1989

Decided July 3, 1989

492 U.S. 573

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

Syllabus

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a creche depicting the Christian nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse, which is the "main," "most beautiful," and "most public" part of the courthouse. The creche was donated by the Holy Name Society, a Roman Catholic group, and bore a sign to that effect. Its manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." The second of the holiday displays in question was an 18-foot Chanukah menorah or candelabrum, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. At the foot of the tree was a sign bearing the mayor's name and containing text declaring the city's "salute to liberty." The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. Respondents, the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents, filed suit seeking permanently to enjoin the county from displaying the creche and the city from displaying the menorah on the ground that the displays violated the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment. The District Court denied relief, relying on *Lynch v. Donnelly,* 465 U. S. 668, which held that a city's inclusion of a creche in its annual Christmas display in a private park did not violate the Establishment Clause. The Court of Appeals

reversed, distinguishing *Lynch v. Donnelly* and holding that the creche and the menorah in the present case must be understood as an impermissible governmental endorsement of Christianity and Judaism under *Lemon v. Kurtzman,* 403 U. S. 602.

Held: The judgment is affirmed in part and reversed in part, and the cases are remanded.

842 F.2d 655, affirmed in part, reversed in part, and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts III-A, IV, and V, concluding that:

1. Under *Lemon v. Kurtzman,* 403 U.S. at 403 U. S. 612, a "practice which touches upon religion, if it is to be permissible under the Establishment Clause," must not, *inter alia,* "advance [or] inhibit religion in its principal or primary effect." Although, in refining the definition of governmental action that unconstitutionally "advances" religion, the Court's subsequent decisions have variously spoken in terms of "endorsement," "favoritism," "preference," or "promotion," the essential principle remains the same: the Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly,* 465 U.S. at 465 U. S. 687 (O'CONNOR, J., concurring). Pp. 492 U. S. 589-594.

2. When viewed in its overall context, the creche display violates the Establishment Clause. The creche angel's words endorse a patently Christian message: Glory to God for the birth of Jesus Christ. Moreover, in contrast to *Lynch,* nothing in the creche's setting detracts from that message. Although the government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. Pp. 492 U. S. 598-602.

3. JUSTICE KENNEDY's reasons for permitting the creche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are unpersuasive. Pp. 492 U. S. 602-613.

(a) History cannot legitimate practices like the creche display that demonstrate the government's allegiance to a particular sect or creed. Pp. 492 U. S. 602-605.

(b) The question whether a particular practice would constitute governmental proselytization is much the same as the endorsement inquiry, except to the extent the proselytization test requires an "obvious" allegiance between the government and the favored sect. This Court's decisions, however, impose no such burden on demonstrating that the government has favored a particular sect or

creed, but, to the contrary, have required strict scrutiny of practices suggesting a denominational preference. *E.g., Larson v. Valente,* 456 U. S. 228, 456 U. S. 246. Pp. 492 U. S. 605-609.

(c) The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating against citizens on the basis of their religious faiths. Thus, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents must fail, since it contradicts the fundamental premise of the Establishment Clause itself. In contrast, confining the government's own Christmas celebration to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians, but simply permits the government to acknowledge the holiday without expressing an impermissible allegiance to Christian beliefs. Pp. 492 U. S. 610-613.

JUSTICE BLACKMUN, joined by JUSTICE STEVENS, concluded in Part III-B that the concurring and dissenting opinions in *Lynch v. Donnelly* set forth the proper analytical framework for determining whether the government's display of objects having religious significance improperly advances religion. 465 U.S. at 465 U. S. 687-694 (O'CONNOR, J., concurring); *id.* at 465 U. S. 694-726 (BRENNAN, J., dissenting). Pp. 492 U. S. 594-597.

JUSTICE BLACKMUN concluded in Part VI that the menorah display does not have the prohibited effect of endorsing religion, given its "particular physical setting." Its combined display with a Christmas tree and a sign saluting liberty does not impermissibly endorse both the Christian and Jewish faiths, but simply recognizes that both Christmas and Chanukah are part of the same winter holiday season, which has attained a secular status in our society. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas season emphasizes this point. The tree, moreover, by virtue of its size and central position in the display, is clearly the predominant element, and the placement of the menorah beside it is readily understood as simply a recognition that Christmas is not the only traditional way of celebrating the season. The absence of a more secular alternative to the menorah negates the inference of endorsement. Similarly, the presence of the mayor's sign confirms that, in the particular context, the government's association with a religious symbol does not represent sponsorship of religious beliefs, but simply a recognition of cultural diversity. Given all these considerations, it is not sufficiently likely that a reasonable observer would view the combined display as an endorsement or disapproval of his individual religious choices. Pp. 492 U. S. 613-621.

