A CELEBRATION OF LIBERTY AND JUSTICE FOR ALL: THE BICENTENNIAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PROTECTORS OF THE CONSTITUTION: THE CIVIL LIBERTIES CASES

Panelists:

The Honorable Cathy Bissoon
United States District Judge

The Honorable Maurice B. Cohill, Jr.
Formerly United States District Judge

Lisa B. Freeland, Esq.
Federal Public Defender, Western District of Pennsylvania

Witold "Vic" Walczak, Esq.
Legal Director, ACLU of Pennsylvania

George M. Janocsko, Esq.
First Assistant County Solicitor, Allegheny County

Dennis Biondo, Esq.
Assistant County Solicitor, Allegheny County

Jon Pushinsky, Esq.
Law Offices of Jon Pushinsky

Moderator:

The Honorable Mark R. Hornak
United States District Judge

BIOGRAPHIES

The Honorable Cathy Bissoon

Judge Cathy Bissoon was born in 1968 in Brooklyn, New York. She was appointed by President Barack Obama as a United States District Judge for the Western District of Pennsylvania on October 20, 2011, having previously served on the Court as a magistrate judge from 2008. With her appointment, Judge Bissoon became the first Hispanic female Article III judge in Pennsylvania, the first Asian American Article III judge in Pennsylvania and the first South Asian American female Article III judge in the United States. Judge Bissoon graduated *summa cum laude* from Alfred University in 1990 and received her law degree from Harvard Law School in 1993.

Following law school, Judge Bissoon joined Reed Smith's Pittsburgh office as an associate. In 1994, she took a year-long "sabbatical" from private practice, during which she clerked for the Honorable Gary L. Lancaster of this Court. In 1995, Judge Bissoon returned to Reed Smith where she ultimately became a partner and the firm-wide head of the Employment Group.

Judge Bissoon also served as Reed Smith's Director of Diversity for six years, earning various accolades for her efforts to increase diversity within the legal profession. Most notably, Judge Bissoon was recognized for her many efforts in the area of diversity with the Honorable Thurgood Marshall award from Minorities in Business Magazine during its 2006 Multicultural Prism Awards ceremony.

In 2007, Judge Bissoon joined the Pittsburgh law firm of Cohen & Grigsby, where she was a director and served as the head of the Labor & Employment Group.

Over the course of her years in private practice, Judge Bissoon was named a Fellow of the Litigation Council of America; listed multiple years in the *Best Lawyers in America*; named a "Pennsylvania Super Lawyer" by *Philadelphia Magazine*; listed in *Chambers USA America's Leading Lawyers*; and was recognized as one of the top 50 lawyers in Pennsylvania under the age of 40 by *Pennsylvania Law Weekly*. Additionally, she served on both the Lawyers Advisory Committee for the Third Judicial Circuit as well as the Local Rules Advisory Committee for the U.S. District Court for the Western District of Pennsylvania.

During her time in private practice, Judge Bissoon also had the honor of serving, upon appointment by the Chief Justice of the Pennsylvania Supreme Court, as an original member of Pennsylvania's Interbranch Commission for Gender, Racial and Ethnic Fairness. The Commission is charged with promoting the equal application of the law for all citizens of the Commonwealth of Pennsylvania and increasing public confidence in the fairness of all three branches of state government. The Commission evaluates and recommends measures to reduce or eliminate bias or invidious discrimination within all branches of government and within the legal profession.

Judge Bissoon was honored as one of five finalists for the 2010 Athena Award. The award honors female leaders in the region who demonstrate excellence, creativity and initiative in business, who provide time and energy to improve the quality of life of others and who actively assist other women in realizing their full leadership potential. Also, that year, Judge Bissoon was honored by Pittsburgh Professional Women as one of their 2010 Women of Integrity. The award is given to women who have distinguished themselves as leaders who balance career and civic responsibilities, while sharing their success by mentoring others and supporting their communities. In 2014, Judge Bissoon was named a "Legal Champion" by the Allegheny County Bar Association for her work in paving the way to a more inclusive bench through her advocacy on behalf of and mentoring of historically underrepresented attorneys.

Judge Bissoon sits as one of the Court's designated patent judges and is one of the founding members of the Q. Todd Dickinson Intellectual Property American Inn of Court. The Dickinson Inn provides a unique opportunity for members to hone their legal skills in a social setting with no agenda other than collegiality and with a shared interest in professionalism and excellence. In 2012, Judge Bissoon was elected the first president of Dickinson Inn, and she continues to serve on the Inn's Executive Committee. Judge Bissoon also was a recipient of the 2017 Linn Alliance Distinguished Service Medal for her work with the Dickinson Inn, and sits on the Linn Inn Alliance Advisory Council as the representative of the Dickinson Inn.

Judge Bissoon has served on the boards of the Pittsburgh Zoo and PPG Aquarium, the Phipps Conservatory and Botanical Gardens, the Girl Scouts of Western Pennsylvania and the Mt. Lebanon Teen Center, and currently sits on the board of Sheldon Calvary Camp. For many years, she was a proud Girl Scout troop leader. Judge Bissoon also holds a Third Degree Black Belt and serves as a Training Instructor in the Korean martial art of Tang Soo Do.

The Honorable Maurice B. Cohill, Jr.

The Honorable Maurice B. Cohill, Jr. is a former judge of the United States District Court for the Western District of Pennsylvania. Nominated by President Gerald Ford on May 4, 1976, Judge Cohill was confirmed by the Senate on May 18, 1976, and received his commission on May 21, 1976. Judge Cohill served the Western District of Pennsylvania for forty years, until his retirement on August 1, 2016. During his tenure, Judge Cohill served as Chief Judge from 1985-1992. Judge Cohill assumed senior status on November 28, 1994.

Judge Cohill was born in 1929 in Ben Avon, Pennsylvania. He attended Princeton University, from which he earned his A.B. degree in 1951. While at Princeton, Judge Cohill was a Cheerleader and appeared as a guest on the Ed Sullivan Show as a stand-up comedian in 1950. Following his time at Princeton, Judge Cohill served as a Captain in the United States Marine Corps, Second Marine Air Wing from 1951-1953. He then attended the University of Pittsburgh School of Law, obtaining his L.L.B. in 1956.

After law school, Judge Cohill worked in private practice from 1956-1965, before becoming a Judge in the Juvenile Court of Allegheny County in 1965. In 1968, Judge Cohill became a Judge in the Court of Common Pleas of Allegheny County

Lisa B. Freeland, Esq.

Ms. Freeland is the Federal Public Defender for the Western District of Pennsylvania. She received a Bachelor of Arts degree in Philosophy from Tufts University and a J.D. from Columbia Law School. She also holds a Master of Science degree in Journalism from Columbia University Graduate School of Journalism. After receiving her journalism degree, Ms. Freeland worked for American Lawyer Media, LP, where she served as Associate Editor of *The American Lawyer* magazine and as a reporter for San Francisco's daily legal newspaper, *The Recorder*. After graduation from law school, she served as a law clerk to the Honorable Timothy K. Lewis, then a member of the Court of Appeals for the Third Circuit. She was a Visiting Professor at the University of Pittsburgh School of Law and staff attorney at the Office of the Appellate Defender in New York City before joining the Federal Public Defender's office in 1999. She was appointed to be the chief defender in 2004. Ms. Freeland primarily represents clients on appeal and in post-conviction proceedings.

Ms. Freeland is a recent recipient of the National Legal Aid and Defender Association's Kutak-Dodds Prize, awarded to attorneys who have significantly contributed to the human dignity and quality of life of individuals unable to afford legal representation. She also received the ACLU's Marjorie H. Matson Award for Civil Liberties and Civil Rights, and the YWCA's Racial Justice Award. Ms. Freeland is a founding member and former board chair of the Board of Governors of the Bar Association of the Third Federal Circuit. In her time as the Federal Defender, she has been counsel of record in three cases in the United States Supreme Court. She was the principal drafter of the briefs in two of those cases, and argued one. The cases involved a wide range of issues, from a First Amendment challenge to the constitutionality of a federal statute criminalizing depictions of animal cruelty; to the applicability of the Court's seminal decision in *Booker v. United States* to cases involving a retroactive amendment to the crack cocaine guideline; and an Administrative Procedures Act challenge to the applicability of the Sex Offender Registration and Notification Act.

Witold "Vic" Walczak, Esq.

Vic Walczak has litigated civil rights case for more than 30 years, the past 25 with the ACLU. Since 2004, Walczak has served as the ACLU of Pennsylvania's Legal Director, overseeing litigation statewide. Walczak has personally handled many nationally significant cases, including Kitzmiller v. Dover Area School District, the first case successfully challenging the teaching in public schools of "intelligent design" creationism; Lozano v. Hazleton, the first case successfully challenging a municipality's misguided attempt to exclude undocumented immigrants; Applewhite v. Commonwealth, which overturned Pennsylvania's restrictive Voter ID law; and Whitewood v. Wolf, which in 2014 reversed Pennsylvania's ban on marriages by same-sex couples. In the mid-1990's Walczak handled major police misconduct cases against the City of Pittsburgh that paved the way for the first ever intervention by the U.S. Department of Justice to overhaul a major city police department. Prior to joining the ACLU, Walczak spent five years

handling prisoners' rights cases for the Maryland Legal Aid Bureau. Walczak is a member of the American College of Trial Lawyers and has received many professional awards. He is a graduate of Colgate University and Boston College Law School.

George M. Janocsko, Esq.

Mr. Janocsko is the First Assistant County Solicitor for Allegheny County, Pennsylvania. He received his undergraduate degree, *summa cum laude*, from the University of Pittsburgh, and his J.D. degree, *cum laude*, from Duquesne University School of Law where he was an articles editor for its Law Review. Mr. Janocsko has represented Allegheny County in a wide variety of cases in both federal and state court has served as legal counsel to numerous county departments, authorities, commissions and social welfare agencies for more than forty years.

In addition to his service to Allegheny County, Mr. Janocsko has been a municipal solicitor and is presently special counsel to several local municipalities and zoning hearing boards throughout Allegheny County. He is a former adjunct Professor of Law at the Duquesne University School of Law and a former member of the Allegheny County Redevelopment Authority. He served two terms as the Chair of the Allegheny County Bar Association's Municipal and School Solicitor Section and served on the Bar Association=s Judiciary Committee.

Mr. Janocsko has been associated with the Pennsylvania Board of Law Examiners for more than twenty-two years and he is currently one of its examiners.

In October 2017, Duquesne Law Alumni Association presented Mr. Janocsko with the Dr. John E. Murray, Jr. Meritorious Service Award in recognition of services rendered and contributions made to Association and to the School of Law.

Dennis Biondo, Esq.

Mr. Biondo has practiced law as an Assistant County Solicitor with the Allegheny County Law Department for over 40 years. He has represented all of the various County departments during that time focusing primarily on the County Jail, the County's Emergency Services Department, and the County's Kane Regional Centers. Additionally, Mr. Biondo is a licensed Nursing Home Administrator. He currently serves as the Executive Director of the Kane Regional Centers. Mr. Biondo is a graduate of Penn State University and Duquesne Law School.

Jon Pushinsky, Esq.

Mr. Pushinsky obtained his BA and MA degrees in Political Science from the University of Pennsylvania in 1976. He was awarded a JD degree by the University of Pittsburgh School of Law in 1979. Mr. Pushinsky maintains a private practice in Pittsburgh, where he concentrates in the areas of civil rights/civil liberties and appellate litigation. He practices before all levels of the state and federal courts. Mr. Pushinsky has litigated numerous cases involving separation of church and state, free exercise of religion, employment, housing, education discrimination, firearm rights and free speech issues. He was nominated for an appointment to the Pennsylvania Superior Court by the Acting Governor in 1993. Mr. Pushinsky was awarded the 1991 Annual Civil Liberties Award of the American Civil Liberties Union of Pennsylvania and was the recipient of the United Jewish Federation's 1997 Sonia and Aaron Levinson Community Relations Award for his demonstrated leadership in advancing intergroup relations and social justice. He currently serves as the chairperson of the Greater Pittsburgh ACLU's legal committee and is a board member of the Aleph Institute. He is a member of the Allegheny County Academy of Trial Lawyers and is a frequent lecturer on civil rights and civil liberties topics.

The Honorable Mark R. Hornak

The Honorable Mark R. Hornak was appointed as a United States District Judge by President Barack Obama on October 19, 2011, and entered on duty on November 21, 2011.

Judge Hornak is a designated patent judge pursuant to the Court's designation as a "Patent Pilot Court" under Public Law 111-349. He is also a Judge of the Court's "Veterans Court" and "Bridges Court" Programs. He chairs the Court's Rules Committee and its Jury Committee, is a member of its Case Management, Court Governance, Court Reporters, and Information Technology Committees, and is a member of its Patent Case Task Force. He is a founder of the Q. Todd Dickinson American Inn of Court, which is dedicated to intellectual property law.

He was born in Homestead, Pennsylvania in 1956, and grew up in Munhall, Pennsylvania. He received his Bachelor of Arts, cum laude, from the University of Pittsburgh in 1978, where he was a National Merit Scholar, and a James Fulton Congressional Intern with Hon. William S. Moorhead (PA-14). He received his law degree, summa cum laude, from the University of Pittsburgh in 1981, and was named a University Scholar by the Chancellor of the University. While in law school, he served as editor-in-chief of the University of Pittsburgh Law Review and was inducted into the Order of the Coif. Upon graduation, he served as a law clerk to Hon. James M. Sprouse of the United States Court of Appeals for the Fourth Circuit. From 1989 to 1993, he served as an Adjunct Professor of Law at the University of Pittsburgh, teaching employment litigation. He is an Elected Member of the American Law Institute, and a Life Fellow of the American Bar Foundation. Judge Hornak has also served on the faculty of the National Trial Advocacy College at the University of Virginia.

In 1982, Judge Hornak began the practice of law at the Pittsburgh office of Buchanan Ingersoll & Rooney PC, where he served on the Firm's Executive Committee and chaired its Conflicts Committee, and where he remained in practice until his appointment to the Court. His practice focused on civil litigation, labor and employment law, the representation of government agencies and officials, and the national representation of broadcasters, publishers and authors, along with extensive service as an ADR neutral. From 1994 to 2011, he also served as the Solicitor to the Sports & Exhibition Authority of Pittsburgh and Allegheny County, which developed and constructed PNC Park, Heinz Field, PPG Paints Arena and the David L. Lawrence Convention Center. Judge Hornak also served as a Governor of the Academy of Trial Lawyers of Allegheny County, and as a member of the Advisory Committee on Practice and Procedure of the United States District Court for the Western District of Pennsylvania.

Judge Hornak previously participated in a variety of community organizations, including service on the Boards of School Directors of the Steel Valley (PA) School District and of the Allegheny Intermediate Unit. He has also served on the boards of the Make-A-Wish Foundation of Western Pennsylvania, the Girl Scouts of Southwestern Pennsylvania, WQED Multimedia, Leadership Pittsburgh, the Pittsburgh Foundation, and the Pennsylvania Economy League of Southwestern Pennsylvania. He previously served as a Battalion Chief/Emergency Medical Technician with the Munhall Volunteer Fire Department, and as an interscholastic basketball official.

While in practice, he was peer-recognized as a "Best Lawyer in America," as one of Pennsylvania's "Top 100 Lawyers," as one of the "Top 50 Lawyers" in Pittsburgh, and as Pittsburgh's 2012 Lawyer of the Year in labor law. For many years, he was listed in Chambers and Partners "Leading Lawyers -- USA" in labor and employment law.

INDEX

I. CRECHE CASE

II. ALLEGHENY COUNTY JAIL CASE

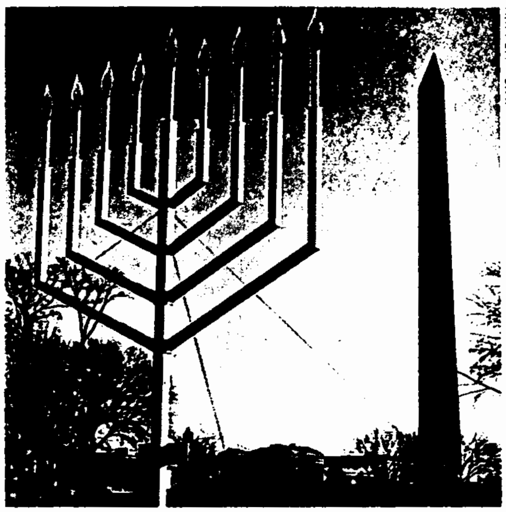
Time Dec. 12, 1988

Revisiting the Reindeer Rule

Are publicly sponsored religious symbols unconstitutional?

The trees are up, the holiday lights are ablaze in towns across the country, and this week menorah candles will be burning in many a storefront and city square to celebrate Hanukkah. But at two public buildings in Pittsburgh there will be no crèche and no holiday candelabrum this year. The religious symbols have been snuffed out as a result of a federal court decision, now on appeal before the U.S. Supreme Court, that has reignited the battle between forces insisting on strict sepa- Pawtucket, R.I., the Justices upheld the constitutionality of a town-supported crèche in a display that included reindeer, Santa's house and candy-striped poles, saying the overall tableau had a "secular purpose" and "effect." Ever since, lower courts have struggled to apply what has come to be ridiculed as the "reindeer rule." At issue: how much secular camouflage is required to sneak a publicly sponsored Nativity scene past the First Amendment bar on an "establishment of religion."

ting up menorahs is a sharing of values with others." Beyond Pittsburgh, his 100,000-member organization has been building menorahs from Washington's Ellipse to San Francisco's Union Square, almost anywhere a reindeer might be lurking. But most Jewish groups oppose the displays. Says Sam Rabinove, legal director of the American Jewish Committee: "We're all in favor of menorahs and crèches, but not in public buildings." Mainstream Christian groups agree. "We consider the display of a Christian religious symbol by a municipality to be an affront to persons of other faiths or of none," says Dean Kelley, director for religious liberty at the National Council of Churches. "As for a menorah, two wrongs



TRIPPETT—SIPA

Hanukkah menorah on the Ellipse in Washington

PETER YATES

Crèche on a private plot near the city hall in Dearborn, Mich.

Are religious symbols in public places "a sharing of values" or "an affront to persons of other faiths"?

Expert to argue city-county creche case

By Ed Blazina

The Pittsburgh Press

Noted constitutional law attorney Peter Buscemi will represent Pittsburgh and Allegheny County in arguments before the U.S. Supreme Court next week concerning controversial holiday displays.

Buscemi, a partner in the firm of Morgan Lewis and Bockius in Washington, D.C., will provide his services at no charge as part of the firm's commitment to provide free legal service. Buscemi is a former assistant solicitor general in the Justice

George Janocsko, assistant county solicitor, said the city and county decided to use Buscemi last month after they were unable to decide how to divide a 30-minute limit for arguments before the Supreme Court.

Buscemi, who was one of several attorneys the city and county considered to handle the case, will argue the positions of the city and county simultaneously. Janocsko said city Solicitor Dan Pellegrini was familiar with Buscemi's work.

"One of the things we decided was that maybe the best way to handle this was to get outside counsel," Janocsko said.

"He has developed that particular expertise. He has more than a lifetime's experience of arguing before the Supreme Court because some lawyers are lucky if they get to argue one case there."

Buscemi regularly offers his services without charge, Curtin said. He said the firm takes seriously the lawyer's code of ethics, which calls for free legal work.

Supreme Court to hear case of city's religious holiday symbols

By Lee Bowman
The Pittsburgh Press

WASHINGTON — The Supreme Court this week will hear arguments on whether religious holiday displays in Pittsburgh government buildings can pass the constitutional test for separation of church and state.

A nativity scene on the grand staircase of the Allegheny County Courthouse and a menorah on the Grant Street steps of the City-County Building, familiar signs of the holiday season since the early 1980s, were missing in December. County officials did not display them because of a ruling by the U.S. 3rd

the limits set by the Supreme Court in a 1984 Rhode Island case. The federal appeals court said they were not.

The city of Pawtucket included a creche it owned in a traditional holiday display in a private park in the downtown business district. Other objects in the display included more secular items such as a plastic Santa Claus and reindeer, snowmen and a Christmas tree.

While acknowledging the religious significance of the creche, the high court concluded that Pawtucket's participation served the "legitimate secular purposes" of celebrating a national holiday and the origins of the holiday.

And so, government officials along with religious and civil liberties groups are watching closely to see whether the high court will expand on the Rhode Island case or tighten the standards.

"There are clearly distinguishable differences," said attorney Roslyn Litman, representing the American Civil Liberties Union and several local residents who first sued for removal of the items from the displays in 1986.

Most notable, at least to the appeals court, was their placement in government buildings by which "city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance

citizen who's not a Christian or a Jew that "they are outsiders simply because of their religious beliefs."

The Rev. Dean Kelley, speaking for the National Council of Churches, one of several groups that have filed briefs in the case, said the Pittsburgh holiday displays are "a misuse of sacred symbols. It's kind of like the city playing church."

But Peter Buscemi, a Washington attorney who will argue the case for the city and county, plans to argue that there is "no constitutionally significant distinction" between the private park locale of the Pawtucket display and the city and county buildings.

He terms the creche and menorah

And even though there's no Santa Claus in either display, both items are surrounded by secular items such as poinsettia plants, wreaths and Christmas trees, he said.

Chabad, a Jewish group that owns the menorah, argues that the eight-stemmed candelabrum symbolic of Hanukkah, the Jewish Feast of Lights, is not a strictly religious symbol.

Further, Chabad attorney Nathan Lewin said in court papers, regardless of whether the creche is allowed in the courthouse, exclusion of the Jewish symbol from the City-County Building would constitute discrimination.

However, a number of Jewish

property, said Richard Fultin, associate director of the American Jewish Committee. "The issue comes up when there's an appearance of government endorsement at the very seat of government."

Even the U.S. government has taken a stand in the case, mindful that it too displays religious symbols as part of holiday displays on some of its property, notably a nativity scene in the annual "Pageant of Peace" on the Ellipse behind the White House.

The Constitution was never "intended to secularize our public life so rigidly that we cannot continue to mark our public holidays in a man-

Review of city creche, menorah begins

By Lee Bowman

The Pittsburgh Press

WASHINGTON — The Supreme Court is struggling with the question of how much government involvement in holiday religious displays is permissible without crossing the constitutional line between church and state.

During arguments yesterday on the legality of two displays in Pittsburgh government buildings Downtown, the justices seemed eager to explore not only the propriety of including religious symbols in holiday scenes, but also whether governments are required to honor the requests of all religious groups to participate in such displays.

The case arose from a suit filed by the American Civil Liberties Union and several Pittsburgh residents who objected to the annual display of a Nativity scene inside the Allegheny County Courthouse and a menorah on the steps of the City-County Building.

ity and Judaism" and unlawfully advanced religion.

Many legal scholars expect that the high court's ruling on the Pittsburgh case, due this spring, will help clarify what role governments can play in such displays and lift a legal cloud over similar displays across the country.

Attorney Peter Buscemi, representing the city and county, said the Pittsburgh displays — both sponsored by outside groups on government property with minimal involvement by government workers — were not significantly different from those included in a Pawtucket, R.I., holiday scene that the Supreme Court upheld in a 1984 decision.

In that case, the court said inclusion of a city-owned creche along with more secular symbols like Christmas trees, candy canes and snowmen in a display at a privately owned park served the "legitimate secular purposes" of celebrating a national holiday.

Buscemi stressed that the creche and menorah were "passive" displays that do not coerce

symbols passive? Would a cross be passive?" Buscemi said it would, if it was not "too dominant."

Later, Kennedy wondered if government "has a duty to accommodate religion?"

Roslyn Litman, representing the American Civil Liberties Union, replied that it does, "but we don't have accommodation here, but government promotion of religion."

Although Justice Antonin Scalia wondered "how can you be endorsing either religion with a tree and a menorah?" Ms. Litman said the symbols "ignore other religions."

Nathan Lewin, representing Chabad, a Jewish group that owns the menorah in Pittsburgh, argued that by including the menorah, the city demonstrated neutrality.

Justice John Paul Stevens wondered how this neutrality could be maintained, though. "If you do this for two religions, do you have an obligation to do this for the third, fourth, fifth?"

Lewin said other religions could be included, although "reason has to apply."

492 U.S. 573, 106 L.Ed.2d 472

[573]COUNTY OF ALLEGHENY, et al., Petitioners

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER et al.

CHABAD, Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION et al.

CITY OF PITTSBURGH, Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER et al.

Nos. 87–2050, 88–90 and 88–96.

Argued Feb. 22, 1989.

Decided July 3, 1989.

Civil liberties organization and certain individuals brought action against county and city to challenge constitutionality of crèche in county courthouse and Chanukah menorah outside city and county building as violations of establishment clause. The United States District Court for the Western District of Pennsylvania, Barron P. McCune, J., entered judgment in favor of defendants. The Court of Appeals, 842 F.2d 655, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Blackmun, held that: (1) display of crèche violated establishment clause, and (2) display of menorah next to Christmas tree did not have unconstitutional effect of endorsing Christian and Jewish faiths.

Court of Appeals affirmed in part and reversed in part, and cases remanded.

Justice O'Connor concurred in part, concurred in judgment, and filed opinion joined in part by Justices Brennan and Stevens.

Justice Brennan concurred in part, dissented in part, and filed opinion joined by Justices Marshall and Stevens.

Justice Stevens concurred in part, dissented in part, and filed opinion joined by Justices Brennan and Marshall.

Justice Kennedy concurred in judgment in part, dissented in part, and filed opinion joined by Chief Justice Rehnquist and Justices White and Scalia.

1. Constitutional Law ⇐84(1)

Establishment clause means that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on basis of their religious beliefs and practices, may not delegate governmental power to religious institution, and may not involve itself too deeply in institution's affairs. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84(1)

Under *Lemon* analysis, statute or practice which touches upon religion, if it is to be permissible under establishment clause, must have secular purpose; it must neither advance nor inhibit religion in principal or primary effect; and it must not

by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943):

"'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'
'The State ..., no less than the Congress of the United States, must respect that basic truth." *Wallace v. Jaffree,* 472 U.S. 38, 52–55, 105 S.Ct. 2479, 2487–89, 86 L.Ed.2d 29 (1985) (footnotes omitted).

foster excessive entanglement with religion. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84(1)

Establishment clause, at very least, prohibits government from appearing to take position on questions of religious belief or from making adherence to religion relevant in any way to person's standing in political community. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐84(1)

Government's use of religious symbolism is unconstitutional if it has effect of endorsing religious beliefs; that effect depends upon context. (Per Justice Blackmun with one Justice joining and four Justices concurring in part.) U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐84.5(11)

Crèche displayed on grand staircase of county courthouse and surrounded by traditional Christmas greens had effect of endorsing patently Christian message and violated establishment clause, even though it was setting for county's annual Christmas carol program and contained sign disclosing ownership by Roman Catholic organization; crèche was its own display distinct from other decorations or exhibitions in the building; angel was presented as saying "Glory to God in the Highest!"; and crèche sent message of support and promotion of Christian praise. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐84.5(1)

Effect of crèche display which is challenged as violation of establishment clause turns on its setting. U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⇐84.5(7)

Establishment clause does not limit only religious content of government's own communication; it also prohibits government's support and promotion of religious communications by religious organizations. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84.5(11)

By prohibiting government endorsement of religion, establishment clause prohibited county from lending support to communication of religious organization's religious message in form of crèche at county courthouse. U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⇐84.5(11)

Celebration of Christmas as national holiday did not validate constitutionality of crèche displayed on grand staircase of county courthouse. U.S.C.A. Const. Amend. 1.

10. Constitutional Law ⇐84.5(15)

Although government may acknowledge Christmas as cultural phenomenon, establishment clause prohibits it from observing it as Christian holy day by suggesting that people praise God for birth of Jesus. U.S.C.A. Const.Amend. 1.

11. Constitutional Law ⇐84.5(11)

Display of crèche in county courthouse could not be justified as accommodation of religion; display of crèche did not remove any burden on free exercise of Christianity. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇐84(1)

Government efforts to accommodate religion are permissible under establishment clause when they remove burdens on free exercise of religion. U.S.C.A. Const. Amend. 1.

13. Constitutional Law ⇐84.5(15)

Government may celebrate Christmas in some manner and form, but not in way that endorses Christian doctrine. U.S.C.A. Const.Amend. 1.

14. Constitutional Law ⇐84.5(11)

For purposes of establishment clause, there is distinction between crèche displays and references to God in Pledge of Allegiance and national motto, "In God We Trust." U.S.C.A. Const.Amend. 1.

15. Constitutional Law ⇐84(1)

However history may affect constitutionality of nonsectarian references to reli-

gion by government, history cannot legitimate practices that demonstrate government's allegiance to particular sect or creed. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⇐84.5(1)

United States' heritage of official discrimination against non-Christians has no place in jurisprudence of establishment clause. U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⇐84(1)

Whatever else the establishment clause may mean, it certainly means at the very least that government may not demonstrate preference for one particular sect or creed, including preference for Christianity over other religions. U.S.C.A. Const.Amend. 1.

18. Constitutional Law ⇐84(1)

Historical incidents of preference for one particular sect or creed cannot diminish in any way force of establishment clause's command not to demonstrate preference for one particular sect or creed. U.S.C.A. Const.Amend. 1.

19. Constitutional Law ⇐84(1)

Establishment clause cannot be interpreted in light of any favoritism for Christianity that may have existed among founders of republic. U.S.C.A. Const.Amend. 1.

20. Constitutional Law ⇐84(1)

Question whether particular practice would constitute governmental proselytization is much the same as endorsement inquiry under establishment clause, except to extent that proselytization test requires "obvious" allegiance between government and favored sects; however, strict scrutiny is required for practices suggesting denominational preference. U.S.C.A. Const. Amend. 1.

21. Constitutional Law ⇐84(1)

Constitution mandates that government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on basis of their religious faith. U.S.C.A. Const.Amend. 1.

22. Constitutional Law ⇐84(1)

Claim that lack of established religion discriminates against some preferences contradicts fundamental, antidiscrimination premise of establishment clause itself. U.S.C.A. Const.Amend. 1.

23. Constitutional Law ⇐84(1)

Antidiscrimination principle inherent in establishment clause necessarily means that would-be discriminators on basis of religion cannot prevail. U.S.C.A. Const. Amend. 1.

24. Constitutional Law ⇐84.5(15)

Claim that prohibiting government from celebrating Christmas as religious holiday discriminates against Christians in favor of nonadherents contradicts fundamental premise of establishment clause. U.S.C.A. Const.Amend. 1.

25. Constitutional Law ⇐84.5(15)

Confining government's own celebration of Christmas to holiday's secular aspects does not favor religious beliefs of non-Christians over those of Christians, but simply permits government to acknowledge holiday without expressing allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians. U.S.C.A. Const.Amend. 1.

26. Constitutional Law ⇐84.5(11)

Not all religious celebrations of Christmas located on government property violate establishment clause. U.S.C.A. Const. Amend. 1.

27. Constitutional Law ⇐84.5(11)

Once judgment has been made that particular proclamation of Christian belief, when disseminated from particular location on government property, has effect of demonstrating government's endorsement of Christian faith, then practice must be enjoined to protect constitutional rights of citizens following some creed other than Christianity. U.S.C.A. Const.Amend. 1.

28. Constitutional Law ⇐84.5(11)

Conclusion that crèche displayed in county courthouse demonstrated county's

endorsement of Christianity did not represent hostility or indifference to religion, but demonstrated respect for religious diversity required by Constitution. U.S.C.A. Const.Amend. 1.

29. Constitutional Law ⇐84.5(11)

Permitting display of crèche in county courthouse would not be "accommodation" of religion. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

30. Constitutional Law ⇐84.5(11)

Display of 18–foot Chanukah menorah and 45–foot Christmas tree under sign saluting liberty did not simultaneously endorse Christian and Jewish faiths, but was secular celebration of Christmas coupled with acknowledgement of Chanukah as contemporaneous alternative tradition, even though menorah retained religious significance in display; sign confirmed that menorah was recognition of cultural diversity; and absence of more secular alternative to menorah was itself part of context in which city's actions were to be judged. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

31. Constitutional Law ⇐84.5(1)

Inquiry concerning government's use of religious object to determine whether that use results in religious preference in violation of establishment clause requires review of factual record concerning religious object. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.) U.S.C.A. Const. Amend. 1.

32. Constitutional Law ⇐84.5(15)

If city celebrates Christmas and Chanukah as religious holidays, then it violates establishment clause; simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than endorsement of Christianity alone. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.)

33. Constitutional Law ⇐84.5(15)

If city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond reach of establishment clause. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

34. Constitutional Law ⇐84.5(11)

While adjudication of effect of display containing Christmas tree and Chanukah menorah must take into account prospective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, constitutionality of effect under establishment clause must also be judged according to standard of reasonable observer. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

35. Constitutional Law ⇐84.5(11)

Christmas tree alone outside city and county building would not endorse Christian belief. (Per Justice Blackmun with the Chief Justice and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1.

Syllabus *

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a crèche 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 crèche was donated by the Holy Name Society, a Roman Catholic group, and bore a sign to that effect. Its

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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 crèche 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, 104 S.Ct. 1355, 79 L.Ed.2d 604, which held that a city's inclusion of a crèche 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 crèche 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, 91 S.Ct. 2105, 29 L.Ed.2d 745.

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

842 F.2d 655 (CA 3 1988), 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 612, 91 S.Ct., at 2111, 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 687, 104 S.Ct., at 1367 (O'CONNOR, J., concurring). Pp. 3099–3101.

2. When viewed in its overall context, the crèche display violates the Establishment Clause. The crèche 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 crèche'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. 3103–3105.

3. Justice KENNEDY's reasons for permitting the crèche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are unpersuasive. Pp. 3105–3111.

(a) History cannot legitimate practices like the crèche display that demonstrate the government's allegiance to a particular sect or creed. Pp. 3106–3107.

(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, 246, 102 S.Ct. 1673, 1684, 72 L.Ed.2d 33. Pp. 3107–3109.

(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[575] 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. 3109–3111.

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 687–694, 104 S.Ct., at 1366–1370 (O'CONNOR, J., concurring); *id.*, at 694–726, 104 S.Ct., at 1370–1387 (BRENNAN, J., dissenting). Pp. 3101–3103.

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. 3111–3115.

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[576] observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs. Pp. 3122–3124.

Justice KENNEDY, joined by The Chief Justice, Justice WHITE, and Justice SCALIA, concluded that both the menorah display and the crèche display are permissible under the Establishment Clause. Pp. 3134–3140.

(a) The test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745– 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 tra-

ditions and case law, supports the conclusion that both the crèche 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, 104 S.Ct. 1355, 79 L.Ed.2d 604, upheld a city's holiday display of a crèche, and *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, held that a State's practice of employing a legislative chaplain was permissible. Pp. 3134–3138.

(b) In permitting the displays of the menorah and the crèche, 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[577] 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 crèche or the menorah to proselytize. Thus, the crèche 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 crèche, displayed in the limited context of the holiday season, cannot be invalid. The facts that, unlike the crèche in *Lynch,* the menorah and crèche 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. 3138–3140.

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. 3117. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 3124. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 3129. 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. 3134.

Peter Buscemi, Washington, D.C., for petitioners in No. 87–2050 and No. 88–96; George R. Specter, D.R. Pellegrini, George M. Janocsko, Robert L. McTiernan, Pittsburgh, Pa., on brief.

[578]Nathan Lewin for petitioner in No. 88–90.

Roslyn M. Litman, Pittsburgh, Pa., for respondents.

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 crèche 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.[579] 842 F.2d 655 (1988). We agree that the crèche 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 crèche 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.[1] Western churches have celebrated Christmas Day on December 25 since the fourth century.[2] As observed in this Nation, Christmas has a secular, as well as a religious, dimension.[3]

1. See 8 Encyclopedia of Religion, "Jesus," 15, 18 (1987).

2. See 3 Encyclopedia of Religion, "Christmas," 460 (1987). Some eastern churches, however, have not adopted December 25 as the Feast of the Nativity, retaining January 6 as the date for celebrating both the birth and the baptism of Jesus. R. Myers, Celebrations: The Complete Book of American Holidays 15, 17 (1972) (Myers).

3. "[T]he Christmas holiday in our national culture contains both secular and sectarian ele-

[580]The crèche in the county courthouse, like other crèches, 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.[4] The crèche 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!" [5]

During the 1986–1987 holiday season, the crèche 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.[6] These trees stood alongside the manger backdrop and were slightly shorter than it was. The angel thus was at the apex of the crèche display. Altogether, the crèche, 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[581] appeared on the Grand Staircase. App. 188.[7] Cf. *Lynch v. Donnelly*, 465 U.S. 668, 671, 104 S.Ct. 1355, 1358, 79 L.Ed.2d 604 (1984). Appendix A at the end of this opinion is a photograph of the display.

The county uses the crèche as the setting for its annual Christmas-carole 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 crèche, 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 Alle-

ments." *Lynch v. Donnelly*, 465 U.S. 668, 709, and n. 15, 104 S.Ct. 1355, 1378, and n. 15, 79 L.Ed.2d 604 (1984) (BRENNAN, J., dissenting). It has been suggested that the cultural aspect of Christmas in this country now exceeds the theological significance of the holiday. See J. Barnett, The American Christmas, a Study in National Culture 23 (1954) (Barnett) ("[B]y the latter part of the last century, the folk-secular aspects of Christmas were taking precedence over its religious ones").

4. Luke 2:1–21; Matthew 2:1–11.

5. This phrase comes from Luke, who tells of an angel appearing to the shepherds to announce the birth of the Messiah. After the angel told the shepherds that they would find the baby lying in a manger, "suddenly there was with the angel a multitude of the heavenly host praising God, and saying, Glory to God in the highest, and on earth peace, good will towards men." Luke 2:13–14 (King James Version). It is unlikely that an observer standing at the bottom of the Grand Staircase would be able to read the text of the angel's banner from that distance, but might be able to do so from a closer vantage point.

6. On each side of the staircase was a sign indicating the direction of county offices. JEV 7–8. A small evergreen tree, decorated much like the trees behind the endposts, was placed next to each directional sign. *Ibid.*

7. In the arched windows behind the staircase were two large wreaths, each with a large red ribbon. *Ibid.*

gheny 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 582 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.[8] The 25th of Kislev usually occurs in December,[9] 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.*, 583 at 138.[10] Chanukah is the holiday which celebrates that event.[11] 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.[12]

The Talmud [13] explains the lamplighting ritual as a commemoration of an event that occurred during the rededication of the Temple. The Temple housed a seven-branch menorah,[14] 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.[15] 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,[16] for

8. See generally A. Bloch, The Biblical and Historical Background of the Jewish Holy Days 49–78 (1978) (Bloch, Holy Days); A. Bloch, The Biblical and Historical Background of Jewish Customs and Ceremonies 267–278 (1980) (Bloch, Ceremonies); 6 Encyclopedia of Religion, "Hanukkah," 193–194; 7 Encyclopaedia Judaica, "Hanukkah," 1280–1288 (1972); O. Rankin, The Origins of the Festival of Hanukkah (1930) (Rankin); A. Chill, The Minhagim 241–254 (1979) (Chill); L. Trepp, The Complete Book of Jewish Observance 137–151 (1980) (Trepp); M. Strassfeld, The Jewish Holidays 161–177 (1985) (Strassfeld).

9. See Columbia Encyclopedia 1190 (4th ed. 1975); J. Williams, What Americans Believe and How they Worship 348 (3d ed. 1969); Myers 302; see also Strassfeld 202; see generally A. Spier, The Comprehensive Hebrew Calendar (1981).

10. See P. Johnson, A History of the Jews 104 (1987) (Johnson); R. Seltzer, Jewish People, Jewish Thought: The Jewish Experience in History 158 (1980) (Seltzer).

11. The word Chanukah, sometimes spelled Chanukkah or Hanukkah, is drawn from the Hebrew for "dedication." 7 Encyclopaedia Judaica 1280.

12. See Strassfeld 161–163; Rankin 133.

13. The Talmud (specifically the Babylonian Talmud) is a collection of rabbinic commentary on Jewish law that was compiled before the sixth century, App. 140. See 14 Encyclopedia of Religion, "Talmud," 256–259; see also Seltzer 265.

14. "Menorah" is Hebrew for "candelabrum." See 11 Encyclopaedia Judaica, "Menorah," at 1356.

15. See The Babylonian Talmud, Seder Mo'ed, 1 Shabbath 21b (Soncino Press 1938); Strassfeld 163; Trepp 143.

16. Cf. "Mitzvah," in 12 Encyclopaedia Judaica 162 (4th ed. 1972) ("In common usage, *mitzvah*

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 584147.[17] Where practicality or safety from persecution so requires, the lamp may be placed in a window or inside the home.[18] The Talmud also ordains certain blessings to be recited each night of Chanukah before lighting the lamp.[19] 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.[20]

Although Jewish law does not contain any rule regarding the shape or substance of a Chanukah lamp (or "hanukkiyyah"), *id.*, at 146, 238,[21] 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.[22] 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.[23] Also in contrast to the Temple menorah, the Chanukah menorah is not a sanctified object; it need not be treated with special care.[24]

585Lighting 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.[25] 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.[26]

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.[27] Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice.[28] Just as some Americans

has taken on the meaning of a good deed. Already in the Talmud, this word was used for a meritorious act as distinct from a positive commandment"). The plural of mitzvah is mitzvot.

17. See also Bloch, Ceremonies 269. According to some Jewish authorities the miracle of Chanukah is the success of the Maccabees over the Seleucids, rather than the fact that the oil lasted eight days. App. 141. Either way, the purpose of lighting the Chanukah candles, as a religious mitzvah, is to celebrate a miracle. *Ibid.*

18. Trepp 146; 7 Encyclopaedia Judaica, at 1283; Talmud Shabbath 21b.

19. Bloch, Ceremonies 274.

20. Another translation is "Praised are you, Lord our God, Ruler of the universe, who has sanctified our lives through His commandments, commanding us to kindle the Hanukkah lights." Strassfeld 167.

21. Trepp 145; see generally 7 Encyclopaedia Judaica, "Hanukkah Lamp," 1288–1316.

22. The design of the menorah is set forth in Exodus 25:31–40; see also 11 Encyclopaedia Judaica 1356–1370.

23. Bloch, Ceremonies 274–275.

24. A Torah scroll—which contains the five Books of Moses—must be buried in a special manner when it is no longer usable. App. 237–238.

25. Strassfeld 167; Bloch, Ceremonies 277.

26. *Id.*, at 277–278; Trepp 147. It is also a custom to serve potato pancakes or other fried foods on Chanukah because the oil in which they are fried is, by tradition, a reminder of the miracle of Chanukah. App. 242–243; Strassfeld 168.

27. *Id.*, at 164.

28. Trepp 144, 150; 6 Encyclopedia of Religion 193; see also Strassfeld 176. Of course, the celebration of Christmas and Chanukah in the Southern Hemisphere occurs during summer. Nonetheless, both Christmas and Chanukah first developed in the Northern Hemisphere and have longstanding cultural associations with the beginning of winter. In fact, ancient rabbis chose Chanukah as the means to mark the beginning of winter. See Bloch, Holy Days 77.

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.*[29]

[586]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.[30] In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas.[31] Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country.[32] Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance[587] would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance.[33] This socially heightened status of Chanukah reflects its cultural or secular dimension.[34]

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,[35] 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

29. See also App. 229, 237. The Court of Appeals in this litigation plainly erred when it asserted that Chanukah "is not ... a holiday with secular aspects." 842 F.2d 655, 662 (CA3 1988). This assertion contradicts uncontroverted record evidence presented by respondents' own expert witness:

"There are also those Jews within the Jewish community who are non-theistic.... [T]hey base their celebration [of Chanukah] on something other than religion." App. 143.

In response to further questioning, the expert added that the celebration of Chanukah as a cultural event "certainly exists." *Ibid.* Thus, on this record, Chanukah unquestionably has "secular aspects," although it is also a religious holiday. See Chill 241 (Chanukah is celebrated by secular as well as religious Jews).

30. Strassfeld 164–165; see also 7 Encyclopaedia Judaica 1288.

31. "In America, Hanukkah has been influenced by the celebration of Christmas. While a tradition of giving Hanukkah gelt—money—is an old one, the proximity to Christmas has made gift giving an intrinsic part of the holiday." Strassfeld 164.

32. "In general, the attempt to create a Jewish equivalent to Christmas has given Hanukkah more significance in the festival cycle than it has had in the past." *Ibid.* "Hanukkah has prospered because it comes about the same time as Christmas and can be used as the Jewish equivalent." D. Elazar, Community and Polity: The Organizational Dynamics of American Jewry 119 (1976). "Hanukkah was elaborated by American Jews to protect the child and to defend Judaism against the glamour and seductive power of Christmas." C. Liebman, The Ambivalent American Jew 66 (1973). See also M. Sklare & J. Greenblum, Jewish Identity on the Suburban Frontier 58 (1967):

"The aspects of Hanukkah observance currently emphasized—the exchange of gifts and the lighting and display of the *menorah* in the windows of homes—offer ready parallels to the general mode of Christmas observance as well as provide a 'Jewish' alternative to the holiday. Instead of alienating the Jew from the general culture, Hanukkah helps situate him as a participant in that culture. Hanukkah, in short, becomes for some the Jewish Christmas."

33. See Chill 241 (from the perspective of Jewish religious law, Chanukah is "only a minor festival").

34. Additionally, menorahs—like Chanukah itself—have a secular as well as a religious dimension. The record in this litigation contains a passing reference to the fact that menorahs "are used extensively by secular Jewish organizations to represent the Jewish people." App. 310.

35. Chabad, also known as Lubavitch, is an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. *Id.*, at 228, 253–254. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism. *Id.*, at 249–250. Pittsburgh has a total population of 45,000 Jews; of these, 100 to 150 families attend synagogue at Pittsburgh's Lubavitch Center. *Id.*, at 247–251.

were all removed on January 13. App. 58, 220–221. Appendix B, p. 3116, is a photograph of the tree, the sign, and the menorah. App. 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 crèche in the county courthouse and the city from displaying the menorah in front of the City–County[588] Building.[36] Respondents claim that the displays of the crèche 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, 48–55, 105 S.Ct. 2479, 2485–2489, 86 L.Ed.2d 29 (1985).[37] Chabad was permitted to intervene to defend the display of its menorah.[38]

On May 8, 1987, the District Court denied respondents' request for a permanent injunction. Relying on *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), the court stated that "the crèche was but part of the holiday decoration of the stairwell and a foreground for the high-school 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 crèche 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[589] 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 crèche 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. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (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 crèche, "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.

36. Respondents also sought a preliminary injunction against the display of the crèche and menorah for the 1986–1987 holiday season. Characterizing the crèche and menorah as "de minimis in the context of the First Amendment," the District Court on December 15 denied respondents' motion for preliminary injunctive relief. *Id.*, at 10.

37. Respondents, however, do not claim that the city's Christmas tree violates the Establishment Clause and do not seek to enjoin its display. Respondents also do not claim that the county's Christmas-carole program is unconstitutional. See Tr. of Oral Arg. 32.

38. In addition to agreeing with the city that the menorah's display does not violate the Establishment Clause, Chabad contends that it has a constitutional right to display the menorah in front of the City–County Building. In light of the Court's disposition of the Establishment Clause question as to the menorah, there is no need to address Chabad's contention.

We granted all three petitions. 488 U.S. 816, 109 S.Ct. 53, 54, 102 L.Ed.2d 32 (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 [590]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. Jaffree*, 472 U.S., at 52, 105 S.Ct., at 2487.[39] It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.*, at 49, 105 S.Ct., at 2485.

[1] 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,[40] may not discriminate among persons on the basis of their religious beliefs and practices,[41] [591]may not delegate a governmental power to a religious institution,[42] and may not involve itself too deeply in such an institution's affairs.[43] Although

39. See also M. Borden, Jews, Turks, and Infidels (1984) (charting the history of discrimination against non-Christian citizens of the United States in the 18th and 19th centuries); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875, 919–920 (1986) (Laycock) (the intolerance of late 18th-century Americans towards Catholics, Jews, Moslems, and atheists cannot be the basis of interpreting the Establishment Clause today).

40. A State may neither allow public-school students to receive religious instruction on public-school premises, *Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), nor allow religious-school students to receive state-sponsored education in their religious schools. *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). Similarly unconstitutional is state-sponsored prayer in public schools. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). And the content of a public school's curriculum may not be based on a desire to promote religious beliefs. *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). For the same reason, posting the Ten Commandments on the wall of a public-school classroom violates the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).

41. A statute that conditions the holding of public office on a belief in the existence of God is unconstitutional, *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), as is one that grants a tax exemption for only religious literature, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), and one that grants an employee a right not to work on his Sabbath, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–710, and n. 9, 105 S.Ct. 2914, 2917–2918, and n. 9, 86 L.Ed.2d 557 (1985) (reasoning that other employees might also have strong reasons for taking a particular day off from work each week). See also *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (invalidating a statute that imposed registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from nonmembers).

42. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982).

43. See *Aguilar v. Felton*, 473 U.S. 402, 409, 105 S.Ct. 3232, 3236, 87 L.Ed.2d 290 (1985); *Wolman v. Walter*, 433 U.S. 229, 254, 97 S.Ct. 2593, 2609, 53 L.Ed.2d 714 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370, 95 S.Ct. 1753, 1765, 44 L.Ed.2d 217 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 619–622, 91 S.Ct. 2105, 2114–2116, 29 L.Ed.2d 745 (1971).

"the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S., at 694, 104 S.Ct., at 1370 (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, 67 S.Ct. 504, 91 L.Ed. 711 (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, 67 S.Ct., at 511–512.

[2] 592 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, 91 S.Ct., at 2111. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.[44]

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, 82 S.Ct. 1261, 1270, 8 L.Ed.2d 601 (1962). Thus, in *Wallace v. Jaffree*, 472 U.S., at 60, 105 S.Ct., at 2491, 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, 107 S.Ct. 2573, 2582, 96 L.Ed.2d 510 (1987). And the educational 593 program in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389–392, 105 S.Ct. 3216, 3225–3227, 87 L.Ed.2d 267 (1985), was held to violate the Establishment Clause because of its "endorsement" effect. See also *Texas Monthly, Inc. v. Bullock*, 489

44. See, *e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 2570, 101 L.Ed.2d 520 (1988); *Edwards v. Aguillard*, 482 U.S., at 583, 107 S.Ct., at 2577; *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 485, 106 S.Ct. 748, 750–751, 88 L.Ed.2d 846 (1986); *Aguilar v. Felton*, 473 U.S., at 410, 105 S.Ct., at 3236; *School Dist. of Grand Rapids v. Ball*, 473 U.S., at 382–383, 105 S.Ct., at 3221–3222; *Estate of Thornton v. Caldor, Inc.*, 472 U.S., at 708, 105 S.Ct., at 2917; *Wallace v. Jaffree*, 472 U.S. 38, 55–56, 105 S.Ct. 2479, 2489–2490, 86 L.Ed.2d 29 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S., at 123, 103 S.Ct., at 510; *Stone v. Graham*, 449 U.S., at 40, 101 S.Ct., at 193; *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980); *Meek v. Pittenger, supra*; *Sloan v. Lemon*, 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772–773, 93 S.Ct. 2955, 2965–2966, 37 L.Ed.2d 948 (1973); *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 481–482, 93 S.Ct. 2814, 2819–2820, 37 L.Ed.2d 736 (1973).

