RELIGIOUS DISPLAYS ON PUBLIC PROPERTY

December 7, 1999

OKLAHOMA COUNTY BAR ASSOCIATION
CONTINUING LEGAL EDUCATION

CERTIFICATE OF ATTENDANCE

This is to certify that the above named individual was in attendance at **"Religious Displays on Public Property."**

This seminar was held December 7, 1999, at the Oklahoma County Bar Association, 119 North Robinson, Suite 240, Oklahoma City, Oklahoma.

You received a credit of 1.0 MCLE Credit Hour.

If further information is required, call the Oklahoma County Bar Office at (405) 236-8421. Or you may write to: Oklahoma County Bar Association, 119 N. Robinson, Suite 240, Oklahoma City, OK 73102.

December 7, 1999
Date

Bobby G. Knapp
Executive Director

CLE ATTENDEE -- Please keep this for your CLE Records Maintenance and End of the Year OBA/MCLE Report.

SOME ADDITIONAL CITES

Lee v. Weisman, 112 S.Ct. 2649 (1992), 5-4, opinion by Kennedy, holding middle school graduation prayers impermissible, emphasizing the particular context/circumstances, using language several times about government created religious orthodoxy; but noting "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." (p. 2658).

Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995).

Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991).

DGG/12-7-99

(V)

RELIGIOUS DISPLAYS ON PUBLIC PROPERTY
Oklahoma County Bar Association/CLE Seminar, December 7, 1999

A. What is clear from U.S. Supreme Court decisions
   1. Klan/public square case
   2. Holiday display cases

B. What is unclear from U.S. Supreme Court decisions
   1. Does a Christmas tree send a message promoting religion?
   2. Does a star (either five-pointed or six-pointed) send a message promoting religion?
   3. The city seal cases
      a. Messages about history: permitted
      b. Messages promoting religion: not permitted
      c. THE OBVIOUS PROBLEM: History and religion are interwoven throughout our past and our present.
   4. The KEY: What messages are being sent by government (by what it does/permits on its property)

C. The "no orthodoxy" principle

D. Communication by symbols: "helpful" comparisons with promoting products (concepts) in "real life": most powerful messages if measured by cost:
   1. Dogs, other furry creatures, the lizard, frogs
   2. What makes a car better as communicated on TV: quieter on the road? lower costs for repairs of dings? less maintenance needed? – racing across a desert, driving on a beach?

E. The people's (public officials') guiding principle: avoiding costs of litigation, i.e., attorney fees
   1. Liberty loses ("there are very few free lunches")
   2. Role of the ACLU

CAPITOL SQUARE REVIEW AND ADVISORY BOARD v. PINETTE
515 U.S. 753, 115 S.Ct. 2440 (1995) (excerpts, footnotes and references to briefs omitted):

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Part IV, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice THOMAS join.

*** The question in this case is whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government. (P.2444)

I

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

It has been the Board's policy "to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square." Such diverse groups as homosexual rights organizations, the Ku Klux Klan, and the United Way have held rallies. The Board has also permitted a variety of unattended displays on Capitol Square: a state- sponsored lighted tree during the Christmas season, a privately sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival.*** (p.2444)

THE DISPLAY:
" In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from respondent Donnie Carr, an officer of the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993." (P.2445)

THE RESULT (THIS IS PRECEDENT):
The Supreme Court affirmed the 6th Circuit, which had affirmed the District Court's issuance of "an injunction requiring the Board to issue the requested permit."(p.2445)

PART IV ON WHICH THERE IS NO MAJORITY (THIS IS NOT PRECEDENT):
[Scalia, Rhenquist, Kennedy, Thomas]
Petitioners argue that one feature of the present case distinguishes it from *Lamb's Chapel* and *Widmar*: the forum's proximity to the seat of government, which, they contend, may produce the

perception that the cross bears the State's approval. They urge us to apply the so-called "endorsement test," see, e.g., *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), and to find that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional.