JUSTICE O'CONNOR also concluded that the city's display of a menorah, together with a Christmas tree and a sign saluting liberty, does not violate the Establishment Clause. The Christmas tree, whatever its origins, is widely viewed today as a secular symbol of the Christmas holiday. Although there may be certain secular aspects to Chanukah, it is primarily a religious holiday, and

the menorah its central religious symbol and ritual object. By including the menorah with the tree, however, and with the sign saluting liberty, the city conveyed a message of pluralism and freedom of belief during the holiday season, which, in this particular physical setting, could not be interpreted by a reasonable observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs. Pp. 492 U. S. 632-637.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded that both the menorah display and the creche display are permissible under the Establishment Clause. Pp. 492 U. S. 655-667.

(a) The test set forth in *Lemon v. Kurtzman,* 403 U. S. 602, 403 U. S. 612 -- which prohibits the "principal or primary effect" of a challenged governmental practice from either advancing or inhibiting religion -- when applied with the proper sensitivity to our traditions and case law, supports the conclusion that both the creche and the menorah are permissible displays in the context of the holiday season. The requirement of neutrality inherent in the *Lemon* formulation does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion, and so to the detriment, of the religious. Thus, this Court's decisions disclose two principles limiting the government's ability to recognize and accommodate religion: it may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to a religion in such a degree that it, in fact, establishes a state religion or tends to do so. In other words, the government may not place its weight behind an obvious effort to proselytize on behalf of a particular religion. On the other hand, where the government's act of recognition or accommodation is passive and symbolic, any intangible benefit to religion is unlikely to present a realistic risk of establishment. To determine whether there exists an establishment, or a tendency toward one, reference must be made to the other types of church-state contacts that have existed unchallenged throughout our history or that have been found permissible in our case law. For example, *Lynch v. Donnelly,* 465 U. S. 668, upheld a city's holiday display of a creche, and *Marsh v. Chambers,* 463 U. S. 783, held that a State's practice of employing a legislative chaplain was permissible. Pp. 492 U. S. 655-663.

(b) In permitting the displays of the menorah and the creche, the city and county sought merely to "celebrate the season," and to acknowledge the historical background and the religious as well as secular nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of governmental accommodation and acknowledgment of religion that has marked our history from the beginning. If government is to participate in its citizens' celebration of a holiday that contains

both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate the religious aspects of the holiday as well. There is no suggestion here that the government's power to coerce has been used to further Christianity or Judaism, or that the city or the county contributed money to further any one faith or intended to use the creche or the menorah to proselytize. Thus, the creche and menorah are purely passive symbols of religious holidays, and their use is permissible under *Lynch, supra.* If *Marsh, supra,* allows Congress and the state legislatures to begin each day with a state-sponsored prayer offered by a government-employed chaplain, a menorah or creche, displayed in the limited context of the holiday season, cannot be invalid. The facts that, unlike the creche in *Lynch,* the menorah and creche at issue were both located on government property and were not surrounded by secular holiday paraphernalia are irrelevant, since the displays present no realistic danger of moving the government down the forbidden road toward an establishment of religion. Pp. 492 U. S. 663-667.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, *post,* p. 492 U. S. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post,* p. 492 U. S. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 492 U. S. 646. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C.J., and WHITE and SCALIA, JJ., joined, *post,* p. 492 U. S. 655.

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, an opinion with respect to Parts I and II, in which JUSTICE STEVENS and JUSTICE O'CONNOR join, an opinion with respect to Part III-B, in which JUSTICE STEVENS joins, an opinion with respect to Part VII, in which JUSTICE O'CONNOR joins, and an opinion with respect to Part VI.

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a creche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty. The Court of Appeals for

the Third Circuit ruled that each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing religion. 842 F.2d 655 (1988). We agree that the creche display has that unconstitutional effect, but reverse the Court of Appeals' judgment regarding the menorah display.

I

A

The county courthouse is owned by Allegheny County and is its seat of government. It houses the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court. Civil and criminal trials are held there. App. 69. The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase, set into one arch and surrounded by others, with arched windows serving as a backdrop. *Id.* at 157-158; *see*Joint Exhibit Volume (JEV) 31.

Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a creche in the county courthouse during the Christmas holiday season. App. 164. Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah. Western churches have celebrated Christmas Day on December 25 since the fourth century. As observed in this Nation, Christmas has a secular, as well as a religious, dimension.

