Mississippi College Law Review

Volume 11
Issue 1 *Vol. 11 Iss. 1*

Article 9

1991

Are Publicly Sponsored Religious Symbols Unconstitutional: The Reindeer Rule Revisited - Allegheny County v. American Civil Liberties Union

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ARE PUBLICLY SPONSORED RELIGIOUS SYMBOLS UNCONSTITUTIONAL?: THE "REINDEER RULE" REVISITED

Allegheny County v. American Civil Liberties Union, 109 S. Ct. 3086 (1989)

I. INTRODUCTION

Allegheny County v. American Civil Liberties Union[1] allowed the Supreme Court to "revisit one of its most controversial and opaque rulings."[2] In *Lynch v. Donnelly*[3] the Court held that a Christmas display which included a reindeer, Christmas tree, and Santa Claus, as well as a nativity scene depicting the birth of Christ, did not violate the establishment clause of the first amendment. The Court concluded the overall tableau had a "secular purpose" and "effect."[4] Following the *Lynch* decision lower courts have struggled to apply what has been ridiculed as the "reindeer rule."[5] The "reindeer rule" is that a tableau depicting the birth of Jesus does not amount to an endorsement of religion if it includes secular symbols of Christmas.[6]

Justice O'Connor prophetically warned us in her lauded concurring opinion in *Lynch* that "courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded."[7] As Professor Tribe has stated: "At issue in *Lynch* . . . was whether ours is to be a society in which the perspective on civil rights and human dignity is to be from . . . majority to minority, from insiders to outsiders—or the other way around."[8] Forty-three years after *Everson v. Board of Education*,[9] how has *Allegheny County v. American Civil Liberties Union* changed establishment clause analysis?

II. FACTS

Public property in downtown Pittsburgh was the site of two recurring holiday displays.[10] One display featured a crèche, donated by a Roman Catholic group and

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1. 109 S. Ct. 3086 (1989).

2. Sanders, *Revisiting the Reindeer Rule*, TIME, Dec. 12, 1988, at Law 71.

3. 465 U.S. 668 (1984).

4. *Id.* at 681.

5. Sanders, *supra* note 2, at 71.

6. McGough, *Menorah Wars: What the 'Reindeer Rule' Hath Wrought; Religious Displays on Public Grounds*, THE NEW REPUBLIC, Feb. 5, 1990, at 12 [hereinafter *Menorah Wars*].

7. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

8. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985), *quoted in* Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465, 473.

9. 330 U.S. 1 (1947). The 1947 case of Everson v. Board of Educ. is considered the foundation for contemporary analysis of the establishment clause.

10. Allegheny County v. ACLU, 109 S. Ct. 3086 (1989).

bearing a sign to that effect, which depicted a Christian nativity scene.[11] The crèche was prominently displayed on the grand staircase of the Allegheny County Courthouse.[12] At the crest of the manger was an angel bearing a banner exclaiming "Gloria in Excelsis Deo."[13]

A second display featured the city's forty-five-foot decorated Christmas tree, an eighteen-foot menorah, and a sign proclaiming the city's "Salute to Liberty."[14] The menorah[15] was owned by a Jewish group but was erected, removed, and stored by the city each year.[16] This display was located just outside the city-county building.[17]

The Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents sought a permanent injunction to prevent further display of both the crèche and the menorah alleging that the displays violated the establishment clause of the first amendment.[18] The district court denied the injunction, relying on *Lynch v. Donnelly*[19] which held that the inclusion of a crèche in a city's Christmas display, in combination with a variety of other symbols, did not violate the establishment clause.[20] The court of appeals reversed, distinguishing *Lynch* by holding that the crèche and the menorah represented an impermissible endorsement of Christianity and Judaism.[21] The United States Supreme Court granted certiorari and affirmed the decision of the court of appeals in part and reversed in part.[22] The Court held that the display of the crèche violated the establishment clause by impermissibly endorsing religion[23] but concluded that the display of the menorah next to the Christmas tree did not have an unconstitutional effect because it represented a "recognition of cultural diversity."[24]

III. HISTORY AND LAW

The establishment clause of the first amendment states in part that "Congress shall make no law respecting an establishment of religion . . . ."[25] An exhaustive review of the background and history of the establishment clause would be counter-productive for purposes of this note. This section will, therefore, focus

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11. *Id.* at 3094.

12. *Id.*

13. *Id.* This phrase comes from the Book of Luke, which tells of an angel appearing to the shepherds to announce the birth of the Messiah. "[S]uddenly there was with the angel a multitude of the heavenly host praising God and saying, Glory to God in the highest . . . ." *Id.* at n.5 (quoting *Luke* 2:13-14 (King James)).

14. *Allegheny,* 109 S. Ct. at 3095.

15. " '*Menorah*' is Hebrew for 'candelabrum.' " *Id.* at 3095 n.14.

16. *Id.* at 3097.

17. *Id.*

18. *Id.* at 3097-98.

19. 465 U.S. 668 (1984).

20. *Allegheny,* 109 S. Ct. at 3098.

21. ACLU v. Allegheny County, 842 F.2d 655 (3d Cir. 1988).

22. *Allegheny,* 109 S. Ct. at 3093.

23. *Id.* at 3105.

24. *Id.* at 3115.

25. U.S. CONST. amend. I.

on the development of the law pertaining to the establishment clause as it relates to the test used by the Court in establishment clause analysis and how changes in the test are pertinent to the present case – particularly government sponsorship of religious ceremonies or displays.

