SUPREME COURT OF THE UNITED STATES

No. 94–780

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, ET AL., PETITIONERS *v.* VINCENT J. PINETTE, DONNIE A. CARR AND KNIGHTS OF THE KU KLUX KLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 29, 1995]

JUSTICE STEVENS, dissenting.

The Establishment Clause should be construed to create a strong presumption against the installation of unattended religious symbols on public property. Although the State of Ohio has allowed Capitol Square, the area around the seat of its government, to be used as a public forum, and although it has occasionally allowed private groups to erect other sectarian displays there, neither fact provides a sufficient basis for rebutting that presumption. On the contrary, the sequence of sectarian displays disclosed by the record in this case illustrates the importance of rebuilding the "wall of separation between church and State" that Jefferson envisioned.[1]

At issue in this case is an unadorned Latin cross, which the Ku Klux Klan placed, and left unattended, on the lawn in front of the Ohio State Capitol. The Court decides this case on the assumption that the cross was a religious symbol. I agree with that assumption notwithstanding the hybrid character of this particular object. The record indicates that the "Grand Titan of the Knights of the Ku Klux Klan for the Realm of Ohio" applied for a permit to place a cross in front of the State Capitol because "the Jews" were

[1]See *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879).

placing a "symbol for the Jewish belief" in the Square. App. 173.[2] Some observers, unaware of who had sponsored the cross, or unfamiliar with the history of the Klan and its reaction to the menorah, might interpret the Klan's cross as an inspirational symbol of the crucifixion and resurrection of Jesus Christ. More knowledgeable observers might regard it, given the context, as an anti-semitic symbol of bigotry and disrespect for a particular religious sect. Under the first interpretation, the cross is plainly a religious symbol.[3] Under the second, an icon of intolerance expressing an anti-clerical message should also be treated as a religious symbol because the Establishment Clause must prohibit official sponsorship of irreligious as well as religious messages. See *Wallace* v. *Jaffree*, 472 U. S. 38, 52 (1985). This principle is no less binding if the anti-religious message is also a bigoted message. See *United States* v. *Ballard*, 322 U. S. 78, 86–89 (1944)

---

[2]The "Grand Titan" apparently was referring to a menorah that a private group placed in the Square during the season of Chanukah. App. 98; see *infra*, at 13–14. The Klan found the menorah offensive. The Klan's cross, in turn, offended a number of observers. It was vandalized the day after it was erected, and a local church group applied for, and was granted, permission to display its own crosses around the Klan's to protest the latter's presence. See Record 31.

[3]Indeed, the Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity. See *American Civil Liberties Union* v. *St. Charles*, 794 F. 2d 265, 271 (CA7 1986) ("Such a display is not only religious but also sectarian. This is not just because some religious Americans are not Christians. Some Protestant sects still do not display the cross . . . . The Greek Orthodox church uses as its symbol the Greek (equilateral) cross, not the Latin cross. . . . [T]he more sectarian the display, the closer it is to the original targets of the [establishment] clause, so the more strictly is the clause applied").

(government lacks power to judge truth of religious beliefs); *Watson* v. *Jones*, 13 Wall. 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect").

Thus, while this unattended, freestanding wooden cross was unquestionably a religious symbol, observers may well have received completely different messages from that symbol. Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion—a Statehouse sign calling powerfully to mind their outsider status. In any event, it was a message that the State of Ohio may not communicate to its citizens without violating the Establishment Clause.

The plurality does not disagree with the proposition that the State may not espouse a religious message. *Ante*, at 10. It concludes, however, that the State has not sent such a message; it has merely allowed others to do so on its property. Thus, the State has provided an "incidental benefit" to religion by allowing private parties access to a traditional public forum. See *ante*, at 10. In my judgment, neither precedent nor respect for the values protected by the Establishment Clause justifies that conclusion.