The creche in the county courthouse, like other creches, is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew. The creche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"

During the 1986-1987 holiday season, the creche was on display on the Grand Staircase from November 26 to January 9. App. 15, 59. It had a wooden fence on three sides, and bore a plaque stating: "This Display Donated by the Holy Name Society." Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. *Id.* at 96. The county also placed a small evergreen tree, decorated with a red bow, behind each of the two endposts of the fence. *Id.* at 204; JEV 7. These trees stood alongside the manger backdrop, and were slightly shorter than it was. The angel thus was at the apex of the creche display. Altogether, the creche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase. No figures of Santa Claus or other decorations appeared on the Grand Staircase. App. 188. *Cf. Lynch v.*

Donnelly, 465 U. S. 668, 465 U. S. 671(1984). Appendix A [omitted] at the end of this opinion is a photograph of the display.

The county uses the creche as the setting for its annual Christmas carol program. *See* JEV 36. During the 1986 season, the county invited high school choirs and other musical groups to perform during weekday lunch hours from December 3 through December 23. The county dedicated this program to world peace and to the families of prisoners of war and of persons missing in action in Southeast Asia. App. 160; JEV 30.

Near the Grand Staircase is an area of the county courthouse known as the "gallery forum" used for art and other cultural exhibits. App. 163. The creche, with its fence and floral frame, however, was distinct, and not connected with any exhibit in the gallery forum. *See* Tr. of Oral Arg. 7 (the forum was "not any kind of an integral part of the Christmas display"); *see also* JEV 32-34. In addition, various departments and offices within the county courthouse had their own Christmas decorations, but these also are not visible from the Grand Staircase. App. 167.

B

The City-County Building is separate and a block removed from the county courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County. The city's portion of the building houses the city's principal offices, including the mayor's. *Id.* at 17. The city is responsible for the building's Grant Street entrance, which has three rounded arches supported by columns. *Id.* at 194, 207.

For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees, on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. *Id.* at 218-219. A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty." Beneath the title, the sign stated:

"During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."

JEV 41.

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday that begins on the 25th day of the Jewish lunar month of Kislev. App. 138. The 25th of Kislev usually occurs in December, and thus Chanukah is

the annual Jewish holiday that falls closest to Christmas Day each year. In 1986, Chanukah began at sundown on December 26. *Id.* at 138-139.

According to Jewish tradition, on the 25th of Kislev in 164 B.C.E. (before the common era (165 B.C.)), the Maccabees rededicated the Temple of Jerusalem after recapturing it from the Greeks, or, more accurately, from the Greek-influenced Seleucid Empire, in the course of a political rebellion. *Id.*at 138. Chanukah is the holiday which celebrates that event. The early history of the celebration of Chanukah is unclear; it appears that the holiday's central ritual -- the lighting of lamps -- was well established long before a single explanation of that ritual took hold.

The Talmud explains the lamp-lighting ritual as a commemoration of an event that occurred during the rededication of the Temple. The Temple housed a seven-branch menorah, which was to be kept burning continuously. *Id.* at 139, 144. When the Maccabees rededicated the Temple, they had only enough oil to last for one day. But, according to the Talmud, the oil miraculously lasted for eight days (the length of time it took to obtain additional oil). *Id.* at 139. To celebrate and publicly proclaim this miracle, the Talmud prescribes that it is a mitzvah (*i.e.,* a religious deed or commandment), *id.*at 140, for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah. *Id.* at 147. Where practicality or safety from persecution so requires, the lamp may be placed in a window or inside the home. The Talmud also ordains certain blessings to be recited each night of Chanukah before lighting the lamp. One such benediction has been translated into English as "We are blessing God who has sanctified us and commanded us with mitzvot and has told us to light the candles of Hanukkah." *Id.* at 306.

Although Jewish law does not contain any rule regarding the shape or substance of a Chanukah lamp (or "hanukkiyyah"), *id.* at 146, 238, it became customary to evoke the memory of the Temple menorah. *Id.* at 139, 144. The Temple menorah was of a tree-and-branch design; it had a central candlestick with six branches. *Id.* at 259. In contrast, a Chanukah menorah of tree-and-branch design has eight branches -- one for each day of the holiday -- plus a ninth to hold the shamash (an extra candle used to light the other eight). *Id.* at 144. Also in contrast to the Temple menorah, the Chanukah menorah is not a sanctified object; it need not be treated with special care.

Lighting the menorah is the primary tradition associated with Chanukah, but the holiday is marked by other traditions as well. One custom among some Jews is to give children Chanukah gelt, or money. Another is for the children to gamble their gelt using a dreidel, a top with four sides. Each of the four sides contains a Hebrew letter; together, the four letters abbreviate a phrase that refers to the Chanukah miracle. *Id.* at 241-242.