The 1947 case of *Everson v. Board of Education*[26] is the foundation for contemporary analysis of the establishment clause.[27] The state action at issue in *Everson* was the reimbursement of money spent by parents to transport their children on public buses to private, including parochial, schools.[28] The Court upheld the New Jersey statute on the basis that the reimbursements were part of a broad program of benefits granted to all citizens of the state regardless of their religious affiliation and not to the church affiliated schools themselves.[29] Justice Black, writing for the Court, produced what has become "one of the most influential paragraphs of dicta in all of constitutional law."[30] Black stated:

> 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 to 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 an 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 . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.[31]

"It soon became apparent that the case would be remembered more for its broad definition of impermissible government conduct than for its holding that the first amendment permits reimbursement for the cost of bus transportation to religious schools."[32] In the forty-three years since *Everson*, results in establishment clause cases have been legendary for their inconsistencies.[33] The Court has waivered as well in its determination of the underlying rationale of establishment clause cases: separation of church and state, neutrality, or accommodation.[34]

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26. 330 U.S. 1 (1947).

27. The establishment clause, like most of the other guarantees of the Bill of Rights, has been incorporated into the fourteenth amendment's due process guarantee and thereby made applicable to the states. *Id.* at 8.

28. *Id.* at 3.

29. *Id.* at 17-18.

30. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 153 (1987).

31. *Everson*, 330 U.S. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

32. Beschle, *supra* note 30, at 153.

33. Marshall, *"We Know It When We See It" the Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

34. *Id.* at 496 (citing *Everson*, 330 U.S. at 16 (separation of church and state); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (neutrality); and *Lynch*, 465 U.S. at 673 (accommodation)).

In *Abington School District v. Schempp*[35] a daily ritual of reading to school children from the Bible was held unconstitutional.[36] It made no difference that no child was compelled to participate.[37] The Court established a two-part test in *Schempp* to determine whether governmental action violates the establishment clause.[38] The Court held that: (1) the purpose of the enactment must be secular; and (2) the primary effect of the enactment must also not advance or inhibit religion.[39] The Court thus articulated for the first time two prongs of the present three-pronged *Lemon* test used in establishment clause analysis. In applying the test to the facts in Abington the Court concluded that the Bible readings were clearly "religious exercises . . . in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."[40] The Court stated: "The place of religion in our society is an exalted one . . . . [I]t is not within the power of government to invade the citadel, whether its *purpose* or *effect* be to aid or oppose, to advance or retard."[41]

In 1971 the *Schempp* two-part test became the three-part test applied by the modern court to determine whether governmental action violates the establishment clause.[42] In *Lemon v. Kurtzman*,[43] the Court held that two programs of public aid to parochial schools violated the establishment clause. The Pennsylvania program reimbursed private schools for the cost of books and teacher salaries in certain secular subjects.[44] In the other program, Rhode Island paid teachers in private elementary schools a supplement equal to fifteen percent of their annual salary.[45] The Court held that even if the primary effect of the programs was secular—enhancing the quality of education—they violated the establishment clause by creating "excessive entanglement between government and religion."[46] Part of the "entanglement" arose from the "surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education."[47]

The Court announced the three-pronged test used in reaching the *Lemon* decision: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with

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35. 374 U.S. 203 (1963).
36. *Id.* at 203.
37. *Id.*
38. *Id.* at 222.
39. *Id.*
40. *Id.* at 225.
41. *Id.* at 226.
42. Beschle, *supra* note 30, at 156.
43. 403 U.S. 602 (1971).
44. *Id.* at 609-10.
45. *Id.* at 607-08.
46. *Id.* at 614.
47. *Id.* at 603.

religion.' "[48] The new third prong of the establishment clause test grew out of the Court's decision in *Walz v. Tax Commission*.[49] The Court in *Walz* upheld state tax exemptions for religious property as well as other property devoted to nonprofit or charitable purposes by secular organizations.[50] The Court reasoned that to tax property for religious purposes would require excessive "entanglement," more so without an exemption scheme than with one.[51] The exemption scheme would require government involvement in "tax valuation of church property, tax liens, tax foreclosures, and the . . . conflicts that follow in the train of those legal processes."[52] This test has been used in all subsequent establishment cases with the exception of *Marsh v. Chambers*[53] and *Larsen v. Valente*.[54] The Court has assigned different roles to this test in resolving establishment inquiry.[55] "At times the Court has described the test as a helpful signpost,[56] at other times the Court has suggested that it can be discarded in certain circumstances,[57] at still other times the Court has held that it must be rigorously applied."[58]

A. Ceremonies and Displays

When the government conducts a ceremony or sponsors a display and there is reference to a religious subject in the display or ceremony, the result is conflict with the establishment clause. Authorities have distinguished this establishment clause arena by the appellation "civil religion."[59] By civil religion is meant the entrenchment of religion in American public life which reflects majoritarian religious beliefs.[60] It involves the incorporation of practices that carry religious

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48. *Id.* at 612-13 (citations omitted).

49. 397 U.S. 664 (1970).

50. *Id.* at 672-74.

51. *Id.* at 674.

52. *Id.*

53. 463 U.S. 783 (1983). The Court held that the practice of opening each daily session of a state legislature with a prayer by a state-paid chaplain does not violate the establishment clause. *Id.* at 792-95. The Court relied on the fact that this practice went back to the First Congress. *Id.* The Court largely ignored the *Lemon* test, and Justice Brennan with whom Justice Marshall joined, noted in his dissent that such a practice could not stand under the settled doctrine of *Lemon*. *Id.* at 797-99 (Brennan, J., dissenting).