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950). Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." *Allegheny, supra*, at 593, 109 S.Ct., at 3101 (citing cases). We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion. [Citations omitted] Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself, Lynch, supra*, or else government action alleged to *discriminate in favor* of private religious expression or activity, [citations omitted]. The test petitioners propose, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test. (pp.2447-48)

Petitioners rely heavily on *Allegheny* and *Lynch*, but each is easily distinguished. In *Allegheny* we held that the display of a privately sponsored creche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the county was *favoring* sectarian religious expression. 492 U.S., at 599-600, and n. 50, 109 S.Ct., at 3104-3105, and n. 50 ("The Grand Staircase does not appear to be the kind of location in which all were free to place their displays"). We expressly distinguished that site from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms, "the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche." *Ibid.* (emphasis added). In *Lynch* we held that a city's display of a creche did not violate the Establishment Clause because, in context, the display did not endorse religion. 465 U.S., at 685-687, 104 S.Ct., at 1365-1366. The opinion does assume, as petitioners contend, that the *government's* use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief. But the case neither holds nor even remotely assumes that the government's neutral treatment of *private* religious expression can be unconstitutional.*** (p.2448)

What distinguishes *Allegheny* and the dictum in *Lynch* from *Widmar* and *Lamb's Chapel* is the difference between government speech and private speech. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S., at 250, 110 S.Ct., at 2372 (opinion of O'CONNOR, J.). Petitioners assert, in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government.

But that, of course, must be merely a subpart of a more general principle: that the distinction disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.* But those situations, which involve governmental *favoritism*, do not exist here. Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none.(pp.2448-49).

The contrary view, most strongly espoused by Justice STEVENS, *post*, at 2469- 2470, but endorsed by Justice SOUTER and Justice O'CONNOR as well, exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech.***(p.2449)

* * *

Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square.(p.2450)

COUNTY OF ALLEGHENY v. AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER
492 U.S. 573, 109 S.Ct. 3086 (1989) (excerpts, footnotes and references to briefs omitted):

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.

THE DISPLAY:
"This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a creche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the

City-County Building, next to a Christmas tree and a sign saluting liberty."***(P.3093

THE RESULT (THIS IS PRECEDENT):
The first is not permitted; the second is.

THIS IS A PART ON WHICH THE COURT AGREES (THIS IS ALSO PRECEDENT):

III
A

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

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree*, 472 U.S., at 52, 105 S.Ct., at 2487. 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.

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. Although "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S., at 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.

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.***(pp.3099-3100)

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.***(p.3100)

LYNCH v. DONNELLY
465 U.S. 668, 104 S. Ct. 1355 (1984)

Chief Justice Burger delivered the opinion of the Court [5-4].

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity
scene, in its annual Christmas display.(p. 1358)

THE DISPLAY:

I

"Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation--often on public grounds--during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

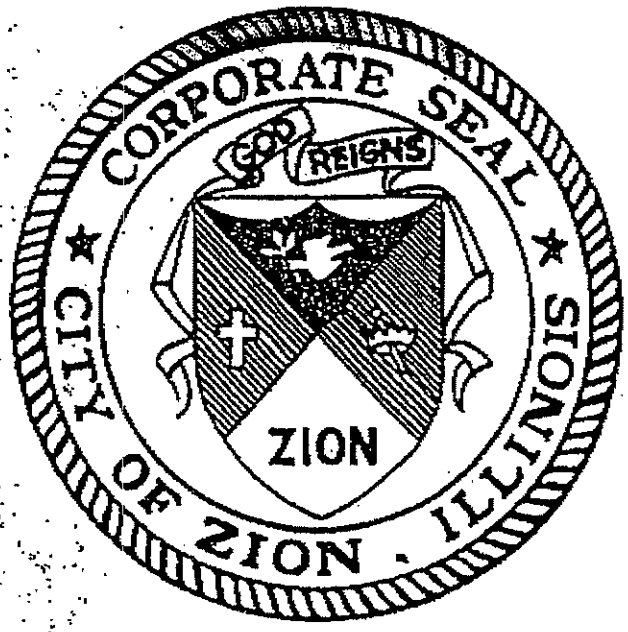
"The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" " to 5'. In 1973, when the present creche was acquired, it cost the City

$1365; it now is valued at $200. The erection and dismantling of the creche costs the City about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years."