U.S. 1, 17, 109 S.Ct. 890, 901, 103 L.Ed.2d 1 (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, 105 S.Ct., at 2497 (O'CONNOR, J., concurring in judgment) (emphasis added). Accord, *Texas Monthly, Inc. v. Bullock*, 489 U.S., at 27, 28, 109 S.Ct., at 906, 907 (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, 107 S.Ct., at 2582 ("preference" for particular religious beliefs constitutes an endorsement of religion); *Abington School District v. Schempp*, 374 U.S. 203, 305, 83 S.Ct. 1560, 1615, 10 L.Ed.2d 844 (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, 104 S.Ct., at 1368 (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, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968). See also *Wallace v. Jaffree*, 472 U.S., at 59–60, 105 S.Ct., at 2491 (using the concepts of endorsement, promotion, and favoritism interchangeably).

[3] Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The 594 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, 104 S.Ct., at 1366 (O'CONNOR, J., concurring).

B

[4] 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, 101 S.Ct. 192, 66 L.Ed.2d 199 (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 crèche 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 crèche in the Pawtucket display, holding, *inter alia*, that the inclusion of the crèche did not have the impermissible effect of advancing or promoting religion.[45]

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 crèche 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, 104 S.Ct., at 1364—but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the govern-

45. There is no need here to review the applications in *Lynch* of the "purpose" and "entanglement" elements of the *Lemon* inquiry, since in the present action the Court of Appeals did not consider these issues.

ment's display of the crèche gave to religion was no more than "indirect, remote, and incidental," *ibid.*—without saying how or why.

[595]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, 104 S.Ct., at 1368, 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, 104 S.Ct., at 1367.

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, 104 S.Ct., at 1369. 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 crèche 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, 104 S.Ct., at 1370.[46]

[596]The concurrence applied this mode of analysis to the Pawtucket crèche, seen in the context of that city's holiday celebration as a whole. In addition to the crèche, 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 crèche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the crèche was "displayed along with purely secular symbols," the crèche'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

46. The difference in approach between the *Lynch* majority and the concurrence is especially evident in each opinion's treatment of *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). In that case, the Court sustained the practice of legislative prayer based on its unique history: Congress authorized the payment of legislative chaplains during the same week that it reached final agreement on the language of the Bill of Rights. *Id.*, at 788, 103 S.Ct., at 3334. The *Lynch* majority employed *Marsh* comparatively: to forbid the use of the crèche, "while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings." *Lynch*, 465 U.S., at 686, 104 S.Ct., at 1366.

The concurrence, in contrast, harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that "serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." 465 U.S., at 693, 104 S.Ct., at 1370. The function and history of this form of ceremonial deism suggest that "those practices are not understood as conveying government approval of particular religious beliefs." *Ibid.*; see also *id.*, at 717, 104 S.Ct., at 1382 (BRENNAN, J., dissenting).

crèche." 465 U.S., at 692, 104 S.Ct., at 1369.

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 crèche." *Id.*, at 698, n. 3, 104 S.Ct., at 1372, n. 3 (BRENNAN, J., dissenting). The dissenters also agreed with the [597] 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, 104 S.Ct., at 1376–1377. 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 crèche. They viewed the inclusion of the crèche in the city's overall display as placing "the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche." *Id.*, at 701, 104 S.Ct., at 1374. 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, 105 S.Ct., at 3226. Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.[47]

[598] IV

[5] We turn first to the county's crèche display. There is no doubt, of course, that the crèche itself is capable of communicating a religious message. See *Lynch*, 465 U.S., at 685, 104 S.Ct., at 1365 (majority opinion); *id.*, at 692, 104 S.Ct., at 1369 (O'CONNOR, J., concurring); 701, 104 S.Ct., at 1374 (BRENNAN, J., dissenting); *id.*, at 727 (BLACKMUN, J., dissenting). Indeed, the crèche 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 crèche—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.

[6] Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the

47. The county and the city argue that their use of religious symbols does not violate the Establishment Clause unless they are shown to be "coercive." Reply Brief for Petitioners County of Allegheny et al. 1–6; Tr. of Oral Arg. 9, 11. They recognize that this Court repeatedly has stated that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S., at 786, 93 S.Ct., at 2972; see also *Abington School District v. Schempp*, 374 U.S., at 222–223, 83 S.Ct., at 1571–1572; *Engel v. Vitale*, 370 U.S., at 430, 82 S.Ct., at 1266. But they suggest that the Court reconsider this principle. Reply Brief for Petitioner Allegheny County et al. 3; cf. *American Jewish Congress v. Chicago*, 827 F.2d 120, 137 (CA7 1987) (dissenting opinion); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L.Rev. 933 (1986). The Court declines to do so, and proceeds to apply the controlling endorsement inquiry, which does not require an independent showing of coercion.

crèche's religious message. The *Lynch* display composed 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 crèche, 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 crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.[48]

[599]The floral decoration surrounding the crèche 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 crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche. 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 crèche fares no better.

Nor does the fact that the crèche 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 crèche 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 crèche were religious in nature,[49] those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the crèche 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 [600]support and approval of the government.[50] Thus, by permitting the "display of the crèche in this particular physical setting," *Lynch*, 465 U.S., at 692, 104 S.Ct., at 1369 (O'CONNOR, J., concurring), the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

[7, 8] The fact that the crèche bears a sign disclosing its ownership by a Roman

48. The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building. Tr. of Oral Arg. 7.

49. See App. 169 (religious as well as nonreligious carols were sung at the program).

50. The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche in that location for over six weeks would then not serve to associate the government with the crèche. Even if the Grand Staircase occasionally was used for displays other than the crèche (for example, a display of flags commemorating the 25th anniversary of Israel's independence, *id.*, at 176), it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government. In any event, the county's own press releases made clear to the public that the county associated itself with the crèche. JEV 28 (flier identifying the choral program as county sponsored); *id.*, at 30; App. 174 (linking the crèche to the choral program). Moreover, the county created a visual link between itself and the crèche: it placed next to official county signs two small evergreens identical to those in the crèche display. In this respect, the crèche here does not raise the kind of "public forum" issue, cf. *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), presented by the crèche in *McCreary v. Stone*, 739 F.2d 716 (CA2 1984), aff'd by an equally divided Court *sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985) (private crèche in public park).

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, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys[601] 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.

[9–12] Finally, the county argues that it is sufficient to validate the display of the crèche 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.[51]

[13] 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[602] demonstrate a violation of the Establishment Clause. The display of the crèche in this context, therefore, must be permanently enjoined.

V

Justice KENNEDY and the three Justices who join him would find the display of the crèche 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, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), which sustained the constitutionality of legislative prayer. *Post*, at 3139. He also asserts that the crèche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," *ibid.*, having repudiated the Court's endorsement inquiry in favor of a "proselytization" approach. The Court's analysis of the crèche, he contends, "reflects an unjustified hostility toward religion." *Post*, at 3134.

Justice KENNEDY'S reasons for permitting the crèche 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.

51. Nor can the display of the crèche be justified as an "accommodation" of religion. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion. *Id.*, at 348, 107 S.Ct., at 2875 (O'CONNOR, J., concurring in judgment). The display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity. Christians remain free to display crèches in their homes and churches. To be sure, prohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.

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 3141, 3142. 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.

[14, 15] 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[603] of religious belief. *Lynch*, 465 U.S., at 693, 104 S.Ct., at 1369 (O'CONNOR, J., concurring); *id.*, at 716–717, 104 S.Ct., at 1382 (BRENNAN, J., dissenting). We need not return to the subject of "ceremonial deism," see n. 46, *supra*, because there is an obvious distinction between crèche 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,[52] 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, 103 S.Ct., at 3336, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.*, at 794–795, 103 S.Ct., at 3337–3338. 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, 103 S.Ct., at 3337, 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 crèche involved in this lawsuit is constitutional. Although Justice KENNEDY says that he "cannot comprehend" how the crèche display could be invalid after *Marsh*, *post*, at 3139, surely he is able to distinguish between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh*.

[16–19] [604]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).[53] Some of these

52. It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. See *post*, at 3143. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality.

53. Among the stories this scholar recounts is one that is especially apt in light of Justice KENNEDY's citation of Thanksgiving Proclamations, *post*, at 3142:

"When James H. Hammond, governor of South Carolina, announced a day of 'Thanksgiving, Humiliation, and Prayer' in 1844, he ... exhorted 'our citizens of all denominations to assemble at their respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world.' The Jews of Charleston protested, charging Hammond with 'such obvious *discrimination and preference* in the tenor of your proclamation, as amounted to an utter exclusion of a portion of the people of South Carolina.' Hammond responded that 'I have always thought it a settled matter that I lived in a Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if

examples date back to the Founding of the Republic,[54] but this heritage of official discrimination [605] 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, 109 S.Ct. 890, 103 L.Ed.2d 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, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (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.[55]

B

[20] 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 3139, n. 3. He concedes also that the term "endorsement" long has been another way of defining a forbidden "preference" for [606] a particular sect, *post*, at 3140–3141, but he would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae," *post*, at 3144, 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, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 (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

it had not come to pass' (*The Occident*, January 1845)." Borden 142, n. 2 (emphasis in Borden). Thus, not all Thanksgiving Proclamations fit the nonsectarian or deist mold as did those examples quoted by Justice KENNEDY. Moreover, the Jews of Charleston succinctly captured the precise evil caused by such sectarian proclamations as Governor Hammond's: they demonstrate an official *preference* for Christianity and a corresponding official *discrimination* against all non-Christians, amounting to an exclusion of a portion of the political community. It is against this very evil that the Establishment Clause, in part, is directed. Indeed, the Jews of Charleston could not better have formulated the essential concepts of the endorsement inquiry.

54. In 1776, for instance, Maryland adopted a "Declaration of Rights" that allowed its legislature to impose a tax "for the support of the Christian religion" and a requirement that all state officials declare "a belief in the Christian religion." 1A. Stokes, Church and State in the United States 865–866 (1950). Efforts made in 1797 to remove these discriminations against non-Christians were unsuccessful. *Id.*, at 867. See also *id.*, at 513 (quoting the explicitly Christian proclamation of President John Adams, who urged all Americans to seek God's grace "through the Redeemer of the world" and "by His Holy Spirit").

55. Justice KENNEDY evidently believes that contemporary references to exclusively Christian creeds (like the Trinity or the divinity of Jesus) in official acts or proclamations is justified by the religious sentiments of those responsible for the adoption of the First Amendment. See 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 663 (1858) (at the time of the First Amendment's adoption, "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state"). This Court, however, squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic. *Wallace v. Jaffree*, 472 U.S., at 52, 105 S.Ct., at 2487.

United States v. Montoya de Hernandez, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985); see also *Treasury Employees v. Von Raab*, 489 U.S. 656, 666, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (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 3136, 3137, 3139, 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[607] would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Post*, at 3137. 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 3139, n. 3. But, for Justice KENNEDY, would it be enough of a preference for Christianity if that city each year displayed a crèche 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 crèche 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 3144, 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[608] 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 3145, 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 3139, 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 3137, 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.[56]

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]609 scrutiny" of practices suggesting "a denominational preference," *Larson v. Valente*, 456 U.S., at 246, 102 S.Ct., at 1684, 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, 108 S.Ct. 2562, 2566, 101 L.Ed.2d 520 (1988) (O'CONNOR, J., concurring), quoting *id.*, at 648, 108 S.Ct., at 2594 (dissenting opinion); see also *Lynch*, 465 U.S., at 694, 104 S.Ct., at 1370 (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.[57]

]610 C

Although Justice KENNEDY repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, *post*, at 3135, 3138, 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

56. In describing what would violate his "proselytization" test, Justice KENNEDY uses the adjectives "permanent," "year-round," and "continual," *post*, at 3137, 3139, n. 3, as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause. Presumably, however, Justice KENNEDY does not really intend these adjectives to define the limits of his principle, since it is obvious that the government's efforts to proselytize may be of short duration, as Governor Hammond's Thanksgiving Proclamation illustrates. See n. 53, *supra*. In any event, the Court repudiated any notion that preferences for particular religious beliefs are permissible unless permanent when, in *Bowen v. Kendrick*, 487 U.S., at 620, 108 S.Ct., at 2597, it ordered an inquiry into the "specific instances of impermissible behavior" that may have occurred in the administration of a statutory program.

57. It is not clear, moreover, why Justice KENNEDY thinks the display of the crèche in this lawsuit is permissible even under his lax "proselytization" test. Although early on in his opinion he finds "no realistic risk that the crèche . . . represent[s] an effort to proselytize," *post*, at 3139, at the end he concludes: "[T]he eager proselytizer may seek to use [public crèche displays] for his own ends. The urge to use them to teach or to taunt is *always present*." *Post*, at 3146 (emphasis added). Whatever the cause of this inconsistency, it should be obvious to all that the crèche on the Grand Staircase communicates the message that Jesus is the Messiah and to be worshipped as such, an inherently prosyletizing message if ever there was one. In fact, the angel in the crèche display represents, according to Christian tradition, one of the original "proselytizers" of the Christian faith: the angel who appeared to the shepards to tell them of the birth of Christ. Thus, it would seem that Justice KENNEDY should find this display unconstitutional according to a consistent application of his principle that government may not place its weight behind obvious efforts to proselytize Christian creeds specifically.

Contrary to Justice KENNEDY's assertion, the Court's decision in *Lynch* does not foreclose this conclusion. *Lynch* certainly is *not* "dispositive of [a] claim," *post*, at 3139, regarding the government's display of a crèche bearing an explicitly proselytizing sign (like "Let's all rejoice in Jesus Christ, the Redeemer of the world," cf. n. 53, *supra*). As much as Justice KENNEDY tries, see *post*, at 3139, there is no hiding behind the fiction that *Lynch* decides the constitutionality of every possible government crèche display. Once stripped of this fiction, Justice KENNEDY's opinion transparently lacks a principled basis, consistent with our precedents, for asserting that the crèche display here must be held constitutional.

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.

[21] 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 3138. 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[611] remain secular is a prescription of orthodoxy. *Post*, at 3146. 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.

[22, 23] 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.

[24, 25] 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 [612]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 " 'logic of secular liberty' " it is the purpose of the Establishment Clause to protect. See *Larson v. Valente*, 456 U.S., at 244, 102 S.Ct., at 1683, quoting B. Bailyn, The Ideological Origins of the American Revolution 265 (1967).

[26] 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, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).[58] The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.

[27–29] 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 crèche display on the Grand Staircase demonstrates[613] 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.[59]

VI

[30, 31] 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[614] symbol for a holiday that, like Christmas, has both religious and secular dimensions.[60]

58. Thus, Justice KENNEDY is incorrect when he says, *post*, at 3144, n. 10, that the Court fails to explain why today's decision does not require the elimination of all religious Christmas music from public property.

59. In his attempt to legitimate the display of the crèche on the Grand Staircase, Justice KENNEDY repeatedly characterizes it as an "accommodation" of religion. See, *e.g.*, *post*, at 3138, 3139. But an accommodation of religion, in order to be permitted under the Establishment Clause, must lift "an identifiable burden *on the exercise of religion.*" *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S., at 348, 107 S.Ct., at 2875 (O'CONNOR, J., concurring in judgment) (emphasis in original); see also McConnell, Accommodation of Religion, 1985 S.Ct. Rev. 1, 3–4 (defining "accommodation" as government action as "specifically for the purpose of facilitating the free exercise of religion," usually by exempting religious practices from general regulations). Defined thus, the concept of accommodation plainly has no relevance to the display of the crèche in this lawsuit. See n. 51, *supra*.

One may agree with Justice KENNEDY that the scope of accommodations permissible under the Establishment Clause is larger than the scope of accommodations mandated by the Free Exercise Clause. See *post*, at 3138, n. 2. An example prompted by the Court's decision in *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986), comes readily to mind: although the Free Exercise Clause does not require the Air Force to exempt yarmulkes from a no-headdress rule, it is at least plausible that the Establishment Clause permits the Air Force to promulgate a regulation exempting yarmulkes (and similar religiously motivated headcoverings) from its no-headdress rule. But a category of "permissible accommodations of religion not required by the Free Exercise Clause" aids the crèche on the Grand Staircase not at all. Prohibiting the display of a crèche at this location, it bears repeating, does not impose a burden on the practice of Christianity (except to the extent that some Christian sect seeks to be an officially approved religion), and therefore permitting the display is not an "accommodation" of religion in the conventional sense.

60. Justice KENNEDY is clever but mistaken in asserting that the description of the menorah, *supra*, at 3095–3098, purports to turn the Court into a "national theology board." *Post*, at 3146. Any inquiry concerning the government's use of a religious object to determine whether that use results in an unconstitutional religious preference requires a review of the factual record

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, 104 S.Ct., at 1369 (O'CONNOR, J., concurring).

[32] 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. [615]The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.[61]

[33] 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,[62] 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.[63]

[616]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 endors-

concerning the religious object—even if the inquiry is conducted pursuant to Justice KENNEDY's "proselytization" test. Surely, Justice KENNEDY cannot mean that this Court must keep itself in ignorance of the symbol's conventional use and decide the constitutional question knowing only what it knew before the case was filed. This prescription of ignorance obviously would bias this Court according to the religious and cultural backgrounds of its Members, a condition much more intolerable than any which results from the Court's efforts to become familiar with the relevant facts.

Moreover, the relevant facts concerning Chanukah and the menorah are largely to be found in the record, as indicated by the extensive citation to the Appendix, *supra*, at 3095–3097. In any event, Members of this Court have not hesitated in referring to secondary sources in aid of their Establishment Clause analysis, see, *e.g.*, *Lynch*, 465 U.S., at 709–712, 721–724, 104 S.Ct., at 1378–1380, 1384–1386 (BRENNAN, J., dissenting), because the question "whether a government activity communicates an endorsement of religion" is "in large part a legal question to be answered on the basis of judicial interpretation of social facts," *id.*, at 693–694, 104 S.Ct., at 1370 (O'CONNOR, J., concurring).

61. The display of a menorah next to a crèche on government property might prove to be invalid. Cf. *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F.Supp. 222 (SD Tex.1984), appeal dism'd, 755 F.2d 426 (CA5), cert. denied, 474 U.S. 980, 106 S.Ct. 383, 88 L.Ed.2d 336 (1985) (war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism, discriminating against the beliefs of patriotic soldiers who were neither Christian nor Jewish).

62. It is worth recalling here that no Member of the Court in *Lynch* suggested that government may not celebrate the secular aspects of Christmas. On the contrary, the four dissenters there stated: "If public officials ... participate in the *secular* celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands, or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause." 465 U.S., at 710–711, 104 S.Ct., at 1379 (BRENNAN, J., dissenting) (emphasis in original).

63. Thus, to take the most obvious of examples, if it were permissible for the city to display in front of the City–County Building a banner exclaiming "Merry Christmas," then it would also be permissible for the city to display in the same location a banner proclaiming "Happy Chanukah."

Justice BRENNAN, however, seems to suggest that even this practice is problematic because holidays associated with other religious traditions would be excluded. See *post*, at 3128. But when the government engages in the secular celebration of Christmas, without any reference to holidays celebrated by non-Christians, other traditions are excluded—and yet Justice BRENNAN has approved the government's secular celebration of Christmas. See n. 62, *supra*.

ing 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*.[64]

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, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986); L. Tribe, American Constitutional Law 1295 (2d ed. 1988) (Tribe).[65] Numerous Americans place [617]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 crèche 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.[66]

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 [618]and Jewish faiths, but in-

64. It is distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing the Jewish faith alone. During the time of this litigation, Pittsburgh had a population of 387,000, of which approximately 45,000 were Jews. U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 34 (108th Ed.1988); App. 247. When a city like Pittsburgh places a symbol of Chanukah next to a symbol of Christmas, the result may be a simultaneous endorsement of Christianity and Judaism (depending upon the circumstances of the display). But the city's addition of a visual representation of Chanukah to its pre-existing Christmas display cannot reasonably be understood as an endorsement of Jewish—yet not Christian—belief. Thus, unless the combined Christmas–Chanukah display fairly can be seen as a double endorsement of Christian and Jewish faiths, it must be viewed as celebrating both holidays without endorsing either faith.

The conclusion that Pittsburgh's combined Christmas–Chanukah display cannot be interpreted as endorsing Judaism alone does not mean, however, that it is implausible, as a general matter, for a city like Pittsburgh to endorse a minority faith. The display of a menorah alone might well have that effect.

65. See also Barnett 141–142 (describing the Christmas tree, along with gift giving and Santa Claus, as those aspects of Christmas which have become "so intimately identified with national life" that immigrants feel the need to adopt these customs in order to be a part of American culture). Of course, the tree is capable of taking on a religious significance if it is decorated with religious symbols. Cf. Gilbert, The Season of Good Will and Inter-religious Tension, 24 Reconstructionist 13 (1958) (considering the Christmas tree, without the Star of Bethlehem, as one of "the cultural aspects of the Christmas celebration").

66. Although the Christmas tree represents the secular celebration of Christmas, its very association with Christmas (a holiday with religious dimensions) makes it conceivable that the tree might be seen as representing Christian religion when displayed next to an object associated with Jewish religion. For this reason, I agree with Justice BRENNAN and Justice STEVENS that one must ask whether the tree and the menorah together endorse the *religious* beliefs of Christians and Jews. For the reasons stated in the text, however, I conclude the city's overall display does not have this impermissible effect.

stead, 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, 83 S.Ct., at 1610 (BRENNAN, J., concurring) (Establishment Clause forbids use of religious means to serve secular ends when secular means suffice); see also Tribe 1285.[67] But where, as here, no such choice has been made, this inference of endorsement is not present.[68]

[619] 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, 101 S.Ct., at 193, 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, 104 S.Ct., at 1377 (BRENNAN, J., dissenting). Here, the mayor's sign serves to confirm what the context already reveals: that the display of

67. Contrary to the assertions of Justice O'CONNOR and Justice KENNEDY, I have not suggested here that the govenment's failure to use an available secular alternative *necessarily* results in an Establishment Clause violation. Rather, it suffices to say that the availability or unavailability of secular alternatives is an obvious *factor* to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith.

68. In *Lynch*, in contrast, there was no need for Pawtucket to include a crèche in order to convey a secular message about Christmas. See 465 U.S., at 726–727, 104 S.Ct., at 1387 (BLACKMUN, J., dissenting). Thus, unless the addition of the crèche to the Pawtucket display was recognized as an endorsement of Christian faith, the crèche there was "relegated to the role of a neutral harbinger of the holiday season," *id.*, at 727, 104 S.Ct., at 1387, serving no function different from that performed by the secular symbols of Christmas. But the same cannot be said of the addition of the menorah to the Pittsburgh display. The inclusion of the menorah here broadens the Pittsburgh display to refer not only to Christmas but also to Chanukah—a different holiday belonging to a different tradition. It does not demean Jewish faith or the religious significance of the menorah to say that the menorah in *this* context represents the holiday of Chanukah as a whole (with religious and secular aspects), just as the Christmas tree in this context can be said to represent the holiday of Christmas as a whole (with *its* religious and secular aspects).

Thus, the menorah retains its religious significance even in this display, but it does not follow that the city has endorsed religious belief over nonbelief. In displaying the menorah next to the tree, the city has demonstrated no preference for the *religious* celebration of the holiday season. This conclusion, however, would be untenable had the city substituted a crèche for its Christmas tree or if the city had failed to substitute for the menorah an alternative, more secular, representation of Chanukah.

the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.

[34, 35] 620Given 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, 105 S.Ct., at 3226. 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, 106 S.Ct. 748, 754, 88 L.Ed.2d 846 (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, 104 S.Ct., at 1370 (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.[69]

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious621 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.[70]

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 crèche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City–County Building, however, does not

69. This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. Cf. *Edwards v. Aguillard*, 482 U.S., at 583–584, 107 S.Ct., at 2577 (Establishment Clause must be applied with special sensitivity in the public-school context).

70. In addition, nothing in this opinion forecloses the possibility that on other facts a menorah display could constitute an impermissible endorsement of religion. Indeed, there is some evidence in this record that in the past Chabad lit the menorah in front of the City–County Building in a religious ceremony that included the recitation of traditional religious blessings. See App. 281. Respondents, however, did not challenge this practice, there are no factual findings on it, and the Court of Appeals did not consider it in deciding that the display of a menorah in this location necessarily endorses Judaism. See 842 F.2d, at 662.

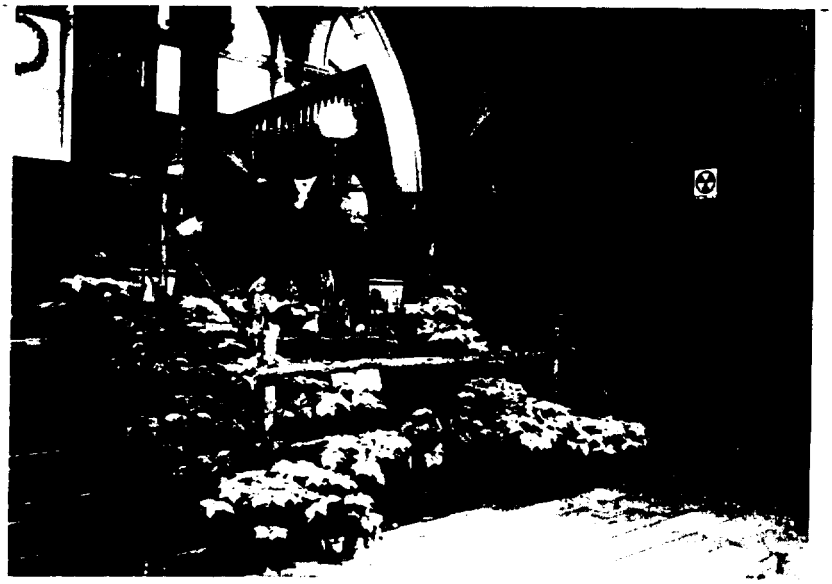
There is also some suggestion in the record that Chabad advocates the public display of menorahs as part of its own proselytizing mission, but again there have been no relevant factual findings that would enable this Court to conclude that Pittsburgh has endorsed Chabad's particular proselytizing message. Of course, nothing in this opinion forecloses a challenge to a menorah display based on such factual findings.

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.

[622]APPENDIX A



APPENDIX B

[623]Justice O'CONNOR, with whom Justice BRENNAN and Justice STEVENS join as to Part II, concurring in part and concurring in the judgment.

I

Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion. Instead the courts have made case-specific examinations of the challenged government action and have attempted to do so with the aid of the standards described by Justice BLACKMUN in Part III–A of the Court's opinion. *Ante*, at 3099–3101. Unfortunately, even the development of articulable standards and guidelines has not always resulted in agreement among the Members of this Court on the results in individual cases. And so it is again today.

The constitutionality of the two displays at issue in these cases turns on how we interpret and apply the holding in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), in which we rejected an Establishment Clause challenge to the city of Pawtucket's inclusion of a crèche in its annual Christmas holiday display. The seasonal display reviewed in *Lynch* was located in a privately owned park in the heart of the shopping district. *Id.*, at 671, 104 S.Ct., at 1358. In addition to the crèche, the display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that rea[d] 'SEASONS GREETINGS.' " *Ibid.* The city owned all the components of the display. Setting up and dismantling the crèche cost the city about $20 a year, and nominal expenses were incurred in lighting the crèche.

The *Lynch* Court began its analysis by stating that Establishment Clause cases call for careful line-drawing: "[N]o fixed, *per se* rule can be framed." *Id.*, at 678, 104 S.Ct., at 1361. Although declaring[624] that it was not willing to be confined to any single test, the Court essentially applied the *Lemon* test, asking "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." 465 U.S., at 679, 104 S.Ct., at 1362 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). In reversing the lower court's decision, which held that inclusion of the crèche in the holiday display violated the Establishment Clause, the Court stressed that the lower court erred in "focusing almost exclusively on the crèche." 465 U.S., at 680, 104 S.Ct., at 1362. "In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole." *Ibid.* When viewed in the "context of the Christmas Holiday season," the Court reasoned, there was insufficient evidence to suggest that *inclusion* of the crèche as *part* of the holiday display was an effort to advocate a particular religious message. *Ibid.* The Court concluded that Pawtucket had a secular purpose for including the crèche in its Christmas holiday display, namely, "to depict the origins of that Holiday." *Id.*, at 681, 104 S.Ct., at 1363.

The Court also concluded that inclusion of the crèche in the display did not have the primary effect of advancing religion. "[D]isplay of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.*, at 683, 104 S.Ct., at 1364. Finally, the Court found no excessive entanglement between

religion and government. There was "no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche." *Id.*, at 684, 104 S.Ct., at 1364.

I joined the majority opinion in *Lynch* because, as I read that opinion, it was consistent with the analysis set forth in my separate concurrence, which stressed that "[e]very government[625] practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion." *Id.*, at 694, 104 S.Ct., at 1370 (emphasis added). Indeed, by referring repeatedly to "inclusion of the crèche" in the larger holiday display, *id.*, at 671, 680–682, 686, 104 S.Ct., at 1358, 1362–1363, 1366, the *Lynch* majority recognized that the crèche had to be viewed in light of the total display of which it was a part. Moreover, I joined the Court's discussion in Part II of *Lynch* concerning government acknowledgments of religion in American life because, in my view, acknowledgments such as the legislative prayers upheld in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and the printing of "In God We Trust" on our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S., at 693, 104 S.Ct., at 1369 (concurring opinion). Because they serve such secular purposes and because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs. *Ibid.* At the same time, it is clear that "[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Id.*, at 694, 104 S.Ct., at 1370.

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*, at 687, 104 S.Ct., at 1366. The government violates this prohibition if it endorses or disapproves of religion. *Id.*, at 688, 104 S.Ct., at 1367. "Endorsement 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." *Ibid.* Disapproval of religion conveys the opposite message. Thus, in my view, the central issue in *Lynch* was whether the city of Pawtucket had[626] endorsed Christianity by displaying a crèche as part of a larger exhibit of traditional secular symbols of the Christmas holiday season.

In *Lynch*, I concluded that the city's display of a crèche in its larger holiday exhibit in a private park in the commercial district had neither the purpose nor the effect of conveying a message of government endorsement of Christianity or disapproval of other religions. The purpose of including the crèche in the larger display was to celebrate the public holiday through its traditional symbols, not to promote the religious content of the crèche. *Id.*, at 691, 104 S.Ct., at 1368. Nor, in my view, did Pawtucket's display of the crèche along with secular symbols of the Christmas holiday objectively convey a message of endorsement of Christianity. *Id.*, at 692, 104 S.Ct., at 1369.

For the reasons stated in Part IV of the Court's opinion in these cases, I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community. In contrast to the crèche in *Lynch*, which was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of

the holiday season, this crèche stands alone in the county courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch, supra*, at 692, 104 S.Ct., at 1369 (concurring opinion). See also *American Jewish Congress v. Chicago*, 827 F.2d 120, 128 (CA7 1987) ("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses [627]Christianity"). The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.

II

In his separate opinion, Justice KENNEDY asserts that the endorsement test "is flawed in its fundamentals and unworkable in practice." *Post*, at 3141 (opinion concurring in judgment in part and dissenting in part). In my view, neither criticism is persuasive. As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70, 105 S.Ct. 2479, 2497, 86 L.Ed.2d 29 (1985) (O'CONNOR, J., concurring in judgment); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389, 105 S.Ct. 3216, 3225, 87 L.Ed.2d 267 (1985). See also Beschle, The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor, 62 Notre Dame L.Rev. 151 (1987); Note, Developments in the Law—Religion and the State, 100 Harv.L.Rev. 1606, 1647 (1987) (Developments in the Law). We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, *post*, at 3136–3137, 3138–3139, but fails to take account of the numerous more subtle ways that government can show favoritism[628] to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. See, *e.g.*, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 786, 93 S.Ct. 2955, 2972, 37 L.Ed.2d 948 (1973) ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element of any claim under the Establishment Clause"); *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962). To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy. See *Abington School District v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963) ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended"). See also Laycock,

"Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875, 922 (1986) ("If coercion is also an element of the establishment clause, establishment adds nothing to free exercise"). Moreover, as even Justice KENNEDY recognizes, any Establishment Clause test limited to "*direct* coercion" clearly would fail to account for forms of "[s]ymbolic recognition or accommodation of religious faith" that may violate the Establishment Clause. *Post*, at 3137.

I continue to believe that the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols. Moreover, commentators in the scholarly literature have found merit in the approach. See, *e.g.*, Beschle, *supra*, at 174; Comment, *Lemon* Reconstituted: Justice O'Connor's Proposed Modifications of the *Lemon* Test for Establishment Clause Violations, 1986 B.Y.U.L.Rev. 465; Marshall, "We Know It When We [629]See It": The Supreme Court and Establishment, 59 S.Cal.L.Rev. 495 (1986); Developments in the Law 1647. I also remain convinced that the endorsement test is capable of consistent application. Indeed, it is notable that the three Courts of Appeals which have considered challenges to the display of a crèche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community. See 842 F.2d 655 (CA3 1988); *American Jewish Congress v. Chicago*, 827 F.2d 120, 127–128 (CA7 1987); *ACLU v. Birmingham*, 791 F.2d 1561, 1566–1567 (CA6), cert. denied, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986). See also *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 780–782 (CA10 1985) (en banc) (county seal including Latin cross and Spanish motto translated as "With This We Conquer," conveys a message of endorsement of Christianity), cert. denied, 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1986). To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law, and even the modified coercion test offered by Justice KENNEDY involves judgment and hard choices at the margin. He admits as much by acknowledging that the permanent display of a Latin cross at city hall would violate the Establishment Clause, as would the display of symbols of Christian holidays alone. *Post*, at 3137, 3139, n. 3. Would the display of a Latin cross for six months have such an unconstitutional effect, or the display of the symbols of most Christian holidays and one Jewish holiday? Would the Christmastime display of a crèche inside a courtroom be "coercive" if subpoenaed witnesses had no opportunity to "turn their backs" and walk away? *Post*, at 3139. Would displaying a crèche in front of a public school violate the Establishment Clause under Justice KENNEDY's test? [630]We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases, and that is not a problem unique to the endorsement test.

Justice KENNEDY submits that the endorsement test is inconsistent with our precedents and traditions because, in his words, if it were "applied without artificial exceptions for historical practice," it would invalidate many traditional practices recognizing the role of religion in our society. *Post*, at 3142. This criticism shortchanges both the endorsement test itself and my explanation of the reason why certain longstanding government acknowledgments of religion do not, under that test, convey a message of endorsement. Practices such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court" serve the secular purposes of "solemnizing public occasions"

and "expressing confidence in the future," *Lynch*, 465 U.S., at 693, 104 S.Ct., at 1369 (concurring opinion). These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. As we recognized in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970): "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

Under the endorsement test, the "history and ubiquity" of a practice is relevant not because it creates an "artificial exception" from that test. On the contrary, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the [631] longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with "God save the United States and this honorable Court," as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs. See *Lynch, supra*, 465 U.S., at 693, 104 S.Ct., at 1369 (concurring opinion); Developments in the Law 1652–1654. Similarly, the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs. The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time. See L. Tribe, American Constitutional Law 1294–1296 (2d ed. 1988). Although the endorsement test requires careful and often difficult line-drawing and is highly context specific, no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement.

Contrary to Justice KENNEDY's assertions, neither the endorsement test nor its application in these cases reflects "an unjustified hostility toward religion." *Post*, at 3134. See also *post*, at 3138, 3140–3146. Instead, the endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others. Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement. See *Lynch, supra*, 465 U.S., at 693, 104 S.Ct., at 1369 (concurring opinion). Moreover, the government can *accommodate* religion by lifting government-imposed burdens on religion. See *Wallace v. Jaffree*, 472 [632] U.S., at 83–84, 105 S.Ct., at 2503–2504 (opinion concurring in judgment). Indeed, the Free Exercise Clause may mandate that it do so in particular cases. In cases involving the lifting of government burdens on the free exercise of religion, a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement. *Id.*, at 83, 105 S.Ct., at 2503. By "build[ing] on the concerns at the core of nonestablishment doctrine and recogniz[ing] the role of accommodations in furthering free exercise," the endorsement test "provides a standard capable of consis-

tent application and avoids the criticism levelled against the *Lemon* test." Rostain, Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute, 96 Yale L.J. 1147, 1159–1160 (1987). The cases before the Court today, however, do not involve lifting a governmental burden on the free exercise of religion. By repeatedly using the terms "acknowledgment" of religion and "accommodation" of religion interchangeably, however, *post*, at 3137–3138, 3142, 3146, Justice KENNEDY obscures the fact that the displays at issue in these cases were not placed at city hall in order to remove a government-imposed burden on the free exercise of religion. Christians remain free to display their crèches at their homes and churches. *Ante*, at 3105, n. 51. Allegheny County has neither placed nor removed a governmental burden on the free exercise of religion but rather, for the reasons stated in Part IV of the Court's opinion, has conveyed a message of governmental endorsement of Christian beliefs. This the Establishment Clause does not permit.

III

For reasons which differ somewhat from those set forth in Part VI of Justice BLACKMUN's opinion, I also conclude that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion. I agree with Justice BLACKMUN, *ante*, at 3113, [633] that the Christmas tree, whatever its origins, is not regarded today as a religious symbol. Although Christmas is a public holiday that has both religious and secular aspects, the Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions. A Christmas tree displayed in front of city hall, in my view, cannot fairly be understood as conveying government endorsement of Christianity. Although Justice BLACKMUN's opinion acknowledges that a Christmas tree alone conveys no endorsement of Christian beliefs, it formulates the question posed by Pittsburgh's combined display of the tree and the menorah as whether the display "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." *Ante*, at 3112–3113 (emphasis added).

That formulation of the question disregards the fact that the Christmas tree is a predominantly secular symbol and, more significantly, obscures the religious nature of the menorah and the holiday of Chanukah. The opinion is correct to recognize that the religious holiday of Chanukah has historical and cultural as well as religious dimensions, and that there may be certain "secular aspects" to the holiday. But that is not to conclude, however, as Justice BLACKMUN seems to do, that Chanukah has become a "secular holiday" in our society. *Ibid.* The Easter holiday celebrated by Christians may be accompanied by certain "secular aspects" such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday. Similarly, Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday. Under Justice BLACKMUN's view, however, the menorah "has been relegated to the role of a neutral harbinger of the holiday season," *Lynch*, 465 U.S., at 727, 104 S.Ct., at 1387 [634] (BLACKMUN, J., dissenting), almost devoid of any religious significance. In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

In characterizing the message conveyed by this display as either a "double endorse-

ment" or a secular acknowledgment of the winter holiday season, the opinion states that "[i]t is distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing Jewish faith alone." *Ante*, at 3113, n. 64. That statement, however, seems to suggest that it would be implausible for the city to endorse a faith adhered to by a minority of the citizenry. Regardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity, whatever the county's purpose in authorizing the display may have been. Thus, the question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display and when the opinion acknowledges that the tree cannot reasonably be understood to convey an endorsement of Christianity. One need not characterize Chanukah as a "secular" holiday or strain to argue that the menorah has a "secular" dimension, *ante*, at 3097, n. 34, in order to conclude that the city of Pittsburgh's combined display does not convey a message of endorsement of Judaism or of religion in general.

[635]In setting up its holiday display, which included the lighted tree and the menorah, the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "'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.'" *Ante*, at 3095. This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom. By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season. "Although the religious and indeed sectarian significance" of the menorah "is not neutralized by the setting," *Lynch*, 465 U.S., at 692, 104 S.Ct., at 1369 (concurring opinion), this particular physical setting "changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Ibid.*

The message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion. Just as government may not favor particular religious beliefs over others, "government may not favor religious belief over disbelief." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (BLACKMUN, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S., at 52–54, 105 S.Ct., at 2487–2488; *id.*, at 70, 105 S.Ct., at 2497 (O'CONNOR, J., concurring in judgment). Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer would, in my view, appreciate that the combined[636] display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, in the holiday context, this combined display in its particular phys-

ical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch, supra,* 465 U.S., at 692, 104 S.Ct., at 1369 (concurring opinion).

My conclusion does not depend on whether or not the city had "a more secular alternative symbol" of Chanukah, *ante,* at 3114, just as the Court's decision in *Lynch* clearly did not turn on whether the city of Pawtucket could have conveyed its tribute to the Christmas holiday season by using a "less religious" alternative to the crèche symbol in its display of traditional holiday symbols. See *Lynch, supra,* 465 U.S., at 681, n. 7, 104 S.Ct., at 1363, n. 7 ("Justice BRENNAN argues that the city's objectives could have been achieved without including the crèche in the display, [465 U.S.,] at 699, 104 S.Ct., at 1373. True or not, that is irrelevant. The question is whether the display of the crèche violates the Establishment Clause"). In my view, Justice BLACKMUN's new rule, *ante,* at 3114, that an inference of endorsement arises every time government uses a symbol with religious meaning if a "more secular alternative" is available is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case. Indeed, the opinion appears to recognize the importance of this contextual sensitivity by creating an exception to its new rule in the very case announcing it: the opinion acknowledges that "a purely secular symbol" of Chanukah is available, namely, a dreidel or four-sided top, but rejects the use of such a symbol because it "might be interpreted by some as mocking the celebration of Chanukah." *Ibid.* This recognition that the more *religious* |637 alternative may, depending on the circumstances, convey a message that is least likely to implicate Establishment Clause concerns is an excellent example of the need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred.

In sum, I conclude that the city of Pittsburgh's combined holiday display had neither the purpose nor the effect of endorsing religion, but that Allegheny County's crèche display had such an effect. Accordingly, I join Parts I, II, III–A, IV, V, and VII of the Court's opinion and concur in the judgment.

Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS join, concurring in part and dissenting in part.

I have previously explained at some length my views on the relationship between the Establishment Clause and government-sponsored celebrations of the Christmas holiday. See *Lynch v. Donnelly,* 465 U.S. 668, 694–726, 104 S.Ct. 1355, 1370–1387, 79 L.Ed.2d 604 (1984) (dissenting opinion). I continue to believe that the display of an object that "retains a specifically Christian [or other] religious meaning," *id.,* at 708, 104 S.Ct., at 1377, is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a crèche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause, and join Parts III–A, IV, and V of the Court's opinion. I cannot agree, however, that the city's display of a 45–foot Christmas tree and an 18–foot Chanukah menorah at the entrance to the building housing the mayor's office shows no favoritism towards Christianity, Judaism, or both. Indeed, I should have thought that the answer as to the first display supplied the answer to the second.

According to the Court, the crèche display sends a message endorsing Christianity because the crèche itself bears a |638 religious meaning, because an angel in the display carries a banner declaring "Glory to God in the highest!," and because the

floral decorations surrounding the crèche highlight it rather than secularize it. The display of a Christmas tree and Chanukah menorah, in contrast, is said to show no endorsement of a particular faith or faiths, or of religion in general, because the Christmas tree is a secular symbol which brings out the secular elements of the menorah. *Ante*, at 3113–3114. And, Justice BLACKMUN concludes, even though the menorah has religious aspects, its display reveals no endorsement of religion because no other symbol could have been used to represent the secular aspects of the holiday of Chanukah without mocking its celebration. *Ante*, at 3114. Rather than endorsing religion, therefore, the display merely demonstrates that "Christmas is not the only traditional way of observing the winter-holiday season," and confirms our "cultural diversity." *Ante*, at 3113, 3115.

Thus, the decision as to the menorah rests on three premises: the Christmas tree is a secular symbol; Chanukah is a holiday with secular dimensions, symbolized by the menorah; and the government may promote pluralism by sponsoring or condoning displays having strong religious associations on its property. None of these is sound.

I

The first step toward Justice BLACKMUN's conclusion is the claim that, despite its religious origins, the Christmas tree is a secular symbol. He explains:

> "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. 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,[639] a 40–foot Christmas tree was one of the objects that validated the crèche 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." *Ante*, at 3113 (citations and footnotes omitted).

Justice O'CONNOR accepts this view of the Christmas tree because, "whatever its origins, [it] is not regarded today as a religious symbol. Although Christmas is a public holiday that has both religious and secular aspects, the Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions." *Ante*, at 3122.

Thus, while acknowledging the religious origins of the Christmas tree, Justices BLACKMUN and O'CONNOR dismiss their significance. In my view, this attempt to take the "Christmas" out of the Christmas tree is unconvincing. That the tree may, without controversy, be deemed a secular symbol if found alone, does not mean that it will be so seen when combined with other symbols or objects. Indeed, Justice BLACKMUN admits that "the tree is capable of taking on a religious significance if it is decorated with religious symbols." *Ante*, at 3113, n. 65.

The notion that the Christmas tree is necessarily secular is, indeed, so shaky that, despite superficial acceptance of the idea, Justice O'CONNOR does not really take it seriously. While conceding that the "menorah standing alone at city hall may well send" a message of endorsement of the Jewish faith, she nevertheless concludes: "By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message[640] of pluralism and freedom of

belief during the holiday season." *Ante*, at 3123. But the "pluralism" to which Justice O'CONNOR refers is *religious* pluralism, and the "freedom of belief" she emphasizes is freedom of *religious* belief.* The display of the tree and the menorah will symbolize such pluralism and freedom only if more than one religion is represented; if only Judaism is represented, the scene is about Judaism, not about pluralism. Thus, the pluralistic message Justice O'CONNOR stresses *depends on* the tree's possessing some religious significance.

In asserting that the Christmas tree, regardless of its surroundings, is a purely secular symbol, Justices BLACKMUN and O'CONNOR ignore the precept they otherwise so enthusiastically embrace: that context is all important in determining the message conveyed by particular objects. See *ante*, at 3103 (BLACKMUN, J.) (relevant question is "whether the [641] display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs") (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985)); *ante*, at 3118 (O'CONNOR, J.) (" '[E]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion' ") (quoting *Lynch v. Donnelly*, 465 U.S., at 694, 104 S.Ct., at 1370 (O'CONNOR, J., concurring)); *ante*, at 3124 (O'CONNOR, J.) ("Establishment Clause analysis ... depends on sensitivity to the context and circumstances presented by each case"); *ibid.* (emphasizing "the need to focus on the specific practice in question in its particular physical setting and context"). In analyzing the symbolic character of the Christmas tree, both Justices BLACKMUN and O'CONNOR abandon this contextual inquiry. In doing so, they go badly astray.

Positioned as it was, the Christmas tree's religious significance was bound to come to the fore. Situated next to the menorah—which, Justice BLACKMUN acknowledges, is "a symbol with religious meaning," *ante*, at 3114, and indeed, is "the central religious symbol and ritual object of" Chanukah, *ante*, at 3122 (O'CONNOR, J.)—the Christmas tree's religious dimension could not be overlooked by observers of the display. Even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol. Consider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol.

Justice BLACKMUN believes that it is the tree that changes the message of the menorah, rather than the menorah that alters our view of the tree. After the abrupt

* If it is not religious pluralism that the display signifies, then I do not know what kind of "pluralism" Justice O'CONNOR has in mind. Perhaps she means the cultural pluralism that results from recognition of many different holidays, religious and nonreligious. In that case, however, the display of a menorah next to a giant firecracker, symbolic of the Fourth of July, would seem to be equally representative of this pluralism, yet I do not sense that this display would pass muster under Justice O'CONNOR's view. If, instead, Justice O'CONNOR means to approve the pluralistic message associated with a symbolic display that may stand for either the secular or religious aspects of a given holiday, then this view would logically entail the conclusion that the display of a Latin cross next to an Easter Bunny in the springtime would be valid under the Establishment Clause; again, however, I sense that such a conclusion would not comport with Justice O'CONNOR's views. The final possibility, and the one that seems most consonant with the views outlined in her opinion, see *ante*, at 3123, is that the pluralism that Justice O'CONNOR perceives in Pittsburgh's display arises from the recognition that there are many different ways to celebrate the winter holiday season." But winter is "*the* holiday season" to Christians, not to Jews, and the implicit message that it, rather than autumn, is the time for pluralism sends an impermissible signal that only holidays stemming from Christianity, not those arising from other religions, favorably dispose the government towards "pluralism." See *infra*, at 3129.

dismissal of the suggestion that the flora surrounding the crèche might have diluted the religious character of the display at *the County Courthouse*, *ante*, at 3104, his quick conclusion that [642]the Christmas tree had a secularizing effect on the menorah is surprising. The distinguishing characteristic, it appears, is the size of the tree. The tree, we are told, is much taller—2½ times taller, in fact—than the menorah, and is located directly under one of the building's archways, whereas the menorah "is positioned to one side ... [i]n the shadow of the tree." *Ante*, at 3113.

As a factual matter, it seems to me that the sight of an 18–foot menorah would be far more eye catching than that of a rather conventionally sized Christmas tree. It also seems to me likely that the symbol with the more singular message will predominate over one lacking such a clear meaning. Given the homogenized message that Justice BLACKMUN associates with the Christmas tree, I would expect that the menorah, with its concededly religious character, would tend to dominate the tree. And, though Justice BLACKMUN shunts the point to a footnote at the end of his opinion, *ante*, at 3115, n. 70, it is highly relevant that the menorah was lit during a religious ceremony complete with traditional religious blessings. I do not comprehend how the failure to challenge separately this portion of the city's festivities precludes us from considering it in assessing the message sent by the display as a whole. But see *ibid.* With such an openly religious introduction, it is most likely that the religious aspects of the menorah would be front and center in this display.

I would not, however, presume to say that my interpretation of the tree's significance is the "correct" one, or the one shared by most visitors to the City–County Building. I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented, and thus both, I think, should satisfy Justice BLACKMUN'S requirement that the display "be judged according to the standard of a 'reasonable observer.'" *Ante*, at 3115. I [643]shudder to think that the only "reasonable observer" is one who shares the particular views on perspective, spacing, and accent expressed in Justice BLACKMUN's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

II

The second premise on which today's decision rests is the notion that Chanukah is a partly secular holiday, for which the menorah can serve as a secular symbol. It is no surprise and no anomaly that Chanukah has historical and societal roots that range beyond the purely religious. I would venture that most, if not all, major religious holidays have beginnings and enjoy histories studded with figures, events, and practices that are not strictly religious. It does not seem to me that the mere fact that Chanukah shares this kind of background makes it a secular holiday in any meaningful sense. The menorah is indisputably a religious symbol, used ritually in a celebration that has deep religious significance. That, in my view, is all that need be said. Whatever secular practices the holiday of Chanukah has taken on in its contemporary observance are beside the point.

Indeed, at the very outset of his discussion of the menorah display, Justice BLACKMUN recognizes that the menorah is a religious symbol. *Ante*, at 3111. That should have been the end of the case. But, as did the Court in *Lynch*, Justice BLACKMUN, "by focusing on the holiday 'context' in which the [menorah] appeared, seeks to explain away the clear religious import of the [menorah]...." 465 U.S., at 705, 104 S.Ct., at 1376 (BRENNAN, J., dissenting). By the end of the opinion, the menorah has become but a coequal symbol, with the Christmas tree, of "the winter-holiday season." *Ante*, at 3115. Pittsburgh's secular-

ization of an inherently religious symbol, aided and abetted here by Justice BLACKMUN's opinion, recalls the effort in *Lynch* to render the crèche a secular symbol. As I said then: "To suggest, as the Court does, that such a symbol [644] is merely 'traditional' and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national 'heritage.'" 465 U.S., at 711–712, 104 S.Ct., at 1379. As Justice O'CONNOR rightly observes, Justice BLACKMUN "obscures the religious nature of the menorah and the holiday of Chanukah." *Ante*, at 3122.