54. 456 U.S. 228 (1982). The Court found a violation of the principle that one religion may not be favored over another. *Id.* at 255. A Minnesota law which exempted all religious organizations from reporting and registration requirements applicable to other charitable organizations was amended to remove the exemption for any religious organization receiving less than half of its total contributions from members. *Id.* at 230-32. The Court determined that where one religion is preferred over another a strict scrutiny analysis must be applied rather than the three-prong test. *Id.* at 246.

55. Marshall, *supra* note 33, at 497.

56. *Id.* at 497 (citing Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985)). *See infra* notes 111-20 and accompanying text.

57. Marshall, *supra* note 33, at 497 (citing Marsh v. Chambers, 463 U.S. 783 (1983)). *See infra* notes 63-70 and accompanying text.

58. Marshall, *supra* note 29, at 497 (citing Stone v. Graham, 449 U.S. 39 (1980)). The posting of the Ten Commandments, even though privately funded, was found to violate the establishment clause because the purpose was "plainly religious." *Stone*, 449 U.S. at 41. Efforts to characterize the Ten Commandments in secular terms as part of our legal heritage failed. *Id.* at 41-42.

59. *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1651 (1987) [hereinafter *Religion and the State*].

60. *Id.* at 1651.

significance or have religious roots into public institutions and ceremonies, i.e., references to God in the pledge of allegiance and the national motto "In God We Trust."[61] "The ambiguous character of civil religion makes it especially difficult to classify in establishment clause terms."[62]

In *Marsh v. Chambers*,[63] the Court held that the practice of opening each daily session of a state legislature with a prayer by a state-paid chaplain did not violate the establishment clause.[64] Chief Justice Burger, writing for the Court, stated: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[65] The Court made no pretense of subjecting Nebraska's practice of legislative prayer to the *Lemon* three-pronged test and concluded that if sufficiently rooted in our cultural identity, a tradition could skirt the *Lemon* test altogether.[66] The Court stated that the practice was not an establishment of religion but rather an acknowledgment of beliefs held by the people of this country.[67] "[T]he Court allowed historical acceptance *indirectly* to validate the practice by reclassifying the practice —precisely by virtue of its wide-spread acceptance—as an 'acknowledgment' rather than a promotion of religion."[68] Justices Brennan and Marshall, dissenting, noted that such a practice could not stand under the principles of *Lemon*.[69] *Marsh* should be noted as heralding the Supreme Court's emerging "accommodation" rationale in the "public sphere" of "civil religion."[70]

In a 1984 case, *Lynch v. Donnelly*,[71] the Court held that the inclusion of a crèche in a Christmas display sponsored by the City of Pawtucket, Rhode Island, and located in the heart of the city's shopping district did not violate the establishment clause.[72] The display included a Santa Claus house, a Christmas tree, a banner reading "Seasons Greetings," and the infamous reindeer.[73] The crèche was comprised of "traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals . . . ."[74] The accommodation doctrine hinted at in *Marsh*[75] emerged full force in *Lynch*.[76] The Court stated:

> The concept of a wall of separation is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists. The Constitu-

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61. *Id.*
62. *Id.* at 1652.
63. 463 U.S. 783 (1983).
64. *Id.* at 791.
65. *Id.* at 786.
66. Beschle, *supra* note 30, at 168.
67. *Marsh*, 463 U.S. at 792.
68. *Religion and the State*, *supra* note 59, at 1656.
69. *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting).
70. *See Religion and the State*, *supra* note 59, at 1641.
71. 465 U.S. 668 (1984).
72. *Id.*
73. *Id.* at 671.
74. *Id.*
75. 463 U.S. 783 (1983).
76. 465 U.S. 668 (1984).

> tion does not require complete separation of church and state; it *affirmatively mandates accommodation*, not merely tolerance, of all religions, and forbids hostility toward any.[77]

The Court further stated that although it previously found the three-pronged *Lemon* test to be useful, the Court had repeatedly emphasized an "unwillingness to be confined to any single test or criterion in this sensitive area."[78] The Court noted that "[t]he narrow question [was] whether there was a secular purpose for Pawtucket's display of the crèche"[79] and declared that the focus of the inquiry should be on the crèche "in the context of the Christmas season."[80] A majority of the Court in a 5-4 vote held the nativity display did not violate any of the *Lemon* prongs in the context of the Christmas season.[81] The secular purpose of the display was to celebrate the holiday and depict the origins of the holiday;[82] the primary effect was not to benefit religion in general or Christianity in particular because any advancement of religion was "indirect, remote, and incidental"—no more an endorsement of religion than an exhibition of religious paintings in museums supported by the government.[83] The Court declared there was no governmental "entanglement" since the city erected and maintained the display.[84] Therefore, political divisiveness alone would not invalidate otherwise permissible conduct.[85]

Justice O'Connor, in a concurring opinion, suggested a reformulation or refinement of *Lemon's* first two prongs.[86] She combined the "purpose" prong[87] and the "effect" prong[88] into a single endorsement standard which would examine the overall message of the display and ask whether "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]."[89] Justice O'Connor emphasized that 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."[90]

Justice Brennan, dissenting,[91] stated: "Nothing in the history of such practices or the setting in which the city's crèche is presented obscures or diminishes the