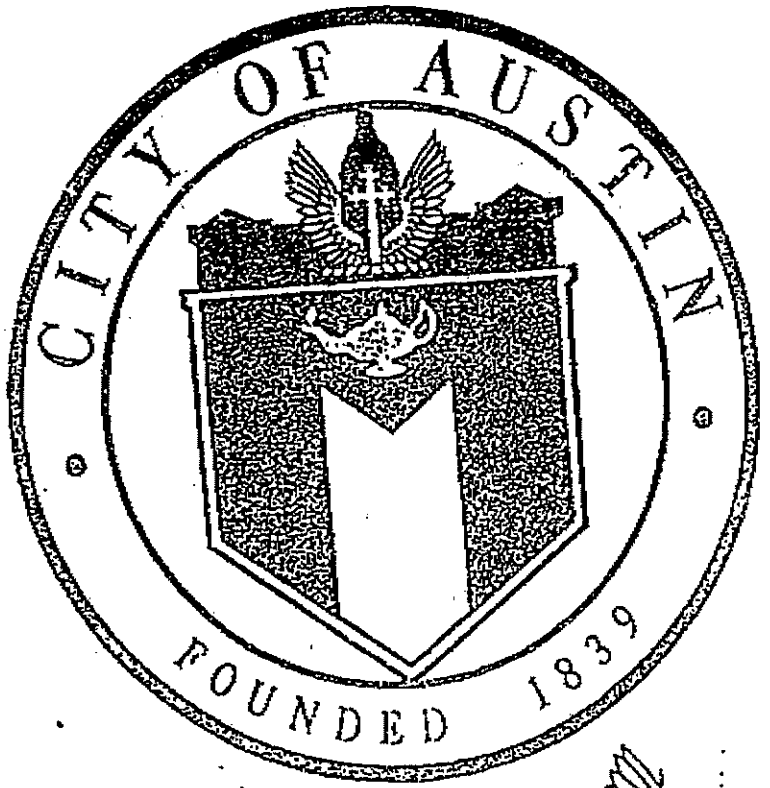
THE RESULT (THIS IS PRECEDENT, along with Burger's opinion, but modified by *Allegheny County*?):
"We hold that, notwithstanding the religious significance of the creche, the City of Pawtucket has not violated the Establishment Clause of the First Amendment. Accordingly, the judgment of the Court of Appeals [upholding an injunction prohibiting city from including of creche] is reversed."(p.1366)