The 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.'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 593–594 (1989), quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 687 (1984) (O'CONNOR, J., concurring). At least when religious symbols are involved, the question of whether the state is "appearing to take a position" is best judged from the standpoint of a "reasonable observer."[4] It is especially important to take account

[4]In *Allegheny*, five Justices found the likely reaction of a "`reasonable observer'" relevant for purposes of

of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. *Ibid.* If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect non-adherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.[5]

---

determining whether an endorsement was present. 492 U. S., at 620 (opinion of Blackmun, J.); *id.*, at 635–636 (opinion of O'CONNOR, J.); *id.*, at 642–643 (opinion of Brennan, J., joined by Marshall and STEVENS, JJ.).

[5]JUSTICE O'CONNOR agrees that an "endorsement test" is appropriate and that we should judge endorsement from the standpoint of a reasonable observer. *Ante*, at 8–9. But her reasonable observer is a legal fiction, "`a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Ante*, at 9. The ideal human JUSTICE O'CONNOR describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "`ideal'" standard. Instead of protecting only the "`ideal'" observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.

JUSTICE O'CONNOR's argument that "there is always *someone*" who will feel excluded by any particular

In determining whether the State's maintenance of the Klan's cross in front of the Statehouse conveyed a forbidden message of endorsement, we should be mindful of the power of a symbol standing alone and unexplained. Even on private property, signs and symbols are generally understood to express the owner's views. The location of the sign is a significant component of the message it conveys.

> "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the `speaker.' As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating `Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *City of Ladue* v. *Gilleo*, 512 U. S. ___, ___ (1994) (slip op., at 13–14) (footnote omitted). Like other speakers, a person who places a sign on her own property has the autonomy to choose the content of her own message. Cf. *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. ___, ___ (1995) (slip

---

governmental action, *ante*, at 10, ignores the requirement that such an apprehension be objectively reasonable. A person who views an exotic cow at the zoo as a symbol of the Government's approval of the Hindu religion cannot survive this test.

op., at 7). Thus, the location of a stationary, unattended sign generally is both a component of its message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location.[6]

So it is with signs and symbols left to speak for themselves on public property. The very fact that a sign is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself. The "reasonable observer" of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message.

That the State may have granted a variety of groups permission to engage in uncensored expressive activities in front of the capitol building does not, in my opinion, qualify or contradict the normal inference of endorsement that the reasonable observer would draw from the unattended, freestanding sign or symbol. Indeed, parades and demonstrations at or near the seat of government are often exercises of the right of the people to petition their government for a redress of grievances—

---

[6]I recognize there may be exceptions to this general rule. A commercial message displayed on a billboard, for example, usually will not be taken to represent the views of the billboard's owner because every reasonable observer is aware that billboards are rented as advertising space. On the other hand, the observer may reasonably infer that the owner of the billboard is not inalterably opposed to the message presented thereon; for the owner has the right to exclude messages with which he disagrees, and he might be expected to exercise that right if his disagreement is sufficiently profound.

exercises in which the government is the recipient of the message rather than the messenger. Even when a demonstration or parade is not directed against government policy, but merely has made use of a particularly visible forum in order to reach as wide an audience as possible, there usually can be no mistake about the identity of the messengers as persons other than the State. But when a statue or some other free-standing, silent, unattended, immoveable structure—regardless of its particular message—appears on the lawn of the Capitol building, the reasonable observer must identify the State either as the messenger, or, at the very least, as one who has endorsed the message. Contrast, in this light, the image of the cross standing alone and unattended, see *infra*, at 22, and the image the observer would take away were a hooded Klansman holding, or standing next to, the very same cross.

This Court has never held that a private party has a right to place an unattended object in a public forum.[7] Today the Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum, *ante*, at 5–6. This is true despite the fact that our cases have condemned a number of laws that foreclose an entire medium of expression, even in places where free speech is otherwise allowed.[8] The First Amendment affords protection to

---

[7]Despite the absence of any holding on this point, JUSTICE O'CONNOR assumes that a reasonable observer would not impute the content of an unattended display to the Government because that observer would know that the State is required to allow all such displays on Capitol Square. *Ante*, at 10–12. JUSTICE O'CONNOR thus presumes a reasonable observer so prescient as to understand legal doctrines that this Court has not yet adopted.