I cannot, in short, accept the effort to transform an emblem of religious faith into the innocuous "symbol for a holiday that ... has both religious and secular dimensions." *Ante*, at 3111 (BLACKMUN, J.).

III

Justice BLACKMUN, in his acceptance of the city's message of "diversity," *ante*, at 3115, and, even more so, Justice O'CONNOR, in her approval of the "message of pluralism and freedom to choose one's own beliefs," *ante*, at 3122, appear to believe that, where seasonal displays are concerned, more is better. Whereas a display might be constitutionally problematic if it showcased the holiday of just one religion, those problems vaporize as soon as more than one religion is included. I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion. See, *e.g.*, *Everson v. Board of Education of Ewing*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 52–54, 105 S.Ct. 2479, 2487–2488, 86 L.Ed.2d 29 (1985).

Nor do I discern the theory under which the government is permitted to appropriate particular holidays and religious objects to its own use in celebrating "pluralism." The message of the sign announcing a "Salute to Liberty" is not religious, but patriotic; the government's use of religion to promote its [645] own cause is undoubtedly offensive to those whose religious beliefs are not bound up with their attitude toward the Nation.

The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism Justices BLACKMUN and O'CONNOR extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.

The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar. As Justice BLACKMUN acknowledges, "the proximity of Christmas [may] accoun[t] for the social prominence of Chanukah in this country." *Ante*, at 3097. It is the proximity of Christmas that undoubtedly accounts for the city's decision to participate in the celebration of Chanukah, rather than the far more significant Jewish holidays of Rosh Hashanah and Yom Kippur. Contrary to the impression the city and Justices BLACKMUN and O'CONNOR seem to create, with their emphasis on "the winter-holiday season," December is not the holiday season for Judaism. Thus, the city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying "the city's secular recognition of

different traditions for celebrating the winter-holiday season," *ante*, at 3115 (BLACKMUN, J.), or "a message of pluralism and freedom of belief," *ante*, at 3123 (O'CONNOR, J.), has the effect of promoting a Christianized version of Judaism. The holiday calendar they appear willing to accept revolves exclusively around a Christian holiday. And those religions that have [646] no holiday at all during the period between Thanksgiving and New Year's Day will not benefit, even in a second-class manner, from the city's once-a-year tribute to "liberty" and "freedom of belief." This is not "pluralism" as I understand it.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and dissenting in part.

Governmental recognition of not one but two religions distinguishes these cases from our prior Establishment Clause cases. It is, therefore, appropriate to reexamine the text and context of the Clause to determine its impact on this novel situation.

Relations between church and state at the end of the 1780s fell into two quite different categories. In several European countries, one national religion, such as the Church of England in Great Britain, was established. The established church typically was supported by tax revenues, by laws conferring privileges only upon members, and sometimes by violent persecution of nonadherents. In contrast, although several American Colonies had assessed taxes to support one chosen faith, none of the newly United States subsidized a single religion. Some States had repealed establishment laws altogether, while others had replaced single establishments with laws providing for nondiscriminatory support of more than one religion.[1]

[647] It is against this historical backdrop that James Madison, then a Representative from Virginia, rose to the floor of the First Congress on June 8, 1789, and proposed a number of amendments to the Constitution, including the following:

> "The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 434 (1789) (emphasis added).

Congressional debate produced several reformulations of the italicized language.[2] One Member suggested the words "Congress shall make no laws *touching religion*," *id.*, at 731 (emphasis added), soon amended to "Congress shall make no law *establishing religion*," *id.*, at 766 (emphasis added). After further alteration, this passage became one of the Religion Claus-

1. The history of religious establishments is discussed in, *e.g.*, J. Swomley, Religious Liberty and the Secular State 24–41 (1987) (Swomley). See generally L. Levy, The Establishment Clause (1986) (Levy). One historian describes the situation at the time of the passage of the First Amendment as follows:
"In America there was no establishment of a single church, as in England. Four states had never adopted any establishment practices. Three had abolished their establishments during the Revolution. The remaining six states—Massachusetts, New Hampshire, Connecticut, Maryland, South Carolina, and Georgia—changed to comprehensive or 'multiple' establishments. That is, aid was provided to all churches in each state on a nonpreferential basis, except that the establishment was limited to churches of the Protestant religion in three states and to those of the Christian religion in the other three states. Since there were almost no Catholics in the first group of states, and very few Jews in any state, this meant that the multiple establishment practices included every religious group with enough members to form a church. It was this nonpreferential assistance to organized churches that constituted 'establishment of religion' in 1791, and it was this practice that the amendment forbade Congress to adopt." C. Pritchett, The American Constitution 401 (3d ed. 1977).

2. For a comprehensive narration of this process, see Levy 75–89. See also, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 92–97, 105 S.Ct. 2479, 2509–2510, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting); Swomley 43–49; Drakeman, Religion and the Republic: James Madison and the First Amendment, in James Madison on Religious Liberty 233–235 (R. Alley ed.1985).

es of the First Amendment. Ratified in 1791, they state that "Congress shall make no law *respecting an establishment of religion,* or prohibiting the free exercise thereof," U.S. Const., Amdt. 1 (emphasis added).

By its terms the initial draft of the Establishment Clause would have prohibited only the national established church that prevailed in England; multiple establishments, such as existed in six States, would have been permitted. But even [648]in those States and even among members of the established churches, there was widespread opposition to multiple establishments because of the social divisions they caused.[3] Perhaps in response to this opposition, subsequent drafts broadened the scope of the Establishment Clause from "any national religion" to "religion," a word understood primarily to mean "[v]irtue, as founded upon reverence of God, and expectation of future rewards and punishments," and only secondarily "[a] system of divine faith and worship, as opposite to others." S. Johnson, A Dictionary of the English Language (7th ed. 1785); accord, T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). Cf. *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 834, 109 S.Ct. 1514, 1518, 103 L.Ed.2d 914 (1989) (construing "religion" protected by Free Exercise[649] Clause to include "sincerely held religious belief" apart from "membership in an organized religious denomination"). Plainly, the Clause as ratified proscribes federal legislation establishing a number of religions as well as a single national church.[4]

Similarly expanded was the relationship between government and religion that was to be disallowed. Whereas earlier drafts had barred only laws "establishing" or "touching" religion, the final text interdicts all laws "respecting an establishment of religion." This phrase forbids even a partial establishment, *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971); *Engel v. Vitale,* 370 U.S. 421, 436, 82 S.Ct. 1261, 1269, 8 L.Ed.2d 601 (1962), not only of a particular sect in favor of others, but also of religion in preference to nonreligion, *Wallace v. Jaffree,* 472 U.S. 38, 52, 105 S.Ct. 2479, 2487, 86 L.Ed.2d 29 (1985). It is also significant that the final draft contains the word "respecting." Like "touching," "respecting" means concerning, or with reference to. But it also means with respect—that is, "reverence," "good will," "regard"—to.[5]

3. "Other members of the established church also disapproved taxation for religious purposes. One of these, James Sullivan, who was later elected Governor of Massachusetts, wrote about such taxation: 'This glaring piece of religious tyranny was founded upon one or the other of these suppositions: that the church members were more religious, had more understanding, or had a higher privilege than, or a preeminence over those who were not in full communion, or in other words, that their growth in grace or religious requirements, gave them the right of taking and disposing of the property of other people against their consent.'

"The struggle for religious liberty in Massachusetts was the struggle against taxation for religious purposes. In that struggle there was civil disobedience; there were appeals to the Court and to the Crown in faraway England. Societies were organized to fight the tax. Even after some denominations had won the right to be taxed only for their own churches or meetings, they continued to resist the tax, even on the nonpreferential basis by which all organized religious groups received tax funds. Finally, the state senate, which had refused to end establishment, voted in 1831 to submit the issue to the people. The vote, which took place in 1833, was 32,234 for disestablishment to 3,273 for keeping the multiple establishments of religion. It was a 10 to 1 vote, and in 1834 the amendment was made effective by legislation." Swomley 28.

Cf. *Engel v. Vitale,* 370 U.S. 421, 432, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand").

4. This proscription applies to the States by virtue of the Fourteenth Amendment. *Jaffree,* 472 U.S., at 48–55, 105 S.Ct., at 2485–2489.

5. "Respect," as defined in T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). See S. Johnson, A Dictionary of the English Language (7th ed. 1785); see also The

Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion.

Treatment of a symbol of a particular tradition demonstrates one's attitude toward that tradition. Cf. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Thus the prominent display of religious symbols on government property falls within the compass of the First Amendment, even though interference with personal choices about supporting a church, by means of governmental tithing, was the primary concern in 1791. See *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970); n. 3, *supra*. Whether the vice in such a display is [650]characterized as "coercion," see *post*, at 3136 (KENNEDY, J., concurring in judgment in part and dissenting in part), or "endorsement," see *ante*, at 3118 (O'CONNOR, J., concurring in part and concurring in judgment), or merely as state action with the purpose and effect of providing support for specific faiths, cf. *Lemon*, 403 U.S., at 612, 91 S.Ct., at 2111, it is common ground that this symbolic governmental speech "respecting an establishment of religion" may violate the Constitution.[6] Cf. *Jaffree*, 472 U.S., at 60–61, 105 S.Ct., at 2491–2492; *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.[7] There is always a [651]risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not count nance its use as an aid to commercialization of Christ's birthday. Cf. *Lynch*, 465 U.S., at 726–727, 104 S.Ct., at 1387 (BLACKMUN, J., dissenting).[8] In this very suit, members

Oxford English Dictionary 733–734 (1989); Webster's Ninth New Collegiate Dictionary 1004 (1988).

6. The criticism that Justice KENNEDY levels at Justice O'CONNOR's endorsement standard for evaluating symbolic speech, see *post*, at 3140–3146, is not only "uncharitable," *post*, at 3144, but also largely unfounded. *Inter alia*, he neglects to mention that 1 of the 2 articles he cites as disfavoring the endorsement test, *post*, at 3141, itself cites no fewer than 16 articles and 1 book lauding the test. See Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich.L.Rev. 266, 274, n. 45 (1987). Justice KENNEDY's preferred "coercion" test, moreover, is, as he himself admits, *post*, at 3137, out of step with our precedent. The Court has stated:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel*, 370 U.S., at 430, 82 S.Ct., at 1266.

Even if the law were not so, it seems unlikely that "coercion" identifies the line between permissible and impermissible religious displays any more brightly than does "endorsement."

7. In a similar vein, we have interpreted the Amendment's strictly worded Free Speech and Free Press Clauses to raise a strong presumption against, rather than to ban outright, state abridgment of communications. See, *e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). By suggesting such a presumption plays a role in considering governmental symbolic speech about religion, I do not retreat from my position that a "'high and impregnable' wall" should separate government funds from parochial schools' treasuries. See *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 671, 100 S.Ct. 840, 855, 63 L.Ed.2d 94 (1980) (STEVENS, J., dissenting) (quoting *Everson v. Board of Education of Ewing*, 330 U.S. 1, 18, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1947)).

8. The point is reiterated here by *amicus* the Governing Board of the National Council of Churches of Christ in the U.S.A., which argues that "government acceptance of a crèche on public property ... secularizes and degrades a sacred symbol of Christianity," Brief for American Jewish Committee et al. as *Amici Curiae* ii. See also *Engel*, 370 U.S., at 431, 82 S.Ct., at 1267. Indeed two Roman Catholics testified before the

of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City–County Building.[9] Even though "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs," see *post*, at 3139 (KENNEDY, J., concurring in judgment in part and dissenting in part), displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement.[10]

[652]Application of a strong presumption against the public use of religious symbols scarcely will "require a relentless extirpation of all contact between government and religion," see *post*, at 3135 (KENNEDY, J., concurring in judgment in part and dissenting in part),[11] for it will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular.[12] For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." See *post*, at 3137 (KENNEDY, J., concurring in judgment in part and dissenting in part). Cf. *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (*per curiam*). Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not[653]for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom,[13] as it would to exclude religious paintings by Italian Renaissance masters from a public museum. Cf. *Lynch*, 465 U.S., at 712–713, 717, 104 S.Ct., at 1379–1380, 1382 (BRENNAN, J., dissenting). Far from "border[ing] on latent hostility toward reli-

District Court in this case that the crèche display offended them. App. 79–80, 93–96.

9. See Brief for American Jewish Committee et al. as *Amici Curiae* i–ii; Brief for American Jewish Congress et al. as *Amici Curiae* 1–2; Tr. of Oral Arg. 44.

10. These cases illustrate the danger that governmental displays of religious symbols may give rise to unintended divisiveness, for the net result of the Court's disposition is to disallow the display of the crèche but to allow the display of the menorah. Laypersons unfamiliar with the intricacies of Establishment Clause jurisprudence may reach the wholly unjustified conclusion that the Court itself is preferring one faith over another. See *Goldman v. Weinberger*, 475 U.S. 503, 512–513, 106 S.Ct. 1310, 1315–1316, 89 L.Ed.2d 478 (1986) (STEVENS, J., concurring). Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 623, 91 S.Ct. 2105, 2116, 29 L.Ed.2d 745 (1971) ("[T]he Constitution's authors sought to protect religious worship from the pervasive power of government"); *Engel*, 370 U.S., at 430, 82 S.Ct., at 1266 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause").

11. The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence. Indeed in its first contemporary examination of the Establishment Clause, the Court, while differing on how to apply the principle, unanimously agreed that government could not require believers or nonbelievers to support religions. *Everson v. Board of Education of Ewing*, 330 U.S., at 15–16, 67 S.Ct., at 511–512; see also *id.*, at 31–33, 67 S.Ct., at 519–520 (Rutledge, J., dissenting). Accord, *Jaffree*, 472 U.S., at 52–55, 105 S.Ct., at 2487–2489.

12. Cf. *New York v. Ferber*, 458 U.S. 747, 778, 102 S.Ct. 3348, 3365, 73 L.Ed.2d 1113 (1982) (STEVENS, J., concurring in judgment) ("The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context").

13. All these leaders, of course, appear in friezes on the walls of our courtroom. See The Supreme Court of the United States 31 (published

gion," see *post*, at 3135 (KENNEDY, J., concurring in judgment in part and dissenting in part), this careful consideration of context gives due regard to religious and nonreligious members of our society.[14]

Thus I find wholly unpersuasive Justice KENNEDY's attempts, *post*, at 3138–3140, to belittle the importance of the obvious differences between the display of the crèche in this case and that in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Even if I had not dissented from the Court's conclusion that the crèche in *Lynch* was constitutional, I would conclude that Allegheny County's unambiguous exposition of a sacred symbol inside its courthouse promoted Christianity to a degree [654] that violated the Establishment Clause. Accordingly, I concur in the Court's judgment regarding the crèche for substantially the same reasons discussed in Justice BRENNAN's opinion, which I join, as well as Part IV of Justice BLACKMUN's opinion and Part I of Justice O'CONNOR's opinion.

I cannot agree with the Court's conclusion that the display at Pittsburgh's City–County Building was constitutional. Standing alone in front of a governmental headquarters, a lighted, 45–foot evergreen tree might convey holiday greetings linked too tenuously to Christianity to have constitutional moment. Juxtaposition of this tree with an 18–foot menorah does not make the latter secular, as Justice BLACKMUN contends, *ante*, at 3112–3113. Rather, the presence of the Chanukah menorah, unquestionably a religious symbol,[15] gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions. Cf. *Jaffree*, 472 U.S., at 60–61, 105 S.Ct., at 2491–2492 (quoting *Lynch*, 465 U.S., at 690–691, 104 S.Ct., at 1368 (O'CONNOR, J., concurring)).[655] Although it conceivably might be interpreted as sending "a message of pluralism and freedom to choose one's own beliefs," *ante*, at 3122 (O'CONNOR, J., concurring in part and

with the cooperation of the Historical Society of the Supreme Court of the United States).

14. The Court long ago rejected a contention similar to that Justice KENNEDY advances today:

"It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion.... [Early Americans] knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel*, 370 U.S., at 433–435, 82 S.Ct., at 1268–1269 (footnotes omitted).

15. After the judge and counsel for both sides agreed at a preliminary injunction hearing that the menorah was a religious symbol, App. 144–145, a rabbi testified as an expert witness that the menorah and the crèche "are comparable symbols, that they both represent what we perceive to be miracles," *id.*, at 146, and that he had never "heard of Hanukkah being declared a general secular holiday in the United States," *id.*, at 148. Although a witness for intervenor Chabad testified at a later hearing that "[w]hen used on Hanukkah in the home it is definitely symbolizing a religious ritual ... whereas, at other times the menorah can symbolize anything that one wants it to symbolize," *id.*, at 240, he also agreed that lighting the menorah in a public place "probably would" publicize the miracle it represents, *id.*, at 263.

Nonetheless, Justice BLACKMUN attaches overriding secular meaning to the menorah. *Ante*, at 3111–3113. Contra, *ante*, at 3121–3123 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 3124, 3126–3127 (BRENNAN, J., concurring in part and dissenting in part); *post*, at 3138–3139 (KENNEDY, J., concurring in judgment in part and dissenting in part). He reaches this conclusion only after exhaustive reference, not only to facts of record but primarily to academic treatises, to assess the degrees to which the menorah, the tree, and the crèche are religious or secular. *Ante*, at 3093–3098, 3113.

concurring in judgment); accord, *ante*, at 3113 (opinion of BLACKMUN, J.), the message is not sufficiently clear to overcome the strong presumption that the display, respecting two religions to the exclusion of all others, is the very kind of double establishment that the First Amendment was designed to outlaw. I would, therefore, affirm the judgment of the Court of Appeals in its entirety.

Justice KENNEDY, with whom The Chief Justice, Justice WHITE, and Justice SCALIA join, concurring in the judgment in part and dissenting in part.

The majority holds that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the "principal or primary effect" of the display is to advance religion within the meaning of *Lemon v. Kurtzman*, 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding. The crèche display is constitutional, and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well. On this latter point, I concur in the result, but not the reasoning, of Part VI of Justice BLACKMUN's opinion.

I

In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. See *Edwards v. Aguillard*, 482 U.S. 578, 636–640, 107 S.Ct. 2573, 2605–2607, 96 L.Ed.2d 510 (1987) (SCALIA, J., dissenting); 1656*Aguilar v. Felton*, 473 U.S. 402, 426–430, 105 S.Ct. 3232, 3245–3247, 87 L.Ed.2d 290 (1985) (O'CONNOR, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108–113, 105 S.Ct. 2479, 2516–2519, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768–769, 96 S.Ct. 2337, 2355, 49 L.Ed.2d 179 (1976) (WHITE, J., concurring in judgment). Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a " 'helpful signpos[t]' " or " 'guidelin[e]' ", to assist our deliberations rather than a comprehensive test. *Mueller v. Allen*, 463 U.S. 388, 394, 103 S.Ct. 3062, 3066, 77 L.Ed.2d 721 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973)); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, n. 31, 93 S.Ct. 2955, 2965, n. 31, 37 L.Ed.2d 948 (1973) (quoting *Tilton v. Richardson*, 403 U.S. 672, 677–678, 91 S.Ct. 2091, 2095, 29 L.Ed.2d 790 (1971)); see *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.

The only *Lemon* factor implicated in these cases directs us to inquire whether the "principal or primary effect" of the challenged government practice is "one that neither advances nor inhibits religion." 403 U.S., at 612, 91 S.Ct., at 2111. The requirement of neutrality inherent in that formulation has sometimes been stated in categorical terms. For example, in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the first case in our modern Establishment Clause jurisprudence, Justice Black wrote

that the Clause forbids laws "which aid one religion, aid all religions, or prefer one religion over another." *Id.*, at 15–16, 67 S.Ct., at 511. We have stated that government "must be neutral in matters of religious theory, doctrine, and practice" and "may not aid, foster, or promote one religion or religious theory against another or even against the [657] militant opposite." *Epperson v. Arkansas*, 393 U.S. 97, 103–104, 89 S.Ct. 266, 269–270, 21 L.Ed.2d 228 (1968). And we have spoken of a prohibition against conferring an " 'imprimatur of state approval' " on religion, *Mueller v. Allen, supra*, 463 U.S. at 399, 103 S.Ct., at 3069 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981)), or "favor[ing] the adherents of any sect or religious organization," *Gillette v. United States*, 401 U.S. 437, 450, 91 S.Ct. 828, 836, 28 L.Ed.2d 168 (1971).

These statements must not give the impression of a formalism that does not exist. Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. As Chief Justice Burger wrote for the Court in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), we must be careful to avoid "[t]he hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Id.*, at 670–671, 90 S.Ct., at 1412.

Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly, supra*, 465 U.S., at 678, 104 S.Ct., at 1361; *Walz v. Tax Comm'n of New York City, supra*, 397 U.S., at 669, 90 S.Ct., at 1411. Any approach less sensitive to our heritage would border on latent hostility toward 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. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects [658] their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Our cases reflect this understanding. In *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), for example, we permitted New York City's public school system to accommodate the religious preferences of its students by giving them the option of staying in school or leaving to attend religious classes for part of the day. Justice Douglas wrote for the Court:

> "When the state encourages religious instruction ... it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Id.*, at 313–314, 72 S.Ct., at 683–684.

Nothing in the First Amendment compelled New York City to establish the release-time policy in *Zorach*, but the fact that the policy served to aid religion, and in particular those sects that offer religious education to the young, did not invalidate the accommodation. Likewise, we have upheld government programs supplying text-

books to students in parochial schools, *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), providing grants to church-sponsored universities and colleges, *Roemer v. Maryland Bd. of Public Works, supra; Tilton v. Richardson, supra*, and exempting churches from the obligation to pay taxes, *Walz v. Tax Comm'n of New York City, supra*. These programs all have the effect of providing substantial benefits to particular religions, see, *e.g., Tilton, supra*, 403 U.S., at 679, 91 S.Ct., at 2096 (grants to church-sponsored educational institutions "surely aid" those institutions), but they are nonetheless permissible. See *Lynch v. Donnelly, supra; McGowan v.* 1659 *Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961); *Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203, 211–212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948). As Justice Goldberg wrote in *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963):

> "It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion...." *Id.*, at 306, 83 S.Ct., at 1615 (concurring opinion, joined by Harlan, J.).

The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government 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 religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S., at 678, 104 S.Ct., at 1361. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain 1660 a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, see *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *McGowan v. Maryland, supra*, 366 U.S., at 452, 81 S.Ct., at 1118 (discussing *McCollum v. Board of Education of School Dist. No. 71, Champaign County, supra*), requiring religious oaths to obtain government office or benefits, *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), or delegating government power to religious groups, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. See *McGowan v. Maryland, supra*, 366

U.S., at 441, 81 S.Ct., at 1113, quoting 1 Annals of Congress 730 (1789) (James Madison, who proposed the First Amendment in Congress, " 'apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience' "); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940) (the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship").

As Justice BLACKMUN observes, *ante,* at 3103, n. 47, some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. See *Engel v. Vitale, supra,* 370 U.S., at 430, 82 S.Ct., at 1266 (dictum) (rejecting, without citation of authority, proposition that coercion is required to demonstrate an Establishment Clause violation); *Abington School District v. Schempp, supra,* 374 U.S., at 223, 83 S.Ct., at 1572; *Nyquist,* 413 U.S., at 786, 93 S.Ct., at 2972. That may be true if by "coercion" is meant |661 *direct* coercion in the classic sense of an establishment of religion that the Framers knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case.[1] I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but 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. Cf. *Friedman v. Board of County Comm'rs of Bernalillo County,* 781 F.2d 777 (CA10 1985) (en banc) (Latin cross on official county seal); *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098 (CA11 1983) (cross erected in public park); *Lowe v. Eugene,* 254 Or. 518, 463 P.2d 360 (1969) (same). Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion. As Chief Justice Burger wrote for the Court in *Walz:*

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist |662 without sponsorship and without interference." 397 U.S., at 669, 90 S.Ct., at 1411.

This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually "establishes a religion or religious faith, or tends to do so." *Lynch,* 465 U.S., at 678, 104 S.Ct., at 1361.

In determining whether there exists an establishment, or a tendency toward one,

1. Justice STEVENS is incorrect when he asserts that requiring a showing of direct or indirect coercion in Establishment Clause cases is "out of step with our precedent." *Ante,* at 3131, n. 6. As is demonstrated by the language Justice STEVENS quotes from *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962), our cases have held only that *direct* coercion need not always be shown to establish an Establishment Clause violation. The prayer invalidated in *Engel* was unquestionably coercive in an indirect manner, as the *Engel* Court itself recognized in the sentences immediately following the passage Justice STEVENS chooses to quote. *Id.,* at 430–431, 82 S.Ct., at 1266–1267.

we refer 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. In *Lynch*, for example, we upheld the city of Pawtucket's holiday display of a crèche, despite the fact that "the display advance[d] religion in a sense." *Id.*, at 683, 104 S.Ct., at 1364. We held that the crèche conferred no greater benefit on religion than did governmental support for religious education, legislative chaplains, "recognition of the origins of the [Christmas] Holiday itself as 'Christ's Mass,' " or many other forms of symbolic or tangible governmental assistance to religious faiths that are ensconced in the safety of national tradition. *Id.*, at 681, 683, 104 S.Ct., at 1363, 1364. And in *Marsh v. Chambers*, we found that Nebraska's practice of employing a legislative chaplain did not violate the Establishment Clause, because "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." 463 U.S., at 791, 103 S.Ct., at 3335 (citations omitted). Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way 1663 more direct and more substantial than practices that are accepted in our national heritage.

II

These principles are not difficult to apply to the facts of the cases before us. In permitting the displays on government property of the menorah and the crèche, the city and county sought to do no more than "celebrate the season," Brief for Petitioner County of Allegheny in No. 87-2050, p. 27, and to acknowledge, along with many of their citizens, 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 government accommodation and acknowledgment of religion that has marked our history from the beginning.[2] It cannot be disputed that government, if it chooses, may participate in sharing with its citizens the joy of the holiday season, by declaring public holidays, installing or permitting festive displays, sponsoring celebrations and parades, and providing holiday vacations for its employees. All levels of our government do precisely that. As we said in *Lynch*, "Government has long recognized—indeed it has subsidized—holidays with religious significance." 465 U.S., at 676, 104 S.Ct., at 1360.

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 1664 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 its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommo-

2. The majority rejects the suggestion that the display of the crèche can "be justified as an 'accommodation' of religion," because it "does not remove any burden on the free exercise of Christianity." *Ante*, at 3105, n. 51. Contrary to the assumption implicit in this analysis, however, we have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, "[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970). Cf. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38, 109 S.Ct. 890, 912, 103 L.Ed.2d 1 (1989) (SCALIA, J., dissenting).

dation and acknowledgment permits government to do so. See *Lynch v. Donnelly, supra;* cf. *Zorach v. Clauson,* 343 U.S., at 314, 72 S.Ct., at 684; *Abington School District v. Schempp,* 374 U.S., at 306, 83 S.Ct., at 1650 (Goldberg, J., concurring).

There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.[3] *Lynch* |665 is dispositive of this claim with respect to the crèche, and I find no reason for reaching a different result with respect to the menorah. Both are the traditional symbols of religious holidays that over time have acquired a secular component. *Ante,* at 3093–3094, and n. 3, 3096–3097, and n. 29. Without ambiguity, *Lynch* instructs that "the focus of our inquiry must be on the [religious symbol] in the context of the [holiday] season," 465 U.S., at 679, 104 S.Ct., at 1362. In that context, religious displays that serve "to celebrate the Holiday and to depict the origins of that Holiday" give rise to no Establishment Clause concern. *Id.,* at 681, 104 S.Ct., at 1363. If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid.[4]

Respondents say that the religious displays involved here are distinguishable from the crèche in *Lynch* because they are located on government property and are not surrounded |666 by the candy canes, reindeer, and other holiday paraphernalia that were a part of the display in *Lynch.* Nothing in Chief Justice Burger's opinion for the Court in *Lynch* provides support for these purported distinctions. After describing the facts, the *Lynch* opinion makes no mention of either of these factors. It concentrates instead on the significance of the crèche as part of the entire

3. One can imagine a case in which the use of passive symbols to acknowledge religious holidays could present this danger. For example, if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain. On the facts of these cases, no such unmistakable and continual preference for one faith has been demonstrated or alleged.

4. The majority suggests that our approval of legislative prayer in *Marsh v. Chambers* is to be distinguished from these cases on the ground that legislative prayer is nonsectarian, while crèches and menorahs are not. *Ante,* at 3106. In the first place, of course, this purported distinction is utterly inconsistent with the majority's belief that the Establishment Clause "mean[s] no official preference even for religion over nonreligion." *Ante,* at 3107. If year-round legislative prayer does not express "official preference for religion over nonreligion," a crèche or menorah display in the context of the holiday season certainly does not "demonstrate a preference for one particular sect or creed." *Ibid.* Moreover, the majority chooses to ignore the Court's opinion in *Lynch v. Donnelly,* 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), which applied *precisely the same analysis* as that I apply today: "[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion ... than ... the legislative prayers upheld in *Marsh v. Chambers*...." *Id.,* 465 U.S., at 681–682, 104 S.Ct., at 1363–1364.

holiday season. Indeed, it is clear that the Court did not view the secular aspects of the display as somehow subduing the religious message conveyed by the crèche, for the majority expressly rejected the dissenters' suggestion that it sought " 'to explain away the clear religious import of the crèche' " or had "equated the crèche with a Santa's house or reindeer." *Id.*, 465 U.S., at 685, n. 12, 104 S.Ct., at 1365, n. 12. Crucial to the Court's conclusion was not the number, prominence, or type of secular items contained in the holiday display but the simple fact that, when displayed by government during the Christmas season, a crèche presents no realistic danger of moving government down the forbidden road toward an establishment of religion. Whether the crèche be surrounded by poinsettias, talking wishing wells, or carolers, the conclusion remains the same, for the relevant context is not the items in the display itself but the season as a whole.

The fact that the crèche and menorah are both located on government property, even at the very seat of government, is likewise inconsequential. In the first place, the *Lynch* Court did not rely on the fact that the setting for Pawtucket's display was a privately owned park, and it is difficult to suggest that anyone could have failed to receive a message of government sponsorship after observing Santa Claus ride the city fire engine to the park to join with the mayor of Pawtucket in inaugurating the holiday season by turning on the lights of the city-owned display. See *Donnelly v. Lynch*, 525 F.Supp. 1150, 1156 (RI 1981). Indeed, the District Court in *Lynch* found that "people might reasonably mistake [667]the Park for public property," and rejected as "frivolous" the suggestion that the display was not directly associated with the city. *Id.*, at 1176, and n. 35.

Our cases do not suggest, moreover, that the use of public property necessarily converts otherwise permissible government conduct into an Establishment Clause violation. To the contrary, in some circumstances the First Amendment may *require* that government property be available for use by religious groups, see *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951), and even where not required, such use has long been permitted. The prayer approved in *Marsh v. Chambers*, for example, was conducted in the legislative chamber of the State of Nebraska, surely the single place most likely to be thought the center of state authority.

Nor can I comprehend why it should be that placement of a government-owned crèche on private land is lawful while placement of a privately owned crèche on public land is not.[5] If anything, I should have thought government ownership of a religious symbol presented the more difficult question under the Establishment Clause, but as *Lynch* resolved that question to sustain the government action, the sponsorship here ought to be all the easier to sustain. In short, nothing about the religious displays here distinguishes them in any meaningful way from the crèche we permitted in *Lynch*.

If *Lynch* is still good law—and until today it was—the judgment below cannot stand. I accept and indeed approve both the holding and the reasoning of Chief Justice Burger's opinion in *Lynch*, and so I must dissent from the judgment that the crèche display is unconstitutional. On the same reasoning, I agree that the menorah display is constitutional.

[668]III

The majority invalidates display of the crèche, not because it disagrees with the interpretation of *Lynch* applied above, but

5. The crèche in *Lynch* was owned by Pawtucket. Neither the crèche nor the menorah at issue in this case is owned by a governmental entity.

because it chooses to discard the reasoning of the *Lynch* majority opinion in favor of Justice O'CONNOR's concurring opinion in that case. See *ante*, at 3101–3103. It has never been my understanding that a concurring opinion "suggest[ing] a clarification of our ... doctrine," *Lynch*, 465 U.S., at 687, 104 S.Ct., at 1366 (O'CONNOR, J., concurring), could take precedence over an opinion joined in its entirety by five Members of the Court.[6] As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law. Since the majority does not state its intent to overrule *Lynch*, I find its refusal to apply the reasoning of that decision quite confusing.

Even if *Lynch* did not control, I would not commit this Court to the test applied by the majority today. The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a " 'reasonable observer' " may " 'fairly understand' " government action to " 'sen[d] a message to nonadherents that they are outsiders, not full members of the political community,' " is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence. *Ante*, at 3102, 3115. Although a scattering of our cases have used "endorsement" as another word for "preference" or "*imprimatur*," the endorsement test applied by the majority had its genesis in Justice O'CONNOR's concurring opinion in *Lynch*. See also *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346, 107 S.Ct. 2862, 2873, 97 L.Ed.2d 273 (1987) (O'CONNOR, J., concurring in judgment); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711, 105 S.Ct. 2914, 2918, 86 L.Ed.2d 557 (1985) (O'CONNOR, J., concurring); *Wallace*$_{669}$ *v. Jaffree*, 472 U.S., at 67, 105 S.Ct., at 2495 (O'CONNOR, J., concurring in judgment). The endorsement test has been criticized by some scholars in the field, see, *e.g.*, Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich.L.Rev. 266 (1987); Tushnet, The Constitution of Religion, 18 Conn.Law Rev. 701, 711–712 (1986). Only one opinion for the Court has purported to apply it in full, see *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389–392, 105 S.Ct. 3216, 3225–3227, 87 L.Ed.2d 267 (1985), but the majority's opinion in these cases suggests that this novel theory is fast becoming a permanent accretion to the law. See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9, 109 S.Ct. 890, 895–896, 103 L.Ed.2d 1 (1989) (opinion of BRENNAN, J.). For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.

A

I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence. See *supra*, at 3134–3138; *Lynch, supra*, 465 U.S., at 673–674, 104 S.Ct., at 1359; *Marsh v. Chambers*, 463 U.S., at 790–791, 103 S.Ct., at 3335; *Walz v. Tax Comm'n of New York City*, 397 U.S., at 671, 90 S.Ct., at 1412. It is true that, for reasons quite unrelated to the First Amendment, displays commemorating religious holidays were not commonplace in 1791. See generally J. Barnett, The American Christmas: A Study in National Culture 2–11 (1954). But the relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding.

6. The majority illustrates the depth of its error in this regard by going so far as to refer to the *concurrence* and *dissent* in *Lynch* as "[o]ur previous opinions...." *Ante*, at 3106.

Our decision in *Marsh v. Chambers* illustrates this proposition. The dissent in that case sought to characterize the decision as "carving out an exception to the Establishment ⌊670 Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer," 463 U.S., at 796, 103 S.Ct., at 3338 (BRENNAN, J., dissenting), but the majority rejected the suggestion that "historical patterns ca[n] justify contemporary violations of constitutional guarantees," *id.*, at 790, 103 S.Ct., at 3335. *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings.[7] Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. See *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S., at 808, 93 S.Ct., at 2979 (REHNQUIST, J., dissenting in part). The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate long-standing traditions cannot be a proper reading of the Clause.

If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.

⌊671 Some examples suffice to make plain my concerns. Since the Founding of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. The first such proclamation was issued by President Washington at the request of the First Congress, and "recommend[ed] and assign[ed]" a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficient author of all the good that was, that is, or that will be," so that "we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to ... promote the knowledge and practice of true religion and virtue...." 1 J. Richardson, A Compilation of Messages and Papers of the Presidents, 1789–1897, p. 64 (1899). Most of President Washington's successors have followed suit,[8] and the forthrightly religious nature of these proclamations has not waned with the years. President Franklin D. Roosevelt went so far as to "suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas" so that "we may bear more earnest witness to our gratitude to Almighty God." Presidential Proclamation No. 2629, 58 Stat. 1160. It requires little imagination to conclude that these proclamations would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning.[9]

7. Contrary to the majority's discussion, *ante*, at 3106–3107, and nn. 53–54, the relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts of "official discrimination against non-Christians" perpetrated in the 18th and 19th centuries by States and municipalities are of course irrelevant to this inquiry, but the practices of past Congresses and Presidents are highly informative.

8. In keeping with his strict views of the degree of separation mandated by the Establishment Clause, Thomas Jefferson declined to follow this tradition. See 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

9. Similarly, our Presidential inaugurations have traditionally opened with a request for divine blessing. At our most recent such occasion, on January 20, 1989, thousands bowed their heads in prayer to this invocation:

[672]The Executive has not been the only Branch of our Government to recognize the central role of religion in our society. The fact that this Court opens its sessions with the request that "God save the United States and this honorable Court" has been noted elsewhere. See *Lynch*, 465 U.S., at 677, 104 S.Ct., at 1361. The Legislature has gone much further, not only employing legislative chaplains, see 2 U.S.C. § 61d, but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate. The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: "Preserve me, O God, for in Thee do I put my trust." Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag. See L. Aikman, We the People: The Story of the United States Capitol 122 (1978). Some endorsement is inherent in these reasonable accommodations, yet the Establishment Clause does not forbid them.

The United States Code itself contains religious references that would be suspect under the endorsement test. Congress has directed the President to "set aside and proclaim a suitable day each year ... as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." 36 U.S.C. § 172. [673]To be sure, no one is obligated to recite this phrase, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), but it borders on sophistry to suggest that the " 'reasonable' " atheist would not feel less than a " 'full membe[r] of the political community' " every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," 36 U.S.C. § 186, which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, 31 U.S.C. §§ 5112(d)(1), 5114(b), must have the same effect.

If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation. It has been argued that "[these] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch, supra*, 465 U.S., at 693, 104 S.Ct., at 1369 (O'CONNOR, J., concurring). I fail to see why prayer is the only way to convey these messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective, were the only purposes at issue the ones described by the *Lynch* concurrence. Nor is it clear to me why "encouraging the recognition of what is worthy of appreciation in society" can be characterized as a purely secular purpose, if it can be achieved only through religious prayer.

"Our Father and our God, Thou hast said blessed is the nation whose God is the Lord.

"We recognize on this historic occasion that we are a nation under God. This faith in God is our foundation and our heritage....

. . . . . .

"As George Washington reminded us in his Farewell Address, morality and faith are the pillars of our society. May we never forget that.

. . . . . .

"We acknowledge Thy divine help in the selection of our leadership each 4 years.

. . . . . .

"All this we pray in the name of the Father, the Son, and the Holy Spirit. Amen." 135 Cong.Rec. 303 (1989) (Rev. Billy Graham).

No doubt prayer is "worthy of appreciation," but that is most assuredly not because it is secular. Even accepting the secular-solemnization explanation at face value, moreover, it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the [674] political norm. Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.[10] Neither result is acceptable.

B

In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism threatens to trivialize constitutional adjudication. By mischaracterizing the Court's opinion in *Lynch* as an endorsement-in-context test, *ante*, at 3103, Justice BLACKMUN embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as "a center of attention separate from the crèche." *Ante*, at 3104. After determining whether these centers of attention are sufficiently "separate" that each "had their specific visual story to tell," the court must then measure their proximity to the crèche. *Ante*, at 3104, and n. 48. A community that wishes to construct a constitutional display must also [675] take care to avoid floral frames or other devices that might insulate the crèche from the sanitizing effect of the secular portions of the display. *Ibid.* The majority also notes the presence of evergreens near the crèche that are identical to two small evergreens placed near official county signs. *Ante*, at 3105, n. 50. After today's decision, municipal greenery must be used with care.

Another important factor will be the prominence of the setting in which the display is placed. In this case, the Grand Staircase of the county courthouse proved too resplendent. Indeed, the Court finds that this location itself conveyed an "unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message." *Ante*, at 3104.

My description of the majority's test, though perhaps uncharitable, is intended to illustrate the inevitable difficulties with its application.[11] This test could provide work-

10. If the majority's test were to be applied logically, it would lead to the elimination of all nonsecular Christmas caroling in public buildings or, presumably, anywhere on public property. It is difficult to argue that lyrics like "Good Christian men, rejoice," "Joy to the world! the Savior reigns," "This, this is Christ the King," "Christ, by highest heav'n adored," and "Come and behold Him, Born the King of angels" have acquired such a secular nature that nonadherents would not feel "left out" by a government-sponsored or approved program that included these carols. See W. Ehret & G. Evans, The International Book of Christmas Carols 12, 28, 30, 46, 318 (1963). We do not think for a moment that the Court will ban such carol programs, however. Like Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court, they constitute practices that the Court will not proscribe, but that the Court's reasoning today does not explain.

11. Justice BLACKMUN and Justice O'CONNOR defend the majority's test by suggesting that the approach followed in *Lynch* would require equally difficult line drawing. *Ante*, at 3107; *ante*, at 3120 (O'CONNOR, J., concurring in part and concurring in judgment). It is true that the *Lynch* test may involve courts in difficult line drawing in the unusual case where a municipality insists on such extreme use of religious speech that an establishment of religion is threatened. See *supra*, at 3137. Only adoption of the absolutist views that either *all* government involvement with religion is permissible, or that *none* is, can provide a bright line in all cases. That price for clarity is neither exacted nor permitted by the Constitution. But for the most part, Justice BLACKMUN's and Justice

able guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on 676 the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

Justice BLACKMUN employs in many respects a similar analysis with respect to the menorah, principally discussing its proximity to the Christmas tree and whether "it is ... more sensible to interpret the menorah in light of the tree, rather than vice versa." *Ante*, at 3113; see also *ante*, at 3123 (O'CONNOR, J., concurring in part and concurring in judgment) (concluding that combination of tree, menorah, and salute to liberty conveys no message of endorsement to reasonable observers). Justice BLACKMUN goes further, however, and in upholding the menorah as an acknowledgment of a holiday with secular aspects emphasizes the city's lack of "reasonable alternatives that are less religious in nature." *Ante*, at 3114; se *ibid.* (noting absence of a "more secular alternative symbol"). This least-religious-means test presents several difficulties.[12] First, it creates an internal inconsistency in Justice BLACKMUN's opinion. Justice BLACKMUN earlier suggests that the display of a crèche is sometimes constitutional. *Ante*, at 3103. But it is obvious that there are innumerable secular symbols of Christmas, and that there will always be a more secular alternative available in place of a crèche. Second, the test as applied by Justice BLACKMUN is unworkable, for it requires not only that the Court engage in the unfamiliar task of deciding whether a particular alternative 677 symbol is more or less religious, but also whether the alternative would "look out of place." *Ante*, at 3114. Third, although Justice BLACKMUN purports not to be overruling *Lynch*, the more-secular-alternative test contradicts that decision, as it comes not from the Court's opinion, nor even from the concurrence, but from the dissent. See 465 U.S., at 699, 104 S.Ct., at 1373 (BRENNAN, J., dissenting). The Court in *Lynch* noted that the dissent "argues that the city's objectives could have been achieved without including the crèche in the display." *Id.*, at 681, n. 7, 104 S.Ct., at 1363, n. 7. "True or false," we said, "that is irrelevant."

The result the Court reaches in these cases is perhaps the clearest illustration of the unwisdom of the endorsement test. Although Justice O'CONNOR disavows Justice BLACKMUN's suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement, *ante*, at 3122–3123 (O'CONNOR, J., concurring in part and concurring in judgment), the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry. If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of reli-

O'CONNOR's objections are not well taken. As a practical matter, the only cases of symbolic recognition likely to arise with much frequency are those involving simple holiday displays, and in that context *Lynch* provides unambiguous guidance. I would follow it. The majority's test, on the other hand, demands the Court to draw exquisite distinctions from fine detail in a wide range of cases. The anomalous result the test has produced here speaks for itself.

12. Of course, a majority of the Court today rejects Justice BLACKMUN's approach in this regard. See *ante*, at 3124 (O'CONNOR, J., concurring in part and concurring in judgment).

gions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions. I would be the first to admit that many questions arising under the Establishment Clause do not admit of easy answers, but whatever the Clause requires, it is not the result reached by the Court today.

IV

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized[678] forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.

A further contradiction arises from the majority's approach, for the Court also assumes the difficult and inappropriate task of saying what every religious symbol means. Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence. This Court is ill-equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so. Indeed, were I required to choose between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter.

The suit before us is admittedly a troubling one. It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.

[679]For these reasons, I might have voted against installation of these particular displays were I a local legislative official. But we have no jurisdiction over matters of taste within the realm of constitutionally permissible discretion. Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

492 U.S. 680, 106 L.Ed.2d 551

[680]**David Lee POWELL**

v.

TEXAS.

No. 88-6801.

July 3, 1989.

Defendant was convicted in a Texas trial court of capital murder, and sentenced

City's creche 'message' fails church-state test; justices OK menorah

By Lee Bowman

The Pittsburgh Press

WASHINGTON — The Supreme Court today said governments can sponsor some religious displays provided they aren't "promoting or endorsing religious beliefs."

The court said a menorah set up beside a Christmas tree on the steps of the City-County Building in Pittsburgh meets that standard and is acceptable under the Constitution.

However, the display of a nativity scene in the Allegheny County Courthouse does not meet the constitutional test for separation of church and state.

The court, in a 5-4 decision, agreed with a U.S. 3rd Circuit Court of Appeals ruling that found the display of a nativity scene "tacitly endorsed Christianity" and unlawfully advanced religion.

Justice Harry Blackmun said that while governments may acknowledge Christmas as a cultural phenomenon, "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 ..."

Blackmun concluded that the menorah display does not endorse

Please see Religion, A4

Pittsburgh Post-Gazette

WEDNESDAY, JULY 5, 1989

Menorah yes, Nativity no

When the U.S. Supreme Court agreed to rule on the constitutionality of religious displays on city and county property in Pittsburgh, many observers hoped the court would clarify its notorious decision in what has come to be known as the "reindeer" case. That was the 1984 ruling in which the justices held that a government-sponsored Nativity scene in Pawtucket, R.I., didn't violate the First Amendment because the display also included secular symbols such as reindeer, a "Santa Claus house," a clown and a teddy bear.

Alas, when the court rendered its decision in the Pittsburgh cases this week, it showed that it is still splitting hairs when it comes to deciding which religious displays are sufficiently secular to pass muster.

By a 5-4 vote, the court ruled that a Nativity scene on the Grand Staircase of the Allegheny County Courthouse violated the Constitution's ban on the establishment of religion. But, by a 6-3 margin, the court upheld the constitutionality of a menorah, or Jewish candelabrum, that had been erected on the steps of the City-County Building.

Harry Blackmun, one of only two justices who voted both to uphold the menorah and to disallow the Nativity scene, attempted in his opinion to distinguish between the two displays.

The Nativity scene was unconstitutional, according to Justice Blackmun, because "nothing in the context of the display detracts from the creche's religious message." He noted that the display included an angel whose banner proclaimed "Gloria in Excelsis Deo" ("Glory to God in the Highest"). This, he said, amounted to Christian preaching.

By contrast, the menorah, although a reli-

Even without the angel's message — and even with the addition of Pawtucket-style secular symbols — placing figures of Jesus, Mary and Joseph in an honored place in a government building resonates with religious meaning.

Anyone who doubts that should ponder a comment from the Rev. Paul Yurko of the Holy Name Society, the Catholic group that supplied the Nativity scene. Last year, after an appeals court ruled against the display, Father Yurko said: "I think it's terrible. You take the percentage of the population who believes in the birth of Christ and we see nothing wrong with displaying [the Nativity scene] in a public building." Never mind that many taxpayers and litigants who must visit the Courthouse are not Christians.

As for the menorah, the appeals court that invalidated both displays had it right when it held that "neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of religious items." Mayor Caliguiri's description of the menorah as a symbol of the secular value of liberty was an exercise in legal cuteness. More likely, the menorah represented a rather patronizing attempt to give Hanukkah equal time with Christmas as a city-approved holiday. (That theory was confirmed this week when City Solicitor Dan Pellegrini said that, in the absence of the Nativity scene, the city wouldn't display the menorah.)

Legal theory aside, this week's decision — like the "reindeer" case — has the ironic effect of demeaning the very religion whose symbols it upholds. Just as Pawtucket's Jesus, Mary and Joseph squeaked through on Santa's coattails, the Pittsburgh menorah passed muster with the court because it was paired with a

Confusing creche ruling

The Supreme Court, ruling in a Pittsburgh case, sought to clarify its stand on religious symbols used in holiday displays on public property.

It failed.

In a 5-4 decision Monday, the court said a Nativity scene erected at the Allegheny County Courthouse by the Holy Name Society during Christmas holidays between 1981 and 1987 was unconstitutional, because it appeared to endorse Christian principles.

But the court unanimously decided that a menorah displayed for Hanukkah by Chabad, a Jewish organization, on the front steps of the City-County Building was permitted under the Constitution. Because this display also included a Christmas tree and a sign saluting liberty, the court said its overall purpose was secular.

Justice Harry A. Blackmun said this week's decision should help clarify a 1984 court ruling that upheld the constitutionality of a creche in Pawtucket, R.I. That creche was surrounded by secular symbols such as Santa Claus, reindeer and snowmen.

The key consideration, said Justice Blackmun, is context: "The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs

risk the court's wrath. But how many secular symbols is enough? Will one Santa Claus next to a creche strike a balance that will satisfy the court? How about a red-nosed reindeer? And if a reindeer is enough, how big must it be?

Ludicrous as those questions sound, it is certain that many groups seeking to erect religious displays on public property will seek a context that allows them to use as few secular symbols in their display as possible. And that, inevitably, will lead to more court challenges.

The court had an opportunity to end this controversy by simply ruling that the Constitution bars the placement of religious symbols on public property. It seems clear that it does.

Such a ruling would have invoked no hardships. In Pittsburgh, as in most cities across the country, space abounds in private settings for the placement of religious symbols during the holiday season. Such settings are as open to the public as any on public property.

Yet there is nothing to prevent local governments from accomplishing what the Supreme Court ruling did not. City and county officials should encourage a private approach to holiday displays and turn down requests to place religious symbols on public property.

Such displays on private property would not

GEORGE F. WILL

A victory for ACLU intolerance

WASHINGTON

Card-carrying members of the American Civil Liberties Union have rescued Pittsburgh from a seasonal menace that must be slain annually. The menace is theocracy — the "establishment" of religion.

True, there were not hordes of Savonarolas creeping in cassocks and sandals along the banks of the Allegheny or ayatollahs floating in flat-bottomed riverboats down the Monongahela to stamp out heterodoxy in Western Pennsylvania. But there were these displays — a creche; a menorah.

Here ... we ... go ... again.

Last week the Supreme Court churned out 105 pages of opinion, concurrences and dissents (and two photographs) about the constitutionally problematic creche and menorah. The menorah was legal; the creche was not. So said the court (6-3 concerning the menorah; 5-4 concerning the creche).

Justice Harry Blackmun, wielding the majority's theological micrometer, said the 18-foot-tall Hanukkah menorah on the steps of Pittsburgh's city hall did not violate the First Amendment guarantee against "establishment" of religion because it was smack next to a Christmas tree.

That mixture of symbols constituted the constitutionally required clutter. It prevented Pittsburghers from exclaiming. "Yo! City hall has endorsed Judaism!" (Remember Pawtucket's creche? It was constitutional because it was surrounded by enough tacky reindeer, Santa's house, snowmen and other secular stuff.)

However, down the block in the Allegheny County Courthouse, a nativity scene was not near any other symbols, so it amounted to endorsement of Christian doctrine. So said five justices.

Congratulations to the ACLU on bagging another creche.