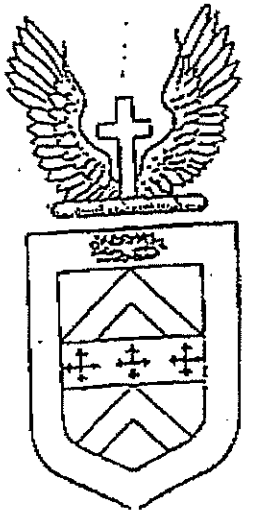
DKJ
12-3-99

Appendix 3



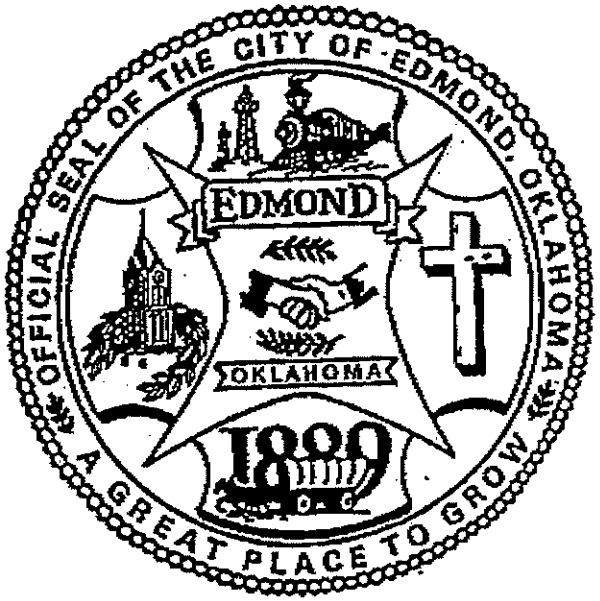
Appendix 4





Stephen F. Austin's
Coat of Arms

Appendix 5


OFFICIAL SEAL OF THE CITY OF EDMOND, OKLAHOMA
EDMOND
OKLAHOMA
1899
A GREAT PLACE TO GROW

ARE WE A CHRISTIAN NATION?
THE U.S. SUPREME COURT RESPONSE

Daniel G. Gibbens

My purpose is to report what is perhaps an obvious U.S. Supreme Court response to the question: Are we a Christian nation? I submit the Supreme Court's response is clear. The response has two parts. First, we *are not* a Christian nation legally, officially, or governmentally. Second, we *are* a Christian nation historically and traditionally, although obviously not exclusively. And if anyone thinks the question asks for declarations about our nation's religious orientation, commitment, behavior, or ethics, the U.S. Supreme Court has nothing to say about that—nor do I.

Each statement has importance in the Court's exercise of its responsibility to apply the language and principles of the First Amendment's religion clauses to late twentieth century cases and controversies. However, on occasion the Court has neglected to observe one or the other when needed. Also, the Court has yet to articulate the distinction between the two. These failures have contributed to the poor quality of the Court's application of the free exercise clause in three recent free exercise cases.

The U.S. is not a Christian nation legally, officially, or governmentally (the no orthodoxy principle)

Using a slightly more encompassing phrase, the effect of the first statement is that legally, officially, and governmentally, *there is no orthodoxy*—not generally in the realm of ideas, speech and press—but also specifically not *in the realm of religious beliefs and practices.* Justice Robert Jackson's statement of this principle in 1943 is particularly eloquent:

> 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.[1]

This powerful statement has been quoted by the U.S. Supreme Court in five 1980s decisions. One of the five was distinctly a religious freedom case, *Wallace v. Jaffree*[2] in 1985, applying the establishment clause to void an Alabama statutory requirement of a moment of silence in each public school day, for the purpose of "prayer or meditation." Justice Stevens' opinion for the five-justice majority[3] emphasized that the legislative history of the statute made it clear that its intent was to promote prayer and that this purpose made it violative of the establishment clause.[4] The other four 1980s cases[5] were

free speech cases, which, nevertheless, were supportive of the *no orthodoxy* position. The two best known uses of the Jackson formulation in these cases were made by Justice Stevens in his separate opinion, in part concurring and in part dissenting, in *Webster v. Reproductive Health Services*,[6] the 1989 decision on federal funding of various abortion services; and by Justice Brennan in his opinion for the five-Justice majority in *Texas v. Johnson*,[7] the 1989 case striking down the Texas' statute prohibiting flag-burning.

The same essential idea of *no orthodoxy* was given effect in at least twelve other 1980s religious freedom decisions. The following eight decisions denied or prevented governmental support for prevailing religious orthodoxies:

> (1) *Stone v. Graham* (1980),[8] striking down a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms.
> (2) *Larkin v. Grendel's Den, Inc.* (1982),[9] refusing religious entities the power to control zoning decisions in the vicinity of churches.
> (3) *Bob Jones University v. United States* (1983),[10] holding the government's compelling interest in eradicating racial discrimination in education prevented tax benefits to a school claiming a religious basis for its discriminatory policies.
> (4) *Estate of Thornton v. Caldor* (1985),[11] invalidating a Connecticut statute protecting (from dismissal) an employee's refusal to work on his chosen "sabbath."
> (5) *Alamo Foundation v. Secretary of Labor* (1985),[12] upholding the application of the Fair Labor Standards Act to religious employers, thereby preventing preferential economic treatment of religious employers.
> (6) *Edwards v. Aguillard* (1987),[13] striking down Louisiana's "creationism" statute.
> (7) and (8) *Lynch v. Donnelly* (1984),[14] and *County of Allegheny v. ACLU Greater Pittsburgh Chapter* (1989),[15] prohibiting governmental affiliation with the distinctively religious aspect of Christmas (while upholding governmental displays of the varieties of American winter holiday celebrations).