Chanukah, like Christmas, is a cultural event as well as a religious holiday. *Id.* at 143. Indeed, the Chanukah story always has had a political or national, as well as a religious, dimension: it tells of

national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice. Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event." *Ibid.*

The cultural significance of Chanukah varies with the setting in which the holiday is celebrated. In contemporary Israel, the nationalist and military aspects of the Chanukah story receive special emphasis. In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas. Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country. Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance. This socially heightened status of Chanukah reflects its cultural or secular dimension.

On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah of an abstract tree-and-branch design. The menorah was placed next to the city's 45-foot Christmas tree, against one of the columns that supports the arch into which the tree was set. The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. *Id.* at 290; *see also* Brief for Petitioner in No. 88-96, p. 4. The tree, the sign, and the menorah were all removed on January 13. App. 58, 220-221. Appendix B [omitted], p. 622, is a photograph of the tree, the sign, and the menorah. *Id.* at 212; JEV 40.

II

This litigation began on December 10, 1986, when respondents, the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents, filed suit against the county and the city, seeking permanently to enjoin the county from displaying the creche in the county courthouse and the city from displaying the menorah in front of the City-County Building. Respondents claim that the displays of the creche and the menorah each violate the Establishment Clause of the First Amendment, made applicable to state governments by the Fourteenth Amendment. *See Wallace v. Jaffree,* 472 U. S. 38, 472 U. S. 48-55 (1985). Chabad was permitted to intervene to defend the display of its menorah.

On May 8, 1987, the District Court denied respondents' request for a permanent injunction. Relying on *Lynch v. Donnelly,* 465 U. S. 668 (1984), the court stated that

"the creche was but part of the holiday decoration of the stairwell and a foreground for the highschool choirs which entertained each day at noon."

App. to Pet. for Cert. in No. 87-2050, p. 4a. Regarding the menorah, the court concluded that "it was but an insignificant part of another holiday display." *Ibid.* The court also found that "the displays had a secular purpose," and "did not create an excessive entanglement of government with religion." *Id.* at 5a.

Respondents appealed, and a divided panel of the Court of Appeals reversed. 842 F.2d 655 (CA3 1988). Distinguishing *Lynch v. Donnelly,* the panel majority determined that the creche and the menorah must be understood as endorsing Christianity and Judaism. The court observed: "Each display was located at or in a public building devoted to core functions of government." 842 F.2d at 662. The court also stated:

"Further, while the menorah was placed near a Christmas tree, neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items."

Ibid. Because the impermissible effect of endorsing religion was a sufficient basis for holding each display to be in violation of the Establishment Clause under *Lemon v. Kurzman,* 403 U. S. 602 (1971), the Court of Appeals did not consider whether either one had an impermissible purpose or resulted in an unconstitutional entanglement between government and religion.

The dissenting judge stated that the creche,

"accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent."

842 F.2d at 670. As to the menorah, he asserted:

"Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing its joy."

Id. at 670-671.

Rehearing en banc was denied by a 6-to-5 vote. *See* App. to Pet. for Cert. in No. 87-2050, p. 45a. The county, the city, and Chabad each filed a petition for certiorari. We granted all three petitions. 488 U.S. 816 (1988).

III

A

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffee,* 472 U. at 472 U. S. 52. It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.* at 472 U. S. 49.

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. Although "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly,* 465 U.S. at 465 U. S. 694 (O'CONNOR, J., concurring), are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause. Thus, in *Everson v. Board of Education of Ewing,* 330 U. S. 1(1947), the Court gave this often-repeated summary:

"The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will, or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

Id. at 330 U. S. 15-16.

In *Lemon v. Kurtzman, supra,* the Court sought to refine these principles by focusing on three "tests" for determining whether a government practice violates the Establishment Clause. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. 403 U.S. at 403 U. S. 612-613. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence. *See Engel v. Vitale,* 370 U. S. 421, 370 U. S. 436 (1962). Thus, in *Wallace v. Jaffree,* 472 U.S. at 472 U. S. 60, the Court held unconstitutional Alabama's moment-of-silence statute because it was "enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities." The Court similarly invalidated Louisiana's "Creationism Act" because it "endorses religion" in its purpose. *Edwards v. Aguillard,* 482 U. S. 578, 482 U. S. 593 (1987). And the educational program in *School Dist. of Grand Rapids v. Ball,* 473 U. S. 373, 473 U. S. 389-392 (1985), was held to violate the Establishment Clause because of its "endorsement" effect. *See also Texas Monthly, Inc. v. Bullock,* 489 U. S. 1, 489 U. S. 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals "effectively endorses religious belief ").