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77. *Id.* (emphasis added).
78. *Id.* at 679.
79. *Id.* at 681.
80. *Id.* at 679 (emphasis added).
81. *Id.* at 685.
82. *Id.* at 681.
83. *Id.* at 683.
84. *Id.* at 684.
85. *Id.*
86. *Id.* at 690 (O'Connor, J., concurring).
87. *Lemon*, 403 U.S. at 612. The "purpose" prong states that the government action must have a secular purpose. *Id.*
88. *Id.* The "effect" prong states the principle or primary effect of the government action must neither advance nor inhibit religion. *Id.*
89. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).
90. *Id.* at 688.
91. *Lynch*, 465 U.S. at 694 (Brennan, J., dissenting, in which Blackmun, Marshall, and Stevens, JJ., joined).

plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith."[92] He concluded that Pawtucket's valid secular objectives could be easily accomplished by other means[93] and noted that "[t]he 'primary effect' of including a nativity scene in the city's display [was] to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche . . . thereby providing 'a significant symbolic benefit to religion . . . .' "[94]

Notwithstanding Justice Brennan's dissent, the *Lynch* decision embodies the Supreme Court's emerging "accommodation" doctrine, allowing the display of the crèche because it was but one of countless "illustrations of the Government's acknowledgment of our religious heritage and government sponsorship of graphic manifestations of that heritage."[95]

B. Religion, Public Education, and Lemon

In *Wallace v. Jaffree*[96] the Court held that an Alabama statute which authorized a one-minute silent period at the start of each school day which was to be used for meditation or voluntary prayer violated the establishment clause.[97] The Court stated: "[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. [T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or *none at all*."[98] The Court based its invalidation of the statute on the first prong, only, of the *Lemon* test. The Court quoted Justice O'Connor's concurring opinion in *Lynch* verbatim:

> "The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."[99]

The majority concluded that the legislature's sole purpose in enacting the statute was to endorse religion, a violation of the first prong of *Lemon*[100] because the provision had nonsecular purpose.[101] The Court concluded that the statute was enacted "to convey a message of state endorsement" of prayer[102] and for the sole purpose "of expressing the State's endorsement of prayer activities for one minute

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92. *Id.* at 695.

93. *Id.* at 699.

94. *Id.* at 701. It has been suggested that "[b]oth the O'Connor and Brennan opinions . . . are essentially paradigms of symbolic interpretation." Marshall, supra note 33, at 517.

95. *Lynch*, 465 U.S. at 677.

96. 472 U.S. 38 (1985).

97. *Id.* at 61.

98. *Id.* at 52-53 (emphasis added).

99. *Id.* at 56 n.42 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

100. *Id.* at 56.

101. *Id.*

102. *Id.* at 59.

at the beginning of each schoolday."[103] The Court thus seemingly began with a *Lemon* analysis, but moved to an emphasis on the endorsement standard.

Justice O'Connor wrote a concurring opinion in which she reiterated that "[d]espite its initial promise, the *Lemon* test has proved problematic."[104] She stated her belief that "the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment."[105] The Court demonstrated agreement by basing the *Wallace* decision on Justice O'Connor's refinement of the *Lemon* test, expressed for the first time in her concurring opinion in *Lynch*. "The proper inquiry under the purpose prong of Lemon . . . is whether the government intends to convey a message of endorsement or disapproval of religion."[106]

Justice Rehnquist in his dissent once again expressed his accommodationist point of view and contended there was "no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[107] He further stated that the establishment clause did not require government neutrality between religion and irreligion.[108] The majority opinion, concurring opinion, and dissenting opinions,[109] although disagreeing on the underlying rationale of the establishment clause, were unanimous in their agreement that the three-pronged test as laid down in *Lemon* is problematic.[110]

In 1985 the Court addressed the issue of sending public school teachers into parochial schools to teach special subjects. In *Grand Rapids School District v. Ball*,[111] a two-part legislative scheme was challenged.[112] A Shared Time Program provided for classes during the regular school day for non-public school students in classrooms leased from non-public schools.[113] The teachers were full-time employees of the public schools.[114] The second program, the Community Education Program, offered classes for both children and adults which were taught in non-public elementary schools and commenced at the conclusion of the regular school

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103. *Id.* at 60.

104. *Id.* at 68 (O'Connor, J., concurring).

105. *Id.* at 68-69.

106. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

107. *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

108. *Id.* at 113.

109. Dissenting opinions in *Wallace* were filed by Chief Justice Burger and Justices White and Rehnquist. Echoing the previously examined "accommodation" theory, Chief Justice Burger stated: "It [the Alabama statute] *accommodates* the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray." *Id.* at 89 (Burger, C.J., dissenting) (emphasis added).

110. *See Wallace*, 472 U.S. at 68 (O'Connor, J., concurring); *id.* at 89 (Burger, C.J., dissenting). "The Court's extended treatment of the 'test' of *Lemon* . . . suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues." *Id.* at 108 (Rehnquist, J., dissenting) ("The secular purpose prong has proved mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate.").

111. 473 U.S. 373 (1985).

112. *Id.* at 375.

113. *Id.* at 375-76.