[8]"Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned

a basic liberty: "the freedom of speech" that an individual may exercise when using the public streets and parks. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.). The Amendment, however, does not destroy all property rights. In particular, it does not empower individuals to erect structures of any kind on public property. *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 814 (1984);[9]

---

the distribution of pamphlets within the municipality, *Lovell* v. *Griffin*, 303 U. S. 444, 451–452 (1938); handbills on the public streets, *Jamison v. Texas*, 318 U. S. 413, 416 (1943); the door-to-door distribution of literature, *Martin* v. *Struthers*, 319 U. S. 141, 145–149 (1943); *Schneider* v. *State*, 308 U. S. 147, 164–165 (1939), and live entertainment, *Schad* v. *Mount Ephraim*, 452 U. S. 61, 75–76 (1981). See also *Frisby* v. *Schultz*, 487 U. S. 474, 486 (1988) (picketing focused upon individual residence is `fundamentally different from more generally directed means of communication that may not be completely banned in residential areas'). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue* v. *Gilleo*, 512 U. S. ___, ___ (1994) (slip op., at 12) (footnote omitted).

[9]In *Vincent*, we stated:

"Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that `the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.' *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981).

see also *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984). Thus our cases protecting the individual's freedom to engage in communicative conduct on public property (whether by speaking, parading, handbilling, waving a flag, or carrying a banner), *e.g.*, *Lovell* v. *Griffin*, 303 U. S. 444 (1938), or to send messages from her own property by placing a sign in the window of her home, *City of Ladue* v. *Gilleo*, 512 U. S., at ___, do not establish the right to implant a physical structure (whether a campaign poster, a burning cross, or a statue of Elvis Presley) on public property. I think the latter "right," which creates a far greater intrusion on government property and interferes with the Government's ability to differentiate its own message from those of public individuals, does not exist.[10]

Because structures on government property—and, in particular, in front of buildings plainly identified with the state—imply state approval of their message, the Government must have considerable leeway, outside of the religious arena, to choose what kinds of displays it will allow and what kinds it will not. Although the First Amendment requires the Government to allow leafletting or demonstrating outside its buildings, the state has greater power to exclude unattended symbols when they convey a

---

Rather, the `existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.' *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983)." 466 U. S., at 814.

[10]At least, it does not exist as a general matter. I recognize there may be cases of viewpoint discrimination (say, if the State were to allow campaign signs supporting an incumbent governor but not signs supporting his opponent) in which access cannot be discriminatorily denied.

type of message with which the state does not wish to be identified. I think it obvious, for example, that Ohio could prohibit certain categories of signs or symbols in Capitol Square—erotic exhibits, commercial advertising, and perhaps campaign posters as well—without violating the Free Speech Clause.[11] Moreover, our "public forum" cases do not foreclose public entities from enforcing prohibitions against all unattended displays in public parks, or possibly even limiting the use of such displays to the communication of non-controversial messages.[12]

---

[11]The plurality incorrectly assumes that a decision to exclude a category of speech from an inappropriate forum must rest on a judgment about the value of that speech. See *ante*, at 11–12. Yet, we have upheld the exclusion of all political signs from public vehicles, *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), though political expression is at the heart of the protection afforded by the First Amendment. *McIntyre*, 514 U. S., at ___ (slip op., at 12–13). A view that "private prayers," *ante*, at 11, are most appropriate in private settings is neither novel nor disrespectful to religious speech.

[12]Several scholars have commented on the malleability of our public-forum precedents.

"As [an] overview of the cases strongly suggests, whether or not a given place is deemed a `public forum' is ordinarily less significant than the nature of the speech restriction—despite the Court's rhetoric. Indeed, even the rhetoric at times reveals as much.

. . . . .

"Beyond confusing the issues, an excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others." L. Tribe, American Constitutional Law 992–993 (2d ed. 1988) (footnotes omitted).

Such a limitation would not inhibit any of the traditional forms of expression that have been given full constitutional protection in public fora.