This is the sort of howitzer-against-gnat nonsense that consumes a society that is convinced that every grievance should be cast as a conflict of individual rights and every such conflict should be adjudicated. What is the ACLU's grievance? Heterodoxy.

The ACLU acted not to protect its members from injury. Rather, it acted to force the community into behaving the way the ACLU likes.

The ACLU is a haven for liberals who like to make courts the coercive instruments of truculent people such as themselves. They want to compel the community into cleaning public spaces of symbols offensive to them but not in the least harmful to them. They delight in using law, which should be a unifying fabric, divisively, to trample traditions enjoyed by their neighbors.

Justice Anthony Kennedy, in a tart dissent joined by William Rehnquist, Byron White and Antonin Scalia, said, rightly, that the court had adopted a function "antithetical to the First Amendment": "Obsessive, implacable resistance to all but the most carefully scripted and secularized form of accommodation requires this court to act as a board," performing "the inappropriate task of saying what every religious symbol means." And for no reason. There is no danger — none — that religious zealots will turn Pittsburgh or any other community into Calvin's Geneva.

Relations between church and state were often tense and vexing earlier in American history because relations between religious sects were marked by suspicion or hostility. Many early Americans *were* early Americans because they were too conscientious or scrupulous or stiff-necked or turbulent or intolerant to stomach (or be stomached by) the Old World.

But for goodness sake, Supreme Court, that was then, this is now. Today the agents of intolerance carry ACLU cards.

At a big banquet in Washington a few years ago, a Washington Redskins running back, in his cups and overflowing with advice, said to a Supreme Court justice, "Lighten up, Sandra baby." His manners were bad, but his advice was good for all five justices who kicked over Pittsburgh's creche.

If they took that advice, they also could take Will's Generic Opinion. It is a one-sentence wonder that is sufficient to dispose of almost all constitutional questions arising from the December decoration of public spaces. The opinion is: "The practice does not do what the Establishment Clause was intended to prevent — impose an official creed, or significantly enhance or hinder a sect — so the practice is constitutional, and the complaining parties should buzz off and go knock back enough eggnog to get in the holiday mood."

The justices spend their spare time lamenting the caseload that leaves them with so little spare time. They would


IT'S OUR NEW SUPREME COURT-APPROVED NATIVITY SCENE: "ADORATION OF THE CHARGE CARD"
©1989 THE PITTSBURGH PRESS UNITED FEATURE SYNDICATE
ROGERS


TA-
DAAA
GOVERNMENT
SOMEHOW I EXPECTED MORE FROM THE SUPREME COURT!

County is trying to find private place for creche

By Mark Belko
Post-Gazette Staff Writer

Allegheny County may try to find a private Downtown building to house the creche that has been a Christmas mainstay in the courthouse for the past 15 years.

Commissioner Tom Foerster said yesterday that officials in his office had been "putting some feelers" out to determine whether any of the Downtown office buildings would be interested in taking the Nativity scene.

The search for a new home for the display would begin because the U.S. Supreme Court ruled on July 3 that placing the creche in the courthouse violated the separation of church and state doctrine because it appeared to endorse Christianity.

In a separate, 6-3 vote, the court decided that a Hanukkah menorah placed outside the City-County Building did not violate that doctrine because that display included a Christmas tree and a sign saluting liberty.

Foerster said he had talked to the owner of one building about taking the display and had made appointments with two others. He did not created by a wonderful, wonderful holiday season the better."

Even if the county does not put up the creche this Christmas, it will display trees and other secular symbols to commemorate the season, he said.

Despite the victory in the Supreme Court, city officials have said that the menorah will not be displayed this year unless the creche is.

To do otherwise could create ill will among religious groups, said city Solicitor Dan Pellegrini.

The Rev. Paul Yurko, a Catholic priest who has erected the Nativity scene for 15 years, said he would have no objection to moving the display to a private building.

"I think that probably the best thing to do is to put it on private property," he said. "We don't need this hassle."

Yurko is spiritual director of the Pittsburgh Diocese of the Holy Name Society, which donated the creche. Members have discussed moving the creche to a private building, he said.

"If you take the Nativity scene out [of Christmas], you might as well take everything else out," he said. Officials of the Greater Pittsburgh

County holds to no-creche plan to avoid a 'junked up' display

By Tim Vercellotti

The Pittsburgh Press

They might pass muster with the U.S. Supreme Court, but plastic reindeer won't prance and paw around a Nativity scene in the Allegheny County Courthouse this holiday season.

County officials said that, given a choice between displaying the creche surrounded by secular items such as reindeer and Santa Claus or not displaying the creche at all, they've chosen the latter.

"You have to ask yourself, how much do you want to junk it up? Then who do you offend?" said Maura Minteer, manager of the county's Bureau of Cultural Programs.

"Do you put in a reindeer and a blue Smurf? I'd just as soon not do it."

As in past years, the county will set up a 12-foot-tall Christmas tree in the courthouse Wednesday, along with wreaths and poinsettias.

Meanwhile, Chabad, a Jewish group, is asking the city to reconsider the decision not to place a menorah on the steps of the City-County Building this year.

Both decisions stem from a Supreme Court ruling in July that the county's Nativity scene crossed the constitutional boundary between church and state. But the court upheld the city's right to display the menorah, which stood alongside a Christmas tree.

The high court indicated in its decision that placing secular items around a Nativity scene might make the display acceptable, prompting city Solicitor Dan Pellegrini to suggest the ruling could require displays to pass a "plastic reindeer test."

Pellegrini said after the ruling that the city had agreed not to display the menorah if the county could not place the creche in the courthouse.

Chabad, which began erecting the menorah at the City-County Building in 1980, since has held talks with Mayor Sophie Masloff's office about

Please see Creche, A6

Menorah case is argued in federal court

By Mark Belko
Post-Gazette Staff Writer

For years, Myron Lurie, who is Jewish, said he felt welcome in Pittsburgh during the holiday season because the city made an effort to honor his faith by placing a menorah on the steps of the City-County Building.

But those sentiments changed this year when Lurie learned that the city would not be displaying the 18-foot candelabrum, a symbol of Hanukkah, even though the U.S. Supreme Court ruled that it could do so.

"I would feel there must be a reason for it [not being up] and one of the obvious ones is that my religion and my feelings aren't as good as other people's," he said yesterday.

Lurie, of Squirrel Hill, testified in U.S. District Court yesterday. He, two other city residents and the Chabad, an orthodox Jewish group, sued the city last week to try to force the city to display the menorah for Hanukkah.

After 3½ hours of testimony and argument yesterday afternoon, Senior U.S. District Judge Barron McCune took the group's request for a preliminary injunction under advisement. He is expected to make a ruling today.

"Whatever I decide will probably be wrong and it will be reversed . . ." said McCune, who ruled in 1986 that the menorah and a creche at the county courthouse were legal. He was overturned by the 3rd U.S. Circuit Court of Appeals.

The U.S. Supreme Court ruled last summer that the menorah, a religious symbol, was permitted on the steps of the government building

Judge orders city to allow menorah on building steps

By Janet Williams

The Pittsburgh Press

A federal judge ordered the city today to allow a Jewish organization to place a menorah on the front steps of the City-County Building during Hanukkah.

In his two-page opinion, Senior U.S. District Judge Barron P. McCune said the menorah shall be placed in the same location as it was in 1986. That was the year the American Civil Liberties Union sued the city and Allegheny County over the placement of the menorah and a Nativity scene.

The Nativity scene had been placed at the County Courthouse.

The menorah will be placed to the right of the 45-foot Christmas tree in the City-County Building entrance.

McCune said the menorah shall be put up by Chabad, at that organization's expense, with a "salute to liberty" sign which was present at the display in 1986.

The judge also said that Chabad must file a $50,000 bond with the city to pay for court costs if the order is found to be in error on appeal and to cover the cost of any damages suffered if anyone is injured erecting the menorah.

Chabad also is required to remove the menorah at the end of Hanukkah without any expense to the city.

Please see Menorah, A10

City to appeal ruling allowing menorah

By Jan Ackerman
Post-Gazette Staff Writer

The city is appealing yesterday's ruling by a federal judge that a Jewish organization should be allowed to place a menorah on the front steps of the City-County Building during Hanukkah.

Assistant City Solicitor George Specter is to appear before Senior U.S. District Judge Barron P. McCune at 10 a.m. this morning to ask the judge to put off implementation of his ruling until an appeals court can hear the case.

McCune ordered the city yesterday to permit Chabad to display the religious symbol in front of the City-County building.

If McCune refuses the city's request, as he is expected to do, Specter will appear before Judge Joseph F. Weis Jr. of the 3rd U.S. Circuit Court of Appeals at 10:30 a.m. to appeal McCune's decision.

The city prepared an appeal immediately after McCune's ruling in an attempt to prevent Chabad from installing the menorah on steps of the City-County Building before sundown tomorrow, when Hanukkah begins.

Elliot Katz, an attorney representing Chabad, said the organization viewed McCune's ruling as a victory and was optimistic that it could overcome the remaining legal hurdles so that the religious symbol

The city prepared an appeal immediately after Senior U.S. District Judge Barron P. McCune's ruling in an attempt to prevent Chabad from installing the menorah.

Court decision. The high court said the menorah could be displayed along with secular symbols — a Christmas tree and a sign promoting liberty.

In his ruling, McCune said the menorah was not allowed to be attached to the City-County building but could be displayed on the bottom step to the right of the 45-foot Christmas tree that is on display.

Even if Chabad wins the appeal, Specter predicted, the group would find it difficult to erect the symbol without attaching it to the building.

"I just don't know how they will brace it. In the past, it was attached to the right side of the wall," he said.

Katz said the menorah and the Christmas tree were displayed on the steps from 1981 until 1987.

Menorah case back with 3rd Circuit

By Carmen J. Lee
Post-Gazette Staff Writer

The decision on whether a menorah will be placed outside the Pittsburgh City-County building has moved up the rung of federal judges into the hands of a panel of judges of the 3rd U.S. Circuit Court of Appeals.

U.S. District Judge Barron P. McCune yesterday denied a request from the city to put off his decision allowing the Jewish organization Chabad to erect the menorah on the bottom step in front of the building.

But on appeal immediately following McCune's decision, Judge Joseph F. Weis Jr. of the 3rd Circuit temporarily stopped McCune's order until three members of his court could review the matter.

The panel would have to decide the case today if the menorah is to be set up before Hanukkah begins at sundown.

McCune and Weis disagreed over whether the bottom step of the City-County Building was a public forum, open to all forms of expression, including the menorah.

"There is no religious issue here at all. It is an issue of public forum," Weis told attorneys who met with him in his chambers. "I am not convinced [the step] is a public forum."

The U.S. Supreme Court ruled last summer that the menorah, a religious symbol, was permitted on the steps of the government building because it was accompanied by secular symbols — mainly a Christmas tree and sign promoting liberty.

But the justices also held that a Nativity scene that had been displayed inside the county courthouse was unconstitutional because it did not include secular symbols.

Despite the Supreme Court's decision, Mayor Masloff decided in the interests of religious harmony that the city would not put up the menorah because the county could not display the creche.

Chabad and three Squirrel Hill residents sued the city last week to have the menorah allowed. They

An unholy controversy

Before ruling that the city of Pittsburgh must allow a menorah to be displayed on the steps of the City-County Building, Senior U.S. District Judge Barron P. McCune quipped: "Whatever I decide, I will probably be reversed."

Judge McCune's prediction was fulfilled to some extent yesterday when U.S. Circuit Judge Joseph Weis stayed the McCune order. The Jewish group that wishes to display the menorah, a candelabrum associated with Hanukkah, may still seek recourse from a panel of appellate judges; if it does, those jurists should make it clear that Judge McCune was wrong.

•

We say that not only because we believe that government property is not the proper location for the symbols of any religion. Judge McCune's ruling also was troubling for its failure to distinguish between what city government *may* do under the First Amendment as interpreted by the U.S. Supreme Court and what it *must* do.

And, perhaps most important, the judge's order if allowed to stand would exacerbate religious tensions. After Judge McCune issued his order on Wednesday, a man called the Post-Gazette to complain that a Jewish symbol would be displayed on city property; how could that be fair, he wondered, when a Nativity scene has been banished from the county Courthouse?

It was to avoid just that sort of sectarian scorekeeping that Mayor Masloff wisely decided this year not to display the menorah on city property, even though the U.S. Supreme Court upheld its constitutionality last July in the same decision in which it ruled against the of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom."

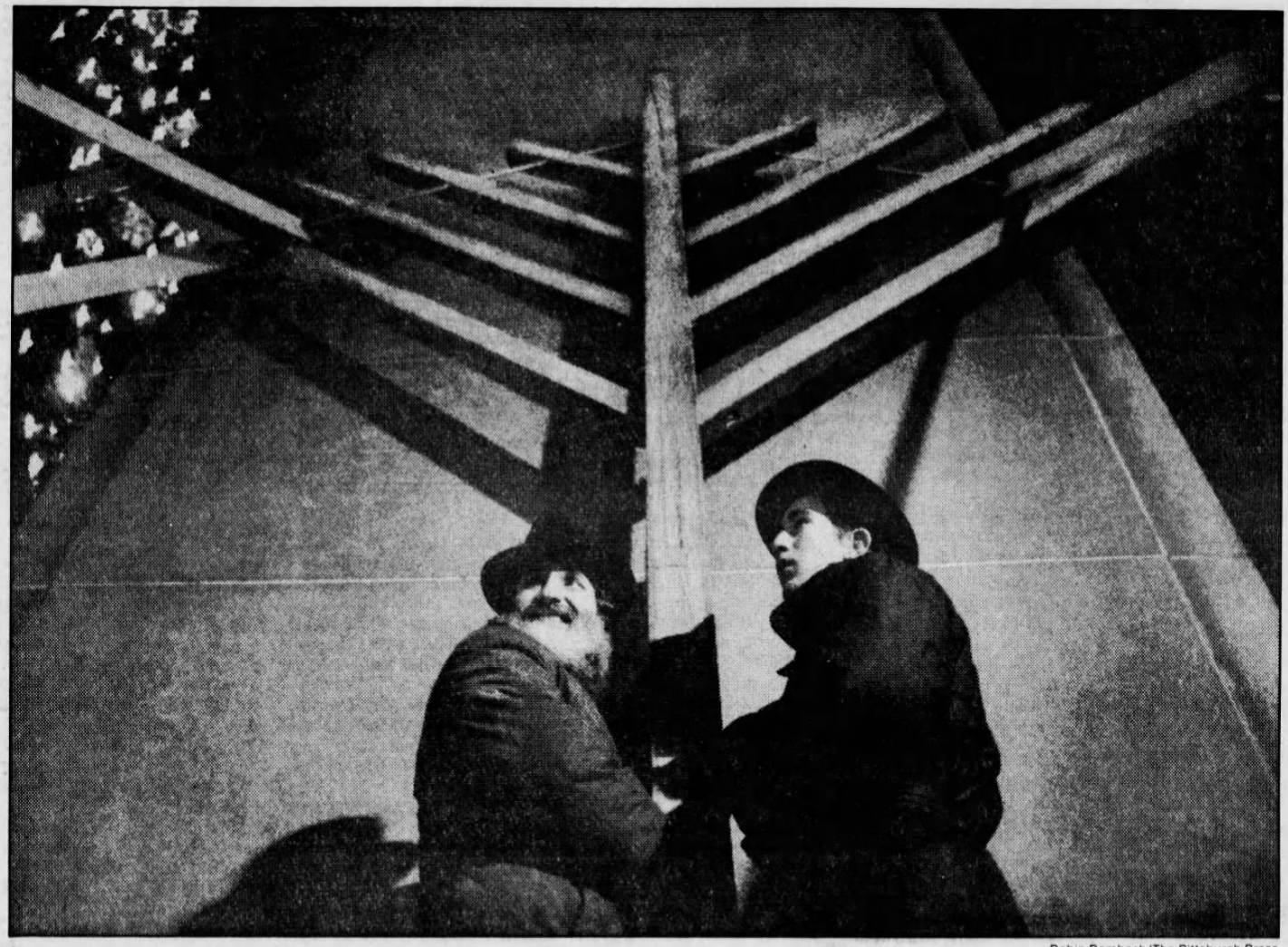
As we observed after the court's decision, the Caliguiri quotation was an exercise in legal cuteness that didn't obscure the religious meaning of the menorah or its function as a form of "equal time" for Jews who might resent the Courthouse Nativity scene. In our view, the Supreme Court should have ruled that both the Nativity scene and the menorah violated the First Amendment.

However, the fact that the court *allowed* the city to display the menorah (with its "secular" trappings) doesn't mean that the court *commanded* the city to do so. In declining to display the menorah this year, the Masloff administration showed a more acute understanding of the menorah's real character than did either the Supreme Court or the city's own lawyers when they were defending the menorah's constitutionality.

•

Enter Chabad, the Orthodox Jewish group that actually owns the "city" menorah. It filed a lawsuit in federal court demanding that the menorah be displayed, and Judge McCune responded sympathetically (stipulating that city workers not be involved in setting up the display).

Judge McCune apparently concluded that the area of the City-County Building over time has acquired the status of a "public forum" in which all comers must be allowed to engage in symbolic speech. Judge Weis, the appellate judge, found that theory questionable; so do we. It is equally far-fetched to suggest that the city's posture towards the menorah in the past was that of a passive "forum" — any more



Robin Rombach/The Pittsburgh Press

Pesach Lazaroff, left, Yossi Swerdlov steady menorah as it is placed at City-County Building

Menorah erected at City-County Building

By Janet Williams

The Pittsburgh Press

After an 11-day legal battle that reached the nation's top court, the placing of a menorah on the steps of the City-County Building was like the raising of the American flag at Iwo Jima, said city Councilman Mark Pollock.

The wooden menorah, erected yesterday on the fifth day of Hanukkah, stands as a symbol of victory for members of Chabad, an organization of orthodox Jews who appealed to the U.S. Supreme Court for the right to display their holiday symbol at the City-County Building.

A menorah is a candelabrum used by Jews to celebrate Hanukkah.

Pollock was one of a group of spectators who stood in the subfreezing temperatures to watch as members of Chabad carefully slid the menorah off the roof of a van and then leaned it against one of the granite pillars of the City-County Building. The menorah was then anchored to the building with steel cable.

"It's a shame. It's a waste of resources and time. I don't understand the passion with which the city is fighting this," said Pollock, who is Jewish.

Mayor Sophie Masloff, whose administration has opposed the display of the menorah at the City-County Building, is also Jewish.

A Chabad news release said the display was being dedicated to the late Mayor Richard Caliguiri, who first included the menorah in the city's holiday display in 1981. "The menorah is a symbol and message of the triumph of freedom over oppression, of light over darkness," the news release said.

Chabad member Pesach Lazaroff of Squirrel Hill called the menorah "a symbol of universal peace and freedom. We're happy to see it up."

Please see Menorah, B4

Menorah will stay, top court declares

By Harry Stoffer
Post-Gazette Washington Bureau

WASHINGTON — The U.S. Supreme Court yesterday rejected Pittsburgh's request for authority to bar a menorah from the steps of the City-County Building.

The justices ruled against the city by an apparent 6-3 margin. Chief Justice William Rehnquist and Justices John Paul Stevens and Antonin Scalia went on record as saying they would have granted the city's request. If all six other justices participated, none chose to comment.

The decision marks the end of yet another skirmish in the long-running legal battles over the display of religious symbols at public buildings in Pittsburgh and Allegheny County.

The high court tried last summer to draw the line between an impermissible display, such as a creche standing alone, and one that would be constitutionally acceptable, such as a menorah beside a Christmas tree.

The latest skirmish began when Mayor Masloff decided that the city would display only a Christmas tree this year. The Jewish group Chabad and several Squirrel Hill residents then insisted that a menorah also be

CONTINUED ON PAGE 6

City-County's menorah stays, top court rules

The U.S. Supreme Court has refused to compel a Jewish organization to remove its menorah from the steps of the City-County Building, meaning it will be displayed through the end of Hanukkah at sundown tomorrow.

Late yesterday, the justices, by a 6-3 vote, upheld an order last week by Justice William Brennan requiring the city to allow Chabad to place its menorah next to the city's 45-foot Christmas tree. Chief Justice William Rehnquist and Justices John Paul Stevens and Antonin Scalia voted to reverse Brennan.

The ruling came in a suit filed

But a week ago today, Brennan reinstated McCune's order. Wednesday, the city asked the full court to reverse Brennan.

William Gullickson, an assistant Supreme Court clerk, said the justices originally scheduled the case for a conference Jan. 5. He said he didn't know why they decided to render a decision in the case yesterday.

City police said someone spray-painted the letters "PLO" on a sign at the base of the menorah. The letters apparently refer to the Palestine Liberation Organization and were written on the bottom of a

TOWN OF GREECE, NEW YORK, Petitioner

v.

Susan GALLOWAY et al.

No. 12–696.

Argued Nov. 6, 2013.

Decided May 5, 2014.

Background: Residents brought civil rights action against town, alleging town's practice of opening town board meetings with prayer violated First Amendment's Establishment Clause. The United States District Court for the Western District of New York, Charles J. Siragusa, J., 732 F.Supp.2d 195, granted summary judgment for town. Residents appealed. The United States Court of Appeals for the Second Circuit, Calabresi, Circuit Judge, 681 F.3d 20, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

(1) prayer opening town board meetings did not have to be nonsectarian to comply with the Establishment Clause, abrogating *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472;

(2) town did not violate First Amendment by opening town board meetings with prayer that comported with tradition of the United States; and

(3) prayer at opening of town board meetings did not compel its citizens to engage in a religious observance, in violation of the Establishment Clause.

Reversed.

Justice Alito filed a concurring opinion in which Justice Scalia joined.

Justice Thomas filed an opinion concurring in part and concurring in judgment in which Justice Scalia joined in part.

Justice Breyer filed a dissenting opinion.

Justice Kagan filed a dissenting opinion in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined.

1. Constitutional Law ⚿1295

The Establishment Clause must be interpreted by reference to historical practices and understandings. U.S.C.A. Const. Amend. 1.

2. Constitutional Law ⚿1295

It is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted; any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⚿1316

Towns ⚿26

Prayer opening town board meetings did not have to be nonsectarian, or not identifiable with any one religion, in order to comply with the Establishment Clause; abrogating *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⚿1310

The United States government is prohibited under the Establishment Clause from prescribing prayers to be recited in public institutions in order to promote a preferred system of belief or code of moral behavior. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⚿1295

Government may not mandate a civic religion that stifles any but the most generic reference to the sacred under the

Establishment Clause, any more than it may prescribe a religious orthodoxy. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⚿1150, 1310, 1574

The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech; once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian. U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⚿1315

The relevant constraint on legislative prayer under the Establishment Clause derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage; prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⚿1316

Towns ⚿26

Town did not violate the First Amendment by opening its town board meetings with prayer that comported with the tradition of the United States; although a number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⚿1310

Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation under the Establishment Clause. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⚿1316

Towns ⚿26

Town did not contravene the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer opening its town board meetings, where the town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one; that nearly all of the congregations in town turned out to be Christian did not reflect an aversion or bias on the part of town leaders against minority faiths. U.S.C.A. Const.Amend. 1.

11. Constitutional Law ⚿1316

So long as a town maintains a policy of nondiscrimination in inviting ministers and laymen to lead a prayer at its meetings, the Establishment Clause does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⚿1316

Towns ⚿26

Town, through the act of offering a brief, solemn, and respectful prayer to open its monthly town board meetings, did not compel its citizens to engage in a religious observance, in violation of the Establishment Clause. (Per Justice Kennedy with two Justices concurring and two Justices concurring in result.) U.S.C.A. Const.Amend. 1.

Syllabus *

Since 1999, the monthly town board meetings in Greece, New York, have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program is open to all creeds, nearly all of the local congregations are Christian; thus, nearly all of the participating prayer givers have been too. Respondents, citizens who attend meetings to speak on local issues, filed suit, alleging that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They sought to limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God." The District Court upheld the prayer practice on summary judgment, finding no impermissible preference for Christianity; concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require Greece to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative prayer must be nonsectarian. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity.

Held: The judgment is reversed.

681 F.3d 20, reversed.

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B, concluding that the town's prayer practice does not violate the Establishment Clause. Pp. 1818 – 1825.

(a) Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. *Marsh v. Chambers,* 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019. In *Marsh,* the Court concluded that it was not necessary to define the Establishment Clause's precise boundary in order to uphold Nebraska's practice of employing a legislative chaplain because history supported the conclusion that the specific practice was permitted. The First Congress voted to appoint and pay official chaplains shortly after approving language for the First Amendment, and both Houses have maintained the office virtually uninterrupted since then. See *id.,* at 787–789, and n. 10, 103 S.Ct. 3330. A majority of the States have also had a consistent practice of legislative prayer. *Id.,* at 788–790, and n. 11, 103 S.Ct. 3330. There is historical precedent for the practice of opening local legislative meetings with prayer as well. *Marsh* teaches that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 670, 109 S.Ct. 3086, 106 L.Ed.2d 472 (opinion of KENNEDY, J.). Thus, any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Pp. 1818 – 1820.

(b) Respondents' insistence on nonsectarian prayer is not consistent with this

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

tradition. The prayers in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. Dictum in *County of Allegheny* suggesting that *Marsh* permitted only prayer with no overtly Christian references is irreconcilable with the facts, holding, and reasoning of *Marsh*, which instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330. To hold that invocations must be nonsectarian would force the legislatures sponsoring prayers and the courts deciding these cases to act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact. Respondents' contrary arguments are unpersuasive. It is doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian prayer. It would also be unwise to conclude that only those religious words acceptable to the majority are permissible, for the First Amendment is not a majority rule and government may not seek to define permissible categories of religious speech. In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the prayer's place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine. The prayers delivered in Greece do not fall outside this tradition. They may have invoked, *e.g.,* the name of Jesus, but they also invoked universal themes, *e.g.,* by calling for a "spirit of cooperation." Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. See 463 U.S., at 794–795, 103 S.Ct. 3330. Finally, so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. Pp. 1819 – 1825.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded in Part II–B that a fact-sensitive inquiry that considers both the setting in which the prayer arises and the audience to whom it is directed shows that the town is not coercing its citizens to engage in a religious observance. The prayer opportunity is evaluated against the backdrop of a historical practice showing that prayer has become part of the Nation's heritage and tradition. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens. Furthermore, the principal audience for these invocations is not the public, but the lawmakers themselves. And those lawmakers did not direct the public to participate, single out dissidents for oppro-

brium, or indicate that their decisions might be influenced by a person's acquiescence in the prayer opportunity. Respondents claim that the prayers gave them offense and made them feel excluded and disrespected, but offense does not equate to coercion. In contrast to *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, where the Court found coercive a religious invocation at a high school graduation, *id.*, at 592–594, 112 S.Ct. 2649, the record here does not suggest that citizens are dissuaded from leaving the meeting room during the prayer, arriving late, or making a later protest. That the prayer in Greece is delivered during the opening ceremonial portion of the town's meeting, not the policymaking portion, also suggests that its purpose and effect are to acknowledge religious leaders and their institutions, not to exclude or coerce nonbelievers. Pp. 1824 – 1828.

Justice THOMAS, joined by Justice SCALIA as to Part II, agreed that the town's prayer practice does not violate the Establishment Clause, but concluded that, even if the Establishment Clause were properly incorporated against the States through the Fourteenth Amendment, the Clause is not violated by the kind of subtle pressures respondents allegedly suffered, which do not amount to actual legal coercion. The municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine. Pp. 1815 – 1819.

KENNEDY, J., delivered the opinion of the Court, except as to Part II–B. ROBERTS, C.J., and ALITO, J., joined the opinion in full, and SCALIA and THOMAS, JJ., joined except as to Part II–B. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined as to Part II. BREYER, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

Thomas G. Hungar, Washington, DC, for Petitioner.

Ian H. Gershengorn, for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

Douglas Laycock, Charlottesville, VA, for Respondents.

Douglas Laycock, University of Virginia School of Law, Charlottesville, VA, Charles A. Rothfeld, Richard B. Katskee, Mayer Brown LLP, Washington, DC, Ayesha N. Khan, Counsel of Record, Gregory M. Lipper, Caitlin E. O'Connell, Americans United for Separation of Church and State, Washington, DC, for Respondents.

For U.S. Supreme Court briefs, see:

2013 WL 5230742 (Resp.Brief)

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B.*

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), that no violation of the Constitution has been shown.

* THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II–B.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. App. 22a–25a.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. *Id.,* at 22a. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> "Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. . . . Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.,* at 45a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . . We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. . . . Praise and glory be yours, O Lord, now

and forever more. Amen." *Id.,* at 88a–89a.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." Complaint in No. 08–cv–6088 (WDNY), ¶ 66. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." 732 F.Supp.2d 195, 203 (2010). They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief. *Id.,* at 210, 241.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative prayer must be nonsectarian. The court began its inquiry with the opinion in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, which permitted prayer in state legislatures by a chaplain paid from the public purse, so long as the prayer opportunity was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.,* at 794–795, 103 S.Ct. 3330. With respect to the prayer in Greece, the District Court concluded that references to Jesus, and the occasional request that the audience stand for the prayer, did not amount to impermissible proselytizing. It located in *Marsh* no additional requirement that the prayers be purged of sectarian content. In this regard the court quoted recent invocations offered in the U.S. House of Representatives "in the name of our Lord Jesus Christ," *e.g.,* 156 Cong Rec. H5205 (June 30, 2010), and situated prayer in this context as part a long tradition. Finally, the trial court noted this Court's statement in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), that the prayers in *Marsh* did not offend the Establishment Clause "because the particular chaplain had 'removed all references to Christ.' " But the District Court did not read that statement to mandate that legislative prayer be nonsectarian, at least in circumstances where the town permitted clergy from a variety of faiths to give invocations. By welcoming many viewpoints, the Dis-

trict Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.

The Court of Appeals for the Second Circuit reversed. 681 F.3d 20, 34 (2012). It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." *Id.,* at 30–31. Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. *Id.,* at 32. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the meeting, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation ... to participate in the prayer ... placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." *Ibid.* That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element, that rendered the prayer unconstitutional. *Id.,* at 33.

Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, 569 U.S. ——, 133 S.Ct. 2388, 185 L.Ed.2d 1103 (2013), the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. See *Lynch v. Donnelly,* 465 U.S. 668, 693, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); cf. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 83 (1990). The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," *Marsh,* 463 U.S., at 792, 103 S.Ct. 3330, rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.,* at 796, 813, 103 S.Ct. 3330 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. See *id.,* at 787–789, and n. 10, 103 S.Ct. 3330; N. Feldman, Divided

by God 109 (2005). But see *Marsh, supra,* at 791–792, and n. 12, 103 S.Ct. 3330 (noting dissenting views among the Framers); Madison, "Detached Memoranda", 3 Wm. & Mary Quarterly 534, 558–559 (1946) (hereinafter Madison's Detached Memoranda). When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. 463 U.S., at 788–790, and n. 11, 103 S.Ct. 3330. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. See Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) ("And now we desire to invoke Thy presence, Thy blessing, and Thy guidance upon those who are gathered here this morning . . ."). "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh, supra,* at 792, 103 S.Ct. 3330.

[1, 2] Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny,* 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, S.Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, *id.,* at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny, supra,* at 670, 109 S.Ct. 3086 (opinion of KENNEDY, J.); see also *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"). A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. See *Van Orden v. Perry,* 545 U.S. 677, 702–704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment).

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the

town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," App. 129a, and the "saving sacrifice of Jesus Christ on the cross," *id.*, at 88a. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

[3] Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." Brief for Respondents 20. A prayer is fitting for the public sphere, in their view, only if it contains the " 'most general, nonsectarian reference to God,' " *id.*, at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11–12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32–33. They argue that prayer which contemplates "the workings of the Holy Spirit, the events of Pentecost, and the belief that God 'has raised up the Lord Jesus' and 'will raise us, in our turn, and put us by His side' " would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition. *Id.*, at 34 (quoting App. 89a and citing *id.*, at 56a, 123a, 134a).

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania 322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate prayer addressing the "Throne of Grace"); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's Prayer). The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by wel-

coming ministers of many creeds. See, *e.g.,* 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama) ("I am a Buddhist monk—a simple Buddhist monk—so we pray to Buddha and all other Gods"); 159 Cong. Rec. H7006 (Nov. 13, 2013) (Rabbi Joshua Gruenberg) ("Our God and God of our ancestors, Everlasting Spirit of the Universe . . ."); 159 Cong. Rec. H3024 (June 4, 2013) (Satguru Bodhinatha Veylanswami) ("Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); 158 Cong. Rec. H5633 (Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds' ").

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny,* 492 U.S. 573, 109 S.Ct. 3086, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." *Id.,* at 601, 109 S.Ct. 3086. Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington. *Id.,* at 670–671, 109 S.Ct. 3086. The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references:

> "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. . . . The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.' " *Id.,* at 603 [109 S.Ct. 3086] (quoting *Marsh, supra,* at 793, n. 14 [103 S.Ct. 3330]; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. See Mallory, "An Officer of the House Which Chooses Him, and Nothing More": How Should *Marsh v. Chambers* Apply to Rotating Chaplains?, 73 U. Chi. L.Rev. 1421, 1445 (2006). *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. See *Van Orden,* 545 U.S., at 688, n. 8, 125 S.Ct. 2854 (recognizing that the prayers in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or

advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330.

[4, 5] To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Cf. *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 705–706, 181 L.Ed.2d 650 (2012). Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. See *Lee v. Weisman,* 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *Schempp,* 374 U.S., at 306, 83 S.Ct. 1560 (Goldberg, J., concurring) (arguing that "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular").

[6] Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. The difficulty, indeed the futility, of sifting sectarian from nonsectarian speech is illustrated by a letter that a lawyer for the respondents sent the town in the early stages of this litigation. The letter opined that references to "Father, God, Lord God, and the Almighty" would be acceptable in public prayer, but that references to "Jesus Christ, the Holy Spirit, and the Holy Trinity" would not. App. 21a. Perhaps the writer believed the former grouping would be acceptable to monotheists. Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County v. American Civil Liberties Union of Ky.,* 545 U.S. 844, 893, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (SCALIA, J., dissenting). Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates,

unfettered by what an administrator or judge considers to be nonsectarian.

[7] In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S., at 794–795, 103 S.Ct. 3330.

It is thus possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. The first prayer delivered to the Continental Congress by the Rev. Jacob Duché on Sept. 7, 1774, provides an example:

> "Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that the scene of blood may be speedily closed; that Order, Harmony, and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.
>
> "Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour, Amen." W. Federer, America's God and Country 137 (2000).

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith. See Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C.

Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37–38 (1876).

[8] The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. App. 31a, 38a. Among numerous examples of such prayer in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board meeting:

> "Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters, and emergency medical personnel.... Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, Amen." *Id.,* at 98a–99a.

[9] Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," *id.,* at 108a, while another lamented that other towns did not have "God-fearing" leaders, *id.,* at 79a. Although these two remarks strayed from the rationale set out in *Marsh,* they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh,* indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer. 463 U.S., at 794–795, 103 S.Ct. 3330.

[10, 11] Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee,* 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

[12] Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that prayer conducted in the intimate setting of a town board meeting differs in

fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny,* 492 U.S., at 659, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden,* 545 U.S., at 683, 125 S.Ct. 2854 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens"). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. See *Lynch,* 465 U.S., at 693, 104 S.Ct. 1355 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See *Salazar v. Buono,* 559 U.S. 700, 720–721, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010) (plurality opinion); *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content. *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the prayer exercise as "an internal act" directed at the Nebraska Legislature's "own members," *Chambers v. Marsh,* 504 F.Supp. 585, 588 (D.Neb.1980), rather than an effort to promote religious observance among the public. See also *Lee,* 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit"); *Atheists of Fla., Inc. v. Lakeland,* 713 F.3d 577, 583 (C.A.11 2013) (quoting a city resolution providing for prayer "for the benefit and blessing of" elected leaders); Madi-

son's Detached Memoranda 558 (characterizing prayer in Congress as "religious worship for national representatives"); Brief for U.S. Senator Marco Rubio et al. as *Amici Curiae* 30–33; Brief for 12 Members of Congress as *Amici Curiae* 6. To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. See App. 69a ("Would you bow your heads with me as we invite the Lord's presence here tonight?"); *id.,* at 93a ("Let us join our hearts and minds together in prayer"); *id.,* at 102a ("Would you join me in a moment of prayer?"); *id.,* at 110a ("Those who are willing may join me now in prayer"). Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. See *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 44, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned . . . was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree"). If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to re-

view the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate. See *County of Allegheny*, 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part).

This case can be distinguished from the conclusions and holding of *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.*, at 592–594, 112 S.Ct. 2649; see also *Santa Fe Independent School Dist.*, 530 U.S., at 312, 120 S.Ct. 2266. Four Justices dissented in *Lee*, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." *Lee*, *supra*, at 597, 112 S.Ct. 2649. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh*, 463 U.S., at 792, 103 S.Ct. 3330 (internal quotation marks and citations omitted).

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. See App. 31a (thanking a pastor for his "community involvement"); *id.*, at 44a (thanking a deacon "for the job that you have done on behalf of our community"). The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher

power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case, *post,* at 1851 – 1852 (opinion of KAGAN, J.), I recount facts that I find particularly salient.

The town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief prayer before sessions of the town board. The task of lining up clergy members willing to provide such a prayer was given to the town's office of constituent services. 732 F.Supp.2d 195, 197–198 (W.D.N.Y.2010). For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece "Community Guide," a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. *Id.,* at 198. This employee eventually began keeping a list of individuals who had agreed to give the invocation, and when a second clerical employee took over the task of finding prayer-givers, the first employee gave that list to the second. *Id.,* at 198, 199. The second employee then randomly called organizations on that list—and possibly others in the Community Guide—until she found someone who agreed to provide the prayer. *Id.,* at 199.

Apparently, all the houses of worship listed in the local Community Guide were Christian churches. *Id.,* at 198–200, 203. That is unsurprising given the small number of non-Christians in the area. Although statistics for the town of Greece alone do not seem to be available, statistics have been compiled for Monroe County, which includes both the town of Greece and the city of Rochester. According to these statistics, of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller.[1] There are no synagogues within the borders of the town of Greece, *id.,* at 203, but there are several not far away across the Rochester border. Presumably, Jewish residents of the town worship at one or more of those synagogues, but because these synagogues fall outside the town's borders, they were not listed in the town's local directory, and the responsible town employee did not include them on her list. *Ibid.* Nor did she include any other non-Christian house of worship. *Id.,* at 198–200.[2]

1. See Assn. of Statisticians of Am. Religious Bodies, C. Grammich et al., 2010 U.S. Religion Census: Religious Congregations & Membership Study 400–401 (2012).

2. It appears that there is one non-Christian house of worship, a Buddhist temple, within

As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had "no religious animus." 681 F.3d 20, 32 (C.A.2 2012).

For some time, the town's practice does not appear to have elicited any criticism, but when complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. *Id.*, at 23, 25; 732 F.Supp.2d, at 197. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths. App. in No. 10–3635 (CA2), pp. A1053–A1055 (hereinafter CA2 App.).

Meetings of the Greece Town Board appear to have been similar to most other town council meetings across the country. The prayer took place at the beginning of the meetings. The board then conducted what might be termed the "legislative" portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances. See Brief for Respondents 5–6; CA2 App. A929–A930; *e.g.*, CA2 App. A1058, A1060.

No prayer occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding. The prayer preceded only the portion of the town board meeting that I view as essentially legislative. While it is true that the matters considered by the board during this initial part of the meeting might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the meeting.

II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent's objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

A

First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." *Post*, at 1851. "Priests and ministers, rabbis and imams," the principal dissent continues, "give such invocations all the time" without any great difficulty. *Post*, at 1851.

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that

the town's borders, but it was not listed in the town directory. 732 F.Supp.2d, at 203. Although located within the town's borders, the temple has a Rochester mailing address. And while the respondents "each lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town." *Id.*, at 197.

nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, see *ante,* at 1818, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.[3]

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." *Post,* at 1851. "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed." *Ibid.*

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. For that is really the only difference between what the town did and what the principal dissent is willing to accept. The Greece clerical employee drew up her list using the town directory instead of a directory covering the entire greater Rochester area. If the task of putting together the list had been handled in a more sophisticated way, the employee in charge would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list.

3. For example, when a rabbi first delivered a prayer at a session of the House of Representatives in 1860, he appeared "in full rabbinic dress, 'piously bedecked in a white tallit and a large velvet skullcap,' " and his prayer "invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew." See Brief for Nathan Lewin as *Amicus Curiae* 9. Many other rabbis have given distinctively Jewish prayers, *id.,* at 10, and n. 3, and distinctively Islamic, Buddhist, and Hindu prayers have also been delivered, see *ante,* at 1820 – 1821.

But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone. Indeed, the Court of Appeals' opinion in this case advised towns that constitutional difficulties "may well prompt municipalities to pause and think carefully before adopting legislative prayer." 681 F.3d, at 34. But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is *never* permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. *Post,* at 1846 – 1847. The guest chaplains stand in front of the room facing the public. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. *Post,* at 1846 – 1847. The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." *Post,* at 1845. Before a session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual.[4] It is common for resi-

4. See, *e.g.,* prayer practice of Saginaw City Council in Michigan, described in Letter from Freedom from Religion Foundation to City Manager, Saginaw City Council (Jan. 31, 2014), online at http://media.mlive.com/saginawnews_impact/other/Saginaw%20prayer%20at%20meetings%20letter.pdf (all Internet materials as visited May 2, 2014,

dents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at the beginning of such a meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, although the principal dissent, *post*, at 1847 – 1848, attaches importance to the fact that guest chaplains in the town of Greece often began with the words "Let us pray," that is also commonplace and for many clergy, I suspect, almost reflexive.[5] In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh v. Chambers*, which upheld the constitutionality of the Nebraska Legislature's practice of prayer at the beginning of legislative sessions, but the principal dissent's acceptance of *Marsh* appears to be predicated on the view that the prayer at issue in that case was little more than a formality to which the legislators paid scant attention. The principal dissent describes this scene: A session of the state legislature begins with or without most members present; a strictly nonsectarian prayer is recited while some legislators remain seated; and few members of the public are exposed to the experience. *Post*, at 1845 – 1846. This sort of perfunctory and hidden-away prayer, the principal dissent implies, is all that *Marsh* and the First Amendment can tolerate.

It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*,[6] but what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. By that time, prayer before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice.

The principal dissent paints a picture of "morning in Nebraska" circa 1983, see *post*, at 1846, but it is more instructive to consider "morning in Philadelphia," September 1774. The First Continental Congress convened in Philadelphia, and the need for the 13 colonies to unite was im-

and available in Clerk of Court's case file); prayer practice of Cobb County commissions in Georgia, described in *Pelphrey v. Cobb County*, 410 F.Supp.2d 1324 (N.D.Ga.2006).

5. For example, at the most recent Presidential inauguration, a minister faced the assembly of onlookers on the National Mall and began with those very words. 159 Cong. Rec. S183, S186 (Jan. 22, 2013).

6. See generally Brief for Robert E. Palmer as *Amicus Curiae* (Nebraska Legislature chaplain at issue in *Marsh*); *e.g., id.*, at 11 (describing his prayers as routinely referring "to Christ, the Bible, [and] holy days"). See also *Chambers v. Marsh*, 504 F.Supp. 585, 590, n. 12 (D.Neb.1980) ("A rule of the Nebraska Legislature requires that 'every member shall be present within the Legislative Chamber during the meetings of the Legislature ... unless excused....' Unless the excuse for nonattendance is deemed sufficient by the legislature, the 'presence of any member may be compelled, if necessary, by sending the Sergeant at Arms' " (alterations in original)).

perative. But "[m]any things set colony apart from colony," and prominent among these sources of division was religion.[7] "Purely as a practical matter," however, the project of bringing the colonies together required that these divisions be overcome.[8]

Samuel Adams sought to bridge these differences by prodding a fellow Massachusetts delegate to move to open the session with a prayer.[9] As John Adams later recounted, this motion was opposed on the ground that the delegates were "so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that [they] could not join in the same act of worship."[10] In response, Samuel Adams proclaimed that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[11] Putting aside his personal prejudices,[12] he moved to invite a local Anglican minister, Jacob Duché, to lead the first prayer.[13]

The following morning, Duché appeared in full "pontificals" and delivered both the Anglican prayers for the day and an extemporaneous prayer.[14] For many of the delegates—members of religious groups that had come to America to escape persecution in Britain—listening to a distinctively Anglican prayer by a minister of the Church of England represented an act of notable ecumenism. But Duché's prayer met with wide approval—John Adams wrote that it "filled the bosom of every man" in attendance[15]—and the practice was continued. This first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational.[16] But one of its purposes, and presumably one of its effects, was not to divide, but to unite.

It is no wonder, then, that the practice of beginning congressional sessions with a prayer was continued after the Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses. The first Senate chaplain, an Episcopalian, was appointed on April 25, 1789, and the first House chaplain, a Presbyterian, was appointed on May 1.[17] Three days later, Madison announced that he planned to introduce proposed constitutional amendments to protect individual rights;

7. G. Wills, Inventing America: Jefferson's Declaration of Independence 46 (1978).

8. N. Cousins, In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers 4–5, 13 (1958).

9. M. Puls, Samuel Adams: Father of the American Revolution 160 (2006).

10. Letter to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37 (1876).

11. *Ibid.*

12. See G. Wills, *supra,* at 46; J. Miller, Sam Adams 85, 87 (1936); I. Stoll, Samuel Adams: A Life 7, 134–135 (2008).

13. C. Adams, *supra,* at 37.

14. *Ibid.*

15. *Ibid.*; see W. Wells, 2 The Life and Public Services of Samuel Adams 222–223 (1865); J. Miller, *supra,* at 320; E. Burnett, The Continental Congress 40 (1941); M. Puls, *supra,* at 161.

16. First Prayer of the Continental Congress, 1774, online at http://chaplain.house.gov/archive/continental.html.

17. 1 Annals of Cong. 24–25 (1789); R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23 (1982).

on June 8, 1789, those amendments were introduced; and on September 26, 1789, the amendments were approved to be sent to the States for ratification.[18] In the years since the adoption of the First Amendment, the practice of prayer before sessions of the House and Senate has continued, and opening prayers from a great variety of faith traditions have been offered.

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, see, *e.g., Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), *Carroll v. United States*, 267 U.S. 132, 150–152, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, when the Court was called upon to decide whether prayer prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice. See 463 U.S., at 786–792, 103 S.Ct. 3330.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, see 681 F.3d, at 26, 30, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

18. 1 Annals of Cong. 247, 424; R. Labunski, James Madison and the Struggle for the Bill of Rights 240–241 (2006).

Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II–B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (THOMAS, J., concurring in judgment), and to state my understanding of the proper "coercion" analysis.

I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. *Newdow, supra*, at 45–46, 124 S.Ct. 2301; see also *Van Orden v. Perry*, 545 U.S. 677, 692–693, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (THOMAS, J., concurring); *Zelman v. Simmons–Harris*, 536 U.S. 639, 677–680, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. Cf. D. Drakeman, Church, State, and Original Intent 260–262 (2010). The text of the Clause also suggests that Congress "could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." *Newdow, supra*, at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). The language of the First Amendment ("Congress shall make no law") "precisely tracked and inverted the exact wording" of the Necessary and Proper Clause ("Congress shall have power . . . to make all laws which shall be necessary and proper . . ."), which was the subject of fierce criticism by Anti–Federalists at the time of ratification. A. Amar, The Bill of Rights 39 (1998) (hereinafter Amar); see also Natelson, The Framing and Adoption of the Necessary and Proper Clause, in The Origins of the Necessary and Proper Clause 84, 94–96 (G. Lawson, G. Miller, R. Natelson, & G. Seidman eds. 2010) (summarizing Anti–Federalist claims that the Necessary and Proper Clause would aggrandize the powers of the Federal Government). That choice of language—"Congress shall make no law"—effectively denied Congress any power to regulate state establishments.

Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789. Amar 32–33. New England States like Massachusetts, Connecticut, and New Hampshire maintained local-rule establishments whereby the majority in each town could select the minister and religious denomination (usually Congregationalism, or "Puritanism"). McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L.Rev. 2105, 2110 (2003); see also L. Levy, The Establishment Clause: Religion and the First Amendment 29–51 (1994) (hereinafter Levy). In the South, Maryland, South Carolina, and Georgia eliminated their exclusive Anglican establishments following the American Revolution and adopted general establishments, which permitted taxation in support of all Christian churches (or, as in South Carolina, all Protestant churches). See Levy 52–58; Amar 32–33. Virginia, by contrast,

had recently abolished its official state establishment and ended direct government funding of clergy after a legislative battle led by James Madison. See T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, pp. 155–164 (1977). Other States—principally Rhode Island, Pennsylvania, and Delaware, which were founded by religious dissenters—had no history of formal establishments at all, although they still maintained religious tests for office. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L.Rev. 1409, 1425–1426, 1430 (1990).

The import of this history is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification. See Muõz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Constitutional L. 585, 605 (2006). Although the remaining state establishments were ultimately dismantled—Massachusetts, the last State to disestablish, would do so in 1833, see Levy 42—that outcome was far from assured when the Bill of Rights was ratified in 1791. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States. Amar 41.

The Federalist logic of the original Establishment Clause poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. See *id.,* at 33. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." *Newdow,* 542 U.S., at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected." *Id.,* at 51, 124 S.Ct. 2301; see Amar 33–34.

Put differently, the structural reasons that counsel against incorporating the Tenth Amendment also apply to the Establishment Clause. *Id.,* at 34. To my knowledge, no court has ever suggested that the Tenth Amendment, which "reserve[s] to the States" powers not delegated to the Federal Government, could or should be applied against the States. To incorporate that limitation would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment. Incorporating the Establishment Clause has precisely the same effect.

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause (notwithstanding its Federalist origins) as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Congressmen who catalogued the personal rights protected by the First Amendment commonly referred to speech, press, petition, and assembly, but not to a personal right of nonestablishment; instead, they spoke only of "'free exercise'" or "'freedom of conscience.'" Amar 253, and 385, n. 91 (collecting sources). There may be reason to think these lists were abbreviated, and silence on the issue is not dispositive. See Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz.

St. L.J. 1085, 1141–1145 (1995); but cf. S. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 50–52 (1995). Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation. See *Newdow, supra*, at 51, 124 S.Ct. 2301 (opinion of THOMAS, J.). The burden of persuasion therefore rests with those who claim that the Clause assumed a different meaning upon adoption of the Fourteenth Amendment.[1]

II

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SCALIA, J., dissenting); see also *Perry*, 545 U.S., at 693–694, 125 S.Ct. 2854 (THOMAS, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 729, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (THOMAS, J., concurring); *Newdow, supra*, at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. McConnell, Establishment and Disestablishment, at 2144–2146, 2152–2159. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. *Id.*, at 2161–2168, 2176–2180.

