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Christmas Without Creches? Can Private Nativity Scenes Be Banned from Public Land?

by Neal Devins

Board of Trustees of the Village of Scarsdale

v.

McCreary

(Docket No. 84-277)

Argued February 20, 1985

ISSUES

Scarsdale v. McCreary broadly questions the freedom of religious expression. Specifically at issue is the authority of local government to prohibit privately-sponsored nativity scene displays on public lands.

Last term, in *Lynch v. Donnelly* (104 S. Ct. 1355 (1984); *Preview*, 1983-84 term, pp. 9-10), the Court found Pawtucket, Rhode Island's practice of sponsoring a nativity scene display on private land to be constitutional. *Lynch*, however, left unaddressed a number of issues concerning the religion and speech clauses of the First Amendment; the *Scarsdale* case will address many of these issues.

Of primary interest, *Scarsdale* presents the Court with an opportunity to define what factors a municipality can take into account in limiting protected expression. In *Scarsdale*, the village denied a citizen's group request to display a creche because it believed that such a display could divide the city on religious grounds. Although *Lynch* suggests that a city-supported nativity display is not state support of religion, the Court expressed no opinion on a municipality's authority to determine, for itself, the significance of approving the public display of a creche. Related to this, *Scarsdale* states the possibility that, in some jurisdictions, public nativity scene displays may impermissibly involve the state in promoting religion. Finally, the *Scarsdale* case presents the Court with another opportunity to define the contours of state authority over protected expression in public forums.

FACTS

In 1981, the Village of Scarsdale, New York, for the first time in approximately twenty-five years, denied a request by the creche committee, a private citizens' group, to display a nativity scene at Boniface Circle—a

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public park. Prior to that, groups such as the B'nai B'rith antidefamation League argued that the publicly-displayed creche was offensive because it suggested that the village favored the Christian religion over other religions. This controversy had, in 1976, led a group of local clergy, "in keeping with our respect for one another's beliefs," to offer their grounds as sites for the display.

Following the city's denial of their request, the creche committee brought suit in federal district court. The court analogized the *Scarsdale* situation to the facts before the Supreme Court when it ruled, in *Widmar v. Vincent* (454 U.S. 263 (1981)) that state universities cannot deny student religious groups access to university facilities. The district court concluded that the village's action could be upheld only if the public display violated the Establishment Clause. Otherwise, the court concluded that the committee's First Amendment freedom of speech right of equal access to a public forum was impermissibly limited by the municipality. Concluding that the display would violate the Establishment Clause, the court approved *Scarsdale's* decision.

The Second Circuit Court of Appeals, pointing to the Supreme Court's recent ruling in *Lynch v. Donnelly* overruled the district court. In light of *Lynch*, the appellate court concluded that the city could not justify its prohibition. The fact that the *Scarsdale* nativity scene was not part of some larger Christmas display, unlike the Pawtucket display at issue in *Lynch*, was considered irrelevant by the Second Circuit. The appellate court urged that: "The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated, rather, the Court consistently referred to 'the creche in the context of the Christmas season,' or the 'Christmas Holiday Season.'"

On appeal before the Supreme Court, *Scarsdale* argues that the appellate court erroneously equated: 1) a nativity scene affixed to public land with speakers who make use of a public forum and then depart, and 2) Establishment Clause concerns of a publicly-funded nativity scene displayed in Pawtucket, Rhode Island, with a public display of a nativity scene in *Scarsdale*, New York.

BACKGROUND AND SIGNIFICANCE

The *Scarsdale* decision—in more ways than one—will be of immediate and visible significance. This past Christmas season produced many nativity scene contro-

versies. In Dearborn, Michigan, a federal judge prohibited a city-sponsored nativity scene display on public land (only to have the city sell that land and the display to private owners not affected by First Amendment laws). In Chicago and New York City, nativity displays were erected, removed and then put up again and in Washington, D.C., the Department of Interior was embroiled in a controversy over its decision to include a nativity scene in its annual Christmas time display. These events indicate that the *Scarsdale* case will greatly affect local decisionmakers confronted either with the prospect of sponsoring their own creche or approving the public display of a privately-funded nativity scene.

The village initially argues that since plaintiffs need not be present at the proposed display, the question of "whose speech is it" is raised. Scarsdale also offers an alternative First Amendment speech argument—that a "municipal government is entitled, and may be obliged, to refrain from causing its citizens to support, or appear to support, moral or religious or otherwise partisan ideas that a substantial number of these people conscientiously oppose." Contrasting *Widmar v. Vincent*, the village posits that: "The Missouri University meeting place was a 'forum generally open' for student speakers; Scarsdale's parks have never supplied a 'forum generally open' for statutes or symbols or other unattended displays of partisan or sectarian positions." According to Scarsdale, this is a distinction of great significance, for alternative private sites are available to the creche committee—permitting the speaker an opportunity to communicate effectively without disrupting the village's desire to appear "nonpartisan" on religious matters.