The following four decisions effectively protected opportunities for peculiarly religious activities from restraints imposed by prevailing secular orthodoxies:

(1) *Thomas v. Review Board* (1981),[16] overturning Indiana's denial of unemployment benefits to a Jehovah's Witness who refused to work in the production of war materials.
(2) *Corporation of Presiding Bishop v. Amos* (1987),[17] upholding the opportunity of religious employers to discriminate along religious lines in their employment practices thereby protecting the opportunity of religious entities to be distinctively different.
(3) and (4) *Widmar v. Vincent* (1981),[18] and *Board of Education v. Mergens* (1990),[19] holding that the premises of state-operated colleges and secondary schools must be open for religious uses as well as secular uses.

The U.S. is a Christian nation historically and traditionally, but not exclusively (the historical context principle)

The second statement is of equal importance and was most clearly expressed in the 1983 decision upholding the Nebraska legislature's employment of a tax-paid chaplain, *Marsh v. Chambers.*[20] This decision and Burger's opinion for the majority have been criticized both for the result and for his neglect of the Court's dominant establishment clause *Lemon* test. In certain respects, however, the opinion merely expresses an essential truth—that we are a Christian nation historically and traditionally. Here is some of the Chief Justice's particularly pertinent language (incorporating a reference to its decision on tax benefits for charitable contributions):

> In *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970), we considered the weight to be accorded to history: It is obviously correct that no 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. Yet an unbroken practice . . . is not something to be lightly cast aside. . . .
>
> 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 prayer has become part of the fabric of our society.[21]

Neither the principle of *no orthodoxy* nor our enormous and complex late-twentieth-century government exists in a vacuum. Thus, the further response to the question asked is an accurate acknowledgment of particular

historical facts and circumstances which form a relevant and powerful context. This context can be particularized in terms of literature, buildings, and persons. But the historical context is especially apparent with our educational system. As is well known, higher education was the exclusive product of religious sponsorship until the middle of the nineteenth century. Even today, of the 3,389 institutions of higher education in the United States, 1,841 of which are private institutions, 301 are specialized religious colleges (*i.e.*, theological seminaries and bible colleges).[22]

As a nation, we cherish our rich history and tradition of religious freedom—our rich diversity of ideas, religious and secular. As Justice Blackmun said in the *Allegheny County* case:

> 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.[23]

This history is too rich to be neglected. It must be recognized verbally and symbolically. It perhaps should be celebrated. Equally significant, it is a history and tradition that can blind us and make us biased and calloused to distinctly different religious perspectives.

Both principles need explicit application in the U.S. Supreme Court's decision-making process

The Supreme Court consistently fails to acknowledge our history and traditions as pervasively representing one particular species of religious experience—the Judeo-Christian.[24] This failure surely lies at the root of the three wrongly decided[25] Native American religion cases: *Bowen v. Roy* (1986),[26] *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1986),[27] and *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990).[28] These cases demonstrate in a poignant way an entirely different species of religious experience. I submit that they illustrate the necessity of an accurate articulation of the decision-maker's historical and traditional perspective, paired with the decision-maker's declaration and application of the principle of *no orthodoxy*.

The three native American cases are applications of the free exercise clause. The two principles have at least equal significance in applications of the establishment clause. The well-known *Lemon* test requires a secular

purpose and a secular effect. Surely there is no doubt that the study of the history and the traditions of our nation is secular in nature. In decisions on religious exercises in public schools, the Court observed (and without challenge to date):

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[29]

Generally accepted study methods of both history and literature entail "getting inside" the material. An effort is made to bring to life the perspectives and experiences of the authors in order to better understand their messages. Both critical analysis and empathy are encouraged. Surely the secular study of religious materials, religious perspectives, and religious messages should be effected the same way.[30] The pilgrims, the Puritans, the Anglicans, and the evangelists are all part of our history, even as the Bible is part of our literature. (Should the study of the Bible be different from the study of Shakespeare, Dostoyevsky, Nietzsche, or Mark Twain?) Historical treatments written in the nineteenth[31] and twentieth centuries[32] identify significant linkages between various religious enterprises and our nation's development.