114. *Id.* at 376.

day.[115] Most of the teachers were employed by the non-public schools as regular instructors and were only part-time public school employees.[116]

In striking down the scheme, the Court stated: "[O]ur cases have consistently recognized that even such praise-worthy, secular purpose [providing for the education of school-children] cannot validate government aid to parochial schools when the aid has the *effect* of promoting a single religion or religion generally . . . ."[117] *Grand Rapids School District* was set in a *Lemon* framework, but marked the first time a Court majority relied on the refined *Lemon* test in its decision.[118] The question under Justice O'Connor's refined *Lemon* test being "whether the program would be *perceived* as endorsement, regardless of effect . . . ."[119] The Court concluded that the programs might provide a crucial link of endorsement between government and religion.[120]

Although the Court seemed to be moving steadily away from the traditional *Lemon* test and toward Justice O'Connor's refined *Lemon* test, in a companion case to *Grand Rapids, Aguilar v. Felton*,[121] the Court adhered to the three-part establishment clause test enunciated in *Lemon*.[122] *Aguilar* dealt with New York City's policy of using federal funds to pay public-payroll teachers to go into parochial schools and teach classes to "educationally deprived children from low-income families."[123] The Court held that the program was "similar" in a number of respects to the program held unconstitutional that same day in *Grand Rapids*.[124] The Court based its decision primarily on the ground that "the supervisory system established by the City of New York [for monitoring the religious content of the publicly funded classes] inevitably results in the excessive entanglement of church and state . . . ."[125]

Justice O'Connor wrote a dissenting opinion in *Aguilar,* stating: "I disagree with the Court's analysis of entanglement, and I question the utility of entanglement as a separate Establishment Clause standard . . . ."[126] She further stated:

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115. *Id.*

116. *Id.* at 377.

117. *Id.* at 382 (emphasis added).

118. Marshall, *supra* note 33, at 520-21. What Marshall terms "symbolic interpretation" is the same as Justice O'Connor's refined *Lemon* test. "Thus she would ask not whether the primary effect of a government practice is to advance religion, but whether government conveys through that practice a message of endorsement of religion." Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465, 475.

119. Marshall, *supra* note 33, at 521.

120. *Grand Rapids*, 473 U.S. at 385. It is probable that the "symbolic effect" or "endorsement standard" alone would have rendered the scheme unconstitutional, but the programs were found invalid on other grounds as well. Justice Brennan stated the programs "pose[d] a substantial risk of state-sponsored indoctrination." *Id.* at 387.

121. 473 U.S. 402 (1985).

122. *See id.* at 410-14.

123. *Id.* at 404.

124. *Id.* at 408-09. Four members of the Court (Burger, C.J., White, Rehnquist, and O'Connor, JJ.) disagreed with the majority view that the New York City program and the Grand Rapids Shared Time Program violated the first amendment. *Id.*

125. *Id.* at 409.

126. *Id.* at 422 (O'Connor, J., dissenting).

"If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state . . . ."[127] Justice O'Connor reiterated combining the purpose and effect prongs of *Lemon*, and declared that entanglement should not remain a separate standard for establishment clause analysis.[128] Rather, all three prongs of *Lemon* should be combined into the single endorsement standard.[129]

The primary problem of the Grand Rapids and New York statutes was that the instruction took place in the parochial schools.[130] Thus in *Grand Rapids*, "[t]he symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public."[131] The Court held in *Aguilar* that the scope and duration of New York City's Title I program would require a permanent and pervasive state presence in sectarian schools receiving aid.[132] The Court noted such presence infringed precisely upon the establishment clause values of excessive entanglement.[133]

A recent case, *Texas Monthly, Inc. v. Bullock*,[134] is notable for reinforcing the supposition that the Court is moving toward a single test in determining establishment clause infringement: Does the state's conduct amount to an "endorsement of religion?" "Endorsement" is both what is *intended* to be communicated and what message is *actually conveyed*.[135] The decision also addressed the concern, verbalized in Justice O'Connor's concurring opinion in *Lynch*, that government endorsement of religion sends a message to nonadherents that they are "outsiders, not full members of the political community . . . ."[136] The Texas statute in question exempted religious organizations from paying sales and use taxes on their religious publications.[137] In striking down the statute the majority stated the main test as whether the legislation "constitutes an endorsement of one or another set of religious beliefs or of religion generally."[138] The Court quoted Justice O'Connor's concurring opinion in *Wallace v. Jaffree* extensively and noted that government is prohibited from placing its authority behind religious beliefs in general or compelling nonadherents to support the practices of religious organizations by "convey-

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127. *Id.* at 430.
128. *Id.* at 422.
129. *See id.* at 429-31.
130. *Id.* at 411-12.
131. *Grand Rapids*, 473 U.S. at 397.
132. *Aguilar*, 473 U.S. at 412-13.
133. *Id.* at 413.
134. 109 S. Ct. 890 (1989).
135. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (emphasis added).
136. *Id.* at 688. *See also id.* at 701-02 (Brennan, J., dissenting).
137. *Texas Monthly*, 109 S. Ct. at 894.
138. *Id.* at 896.

ing the message that those who do not are less than full members of the community."[139]

Texas Monthly should be contrasted with *Walz v. Tax Commission.*[140] The tax exemption upheld in *Walz* was part of a broad scheme that did not prefer religion over nonreligion—property owned by many types of non-profit organizations were also exempted.[141] In *Texas Monthly,* only writings published by religious groups concerning religious subject matter were exempted.[142] Therefore, the exemption's principle effect was to advance or endorse religion. Although the Court appears to be unhappy with the three-pronged *Lemon* test and moving toward the refined *Lemon* test of Justice O'Connor, the three-pronged test remains the official standard in establishment clause cases.