The State's general power to restrict the types of unattended displays does not alone suffice to decide this case, because Ohio did not profess to be exercising any such authority. Instead, the Capitol Square Review Board denied a permit for the cross because it believed the Establishment Clause required as much, and we cannot know whether the Board would have denied the permit on other grounds. App. 91–92, 169. Accordingly, we must evaluate the State's rationale on its own terms. But in this case, the endorsement inquiry under the Establishment Clause follows from the State's power to exclude unattended private displays from public property. Just as the Constitution recognizes the State's interest in preventing its property from being used as a conduit for ideas it does not wish to give the appearance of ratifying, the Establishment Clause prohibits government from allowing, and thus endorsing, unattended displays that take a position on a religious issue. If the State allows such stationary displays in front of its seat of government, viewers will reasonably assume that it approves of them. As the picture appended to this opinion demonstrates, *infra*, at 22, a reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same

---

See also Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1221–1222 (1984).

message of endorsement as if she had erected it herself.[13]

When the message is religious in character, it is a message the state can neither send nor reinforce without violating the Establishment Clause. Accordingly, I would hold that the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government.

The Court correctly acknowledges that the state's duty to avoid a violation of the Establishment Clause can justify a content-based restriction on speech or expression, even when that restriction would otherwise be prohibited by the Free Speech Clause. *Ante*, at 6; *ante*, at 13 (opinion of O'CONNOR, J.). The plurality asserts, however, that government cannot be perceived to be endorsing a religious display when it merely accords that display "the same access to a public forum that all other displays enjoy." *Ante*, at 8. I find this argument unpersuasive.

The existence of a "public forum" in itself cannot dispel the message of endorsement. A contrary argument would assume an "ultra-reasonable observer"

---

[13]Indeed, I do not think *any* disclaimer could dispel the message of endorsement in this case. Capitol Square's location in downtown Columbus, Ohio, makes it inevitable that countless motorists and pedestrians would immediately perceive the proximity of the cross to the Capitol without necessarily noticing any disclaimer of public sponsorship. The plurality thus correctly abjures inquiry into the possible adequacy or significance of a legend identifying the owner of the cross. See *ante*, at 14, n. 4. JUSTICE SOUTER is of the view that an adequate disclaimer is constitutionally required, *ante*, at 11–12, but he does not suggest that the attachment to the Klan's cross in this case was adequate.

who understands the vagaries of this Court's First Amendment jurisprudence. I think it presumptuous to consider such knowledge a precondition of Establishment Clause protection. Many (probably most) reasonable people do not know the difference between a "public forum," a "limited public forum," and a "non-public forum." They *do* know the difference between a state capitol and a church. Reasonable people have differing degrees of knowledge; that does not make them "`obtuse,'" see 30 F. 3d 675, 679 (CA6 1994) (quoting *Doe* v. *Small*, 964 F. 2d 611, 630 (CA7 1992) (Easterbrook, J., concurring)); nor does it make them unworthy of constitutional protection. It merely makes them human. For a religious display to violate the Establishment Clause, I think it is enough that *some* reasonable observers would attribute a religious message to the State.

The plurality appears to rely on the history of this particular public forum—specifically, it emphasizes that Ohio has in the past allowed three other private unattended displays. Even if the State could not reasonably have been understood to endorse the prior displays, I would not find this argument convincing, because it assumes that all reasonable viewers know all about the history of Capitol Square—a highly unlikely supposition.[14] But the plurality's

[14]JUSTICE O'CONNOR apparently would not extend Establishment Clause protection to passers by who are unaware of Capitol Square's history. See *ante*, at 10–12. Thus, she sees no reason to distinguish an intimate knowledge of the Square's history from the knowledge that a cross is a religious symbol or that the Statehouse is the Statehouse. *Ante*, at 10–11. But passers by, including schoolchildren, traveling salesmen, and tourists as much as those who live next to the Statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion.

argument fails on its own terms, because each of the three previous displays conveyed the same message of approval and endorsement that this one does.