Historical roots are also transmitted outside the classroom. Many of our holiday celebrations have this obvious purpose, (*e.g.*, Independence Day, Thanksgiving, Martin Luther King Day). The term "celebration" is surely a public method of "getting inside" historic lives and events in order to bring important messages from the past to life today.

The Nebraska legislative chaplain case arguably exemplifies a similar acknowledgement of historical context.[33] For an illustration of the effective interaction (delicate balance?) of both principles—*no orthodoxy* and *historical context*—the Christmas holiday display cases[34] are the paradigm. The prominent placement of the elaborate creche by itself in the County Courthouse sends a message[35] of official governmental endorsement of the Christian Christmas theme, inconsistent with the *no orthodoxy* principle. But there is no possibility the three-part display at the City County Building sends this message; its message is of the liberty to celebrate more than one religious tradition. Both that liberty and the Christian and Jewish traditions are significant parts of our nation's history. The three-part combination makes

clear the particular liberty is not the exclusive property of the majoritarian religion,[36] thus forcefully conveying the *no orthodoxy* principle.[37]

It may be true, as Justice Clark observed, "that religion has been closely identified with our history and government."[38] The difficulty with such statements is what is left unsaid—the importance of the distinction between what is contained in history and what is done by government. All too well known are instances in which history has had to be overcome, lived through, or lived down in order for government to be acceptable. It is indeed essential in applications of the First Amendment religion clauses that we hold fast to both the *no orthodoxy* principle and the *historical context* principles and also keep them distinct.

Endnotes

1. *West Virginia Board of Education v. Barnette* (protecting Jehovah's Witnesses' children from a statutory flag salute requirement on freedom of expression grounds, rather than on the basis of freedom of religion. 319 U.S. 624, 642 [1943].)

2. 472 U.S. 38 (1985).

3. O'Connor concurred in judgment; Burger, White, and Rehnquist dissented.

4. The statutory language stating a non-religious alternative to prayer was intended to remove establishment clause objections. If an attempt were made to convey this alternative to grade-schoolers (or even to many high-schoolers), what explanation would work? Even explaining a similar mental state, such as day-dreaming, taxes one's imagination. And the only other option was prayer! Consistent with the Court's opinion, the moment of silence requirement might pass constitutional muster if the specified purpose was to create an opportunity for quiet activity of each child's free choice. Such a statute might authorize teachers to give examples of acceptable activities which the children actually understand and occasionally do for their own happiness, (*e.g.* draw a picture, make a paper airplane, close their eyes and think of a favorite food or a favorite person, pray, wiggle their toes, *etc.*) This sort of a short list arguably would not convey the message that the *real* purpose of the moment is prayer. Of course, the legislative history should also emphasize that no teacher should use the moment to promote prayer.

5. In addition to the two cases discussed in the text immediately following, see: *Board of Education v. Pico*, 457 U.S. 853, 870 (1982); *Brantl v. Finkel*, 445 U.S. 507, 514 n. 9 (1980).

6. 492 U.S. 490, 572, n. 17 (1989) (J. Stevens, concurring in part and dissenting in part).

7. 491 U.S. 397, 415 (1989).

8. 449 U.S. 39 (1980).

9. 459 U.S. 116 (1982).

10. 461 U.S. 574 (1983).

11. 472 U.S. 703 (1985).

12. 471 U.S. 290 (1985).

13. 482 U.S. 578 (1987).

14. 465 U.S. 668 (1984).

15. 492 U.S. 573 (1989).

16. 450 U.S. 707 (1981).

17. 483 U.S. 327 (1987).

18. 454 U.S. 263 (1981).

19. 496 U.S. 226 (1990).

20. 463 U.S. 783 (1983).

21. 463 U.S. 783, 790, 792 (1983).

22. *Random House Dictionary* (1967), 1677-90; see John Brubacher and Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities 1636-1976* (New York, 1976), 5-74.

23. 492 U.S. 573, 589 (1989).

24. See *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985)(C.J. Rehnquist, dissenting): Chief Justice Rehnquist's development of "constitutional history" has a distinctively different focus and purpose.

25. Petition for rehearing filed in No. 88-1213, *Employment Div., Dept of Human Resources of Oregon v. Smith* (1990); H. Tepker, *Hallucinations of Neutrality in the Oregon Peyote Case*, *Am. Indian L. Rev.* 16 (1991): 1.