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*." *Wallace v. Jaffree,* 472 U.S. at 472 U. S. 70 (O'CONNOR, J., concurring in judgment) (emphasis added). *Accord, Texas Monthly, Inc. v. Bullock,* 489 U.S. at 489 U. S. 27, 489 U. S. 28 (separate opinion concurring in judgment) (reaffirming that "government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas"); *Edwards v. Aguillard,* 482 U.S. at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion); *Abington School District v. Schempp,* 374 U. S. 203, 374 U. S. 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion"). Moreover, the term "endorsement" is closely linked to the term "promotion," *Lynch v. Donnelly,*465 U.S. at 465 U. S. 691 (O'CONNOR, J., concurring), and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even

against the militant opposite," *Epperson v. Arkansas,* 393 U. S. 97, 393 U. S. 104 (1968). *See also Wallace v. Jaffree,* 472 U.S. at 472 U. S. 59-60 (using the concepts of endorsement, promotion, and favoritism interchangeably).

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly,* 465 U.S. at 465 U. S. 687 (O'CONNOR, J., concurring).

B

We have had occasion in the past to apply Establishment Clause principles to the government's display of objects with religious significance. In *Stone v. Graham,* 449 U. S. 39 (1980), we held that the display of a copy of the Ten Commandments on the walls of public classrooms violates the Establishment Clause. Closer to the facts of this litigation is *Lynch v. Donnelly, supra,* in which we considered whether the city of Pawtucket, R.I., had violated the Establishment Clause by including a creche in its annual Christmas display, located in a private park within the downtown shopping district. By a 5-to-4 decision in that difficult case, the Court upheld inclusion of the creche in the Pawtucket display, holding, *inter alia,* that the inclusion of the creche did not have the impermissible effect of advancing or promoting religion.

The rationale of the majority opinion in *Lynch* is none too clear: the opinion contains two strands, neither of which provides guidance for decision in subsequent cases. First, the opinion states that the inclusion of the creche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past, 465 U.S. at 465 U. S. 683 -- but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the creche gave to religion was no more than "indirect, remote, and incidental," *ibid.* -- without saying how or why.

Although JUSTICE O'CONNOR joined the majority opinion in *Lynch,* she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.

First and foremost, the concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion. Rather, the concurrence recognizes any endorsement of religion as "invalid," *id.* at 465 U. S. 690, because it

"sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community,"

id. at 465 U. S. 688.

Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." *Id.* at 465 U. S. 692. That inquiry, of necessity, turns upon the context in which the contested object appears:

"[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."

Ibid. The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its "particular physical setting," *ibid.,* and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion," *id.* at 465 U. S. 694.

The concurrence applied this mode of analysis to the Pawtucket creche, seen in the context of that city's holiday celebration as a whole. In addition to the creche, the city's display contained: a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear. *See* 525 F. Supp. 1150, 1155 (RI 1981). The concurrence concluded that, both because the creche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the creche was "displayed along with purely secular symbols," the creche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the creche." 465 U.S. at 465 U. S. 692.

The four *Lynch* dissenters agreed with the concurrence that the controlling question was "whether Pawtucket ha[d] run afoul of the Establishment Clause by endorsing religion through its display of the creche." *Id.* at 465 U. S. 698, n. 3 (BRENNAN, J., dissenting). The dissenters also agreed with the general proposition that the context in which the government uses a religious symbol is relevant for determining the answer to that question. *Id.* at 465 U. S. 705-706. They simply reached a different answer: the dissenters concluded that the other elements of the Pawtucket display did not negate the endorsement of Christian faith caused by the presence of the creche. They viewed the

inclusion of the creche in the city's overall display as placing "the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." *Id.* at 465 U. S. 701. Thus, they stated:

"The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support."

Ibid.

Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in *Lynch* agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. These general principles are sound, and have been adopted by the Court in subsequent cases. Since *Lynch,* the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether

"the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

Grand Rapids, 473 U.S. at 473 U. S. 390. Accordingly, our present task is to determine whether the display of the creche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.

IV

We turn first to the county's creche display. There is no doubt, of course, that the creche itself is capable of communicating a religious message. *See Lynch,* 465 U.S. at 465 U. S. 685 (majority opinion); *id.* at 465 U. S. 692 (O'CONNOR, J., concurring); *id.* at 465 U. S. 701 (BRENNAN, J., dissenting); *id.* at 465 U. S. 727(BLACKMUN, J., dissenting). Indeed, the creche in this lawsuit uses words, as well as the picture of the nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the creche -- Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious -- indeed sectarian -- just as it is when said in the Gospel or in a church service.