Most significant, of course, is the menorah that stood in Capitol Square during Chanukah. The display of that religious symbol should be governed by the same rule as the display of the cross.[15] In my opinion, both displays are equally objectionable. Moreover, the fact that the State has placed its stamp

---

[15]A fragmented Court reached a different conclusion in *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989). In that case, a majority of this Court decided that a crèche placed by a private group inside a public building violated the Establishment Clause, *id.*, at 598–602, but that a menorah placed alongside a Christmas tree and a "sign saluting liberty" outside that same building did not. *Id.*, at 613–621 (opinion of Blackmun, J.); *id.*, at 632–637 (opinion of O'CONNOR, J.); *id.*, at 663–667 (opinion of KENNEDY, J., joined by REHNQUIST, C. J., White and SCALIA, JJ.). The two Justices who provided the decisive votes to distinguish these situations relied on the presence of the tree and the sign to find that the menorah, in context, was not a religious but a secular symbol of liberty. *Id.*, at 613–621 (opinion of Blackmun, J.); *id.*, at 632–637 (opinion of O'CONNOR, J.). It was apparently in reliance on the outcome of the *Allegheny* case that Ohio believed it could provide a forum for the menorah (which appeared in Capitol Square with a state-owned Christmas tree and a banner reading, "Season's Greetings") and yet could not provide one for the cross. See App. 169. Given the state of the law at the time, Ohio's decision was hardly unreasonable; but I cannot support a view of the Establishment Clause that permits a State effectively to endorse some kinds of religious symbols but not others. I would find that the State is powerless to place, or allow to be placed, any religious symbol—including a menorah or a cross—in front of its seat of government.

of approval on two different religions instead of one only compounds the constitutional violation. The Establishment Clause does not merely prohibit the State from favoring one religious sect over others. It also proscribes state action supporting the establishment of a number of religions,[16] as well as the official endorsement of religion in preference to nonreligion. *Wallace* v. *Jaffree*, 472 U. S., at 52–55. The State's prior approval of the pro-religious message conveyed by the menorah is fully consistent with its endorsement of one of the messages conveyed by the cross: "The State of Ohio favors religion over irreligion." This message is incompatible with the principles embodied by our Establishment Clause.

The record identifies two other examples of free-standing displays that the State previously permitted in Capitol Square: a "United Way Campaign `thermometer,'" and "craftsmen's booths and displays erected during an Arts Festival."[17] App. to Pet. for Cert. A–16. Both of those examples confirm the proposition that a reasonable observer should infer official approval of the message conveyed by a structure erected in front of the Statehouse. Surely the thermometer suggested that the State was encouraging passersby to contribute to the United Way. It seems equally clear that the State was endorsing the creativity of artisans and craftsmen by permitting their booths to occupy a part of the Square. Nothing about either of those freestanding displays contradicts the normal inference that the State has endorsed whatever message might be conveyed by permitting an unattended symbol to

---

[16]See *Allegheny*, 492 U. S., at 647–649 (STEVENS, J., dissenting).

[17]The booths were attended during the festival itself, but were left standing overnight during the pendency of the event. App. 159.

adorn the Capitol grounds.[18] Accordingly, the fact that the menorah, and later the cross, stood in an area available "`for free discussion of public questions, or for activities of a broad public purpose,'" Ohio Rev. Code Ann. §105.41 (1994), quoted *ante*, at 1–2, is fully consistent with the conclusion that the State sponsored those religious symbols. They, like the thermometer and the booths, were displayed in a context that connotes state approval.

This case is therefore readily distinguishable from *Widmar* v. *Vincent*, 454 U. S. 263 (1981), and *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. ___ (1993). In both of those cases, as we made perfectly clear, there was no danger of incorrect identification of the speakers and no basis for inferring that their messages had been endorsed by any public entity. As we explained in the later case:

> "Under these circumstances, as in *Widmar,* there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar, supra,* at 271–272, permitting District property to be used to exhibit the film involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Id.*, at ___ (slip op., at 10) (footnote

[18]Of course, neither of these endorsements was religious in nature, and thus neither was forbidden by the Constitution.

omitted).