This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform. As previously noted, establishments in the South were typically governed through the state legislature or State Constitution, while establishments in New England were administered at the municipal level. See *supra*, at 1835 – 1836. Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion," *Newdow, supra*, at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.): They exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

None of these founding-era state establishments remained at the time of Recon-

1. This Court has never squarely addressed these barriers to the incorporation of the Establishment Clause. When the issue was first presented in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Court casually asserted that "the Fourteenth Amendment [has been] interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Id.*, at 15, 67 S.Ct. 504 (footnote omitted). The cases the Court cited in support of that proposition involved the Free Exercise Clause—which had been incorporated seven years earlier, in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)—not the Establishment Clause. 330 U.S., at 15, n. 22, 67 S.Ct. 504 (collecting cases). Thus, in the space of a single paragraph and a nonresponsive string citation, the *Everson* Court glibly effected a sea change in constitutional law. The Court's inattention to these doctrinal questions might be explained, although not excused, by the rise of popular conceptions about "separation of church and state" as an "American" constitutional right. See generally P. Hamburger, Separation of Church and State 454–463 (2002); see also *id.*, at 391–454 (discussing the role of nativist sentiment in the campaign for "separation" as an American ideal).

struction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of *what constituted an establishment*. At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," *ante*, at 1824 – 1825, 1825, or perceives governmental "endors[ement]," *ante*, at 1817 – 1818. For example, of the 37 States in existence when the Fourteenth Amendment was ratified, 27 State Constitutions "contained an explicit reference to God in their preambles." Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L.Rev. 7, 12, 37 (2008). In addition to the preamble references, 30 State Constitutions contained other references to the divine, using such phrases as " 'Almighty God,' " " '[O]ur Creator,' " and " 'Sovereign Ruler of the Universe.' " *Id.*, at 37, 38, 39, n. 104. Moreover, the state constitutional provisions that prohibited religious "comp[ulsion]" made clear that the relevant sort of compulsion was legal in nature, of the same type that had characterized founding-era establishments.[2] These provisions strongly suggest that, whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the "reasonable observer."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case, *ante*, at 1819 – 1820. The majority properly concludes that "[o]ffense . . . does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Ante*, at 1826. I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either. *Newdow*, 542 U.S., at 49, 124 S.Ct. 2301 (opinion of THOMAS, J.).

Justice BREYER, dissenting.

As we all recognize, this is a "fact-sensitive" case. *Ante*, at 1825 (opinion of KENNEDY, J.); see also *post*, at 1851 – 1852 (KAGAN, J., dissenting); 681 F.3d 20, 34 (C.A.2 2012) (explaining that the Court of Appeals' holding follows from the "totality of the circumstances"). The Court of Appeals did not believe that the Constitution

2. See, *e.g.*, Del. Const., Art. I, § 1 (1831) ("[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); Me. Const., Art. I, § 3 (1820) ("[N]o one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience"); Mo. Const., Art. I, § 10 (1865) ("[N]o person can be compelled to erect, support, or attend any place of worship, or maintain any minister of the Gospel or teacher of religion"); R.I. Const., Art. I, § 3 (1842) ("[N]o man shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract"); Vt. Const., Ch. I, § 3 (1777) ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

forbids legislative prayers that incorporate content associated with a particular denomination. *Id.*, at 28. Rather, the court's holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive "prayer-giver selection process." *Id.*, at 30. It also took into account related "actions (and inactions) of prayer-givers and town officials." *Ibid.* Those actions and inactions included (1) a selection process that led to the selection of "clergy almost exclusively from places of worship located within the town's borders," despite the likelihood that significant numbers of town residents were members of congregations that gather just outside those borders; (2) a failure to "infor[m] members of the general public that volunteers" would be acceptable prayer givers; and (3) a failure to "infor[m] prayer-givers that invocations were not to be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.*, at 31–32 (internal quotation marks omitted).

The Court of Appeals further emphasized what it was not holding. It did not hold that "the town may not open its public meetings with a prayer," or that "any prayers offered in this context must be blandly 'nonsectarian.'" *Id.*, at 33. In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. A map of the town's houses of worship introduced in the District Court shows many Christian churches within the town's limits. It also shows a Buddhist temple within the town and several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York. *Id.*, at 24. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced. See *post*, at 1848, 1852.

To be precise: During 2008, two prayers were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan prayer givers were invited only after they reached out to the town to inquire about giving an invocation. The town apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 meetings, which contrasts starkly with the exclusively single-denomination prayers every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. See *post*, at 1852. Beginning in 1999, when it instituted its practice of opening its monthly board meetings with prayer, Greece select-

ed prayer givers as follows: Initially, the town's employees invited clergy from each religious organization listed in a "Community Guide" published by the Greece Chamber of Commerce. After that, the town kept a list of clergy who had accepted invitations and reinvited those clergy to give prayers at future meetings. From time to time, the town supplemented this list in response to requests from citizens and to new additions to the Community Guide and a town newspaper called the Greece Post.

The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite, 681 F.3d, at 26, and the town claims, plausibly, that it would have allowed anyone who asked to give an invocation to do so. Rather, the evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits (again, the Buddhist temple on the map was within those limits, but the synagogues were just outside them). *Id.*, at 24, 31.

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its website, greeceny.gov, which provides dates and times of upcoming town board meetings along with minutes of prior meetings. It could have announced inclusive policies at the beginning of its board meetings, just before introducing the month's prayer giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion. See *post*, at 1841 – 1843, 1845 – 1846, 1848 – 1849, 1852 – 1853.

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not. Cf. *post*, at 1845 – 1848, 1849 – 1850, 1851 – 1852.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an

invocation for a government body in a religiously pluralistic Nation:

> "The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
>
> "The length of the prayer should not exceed 150 words.
>
> "The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy." App. to Brief for Respondents 2a.

The town made no effort to promote a similarly inclusive prayer practice here. See *post,* at 1852 – 1853.

As both the Court and Justice KAGAN point out, we are a Nation of many religions. *Ante,* at 1820 – 1821; *post,* at 1841 – 1842, 1850 – 1851. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." *Zelman v. Simmons–Harris,* 536 U.S. 639, 717, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (BREYER, J., dissenting). The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman,* 403 U.S. 602, 622, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry,* 545 U.S. 677, 700, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

I dissent from the Court's decision to the contrary.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v.*

Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." App. 88a–89a. The judge then asks your lawyer to begin the trial.
- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....'" *Id.,* at 56a. And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to

> pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit—it is with a due sense of reverence and awe that we come before you [today] seeking your blessing.... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen." *Id.*, at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. See *ante*, at 1834 (ALITO, J., concurring). And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. See Tr. of Oral Arg. 3–4. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One.... Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over nonreligion. Compare, *e.g., McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) ("[T]he First Amendment mandates governmental neutrality between ... religion and nonreligion"), with, *e.g., id.*, at 885, 125 S.Ct. 2722 (SCALIA, J., dissenting) ("[T]he Court's oft repeated assertion that the government cannot favor religious practice [generally] is false"). But no one has disagreed with this much:

> "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington ... down to the present day, has ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee v. Weisman*, 505 U.S. 577, 641 [112 S.Ct.

2649, 120 L.Ed.2d 467] (1992) (SCALIA, J., dissenting).

See also *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("Whatever else the Establishment Clause may mean[,] . . . [it] 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)").[1] By authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs

1. That principle meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century "political correctness," but of the 18th century view—rendered no less wise by time—that, in George Washington's words, "[r]eligious controversies are always productive of more acrimony and irreconciliable hatreds than those which spring from any other cause." Letter to Edward Newenham (June 22, 1792), in 10 Papers of George Washington: Presidential Series 493 (R. Haggard & M. Mastromarino eds. 2002) (hereinafter PGW). In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. See Brief for Paul Finkelman et al. as *Amici Curiae* 15–19 (noting, for example, that in revising his first inaugural address, Washington deleted the phrase "the blessed Religion revealed in the word of God" because it was understood to denote only Christianity). Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia's Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, "if not strictly guarded," express only "the creed of the majority and a single sect." Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 561 (1946).

do not enter into the picture. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 85 (P. Kurland & R. Lerner eds. 1987) ("[O]pinion[s] in matters of religion ... shall in no wise diminish, enlarge, or affect [our] civil capacities"). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330. *Ante*, at 1820 – 1821. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), "ha[s] shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.' " *Ante*, at 1820 (quoting *Marsh*, 463 U.S., at 786, 103 S.Ct. 3330). Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792, 103 S.Ct. 3330. And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures." *Ante*, at 1819.

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen.[2] But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in

2. Because Justice ALITO questions this point, it bears repeating. I do not remotely contend that "prayer is not allowed" at participatory meetings of "local government legislative bodies"; nor is that the "logical thrust" of any argument I make. *Ante*, at 1818 – 1819. Rather, what I say throughout this opinion is that in this citizen-centered venue, government officials must take steps to ensure—as none of Greece's Board members ever did—that opening prayers are inclusive of different faiths, rather than always identified with a single religion.

Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. See *Chambers v. Marsh*, 504 F.Supp. 585, 590, and n. 12 (D.Neb.1980); *Lee*, 505 U.S., at 597, 112 S.Ct. 2649. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the public at large." Brief for Petitioners in *Marsh* 30. Any members of the public who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery. See App. 72 in *Marsh* (senator's testimony that "as a practical matter the public usually is not there" during the prayer).

The longtime chaplain says something like the following (the excerpt is from his own *amicus* brief supporting Greece in this case): "*O God*, who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." Brief for Robert E. Palmer 9. The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to Christ" after a single legislator complained. *Marsh*, 463 U.S., at 793, n. 14, 103 S.Ct. 3330; Brief for Petitioners in *Marsh* 12. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See *ibid.*

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny.gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, see Pl. Exhs. 718, 755, in No. 6:08–cv–6088 (WDNY)); and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal)

at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's town meeting." App. 134a. (He does not suggest that anyone should feel free not to participate.) And he says:

> "The beauties of spring ... are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so ... [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets." *Ibid.*

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." See 681 F.3d 20, 24 (C.A.2 2012). The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company. See App. in No. 10–3635 (CA2), p. A574.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U.S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing *Marsh*, and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the public." Brief for Petitioners in *Marsh* 30; see Reply Brief for Petitioners in *Marsh* 8 ("The [prayer] practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs"). The same is true in the U.S. Congress and, I suspect, in every other state legislature. See Brief for Members of Congress as *Amici Curiae* 6 ("Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citi-

zens"). As several Justices later noted (and the majority today agrees, see *ante,* at 1825 – 1826),[3] *Marsh* involved "government officials invok[ing] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead." *Lee,* 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, see *ante,* at 1825 – 1826, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. See *supra,* at 1846. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." *Ante,* at 1826. He almost always begins with some version of "Let us all pray together." See, *e.g.,* App. 75a, 93a, 106a, 109a. Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. See, *e.g., id.,* at 28a, 42a, 43a, 56a, 77a. He refers, constantly, to a collective "we"—to "our" savior, for example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." See, *e.g., id.,* at 32a, 45a, 47a, 69a, 71a. In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as "in the Judeo–Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. And as the majority acknowledges, see *ante,* at 1821 – 1822, *Marsh* hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief"; had it been otherwise, the Court would have reached a different decision. 463 U.S., at 794–795, 103 S.Ct. 3330.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian—constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. See App. 129a–143a. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. See generally *id.,* at 27a–143a. Many prayers contained elaborations of Christian doctrine or recitations of scripture. See, *e.g., id.,* at 129a ("And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated"); *id.,* at 94a ("For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder ..."). And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son." See, *e.g., id.,* at 55a, 65a, 73a, 85a.

3. For ease of reference and to avoid confusion, I refer to Justice KENNEDY's opinion as "the majority." But the language I cite that appears in Part II–B of that opinion is, in fact, only attributable to a plurality of the Court.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion) (recognizing even half a century ago that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference"). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship [4]). The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, see *ante*, at 1824, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and ... ignorant of the history of our country." App. 137a, 108a.

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld prayer addressed to legislators alone, in a proceeding in which citizens had no role—and even then, only when it did not "proselytize or advance" any single religion. 463 U.S., at 794, 103 S.Ct. 3330. It was that legislative prayer practice (not every prayer in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." *Id.*, at 792, 103 S.Ct. 3330. But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." *Ante*, at 1819. And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. See *supra*, at 1842 – 1845. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting.

4. Leaders of several Baptist and other Christian congregations have explained to the Court that "many Christians believe ... that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 18.

The case, I think, has a fair bit in common with my earlier hypotheticals. See *supra*, at 1841 – 1843, 1844 – 1845. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." App. 99a. She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting—or even, as the majority proposes, that she stands up and leaves the room altogether, see *ante*, at 1826. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town's clergy always used the liturgy of some other religion. See *supra*, at 1842 – 1844.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," *Marsh* observed, 463 U.S., at 792, 103 S.Ct. 3330, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature, see *supra*, at 1845 – 1846. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, see *ante*, at 1822 –

1823; *ante,* at 1817 – 1819, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. See *Joyner v. Forsyth County,* 653 F.3d 341, 347 (C.A.4 2011) (Wilkinson, J.) (Such prayers show that "those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith"). Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "[t]he First Amendment is not a majority rule," as the Court (headspinningly) suggests, *ante,* at 1822; what does that is the Board's *refusal* to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. See *ante,* at 1820 – 1821. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, see *ante,* at 1820 – 1821, 1823—the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide. See also *ante,* at 1840 (BREYER, J., dissenting).

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the prayer arises and the audience to whom it is directed." *Ante,* at 1825. But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature, see *ante,* at 1818 – 1819, 1820 – 1821, 1823 – 1824, 1825 – 1826; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap—more like,

the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than (as in the forums it discusses) to the lawmakers. "The District Court in *Marsh*," the majority expounds, "described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members.' " *Ante*, at 1825 (quoting *Chambers v. Marsh*, 504 F.Supp., at 588); see *ante*, at 1825 (similarly noting that Nebraska senators "invoke[d] spiritual inspiration entirely for their own benefit" and that prayer in Congress is "religious worship for national representatives" only). Well, yes, so it is in Lincoln, and on Capitol Hill. But not in Greece, where as I have described, the chaplain faces the Town's residents—with the Board watching from on high—and calls on them to pray together. See *supra*, at 1846, 1847.

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in *other* government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal," *ante*, at 1821, 1823; and in that context, the majority opines, the fact "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah . . . does not remove it from" *Marsh*'s protection, see *ante*, at 1823. But that case is not this one, as I have shown, because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. See *supra*, at 1847 – 1848. So all the majority can point to in the Town's practice is that the Board "maintains a policy of nondiscrimination," and "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." *Ante*, at 1824. But that representation has never been publicized; nor has the Board (except for a few months surrounding this suit's filing) offered the chaplain's role to any non-Christian clergy or layman, in either Greece or its environs; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, as most state legislatures and Congress do. See 732 F.Supp.2d 195, 197–203 (W.D.N.Y. 2010); National Conference of State Legislatures, Inside the Legislative Process: Prayer Practices 5–145, 5–146 (2002); *ante*, at 1840 – 1841 (BREYER, J., dissenting). The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly—and relentlessly—noninclusive.[5]

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. *Ante*, at 1823 – 1824, 1825, 1826, 1827 – 1828. Ceremonial references to the divine

5. Justice ALITO similarly falters in attempting to excuse the Town Board's constant sectarianism. His concurring opinion takes great pains to show that the problem arose from a sort of bureaucratic glitch: The Town's clerks, he writes, merely "did a bad job in compiling the list" of chaplains. *Ante*, at 1818; see *ante*, at 1815 – 1817. Now I suppose one question that account raises is why in over a decade, no member of the Board noticed that the clerk's list was producing prayers of only one kind. But put that aside. Honest oversight or not, the problem remains: Every month for more than a decade, the Board aligned itself, through its prayer practices, with a single religion. That the concurring opinion thinks my objection to that is "really quite niggling," *ante*, at 1829, says all there is to say about the difference between our respective views.

surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. *Ante,* at 1825. But prayers evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? See App. 56a, 88a–89a, 99a, 123a, 129a, 134a. No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of [one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. *Ante,* at 1825. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry,* 545 U.S. 677, 704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation's lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government—"a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of

citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike . . . immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens." *Ibid.*

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

Benjamin ROBERS, Petitioner

v.

UNITED STATES.

No. 12–9012.

Argued Feb. 25, 2014.

Decided May 5, 2014.

Background: Defendant was convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., of conspiracy to commit wire fraud in connection with mortgage fraud scheme. He appealed, challenging restitution order. The United States Court of Appeals for the Seventh Circuit, Manion, Circuit Judge, 698 F.3d 937, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Breyer, held that restitution obligation is reduced by money received from sale of collateral, not value of collateral at time lender took title, abrogating *United States v. Yeung*, 672 F.3d 594.

Affirmed.

Justice Sotomayor filed concurring opinion, in which Justice Ginsburg joined.

1. Sentencing and Punishment ⚿2175

Under Mandatory Victims Restitution Act, when victim of fraudulent loan takes title to collateral securing the loan, sentencing court must reduce offender's restitution amount by amount of money victim received in selling the collateral, not value of collateral when victim received it; no "part of the property" lost by victim is "returned" to victim until collateral is sold and victim receives money from the sale; abrogating *United States v. Yeung*, 672 F.3d 594. 18 U.S.C.A. § 3663A(b)(1).

2. Statutes ⚿1375

Generally, identical words used in different parts of same statute are presumed to have same meaning.

Mississippi. Although the indictment alleges a continuing scheme of channeling confidential data to Thomas Kent and then to Patrick Petroleum, each and every mailing alleged in the indictment was remote from the misappropriation of the data and the defalcation of the Union Oil employee. Therefore, it is

ORDERED that the indictment be dismissed.

Kenneth OWENS-EL and Inmates and Future Residents of Allegheny County Jail, Plaintiffs,

v.

William ROBINSON and James Jennings, Defendants.

INMATES OF the ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

Robert PEIRCE, Chairman, Allegheny County Board of Prison Inspectors and all other members of the Board, James Jennings, Warden Allegheny County Jail, and James Flaherty, Robert Peirce and Thomas Foerster, Commissioners for Allegheny County, Defendants.

Civ. A. Nos. 75-412, 76-743.

United States District Court,
W. D. Pennsylvania.

Oct. 11, 1978.

In a suit challenging constitutionality of conditions of confinement of county jail inmates, and seeking money damages and equitable relief, the District Court, Cohill, J., granted a final order containing provisions as to presence of guards, cleanliness and sanitation, electrical and plumbing problems, lighting, clothing, bedding, etc., laundry, rules and regulations, restraints, mail and law libraries.

Order in accordance with opinion.

1. Prisons ⇐4(2)

District court had broad, inherent equitable powers to remedy jail conditions which were unacceptable as violating rights of prisoners.

2. Prisons ⇐17

It was not within district court's authority to tell county authorities who to appoint to have primary responsibility for cleanliness and sanitation at jail, but it was obligation of county authorities to appoint someone who could assume responsibility to carry out mandates of court's order with respect to cleanliness and sanitation.

3. Prisons ⇐4(13), 17

In suit challenging constitutionality of conditions of county jail inmates, and seeking money damages and equitable relief, court made final order with respect to various jail conditions, including guard presence in cell blocks, electrical and plumbing problems, lighting, clothing, bedding, etc., laundry, rules and regulations, restraints, mail and law library. 28 U.S.C.A. § 1291.

4. Prisons ⇐4(6)

Jail inmates had no constitutional right to contact visits.

Jere Krakoff, Neighborhood Legal Services, Pittsburgh, Pa., for plaintiffs.

John G. Arch, Asst. County Sol., Allegheny County Law Dept., Pittsburgh, Pa., for defendants.

OPINION, SUPPLEMENTAL FINDINGS OF FACT, AND FINAL ORDER

COHILL, District Judge.

I.

History of the Case

Plaintiff Kenneth Owens-El is a former inmate of the Allegheny County Jail

("jail"), Pittsburgh, Pennsylvania. In 1975 he filed a *pro se* suit challenging the constitutionality of the conditions under which inmates of the jail were confined, seeking money damages and equitable relief.

In a separate action in 1976 Neighborhood Legal Services ("NLS") filed a class action suit on behalf of all jail inmates, past, present and future, petitioning for a declaratory judgment holding that the conditions of confinement at the jail were violative of certain constitutional rights of the inmates. The two cases were consolidated for trial and certified as a class action.

A six week non-jury trial ensued beginning August 15, 1977, at which time we received testimony from some 50 witnesses including experts in the fields of mental health, medicine, penology and hygiene, as well as that of many lay witnesses who, in one capacity or another, were familiar with conditions at the jail. On January 4, 1978, pursuant to Fed.R.Civ.P. 52, we issued Findings of Fact and Conclusions of Law in which we held that in many areas the inmates had, indeed, been deprived of their constitutional rights. The accompanying Order provided for the appointment of an expert to serve as a "Court Advisor" and to monitor the implementation of the requirements of the Order.

The Opinion, Findings of Fact and Conclusions of Law were reported under the designation *Owens-El v. Robinson* at 442 F.Supp. 1368 (D.C.1978). On February 21, 1978 we appointed a former federal warden and expert in penology, Arnold E. Pontesso, to be the Court Advisor. A copy of that Order is appended hereto as Appendix A.

Mr. Pontesso visited the jail in March and May, 1978, filing a written report with the court each time. He also met with the entire Allegheny County Board of Prison Inspectors (one of the named defendants), conferred many times with the warden and interviewed many jail personnel and inmates.

On August 17 and 18, 1978, a final hearing was held at which Mr. Pontesso testified as the court's witness and was cross-examined by all counsel and the *pro se* plaintiff, Kenneth Owens-El.

All parties were given the opportunity to submit a proposed final order. Extensive changes had been ordered at the jail in the Order of January 4, 1978, but it had been our intention to keep the case in such a posture that the Order could be amended and modified after receiving the expert opinion of the Court Advisor.

We have now had the benefit of that expertise and are prepared to make Supplemental Findings of Fact and a final decision and Order from which the parties may appeal. 28 U.S.C. § 1291.

II.

Previous Findings of Fact, Conclusions of Law and Order

The Findings of Fact and Conclusions of Law previously filed (442 F.Supp. 1368 (1978)) are incorporated by reference herein. For ease in reference we will enter an entire final Order here, even including those portions of the January 4, 1978 order which are not changed.

[1] We do not deem it necessary to make additional Conclusions of Law in this Opinion, since we feel that sufficient Conclusions of Law were made at the time of the January 4, 1978 Order. At this point, we are content to rely on the inherent equitable powers of the court:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554, 566 (1971).

III.

Guards

The January 4, 1978 Order required two guards to be present in each occupied cell block at all times. Upon reconsideration we are satisfied that two guards are not required when the inmates have been locked

in their cells. The Order will be changed accordingly, but adequate records of job assignments will be required.

IV.

Cleanliness and Sanitation

There has been improvement in the cleanliness and sanitation at the jail, but there are not daily inspections of the cells by jail personnel to check for cleanliness, damage to paint and condition of plumbing and electrical fixtures.

Jail officials will have to prepare a written program setting forth the daily housekeeping procedure to be followed at the jail.

[2] A person has not been designated to have primary responsibility for the cleanliness and sanitation at the jail. It is only when this responsibility is delegated to one person that the desired accountability for the sanitary conditions at the jail can be achieved. It would be most desirable to appoint to this position a person trained as a sanitation specialist, but we do not consider it to be within the purview of this court's authority to tell the county authorities whom to appoint to such a position. Nevertheless, it will be their obligation to appoint someone who can assume the responsibility for carrying out the mandates of this order insofar as the cleanliness and sanitation of the jail are concerned, and if necessary, hire a new employee for the position.

V.

Electrical and Plumbing Problems

[3] There has been improvement in the maintenance of electrical fixtures and wiring at the jail, but the problem of obtaining electricians when needed remains. Although the Court Advisor recommended a full-time in-house electrician, we will stop short of ordering that; but it will be necessary to have an electrician available within twenty-four hours from the time one is requested by the warden or his designated representative. A plumber is presently assigned to the jail on a full-time basis. If this arrangement should be discontinued, a plumber will likewise have to be available within twenty-four hours of when requested.

VI.

Lighting

The January 4, 1978 Order required the defendants to install sufficient lighting in the cells to enable an inmate to read a newspaper. To make the standard more definitive, we will require that each cell be furnished with at least a 100 watt light bulb.

VII.

Distribution of Clothing, Bedding, Towels and Toilet Articles

It is difficult to understand why the distribution of bedding and towels should continue to present such a problem at the jail. Our Order required that each inmate be provided a clean towel, clean sheet and clean blanket which should be laundered once a week. Mr. Pontesso and others testified that while the situation has improved there are still occasions where there are shortages of bedding and towels.

Our Order also required that soap, toothbrush and toothpaste be furnished without charge to inmates having less than $2.00. It appears more feasible, and we will direct, that *all* incoming inmates be furnished these items without charge, since the jail personnel have not devised a systematic method of implementing the previous Order concerning those items.

It may be that someone with experience as a supply sergeant in the military service should be employed to oversee the distribution of these articles to incoming inmates and the collection of towels, bedding, etc. from departing inmates. Again, we will not direct the defendants to hire a person with particular training for this task, but we will direct the defendants to arrange the table of organization at the jail so that one person on each shift will have responsibility for seeing that this mandate is carried out

pursuant to a written procedure for such distribution.

There has been some confusion as to the definition of "adequate clothing" as used in our January 4, 1978 Order wherein we directed the defendants to furnish clothing to "each inmate who does not have adequate clothing when entering the jail . . . ." We will better define the clothing to be supplied in the Order. The defendants will be required to develop a written procedure for such distribution.

VIII.

Laundry

Our January 4, 1978 Order required that free laundry service be provided all inmates at least once a week. A chronic problem is that prisoners operating the laundry require "pay" from inmates desiring laundry service. This problem can be avoided by jail personnel developing a plan whereby the inmates do not have face-to-face contact with the laundry workers when they bring their wash to the laundry.

IX.

Rules and Regulations Manual

The inmates often do not know what they are entitled to. The Rules and Regulations Manual will be revised to reflect in clear and easy-to-understand language what items, supplies, and services the inmate is entitled to pursuant to the terms of the Order accompanying this Opinion. In addition some jail employee must be assigned the job of verbally informing inmates of what supplies and services they are entitled to.

X.

Restraints

Although since the January 4, 1978 Order a log has been kept relative to those inmates who were placed in restraints, it appears to be kept in almost *pro forma* fashion. Our Order will further refine the circumstances under which restraints may be used and the method of record keeping required.

XI.

Psychiatric Training for Nurses

It would appear that the requirement in our January 4, 1978 Order of one psychiatric nurse on duty at the jail at all times is not feasible. (Paragraph 14 of the January 4, 1978 Order). The defendants used their best efforts to employ such nurses without success. It also became apparent that the employment of psychiatric nurses would create morale and administrative problems with respect to other nurses at the jail who did not have such training. We will therefore modify the Order to require only that nurses employed at the jail be given a course in the handling of patients with mental problems.

XII.

Mail

It is not feasible to open all incoming mail in the presence of the inmate addressee, and the Order will be modified accordingly.

XIII.

Law Library

The defendants informally requested, and the plaintiffs' class, through its attorneys, informally consented to, reconsideration by the court of its Order pertaining to the contents of the law library ordered for the jail. We will modify the Order so as to reduce the number of case reporters which the defendants must provide, but increase the number of resource volumes required.

XIV.

Contact Visits

The attorneys for the plaintiffs have argued vigorously for "contact visits" between inmates and their families—that is visits where the inmates and families are within the physical presence of each other and can touch one another. Mr. Pontesso has likewise recommended this.

[4] While we agree that contact visits would be more desirable, we do not believe that the lack of such visits in a jail setting deprives the inmates of a constitutional right. We would say, parenthetically, that we hope that the jail administration will attempt at least to provide such visits for inmates who are in the jail for extended periods of time.

XV.

Closing of this Case by the Court

We intend the Order accompanying this Opinion to be a final, appealable decision within the meaning of 28 U.S.C. § 1291. We will direct that Mr. Pontesso make an additional visit to the jail to be sure that the defendants are complying with the Order, but we do not intend to consider this again unless there is a petition for a Rule to Show Cause why a party should not be held in contempt for failure to obey the terms and conditions of the Order accompanying this Opinion.

APPENDIX A

ORDER

Pursuant to the Opinion and Order of Court entered in this case on January 4, 1978, it is hereby ordered that Arnold E. Pontesso is appointed to serve as the Advisor of this Court under the following terms:

1. The Court Advisor shall have the authority and duty to monitor the implementation of the requirements of said decree of January 4, 1978. He shall review plans prepared by the defendants for implementation of the decree to ensure that they comport with the minimum standards set forth therein. The Court Advisor shall submit a comprehensive report to the Court describing progress made in the implementation of the decree and shall in addition, submit a comprehensive report detailing methods, procedures and programs which he deems appropriate to implement said decree. In addition to these functions, the Court Advisor shall perform such other services as the Court may assign.

2. The Court Advisor shall report his findings and recommendations no later than May 1, 1978, and shall submit such other reports as the Court may direct.

3. The Court Advisor shall have access to all areas and departments of the Allegheny County Jail, during all times of the day, and shall not be required to provide advance notice of his appearance in order to gain entry.

4. The Court Advisor shall be permitted to take photographs within all areas of the Allegheny County Jail.

5. The Court Advisor shall be permitted at reasonable times to interview inmates and institutional personnel and to inspect and photocopy institutional records.

6. With the approval of the Court, the Court Advisor may engage and consult appropriate specialists who shall be compensated by Allegheny County.

7. The Court Advisor shall be compensated by Allegheny County at the rate of $135 per day and shall be reimbursed for travel and other expenses necessarily incurred in the performance of his duties.

Entered this 21st day of February, 1978.

ORDER

AND NOW, to-wit, this 11th day of October, 1978, after hearing testimony, arguments and careful study of the briefs filed, in accordance with the Findings of Fact and Conclusions of Law filed January 4, 1978 (442 F.Supp. 1368 (1978)), and pursuant to the Supplemental Findings of Fact and Conclusions of Law filed herewith, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants herein, within the gambit and purview of their particular individual responsibilities, are directed as follows:

I.

Guards

1. There shall be no fewer than two guards stationed on a full time basis in each occupied cell block of the Allegheny County Jail ("jail") during the hours between 8:00

APPENDIX A—Continued

A.M. and evening lock-up of inmates daily. A separate daily log shall be maintained reflecting the names of the guards stationed in the occupied cell blocks, the specific cell blocks to which they were assigned and the particular hours each of the guards worked in the cell blocks.

II.

Cleanliness and Sanitation

2. All areas of the jail shall be maintained in a clean and sanitary condition. The jail administration shall establish an organized daily cleaning program which shall include daily inspections of the cells and ranges. In addition, the defendants shall ensure that all necessary cleaning materials and utensils are readily available to inmates as needed.

3. The defendants shall prepare and update from time to time a written plan describing in detail the operation of the jail's cleaning and sanitation program. Said plan shall be prepared by January 1, 1979.

4. A position of sanitation officer shall be established in the jail. The sanitation officer shall be adequately trained in sanitation procedures. His duties will include supervision of the jail's cleaning and sanitation program and enforcement of sanitation standards throughout the jail. The position shall be established immediately.

5. All living areas in the jail shall be kept adequately heated and ventilated.

6. A vigorous and ongoing insect and vermin extermination program shall be maintained.

7. No inmate shall be assigned to, or placed in a cell (including double lock), which is not clean or which is equipped with an unsanitary, inoperable or malfunctioning toilet, sink or cot, or where the cell is not illuminated by at least a 100 watt light bulb.

III.

Electrical and Plumbing

8. At least one electrician and one plumber shall be available within 24 hours after being called for by the Warden or his designated representative.

IV.

Lighting

9. All occupied cells shall be equipped with no less than 100 watt light bulbs.

V.

Clothing, Bedding, Towels and Toilet Articles

10. Upon admission to the jail each inmate shall be provided with a clean towel, clean sheet and clean blanket which shall be laundered at least once a week. In addition to the towel distributed to incoming inmates for use in their cells, there shall be a sufficient number of towels available for distribution in the jail's bathhouse for use there.

11. Each inmate who does not have clean and otherwise adequate clothing when entering the jail shall be furnished adequate clothing within 24 hours of admission if such clothing has not been furnished to the inmate within that time period by family or friends. Among the articles of clothing which the jail shall furnish to an inadequately clothed inmate are underwear, socks, shirts, and slacks. If at any time during the course of confinement an inmate becomes inadequately clothed, the jail shall furnish suitable clothing to such inmate upon request consisting of the articles described above.

12. Each inmate shall be furnished without charge, within 24 hours of admission to the jail, soap, a toothbrush and toothpaste. Thereafter, soap, toothbrushes and toothpaste shall be furnished, without charge, to indigent inmates as their need for additional soap, toothbrushes and toothpaste arises. For purposes of this Order, an inmate is indigent if he is admitted to the jail with less than $2.00 in his possession or if his most recent two week average balance in his account is less than $2.00.

13. The defendants shall prepare a written plan describing in detail the method for

APPENDIX A—Continued

distributing towels, sheets, blankets, clothing, toothbrushes, and toothpaste to the inmates. Said plan shall be prepared by January 1, 1979.

14. The position of one supply officer for each shift shall be established in the jail. The supply officer shall be responsible for supervising the distribution of the various articles detailed in paragraphs 10, 11 and 12 hereof.

VI.

Laundry

15. Free personal laundry service shall be provided to all inmates at least once a week. The defendants shall devise a system to prevent inmate laundry workers from charging a fee for laundry services. Said plan shall also describe in detail the operation of the laundry service and shall be prepared by January 1, 1979.

VII.

Telephones

16. Telephones shall be maintained in the jail in appropriate numbers and locations to enable inmates to have reasonable access to them without undue delay. The telephone system shall operate on a reverse charge basis, except for those calls which cannot be made on that basis (calls to the Public Defender's Officer, governmental agencies, private bail bondsmen, etc.) Where reverse charge calls are not possible, the jail shall provide a reasonable alternative, such as processing such calls through the counseling office or installing pay telephones. Telephone conversations may not be monitored by jail personnel.

VIII.

Rules and Regulation Manual

17. The Allegheny County Jail Resident Rules and Regulations Manual shall be updated from time to time to reflect current rules, procedures, and practices in the jail. The Manual shall be distributed to each inmate upon admission to the jail and shall specify with particularity all supplies and services that inmates are entitled to receive under this Order.

18. All incoming inmates shall be verbally informed of the supplies and services to which they are entitled under this Order. This shall be done no later than 48 hours after such inmate's admission to the jail and may be done as part of the jail's orientation procedure or in any other reasonable manner.

IX.

Use of Restraints, Cots with Holes, Delirium Tremens

19. The following procedures shall govern the use of restraints at the jail:

(i) Inmates requiring restraints will be housed only in a hospital setting and only on regular beds with a mattress, clean sheet or mattress and blanket. Under no circumstances will restrained inmates be placed on cots with holes in them;

(ii) Restraints may be used only on the specific written authorization of a medical doctor, and such authorization shall state in terms sufficient to enable a reasonable person to understand why the restrained inmate is believed to be dangerous to himself or others;

(iii) If required in an emergency situation, when a doctor is not present, a registered nurse may order the temporary use of restraints, subject to the receipt, by telephone or otherwise, of approval from a medical doctor within two hours of the imposition of such restraints;

(iv) A separate log shall be kept reflecting the use of restraints, the time of such approval and the reason therefore as set forth in subparagraph (ii) hereof;

(v) Orders by a doctor authorizing the use of restraints are valid for twenty-four hours only, and if no further written order has been entered within that period, the inmates shall be released from restraints.

20. Any use of cots with holes cut in them for the passage of human waste is prohibited.

APPENDIX A—Continued

21. Any person suffering from delirium tremens shall never be housed in the jail but shall be immediately transferred to an appropriate medical facility until recovered from said delirium tremens.

X.

Double Lock Cells

22. The following conditions of confinement shall apply to inmates in double lock cells:

(i) They shall be permitted to bring to double lock: soap, a toothbrush and toothpaste, a towel, blanket and sheet which shall be laundered and redistributed on a weekly basis;

(ii) They shall be permitted to have a change of clothing and the same laundry service as all other inmates;

(iii) All double lock cells shall be equipped with the same type cots as are in the regular cells in the jail;

(iv) Food trays shall be removed from double lock promptly after each meal.

23. With respect to the disciplinary proceedings the following conditions shall apply:

(i) Inmates who are subjected to disciplinary proceedings shall be given written notice of the charges a reasonable period of time in advance of their scheduled appearance before the Disciplinary Board;

(ii) In all cases where an inmate is sentenced to double lock, the jail Disciplinary Board shall prepare a written statement summarizing the evidence relied upon and the reasons for its decision.

XI.

Isolation Cell

24. With respect to the use of the isolation cell, the following conditions shall apply:

(i) Inmates shall not be placed in the jail's isolation cell as punishment for infraction of jail rules;

(ii) Inmates who are placed in the isolation cell shall not be stripped of their clothing; however, their shoes and belts may be removed in the interest of their personal safety;

(iii) The isolation cell shall be equipped with a toilet and a bed. Inmates who are confined to the cell shall be furnished a blanket and a sheet. The isolation cell shall be adequately heated during cold weather and adequately ventilated at all times. The isolation cell shall have interior lighting which can be controlled from the inside of the cell. The door which fronts the isolation cell shall be partially transparent so that guards can observe the inmate and the inmate see out. The cell shall be checked at least every fifteen minutes. No inmate shall be kept in the isolation cell more than two hours without the express consent of the warden or his designated representative. A separate log book shall be kept reflecting the circumstances surrounding the placement of anyone in the isolation cell.

XII.

Psychiatric Training for Nurses

25. The defendants shall, by January 1, 1979, arrange for a training program for present and future jail nurses in the area of psychiatric nursing. All present jail nurses must enroll in the program as soon as it is established. All nurses employed by the jail in the future shall, within six months of their date of employment, complete said training course.

XIII.

Mail

26. With respect to the handling of mail the following conditions shall apply:

(i) All outgoing mail may be sealed by the inmate before being deposited in the mailbox. Outgoing mail may be inspected for contraband by mechanical or other devices but may not be opened by jail personnel unless there is reasonable cause to believe it contains contraband, in which case a log shall be kept of the name of the sender, date, time and re-

APPENDIX A—Continued

sults of the search. If no contraband is found, the letter shall immediately be resealed and sent to its addressee;

(ii) There shall be no limitation on the number of pages contained in an outgoing letter;

(iii) Incoming mail may be opened only for the purpose of searching for contraband. Such mail may not be read by anyone without the consent of the addressee;

(iv) Incoming mail with a return address indicating that it is from a judge or an attorney must be opened in the presence of the inmate-addressee;

(v) The policy of requiring inmates to receive printed matter directly from the publishers shall be discontinued. Hereafter, inmates shall be permitted to receive books, magazines, and other reading material from any source so long as the publication has not been determined by the courts to violate postal regulations.

XIV.

Law Library

27. The defendants shall establish and keep updated a limited law reference library which shall be available for daily inmate use and shall include:

a. Federal Rules of Civil Procedure;
b. Federal Rules of Criminal Procedure;
c. Pennsylvania Rules of Court;
d. A complete set of Purdon's Pa. Statutes Annotated;
e. A complete set of United States Code Annotated;
f. Black's Law Dictionary;
g. Pennsylvania Appellate Court Reporters (beginning no later than the year 1955, including Atlantic 2d Series);
h. Federal Case Reporters including Federal Supplement, Federal Reporter 2d Series, and the Lawyers Edition of the Supreme Court Reporter (all beginning no later than the year 1955);
i. Federal Practice Digest 2d Series (all volumes relating to civil rights, the U. S. Constitution, criminal law, and habeas corpus);
j. Vales Pennsylvania Digest (all volumes relating to civil rights, the Pennsylvania Constitution, criminal law, and family law and habeas corpus);
k. Shepard's United States Citations;
l. Shepard's Federal Citations;
m. Shepard's Pennsylvania Citations;
n. *Criminal Law in a Nutshell.* Israel, Jerold H. and Wayne R. LaFave. West Publishing Co., 1975;
o. *Complete Manual of Criminal Forms, Federal and State.* Bailey, F. Lee and Henry Rothblatt. Lawyers Co-op Publishing Co., 1974. 2 volumes;
p. *Legal Research in a Nutshell.* (2nd ed.) West Publishing Co.;
q. *Post Conviction Remedies in a Nutshell.* Popper, Robert. West Publishing Co.;
r. *Constitutional Rights of the Accused: Pre-Trial Rights* (1972). *Trial Rights.* (1974) *Post Trial Rights.* (1976) Cook, Joseph. Lawyer's Co-op Publishing Co.

XV.

Juvenile Records

28. The defendants shall keep all records and files, including fingerprint information, of juvenile inmates separate from the records and files of adults. A juvenile inmate's file may be inspected only as allowed under Pennsylvania law.

XVI.

Building Evacuation Plan

29. The jail administration shall maintain and keep current a building evacuation plan to be used in the event of fire or other emergency.

XVII.

Inspection by Court Advisor

30. In the month of March, 1979, or as soon thereafter as practicable, the Court

APPENDIX A—Continued

Advisor, Arnold E. Pontesso, shall inspect the jail to ascertain that this Order is being complied with and review all written plans required by this Order. The defendants shall pay the travel and other reasonable expenses of Mr. Pontesso and compensation at the rate of $135 per day, not to exceed five days.

XVIII.

Damages

31. Judgment is entered in favor of the defendants and against the plaintiffs in connection with the claim for money damages by the plaintiffs in the case at No. 75–412.

XIX.

Costs

32. Defendants shall pay all costs.

Application of John R. TRACEY for Appointment of Counsel.

No. 78–3231A.

United States District Court, D. Kansas.

Oct. 11, 1978.

On request for appointment of an attorney to represent a prisoner at a parole violation hearing, the District Court, Stanley, Senior District Judge, assigned, held that on request for appointment of counsel by an indigent parolee, though the fact of his violation has been judicially determined, the court no longer has any discretion but to enter an order granting the application.

Application granted.

Pardon and Parole ⇐14.18

On request for appointment of counsel by indigent parolee, though fact of his violation has been judicially determined, court no longer has any discretion but to enter order granting application. 18 U.S.C.A. §§ 3006A, 4213(d), 4214(a)(2)(B).

John R. Tracey, pro se.

OPINION

STANLEY, Senior District Judge, Assigned.

John R. Tracey, in custody under the provisions of 18 U.S.C.A. § 4213(d), claiming financial inability to retain counsel, has requested the appointment of an attorney to represent him at a parole violation hearing.

The application and attached exhibits establish the following facts: Tracey, serving a sentence imposed after his conviction on the charge of possession of heroin, was on March 18, 1977 released from confinement on special parole with a termination date of March 17, 1982. On July 29, 1977, while on parole status and after trial to the court, he was convicted in the Criminal Court of Marion County, Indiana on the charge of violation of the Indiana Controlled Substance Act. Released on bail pending sentencing scheduled for August 26, 1977 he absconded and remained at large until September 23, 1977 when he was apprehended by state authorities. Tracey thus falls precisely into the class of cases described by the Supreme Court in *Moody v. Daggett*, 429 U.S. 78, 89, 97 S.Ct. 274, 279, 50 L.Ed.2d 236, as a case

> "in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry [being] whether continued release is justified notwithstanding the violation. This is uniquely a 'prediction as to the ability of the individual to live in society without committing antisocial acts'."

The application is submitted under the provisions of 18 U.S.C.A. § 4214(a)(2)(B) providing that if a parolee "is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A". 18

one end, the grocery retailer who buys a single shipment of canned goods buys in ordinary course. At the other end, the person who buys the business with all its inventory does not buy the inventory in ordinary course. What we have here is a situation somewhere between the two. While it might be possible to come up with a judicially formed test that addresses the question, we think that article 6 of the UCC provides a possible framework for analysis.

Under article 6, a bulk sale of inventory of a debtor triggers certain rights in the creditor such as notice from the buyer and a chance to step in and protect its interest. *See* UCC §§ 6–104 to –105. One of the problems sought to be corrected was dissipation of the proceeds of the sale by the debtor to the detriment of the creditor. *Id.* § 6–101, comments 2, 4. Although the comment only mentions the debtor who runs away with the proceeds, we feel that the present situation is sufficiently analogous to warrant use of article 6. Where the Code addresses itself to the same type of problem as that here, we think it better to rely on those provisions rather than trying to formulate a rule ourselves. Moreover, this reasoning is consistent with the goal of the UCC, which is to read the Code as an integrated whole and a comprehensive attempt to deal with problems from a variety of perspectives.

[8] The facts here require a remand for the district court to consider the question in the first instance. For example, the district court must first decide if this was a bulk sale under article 6. *See* UCC § 6–102(1) (sale of a "major part" of the inventory); New Jersey Study Committee Comment to N.J.Stat.Ann. § 12A:6–102, comment 2. This in part will involve the question of what time frame to use in deciding what proportion of Hollander's inventory was sold (*e. g.*, monthly or yearly inventory). Next, the district court must determine if the plaintiff and Hollander complied with article 6. Finally, the court should consider whether the buyer can prevail on any other ground against the creditor under article 6 and whether that ground applies to article 9.

In short, we believe that a bulk sale within article 6 would not be a purchase in ordinary course under § 1–201(9) and § 9–307(1). Accordingly, we reverse and remand to the district court for further proceedings on this question and any other theory that may be applicable.

IV.

The judgment will be reversed and the case remanded for further proceedings consistent with this opinion.

INMATES OF the ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Harry Smith, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated, Appellants,

v.

Robert PIERCE, Chairman, Allegheny County Board of Prison Inspectors and all other members of the Board; James Jennings, Warden of Allegheny County Jail; and James Flaherty, Robert Pierce and Thomas Foerster, Commissioners for Allegheny County; John P. Lynch, Controller for Allegheny County; Eugene Coon, Sheriff for Allegheny County; The Honorable Henry Ellenbogen, The Honorable John W. O'Brien, The Honorable Samuel Strauss, and The Honorable Patrick R. Tamila, Judges of the Court of Common Pleas of Allegheny County; Peter Flaherty, Mayor of the City of Pittsburgh.

No. 78–2621.

United States Court of Appeals,
Third Circuit.

Argued Sept. 4, 1979.

Decided Dec. 28, 1979.

Inmates of county jail brought civil rights action seeking declaratory judgment

that conditions of confinement for pretrial detainees incarcerated in jail violated their constitutional rights. The United States District Court for the Western District of Pennsylvania, Maurice B. Cohill, Jr., J., 457 F.Supp. 984, found that many of the challenged conditions violated constitutional rights of the inmates but held against them on the issues of contact visits, methadone treatment, and psychiatric care, and inmates appealed. The Court of Appeals, Rosenn, Circuit Judge, held that: (1) denial of contact visits did not violate inmates' constitutional rights; (2) district court did not err in finding that system of methadone treatment at jail did not constitute denial of due process; and (3) remand was required for determination whether level of psychiatric care at jail met constitutional requirement that inmates with serious mental or emotional illnesses or disturbances be provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances.

Affirmed in part and remanded in part.

Aldisert, Circuit Judge, concurred and dissented and filed opinion.

1. Constitutional Law ⇐272(2)

Denial of contact visits for county jail inmates did not constitute denial of due process, where evidence indicated that allowing contact visits would present security problem at jail and where there was no indication that prohibition was adopted for purposes of punishment, even though chance of additional contraband reaching jail as a result of contact visits might have been remote. U.S.C.A.Const. Amend. 14.

2. Prisons ⇐4(6)

Denial of contact visits at county jail was a permissible restriction of inmates' right to privacy, where prohibition of contact visits was reasonable response to legitimate concerns of prison security and where restriction prohibiting physical contact was specifically tailored to meet perceived security problem.

3. Constitutional Law ⇐272(2)

Where inmates of county jail who had been receiving methadone treatment prior to incarceration from an approved clinic in the county were given methadone treatment through their sixth day of confinement, after which treatment was terminated, system of methadone treatment at jail would not constitute denial of due process, where there was medical testimony to the effect that system was adequate and where record did not establish any deliberate indifference to inmates' serious medical needs. U.S.C.A.Const. Amend. 14.

4. Prisons ⇐4(6, 7)

Jail authorities may reasonably act so as to exclude contraband from jail environment, and thus they may prohibit contact visits, regulate material received by inmates from outside jail, or institute strip searches of inmates after contact visits with noninmates.

5. Prisons ⇐17

Jail authorities have a legitimate security concern in limiting exposure of inmates to drugs, even those administered on a controlled basis, to as short a period of time as is medically reasonable.

6. Criminal Law ⇐1213

Although negligence in the administration of medical treatment to prisoners is not itself actionable under the Constitution, failure to provide adequate treatment is a violation of the Eighth Amendment when it results from deliberate indifference to a prisoner's serious illness or injury. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8.

7. Constitutional Law ⇐272(2)
Prisons ⇐17

Analysis of whether county jail provided adequate medical treatment to pretrial detainees, as opposed to convicted prisoners, had to proceed under due process clause of Fourteenth Amendment rather than Eighth Amendment, but because it would be anomalous to afford pretrial detainee less constitutional protection than a convicted one, county jail had to meet, at a minimum, "deliberate indifference" standard prohibit-

ing jail from failing to provide adequate medical treatment as a result of deliberate indifference to prisoner's serious illness or injury. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

8. Prisons ⇐17

"Deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate is two-pronged: it requires deliberate indifference on the part of prison officials and it requires prisoner's medical needs to be serious. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

9. Prisons ⇐17

"Deliberate indifference" standard for determining whether medical care afforded prisoners is constitutionally adequate affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients, but where prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating need for such treatment, constitutional standard has been violated. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

10. Prisons ⇐17

Where size of prison medical staff in relation to number of inmates having serious health problems constitutes an effective denial of access to diagnosis and treatment by qualified health care professionals, "deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate has been violated, for, in such circumstances, exercise of informed professional judgment as to serious medical problems of individual inmates is precluded by patently inadequate size of the staff.

11. Prisons ⇐17

"Deliberate indifference" standard for determining whether medical treatment afforded prisoners is constitutionally adequate is applicable in evaluating constitutional adequacy of psychological or psychiatric care provided at a jail or prison; key factor in determining whether system for psychological or psychiatric care in a jail or prison is constitutionally adequate is whether inmates with serious mental or emotional illnesses or disturbances are provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

12. Prisons ⇐17

Even though system of medical care at a jail or prison may itself be constitutionally sufficient, refusal to make that system of care available to a particular inmate may itself be unconstitutional. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

13. Federal Courts ⇐944

In view of fact that record indicated that there were substantial deficiencies in system of psychiatric care at county jail, in view of factors indicating that record did not accurately reflect existing conditions at jail, and in view of lack of any specific finding as to adequacy of system for psychiatric care at jail, case would be remanded for determination as to whether level of psychiatric care at jail met constitutional minimum prohibiting prison officials from being deliberately indifferent to serious medical needs of inmates. U.S.C.A.Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

Jere Krakoff (argued), Mark B. Greenblatt, Jon Pushinsky, Neighborhood Legal Services Association, Pittsburgh, Pa., for appellants.

Alexander J. Jaffurs, County Sol., Dennis R. Biondo (argued), Asst. County Sol., Pittsburgh, Pa., for appellees.

Before ALDISERT, ROSENN and GARTH, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

We are faced on this appeal with a challenge to certain conditions of confinement for pretrial detainees incarcerated in the Allegheny County Jail. On June 2, 1976,

inmates of the jail ("Inmates") filed a class action against the Allegheny County Board of Prison Inspectors ("Board") and other county officials under 42 U.S.C. § 1983 seeking a declaratory judgment that the conditions violate the constitutional rights of the inmates.