Under the Court's holding in *Lynch,* the effect of a creche display turns on its setting. Here, unlike in *Lynch,*nothing in the context of the display detracts from the creche's religious message. The *Lynch*

display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the creche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the creche. Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

The floral decoration surrounding the creche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display. The floral frame, like all good frames, serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the creche contributes to, rather than detracts from, the endorsement of religion conveyed by the creche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention that the traditional Christmas greens negate the endorsement effect of the creche fares no better.

Nor does the fact that the creche was the setting for the county's annual Christmas carol program diminish its religious meaning. First, the carol program in 1986 lasted only from December 3 to December 23, and occupied, at most, one hour a day. JEV 28. The effect of the creche on those who viewed it when the choirs were not singing -- the vast majority of the time -- cannot be negated by the presence of the choir program. Second, because some of the carols performed at the site of the creche were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. App. 157. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," *Lynch,* 465 U.S. at 465 U. S. 692 (O'CONNOR, J., concurring), the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

The fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. *See, e.g., Texas Monthly, Inc. v. Bullock,* 489 U. S. 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys the sense of promoting

someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Finally, the county argues that it is sufficient to validate the display of the creche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. It would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. While the county may have doubts about the constitutional status of celebrating the Eucharist inside the courthouse under the government's auspices, *see* Tr. of Oral Arg. 8-9, this Court does not. The government may acknowledge Christmas as a cultural phenomenon, but, under the First Amendment, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch,* and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the creche in this context, therefore, must be permanently enjoined.

V

JUSTICE KENNEDY and the three Justices who join him would find the display of the creche consistent with the Establishment Clause. He argues that this conclusion necessarily follows from the Court's decision in *Marsh v. Chambers,* 463 U. S. 783 (1983), which sustained the constitutionality of legislative prayer. *Post* at 492 U. S. 665. He also asserts that the creche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," *post* at 492 U. S. 664, having repudiated the Court's endorsement inquiry in favor of a "proselytization" approach. The Court's analysis of the creche, he contends, "reflects an unjustified hostility toward religion." *Post* at 492 U. S. 655.

JUSTICE KENNEDY's reasons for permitting the creche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are so far-reaching in their implications that they require a response in some depth.

A

In *Marsh,* the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. *See* 492 U. S. 46, *supra.* JUSTICE KENNEDY, however, argues that *Marsh* legitimates all "practices with no greater potential for an establishment of

religion" than those "accepted traditions dating back to the Founding." *Post* at 492 U. S. 669, 492 U. S. 670. Otherwise, the Justice asserts, such practices as our national motto ("In God We Trust") and our Pledge of Allegiance (with the phrase "under God," added in 1954, Pub.L. 396, 68 Stat. 249) are in danger of invalidity.

Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. *Lynch,* 465 U.S. at 465 U. S. 693 (O'CONNOR, J., concurring); *id.* at 465 U. S. 716-717 (BRENNAN, J., dissenting). We need not return to the subject of "ceremonial deism," *see* n 46, *supra,* because there is an obvious distinction between creche displays and references to God in the motto and the pledge. However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.

Indeed, in *Marsh* itself, the Court recognized that not even the "unique history" of legislative prayer, 463 U.S. at 463 U. S. 791, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.* at 463 U. S. 794-795. The legislative prayers involved in *Marsh* did not violate this principle, because the particular chaplain had "removed all references to Christ." *Id.* at 463 U. S. 793, n. 14. Thus, *Marsh* plainly does not stand for the sweeping proposition JUSTICE KENNEDY apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today. Nor can *Marsh,* given its facts and its reasoning, compel the conclusion that the display of the creche involved in this lawsuit is constitutional. Although JUSTICE KENNEDY says that he "cannot comprehend" how the creche display could be invalid after *Marsh, post* at 492 U. S. 665, surely he is able to distinguish between a specifically Christian symbol, like a creche, and more general religious references, like the legislative prayers in *Marsh.*

JUSTICE KENNEDY's reading of *Marsh* would gut the core of the Establishment Clause as this Court understands it. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. *See* M. Borden, Jews, Turks, and Infidels (1984). Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, *see, e.g., Texas Monthly, Inc. v. Bullock,* 489 U. S. 1 (1989)), it certainly means, at the very least, that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U. S. 228, 456 U. S. 244(1982).

There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command. *Cf.* Laycock, *supra,* n 39, at 923.

