CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

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

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

The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating against citizens on the basis of their religious faiths. Thus, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians

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in favor of nonadherents must fail, since it contradicts the fundamental premise of the Establishment Clause itself. In contrast, confining the government's own Christmas celebration to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians, but simply permits the government to acknowledge the holiday without expressing an impermissible allegiance to Christian beliefs. Pp. 492 U. S. 610-613.

JUSTICE O'CONNOR also concluded that the city's display of a menorah, together with a Christmas tree and a sign saluting liberty, does not violate the Establishment Clause. The

Christmas tree, whatever its origins, is widely viewed today as a secular symbol of the Christmas holiday. Although there may be certain secular aspects to Chanukah, it is primarily a religious holiday, and the menorah its central religious symbol and ritual object. By including the menorah with the tree, however, and with the sign saluting liberty, the city conveyed a message of pluralism and freedom of belief during the holiday season, which, in this particular physical setting, could not be interpreted by a reasonable

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observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs. Pp. 492 U. S. 632-637.

(b) In permitting the displays of the menorah and the creche, the city and county sought merely to "celebrate the season," and to acknowledge the historical background and the religious as well as secular nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of governmental accommodation and acknowledgment of religion

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

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, [Footnote 40] may not discriminate among persons on the basis of their religious beliefs and practices, [Footnote 41]

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may not delegate a governmental power to a religious institution, [Footnote 42] and may not involve itself too deeply in such an institution's affairs. [Footnote 43] **Although "the myriad, subtle ways in which Establishment Clause values can be eroded,"** Lynch v. Donnelly, 465

U.S. at 465 U. S. 694 (O'CONNOR, J., concurring), are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause. Thus, in Everson v. Board of Education of Ewing, 330 U. S. 1 (1947), the Court gave this often-repeated summary:

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

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

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The Court similarly invalidated Louisiana's "Creationism Act" because it "endorses religion" in its purpose. Edwards v. Aguillard, 482 U. S. 578, 482 U. S. 593 (1987). And the educational

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program in School Dist. of Grand Rapids v. Ball, 473 U. S. 373, 473 U. S. 389-392 (1985), was held to violate the Establishment Clause because of its "endorsement" effect. See also Texas Monthly, Inc. v. Bullock, 489 U. S. 1, 489 U. S. 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals "effectively endorses religious belief ").

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

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

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The

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Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." Lynch v. Donnelly, 465 U.S. at 465 U. S. 687 (O'CONNOR, J., concurring).

It also prohibits the government's support and promotion of religious communications by religious organizations. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U. S. 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys

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

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