In addition to questioning the scope of the committee's speech rights, the village argues that, because of factual distinctions, *Lynch v. Donnelly* is not dispositive of the First Amendment religion clause issue central to this argument. Instead, it alleges that "actual and severe" divisiveness (not merely the potential of divisiveness) has characterized the Scarsdale creche controversy. It also notes that the creche could be displayed in isolation and on public land—not as a part of a seasonal display located in a privately-owned park and featuring such secular symbols as candy-striped poles, animal figures and colored lights.

The creche committee, placing great emphasis on the Supreme Court's decisions in *Widmar v. Vincent* and *Lynch v. Donnelly*, seeks to rebut both of these arguments. After noting that First Amendment speech protections extend to such detached symbols as commercial billboards (*Metromedia, Inc. v. San Diego*, 453 U.S. 480 (1981)) and that Scarsdale has no statutes or ordinances limiting public displays of such symbols, the committee argues that the village is bound by the Supreme Court's admonition in *Widmar* that: "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not requested to

create the forum in the first place." (454 U.S. at 267-68) Relying on *Widmar*, the committee claims that Scarsdale's prohibition can be supported only if it is the least restrictive means available to serve some compelling state interest.

The creche committee, pointing to the *Lynch* case, claims that the village cannot meet this burden. Arguing that *Lynch* does not support the village's factual distinctions, the committee notes a Supreme Court ruling that: "The state's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association." (*McDaniel v. Paty*, 435 U.S. 618, 640 (1978)) It claims that Scarsdale's prohibition of the display is unrelated to any legitimate state interest. "In contrast," the committee asserts, "by permitting the temporary display of a privately-owned nativity scene in an open public forum, accompanied by a sign identifying the sponsor, the village does not force anyone actually or apparently to affirm the truth of the display's message."

If the creche committee ultimately prevails in this case, political and religious groups will probably make increasing use of public displays at city parks and other such sites as a mechanism to make their positions felt in the community at large. If Scarsdale prevails, municipalities will have authority to restrict "divisive" symbols. Were this to occur, local governments, by determining what is "divisive," will have substantial authority to regulate protected speech.

The *Scarsdale* case will also have substantial impact on how broadly Supreme Court precedents should be read. *Lynch v. Donnelly*, if broadly read, suggests that public nativity scene displays pose no Establishment Clause problems. In *Scarsdale*, the village argues that divisiveness surrounding the creche committee proposal distinguishes its case from *Lynch*. If this argument is validated, local, state and federal government will be reminded of the potentially fact-specific nature of Supreme Court rulings. Were government to narrowly read Supreme Court decisions, it may pay less attention to those rulings in drafting legislation or devising regulations.

Finally, the *Scarsdale* case may prove important to understanding the scope of government authority in regulating public forums. The village of Scarsdale had no set procedures governing either the approval of public displays or time, place, or manner of restrictions on such displays. If the village loses this case, one contributing factor might be the absence of such guidelines. One effect of such a ruling might be that municipalities throughout the nation may establish such rules and regulations governing public displays.

ARGUMENTS

For the Village of Scarsdale (*Counsel of Record, Marvin E. Frankel, 919 Third Avenue, New York, NY 10022; telephone (212) 715-9100*)

1. Since the creche committee could accomplish its purpose through alternative means, the village is not obligated to provide public sites for sectarian or partisan displays. Related to this proposition, Scarsdale notes the possible divisiveness of such displays and asserts the committee's expression rights are limited, since public displays are materially distinguishable from vocal speech.
2. Concern for the appearance of sponsoring religion and fear of divisiveness establish a compelling state interest sufficient to justify denying the request here to display the creche.
3. The facts of last term's creche case, *Lynch v. Donnelly*, are distinguishable from the situation faced in Scarsdale, and thus do not compel the village to approve public displays of privately-owned nativity scenes.

For the Scarsdale Creche Committee (*Counsel of Record, Marvin Schwartz, 125 Broad Street, New York, NY 10004; telephone (212) 558-4000*)

1. Since Boniface Circle is a traditional public forum, Scarsdale must demonstrate a compelling state interest to support its denial of the creche committee request.
2. The village's approval of the privately-owned creche does not constitute the sort of government support of religion necessary to establish compelling state interest sufficient to support its actions.
3. The Establishment Clause does not prohibit the temporary display of a privately-sponsored creche in a public park at Christmas.

AMICUS BRIEFS

In Support of the Village of Scarsdale

The American Civil Liberties Union and Antidefamation League of B'nai B'rith.

In Support of the Creche Committee

The United States, Catholic League for Religious and Civil Rights.