B

Although JUSTICE KENNEDY's misreading of *Marsh* is predicated on a failure to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable. *Post* at 492 U. S. 664-665, n. 3. He concedes also that the term "endorsement" long has been another way of defining a forbidden "preference" for a particular sect, *post* at 492 U. S. 668-669, but he would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae," *post* at 492 U. S. 674, because it examines the particular contexts in which the government employs religious symbols.

This label, of course, could be tagged on many areas of constitutional adjudication. For example, in determining whether the Fourth Amendment requires a warrant and probable cause before the government may conduct a particular search or seizure,

"we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements *in the particular context,*"

Skinner v. Railway Labor Executives' Assn., 489 U. S. 602, 489 U. S. 619 (1989) (emphasis added), an inquiry that "*depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself,'" ibid., quoting United States v. Montoya de Hernandez, 473 U. S. 531, 473 U. S. 537 (1985); see also Treasury Employees v. Von Raab, 489 U. S. 656, 489 U. S. 666 (1989) (repeating the principle that the applicability of the warrant requirement turns on "the particular context" of the search at issue). It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.*

Indeed, not even under JUSTICE KENNEDY's preferred approach can the Establishment Clause be transformed into an exception to this rule. The Justice would substitute the term "proselytization" for "endorsement," *post* at 492 U.S. 659-660, 492 U. S. 661, 492 U. S. 664, but his "proselytization" test suffers from the same "defect," if one must call it that, of requiring close factual analysis. JUSTICE KENNEDY has no doubt,

"for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display

would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."

Post at 492 U. S. 661. He also suggests that a city would demonstrate an unconstitutional preference for Christianity if it displayed a Christian symbol during every major Christian holiday, but did not display the religious symbols of other faiths during other religious holidays. *Post* at 492 U. S. 664-665, n. 3. But, for JUSTICE KENNEDY, would it be enough of a preference for Christianity if that city each year displayed a creche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)? If so, then what if there were no cross, but the 40-day creche display contained a sign exhorting the city's citizens "to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world"? *See* n. 53, *supra.*

The point of these rhetorical questions is obvious. In order to define precisely what government could and could not do under JUSTICE KENNEDY's "proselytization" test, the Court would have to decide a series of cases with particular fact patterns that fall along the spectrum of government references to religion (from the permanent display of a cross atop city hall to a passing reference to divine Providence in an official address). If one wished to be "uncharitable" to JUSTICE KENNEDY, *see post* at 492 U. S. 675, one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed, divided by the number of different non-Christian religions represented in these displays, and then somehow factoring into this equation the prominence of the display's location and the degree to which each symbol possesses an inherently proselytizing quality. JUSTICE KENNEDY, of course, could defend his position by pointing to the inevitably fact-specific nature of the question whether a particular governmental practice signals the government's unconstitutional preference for a specific religious faith. But because JUSTICE KENNEDY's formulation of this essential Establishment Clause inquiry is no less fact-intensive than the "endorsement" formulation adopted by the Court, JUSTICE KENNEDY should be wary of accusing the Court's formulation as "using little more than intuition and a tape measure," *post* at 492 U. S. 675, lest he find his own formulation convicted on an identical charge.

Indeed, perhaps the only real distinction between JUSTICE KENNEDY's "proselytization" test and the Court's "endorsement" inquiry is a burden of "unmistakable" clarity that JUSTICE KENNEDY apparently would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause. *Post* at 492 U. S. 664-665, n. 3. The question whether a particular practice "would place the government's weight behind an obvious effort to proselytize for a particular religion," *post* at 492 U. S. 661, is much the same as whether the practice demonstrates

the government's support, promotion, or "endorsement" of the particular creed of a particular sect -- except to the extent that it requires an "obvious" allegiance between the government and the sect.

Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required "strict scrutiny" of practices suggesting "a denominational preference," *Larson v. Valente,* 456 U.S. at 456 U. S. 246, in keeping with "*the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause. Bowen v. Kendrick, 487 U. S. 589, 487 U. S. 623 (1988) (O'CONNOR, J., concurring), quoting id. at 487 U. S. 648 (dissenting opinion); see also Lynch, 465 U.S. at 465 U. S. 694 (O'CONNOR, J., concurring) ("[T]he myriad, subtle ways in which Establishment Clause values can be eroded" necessitates "careful judicial scrutiny" of "[g]overnment practices that purport to celebrate or acknowledge events with religious significance"). Thus, when all is said and done, JUSTICE KENNEDY's effort to abandon the "endorsement" inquiry in favor of his "proselytization" test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.*

C

Although JUSTICE KENNEDY repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, *post* at 492 U. S. 657, 492 U. S. 664, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd. JUSTICE KENNEDY apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.

