COUNTY OF ALLEGHENY V. ACLU

PUBLIC MENORAH LIGHTINGS

BLACKMUN, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

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492 U.S. 573

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-2050 Argued: February 22, 1989 --- Decided: July 3, 1989 [*]

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. [p579] 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.[n1] Western churches have celebrated Christmas Day on December 25 since the fourth century.[n2] As observed in this Nation, Christmas has a secular, as well as a religious, dimension.[n3] [p580]

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.[n4] 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!".[n5]

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.[n6] 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 [p581]appeared on the Grand Staircase. App. 188.[n7] *Cf. Lynch v. Donnelly,* 465 U.S. 668, 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 [p582] 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.[n8] The 25th of Kislev usually occurs in December,[n9] 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.* [p583] at 138.[n10] Chanukah is the holiday which celebrates that event.[n11] 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.[n12]

The Talmud[n13] 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,[n14] 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.[n15] 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,[n16] 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 [p584] 147.[n17] Where practicality or safety from persecution so requires, the lamp may be placed in a window or inside the home.[n18] The Talmud also ordains certain blessings to be recited each night of Chanukah before lighting the lamp.[n19] 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.[n20]

Although Jewish law does not contain any rule regarding the shape or substance of a Chanukah lamp (or "hanukkiyyah"), *id.* at 146, 238,[n21] 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.[n22] 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.[n23] Also in contrast to the Temple menorah, the Chanukah menorah is not a sanctified object; it need not be treated with special care.[n24] [p585]

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.[n25] 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.[n26]

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.[n27] Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice.[n28] 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.*[n29] [p586]

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.[n30] In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas.[n31] Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this

country.[n32] Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance [p587] would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance.[n33] This socially heightened status of Chanukah reflects its cultural or secular dimension.[n34]

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,[n35] 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 [p588] Building.[n36]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 theFourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985).[n37] Chabad was permitted to intervene to defend the display of its menorah.[n38]

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 [p589] 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 [p590] 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 52.[n39] It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.* at 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,[n40] may not discriminate among persons on the basis of their religious beliefs and practices,[n41] [p591] may not delegate a governmental power to a religious institution,[n42] and may not involve itself too deeply in such an institution's affairs.[n43] Although "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly,* 465 U.S. at 465 U.S. 694"]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 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 15-16. [p592]

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 612-613. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.[n44]

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, 436 (1962). Thus, in *Wallace v. Jaffree,* 472 U.S. at 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, 593 (1987). And the educational [p593] program in *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 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, 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 70 (O'CONNOR, J., concurring in judgment) (emphasis added). *Accord, Texas Monthly, Inc. v. Bullock,* 489 U.S. at 27, 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, 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 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, 104 (1968). *See also Wallace v. Jaffree,* 472 U.S. at 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 [p594]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 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.[n45]

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 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. [p595]

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 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 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 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 694.[n46] [p596]

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 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 698, n. 3 (BRENNAN, J., dissenting). The dissenters also agreed with the [p597] general proposition that the context in which the government uses a religious symbol is relevant for determining the answer to that question. *Id.* at 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 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 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.[n47] [p598]

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 685 (majority opinion);*id.* at 692 (O'CONNOR, J., concurring); *id.* at 701 (BRENNAN, J., dissenting); *id.* at 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.[n48] [p599]

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,[n49] 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 [p600] support and approval of the government.[n50] Thus, by permitting the "display of the creche in this particular physical setting," *Lynch,* 465 U.S. at 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 [p601] 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.[n51]

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 [p602] 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 665. He also asserts that the creche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," *post*at 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 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* n. 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 669, 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 [p603] of religious belief. *Lynch,* 465 U.S. at 693 (O'CONNOR, J., concurring);*id.* at 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,[n52] 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 791, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.* at 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 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 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.* [p604]

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).[n53] Some of these examples date back to the Founding of the Republic,[n54] but this heritage of official discrimination [p605] 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, 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.[n55]

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 664-665, n. 3. He concedes also that the term "endorsement" long has been another way of defining a forbidden "preference" for [p606] a particular sect, *post* at 668-669, but he would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae," *post* at 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, 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, 537 (1985); *see also Treasury Employees v. Von Raab*, 489 U.S. 656, 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 659-660, 661, 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 [p607] would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Post at 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 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 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 [p608] 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 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 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 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.[n56]

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 [p609] scrutiny" of practices suggesting "a denominational preference," *Larson v. Valente*, 456 U.S. at 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, 623 (1988) (O'CONNOR, J., concurring), quoting *id.* at 648 (dissenting opinion); *see also Lynch*, 465 U.S. at 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.[n57] [p610]

C

Although JUSTICE KENNEDY repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, *post* at 657, 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 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 [p611] remain secular is a prescription of orthodoxy. *Post* at 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[p612] 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 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).[n58] 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 [p613] 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.[n59]

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 [p614] symbol for

a holiday that, like Christmas, has both religious and secular dimensions.[n60]

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 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. [p615] The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.[n61]

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,[n62] 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.[n63] [p616]

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.*[n64]

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).[n65] Numerous Americans place [p617] 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.[n66]

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 [p618] 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 295 (BRENNAN, J., concurring) (Establishment Clause forbids use of religious means to serve secular ends when secular means suffice); *see also*Tribe 1285.[n67] But where, as here, no such choice has been made, this inference of endorsement is not present.[n68] [p619]

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 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 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. [p620]

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 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, 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 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.[n69]

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious [p621] 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.[n70]

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. [p623]

* Together with No. 88-90, Chabad v. American Civil Liberties Union et al., and No. 88-96, City of Pittsburgh v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al., also on certiorari to the same court.