On January 4, 1978, the district court issued the first of its two opinions. *Owens-FI v. Robinson,* 442 F.Supp. 1368 (W.D.Pa. 1978). Although it found that many of the challenged conditions did violate the constitutional rights of the inmates, it held against them on the issues of contact visits, methadone treatment, and psychiatric care. These findings were incorporated in the court's final opinion and order of October 11, 1978. 457 F.Supp. 984. The Inmates appealed. We affirm on the issues of contact visits and drug detoxification, and remand on the issue of psychiatric care.

I.

The Allegheny County Jail is used primarily as a detention facility for persons awaiting trial. In addition to pretrial detainees, other inmates are also housed at the jail. These include: inmates who have been convicted but are awaiting sentencing; inmates who have been committed to the jail for misdemeanors for relatively short sentences; inmates on a work-release program; federal prisoners awaiting trial or sentencing; and state and federal prisoners from other institutions held in the jail while testifying in pending state and federal cases. The average daily population is approximately 430 inmates with an average length of confinement of about three weeks. Many inmates, however, are confined for substantially longer periods of time.

The Inmates' action against the Board sought broad scale relief from allegedly unconstitutional conditions at the jail. The district court found that many of the challenged conditions did indeed fall below the constitutional minimum and granted substantial relief.

Although not dispositive of the appeal before us, it is instructive to briefly summarize the conditions found to exist by the district court. Living facilities were unhealthy and unsafe. The plumbing system was antiquated and in disrepair. As a result, leaks and overflows frequently occurred in the cells. The cells lacked adequate lighting; the efforts of inmate-electricians seeking to remedy that defect caused exposed electrical wires which presented fire and shock hazards. Prisoners were required to sleep on canvas cots, many of which were discolored by blood, vomit, feces, and urine. Vermin abounded. Cell temperatures fluctuated between extreme cold in the winter and extreme heat in the summer. The shortage of guards reduced supervision of the inmates and permitted hoarding and vandalism of necessary supplies. This in turn contributed significantly to chronic shortages of necessary items such as blankets and bath towels.

Inmates with a wide spectrum of emotional and mental problems, ranging from simple "acting-out" behavior to drug withdrawal, delirium tremens, epileptic seizures, and mental instability, were confined in the "restraint room." Clothed in hospital gowns or left naked, there they were bound to canvas cots with a hole cut in the middle. A tub was placed underneath the hole to collect the body wastes of the occupant.

Some inmates were placed in solitary confinement for up to fourteen days without a mattress, toilet articles, or a change of clothing. Other inmates were confined in the nude in the isolation cell, an unfurnished, darkened, windowless room for up to fourteen consecutive hours, without any blankets or sheets.

In short, conditions in the jail were shockingly substandard and, the district court found, well below the minimum required by the Constitution. Accordingly, the court entered an order providing relief. The Board does not challenge these findings or the terms of the district court's order. In addition, however, the district court denied the Inmates relief in three specific areas. These denials form the basis of the Inmates' appeal presently before us.

Currently, jail policy precludes inmates and their visitors from physical contact, restricting them instead to booths in which the inmate and visitor are separated by a pane of glass and communication is by telephone.[1] The district court upheld this practice as a legitimate restriction in light of the security interests of the jail.

The Inmates also challenge the method of drug detoxification at the jail. Currently, any inmate who has been receiving methadone treatment from an authorized treatment center in Allegheny County prior to his incarceration is allowed to receive such treatment for six days following the date of confinement, after which the treatment is terminated. The district court upheld this practice as within the sound discretion of prison medical authorities.

Finally, the Inmates challenge the system of psychiatric care at the jail alleging it to be constitutionally inadequate because of insufficient staffing. Although the court ordered psychiatric training for all nurses at the jail and prohibited the further use of restraint cots, it expressed no opinion as to the constitutional sufficiency of the general level of psychiatric care.

II.

[1] The Inmates' first contention on appeal is that the district court erred in ruling that the prohibition of contact visits does not deprive the Inmates of their due process rights under the fourteenth amendment. They argue that, under *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the denial of contact visits represents an "exaggerated response" to an asserted security interest and therefore constitutes a denial of due process. We disagree.

In *Bell v. Wolfish*, the Supreme Court considered the standard to be applied in evaluating conditions of pretrial detention. The Court held that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law we think the proper inquiry is whether those conditions amount to punishment of the detainee." *Bell v. Wolfish, supra*, 441 U.S. at 535, 99 S.Ct. at 1872.

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." . . . Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment". . . . Conversely if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 538–539, 99 S.Ct. at 1874. The Court admonished lower courts that the government's interest in maintaining security and order and operating the institutions in a manageable fashion is "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." 441 U.S. at 540, 99 S.Ct. at 1875 n. 23.

The Inmates argue that there is very little likelihood that additional contraband will find its way into the jail if contact visits are allowed and that contraband will be introduced into the jail in any case. They urge that a plan recommended by the court adviser[2] which would have allowed

1. Inmates are allowed to have visitors three times per week for one hour.

2. Arnold Pontesso was appointed by the district court as its advisor in this case. He previously served as Director of Corrections for the State of Oklahoma as well as Warden of the Federal Reformatory in El Reno, Oklahoma.

contact visits in certain instances, is a reasonable alternative to the absolute prohibition presently imposed and would provide adequate protection for security interests at the jail. Under that plan inmates would not be eligible for contact visits until after having spent 45 days in confinement. The Inmates argue that this plan would protect security interests in a number of ways. First, it would limit the number of contact visits to a manageable level and thus eliminate the need to make major structural changes in the jail. Second, the waiting period would give the jail administration sufficient time to observe the various inmates and identify which of them would pose security risks if permitted to have contact visits. It also would afford the institution sufficient time to set up a visitor list for eligible inmates and determine which visitors might pose security problems.

The Inmates' arguments, however, are unpersuasive. Even though the chances of additional contraband being introduced into the jail by virtue of contact visits may well be small, prohibition of such visits is, nevertheless, not unreasonable. In *Bell v. Wolfish* the Court upheld body cavity inspection of inmates conducted after contact visits. The Court noted that, although

> there has been only one instance where an . . . inmate was discovered attempting to smuggle contraband into the institution on his person [this], may be more a testament to the effectiveness of . . . [the body cavity search] as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell v. Wolfish, supra, 441 U.S. at 559, 99 S.Ct. at 1884–1885.

The rationale applied in *Wolfish* is applicable here, particularly because the procedure the Court upheld was directed at detecting contraband that the prisoners might attempt to smuggle in after contact visits. Testimony in this case, by both the present and past wardens of the jail indicates that preventing the introduction of contraband into the jail is the primary reason for the ban on contact visits. The district court chose to credit that testimony and we cannot say that its decision was clearly erroneous. The court found that "[a]llowing contact visits would present a security problem at the jail." Thus, even though the chance of additional contraband reaching the jail as a result of contact visits may be remote, jail officials may reasonably act to remove even that remote possibility.

Similarly, the existence of other less restrictive alternatives is also not dispositive. As the Court indicated in *Wolfish*, unless the decision of prison authorities has a punitive purpose or is unreasonable or exaggerated in relation to an otherwise legitimate purpose, it is entitled to deference.

[2] There is no indication in the record that the prohibition was adopted for purposes of punishment. The Inmates, however, further argue that the prohibition of contact visits encroaches upon a fundamental zone of privacy, the family relationship, and therefore, is deserving of heightened scrutiny even under *Bell v. Wolfish*. However, assuming a fundamental right is implicated by the prohibition of contact visits, we believe that prohibition to be a permissible restriction in the context of this case.

As the Court noted in *Wolfish*, "even when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish, supra*, 441 U.S. at 547, 99 S.Ct. at 1878. *See Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). As we noted above, the prohibition of contact visits is a reasonable response to legitimate concerns of prison security. An inmate is not precluded from visiting with members of his family and others, but only from physical contact with those individu-

als.[3] Thus the restriction is specifically tailored to meet the perceived security problem. Further, the district court noted that, were contact visits to be allowed, other costly and extensive security measures would be required to prevent the entry of contraband. Where contact visits are allowed such measures include: installation of metal detectors, fluoroscopes, strip search rooms, and the testing of urine samples for drugs. The court found that requiring these in the antiquated facilities of the Allegheny County jail "would place an undue burden on the administration." In such circumstances, a ban on contact visits represents a reasonable choice by prison officials between alternative methods of protecting the legitimate security interests of the jail.[4] Thus, we affirm the holding of the court permitting the jail officials to prohibit contact visits.

III.

[3] The Inmates' next claim is that the district court erred in its finding that the system of methadone treatment at the jail does not constitute a denial of due process. Inmates of the jail who have been receiving methadone treatment prior to incarceration from an approved clinic in Allegheny County[5] are given methadone treatment through their sixth day of confinement, after which treatment is terminated.[6]

The testimony of the medical experts conflicted; one testified that seven days of methadone treatment would be sufficient and another advocated administering decreasing methadone dosages over a twenty-one day period. Both the prior and present jail physicians approved of the jail's program of treatment. The district court concluded that the appropriate form of treatment involved a "discrete medical judgment" and it found no abuse of discretion of the jail physicians regarding the choice of treatment. On this record, we perceive no "deliberate indifference" to the inmates' serious medical needs in disregard of the standard enunciated in *Estelle v. Gamble*, 429 U.S. 97, 105–06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

The Inmates, however, argue that our opinion in *Norris v. Frame*, 585 F.2d 1183 (3d Cir. 1978), requires that we vacate the district court's holding and remand for further fact finding. In *Norris*, we held that because Pennsylvania has by regulation provided specific procedures for termination of methadone treatment, *id.* at 1189 n.17, a pretrial detainee who has been receiving such treatment in an approved program prior to incarceration, has a due process liberty interest in the continuation of such treatment. We held that when prison officials seek to terminate that treatment other than in accordance with the procedures required by that regulation they must "demonstrate . . . a legitimate security concern, or a genuine fear of substantial administrative disruption." Id. at 1185.

Our opinion in *Norris*, however, must be read in light of the Supreme Court's opinion in *Bell v. Wolfish, supra.* There the Supreme Court set forth the standard to be used in evaluating the constitutionality of conditions of pretrial confinement. The

3. We note that the restriction at issue here does not prevent visits from non-inmates but only prohibits contact visits. *See Valentine v. Englehart*, 474 F.Supp. 294 (D.N.J., 1979) (court holds ban on visits by children unconstitutional under *Bell v. Wolfish.*)

4. Although the issue was not before it in *Wolfish*, the Court implied that prohibition of contact visits is a reasonable alternative to body cavity searches in preventing contraband from entering a jail or prison. *.Bell v. Wolfish*, 441 U.S. at 559–60, 99 S.Ct. 1861 n. 40.

5. Currently, inmates who have been receiving methadone treatment from clinics located outside Allegheny County receive no methadone treatment after incarceration. The district court found this "uneven treatment" to constitute a violation of the Equal Protection Clause. Nevertheless, the court apparently ordered no relief in this regard and the parties do not raise the issue on appeal.

6. The district court, however, found that the inmate can request other medication to help ease the effects of his methadone or heroin withdrawal. Those dispensed at the jail included the tranquilizer Sparine and such medicine as Tylenol, Maalox, and Benadryl.

governing inquiry, as we noted above, is whether the particular condition or restriction has a punitive purpose. "Absent a showing of an expressed intent to punish on the part of detention facility officials," we must determine "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish, supra*, 441 U.S. at 538, 99 S.Ct. at 1873–1874.

In this case, there is nothing in either the district court's opinion or the record of the testimony presented at trial which indicates a punitive purpose on the part of jail authorities. The district court itself held that, given the circumstances, the methadone treatment provided at the jail constituted a reasonable medical decision. We believe the record supports the court's conclusion.

[4, 5] There also appears to be a permissible purpose in curtailing the methadone treatment. Jail authorities may reasonably act so as to exclude contraband from the jail environment. *See Bell v. Wolfish, supra.* Thus, they may prohibit contact visits, regulate the material received by inmates from outside the jail, or institute strip searches of inmates after contact visits with non-inmates. Such measures have been held to be reasonably related to the legitimate concerns of institutional security. This type of concern is also evinced in the testimony of the jail wardens. It appears to us that such a legitimate security interest is also present in the jail's restriction of methadone treatment. Drug use in jails or prison facilities is certainly of the utmost concern to jail and prison authorities. That is true whether the drug is heroin, marijuana, or methadone. The potential for jail or prison disruption caused by the presence of drugs is well-known. Thus, jail authorities have a legitimate security concern in limiting exposure of inmates to drugs, even those administered on a controlled basis, to as short a period of time as is medically reasonable. We therefore perceive no error in the district court's approval of the methadone detoxification program.

IV.

The Inmates' final contention is that the relief granted by the district court, fails to raise the level of psychiatric care at the jail to the constitutionally required minimum.

Expert testimony at trial indicated that, of an average daily population at the jail of approximately 430 inmates, between 60 and 80 could reasonably be expected to have "easily identifiable and fairly serious mental health problems." Notwithstanding, there are no psychiatric care professionals on the staff of the jail. The medical staff consists of one part-time physician and five registered nurses. Although the doctor is on call twenty-four hours a day he spends approximately two hours a day at the jail. Of this, generally less than fifteen minutes per day is spent in the jail hospital—which includes the restraint ward. Testimony indicated that the doctor spends approximately 35 seconds with each patient in restraint in reaching his decision as to the need for continued restraint. No nurses are stationed in the jail hospital. A nurse will visit the hospital twice every shift for fifteen or twenty minutes in order to dispense medication.

Some assistance is provided to the jail physician by the psychiatrists of the Allegheny County Behavior Clinic. The Clinic is under the jurisdiction of the Allegheny County Court of Common Pleas and is responsible for evaluating all persons charged with homicide, sex offenses, and certain other crimes regardless of whether they are incarcerated. The Clinic, however, has no formal responsibility for psychiatric diagnosis and treatment of inmates of the jail. Nevertheless, when requested by the jail physician, a Behavior Clinic psychiatrist will see patients at the jail and recommend medication. The decision whether to actually prescribe and administer the medicine remains with the jail physician, however. This is because the Clinic is primarily diagnostic and is not involved in treatment. Even then, testimony indicates the psychiatrist will generally see a patient only one time, although where deemed necessary

more visits will be made. From the record it appears that the diagnosis offered by the Clinic is conclusory and without the sort of full explanation that would normally be offered if the case had been referred by another physician. The record also indicates that restraint and administration of psychotropic medication remain the primary methods of treatment for psychiatric disturbances at the jail. Expert testimony indicates that without the close supervision that is lacking at the jail, administration of such drugs is likely to be either ineffective or dangerous.

The district court's order does provide some relief: the court forbade the further use of restraint cots, limited the use of restraints in general, and ordered that all nurses at the jail receive psychiatric training. The court, however, expressed no finding as to the adequacy of psychiatric care at the jail.

[6–8] Although negligence in the administration of medical treatment to prisoners is not itself actionable under the Constitution, failure to provide adequate treatment is a violation of the eighth amendment when it results from "deliberate indifference to a prisoner's serious illness or injury." *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). Because the case before us involves pretrial detainees, rather than convicted prisoners, our analysis must proceed under the Due Process Clause of the fourteenth amendment rather than the eighth amendment. *See Bell v. Wolfish, supra*, 441 U.S. at 535, 99 S.Ct. 1861. Nevertheless, "[i]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted." *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1079–80 (3d Cir. 1976). Thus, at a minimum the "deliberate indifference" standard of *Estelle v. Gamble*, must be met. As we noted in *West v. Keve*, 571 F.2d 158 (3d Cir. 1978), the *Estelle* test is two-pronged. "It requires deliberate indifference on the part of prison officials and it requires the prisoner's medical needs to be serious." *Id.* at 161.

[9] Appropriately, this test affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients. Courts will "disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment." *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977). Implicit in this deference to prison medical authorities is the assumption that such an informed judgment has, in fact, been made. When, however, prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment, the constitutional standard of *Estelle* has been violated. *West v. Keve, supra*, 571 F.2d at 162.

Systemic deficiencies in staffing which effectively deny inmates access to qualified medical personnel for diagnosis and treatment of serious health problems have been held to violate constitutional requirements. In *Gates v. Collier*, 349 F.Supp. 881 (N.D. Miss.1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974), for instance, the court found that "[t]he medical staff and available facilities [at the Mississippi State Penitentiary] fail to provide adequate medical [treatment] for the inmate population." 349 F.Supp. at 888. As a result the court ordered the hiring of additional medical staff, both physicians and nurses, to bring the level of medical care up to the constitutional minimum.

[10] In *Newman v. Alabama*, 349 F.Supp. 278 (M.D.Ala.1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), the court found that "gross understaffing" of medical facilities in the Alabama prison system constituted a constitutional violation. As the Second Circuit noted in *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977), "[w]hen systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers." *See Bishop v. Stoneman*, 508 F.2d 1224 (2d Cir.

1974). Thus, where the size of the medical staff at a prison in relation to the number of inmates having serious health problems constitutes an effective denial of access to diagnosis and treatment by qualified health care professionals, the "deliberate indifference" standard of *Estelle v. Gamble* has been violated. In such circumstances, the exercise of informed professional judgment as to the serious medical problems of individual inmates is precluded by the patently inadequate size of the staff.

[11, 12] Although most challenges to prison medical treatment have focused on the alleged deficiencies of medical treatment for physical ills, we perceive no reason why psychological or psychiatric care should not be held to the same standard. The leading case in this respect is *Bowring v. Godwin, supra.* There, in holding that a convicted prisoner is entitled to psychological or psychiatric care for serious mental or emotional illness, the court noted that it saw "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Bowring v. Godwin, supra,* 551 F.2d at 47. See *Laaman v. Helgemoe,* 437 F.Supp. 269 (D.N.H.1977). Further, expert testimony received at trial in the instant case indicated that the failure to provide necessary psychological or psychiatric treatment to inmates with serious mental or emotional disturbances will result in the infliction of pain and suffering just as real as would result from the failure to treat serious physical ailments. Thus, the "deliberate indifference" standard of *Estelle v. Gamble* is applicable in evaluating the constitutional adequacy of psychological or psychiatric care provided at a jail or prison. The key factor in determining whether a system for psychological or psychiatric care in a jail or prison is constitutionally adequate[7] is whether inmates with serious mental or emotional illnesses or disturbances are provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances. We hold that, when inmates with serious mental ills are effectively prevented from being diagnosed and treated by qualified professionals, the system of care does not meet the constitutional requirements set forth by *Estelle v. Gamble, supra,* and thus violates the Due Process Clause.

[13] The record before us indicates there are substantial deficiencies in the system of psychiatric care at the Allegheny County Jail. Nevertheless, we are not confident that the record accurately reflects existing conditions at the jail. As indicated at oral argument, it does not contain the two reports of the advisor appointed by the district court nor does it reflect the change in conditions caused by the district court's order.[8] Furthermore, the district court did not make a specific finding as to the adequacy of the system for psychiatric care at the jail. We, therefore, remand to the district court for its determination whether the level of psychiatric care meets the constitutional minimum in light of the standards which we have articulated.[9] Should the district court determine that the constitutional requirements have not been satisfied, it will then, of course, order such relief as it finds is required.

V.

The judgment of the district court accordingly will be affirmed on the issue of contact visitation and drug detoxification. The district court's judgment on the issue of psychiatric care will be vacated and the

7. We caution, however, that even though the *system* of care may itself be constitutionally sufficient the refusal to make that system of care available to a particular inmate may itself be unconstitutional. *See Bowring v. Godwin, supra.* We are not faced with that issue here, however, and express no opinion as to the relevant standards to be applied in making that determination.

8. The Board, for instance, alleged at oral argument that the improved recordkeeping required by the district court's order indicates that psychiatrists from the Behavior Clinic now spend a substantial amount of time at the jail.

9. The district court may receive whatever additional evidence it deems relevant in making that determination.

case remanded for further proceedings not inconsistent with this opinion.

Each side to bear its own costs.

ALDISERT, Circuit Judge, concurring and dissenting.

Because I find no error in the disposition by the trial court of the three basic constitutional issues presented by this appeal—contact visits, methadone treatment, and psychiatric care—I would affirm the judgment of the district court in full. Accordingly, I join parts II and III of Judge Rosenn's opinion affirming those portions of the district court's judgment which determine that the county jail rules prohibiting contact visitations and administering methadone treatment do not offend the fourteenth amendment. For the reasons that follow, however, I dissent from the majority's reversal of that part of the judgment relating to psychiatric care.

I.

In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the prisoner-plaintiff suffered a back injury during a prison work assignment when a bale of cotton fell on him. He was initially examined and returned to work but then was re-examined, prescribed a painkiller, and permitted to remain in his cell. During a three month period he was seen by medical personnel on seventeen occasions but, allegedly, was treated inadequately for his back injury, high blood pressure, and heart problems. Presented with the opportunity for deciding when faulty medical treatment of an inmate amounts to a constitutional deprivation, the Court determined that the government has an obligation to provide medical care for those it is punishing by incarceration, that *denial* of medical care causes pain and suffering inconsistent with contemporary standards of decency, and then concluded that deliberate indifference to serious medical needs of prisoners constitutes a violation of the eighth amendment:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once proscribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

429 U.S. at 104–05, 97 S.Ct. at 291 (citations and footnotes omitted). The deliberate indifference standard, however, was clarified by the Court to include only "wanton infliction of unnecessary pain" and not circumstances caused by an accident or by inadvertent failure:

> Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 106, 97 S.Ct. at 292. Subsequently, in *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Court specifically instructed that the proper constitutional inquiry is whether conditions of pretrial detention amount to punishment of the detainee.

It is against the standards announced in *Estelle* and *Wolfish* that we must evaluate the claims that the psychiatric procedures offend the eighth and fourteenth amendments. In my view, the legal precepts that control require us to decide whether appellants met their burden of proof before the district court by satisfying (1) the test of *Estelle*: whether there was "deliberate indifference to serious medical needs" constituting "unnecessary and wanton infliction

of pain," and (2) the test of *Wolfish*: whether conditions or medical treatment were designed "for the purpose of punishment," or if not expressly so designed, were "not reasonably related to a legitimate goal," or were "arbitrary or purposeless." 441 U.S. at 539, 99 S.Ct. at 1874.

II.

Applying these legal precepts to the facts adduced at trial on the adequacy of psychiatric treatment, I concur in the result reached by the district court. I agree with the majority that the district court made no findings *ipsissimis verbis* as to the adequacy of psychiatric care at the jail, but after examining a voluminous record and a comprehensive opinion dealing with many phases of jail conditions, supplemented by decrees which ordered sweeping reforms, I find no fault in the district court's final resolution of the constitutional issues relating to psychiatric care. By ordering special training for the nurses, the district court implicitly considered it unnecessary to require the jail to install additional professional staff or procedures in order to meet minimum constitutional standards. Judge Cohill ordered:

> 14. A sufficient number of nurses who qualify as psychiatric nurses shall be employed so that there will be at least one psychiatric nurse on duty at the jail at all times.

Appendix for Appellants at 76a.

> 25. The defendants shall, by January 1, 1979, arrange for a training program for present and future jail nurses in the area of psychiatric nursing. All present jail nurses must enroll in the program as soon as it is established. All nurses employed by the jail in the future shall, within six months of their date of employment, complete said training course.

Id. at 96a–97a.

The testimony concerning adequate psychiatric care was conflicting. Appellants presented expert witnesses supporting the necessity for expanded services. Appellees presented expert testimony to the contrary. Dr. Alphonse J. Cipriani described how the jail physicians referred appropriate cases to a psychiatric setting if the symptoms warranted:

> Q. But in the case of men who have psychiatric disorders, specifically, [the nurses] are not trained?
>
> A. No. As I indicated before, we are into a philosophical question, I would repeat for the Court, this is a County Jail with a medical infirmary, a medical hospital, a medical restraining room. We are a County Jail.
>
> I am not, and we are not a psychiatric hospital. We are not a psychiatric unit. The patients, as I said before, get adequate care until final disposition is made.
>
> Now if final disposition means within 24 hours I should have this patient in a general hospital, that's where he or she goes. If it means that this patient should be in a psychiatric setting immediately even before the psychiatric consultation agrees, I told you, that is the way that patient would be handled, the disposition.
>
> But in terms of being a County Jail, they are getting good, adequate psychiatric and general medical care for that period of time that they are there until the Court decides the final disposition.
>
> It is my opinion. That's what I have observed in three months.

Appendix for Appellees at 6b.

Testimony was also adduced that a jail physician is on call twenty-four hours a day and is actually on the premises approximately two and one-half hours a day, and that the services of the Allegheny County Behavior Clinic, an arm of the court of common pleas, are available to the inmates. Five psychiatrists and two psychologists from the clinic "have direct involvement in the Allegheny County Jail." Appendix for Appellants at 369a. The director of the clinic testified that the clinic acts as "psychiatric consultant to Dr. Smith, the jail physician." *Id.* at 372a. Upon request of the jail physician, an inmate will be examined by a Behavior Clinic psychiatrist, a diagnosis will be made, and medication or other treatment will be recommended to the jail physician. *Id.* at 374a. These psy-

chiatrists are available five days a week. *Id.* at 385a.

On this record I cannot conclude that appellants met either their burden under *Estelle* of proving "deliberate indifference to serious medical needs" or the test of *Wolfish*, that the professional psychiatric care was "[designed] for the purpose of punishment," or if not expressly so designed, was "arbitrary or purposeless." For their part, the majority conclude that they "are not confident that the record accurately reflects existing conditions at the jail." Maj. Op., at 763. The function of an appellate court in the Anglo-American tradition, however, is to review the judgment of the district court based on the record before it. Having reviewed that record I would affirm the judgment of the district court in all respects.

Jerry Wayne RHODES, Appellant,

v.

William B. ROBINSON, Lowell D. Hewitt, Richard D. Kelly, Dennis R. Erhard, Terry W. Henry, David P. Malone, Steve G. Polte, Charles D. Rodgers, Eugene C. Wicker, Gilbert N. Mountain, Sgt. Varner, B. Lear, James O. Miller, Richard I. Norris, James Morder, Lieutenant Myers, Appellees.

No. 78-2525.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Sept. 17, 1979.

Decided Dec. 28, 1979.

Suit was brought by state prisoner to redress violations of his constitutional rights. The United States District Court for the Middle District of Pennsylvania, Malcolm Muir, J., granted defendants' motion for summary judgment on nine claims, and, after trial on remaining claim was completed, prisoner appealed from grants of summary judgment. The Court of Appeals, Seitz, Chief Judge, held that: (1) prisoner, who worked as clerk in prison law library, had standing to object to restriction on his duties prohibiting him from assisting other prisoners in preparation of their legal materials; (2) prisoner's asserted intention to use photocopying machine to send copies of certain papers concerning prior criminal conviction of guard to state legislators could not supply basis for First Amendment violation; (3) discarding of out-of-date advance sheets and supplementary pamphlets by prison officials did not interfere with prisoner's access to courts; and (4) no basis existed for challenging transactions between prison and its inmates simply because transactions returned profit to prison administration.

Affirmed in part and vacated and remanded in part.

1. Constitutional Law ⇐42.1(3)

In light of fact that many prisoners were unable to prepare legal materials and file suits without assistance, and since challenged restriction might materially impair ability of some prisoners to file civil rights actions, prisoner had standing to object to restriction prohibiting him from assisting other prisoners in preparation of their legal materials while on duty as clerk in prison law library on ground that restriction violated other prisoners' access to courts and violated their rights under due process clause. U.S.C.A.Const. Amend. 5.

2. Constitutional Law ⇐90.1(1)

Selective denial of photocopying privileges amounted to censorship of prisoner's speech since, with any such denial, prison superintendent reduced prisoner's ability to communicate through written materials, and consequently prison superintendent's denial of privileges was subject to scrutiny under the First Amendment. U.S.C.A. Const. Amend. 1.

option to affirm or reject executory contracts. It does not, however, enlarge the contract rights of the debtor under state law. If the non-bankrupt party to a contract has, under state law, a right to rescind, that right is unaffected by section 365. Indeed section 365(b)(1) provides explicitly that "[i]f there has been a default in an executory contract ... the trustee may not assume such contract ... unless ... the trustee—(A) cures ... such default; (B) compensates ... for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract...." The joint tortfeasors do not suggest that the conditions specified in section 365 have been satisfied. So far as this record discloses, Unarco's trustee in bankruptcy could not affirm the executory settlement agreement. Thus nothing in the Bankruptcy Code supports the majority's holding that Pennsylvania law, which allows the victim to avoid the settlement agreement and sue on the underlying cause of action, is preempted by federal bankruptcy law.

I would hold, therefore, that the Roccos' claims should not have been reduced by the amount of the unpaid stated consideration in a release, which is voidable under Pennsylvania law despite Unarco's bankruptcy.

INMATES OF the ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Harry Smith, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated

v.

Cyril H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board; Thomas Foerster and William Hunt, Commissioners for Allegheny County, Frank J. Lucchino, Controller for Allegheny County, Eugene Coon, Sheriff for Allegheny County, the Honorable Patrick R. Tamilia, Michael J. O'Malley and Marion K. Finkelhor, Judges Court of Common Pleas of Allegheny County; Richard S. Caliguri, Mayor of the City of Pittsburgh, Harriet McCray, Monsg. Charles Owen Rice and Charles Kozakiewicz, Warden of the Allegheny County Jail, and William B. Robinson, Executive Director of Prison Inspectors and Cyril Wecht, Thomas Foerster and William H. Hunt, as Commissioners of Allegheny County, Appellants.

Nos. 84-3024, 84-3191.

United States Court of Appeals, Third Circuit.

Argued Oct. 18, 1984.

Decided Jan. 29, 1985.

County officials appealed from two orders of the United States District Court for the Western District of Pennsylvania, Maurice B. Cohill, Jr., J., denying their motion for modification of an earlier order placing maximum population limits for male and female inmates in jail and order directing them to pay a sanction of $5,000 for each prisoner released from jail in order to comply with inmate population limits. The Court of Appeals, Gibbons, Circuit Judge,

held that: (1) District Court order denying county officials relief from earlier order imposing limit on permitted inmate population was fully supported by record evidence, and (2) order directing county officials to pay sanction of $5,000 for each prisoner released from jail in order to comply with inmate population limits imposed by court could not be upheld as a civil contempt order or as a modification of underlying injunction.

Affirmed in part and vacated and remanded in part.

1. Federal Courts ⇐829

Since extraordinary-circumstances standard applicable to trial court's exercise of discretion on motion for relief from judgment is a strict one, the Court of Appeals' review of denial of motion for relief from judgment when it is no longer equitable that judgment should have prospective application is commensurately narrow and where evidentiary hearing has been held, trial court's findings of fact must be accepted unless clearly erroneous. Fed. Rules Civ.Proc.Rules 52(a), 60(b), (b)(5), 28 U.S.C.A.

2. Federal Courts ⇐829

Trial court's exercise of discretion in ruling on motion for relief from judgment in light of supportable findings of fact will not be disturbed unless there was a clear abuse. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2651

Trial court did not abuse its discretion in denying county officials' motion for relief from judgment for what county officials proposed in their motion was to reinstate conditions in county jail when they had already been found to be constitutional violations and relief requested would add new risks to health and safety of inmates. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

4. Injunction ⇐231

Court of Appeals had appellate jurisdiction to review order imposing sanction of $5,000 on county officials for each prisoner released from custody under terms of a previous district court order, whether order was intended as civil contempt order or modification of underlying injunction. 28 U.S.C.A. §§ 1291, 1292(a)(1).

5. Contempt ⇐2

Persons may not be placed at risk of contempt unless they have been given specific notice of norm to which they must pattern their conduct.

6. Contempt ⇐20

Under terms of district court order county officials were free to do what they were doing with respect to terms of overcrowding in county jail in releasing prisoners in order to comply with population limits in jail and since they were not given any specific direction to prepare and implement alternative plan for housing inmates, officials could not be held in civil contempt for failing to do so however irresponsible that failure may have been.

7. Civil Rights ⇐13.16

A district court order directing county officials in charge of overcrowded jail to pay $5,000 to clerk of district court for each released inmate lacked sufficiently specific nexus with underlying constitutional violations and their corrections so as to amount to an abuse of discretion.

Edward Feinstein (argued), Timothy P. O'Brien, Neighborhood Legal Services Ass'n, Pittsburgh, Pa., for appellees.

James H. McLean, County Sol., Dennis R. Biondo (argued), Allegheny County Law Dept. Pittsburgh, Pa., for appellants.

Before GIBBONS and BECKER, Circuit Judges, and VAN DUSEN, Senior Circuit Judge.

OPINION OF THE COURT

GIBBONS, Circuit Judge:

County Officials of Allegheny County appeal from two orders entered by the United States District Court in the longstanding

dispute over conditions at the Allegheny County Jail. In No. 84–3191 they appeal from an order dated March 13, 1984, denying their motion for modification of a May 25, 1983 order placing maximum population limits for male and female inmates in the jail. In No. 84–3024 the county officials appeal from an order dated December 30, 1983, directing them to pay a sanction of $5,000 for each prisoner released from the jail in order to comply with the inmate population limits. We affirm in No. 84–3191, and vacate and remand in No. 84–3024.

I.

Prior Proceedings

A. The 1978 and 1980 Proceedings

On January 4, 1978 the district court, after a six-week trial in a class action brought pursuant to 42 U.S.C. § 1983 (1982), held that the conditions in which inmates of the jail were held violated the United States Constitution in numerous respects. *Owens-El v. Robinson,* 442 F.Supp. 1368 (W.D.Pa.1978). In order to remedy those violations the court appointed a master to make a report and recommendations. The court adopted the master's recommendations in a final injunction dated October 11, 1978. *Owens-El v. Robinson,* 457 F.Supp. 984 (W.D.Pa.1978). The defendants did not appeal. The class representatives, however, appealed with respect to three requested remedies not included in the judgment. This court in *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754 (3d Cir.1979) affirmed the district court on two of the issues, but remanded for further consideration of changes in the decree necessary to raise the level of pyschiatric care at the jail to the minimum required by the Constitution. After a five-day non-jury trial the district court in *Inmates of Allegheny County Jail v. Pierce,* 487 F.Supp. 638 (W.D.Pa.1980) found that the conditions in the jail with respect to care of mentally ill inmates amounted to deliberate indifference within the meaning of *Estelle v. Gamble,* 429 U.S. 97, 105–06, 97 S.Ct. 285, 291–92, 50 L.Ed.2d 251 (1976). The court also found that the provisions of the October 11, 1978 final injunction had not been fully complied with, and on April 17, 1980 entered an order directing that the October 11, 1978 order be fully implemented, and that specific steps be taken to remedy deliberate indifference to the care of mentally ill inmates. *Inmates,* 487 F.Supp. at 643–45. No appeal was taken from the April 17, 1980 judgment.

B.

The April 1983 Proceedings

At the time of the October 11, 1978 judgment the inmate population of the jail had not been found to be a factor contributing to the constitutional violations identified by the court. Indeed in 1975 the average daily inmate population was only 429, and the court found that "[o]vercrowding of the institution is not a problem." *Owens-El,* 442 F.Supp. at 1376. By April of 1983, however, conditions in the jail had been radically altered by an increase in the average daily inmate population to 690. The class representatives brought the deteriorating conditions to the district court's attention by moving to hold the defendants in contempt for failing to comply with the October 11, 1978 and April 17, 1980 orders, and for additional relief. The court held a six-day hearing on these motions, and found ongoing violations of both the October 11, 1978 and April 17, 1980 orders. Despite the seriousness of many of the violations, the court held that the conduct of the defendants did not rise to the level of contempt. The defendants moved to dismiss the motion for additional relief. The trial court denied this motion, holding that the class representatives had made an adequate showing of the need for such relief. The court credited the testimony of defendant William B. Robinson, a prior warden and currently Executive Director of the Allegheny County Prison Board, that the maximum number of inmates should be 475–500 males in the main unit, 63 males in the receiving unit, and 38 in the female section. On May 5, 1983 when the court

toured the jail, the inmate population was 705. Robinson forecasted that if present arrest and sentencing trends continued the average daily population would eventually rise to 940. Summarizing its detailed findings of fact, the trial court observed:

> *The jail is now dangerously overcrowded. Fires and prisoner unrest are an ever-present danger in any penal setting. Here they could result in disaster. The Allegheny County Jail is a catastrophe waiting to happen.* 565 F.Supp. 1278, 1281.

App. 57a (emphasis in original). Not finding the overcrowding to be for the express purpose of inflicting punishment, the court nevertheless held it to be a constitutional violation because the sole justification advanced for the crowded conditions was Allegheny County's disinclination, for economic reasons, to spend the funds necessary to provide additional facilities. "As a result," the trial court continued, "the jail remains with us—old, dilapidated and unconstitutionally overcrowded." App. 98a. Moreover, the court observed, "this condition impedes the implementation of the 1978 and 1980 orders. Therefore, an order to reduce the overcrowding not only is within our power to correct the constitutional violations, but also falls within our remedial powers to modify and enforce our previous orders." App. 99a. Accordingly on May 25, 1983 the court ordered:

> [T]he population of the Allegheny County Jail [shall] be reduced as follows:
>
> a. After July 1, 1983, there shall be no more than 650 male and 60 female inmates housed in the Jail.
>
> b. After August 15, 1983, there shall be no more than 600 male and 50 female inmates housed in the Jail.
>
> c. After October 1, 1983, there shall be no more than 550 male and 40 female inmates housed in the Jail.
>
> d. After January 1, 1984, there shall be no more than 500 male and 30 female inmates housed in the Jail.

App. 104a. No appeal was taken from the May 25, 1983 order.

C.

The October 1983 Proceedings

Initially the defendants complied with the population caps. On August 4, 1983, however, they moved for relief from the May 25, 1983 order because of the anticipated difficulty in finding alternative arrangements for incarceration. This motion was denied, and no appeal was taken. On September 30, 1983 the defendants moved, again, for relief from the May 25, 1983 order. App. 107a. Their moving papers conceded that on September 30, 1983 the jail population exceeded the October 1, 1983 caps (550 males and 40 females) by 42 males and 7 females. As before, defendants relied upon the difficulty in finding alternative arrangements for incarceration.

The class representatives opposed modification of the May 25, 1983 order, pointing to the absence of any concrete proposal by the defendants for alternate arrangements, and to the willingness of several private charitable agencies to assist the county in housing low-risk inmates. The class representatives also moved that the court "[o]rder Defendants, under penalty of fine or other penalty as deemed appropriate by this Court, to immediately reduce the population of the Jail by whatever means necessary ... and to order any other relief necessary to ensure compliance with the Court's order." App. 115a.

A hearing on these motions, at which the defendants offered testimony, was held on October 10, 1983. In its opinion disposing of them the trial court found that since August 15, 1983 the population has been almost constantly in excess of the limits set for October 1, 1983. It found, further, that "[a]lthough there has been some reduction in population, the dangerously overcrowded condition of the jail is just as serious today as it was on May 25, 1983." App. 187a. To meet that emergency, the court held that Director William B. Robinson and Warden Charles Kozakiewicz would be ordered to release on their own recognizance those prisoners held in default of the lowest amount of bail, until the population limits of the May 25, 1983 order were met.

App. 186a. On October 20, 1983 such an order was entered.[1] 573 F.Supp. 454.

No appeal was taken from the October 20, 1983 order.

D.

The December 30, 1983 Proceedings

When the October 20, 1983 order went into effect on November 1, 1983 Director Robinson and Warden Kozakiewicz began complying with its terms. By late December, 1983, 14 males and 12 females had been released. The order provided that it would be reviewed on or before March 1, 1984. App. 190a. On December 28, 1983 the trial court directed the parties to attend a status conference on December 30, 1983 "to report to the court on what steps the defendants are now taking to obtain interim facilities for housing prisoners pending completion of construction of the new Allegheny County Jail addition." App. 210–11a. At that status conference Director Robinson testified as to the inability of the county to consummate the purchase of a facility to house inmates who could not, under the May 25, 1983 and October 20, 1983 orders, be housed at the jail. He also testified about the unwillingness of the state prison authorities to accept sentenced state prisoners confined in the jail. Finally, he disclosed to the court the number of prisoners released to enable compliance with the October 20, 1983 order. At the conclusion of his testimony the trial court observed:

> Well, I am still concerned about the lack of a facility—of an interim facility. I think the officials at the jail, the Warden and the Director, have done a remarkable job in moving these people around, but I still think that it is a poor substitute for having an interim facility here in the county, and I did prepare an order in anticipation of this hearing this morning, and I see no reason to change it....

App. 227a. The Court thereupon ordered "that after February 15, 1984, a sanction of $5,000 will be imposed against the defendants for each prisoner released under the formula described in this Court's order of October 20, 1983." [2] From this December 30, 1983 order the appeal in No. 84–3024 is

1. The order provided that the Court of Common Pleas was free to specify a different method of bringing the population of the jail into compliance with the May 25, 1983 order. Such a plan was proposed, with a stipulation that if it proved to be unsuccessful the provisions of the October 20, 1983 order would govern.

2. The full text of the order is as follows:

AND NOW, to-wit, this 30th day of December, 1983, after a hearing in open court, it appearing that:

1. the October 20, 1983 Order of this Court set a maximum limit of 500 men and 30 women in the Allegheny County Jail as of January 1, 1984; and

2. the experience at the Allegheny County Jail in recent years has been that the population generally exceeded those limits; and

3. the October 20, 1983 Order of this Court provided that when the various population limits previously ordered were exceeded, and if the Court of Common Pleas did not adopt an alternate plan, jail officials were authorized and directed to release on their own recognizance prisoners held in default of the lowest amount of percentage bail until the population level was met; and

4. jail officials have found it necessary to release some prisoners pursuant to that formula because Allegheny County has not provided an interim facility to house such prisoners pending completion of the Allegheny County Jail addition at the site of the Jones Law Building; and

5. it having been the intention of this Court to order such release only as "a temporary effort to ameliorate the situation, not as a solution to the problem" (*See* Memorandum Opinion of October 20, 1983, page 7); and

6. it being apparent that such releases are a poor substitute for the provision of suitable interim housing facilities; and

7. it being apparent to this Court that it is within the capability of county officials to provide the necessary interim facility;

It is HEREBY ORDERED, ADJUDGED and DECREED that after February 15, 1984 a sanction of $5,000 will be imposed against the defendants for each prisoner released under the formula described in this Court's Order of October 20, 1983. Such funds shall be paid to the Clerk of Court of the United States District Court for the Western District of Pennsylvania. Robert J. Cindrich, Esq., the court-appointed monitor, shall be responsible for monitoring the releases made pursuant to the formula aforesaid.

App. 231a–32a.

taken. This court stayed execution of the $5,000 per person sanction pending appeal.

E.

The March 1983 Proceedings

On February 28, 1984 the defendants moved for a modification of the May 25, 1983 order so as to raise the permitted inmate population of the jail by 80 males. That motion was predicated upon certain repairs made to existing cells, and the proposed installation of two modular trailer housing units in the jail courtyard. The motion does not identify what rule the defendants relied upon, but it is not disputed that they were proceeding under Fed.R. Civ.P. 60(b). A hearing was held on the motion on March 8, 1984 at which time the defendants offered testimony by an architect, a corrections officer, Director Robinson and Warden Kozakiewicz. At the hearing it became apparent that efforts by the county officials to find temporary accommodations elsewhere for inmates had proved to be fruitless, although representations had been made to the court that such accommodations would be operational by March 1, 1984. At the close of the hearing the trial judge visited the jail to personally review the plans presented.

On March 13, 1984 the court denied defendants' motion for relief from the May 25, 1983 order. Addressing the suggested use of trailers the court found:

> For lack of a better word, we will refer to the structure proposed by the defendants as a "trailer," for that is what most witnesses called it. It is not really a trailer, but rather a rectangular metal-covered structure that is 12' 11" high, 28' wide and 76' long set on concrete block piers. It resembles two modular trailers put back-to-back. It is proposed that the trailer house forty inmates in twenty double-decker beds. It has its own toilet and shower facilities (28' × 10') and self-contained climate control but no recreational or living area other than the space between the double deckers. It would have two guards, one in a locked, glass-walled (polycarbonate) security area and another moving throughout the trailer.
>
> The defendants want to place the trailer in an unused recreation yard within the jail. Several considerations militate against permitting the defendants to do this.
>
> ....
>
> What the defendants seem to have overlooked here is that the jail must provide more than a bed for each prisoner. The trailer will allow just under 45 square feet of space *per inmate.* The defendants' petition (Paragraph 3) had alleged that the trailer would contain "recreation-areas," but it did not.
>
> ....
>
> In the case *sub judice,* the proposed trailer would provide only 45 square feet per inmate, far below the minimum standards of any known health or corrections organization or federal court. This lack of space, and the problems associated therewith, would violate the inmates' constitutional rights under the Fourteenth Amendment.
>
> The failure to provide adequate living space for the forty additional inmates is just one of the problems which would be created by the trailer. Director Robinson said that forty additional prisoners would mean additional visitors coming to the already cramped jail visitors' area, more attorneys in the inadequate lawyers' visiting room and an overall greater strain on food-service, the mental health unit and the already-limited gymnasium.
>
> Besides inadequate space, perhaps the worst feature of the trailer proposal is its location. The yard where the defendants want to locate the trailer is immediately outside the jail hospital. The hospital area for patients is a circular room approximately thirty feet in diameter with beds for the patients sticking out from the walls toward the center of the circle.
>
> At the edge of this circle, but in the same room with the hospital patients, is the door leading out to the area where

the trailer would be located. One prisoner-patient's bed is approximately five feet from the door. The day we visited the jail (March 8, 1984) was very cold. When the door was opened for us to go out into the yard, a blast of icy air came right into the hospital room. It was not difficult to imagine what it would be like on a cold winter's day to have forty prisoners and assorted guards trooping in and out through that door past hospital patients suffering various ailments.

If an air lock were placed on the door (a suggestion made by the defendants after we commented on this problem), the cold blasts of air into the hospital might end. However, the constant traffic in and out of the hospital would make it extremely difficult to keep the hospital clean and sanitary, causing a health hazard to the patients. In addition, the forty prisoners and guards travelling to and from the trailer could become infected by the hospital inmates, thus creating a sort of reverse health hazard. Ill prisoners are purposely placed in the hospital ward for two reasons; 1) so that they may receive proper medical treatment, and 2) so that they are kept separate from the general population so as not to spread disease. The latter purpose would be frustrated if forty prisoners who spend their days in general population are in constant contact with the ill inmates.

The location of the trailer poses another very serious problem: the safety of the forty inmates and guards within the trailer in the event of a fire. As previously stated, the trailer will be within the confines of an old recreational yard, an area surrounded by stone walls towering 36 feet into the air. Since this area was once used by inmates for outside recreation, it had to be secure. Therefore, there are no accesses to the street and only one door into the jail itself. If a fire were to start in the trailer or near the door to the jail, those inmates and guards in the trailer would be trapped with no route of escape. If this were to occur, the possibility of serious injuries or death would be enormous.

Addressing the suggested use of cells which had been rehabilitated the court found:

> The petition filed by the defendants also requested that we raise the male population cap by another forty inmates because "Since January 1, 1984, weekly cell reports have indicated that of the 587 existing cells, an average of 548 cells are available for male occupancy in the jail." (Petition, ¶ 7).
>
> The testimony of defendants' witnesses, however, including that of Lt. Matthew W. Kerr, a guard shift commander, revealed that of the 48 additional cells alleged to be available, only 10 could, in reality, be utilized. Some were in the reception area which must be available when an unusually large number of prisoners are brought in at the same time. Others currently (but not usually) were available in the Mental Health Unit and administrative areas. Both Warden Kozakiewicz and Director Robinson estimated that at most ten additional cells could be utilized within the ACJ [Allegheny County Jail].
>
> The additional strain on the inadequate jail facilities caused by the presence of more inmates has already been discussed here in conjunction with the trailer proposal. Needless to say, the same factors apply in connection with using additional cells within the ACJ.

Concluding that the defendants had not convinced him that the May 25, 1983 order should be modified, the court observed:

> While one can always argue that the 500 male population cap is an arbitrary figure, it must necessarily be so. Perhaps another judge, viewing the same factual situation, would say that the constitutional limit could be 510, and such a finding would not necessarily be an abuse of discretion either. Nevertheless, the limitation must be set at some point, and attempts to change the figures, once established, must likewise end. We believe that in its present condition the Allegheny County Jail should have a population of no more than 500 males and 30

females and that any number in excess of those limits would violate the constitutional rights of the inmates.

From the March 13, 1984 order denying their Rule 60(b) motion the defendants appeal at No. 84–3191.

II.

Our Rulings

A. The March 13, 1984 Order

[1, 2] We have appellate jurisdiction to review the denial of a Rule 60(b) motion to modify an injunction. 28 U.S.C. § 1292(a)(1) (1982). Although the defendants do not specify which ground for Rule 60(b) relief they rely upon, we conclude that they are proceeding under Rule 60(b)(5), which provides for relief from a judgment when "it is no longer equitable that the judgment should have prospective application."

> The Rule confers on district judges "[no] standardless residual discretionary power to set aside judgments...." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir.1977). Such relief is extraordinary and may be granted only upon a showing of exceptional circumstances. *Id.*

Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1119 (3d Cir.1979). Since the extraordinary circumstances standard applicable to the trial court's exercise of discretion is a strict one, our review of the denial of Rule 60(b)(5) relief is commensurately narrow. Where, as here, an evidentiary hearing has been held, the trial court's findings of fact must be accepted unless clearly erroneous. Fed.R.Civ.P. 52(a). The court's exercise of discretion in light of supportable findings of fact will not be disturbed unless there was a clear abuse. *Hodge v. Hodge*, 621 F.2d 590, 593 (3d Cir.1980); *S.E.C. v. Warren*, 583 F.2d 115, 120 (3d Cir.1978); *Girard Trust Bank v. Martin*, 557 F.2d 386, 390 (3d Cir.1977); *Virgin Islands National Bank v. Tyson*, 506 F.2d 802, 804 (3d Cir.1974); *Giordano v. McCartney*, 385 F.2d 154, 155 (3d Cir. 1967).

[3] Applying these standards of review, we affirm the March 13, 1984 order. The trial court's findings of fact, far from being clearly erroneous, are fully supported by record evidence that is for the most part undisputed.[3] The defendants made no real showing of extraordinary circumstances occurring since the entry of the May 25, 1983 injunction, from which no appeal was taken. The makeshift arrangements which they proposed in March of 1984 could have been suggested a year earlier, but were not. Instead, the defendants allowed the inmate ceilings to go into effect, while making no arrangements for alternative places of accommodation outside the jail. The County's reluctance to find such alternative accommodations is the same as it was in the spring of 1983. Meanwhile, by virtue of the ceiling on the jail population, some alleviation of the unconstitutional conditions found by the trial court occurred as a result of the May 25, 1983 injunction. As the court's findings make clear, what the defendants proposed in their Rule 60(b)(5) motion was to reinstate conditions which had already been found to be constitutional violations, and to add new risks to the health and safety of inmates. We can find no clear abuse of discretion in the court's denial of the defendants' motion for such extraordinary relief.

B. The December 30, 1983 Order

[4] The parties are not in agreement as to the nature of the December 30, 1983 order imposing a sanction of $5,000 on the defendants for each prisoner released from custody under the terms of the October 20, 1983 order. It is undisputed that the trial court intended the sanction to act as a spur to action by the county with respect to the provision of facilities for housing inmates outside the jail.[4] Since the $5,000 is de-

3. The trial court did discredit several affidavits, filed after the hearing, dealing with health and food services, as inconsistent with testimony at the hearing. The affiants had not been subject to cross-examination.