JUSTICE KENNEDY's accusations are shot from a weapon triggered by the following proposition: if government may celebrate the secular aspects of Christmas, then it must be allowed to celebrate the religious aspects as well because, otherwise, the government would be discriminating against citizens who celebrate Christmas as a religious, and not just a secular, holiday. *Post* at 492 U. S. 663-664. This proposition, however, is flawed at its foundation. The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.

A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed. JUSTICE KENNEDY thus has it exactly backwards when he says that enforcing the Constitution's requirement that government remain secular is a prescription of orthodoxy. *Post* at 492 U. S. 678. It follows directly

from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state. Although JUSTICE KENNEDY accuses the Court of "an Orwellian rewriting of history," *ibid.,* perhaps it is JUSTICE KENNEDY himself who has slipped into a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.

To be sure, in a pluralistic society, there may be some would-be theocrats who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.

For this reason, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents must fail. Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: "We rejoice in the glory of Christ's birth!"), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians. To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the "*the logic of secular liberty*'" *it is the purpose of the Establishment Clause to protect. See Larson v. Valente, 456 U.S. at 456 U. S. 244, quoting B. Bailyn, The Ideological Origins of the American Revolution 265 (1967).*

Of course, not all religious celebrations of Christmas located on government property violate the Establishment Clause. It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting. *Cf. Widmar v. Vincent,* 454 U. S. 263 (1981). The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.

Equally obvious, however, is the proposition that not all proclamations of Christian faith located on government property are permitted by the Establishment Clause just because they occur during the Christmas holiday season, as the example of a Mass in the courthouse surely illustrates. And once

the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity. It is thus incontrovertible that the Court's decision today, premised on the determination that the creche display on the Grand Staircase demonstrates the county's endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.

VI

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah's display. The necessary result of placing a menorah next to a Christmas tree is to create an "overall holiday setting" that represents both Christmas and Chanukah -- two holidays, not one. *See Lynch,* 465 U.S. at 465 U. S. 692 (O'CONNOR, J., concurring).

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause.

The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.

Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause. Because government may celebrate Christmas as a secular holiday, it follows that government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city's acknowledgment of Chanukah as a contemporaneous cultural tradition.

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible, and is also in line with *Lynch.*

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. *See American Civil Liberties Union of Illinois v. St. Charles,* 794 F.2d 265, 271 (CA7), *cert. denied,* 479 U.S. 961 (1986); L. Tribe, American Constitutional Law 1295 (2d ed.1988) (Tribe). Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. Indeed, a 40-foot Christmas tree was one of the objects that validated the creche in *Lynch.* The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice-versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter holiday season. In these circumstances, then, the combination of the tree and the menorah communicates not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place, and might be interpreted by some as mocking the celebration of Chanukah. The absence of a more secular alternative symbol is itself part of the context in which the city's actions must be judged in determining the likely effect of its use of the menorah. Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith. *See Abington School District v. Schempp,* 374 U.S. at 374 U. S. 295 (BRENNAN, J., concurring) (Establishment Clause forbids use of religious means to serve secular ends when secular means

suffice); *see also* Tribe 1285. But where, as here, no such choice has been made, this inference of endorsement is not present.

The mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that, during the holiday season, the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, *see Stone v. Graham,* 449 U.S. at 449 U. S. 41, an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. *See Lynch,* 465 U.S. at 465 U. S. 707 (BRENNAN, J., dissenting). Here, the mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith, but simply a recognition of cultural diversity.

Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval . . . of their individual religious choices." *Grand Rapids,* 473 U.S. at 473 U. S. 390. While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, *ibid.,* the constitutionality of its effect must also be judged according to the standard of a "reasonable observer," *see Witters v. Washington Dept. of Services for Blind,* 474 U. S. 481, 474 U. S. 493 (1986) (O'CONNOR, J., concurring in part and concurring in judgment); *see also* Tribe 1296 (challenged government practices should be judged "from the perspective of a *reasonable non-adherent'"). When measured against this standard, the menorah need not be excluded from this particular display. The Christmas tree alone in the Pittsburgh location does not endorse Christian belief; and, on the facts before us, the addition of the menorah "cannot fairly be understood to" result in the simultaneous endorsement of Christian and Jewish faiths. Lynch, 465 U.S. at 465 U. S. 693 (O'CONNOR, J., concurring). On the contrary, for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.*

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the *Lemon* analysis. These issues were not addressed by the Court of Appeals, and may be considered by that court on remand.

VII

Lynch v. Donnelly confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the creche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its "particular physical setting."

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings.

It is so ordered.