IV. THE PRESENT CASE

In *Allegheny County v. American Civil Liberties Union,*[143] a five-justice majority held that the crèche on the grand staircase of the Allegheny County Courthouse violated the establishment clause.[144] The Court adopted Justice O'Connor's *Lynch* endorsement test as the basis for the decision.[145] Justice Blackmun, writing for the Court, stated that the Court had applied a refined version of the three-part *Lemon* test in recent decisions, asking "whether the challenged governmental practice either has the *purpose* or *effect* of 'endorsing' religion . . . ."[146] The Court concluded that Allegheny County had violated the establishment clause by choosing "to celebrate Christmas in a way that has the effect of endorsing a patently Christian message [with regard to the crèche] . . . ."[147]

Justice Blackmun reasoned in Part VI that "the menorah did not have the prohibited effect of endorsing religion, given its particular [physical] context."[148] Justice O'Connor also concluded that the city's display of the menorah next to the tree and a sign saluting liberty did not violate the establishment clause because the display conveyed a message of "pluralism" which, in the particular setting, could not be interpreted by a "reasonable observer" as an endorsement of Judaism or Christianity or as a disapproval of alternative beliefs.[149]

Justice Kennedy surmised that neither the menorah nor the crèche violated the establishment clause, claiming that "[g]overnment policies of accommodation,

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139. *Id.* (citations omitted). The Court is quoting Justice O'Connor's concurrence in Wallace v. Jaffree, 472 U.S. 38 (1985).

140. 397 U.S. 664 (1970). *See supra* note 49 and accompanying text.

141. *Walz,* 397 U.S. at 672-73.

142. *Texas Monthly,* 109 S. Ct. at 894.

143. 109 S. Ct. 3086 (1989).

144. *Id.* at 3092-93. The five-Justice majority included Blackmun, Brennan, Marshall, Stevens, and O'Connor, JJ. *Id.*

145. *Id.* at 3103.

146. *Id.* at 3100 (emphasis added).

147. *Id.* at 3105. Justice Kennedy, joined by Justices Rehnquist, White, and Scalia, found the crèche did not violate the establishment clause. *Id.*

148. *Id.* at 3115.

149. *Id.* at 3123-24.

acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[150]

Justice Brennan concurred that the crèche signified an endorsement of religion which violated the establishment clause, but disagreed with the conclusion that the display of the Christmas tree and menorah did not have the impermissible effect of endorsing religion.[151] Justice Brennan stated that the notion that a Christmas tree was secular was "shaky."[152] He noted that the "attempt to take the 'Christmas' out of the Christmas tree [was] unconvincing."[153] He further stated that the menorah was "indisputably a religious symbol."[154]

Thus, the majority expressly adopted Justice O'Connor's "refined" *Lemon* test, by determining that a reasonable observer, seeing the nativity display, would construe the crèche, but not the menorah, as an endorsement of religion.[155]

V. ANALYSIS

A. "What the 'Reindeer Rule' Hath Wrought" [156]

The Court has addressed the problem of public ceremonies and displays which include government sponsored religious symbols on two recent occasions. This arena, deemed the public sphere of civil religion, most emphatically represents one of what Justice O'Connor has termed "the myriad, subtle ways in which Establishment Clause values can be eroded."[157] A conflict exists as to whether the Court is to maintain the position stated in *Everson*—that the first amendment was intended to erect a wall of separation between church and state that must be kept "high and impregnable"[158] and without the "slightest breach"[159]—or alternatively, whether the Court should adopt the diametrically opposed viewpoint of the *Lynch* decision, that the Constitution "affirmatively mandates accommodation . . . of all religions."[160] The *Lynch* majority[161] would label such accommodation an acknowledgment of our cultural heritage.[162]

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150. *Id.* at 3135 (Kennedy, J., concurring in the judgment in part and dissenting in part, in which Rehnquist, C.J., Scalia and White, JJ., joined).

151. *Id.* at 3124 (Brennan, J., concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined).

152. *Id.* at 3125.

153. *Id.*

154. *Id.* at 3127.

155. *Allegheny,* 109 S. Ct. at 3100-01. "Endorsement" would be a perception by the observer that the government is taking a position on the question of religious belief or " 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Id.* at 3101 (*quoting* Lynch v. Donnelly, 465 U.S. at 687).

156. *Menorah Wars, supra* note 6, at 12.

157. *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring).

158. *Everson,* 330 U.S. at 18.

159. *Id.*

160. *Lynch,* 465 U.S. at 673.

161. Burger, C.J., delivered the opinion of the Court, in which White, Powell, Rehnquist, and O'Connor, JJ., joined. *Id.* at 670.

162. *Id.* at 677 (suggesting the Christmas tree and the crèche have become secularized).

B. *The Test: Old* Lemon *v. New* Lemon

Because the Court in the past has used the three-pronged *Lemon* test to determine establishment clause violations, accommodationists on the Court desiring to satisfy the purpose prong – that the display have a secular purpose – could ascribe to any religious practice or symbol the purpose of preserving tradition.[163] Thus, a crèche had a secular purpose because it was part of the tradition of Christmas, which had become part of our cultural heritage. The *Lynch* decision clearly demonstrated the fallibility of the *Lemon* purpose prong. The Court held that the crèche in the challenged display depicted the "historical origins of this traditional event long recognized as a National Holiday."[164] The Court noted that the display had a legitimate secular purpose of celebrating a traditional holiday, and to depict the origins of the holiday.[165] The Court ignored the fact that the creche symbolized the birth of Jesus and the Christian religion's celebration of that birth. "The Court's position, in essence, was that the government-sponsored nativity scene was no big deal; if any non-Christians felt alienated by it, that was their problem."[166] Professor Tribe notes that "[o]ne cannot avoid hearing in *Lynch* a faint echo of the Court that found nothing invidious in the Jim Crow policy of 'separate but equal.' "[167]