4. Press reports as recent as December 18, 1984 suggest that the County, despite the spur, still

scribed as a sanction it may have been intended as a civil contempt order. Alternatively, as urged by the class representatives, it may have been intended as a modification of the underlying injunction.

In either event we have appellate jurisdiction. If it was intended as a civil contempt, it was entered in a post-permanent injunction proceeding, and is reviewable under 28 U.S.C. § 1291, but only with respect to the question whether the alleged contemnor has disobeyed the underlying injunction. *Halderman v. Pennhurst State School & Hospital,* 673 F.2d 628, 636–37 (3d Cir.1982). If it was intended as a modification of the underlying injunction, the December 30, 1983 order is reviewable under 28 U.S.C. § 1292(a)(1). Because the trial court's intention is not entirely clear, we will consider alternative constructions of the order.

(1) Civil Contempt

We noted in Part II B above, that in April of 1983 the class representatives moved to hold the defendants in contempt of the October 11, 1978 and April 17, 1980 orders. At the close of the plaintiffs' case the court found that the defendants' conduct did not rise to the level of contempt. App.60a. The class representatives' motion for additional relief was granted, however, resulting in the May 25, 1983 order imposing a cap on inmate population, and other relief.

The other relief in the May 25, 1983 order might well have included a direction to the county defendants to produce and implement a plan within a specified time for housing inmates elsewhere.[5] The court did not do so. Instead the order provided for a gradual reduction of the inmate population over five months, in the obvious hope that the inability to house greater numbers of inmates in the jail would move the county to discharge an obligation resting, under state law, with county government. The sad record of Allegheny County in this respect demonstrates that this hope was misplaced. While the court's frustration over the County's attitude is understandable, even irresponsible officials can only be held in civil contempt as a means of coercing their compliance with specific court orders.

balks. Pittsburgh Post-Gazette, Dec. 18, 1984, at 6, col. 1.

5. Orders to responsible public officials to prepare and submit plans for remedying constitutional violations are not uncommon. Such orders often issue in the school desegregation context. *See, e.g., Green v. County School Bd.,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Monroe v. Bd. of Comm'rs,* 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1968); *Evans v. Buchanan,* 555 F.2d 373 (3d Cir.), *cert. denied,* 434 U.S. 880, 98 S.Ct. 235, 54 L.Ed.2d 160 (1977); *Hoots v. Pennsylvania,* 703 F.2d 722 (3d Cir.1983); *Arthur v. Nyquist,* 547 F.2d 7 (2d Cir.1976), *cert. denied,* 439 U.S. 860, 99 S.Ct. 179, 58 L.Ed.2d 169 (1978); *Brewer v. School Bd. of Norfolk,* 434 F.2d 408 (4th Cir.), *cert. denied,* 399 U.S. 929, 90 S.Ct. 2247, 26 L.Ed.2d 796 (1970); *Cisneros v. Corpus Christi Indep. School Dist.,* 467 F.2d 142 (5th Cir.1972), *cert. denied,* 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044 (1973); *United States v. School Dist. 151 of Cook County,* 404 F.2d 1125 (1968), *cert. denied,* 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111 (1971); *United States v. School Dist. of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280 (1975); *Kelly v. Guinn,* 456 F.2d 100 (9th Cir.1972), *cert. denied,* 413 U.S. 919, 93 S.Ct. 3048, 37 L.Ed.2d 1041 (1973).

Similarly in the prison context the courts have authority to order local officials to take costly measures necessary to cure constitutional violations. *Union County Jail Inmates v. DiBuono,* 713 F.2d 984 (3d Cir.1983). Such orders are often quite comprehensive. *See, e.g., Hamilton v. Landrieu,* 351 F.Supp. 549 (E.D.La.1972) (court order requiring *inter alia:* immediate construction of hospital-infirmary, future construction of indoor recreation area, wage increases for some personnel, additional staffing, renovation of each tier, and provision of funds for an "ombudsman"); *Taylor v. Sterrett,* 344 F.Supp. 411, 422 (N.D.Tex.1972), *aff'd in part, rev'd in part,* 499 F.2d 367 (5th Cir.1974) (court order requiring renovation of cells of several hundred inmates and provision of facilities for recreation, religious and educational programs); *Jones v. Wittenberg,* 330 F.Supp. 707, 720–21 (N.D.Ohio 1971), *aff'd sub nom. Jones v. Metzger,* 456 F.2d 854 (6th Cir.1972) (court order requiring extensive repairs and remodelling). *Cf. Detainees of Brooklyn House of Detention v. Malcolm,* 520 F.2d 392 (2d Cir.1975).

The court has found numerous violations of the successive injunctions entered in this case since October 11, 1978. Indeed, the court has found violations of its May 25, 1983 order imposing population limits. The December 30, 1983 order is not, however, directed toward coercing a correction of such violations. By December 30, 1983 the jail officials were in compliance, and they have given no indication that the population limits will in the future be exceeded.

[5, 6] Plainly, therefore, if the $5,000 per released prisoner is to be regarded as a contempt sanction, it is one aimed at coercing the County into spending the funds needed to develop and implement a plan for an alternative housing arrangement. There is no question but that the defendants are fully aware of the court's wishes in this respect. Wishes, however, are not orders. Fed.R.Civ.P. 65(d) requires that "[e]very order granting an injunction ... shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...." This requirement of specificity is related to the court's awesome civil and criminal contempt powers. Persons may not be placed at risk of contempt unless they have been given specific notice of the norm to which they must pattern their conduct. *Granny Goose Foods, Inc. v. Local 70, International Brotherhood of Teamsters*, 415 U.S. 423, 444, 94 S.Ct. 1113, 1126, 39 L.Ed.2d 435 (1974); *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S.Ct. 713, 715, 38 L.Ed.2d 661 (1974); *Gunn v. University Committee To End The War in Viet Nam*, 399 U.S. 383, 388–89, 90 S.Ct. 2013, 2016–17, 26 L.Ed.2d 684 (1970). Under the terms of the May 25, 1983 order, the County defendants were free to do what they are doing: release prisoners in order to comply with the population limits in the jail. They were not given any specific direction to prepare and implement an alternative plan for housing inmates. Thus they cannot be held in civil contempt for failing to do so, however irresponsible that failure may be.

(2) Modification of the Injunction

[7] The court's October 20, 1983 order provided that it would be reviewed on or before March 1, 1984. Thus the defendants were on notice that the trial court might modify it to provide for additional relief. They were also on notice that in the motion which resulted in the October 20, 1983 order the class representatives requested that the court

> [o]rder Defendants, under penalty of fine or other penalty as deemed appropriate by this Court, to immediately reduce the population of the Jail by whatever means necessary, to levels consistent with restrictions set forth in this Court's May 15th [sic] Order, and to order any other relief necessary to ensure compliance with the Court's Order.

App. 115a. Arguably the notice of motion and the court's retention of authority to review its order on or before March 1, 1984 gave the defendants notice that further relief would be considered on December 30, 1983. Moreover the defendants were given a full opportunity to present testimony with respect to additional relief. Assuming, without deciding, that notice and an opportunity to be heard on December 30, 1983 satisfied procedural due process, we turn to the question whether the order which was entered, if considered as a modification of the injunction, was an abuse of discretion.

At the outset we note that the $5,000 sanction imposed for each prisoner released is to be paid to the Clerk of Court of the United States District Court. No provision is made for the disposition of these funds; apparently they would inure to the benefit of the United States. The court did not direct the defendants to implement an alternative plan for housing inmates, and couple that order with fines for delay which could be used by the court or the plaintiffs to develop their own plan. There is no discernable connection between the sanction and any of the remedial features of the injunction in place. If the court had directed the County defendants to develop

and implement a plan for alternative housing, there would be an obvious relationship between such an order and a monetary sanction for delay in compliance. Absent such a relationship, however, we are reluctantly constrained to hold that the December 30, 1983 order, insofar as it directed the defendants to pay $5,000 to the Clerk of the United States District Court for each released inmate, lacked a sufficiently specific nexus with the underlying violations and their correction so as to amount to an abuse of discretion. Our reluctance reflects our complete sympathy with the court's frustration with County Officials whose continued contumacy has aggravated a serious problem which itself was in large part a result of their inactivity.

III.

Conclusion

In No. 84-3191 the order denying a Motion for Rule 60(b) relief from the provisions of the May 25, 1983 injunction will be affirmed. In No. 84-3024 the order of December 30, 1983 will be vacated and the case remanded for further proceedings consistent with this opinion.

Re: In the Matter of: RAMCO AMERICAN INTERNATIONAL, INC., a Corporation of the State of Delaware, Debtor-in-Possession

Appeal of PAN-AMERICAN WORLD AIRWAYS, INC., Judgment creditor.

Nos. 84-5391, 84-5791.

United States Court of Appeals, Third Circuit.

Argued Jan. 16, 1985.

Decided Feb. 4, 1985.

As Amended Feb. 7, 1985.

Chapter 11 debtor sought to void as preferential transfer a judgment creditor's prepetition levy on debtor's bank account. The Bankruptcy Court, and on appeal, the United States District Court for the District of New Jersey, H. Lee Sarokin, J., held that for preferential transfer purposes, transfer took place on actual date of levy, not on the date that judgment creditor delivered writ of execution to the marshal's Service. Creditor appealed. The Court of Appeals, James Hunter, III, Circuit Judge, held that under New Jersey law, "transfer" was perfected, for purposes of determining whether preferential transfer under bankruptcy law occurred, as of the date of delivery of the writ of execution to the marshal, who subsequently levied on debtor's property, rather than on the actual date of the levy; hence, since writ of execution was delivered 92 days prior to filing of bankruptcy petition, no voidable preferential transfer occurred, inasmuch as effective date of the transfer related back to the date that writ of execution was delivered, once the levy was made.

Reversed and remanded.

1. Execution ⇐112

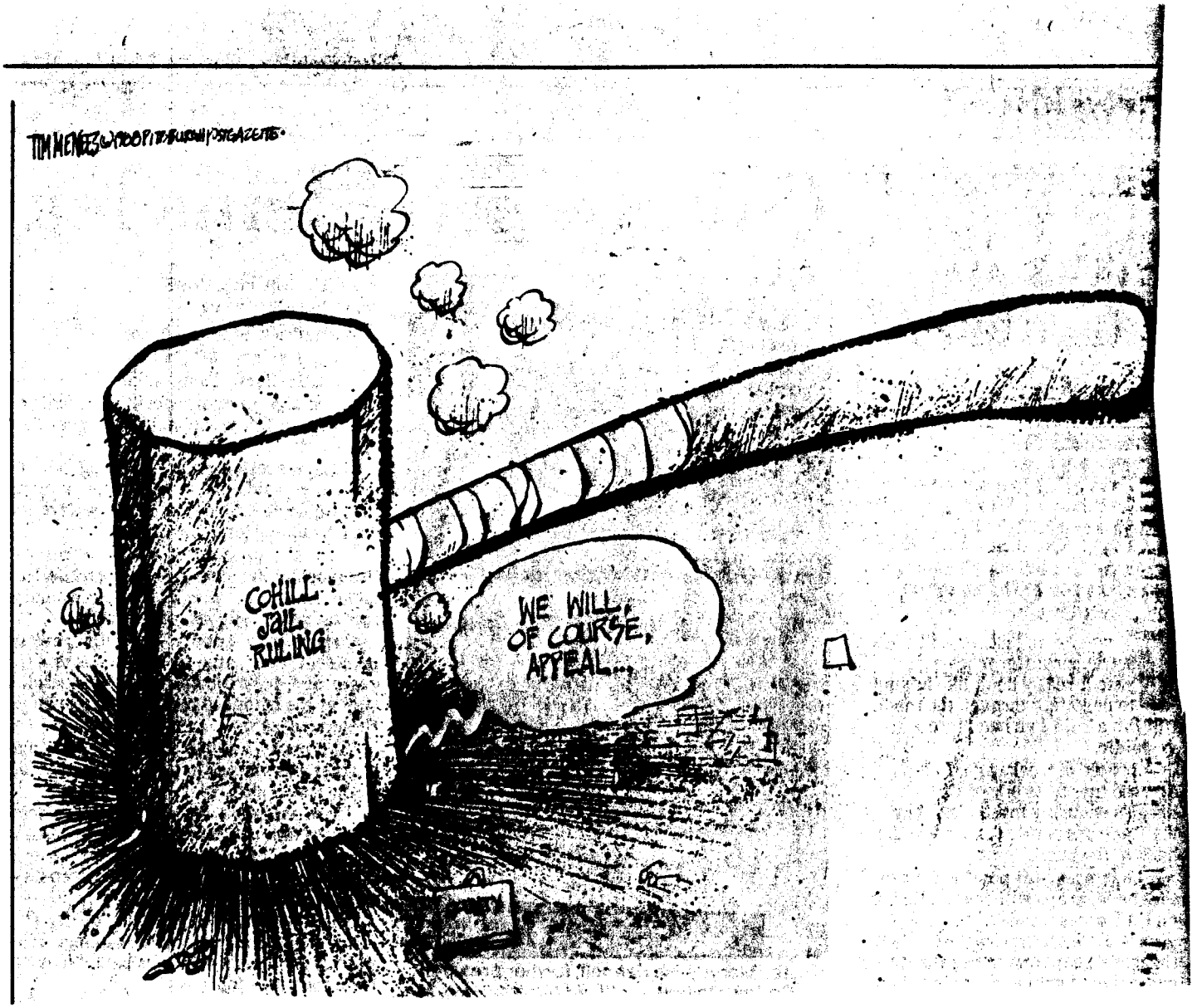
Under New Jersey law, superiority of interests as between two judgment creditors is determined not by the date of levy, but, once levy is made, by the date writ of execution is delivered to the levying authority; in other words, although transfer of interest does not occur until levy is made, once levy is made the effective date of the transfer relates back to date the writ of execution was delivered to the levying authority, with purpose being to protect the diligent creditor from any delay between the date the writ is delivered and the date of levy.

2. Bankruptcy ⇐161(1)

For purposes of Bankruptcy Code section relating to preferential transfers, "transfer" was perfected as of the date of delivery of writ of execution to the United States marshal, 92 days before judgment

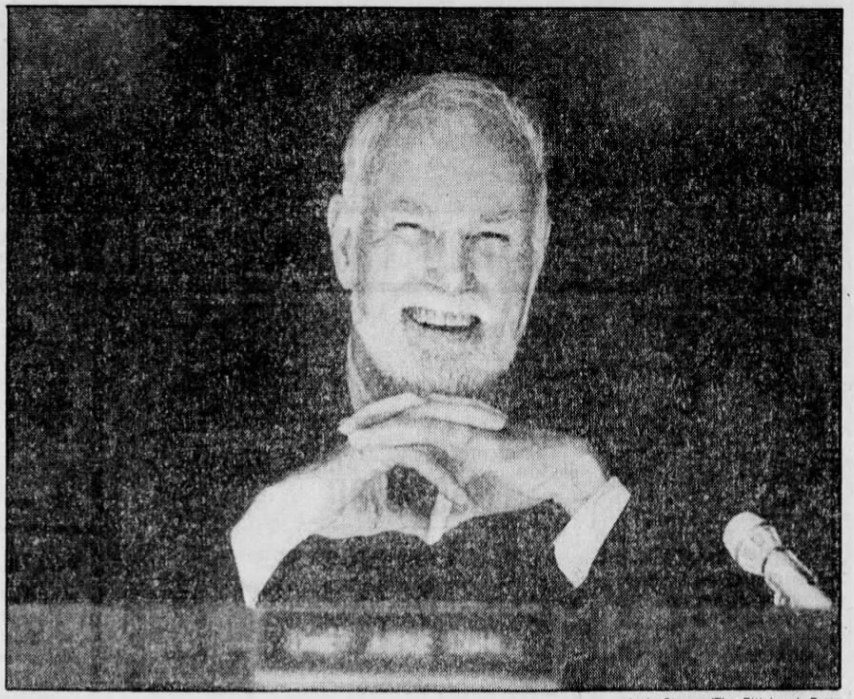
NION


ROGERS
© 1988 THE PITTSBURGH PRESS
THIS COURT WILL TAKE A SHORT RECESS TO BUILD A NEW JAIL...
JUDGE COHILL


COHILL JAIL RULING
WE WILL, OF COURSE, APPEAL...

Cohill strives for judicious approach to controversial cases

By Matthew Brelis
The Pittsburgh Press



Andy Starnes/The Pittsburgh Press

U.S. District Court Chief Judge Maurice Cohill has reputation for fairness

In July 1965 "My Fair Lady" was running in local movie theaters, the Rolling Stones' "Satisfaction" was playing on the radio and a 35-year-old attorney named Maurice Blanchard Cohill Jr., a Republican from Ben Avon, was appointed to the juvenile court bench.

Then-Gov. William Scranton plucked the ex-Marine from the Downtown firm of Kirkpatrick, Pomeroy, Lockhart and Johnson. Cohill had been with the firm since he was graduated from the University of Pittsburgh's School of Law in 1956.

Thomas W. Pomeroy Jr., the former state Supreme Court justice and an original partner in the firm, now known as Kirkpatrick & Lockhart, gave the young jurist a small book on decision making as a parting gift.

"He was my mentor," Cohill recalled recently. "On the flyleaf he wrote, 'Do justice and fear only the Lord.' I've tried to follow that philosophy for the last 23 years."

Friends, colleagues and attorneys, who have argued cases before Cohill, say those seven words speak volumes on understanding the chief judge of the U.S. District Court for Western Pennsylvania, who has received much publicity for his 12-year-long watch on living conditions in the County Jail.

His name has worked its way into the vocabulary at the county courthouse. In 1983, Cohill set a jail population cap and ruled that if it was exceeded, pre-trial detainees with the lowest bonds should be released until the population conformed to his ruling.

Since then, thousands of prisoners have been released on so-called "Cohill bonds." In October, for example, Warden Charles Kozakiewicz released an average of 69 prisoners a day to comply with the cap of 540. Kozakiewicz said about 35 percent failed to show up for their hearings.

Last month, Cohill sent shock waves reverberating down Grant Street when he ruled living conditions in the jail were unconstitutional and ordered the facility be closed by July, 1, 1990, and alternative housing be built for 900 prisoners.

The 59-year-old judge also directed the county to have plans for such

But even those most adversely affected by Cohill's orders compliment him more than they criticize.

"I think he is a very fair man. He is fair in his perceptions and has generally treated the jail in a fair manner," said Kozakiewicz. "He is certainly cognizant of inmate rights."

Having his order appealed does not bother Cohill. "I don't fear being reversed. I just do what I think is right and most of the time it has worked out."

He dismissed criticism of being an "imperial judge" by saying, "I've been around long enough to know it is not too surprising to get clipped that way once in a while."

Cohill was born in Butler County and has been around Western Pennsylvania his whole life. His father was in the real estate business and

Cohill was a second lieutenant in charge of an aircraft warehouse in Cherry Point, N.C., when an enlisted man under his charge got into some trouble and asked Cohill to represent him at a court martial. Because there was a shortage of lawyers, officers could represent enlisted men in some cases.

"If a guy asked me to do that today I would say, 'No, I don't know enough.' But then I was young and probably cocky and so I said sure. He was found not guilty, so the word spread like wildfire through the enlisted men that I was good jailhouse lawyer," Cohill said.

"I proceeded to represent a couple more and managed to win those cases and then my commanding officer said well, 'I'm not gonna have you getting these guys off the hook anymore. I'm going to send you to

son and continued working there while he attended law school at Pitt.

"Even then (in law school) he was an extraordinary individual," said classmate Richard Crone. "He worked hard and did well and was a credit to our class. He had already been a Marine so he was a dash more serious than those of us who went into service after."

Cohill worked on the Law Review and helped write an article on the need for a family court, a topic — especially juvenile law — that has interested Cohill his entire career.

Cohill says he was intrigued by the juvenile justice system because it has "been the neglected stepchild of the entire judicial system for a long time. A lot of people in the profession, both judges and lawyers, kind of look down their nose at juvenile court and yet in terms of sheer human impact, no court touches

over probation officers' salaries and with critics who didn't want a new juvenile detention home.

Whether in his role as a judge, or as a board member of a community organization, Cohill has wanted to examine things for himself.

As a member of the board of the Shadyside Boys Club and the Kay Boys Club, Cohill visited them frequently.

"I think he felt a responsibility as a board member to do that, to see first-hand what was happening. He is the genuine article. Other people come on to the board for different reasons. His reasons struck me as pure — doing good for kids," said Mike Murray, president of Boys and Girls Club of Western Pennsylvania.

Cohill said his eagerness to view things for himself stems from his time on juvenile court.

"I never wanted to send a kid to a place that I wasn't familiar with because they are pretty helpless in the toils of the law and I wanted to make sure I wasn't sending them to a horrible place, and it's just carried over here."

He has heard hundreds of cases on the federal bench, including a consent decree between U.S. Steel Corp. and the Environmental Protection Agency regarding clean air and water standards and the case of Robert W. McCue, who was sentenced to 10 years in prison for selling cocaine to two former Pittsburgh Pirate baseball players.

But the case to which his career seems inextricably attached started on June 3, 1976, when four inmates, acting on behalf of the jail population, filed suit against county officials, citing numerous problems with living conditions at the jail.

Cohill has visited the jail several times and has seen marked cosmetic improvements.

"The warden has done a wonderful job of cleaning the place up, getting rid of the dirt, but he can't get rid of the underlying structure. When I first went up there in 1976, I was appalled. You could smell it when you hit the first step. Prisoners were restrained on cots with holes cut in the canvas where they could go to the bathroom through the hole into a bucket underneath. That kind of stuff. It was just indescribable.

"Overcrowding did not become a problem until 1983. I even said in the

the county officials have not dealt appropriately with the problem and why it has gotten to the point where the judge has had to rule, but it is within the means of the county to address the problem if they were really serious about it."

Cohill said the county is not being mean-spirited, but may have motives for not acting as swiftly as possible to rectify the situation.

"It is a lot easier to paint me as a bad guy for allowing people out on Cohill bonds rather than blame it as a failure of the commissioners to provide facilities for the number of prisoners they have on their hands."

County officials say it is not a delay by design, that they are not procrastinating to force the federal court to act, thereby allowing them to deflect taxpayers' wrath.

"I can see why people might think that is a logical syllogism, but the commissioners have acted responsibly and are not looking to lay it off on him," said County Controller Frank Lucchino.

Lucchino said Cohill was "blazing new territory with his reasoning," referring to the size of cells, which, Cohill said, "are too small to provide humane living conditions to inmates.

"I am a Maurice Cohill fan. But he is directing elected officials to take a specific action."

The judge felt it necessary to act.

"After 12 years of tippy-toeing around, actually about five years of tippy-toeing around the population problem, I lowered the boom in the last opinion," he said

While Cohill declined to say what he fears most about the jail case, he did say he fears "making a mistake on a custody question or a release question where it turns out it was a bad guess and somebody got hurt because of that."

Someone did get hurt as a result of a Cohill bond release.

Victoria Cohill, the judge's daughter, was mugged this fall by man out on a Cohill bond.

Cohill said it was difficult to take. "I thought about that old saw, 'A new conservative is a liberal who has just been mugged.' " But it did not alter his opinion on the population cap.

"He has a sense of public duty and public obligation," said Braham, his college roommate and best man at his wedding.

"I never talked to him about the

Pittsburgh Post-Gazette

WEDNESDAY, FEBRUARY 22, 1989

Tough talk, suspects walk

Getting tough on crime is politically popular. Spending tax dollars to build jails is not. So we have an overcrowded jail with state mandates to fill it even fuller. And a federal judge is saying, "Stop."

As this dynamic works its way to its illogical conclusion, the state drive to get tough leads to the exact opposite result.

The first large-scale systematic study of suspects released to relieve overcrowding at the Allegheny County Jail confirms what many in the criminal-justice system have long suspected — they are much more likely to be no-shows for court appearances than those released through the regular bail process.

In his 1988 annual report on the Criminal Division of the Allegheny County Common Pleas Court, Judge Robert E. Dauer noted that 30 percent of those released under U.S. District Judge Maurice Cohill's order limiting the jail population either forfeit bond or are arrested on another crime before their court date.

The bond-forfeiture rate is nearly triple what it is for defendants who are released by making bail set by a judge.

The statistics come from a 1988 study conducted by the Allegheny County Bail Agency. The agency, according to its director, David W. Brandon, looked at 1,000 cases of suspects released from the jail because of safe bets to show up for court, chances were good they would have been out on bail already.

In determining who will walk on a "Cohill bond," once the combined population of the jail and the jail annex exceeds 995, the warden takes into consideration two factors: time served and bond level. Those who have been in jail the longest with the lowest bond are released.

Under a simultaneous order from Judge Dauer, jail officials are not allowed to release suspects of violent crime on a Cohill bond and should not release suspects who have previously skipped bail. By following that order, the county has in the past gone over the cap and been fined $25,000 for doing so.

How much longer the county can continue to pay such penalties for what in effect is a responsible policy is unclear.

What is clear is that something has to give. Judge Cohill believes that the existing county jail is incapable of handling the load and should be closed and replaced by June 1990.

This seems to be an unfair request because it places all the responsibility on the county.

The county jail is responsible for scores of inmates serving state sentences for breaking state laws but with no state facilities available to house them.

County to answer jail-closing order

By Ed Blazina

The Pittsburgh Press

Allegheny County will present a plan to U.S. District Court tomorrow to comply with Judge Maurice B. Cohill Jr.'s order to close the overcrowded County Jail by June 1990.

The commissioners received a private briefing on the plan last week from Charlotte Arnold, executive director of the Program for Female Offenders. That agency was hired earlier this year to prepare a plan to meet Cohill's order to replace the existing jail and provide space for at least 900 inmates.

The commissioners refused to discuss the contents of the plan before it is submitted to the court, but their comments and actions in recent weeks indicated the plan will include:

- Increasing use of community work-release centers for non-violent inmates.
- Adding space for about 15 inmates at the Jail Annex.
- Lobbying for a regional jail to house drunken drivers from Western Pennsylvania counties.
- Diverting inmates with mental health problems away from the jail and into treatment programs.

However, the plan is not expected

Two weeks ago, Foerster said the county's plan would include programs that will be "as innovative as anyone in the country is doing."

After more than 12 years of hearings about inadequate conditions and overcrowding at the jail, Cohill ordered the county to develop plans to close the facility. He said cells for 576 inmates at the jail are too small and the heating, ventilating and other systems at the 100-year-old facility can't be brought up to standards because of their age.

The county is appealing that order, but the 3rd U.S. Circuit Court of Appeals hasn't ruled yet. Since Cohill refused to stay his order until the appeal is decided, the county must comply with the order until the appeals court rules.

The major part of the plan to deal with a large number of inmates has been kept tightly under wraps by the county. Foerster has been pushing for expansion of the Jail Annex to house another 700 inmates, but he has been unable to get colleagues Pete Flaherty and Lawrence Dunn to approve the $50 million price tag.

A study by a consultant more than six years ago concluded that renovating the existing jail would cost about $35 million and reduce its capacity to about 350 inmates.

One element sure to be part of the such facilities.

Foerster has acknowledged that one community, Glassport, has expressed interest in a work-release center. Others are also considering the idea, Foerster said, but they haven't been identified and probably won't be named in the plan for fear community opposition will defeat the idea before it is fully explored.

The county has already started architectural drawings for adding work-release space for about 15 inmates on the Jail Annex's 13th floor, currently used for storage. That will be dormitory-style space that is expected to be ready for occupancy by the end of the year.

Last month, Foerster presented the county's proposal for a regional facility for drunken drivers to the state Department of Corrections. The state hasn't responded, but some commissioners in other counties have expressed support for the idea.

The diversion project for mentally ill inmates is expected to start this week. Under that program, the county's Department of Mental Health-Mental Retardation will assign a team to work at the city's North Side lockup to screen inmates before they are sent to the County Jail. Inmates with minor criminal charges against them who seem to have mental health problems will be diverted to

Officials admit new jail proposal is short on detail

By Ed Blazina

The Pittsburgh Press

County officials admit their plan to replace the County Jail lacks specifics, but commissioners and Prison Board members say the details will take more time to work out.

The county submitted a 51-page plan to U.S. District Court Judge Maurice B. Cohill Jr. yesterday that is designed to meet his order to close the Downtown facility.

Commissioners' Chairman Tom Foerster said it will be "very, very difficult" close the jail by Cohill's June, 1990 deadline. The commissioners said more work is needed before the plan can be implemented, but aides say privately that any new facility won't be available until 1993 at the earliest.

In November, Cohill ordered the county to close the jail because its small cells violated inmates' constitutional rights, and it is too old to be renovated. He gave the county until yesterday to submit a plan to provide space for 900 inmates.

The plan, prepared by the Program for Female Offenders, calls for 357 spaces in work-release centers or alternative programs over the next two years.

It also offers three alternatives for housing up to 600 inmates: buying space for 200 inmates and building a facility for 400; buying space for 200 and renovating the existing jail to house 400; and buying or building space for 600.

Foerster said a team of architects and engineers will determine the as we go along."

Sheriff Eugene Coon, a member of the Prison Board, conceded the plan is short on details. "We didn't have time in two or three months to go into the kind of detail that's needed. What we're trying to show ... is we're making an effort to comply... and the opinion of the Law Department is that it does that."

Common Pleas Judge James McGregor, another board member, called the plan "a very good beginning."

Foerster said the county may ask Cohill to extend the deadline for closing the jail. Donald Driscoll, a Neighborhood Legal Services attorney who has been pushing for jail improvements, said he would oppose any extension and questioned whether the county is trying to comply with the order.

"They've had six months already to look at the problem," he said. "I don't know why it would take them more than a matter of months. If they were truly interested in meeting the needs, they would do it.

"They are going to have to justify it if they say they can't do anything until 1993."

Charlotte Arnold, PFO executive director, said the county will begin adding work-release centers as early as next month. The plan calls for one center for 60 inmates convicted of drunken driving; a center where 50 inmates serving time for drug offenses can receive treatment; and two facilities for 25 inmates each.

Ms. Arnold said the county has had interest from "many communities" willing to host work-release

County plan tackles jail overcrowding

By Mark Belko
Post-Gazette Staff Writer

Allegheny County will confront a federal court order requiring it to close the main jail by June 1990 with programs to divert prisoners from the jail and promises to study possible construction.

But the plan, submitted to Chief U.S. District Court Judge Maurice B. Cohill Jr. yesterday, doesn't place a deadline on replacing the century-old jail and the commissioners refused to say when they would do so.

County Commissioner Tom Foerster conceded that it would be "very, very difficult" to meet the 1990 date and Solicitor James Dodaro said the county might approach Cohill about an extension.

Other county officials said that it might not be until 1993 that a replacement to the old jail will be available.

Donald Driscoll, attorney for Neighborhood Legal Services Association, which brought suit against the county in 1976 over conditions at the jail, said the agency likely would oppose any delay in implementing Cohill's order.

He accused the county of stalling, noting that he has talked with several companies that indicated they could build a prison with prefabricated materials within months.

county, he said, hasn't had enough time to study available buildings or to determine capital and operating costs. It also must confront the likelihood of securing permission from the local municipality where the prison would be located, he said.

Architectural and engineering consultants will be appointed to study the three options outlined in the plan for 600 new jail spaces and to make recommendations to the commissioners within three months, Foerster said.

The options are to build or buy space for 600 inmates; construct a 400-bed prison, which would be augmented by leasing or buying 200 beds for prisoners who have been tried and sentenced; or renovating the old jail to house 400 prisoners, coupled with the 200 beds for those who have been sentenced.

Carter-Goble Associates, a consultant based in Columbia, S.C., has told county officials that the old jail could be gutted from the inside and replaced with about 400 new cells — 180 less than now available — for $17 million to $23 million.

The cost of an addition to the jail annex, one of the options being considered, is estimated at $56 million.

In November, Cohill ordered the county to close the lockup by June 30, 1990, because it was becoming

produced the plan, insisted that it met the requirements of the court order.

"Not only is this plan in compliance with the court order, but it is a strong commitment ... to do a creative job in solving the overcrowding problem at the county jail," said Arnold, director of the Program for Female Offenders.

She and county officials said the plan would provide another 222 beds within eight months and eventually 372 beds through proposed diversion programs and other short-term initiatives.

They include two new work-release centers that officials hope to have in place by 1991, a 60-bed facility for drunken drivers scheduled to open in June and a 35-bed detention center for the same offenders by 1991. The county also hopes to start a drug treatment and work-release facility for 50 inmates by January 1990.

Arnold said the county was negotiating for the drunken driving offenders, but she and Foerster declined to name the location. They also refused to name locations for the work-release centers.

The plan also relies on a number of initiatives already started by the county.

Lawsuit over conditions at prison before Cohill

By Ed Phillips
Post-Gazette Staff Writer

The federal judge who ordered Allegheny County to improve its jail will begin today to hear a lawsuit brought by prisoners over conditions at the State Correctional Institution at Pittsburgh.

In June 1987, a group of inmates at the prison sued the state, contending that their living conditions were so adverse that their civil rights were being violated.

The men in the prison described a place that is filthy, cramped and dangerous. Their complaint is scheduled for trial today before U.S. District Judge Maurice B. Cohill Jr., the same judge who has been dealing with a similar lawsuit brought by Allegheny County Jail inmates in 1976.

Cohill, who will hear the class-action case without a jury, will be asked to enjoin the state from

claims:

- The walls and floors of cellblocks within the maximum-security prison are covered with bird droppings and the facilities are infested with cockroaches and rodents.
- About 1,660 prisoners are crowded into the two five-tier cellblocks designed to hold 1,100, with many of the men doubled up in 56-square-foot cells designed for one.
- The population includes hundreds of inmates with serious psychiatric disorders who receive inadequate treatment and who increase the general level of tension.
- The likelihood of being attacked by other inmates is increasing, the problem compounded by both overcrowding and understaffing.
- There is no organized, consistent effort to maintain sanitation; there are many plumbing problems and kitchen and dining facilities are unsanitary.

Replacing the County Jail

The Allegheny County Commissioners still have to decide how to comply with a federal court order requiring them to close the overcrowded County Jail on Ross Street by June 30, 1990.

But at least they now have three options, submitted by a committee headed by Charlotte Arnold, director of the United Way-supported Program for Female Offenders.

What is particularly significant is that in accepting the Arnold committee proposal, the commissioners have adopted the concept of greatly expanding the number of community-release centers so that by late 1990 they should provide another 372 beds outside the walls. That would be in addition to the present 55 beds in a center in Oakland for women, opened in 1984, and another in Homestead for men, opened last autumn.

In that important sense, the commissioners have complied with the urgings of Chief U.S. District Judge Maurice B. Cohill Jr. to do "creative thinking" in responding to his order that they present a plan by Monday of this week for replacing the century-old landmark jail. The judge contends that the landmark

elsewhere.

The second Arnold committee option calls for, in effect, putting a "For Sale" sign on the old jail and building an entirely new 400-bed facility for detainees. One possibility is an addition to the new Jail Annex on Ross Street, a project whose cost is estimated at $56 million. This option would require the same additional 200 beds elsewhere for sentenced prisoners.

The third option calls for an entirely new jail building or the renovation of a major building Downtown to provide 600 cells for both detainees and sentenced prisoners. The Arnold report has no cost figure for such a facility.

In defending their decision not to set a deadline at this time for closing the main jail, the commissioners said it would require time to study the plans and make cost analyses.

That position is defensible as long as the commissioners press ahead without undue delay and, most important, take into full account projections for any future growth or decrease in the prison population in the 1990s and beyond. Certainly at this point, given the

Rethinking the County Jail

It's been called a concept, a beginning and a first step — and that pretty much describes the inch-thick report presented to the Allegheny County commissioners this week on what to do about the naggingly troublesome jail.

The report offers several long-term options for dealing with the overcrowding problems at the 100-year-old lockup which have put the commissioners and U.S. District Judge Maurice B. Cohill Jr. in conflict for years.

That battle heated up another few degrees last November when Judge Cohill ordered that the jail be closed by June 1990, by which time a replacement for it would have to be built, with room for 900 prisoners. He asked that a plan for doing so be submitted to him within six months.

The commissioners met this latter deadline, but conceded that the report — prepared by The Program for Female Offenders — wasn't a definitive response. Rather, it offers several options which presumably will form the basis for further negotiations with Judge Cohill.

But, first, the judge will have to review the report. A key question is whether he will be agreeable to accepting a much-longer timetable for closing down the old jail. Designing and constructing a new one would require much more time than the one year left in Judge

the old jail on Ross Street, at a cost estimated from $17 million to $23 million, although that idea has been rejected in the past because of structural and mechanical problems.

In any event, the report projects a jail capacity of 600 — not much larger than the present, court-limited size — along with finding space elsewhere for minimum-security prisoners such as those in work-release, or in drug and alcohol rehabilitation programs.

The projected costs of these options run from $17 million to $30 million.

It should be clear, by now, that any county planning for dealing with short-term prisoners must include programs outside the traditional behind-bars settings. These are cheaper to maintain and to expand, as needed.

Putting up new brick-and-steel jails, on the other hand, is not only hugely expensive but no solution to handling what appears to be never-ending increases in prisoner numbers. Witness the jail annex, built at a cost of nearly $12 million, opened in 1986, and quickly filled to capacity.

The likelihood is that some mix of ideas, as proposed in this report, will eventually emerge as the answer to where to put all the prisoners

John Beale/Post-Gazette

U.S. District Judge Maurice B. Cohill Jr., center, listens to lawyer Jere Krakoff at the prison yesterday. James A. Wigton, deputy superintendant of the State Correctional Institution, is at left.

Judge samples life behind bars

By Ed Phillips
Post-Gazette Staff Writer

U.S. District Judge Maurice B. Cohill Jr. got a taste of prison life yesterday. It tasted like grilled cheese, baked beans and chicken-vegetable soup.

The judge is in the early stages of hearing a civil rights suit filed by inmates of the State Correctional Institution at Pittsburgh, alleging that living conditions at the institu-

Cohill said the two inmates, who knew about the tour in advance, had kept quiet about it. He added, "Word obviously got around pretty quickly."

On the administration side, there was virtually no advance notice.

"To the best of my knowledge, they didn't know we were coming," Cohill said. "Ken Benson called as we were leaving to give the warden about 15 minutes' warning that we were on the way."

Although Cohill would not discuss his impressions of what he saw, he said the inspection covered every living area as well as inside and outside visiting areas, medical facilities, the libraries and the gym.

The tour also included lunch — soup, sandwich and beans. The judge's party ate with the guards — who, he noted, have the same menu as the prisoners.

Inmate cap at jail is often exceeded

By Ed Phillips
Post-Gazette Staff Writer

Raising the population cap at the Allegheny County Jail hasn't meant that the county has been more successful in meeting that limit, U.S. District Judge Maurice B. Cohill Jr. was told yesterday.

Lynette Norton, Cohill's jail monitor, reported at a hearing that the cap was exceeded 17 times in May, even though it was raised from 560 to 578 in April. The limit also was exceeded on each of the first six days of June, the latest period for which figures were available.

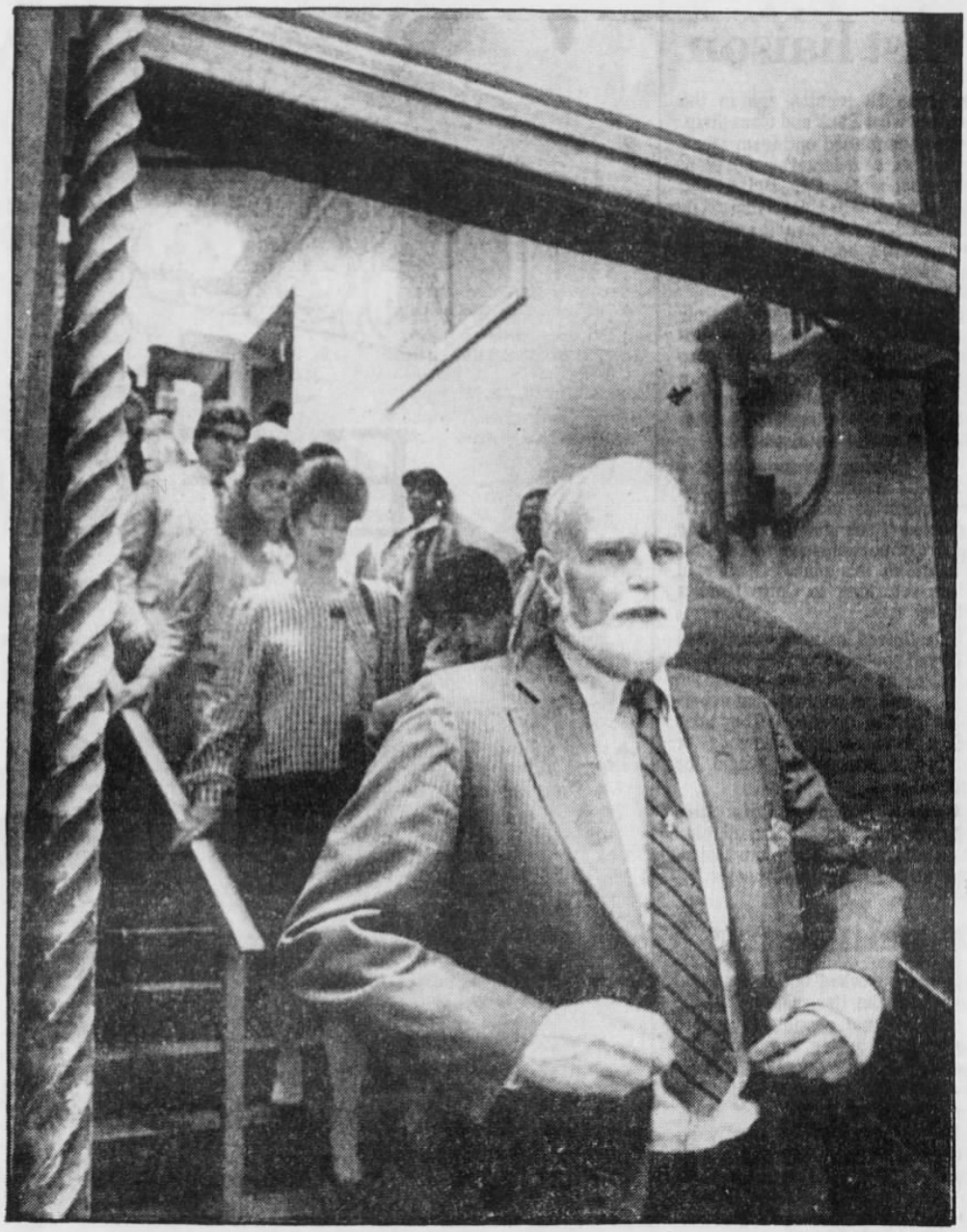
Cohill has been overseeing jail operations as part of a settlement of a 1976 suit by inmates charging inhumane conditions. In November, he ordered the county to close the century-old lockup by June 30, 1990, and to present plans for a new jail by May 1 this year.

The purpose of yesterday's hearing was to inform the judge of specific plans, but testimony tended to be general and focused on alternatives for dealing with a rising jail population.

Although no specific sites were mentioned — Assistant County Solicitor George Diamantopulos avoided putting proposed sites on the record — plans call for putting about 350 non-violent inmates into community-based, work-release programs and constructing higher security housing for 600.

Charlotte Arnold, director of the Program for Female Offenders and a consultant to the county on criminal justice matters, said the county commissioners would select one of three options for the secure facility by Sept. 15.

The options, discussed later by



Bill Levis/Post-Gazette

Judge Maurice B. Cohill Jr. leaves the county jail after a surprise inspection.

Cohill levies higher fines at county jail

Monthly fee set for overcrowding

By Ed Phillips
Post-Gazette Staff Writer

Ten days after dismissing an estimated $175,000 in fines against Allegheny County for violating a court-imposed population cap at the County Jail, U.S. District Judge Maurice B. Cohill Jr. said yesterday that he would impose higher fines for future violations.

In a five-page order, the judge said that after Aug. 1, he would fine the county $25,000 a month for any month in which the population cap is exceeded, and $100 for each prisoner released in order to meet that cap.

If such fines had been in effect last month, Warden Charles Kozakiewicz estimated, it would have cost the county $130,600. That would be $25,000 for being over the cap, which the jail was every day in June, plus $31,600 for 316 prisoners released and $74,000 for 740 work-release inmates allowed to go home overnight.

The fines dismissed by Cohill were $25,000 a month for seven months of 1988-89, with no surcharge for released prisoners. That action was taken as part of an agreement for the county to make improvements to the jail and find a facility for work-release prisoners.

Branding yesterday's order unfair, Commissioners Pete Flaherty and Larry W. Dunn said they favored an appeal to the 3rd U.S. Circuit Court of Appeals.

"It appears to be hostile to the good faith rapport we have been achieving," Flaherty said. "To me, there's a question of fairness here in that we had worked out a plan in good faith."

Kozakiewicz testified yesterday at a hearing that Cohill called June 21. At the time, the county was using Mayview State Hospital to house 40 persons arrested in an anti-abortion protest, most of whom were charged with obstructing traffic.

In the order setting the hearing and again in court, the judge asked why emergency arrangements could be made to house people facing summary charges while others, charged with more serious crimes, were set free to meet the cap.

Kozakiewicz said he was reluctant to take custody of the protesters from Pittsburgh city police, but Judge Robert E. Dauer, administrative judge of the criminal division in

CONTINUED ON PAGE 5

The Pittsburgh Press

Section D

Tuesday, July 18, 1989

Judge says inconsistency in jail releases led to new fines

By Eleanor Chute
The Pittsburgh Press

Chief U.S. District Judge Maurice B. Cohill Jr. said it doesn't make sense that the county can find housing for jailed abortion protesters, yet is releasing inmates charged with more serious crimes.

The judge made the statement in a written order issued yesterday after a hearing in which he imposed fines against the county if it can't find space for its prisoners beginning next month.

The county will be fined $25,000 for any month in which the population cap at the County Jail is exceeded. The cap, which was imposed by the judge earlier, is 578.

In addition, the county will be fined $100 for each inmate released in an attempt to meet the cap and for each work-release prisoner who is permitted to return home at night instead of being kept in jail.

The county used Mayview State Hospital in March to hold 99 arrested abortion protesters and in June to hold 40 protesters. Last week the state Welfare Department announced that the county no longer will be allowed to keep abortion protesters at the mental institution.

While the protesters were in custody, the jail continued to exceed the court-imposed limit. The jail released from seven to 31 inmates each day because of overcrowding. It also released up to 24 work-release inmates each day. Even so, the inmate population ran from six to 40 inmates over the cap.

In the written order, Cohill stated, "The tragic irony of this situation is apparent to anyone having the patience to think it through.

"Inmates charged with crimes are summarily released on Cohill bonds; others are kept at the jail on orders of the warden (and with the concurrence of the commissioners) in admitted violation of this court's orders; if you were an abortion protester in March or June of 1989, you got special treatment.

"The whole situation doesn't make sense, but it does establish the fact that the county can move fast when the 'right' crisis develops."

Since the beginning of the jail case, the county has paid a total of $30,000 in fines.

Cohill fined the county $25,000 in November after Warden Charles Kozakiewicz purposely exceeded the jail's population cap. The warden held prisoners above the cap because he believed anyone else he could release could be dangerous to the public.

Cohill added an additional $5,000 penalty for contempt of court when the county failed to pay the fine on time.

The judge waived previous fines for releasing inmates.

Even faced with new fines, the county still may wind up exceeding the limit on the number of inmates, said Kozakiewicz.

"I don't see the population decreasing," he said after the hearing.

Assistant County Solicitor George Diamantopulos said the county was not pleased and that "the county has presented a plan in good faith and is doing everything possible to implement the plan."

Earlier this month the county and Neighborhood Legal Services, which initiated the federal lawsuit to stop the overcrowding, reached an out-of-court agreement. The agreement gave the county a two-year extension — until June 30, 1992 — to replace or renovate the County Jail.

In return for the extension, the county agreed to set up a separate 100-bed facility by next June, make immediate improvements in electrical wiring in the jail, remove asbestos insulation and install smoke detectors. Cohill approved the agreement.

After the hearing, Donald Driscoll, who represents inmates for Neighborhood Legal Services, said he thinks the county is "moving in the right direction" but the problem of overcrowding persists.

Please see Jail, D4

Crackin' on the jail

He didn't say it just this way, of course, but what Chief U.S. District Judge Maurice B. Cohill Jr. was telling Allegheny County the other day was "Get crackin'."

He was talking about — is there ever any other subject in Allegheny County? — overcrowding at the County Jail and he was demonstrative. Beginning next month, he said, the county will be fined $25,000 for any month in which the population cap of 578 which he has placed on the jail is exceeded.

In addition, there will be a $100 fine for each inmate released in an attempt to meet the cap and for each work-release prisoner who is permitted to return home at night instead of being kept in the jail.

At the heart of the new fine orders is Judge Cohill's exasperation with what he perceives as the county's faint attempts to provide more prison space for its criminals.

He makes a good point. When holding space was needed to store large numbers of arrested

fine the county for any work-release prisoner allowed to go home at night is inappropriate. We look upon such a maneuver not only as an attempt to keep down the prison population but also as a sort of alternative sentencing, a highly desirable method of rehabilitation and cost control.

Overall, though, Judge Cohill deserves high marks for his efforts in this round of the never-ending jail saga. All he wants, really, is for the county to get crackin' on providing enough jail space to avoid the intolerable jail conditions that led to his decision 13 years ago that the prisoners were being treated inhumanely.

Until now, he has been mostly patient. Just a couple of weeks ago, in fact, Judge Cohill approved an agreement to allow the county an additional two years — until June 30, 1992 — to replace or renovate the jail. And he dismissed about $175,000 in fines owed by the county for previous population cap violations.

Patience, though, has not produced much in

14 federal prisoners removed from jail

By Andrew Sheehan
Post-Gazette Staff Writer

The U.S. Marshals Service removed 14 of its 21 inmates from the Allegheny County Jail yesterday in effort to clear the aging lockup of federal prisoners by 4 p.m. today.

"We don't know if they'll be able to meet our deadline, but the Marshals Service is certainly trying to cooperate," said Warden Charles Kozakiewicz.

The county on Tuesday ordered the federal government to remove its prisoners by this afternoon in an attempt to relieve crowding and comply with a federal cap on the number of inmates in the main jail.

The Marshals Service is moving its prisoners to other undisclosed jails and prisons.

On Monday, U.S. District Judge Maurice B. Cohill Jr. said he would begin imposing fines on the county of $100 a day for each inmate released in order to keep the jail's population at 578 inmates. Cohill also said a $25,000 fine would be charged for each month the cap was exceeded.

Last night, the county released 12 work-release prisoners to comply with the federal cap. Ordinarily, the prisoners would work during the day and return to the lockup for incarceration at night.

Had Cohill's penalties been in effect yesterday, the county would have been fined $1,200. But, the warden said, future bills will be greatly reduced with the absence of federal prisoners.

Pittsburgh Post-Gazette

FRIDAY, JULY 21, 1989

The county jail waltz

What could be called the reluctant jail waltz continues between Chief U.S. District Judge Maurice Cohill and the Allegheny County Commissioners.

•

Last week Judge Cohill dismissed $175,000 in fines against the county for violating a court-imposed population cap of 578 inmates at the jail on Ross Street. The dismissal came because the county and Neighborhood Legal Services had reached an agreement under which the county would make certain improvements in the century-old jail and also find work-release centers for non-violent prisoners.