26. 476 U.S. 693 (1986).

27. 485 U.S. 439 (1988).

28. 494 U.S. 872 (1990).

29. *School District v. Schempp*, 374 U.S. 203, 225 (1963).

30. As an example, in 1964, our children were in the first and third grades in the New York City public school located close by Columbia University and Harlem. One child told about a candle-lighting ceremony his class had participated in, with an explanation of the Jewish holiday being celebrated. This was his first participation in a non-Christian celebration. We remember it as an incredibly valuable learning experience. A part of that value was the sense that other religions are vital and worthy of appreciation and celebration.

31. See, for example, Alexis DeTocqueville, *Democracy in America* (1835, 1840).

32. See, Ralph Gabriel, *The Course of American Democratic Thought* (1940).

33. *Marsh v. Chambers*, 463 U.S. 783 (1983).

34. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

35. This phrase is vernacular for "symbolic expression."

36. *Cf.* J. Mansfield, "The Religion Clauses of the First Amendment and the Philosophy of the Constitution," *California Law Review* 72 (1984): 847; Holmes' dissent in *Abrams v. U.S.*, 250 U.S. 616, 630 (1919): ("we should be eternally vigilant against attempts to check the expressions that we loathe"); Brandeis concurring, in *Whitney v. California*, 274 U.S. 357, 376 (1927)("[r]ecognizing the occasional tyrannies of governing majorities").

37. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the inclusion of the creche with the traditional secular Christmas symbols sends the message that Christmas celebrations include both secular and religious aspects, and the government-sponsor in this instance appropriately permitted the secular symbols to dominate.

38. *School District v. Schempp*, 374 U.S. 203, 212 (1963).

(15)

INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE

Menachem Mor, Editor

Center for the Study of Religion and Society

Creighton University Press

1993

Paul Harvey

Message of Truth Too Much for Kansas Legislature

MAN, oh, man! They won't invite Pastor Joe to the Kansas State Legislature again!

They invited Pastor Joe Wright of Wichita's Central Christian Church to deliver the invocation — and he told God on them!

No sooner had their guest chaplain concluded his prayer than three Democrats in the state Legislature were on their feet at microphones protesting, "He can't talk like that about us!" Rep. Delbert Gross considered the invocation gross, calling it "divisive," "sanctimonious" and "overbearing."

What in the world did Pastor Joe say in Topeka that incited the righteous wrath of three Democrats from Hays and Kansas City?

I've secured the entire text of the invocation so you can evaluate it:

"Heavenly Father, we come before you today to ask Your forgiveness and to seek Your direction and guidance.

"We know Your word says, 'Woe to those who call evil good,' but that is exactly what we have done. We have lost our spiritual equilibrium and inverted our values.

"We confess that we have ridiculed the absolute truth of Your word in the name of moral pluralism.

"We have worshipped other gods and called it 'multiculturalism.'

"We have endorsed perversion and called it 'an alternative lifestyle.'

"We have exploited the poor and called it 'a lottery.'

"We have neglected the needy and called it 'self-preservation.'

"We have rewarded laziness and called it 'welfare.'

"In the name of 'choice,' we have killed our unborn.

"In the name of 'right to life,' we have killed abortionists.

"We have neglected to discipline our children and called it 'building esteem.'

"We have abused power and called it 'political savvy.'

"We've coveted our neighbors' possessions and called it 'taxes.'

"We've polluted the air with profanity and pornography and called it 'freedom of expression.'

"We've ridiculed the time-honored values of our forefathers and called it 'enlightenment.'

"Search us, oh God, and know our hearts today. Try us, and show us any wicked in us. Cleanse us from every sin, and set us free.

"Guide and bless these men and women who have been sent here by the people of Kansas and who have been ordained by You to govern this great state.

"Grant them Your wisdom to rule, and may their decisions direct us to the center of Your will.

"I ask it in the name of your son, the living savior, Jesus Christ.

"Amen."

Creators Syndicate

Chattanooga p. 4 — 2/12/96

(19)