Justice O'Connor's suggested "reformulation" of the *Lemon* test, found in recent separate opinions,[168] appears to satisfy one of the shortcomings of *Lemon's* purpose prong: "[I]t is too easy a hurdle because it can usually be satisfied by calling the challenged activity a tradition."[169] Justice O'Connor's test applies a single standard and asks whether, irrespective of government's purpose, the practice being challenged in fact has the *effect* of communicating "a message of [governmental] endorsement or disapproval [of religion]."[170] The O'Connor test, which focuses on the perceived effect of the message, rather than the purpose behind the message, provides a more effective and honest means of evaluating establishment clause problems than the traditional test used by the Court in previous establishment clause challenges. The new test focuses, additionally, on the establishment clause "as guarding against majoritarian infringements on religious autonomy. Accordingly, courts should be sensitive to the exclusionary and coercive pressures

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163. Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465, 475 [hereinafter Lemon *Reconstituted*].

164. *Lynch*, 465 U.S. at 680.

165. *Id.* at 681.

166. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985).

167. *Id.* (quoting Plessey v. Ferguson, 163 U.S. 537 (1896)).

168. *Religion and the State*, *supra* note 59, at 1647. The comment states that "Justice O'Connor has developed her views in Lynch v. Donnelly, 465 U.S. 668, 687-90 (1984) (O'Connor, J., concurring), Wallace v. Jaffree, 472 U.S. 38, 68-70, 74-76 (1985) (O'Connor, J., concurring in the judgment), Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring), and Witters v. Washington Dep't of Servs., 447 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment)." *Id.* at 1647 n.30.

169. Lemon *Reconstituted*, *supra* note 163, at 467.

170. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

on those who do not adhere to mainstream faiths, pressures created by the inclusion of religion in public institutions or its endorsement by government."[171]

C. The "Crèche No, Menorah Yes" Decision[172]

The *Allegheny* Court based its decision on two principles: "[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs," [173] and the *effect* of the government's use of religious symbolism depends upon its *context*.[174]

1. "Context"

The Court in *Allegheny* held that the crèche, which occupied a prominent position on the grand staircase of the Allegheny County Courthouse, violated the establishment clause of the first amendment because, "[u]nder the Court's holding in *Lynch*, the effect of a crèche display turns on its *setting*."[175] The Court noted that the task in *Allegheny* was "to determine whether the display of the crèche and the menorah, in their respective 'particular settings,' ha[d] the effect of endorsing or disapproving religious beliefs."[176] The Court stated that nothing in the *Allegheny* display detracted from the crèche's religious message.[177] No figure of Santa Claus or other decorations accompanied the figures comprising the crèche, except poinsettia plants placed around the fence surrounding the crèche.[178] The Court held that by permitting the display of the crèche *in that particular setting*, a reasonable observer seeing the display would conclude that the government was "endorsing religion in general or a particular religion."[179]

A different five-justice majority in *Allegheny* held that an eighteen-foot Hanukkah menorah placed next to a forty-five-foot Christmas tree in a different part of Pittsburgh did not violate the establishment clause.[180] Again, *context* was the determining factor. The Court reasoned that the combined display of a Christmas tree, a menorah, and a sign saluting liberty simply recognized a holiday season which has attained a secular status in American culture.[181] One publication has paraphrased the "context" principle in the following manner: "How much secular camouflage is required to sneak a publicly sponsored Nativity scene past the First Amendment bar on an 'establishment of religion.' "[182] This statement demon-

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171. *Religion and the State*, *supra* note 59, at 1611.

172. *Menorah Wars*, *supra* note 6, at 12.

173. *Allegheny*, 109 S. Ct. at 3103.

174. *Id.* (emphasis added).

175. *Id.* (emphasis added).

176. *Id.*

177. *Id.* at 3103-04.

178. *Id.* at 3104. The *Lynch* display included a Santa Claus, a reindeer, a Christmas tree, and a banner reading "Season's Greetings," in addition to the crèche or nativity scene depicting the birth of Christ. *Lynch*, 465 U.S. at 671.

179. *Allegheny*, 109 S. Ct. at 3104.

180. *Id.* at 3093.

181. *Id.* at 3113-15.

182. *Sanders*, *supra* note 2.

strates the extent to which the "context" requirement trivializes the constitutional requirements of the establishment clause. To minorities, the fact that an overtly religious symbol, representing a particular faith, is part of a wider secular display does not alter the impression that the government is endorsing the beliefs associated with the particular symbol.[183]

The *Allegheny* Court held that because the menorah was near the Christmas tree, which was "primarily" secular, the two symbols taken together conveyed the message of celebration of a secular holiday season.[184] In actuality, members of a religious majority, or of a particular religion whose beliefs are recognized by a display, are likely to view the display and conclude that it "accommodates their beliefs without infringing the religious autonomy of nonadherents."[185] To minorities, including irreligionists, the message conveyed is that they are "not similarly worthy of public recognition nor entitled to public support."[186] The Court is seemingly unaware of "the inherent exclusionary impact of such symbols on nonadherents."[187] The Court's reasoning that context determines the effect of endorsement or non-endorsement of religion is faulty. "The gradual but increasingly pervasive installment of compromised religious ritual within government itself thus draws that which was formerly outside to the inside . . . ."[188] Another authority has similarly stated: "The Court's approach in *Lynch* . . . thus represents an inversion of the principle that the religion clauses protect unpopular minorities against exercises of majority will in matters of religion."[189] This same faulty reasoning is evident in the Court's conclusion in *Allegheny* that the display of the menorah does not violate the establishment clause and that the reason the crèche does violate the clause is primarily because there are no "secular" symbols displayed with the crèche.