The county then announced it had in mind such a 60-bed work-release center on the seventh floor of 121 Ninth Street, Downtown. That brought an immediate negative response from the Median School of Allied Health Careers, housed in that building, including an appeal filed with the city's Zoning Board of Adjustment to block the move. And in a controversy over rezoning the former McIntyre Shelter in Ross, a deputy county solicitor suggested it might be used as a work-release center if the township continued to thwart a shopping center development there. Here is the "not in my backyard" phenomenon at work with a vengeance.

Then this week Judge Cohill, irked that the county can find housing for jailed anti-abortion protesters while releasing inmates charged with more serious crimes, said he will begin imposing fines against the county if it can't find space for its prisoners, beginning

issue, the Post-Gazette agrees with the commissioners. Our view is that the jail remains quite serviceable if it were properly rehabilitated for a population smaller than the present.

But we have been as irked as the judge with the snail's pace shown by the commissioners in making new arrangements that will be necessary whether or not the present jail is kept. Put another way, if the commissioners wish to avoid razing the jail, they certainly have done a poor job of taking the steps necessary to travel an alternate route.

To be sure, the reaction at 121 Ninth Street and in Ross Township shows the political difficulties of developing alternative sites. But the commissioners have known that all along; they just haven't had the courage to move ahead. Instead, they have tried to throw on the judge the onus for the release of prisoners to avoid overcrowding, referring to the people who have been released on "Cohill bonds."

We can't help wondering whether Chairman Tom Foerster and his fellow commissioners might have moved faster if the media had called them "Foerster bonds" or "Flaherty bonds"!

It's understandable that the judge would be irritated at the way the commissioners have waltzed around the issue. He seems particularly miffed that they were able to scurry around and find non-jail quarters for arrested anti-abortionists, presumably because as vocal middle-class persons they were a political hot potato.

•

Inmates shifted to avoid fines for jail crowding

By Ed Blazina

The Pittsburgh Press

It took some last-minute shifting of inmates, but Allegheny County managed to avoid a fine over the number of inmates housed at the County Jail.

"There will be no releases and we are right at the cap, so there are no fines," Sal Sirabella, the county's chief clerk and director of administration said shortly after yesterday's 4 p.m. deadline.

U.S. District Court Judge Maurice B. Cohill Jr. has ordered the county to pay fines of $100 for each inmate released to remain within his 578-inmate population cap. The judge also said he will fine the county $25,000 for each month in which it holds inmates above the 578 cap.

The county got under the limit yesterday by transferring work-release inmates from the jail into outside work-release programs or into the Adult Probation Office's intensive supervision program. Additionally, the county transferred five inmates to Greene County, which was added last week to the list of counties in the region that have agreed to house local inmates.

the city's former Public Safety Building by the end of the month.

The county's subcontractor, Renewal Inc., is expected to sign a lease with the owner of a building at 121 Ninth St., Downtown, shortly. Once the lease is signed, the facility is in move-in condition for non-violent offenders, Coll said.

Additionally, the county and city law departments are in the process of writing a lease for the county to use the former Public Safety Building, Downtown, to house abortion protesters or others apprehended in mass arrests. The lease will be on a month-to-month basis while the city decides what to do with the building.

"In the next couple of weeks, we're going to have this taken care of," Sirabella said. "Until then, we have to make a decision on the cost — whether we should pay $100 for releasing them or hold them and pay $25,000 for the month."

George Diamantopulos, assistant county solicitor, said the county will ask the U.S. Supreme Court to review Cohill's order last November to close the main jail on the basis that he has, in effect, ordered the county to build a new facility. The 3rd U.S. Circuit Court of Appeals already has rejected the county's position that

It's time to pay the jail bill

Nationally, the pressure is building. Americans want an all-out battle against crime and drugs.

They want criminals jailed. And they want them jailed for a long time.

But where? Cross Western Penitentiary off the list, says Chief U.S. District Judge Maurice B. Cohill Jr.

In response to a suit filed by inmates, Judge Cohill ordered the state to embark immediately on a far-reaching reform plan for Western Pen in Pittsburgh. Indeed, had there been anywhere else to put its nearly 2,000 inmates, he said, he would have ordered the place closed.

Declaring that conditions at the prison are unconstitutional and inadequate, Judge Cohill ordered the state to develop plans by Dec. 1 to replace two cell blocks and reduce fire hazards, increase the corrections staff and improve the quality of physical and mental health care. Further improvement plans must be made by March 1, he ordered.

The orders are similar to those Judge Cohill partially by the national demand for stiffer sentences for criminals.

And there are more criminals now than ever before. Violent crime, the FBI reported last week, was up 6 percent in 1988 over 1987. And, even though fewer Americans are experimenting with drugs, cocaine addiction rose 33 percent last year.

Indeed, a national survey showed that Americans think drugs are the country's biggest problem and want more arrests.

In Pennsylvania, one of the responses to the national mood was an allocation last week of $11 million over two years to help establish task forces, pay police overtime and finance undercover operations in the drug war.

But any gains made in the war will be blunted if there is no place to house those taken captive. Even though the National Conference of State Legislatures reported that spending on prisons was up 14.1 percent last year over 1987, the increase was not enough.

Even though Pennsylvania embarked in the

Sunday, August 20, 1989 The Pittsburgh Press B5

Crowding, other similar problems link Western Pen, County Jail

By Ed Blazina
The Pittsburgh Press

The new court order to improve conditions at Western Penitentiary and a longstanding order to cap the population at the Allegheny County Jail are two separate cases.

Yet, the institutions are part of the same system and their problems with overcrowding and providing inmate services are similar and intertwined.

Western is a maximum security prison run by the state where inmates who have committed serious crimes such as murder, rape and armed robbery serve lengthy sentences.

than two years.

But because of overcrowding at both institutions — conditions inmates charged were unconstitutional — both cases ended up before Chief U.S. District Judge Maurice B. Cohill Jr.

Cohill, who has been working on the County Jail case since 1976, asked for the penitentiary case because it was similar and because the county earlier had sought to include the state as a defendant in its case. The county maintains some of its overcrowding is caused by the state's refusal to take certain inmates into the state system.

The penitentiary case initially had been assigned to U.S. District Judge Gustave Diamond in the summer of

lature to get tough on crime has its first impact there.

And as state institutions fill up with sentenced inmates, the county system gets jammed because local jails are forced to hold inmates longer, said Stover Clark, jail overcrowding project director for the Pennsylvania State Association of County Commissioners.

For example, some Allegheny County inmates with sentences of up to two years, who used to be sent to state regional facilities in Greensburg or Mercer, are being refused by the state due to overcrowding and must be held at the County Jail.

Figures compiled by the state Commission on Crime and Delinquency show that county jails across

ing is concentrated in counties with jails designed for 50 or more inmates, Clark said.

The study shows there are 10 county jails where the population is more than 20 percent above capacity. Another 16 have populations from 1 to 19 percent above.

Those figures do not include Allegheny County, which is under a federal court order to hold no more than its capacity of 578.

At the end of 1970, the study said, county jails housed 5,421 inmates. The commission and Clark attributed the increase in inmate population to mandatory sentences for crimes such as drunken driving and new sentencing guidelines.

Clark said 635 people in Pennsyl-

Additionally, the length of time an inmate spends in local jails has increased — from 38 days in 1980 to 48 days last year.

Clark said the entire system must work harder to educate the public so it will accept such alternatives as work-release centers and electronic monitoring.

"We've got this faucet running and we're trying to mop the floor when what we really need to do is turn off the faucet," Clark said. "We can't build our way out of this."

Clark echoed the sentiment of the American Correctional Association at its conference in Baltimore last week by calling for an examination of the types of crimes that should result in jail sentences.

tives and other stop-gap types of things."

However, in Allegheny County's case, those alternatives also have not relieved the problem.

Figures compiled by the county show it has spent $33 million over the past five years to try to meet Cohill's population limit at the jail. The county has built an auxiliary jail for 435 inmates; opened special house arrest and work-release programs; increased probation supervision; and improved medical services.

But after more than five years of trying, the jail daily transfers and releases inmates to remain within the limit of 578. The county has agreed to replace or renovate the main jail Downtown by 1992, but

Prison bill: $71 million

State gives rough estimate of court-ordered repair

By Barbara White Stack
Post-Gazette Staff Writer

It will cost the state about $71 million to correct conditions at the State Correctional Institution at Pittsburgh, the head of the Pennsylvania prison system said yesterday.

"That is a rough estimate. . . . We don't know if we can get the money," state Corrections Commissioner David S. Owens Jr. said in a taped interview with Post-Gazette editors on WQED-TV's "The Editors," which was broadcast last night.

U.S. District Judge Maurice B. Cohill Jr. ordered massive improvements at the prison last week, calling the 107-year-old structure an "overcrowded, unsanitary and understaffed firetrap."

Although he said the Corrections Department had been considering an appeal, Owens said he agreed that some of the repairs Cohill had ordered needed to be done. The department had planned to make improvements and even set aside $41 million for them, he said.

"What we can do, we will do right away," he said. "What we cannot do, we will discuss with the court."

He objected, however, to Cohill's characterization of the prison as a firetrap, saying he wouldn't knowingly endanger his staff or the prisoners.

Ironically, overcrowding — one of the conditions cited by Cohill — is also the reason the $41 million in repairs haven't been done, Owens said.

The state has no place to put the 1,000 inmates it would have to move while their cells were being replaced. He said he hoped to know in about a month where to move the prisoners if the prison is to be renovated as a result of Cohill's order.

The department had planned to use the $41 million to gut the two oldest cell blocks in the Woods Run facility. New cells and a health center would be constructed elsewhere within the prison walls. And prison industries, classrooms, an auditorium, laundry and other facilities would replace the old cells.

Those changes are among the things Cohill ordered in a ruling that said conditions at the prison were so bad that they violated the inmates' constitutional right to humane treatment.

CONTINUED ON PAGE 7


TIM MENEES
Pittsburgh Post-Gazette 8/30/89
COHILL REFORMS
CLANG CLANG BANG
CLANG CLANG CLANG
BANG CLANK
CLANG CLANG
CLANG BANG
COUNTY
ESCAPE PLAN
I...UM...
ACE NECK
"IT'S THE WESTERN PEN WARDEN-DO WE HAVE ANY DEAD INMATES TO GET $7 MILLION'S?"

County appeals $59,000 jail fines

By Linda S. Wilson
Post-Gazette Staff Writer

Allegheny County is asking a federal appeals court to drop nearly $59,000 in fines it owes for jail overcrowding because U.S. District Judge Maurice B. Cohill Jr. "abused his discretion" when he imposed the fines.

The county mailed the appeal Friday to the 3rd U.S. Circuit Court of Appeals in Philadelphia, said assistant county solicitor George Diamantopulos.

He said he didn't know when the court would respond to the appeal. The fines imposed during August are due Sept. 30, Diamantopulos said.

Cohill imposes fines of $25,000 each month the jail population exceeds 578 prisoners plus $100 for each prisoner released in order to meet the cap.

County officials first had asked Cohill to set aside the fines, to stop the per-month and per-prisoner fines, which Cohill imposed July 17. The county also is appealing another Cohill mandate, handed down in July, which directs the county to pay about $23,000 in legal fees to Neighborhood Legal Services.

Neighborhood Legal Services represents inmates in a suit that seeks to improve conditions in the jail.

The county has not paid any fines for jail overcrowding.

On July 7, Cohill had dismissed an estimated $175,000 in fines levied against the county for earlier jail overcrowding. The dismissal came after the county agreed to make improvements at the century-old jail.

Last weekend, 52 inmates were released because of overcrowding. A total of 190 inmates have been released so far in September. Fines accrued during September are due at the end of October.

Wednesday, the county gained slots for 14 additional prisoners with the opening of a dormitory-style facility on the 13th floor of the Jail Annex on Ross Street.

"Within a couple weeks, at most," another 58 to 60 beds should be available at the former Pittsburgh Public Safety building, according to county jail Warden Charles Kozakiewicz. The

Jail crowding must be ended, judge says

By Jim Wilhelm

The Pittsburgh Press

U.S. District Chief Judge Maurice B. Cohill Jr. said the county commissioners — and ultimately, county taxpayers — will have to "bite the bullet" and spend the money necessary to ease County Jail overcrowding.

"They just have to build new facilities, as I see it," Cohill last night told the Society of Professional Journalists at Maggie Mae's restaurant, North Side. "You've got to

come from, Cohill replied: "There's only one way to do it — you and me. We all have to face the problems of society with tax dollars."

He has ordered the county to limit population at the jail to 578 inmates, and he fines the county $100 for each inmate released to meet the cap. In addition, he has ordered the county to close the old jail by June 30 and provide new space for 1,000 inmates.

The county will have until Monday to submit a plan to Cohill.

adults, particularly the elderly, who must pay school taxes to educate their neighbors' children.

He said he is aware that some taxpayers are unhappy with his order to release inmates when the jail population reaches the cap, saying some people believe a prisoner serving time even on a simple retail theft charge "should suffer like he is in Alcatraz."

"My job is to interpret the Constitution. The Eighth Amendment does not allow cruel and unusual punish-

New jail for county

$40 million building to hold up to 900; 4 sites under study

By Ed Blazina

The Pittsburgh Press

Allegheny County announced today it will close the century-old County Jail and replace it with a jail that would hold 600 to 900 inmates and cost more than $40 million.

The county filed its plan for replacing the jail with U.S. District Judge Maurice B. Cohill Jr. The plan was filed in federal court late Friday and announced today.

It does not specify where a new facility will be built, but county officials say they are reviewing four potential sites and expect construction to cost more than $40 million.

The county expects to pay for the new jail by borrowing the money from the capital budget and then paying it back over time.

No decision has been made about the future of the existing jail, which is a national historic landmark that can't be torn down or substantially altered. It could be converted into office space, renovated to hold inmates awaiting court hearings or sold for private development.

Commissioners Tom Foerster, Pete Flaherty and Lawrence Dunn agreed to replace the jail at a private meeting Thursday. The meeting did not violate the state open meetings law because it involved litigation against the county, which is an exception to the so-called Sunshine Law.

Cohill has been overseeing the operation of the jail for more than 10 years due to poor conditions and overcrowding. The county has entered into an agreement with Neighborhood Legal Services — which filed the initial lawsuit over conditions at the jail — to replace or renovate the jail by June 1992.

That agreement came after Cohill ruled the jail doesn't meet constitutional standards for cell size and inmate services.

Robert Coll, the county's criminal justice planner, said it is impractical to renovate the existing jail. The project would cost more than $25 million and reduce the jail's capacity from 578 to about 373 inmates, meaning the county would have to find additional space elsewhere.

The county also would have to find space to house inmates during renovation.

"In a sense, with all of the auxiliary sites we have, we already have over 700 cells," Coll said. "You can't reduce that to 373 cells. It also becomes very expensive if you're running jails at three different sites."

Coll said the county will continue to work with consultants to review potential sites for a new facility. The county hasn't ruled out adding to the Jail Annex at a cost of about $53 million, but four other sites are under

Please see Jail, A3

County to build new jail

4 sites being considered

By Mark Belko
Post-Gazette Staff Writer

Allegheny County will spend about $50 million to build a new jail, mainly for sentenced inmates, to replace the century-old Ross Street lockup which a federal judge has ordered closed by June 30, 1992.

Four sites are under consideration for the new facility, including land adjacent to the jail annex on Ross Street and the former Buyers Mart building in the Strip District. Several suburban sites also are under study, said Robert Coll, director of criminal justice planning. He declined to identify the suburban sites.

The county hopes to select a site by Dec. 31.

County officials have ruled out the former Fifth Avenue High School, Uptown, and old Dixmont State Hospital, Kilbuck, as sites, said Sal Sirabella, chief clerk and director of administration.

Exact costs have yet to be determined for the new prison, but officials estimated yesterday that construction expenses would be about $50 million.

"In my opinion, we need a large site, perhaps 20 acres or more, where we can build from the ground up, where can hold 1,000 inmates," said Commissioner Pete Flaherty.

"I'd like to find a large enough site so that we can keep adding on as the population increases. That's basically what the consultants are telling us."

Flaherty, who previously opposed new construction, is now convinced "that is the way to go after discussing it with the consultants and looking at population figures."

Construction of a new jail and a move to consolidate most prison functions into a new facility may eliminate the need for the jail annex, completed in 1986 at a cost of $11.8 million. If the need for the annex were not completely eliminated, the annex's role could be drastically altered, authorities conceded.

The decision to build a new jail came 11 months after chief U.S. District Judge Maurice B. Cohill Jr. ordered the Ross Street lockup, which holds 578 inmates, closed because it was becoming unfit for housing.

The commissioners formally notified Cohill yesterday, as required by court order, of their intent to build a jail. They will have 33 months to do so, but Commissioner Tom Foerster said there will be no joy in the task ahead.

"I'm not happy at all. I'm very unhappy," he said. "I'm just glad that when I was brought up and four of us were living in one [small bedroom], some judge wasn't

CONTINUED ON PAGE 5

Finally, a new county jail

The easy decision — to build a new Allegheny County jail — took years. The tough one — where to build it — is expected to be made within three months.

That somewhat disarranged situation came about this week when the county commissioners finally responded to U.S. District Court Judge Maurice Cohill's order to provide adequate and humane jail space for prisoners who, he said, were living in unfit conditions.

The decision to build a new jail came 11 months after Judge Cohill ordered the present lock-up closed and 13 years after Neighborhood Legal Services filed a lawsuit on the behalf of jail inmates seeking improved conditions. As a result of that suit, Judge Cohill placed a population cap on the jail and the county has been routinely releasing non-violent inmates in an attempt to stay under the limit, which, for the most part, it hasn't been able to do.

As conceived now, the new jail will be expensive, one. Renovation of the present jail was estimated to cost $25 million and would have reduced the capacity to 373, far below what is needed.

That leaves the commissioners with about three months to pick a location for the jail. Four possible sites are the Buyers Mart in the Strip District, land next to the jail annex on Ross Street and two undisclosed suburban sites.

The Buyers Mart and the jail annex land have to be considered the front-runners because they may not have the NIMBY — Not In My Back Yard — opposition that any suburban site would have. They also are easily accesible from the courthouse, a major consideration in the transportation of defendants.

Although site selection will be a consuming preoccupation for the county commissioners over the next few months, they should be ready to embark immediately thereafter on the next logical step, office consolidation.

Pittsburgh Post-Gazette

WEDNESDAY, OCTOBER 4, 1989

Decision for a new jail

The county finally has moved off dead center on the jail issue with its decision to spend an estimated $50 million to build a new facility, in place of the century-old Allegheny County Jail on Ross Street.

In essence, Chief U.S. District Judge Maurice B. Cohill Jr. has prevailed with the view — evident in his continuing orders — that the current jail is hopelessly outmoded given today's humane requirements for housing prisoners. After earlier orders capping the prison population, 11 months ago the judge ordered the building closed by June 30, 1990 (later extended to June 30, 1992).

The Post-Gazette, in keeping with the philosophy that historic buildings should be preserved, has hoped that the county jail could be remodeled. But the commissioners after a series of studies say they now are convinced that is not a feasible course.

This newspaper will continue to urge the preservation of the old jail, a crown jewel of the works of architect H.H. Richardson and one of the finest examples of 19th-century Romanesque architecture in the United States. Finding a suitable use for the building will be a major challenge for historic preservationists, as well as for the county.

The new hard line on drug offenders to the campaign against drunken drivers and the pressure for ever more cells is bound to increase. Consultants to the county estimate that cells for 1,350 inmates will be needed by 1992. The present population at the county jail and the jail annex, also on Ross Street, is 1,013.

The decision to build a new jail should not mean a slackening of efforts to establish work-release centers and other alternative sites for non-violent offenders. Such alternatives are desirable for humane and rehabilitative reasons, but they also offer a way to hold down costs.

As the county determines where to build the new jail, there is bound to be the same "not in my backyard" resistance encountered by other proposals for alternative sites. That reaction is especially likely if the county opts for the "green field concept" of constructing the jail in a place where there is plenty of land for expansion, such as in the suburbs.

It is interesting that along with talk of a new jail comes debate over what to do with the annex, a remodeling completed three years ago of the old Jones Law Building that cost $11.8 million. In retrospect, it is unfortunate that the county didn't bite the bullet on the

Jail issue now moot, top court declares

By Jack Torry
Post-Gazette Washington Bureau

WASHINGTON — Declaring that the issue is moot, the Supreme Court declined yesterday to rule on whether a federal judge in Pittsburgh exceeded his authority last year when he ordered Allegheny County officials to close the century-old jail and build a replacement.

The justices' decision suggests that the lengthy legal battle over the Ross Street jail may soon end. After years of court actions, county officials agreed in July to construct a new jail. The county expects to select a site for the $50 million facility by the end of this year.

Because of the county's decision to replace the jail, the justices ordered the case returned to the 3rd U.S. Circuit Court of

In its one-paragraph ruling yesterday, the Supreme Court pointed to a 1981 decision in which a federal court in Texas ordered the University of Texas to pay for the interpreter of a deaf graduate student.

When that appeal reached the Supreme Court, the late Justice Potter Stewart declared the case moot, or academic, because the university had agreed to pay for the interpreter and the student had already graduated.

The court's decision yesterday appeared to be a victory for the inmates who have been crowded into the old jail. Their original suit in 1976 led to the county's decision to complete construction of a jail by the summer of 1992.

Donald Driscoll, the attorney for Neighborhood Legal Services who represented the inmates, said it appeared that the justices were not interested in reviewing whether Cohill had the power to close the jail and order a facility built.

"I'm totally at a loss [as to] what there is yet to argue over," Driscoll said. "If [the county's] concern was the judge had taken away their decision-making authority to replace or renovate

PENNSYLVANIA'S PRISONS/NO PLACE TO GET SICK

Treatment of mentally ill inmates drew Cohill's wrath

By Bill Moushey
Post-Gazette Staff Writer

U.S. District Judge Maurice B. Cohill Jr. minced no words.

"By far the most wanton and unnecessary infliction of pain we encountered on our visit to [the State Correctional Institution at Pittsburgh] occurred in the psychiatric observation cells," Cohill wrote in part of his 142-page opinion in favor of a group of inmates who sued the institution for inhumane conditions.

"Indeed, we did not even achieve a view of these [observation] cells, located down a narrow hallway at one end of the infirmary, or of the occupants," Cohill said. "We were warded off by the overpowering stench emanating from the other end of the hall, as well as by warnings

Cohill also denounced the physical conditions at the prison.

"Not only are the facilities malodorous, filthy, dismal and crowded, but the atmosphere is oppressive and terrifying, especially to those weakened by mental illness," he wrote.

He also questioned the Department of Corrections' failure to provide segregated housing for severely mentally ill inmates, a situation that is the same throughout the state prison system.

"We think it only makes sense that severely mentally ill inmates should be segregated from the general population. These inmates who randomly scream all night, talk loudly and laugh hysterically without apparent reason increase tension for the psychologically normal inmates."

Such behavior "invites retaliation from impatient and stronger inmates," he wrote.

It also can be an excruciating burden on sane prisoners housed with mentally ill ones.

As a dramatic example of that, Cohill's opinion included the story of inmate Robert Anderson.

Anderson, who was convicted of murder, initially complained about being housed in a cell with a "jailhouse lawyer" — a prisoner who takes legal actions against the system — whose cell in this case was filled with boxes of written material.

When he was moved, Cohill wrote, Anderson found that his "second cellmate, characterized as assaultive and a homosexual rapist, had been diagnosed as having a schizoid personality with paranoid tendencies.

"Anderson testified the man showed him his records that revealed prison officials knew the man had a mixed personality disorder with sadomasochistic tendencies. He had committed homosexual sodomy as a youth."

Anderson was moved again. His third cellmate was a "psychiatrically disturbed, filthy and mumbling inmate," and his fourth cellmate, a severely paranoid psychotic, "soaked his sheets with water and stood on the toilet for six hours one night," according to the testimony.

"Chief Psychiatrist Herbert Thomas, M.D., had ordered that Robert Anderson, by now exhausted, remain single-celled for a minimum of four weeks. However, he was double-celled five days later.

At the time of Cohill's opinion in August, Anderson was again sharing a cell with a severely mentally ill man, against the advice of three psychiatrists. He has since been transferred to the State Correctional Institution at Huntingdon.

Because of the high proportion of inmates with serious emotional illnesses, Anderson's series of disturbed cellmates is not unusual, prisoners say.

Cohill ruled that continuing to mix mentally ill prisoners with the general inmate population "concocts a recipe for explosion."

He said the system should provide a special-needs unit for mentally ill prisoners, but noted that it should not become a dumping ground for people who need treatment in state hospitals. The Pittsburgh prison had such a unit for a short time in 1986, but it was abolished because of a lack of staff.

"Specifically, personnel in the unit should monitor and assist those individuals who will not themselves take medication regularly, maintain normal hygienic practices, accept dietary restrictions or report symptoms of illness," Cohill wrote.

And though he found that medical records were inadequate, he also concluded that the mental health staff at the prison is so shorthanded that "the professionals have spent more than 90 percent of their time with paper work instead of with inmates."

Overcrowding and crime

Under terms of a federal court order, Allegheny County must have a new jail built by June 30, 1992. The site already selected, there's a decent chance that deadline will be met.

In the meantime, though, a population cap imposed on the present jail remains in effect, forcing the almost daily release of prisoners. Those with low bonds who have not been charged with violent crimes go first.

Such liberations have come to be known as "Cohill Bond" releases, named for U. S. District Judge Maurice Cohill, who issued the order to alleviate overcrowding at the present jail.

One recipient of "Cohill Bonds" was Maurice O'Malley, 19, of Allentown, who was released three times over the past nine months. Six days after his latest release he was charged with the beating death of Cary Ball, 18, of Brookline.

The tragic sequence is not unique. Last summer, a McKeesport man, released to meet the jail cap, was charged two weeks later with the stabbing death of a Stowe man. Even Judge Cohill's daughter saw the effects of the releases. Attacked in September 1988 by a man who then stole her car and the keys to her

These, and other, crimes lead to an inevitable question. Is it time for Judge Cohill to modify his order, at least as it pertains to the jail population limit?

Perhaps it is.

Judge Cohill imposed the limit only after the county commissioners delayed making a decision on a new jail for more than a decade. A push was needed, he gave a shove.

Finally, though, the commissioners were moved to carry out their responsibilities. Last month they selected a site on which a combined jail-public safety center will be constructed, with the city of Pittsburgh as a partner in the development.

That show of good faith, and the fact that fewer than 29 months remain before scheduled completion of the new jail, should be considered by Judge Cohill.

The objective of his order has been reached, at least to the point where the wheels of change are in motion. While they are turning, the population cap should at least be placed at a higher figure, if not removed.

Twenty-nine months of possible overcrowd-

Don't blame 'Cohill bonds'

To ridicule the so-called "Cohill bond" principle every time a prisoner who is released due to overcrowding at the county jail subsequently gets into trouble is, by extension, to question the whole concept of bail.

Whether the re-arrested individual has gotten out of jail pending trial by putting up cash or has been released on his own recognizance under the Cohill program is really not to the point. Bail is something all persons charged with anything less than a capital crime are entitled to by law and that bond is set with only one consideration in mind — to ensure the accused's appearance in court to face the charges against him.

Nevertheless, whenever someone who is out on a Cohill bond awaiting court action gets into fresh trouble, the outcry is that the person should never have been released — even if the alternative was housing the accused under inhumane conditions.

One safeguard built into the Cohill bonding program is that persons who have been held on serious crimes of violence are not considered eligible (even though if they could raise the necessary cash, by whatever means, legal or illegal, they would be let go).

Unfortunately, the authorities are being placed in the position of having to make

er young man to death with a baseball bat while out on a Cohill bond.

Mr. O'Malley had been charged last August with aggravated assault, terroristic threats, simple assault and other offenses. In evaluating Mr. O'Malley for release recently, upon his rearrest for theft, Warden Charles Kozakiewicz said he noted on his record that the offense he viewed as most serious — aggravated assault — had been disposed of at the magisterial level (though other court records indicate the charge is still outstanding). Prisoners charged only with simple assault are routinely let out, the warden said.

Mr. Kozakiewicz says he knew nothing more about the circumstances of Mr. O'Malley's earlier arrest but, if he hadn't been led to believe the aggravated-assault charge had been settled, he would not have let him go.

As long as the overcrowding situation at the jail continues, every effort should be made to tighten up record-keeping and speed interdepartmental communication so that there should be no doubt as to the status of the persons being released.

But if occasionally someone is let out and commits acts that his or her record would indicate are not characteristic, the "Cohill bond" system can't be faulted any more than

County's monthly fine for jail crowding upheld

By Lynda Guydon
Post-Gazette Staff Writer

The legality of monthly $25,000 fines imposed on Allegheny County when there is overcrowding at the County Jail has been upheld by the 3rd U.S. Circuit Court of Appeals.

The appeals court affirmed a 1989 order by U.S. District Judge Maurice B. Cohill Jr. that fixed the fines.

The 3rd Circuit order, issued April 19, is the result of an appeal of the fines the county filed last year.

The population limits are part of an unresolved suit that inmates filed against the county June 2, 1976, argument. In May 1983, he ordered that the jail population be gradually reduced to 500 males and 30 females. That figure was later amended to a total of 540 inmates.

In some months before the order, the county held many hundreds more inmates than the current limit.

In 1986, the county opened a jail annex to house about 460 inmates in the old Jones Law Building, Downtown, but overcrowding has persisted at the jail.

On July 17, 1989, Cohill imposed a $25,000 contempt sanction against the county for violating his population order.

ing had been procedurally proper, that the county had violated the order and that compliance had been physically possible.

The 3rd Circuit order states: "We conclude that the district court acted within its discretion in imposing coercive sanctions. The reported decisions in this action chronicle Allegheny County's consistent failure to meet its meager Eighth Amendment obligations, and document the defendants' chronic non-compliance with the district court's remedial orders."

Cohill has imposed fines of $25,000 for each month the county exceeds the population cap and $100

disappointed. The county is continuing on course, hopefully, of building a new facility." He declined further comment.

Cohill has ordered that the county must have a new jail completed by June 1992 to replace the current Ross Street lockup.

The county has entered into an agreement with the city to develop and construct a multiuse facility jointly. It would include a jail and offices on the old CSX property on Grant Street, at an estimated cost of $60 million.

The new jail is expected to be big enough to accommodate all inmates

population limit. Last month alone, fines of $58,000 were paid.

The commissioners have not yet determined whether they will file a petition seeking U.S. Supreme Court review of the 3rd Circuit decision, Dodaro said.

The 3rd Circuit did order Cohill to reconsider his order awarding $23,185 to attorneys for the inmates because, the appeals court said, Cohill did not give the county an opportunity to contest the fee. The circuit court also found that Cohill did not state the basis for determining the fee.

Donald Driscoll, a Neighborhood Legal Services Association lawyer

Judge Cohill wins again

There's always one sure bet. For a while, it was the New York Yankees. A little further back, no horse could stay with Man O' War. For a long, long time, it was the Democrats in the South.

These days, if you're looking for that kind of consistency, put your money on U.S. Chief District Judge Maurice B. Cohill. Despite fighting a lonely battle, he never seems to lose, at least when it comes to his decisions on prison living conditions.

Judge Cohill's latest victory came this week when a federal appeals court ruled that he was correct in ordering an end to double-celling in the two oldest cellblocks at Western Penitentiary in Pittsburgh. The 3rd U.S. Circuit Court of Appeals said he was right in finding the practice inhumane and unconstitutional.

It didn't take the circuit court long to reach

probably will be a speed-up of state plans to upgrade conditions at the Woods Run prison. It certainly will mean that Western Pen prisoners will have to be afforded more humane treatment.

It also means that Judge Cohill is on a roll. Over the last five years, he has been upheld five times on his decisions on the Allegheny County Jail, where he also declared living conditions inhumane.

Judge Cohill's order to clean up the conditions withstood appeals, led to construction of a jail annex and, finally, to a county decision to build a new jail near the Tenth Street Bridge on the Monongahela River. Also meeting a dead end were appeals of punitive fines he levied — and is still levying — on the county for exceeding a population cap he imposed on the old jail.

As for the appeals court's ruling on Western

Fines top $1 million for jail crowding

By Mark Belko
Post-Gazette Staff Writer

Court-imposed fines caused by crowding at the Allegheny County Jail have topped $1 million, a dubious milestone in the commissioners' drive to build a new jail.

The county topped the $1 million mark last month when it delivered a check totaling $81,900 to the federal clerk of courts office, representing the fines due because of releases or crowding at the jail.

That brought the total the county has paid since August 1989, when the fines were ordered by U.S. District Judge Maurice B. Cohill Jr., to $1,050,500, which has been deposited into the federal treasury.

"It's a milestone all right. It's the taxpayers' money," said George Diamantopulos, the county assistant solicitor handling jail matters.

Cohill's order, designed to prod the commissioners into closing the antiquated main jail and building another, requires the county to pay $100 for every inmate released to meet the population limit of 578 prisoners.

The county also must pay a $25,000 fine if it exceeds that limit at any time during the month. Warden Charles Kozakiewicz won't release inmates he deems to be a danger to the community.

Amounts paid monthly have var-

Conditions at prison improving, Cohill says

By Mike Bucsko
Post-Gazette Staff Writer

U.S. District Chief Judge Maurice B. Cohill Jr. said yesterday that conditions at the State Correctional Institution at Pittsburgh had improved considerably since he visited it in 1989 and found it to be an "overcrowded, unsanitary and understaffed firetrap."

"I think there's been a dramatic improvement, as far as the physical improvements are concerned," he said.

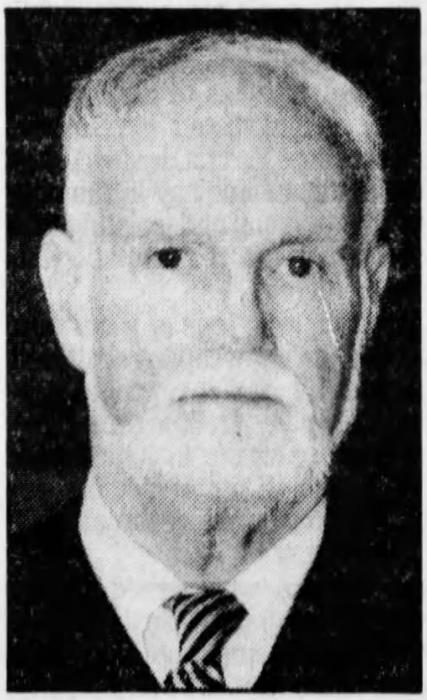
In August 1989, Cohill ordered sweeping physical and organizational changes at the Woods Run prison in a civil suit over prison conditions brought by inmates. The judge, his three law clerks, court-appointed prison monitor Lynette Norton and two attorneys for the inmates toured the prison for two hours yesterday morning to check the progress.

Cohill discussed his impressions from the visit after a status conference in the suit brought by the inmates.

The prison has improved sanitary conditions by installing stainless-steel shower stalls and adding more guards on the cell blocks, he said. The judge cited a special unit for mentally ill inmates as a particular improvement.

"I was favorably impressed by that," Cohill said. "It used to be kind of a zoo over there as far as the psychiatric inmates were concerned."

The medical-records department has improved but could benefit from the addition of a computer, he said. The law li-



"I think there's been a dramatic improvement, as far as the physical improvements are concerned."

— Maurice B. Cohill Jr.
U.S. district chief judge

Improvements have been made in fire safety, but Cohill said the prison was probably still a hazard. All mattresses are fire-retardant and prison officials plan to install fire-resistant privacy panels in the cells. But the state and attorneys for the inmates have

Judge Cohill's successes

It's been a long and lonesome two-pronged battle, but Chief U.S. District Court Judge Maurice B. Cohill Jr. is seeing progress on both fronts.

The latest glimpse of victory came last week for Judge Cohill when he visited Western Penitentiary and found "dramatic" improvements over the conditions he discovered there two years ago.

"It's still overcrowded but it's under control," he said after visiting the state penitentiary.

That was in sharp contrast to his mood in 1989 when, in response to a suit by inmates, he declared conditions at the jail unconstitutional and inadequate. He ordered the state to make sweeping changes.

Since then, the judge noted, progress has been made in several areas that concerned

Progress also is visible on the second front, which has turned out to be a riverfront. Construction of Allegheny County's $134 million, 1,800-cell jail probably will begin this month on a site along the Monongahela River just upstream of the Liberty Bridge.

Scheduled for completion in the spring of 1994, the new jail was ordered built after Judge Cohill in 1983 found conditions at the present jail inhumane. He placed a population cap on the 109-year-old lockup that is still in force.

Although completion of the new jail will be almost two years behind the schedule the judge established, the county is now making rapid headway.

In both the penitentiary renovation and the jail construction, there was initial foot-dragging, but both the state and the county

request to impose Rule 11 sanctions against T. Rowe Price.

A written order will follow.

ORDER

AND NOW, this 1st day of November, 1993, after consideration of the submissions of the parties,

IT IS ORDERED that the motion of defendants, County NatWest Global Securities Limited, NatWest Capital Markets, National Westminster Bank PLC, County NatWest Securities USA, and County NatWest Securities Corporation USA, ("NatWest"), to dismiss plaintiff's Amended and Supplemental Complaint with respect to NatWest, be and hereby is denied.

INMATES OF THE ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

Cyril H. WECHT, President of the Allegheny County Board of Prison Inspectors and the other members of the Board: Thomas Foerster and William H. Hunt, Commissioners for Allegheny County; Frank J. Lucchino, Controller for Allegheny County, Eugene Coon, Sheriff for Allegheny County; the Honorable Patrick R. Tamilia, Michael J. O'Malley and Marion K. Finkelhor, Judges Court of Common Pleas of Allegheny County; Richard S. Caliguiri, Mayor of the City of Pittsburgh; Harriet McCray; Monsg. Charles Owen Rice and Charles Kozakiewicz, Warden of the Allegheny County Jail, and William B. Robinson, Executive Director of Prison Inspectors, and Cyril Wecht, Thomas Foerster and William H. Hunt, as Commissioners of Allegheny County, Defendants,

v.

COMMONWEALTH OF PENNSYLVANIA, Third-Party Defendant.

Civ. A. No. 76-743.

United States District Court, W.D. Pennsylvania.

March 30, 1994.

In civil rights litigation pertaining to conditions at county detention facility, the District Court, Cohill, J., held that upon county's compliance with court orders concerning jail conditions, court would sua sponte relieve county of obligation to pay further fines and would return fines already paid for exclusive purpose of contribution to jail construction or drug rehabilitation programs.

So ordered.

Injunction ⇨232

Court would sua sponte relieve county and county officials of obligation to pay further fines imposed for violating court orders relating to prison conditions at detention facilities so long as county remained in substantial compliance with orders relating to prison conditions until completion of new facility and so long as county continued with good faith effort to meet population limits in existing facilities; further, fines previously paid would be returned for exclusive purpose of contribution to jail construction or drug rehabilitation programs.

Peter G. Nychis and Timothy W. Pawol, Asst. Allegheny County Solicitors, Pittsburgh, PA, for defendant Allegheny County.

Donald Driscoll, Neighborhood Legal Services Assn. and Jere Krakoff, Pittsburgh, PA, for plaintiffs.

Thomas F. Halloran, Office of Atty. Gen., Western Regional Office and Lynette Norton, Picadio McCall Kane & Norton, Pittsburgh, PA, for third-party defendant.

MEMORANDUM ORDER

COHILL, District Judge.

The new Allegheny County Jail building has arisen! Located on the Monongahela riverfront, its size and solidity convince the undersigned that it is no mirage. It has been almost two decades since the litigation concerning jail conditions was first initiated.

Ironically enough, the early problems were related to sanitary conditions and the humane treatment of prisoners, not overcrowding. When I wrote the first opinion in this case (442 F.Supp. 1368 (W.D.Pa.1978)), I stated, "Overcrowding is not a problem. In 1975 the average daily population was 429." *Id.* at 1376. The old jail contained about 600 cells, but as many as 200 at a time were unusable because of the need for repairs.

By 1983 the average daily population was 644.

While inmate populations have recently fluctuated a great deal, we can say that the County now has approximately 1270 inmates in secure custody: 645 in the old jail; 450 in the so-called "Jail Annex," the former Jones Law Building; and 175 in the former Public–Safety Building; additional inmates are housed in rented jail space in other counties and in community-based centers of one sort or another. *See* Allegheny County Jail Annual Reports, 1992 and 1993.

The new jail will have a maximum capacity of 2400 prisoners.

Since 1976, when this case was filed, there have been untold numbers of motions, hearings, orders and appeals. It took years for the squalid conditions which existed in 1976 to be alleviated. Efforts to improve grossly inadequate sanitation and housing conditions were thwarted over time by a steadily increasing jail population until it reached the crisis proportions I have just described.

Despite the creation of extra space and the use of numerous external facilities, the inmate population has continued to overflow all available areas. In just one month, January 1994, the Warden reported that there were over 250 inmates who could not make bond but who were released from custody on so-called "Cohill Bonds" due to overcrowding.

There have been times when the problems associated with the Allegheny County Jail appeared insoluble; there were times when court orders appeared to be ignored; there were (and are) times when fines have been imposed. Recently, however, this Court has been more than satisfied with the strides made by the defendants in controlling the conditions of confinement. *See* report of Lynette Norton, Esq., Court Monitor, January 21, 1994, describing the "high level of consistency in conditions" at the jail for the last year. In their efforts to provide for the expanding population the County Commissioners apparently will have succeeded when the new jail opens late this year. *See* monthly reports to the Court by Robert Coll and Herbert Higginbotham during 1993–94.

The parties, the lawyers and this Court all have been subjected to public criticism from time to time during these eighteen years, but the defendants have now faced up to their responsibilities, apparently putting aside concerns of public opinion.

Critics have accused the court of "coddling" prisoners. I need only remember the stench which assailed the nostrils when I entered the jail for the first time in 1976, or recall the sight of human beings strapped down on canvas cots, their wrists and ankles held tight by leather thongs, to take comfort in believing that regardless of what the critics said, what I ordered was the right thing to do. I have appreciated the general support of the editorial boards of the major local news media through this laborious process.

On July 17, 1989 I imposed serial fines on the County for violating my orders regarding prisoner population. Since that time the County has paid to the Clerk of this Court $2,729,300.00.

"Justice," as Judge Learned Hand once described it, "is the tolerable accommodation of the conflicting interests of society. I don't

believe there is any royal road to attain such accommodations concretely." [1]

While justice rarely comes easily, we must all remember that justice must be the basic goal not just of the judiciary, but of our elected representatives and of the citizens themselves. Each of us has a role to play. Ideally, those roles should dovetail without the excessive friction or frustration which has sometimes plagued this litigation.

It has also been said that while the human inclination to injustice makes democracy necessary, it is the human capacity for justice which makes democracy possible.

Today this Court pauses to recognize the distance that the defendants have come in living up to their obligations in our constitutional democracy—that is, in doing justice on their own initiative.

The defendants have not petitioned formally for the return of the fines heretofore imposed; the court is issuing this Order of its own volition, *sua sponte.*

An appropriate order will issue relieving the defendants of further fines so long as they remain in substantial compliance with this Court's orders relating to prison conditions until completion of the new facility, and so long as they continue with a good faith effort to meet population limits in existing facilities. Fines previously paid will be returned for the exclusive purpose of contribution to the jail construction or drug rehabilitation programs.

AND NOW, to-wit, this 30th day of March, 1994, it is ORDERED, ADJUDGED and DECREED that:

1. The Order of this Court entered July 17, 1989, imposing fines on the defendants for the unauthorized release of prisoners be, and the same hereby is VACATED.

2. All fines paid into the office of the Clerk of Court pursuant to said Order dated July 17, 1989, to-wit, $2,729,300.00 shall be returned to the County of Allegheny by the Clerk of Court forthwith.

3. Said funds shall be used by the County of Allegheny to contribute to the cost of jail construction or for drug rehabilitation programs previously approved by this Court.

1. Learned Hand, quoted by Phillip Hamburger, *The Great Judge,* 1946.

BJT, INC., et al., Plaintiffs,

v.

MOLSON BREWERIES USA, INC., et al., Defendants.

No. 3:94–CV–16–H3.

United States District Court, E.D. North Carolina, Fayetteville Division.

March 14, 1994.

Beer wholesalers brought action against seven defendants, three of which were North Carolina corporations, alleging violations of North Carolina's unfair or deceptive trade practices statute, common law unfair or deceptive trade practices, and violation of North Carolina's beer franchise law. The action was removed to federal court. On plaintiffs' motion to remand, the District Court, Malcolm J. Howard, J., held that defendants failed to establish that the three North Carolina defendants were nominal defendants joined to prevent removal.

Remanded.

1. Removal of Cases ⇐1

Federal court's removal jurisdiction is form of subject matter jurisdiction. 28 U.S.C.A. § 1441(a).

2. Removal of Cases ⇐102

Without subject matter jurisdiction, federal district court must remand improperly removed case back to state court from which it came. 28 U.S.C.A. § 1441(a).

Fine conclusion

Judge Cohill returns funds as a new jail nears completion

There may be grousing and groaning over the design and placement of the $140 million Allegheny County jail nearing completion under the Duquesne University bluff. But the very fact that there is a new facility going up can be attributed to the unyielding persistence of a single individual: Maurice B. Cohill Jr.

The building will stand as a monument to the U.S. District Court judge's contribution to the humane handling of prisoners in Allegheny County.

Were it not for Judge Cohill's prodding — first in the form of requiring the release of prisoners when certain capacity levels were reached at the old jail and later through heavy fines imposed on Allegheny County — there is no telling when a new, larger and healthier facility may ever have been built.

It hasn't been an easy position for Judge Cohill to maintain, particularly for a man as

duration. It was back in 1978 — and many appeals ago — that the judge issued his decision in response to a suit from a group of Allegheny County Jail inmates about the manner in which they were being held.

It has taken until now for the new jail (one large enough to accommodate 2,400 prisoners) to reach an adequate stage of completion for the judge to feel satisfied that his concerns have been dealt with and that the time was right to take the step he did this week.

We're referring to his dramatic decision to return to the county the $2.7 million in fines he has been collecting from it since 1989 for continued overcrowding at the old jail.

While county officials may feel extremely grateful to receive this money back at this time, so can Allegheny County residents be

Can new jail clear judge's name?

Cohill hopes extra capacity will end use of 'Cohill bonds'

5/12/95

By Mark Belko
Post-Gazette Staff Writer

Senior U.S. District Court Judge Maurice B. Cohill Jr. said he hoped that the opening of the new Allegheny County Jail would cause a bit of local slang to fade away.

The judge referred, of course, to "Cohill bond" — the term commonly used to describe the release of an inmate from the county's old Ross Street lockup because of crowding. That has happened 27,000 times since Cohill ordered caps on the jail population in 1983.

Cohill said yesterday that he never realized how his name would come to be used when he first toured the old jail in 1977, after inmates sued the county over conditions there.

"At that time, I never dreamed that my name would creep into the criminal lexicon as the adjective on a bond," he said.

Common Pleas Judge James R. McGregor once reminded Cohill that his last name doubled as a verb as well.

"He said, 'I had a guy in front of me the other day and I said, what are you doing out? I thought you were in jail.' He said 'I was Cohilled,' " Cohill related. "At any rate, I hope that the Cohill bonds will soon be a thing of the past."

Jail civil rights suit closes after 20 years

Federal Judge Cohill follows marathon case from inception

By Marylynne Pitz
Post-Gazette Staff Writer

A 20-year-old civil rights lawsuit that forced construction of the new Allegheny County Jail was closed yesterday by the federal judge whose name became synonymous with the release of prisoners due to crowding.

Filthy living conditions and draconian punishments led four jail inmates to sue the county on June 2, 1976, one day after U.S. District Judge Maurice B. Cohill Jr. became a federal judge.

Now a senior judge, Cohill did not realize that the case would become the judicial marathon of his career.

In addition to the construction of the new jail, the suit ended crowding at the old Ross Street lockup and led to improved living conditions for prisoners.

In yesterday's order closing the case, Cohill wrote, "The new Allegheny County Jail meets constitutional muster at this time."

When the county's 600-cell Ross Street lockup became too crowed in 1983, Cohill ordered a population cap on inmates. The prisoners who were set free when that cap was exceeded were said to be released on "Cohill bonds."

"I never thought I'd creep into the criminal lexicon the way I did," said Cohill, who assessed hefty

said. "I have no regrets. I received a lot of criticism from a lot of important people. I really think I did the right thing."

Cohill praised lawyer Lynette Norton for serving as jail monitor during the past eight years.

Michael Antol, the Neighborhood Legal Services lawyer who represents the jail inmates, vowed yesterday to keep an eye on the new jail.

"Just because the case is closed doesn't mean that we're not going to look into any problems in the future," Antol said.

Acting Warden James Gregg said the county tried to comply with all of Cohill's directives.

"It's something we can put behind us after all these years," Gregg said.

Jere Krakoff, the civil rights lawyer who represented the inmates filing the suit from 1976 to 1983, said the case led to the elimination of a restraint room where naked inmates were tied to canvas cots that had a hole in the middle.

"The waste would go through the hole to buckets. The buckets were collected every 12 hours," Krakoff recalled, adding that some inmates were restrained in that manner for five weeks and not bathed.

Inmates who misbehaved were kept in an isolation cell that had no bed, light or window.

"Inmates would have the option of standing naked for 15 or 16 hours or lying on the concrete floor," Krakoff said.

"It took a federal court to say 'No, this is unconstitutional, this can't be done'," said Krakoff, who ques-

'COHILL BONDS'

Judge orders prisoners' rights suit closed

Rules new jail addressed inmate issues

By Joe Mandak
TRIBUNE REVIEW

3/13/96

Senior U.S. District Judge Maurice B. Cohill Jr. Tuesday closed the landmark 1976 prisoners' rights suit that led to a new Allegheny County Jail — and under which 27,000 inmates were freed on so-called "Cohill bonds" to reduce overcrowding.

Cohill issued the order closing the case at the request of the county, which claimed several months ago that its new $147 million, 2,400-capacity jail and revamped inmate services had solved the problems the suit sought to address.

Attorney Michael Antol of Neighborhood Legal Services, which represents the inmates who brought the suit, said he believes the new jail complies with Cohill's directions under the suit. But he and attorney Donald Driscoll challenged the county's motion to close the case, asking Cohill to leave the suit open for another year or so to "break in" the new jail and its policies.


Maurice Cohill

After meeting with both sides on Friday, Cohill decided the suit's goals had all been attained.

"This might better be called an 'epitaph' than a memorandum order . . . We will not attempt to review the tortured history of the case here," Cohill wrote in closing the case yesterday.

"The new Allegheny County Jail meets constitutional muster at this time. The county is complying with all aspects of orders relevant to procedures at the jail at this time. The time has come to close the case."

Asked for a personal epitaph, Cohill said: "I have absolutely no regrets about what I did — although it's been criticized widely."

The jail has also brought him national legal renown and a continuing stream of letters from inmates and "jailhouse lawyers" throughout the country.

The suit began quietly enough when inmate Kenneth Owens-El scrawled out one of hundreds of inmate suits filed each year in U.S. District Court.

Owens-El filed the suit after a fellow prisoner died in a neighboring cell during a seizure. Frustrated about the lack of attention his suit received, Owens-El contacted Neighborhood Legal Services and spoke to attorney Jere Krakoff about the conditions at the 108-year-old lockup.

Krakoff made a name for himself

PLEASE SEE **LAWSUIT/B2**


Kenneth Owens-El filed lawsuit