In contrast, the installation of the religious symbols in Capitol Square quite obviously did "have the principal or primary effect of advancing or inhibiting religion"; indeed, no other effect is even suggested by the record. The primary difference is that in this case we are dealing with a *visual display*—a symbol readily associated with a religion, in a venue readily associated with the State. This clear image of endorsement was lacking in *Widmar* and *Lamb's Chapel*, in which the issue was access to government facilities. Moreover, there was no question in those cases of an unattended display; private speakers, who could be distinguished from the state, were present. See *supra*, at 6–7. Endorsement might still be present in an access case if, for example, the religious group sought the use of the roof of a public building for an obviously religious ceremony, where many onlookers might witness that ceremony and connect it to the State. But no such facts were alleged in *Widmar* or *Lamb's Chapel*. The religious practices in those cases were simply less obtrusive, and less likely to send a message of endorsement, than the eye-catching symbolism at issue in this case.

The battle over the Klan cross underscores the power of such symbolism. The menorah prompted the Klan to seek permission to erect an anti-semitic symbol, which in turn not only prompted vandalism but also motivated other sects to seek permission to place their own symbols in the Square. These facts illustrate the potential for insidious entanglement that flows from state-endorsed proselytizing. There is no reason to believe that a menorah placed in front of a synagogue would have motivated any reaction from the Klan, or that a Klan cross placed on a Klansman's front lawn would have produced the same reaction as one that enjoyed the apparent imprimatur of the State of Ohio. Nor is there any reason to believe the

placement of the displays in Capitol Square had any purpose other than to connect the State—though perhaps against its will—to the religious or anti-religious beliefs of those who placed them there. The cause of the conflict is the State's apparent approval of a religious or anti-religious message.[19] Our Constitution wisely seeks to minimize such strife by forbidding state-endorsed religious activity.

---

[19]As I stated in *Allegheny*,

"There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building. Even though `[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs,' displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement." 492 U. S., at 650–651 (opinion concurring in part and dissenting in part) (citations omitted), quoting *id.*, at 664 (KENNEDY, J., concurring in judgment in part and dissenting in part).

In the words of Clarence Darrow:

"`The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.'" Tr. of Oral Arg. 7, *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363 (1927), quoted in *Wolman* v. *Walter*, 433 U. S. 229, 264 (1977) (opinion of

Conspicuously absent from the plurality's opinion is any mention of the values served by the Establishment Clause. It therefore seems appropriate to repeat a portion of a Court opinion authored by Justice Black who, more than any other Justice in the Court's history, espoused a literal interpretation of constitutional text:

> "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay

---

STEVENS, J.).

taxes and tithes to support them.

"These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

. . . . .

"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. . . . Neither a state nor the Federal Government can, openly or secretly,

> participate in the affairs of any religious organizations or groups and *vice versa*. 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.'" *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 8–10, 15, 16 (1947) (footnotes and citation omitted).

In his eloquent dissent in that same case, Justice Jackson succinctly explained—

> "that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business . . . . It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life . . . ." *Id.*, at 26–27.

The wrestling over the Klan cross in Capitol Square is far removed from the persecution that motivated William Penn to set sail for America, and the issue resolved in *Everson* is quite different from the controversy over symbols that gave rise to this litigation.[20] Nevertheless the views expressed by both the majority and the dissenters in that landmark case counsel caution before approving the order of a federal judge commanding a State to authorize the placement of free-standing religious symbols in front of the seat of its government. The Court's decision today is unprecedented. It entangles two sovereigns in the propagation of religion, and it disserves the principle of tolerance that underlies the prohibition against state action "respecting an establishment of

---

[20] *Everson* held that a school district could, as part of a larger program of reimbursing students for their transportation to and from school, also reimburse students attending Catholic schools. 330 U. S. 1 (1947).

religion."[21]

I respectfully dissent.

[21]The words, "respecting an establishment of religion," were selected to emphasize the breadth and richer meaning of this fundamental command. See *Allegheny*, 492 U. S., at 647–649 (STEVENS, J., dissenting).

APPENDIX TO OPINION OF STEVENS, J.