2. Endorsement and Perception

The second constitutional principle agreed upon by the Court in *Allegheny* was that "the government's use of religious symbolism is unconstitutional if it has the *effect* of endorsing religious beliefs."[190] Justice O'Connor relies on the perspective of an "objective observer"[191] to determine whether the government's action impermissibly endorses religion,[192] and notes that both the subjective and objective components of a message determine the perception of that message.[193] She states

183. *Religion and the State*, *supra* note 59, at 1657.
184. *Allegheny*, 109 S. Ct. at 3114.
185. *Religion and the State*, *supra* note 59, at 1657.
186. *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting).
187. *Religion and the State*, *supra* note 59, at 1659.
188. Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 787 [hereinafter *Mr. Jefferson's Crumbling Wall*].
189. *Religion and the State*, *supra* note 59, at 1659.
190. *Allegheny*, 109 S. Ct. at 3103.
191. *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).
192. *Religion and the State*, *supra* note 59, at 1647.
193. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

that "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."[194] In other words, "a symbol has no natural meaning independent of its 'interpretive community'—the meaning of a symbol depends on the nature of its audience."[195]

The perception of "endorsement" depends largely upon the outlook of the observer.[196] "Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view?"[197] Most importantly, the objective observer, in the final analysis, becomes the individual Justice sitting on the Court who must "understand and evaluate a symbol on the basis of an objective paradigm different from his or her own,"[198] and "it is far more likely that such a person will assume the objective observer to be him or herself rather than employ an external standard."[199] One should deduce from this analysis that predictability as to future establishment clause decisions can be predicated on the "perceptions" of the Justices currently sitting on the Court. In other words, "[e]stablishment is no more than what the Justices perceive it to be."[200]

VI. CONCLUSION

Although Justice O'Connor's modifications of the *Lemon* test restrict the practice of ascribing to almost any state religious practice "the purpose of preserving tradition,"[201] and also address the "concern that state religious activities may ostracize religious minorities,"[202] the new test will not realistically change the emerging trend toward accommodation of de facto religion when application of the test is coupled with the context requirement.

It remains unclear, as well, who the objective observer will be whose determination is dispositive in determining whether or not a symbol "endorses" religion. If establishment is what the Justices perceive it to be, it will be a far cry from the Jeffersonian "wall of separation." From a separationist point of view, "the objectives subsumed under the public sphere accommodation rationale, when invoked to justify the formal, public honoring of religious beliefs by the state, cannot be squared with the protection of the religious autonomy of minorities."[203] The rea-

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194. *Id.*

195. Marshall, *supra* note 33, at 533 (citing Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84-85 (1985)).

196. *Id.* at 534.

197. *Id.* at 537.

198. *Id.*

199. *Id.* (citing F. SCHAUER, THE LAW OF OBSCENITY 72-73 (1976)). "The obscenity test is based upon a judge's or jury's interpretation of the standards of the population as a whole. However, it is more likely that a judge or jury applies personal standards." *Id.* at 537 n.243 (citing F. SCHAUER, THE LAW OF OBSCENITY 72-73 (1976)).

200. *Id.* at 537.

201. Lemon *Reconstituted*, *supra* note 163, at 475.

202. *Id.*

203. *Religion and State*, *supra* note 59, at 1657.

soning apparent in recent establishment decisions "equates majority acceptance with constitutional acceptability."[204]

Examination of the *Allegheny* decision discloses that Justice O'Connor found the crèche violated the establishment clause,[205] but that the menorah next to the Christmas tree did not.[206] Four Justices, Kennedy, Rehnquist, White, and Scalia, believed neither the crèche nor the menorah violated the establishment clause.[207] This would seem to indicate that in the future, provided "enough" secular symbols were included in the religious display, five Justices[208] would agree that the display is not an endorsement of religion. One authority has stated concerning the *Lynch* decision, applicable to *Allegheny* as well, that "[b]oth the case and the tendency it represents are disappointing reminders that religious ethnocentrism, as well as religious insensitivity, are still with us. I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed."[209]

Despite properly focusing on "the impact of state actions on nonadherents of benefitted creeds,"[210] Justice O'Connor's refined *Lemon* test when coupled with the context requirement imposed by the *Lynch* and *Allegheny* decisions, and governed by the majority perspective on endorsement, will be "inadequately sensitive to the impact of government actions on religious minorities" in the arena of civil religion.[211] "The 'Crèche No, Menorah Yes' decision has come in for as much abuse as the reindeer rule on which it relied."[212]

Mary B. Davis

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204. *Id.* at 1656.
205. *Allegheny*, 109 S. Ct. at 3119 (O'Connor, J., concurring in part and concurring in the judgment).
206. *Id.* at 3122.
207. *Id.* at 3134 (Kennedy, J., concurring in the judgment in part and dissenting in part).
208. Kennedy, Rehnquist, O'Connor, Scalia, and White, JJ.
209. *Mr. Jefferson's Crumbling Wall*, *supra* note 188, at 787.
210. *Religion and the State*, *supra* note 59, at 1647.
211. *Id.* at 1648.
212. *Menorah Wars*, *supra* note 6, at 12.