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Religious Symbols and the Establishment Clause

NEAL DEVINS

On 5 March 1984, the United States Supreme Court upheld (five to four) as constitutional the city of Pawtucket, Rhode Island's Christmas display of the nativity scene. This decision, *Lynch v. Donnelly*,¹ once again, points to the inherent problems of the government's attempting to recognize America's religious heritage without infringing on the Bill of Rights' mandate that church and state remain separate.

Lynch raises a number of questions concerning the manner in which the government may constitutionally involve itself with the display of explicitly religious objects: Can it subsidize the display of such objects? Does it matter whether the object is part of some larger "secular" display? Should the prominence of the display or the proximity of the display to some religious holiday be considered legally relevant? Must the government indicate on the display that its motivation is nonreligious? Must the religious object be sufficiently connected to the "secular" culture as to make meaningless the display's religious significance?

These questions are of constitutional significance because the First Amendment of the Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion." This prohibition was made applicable to the actions of state governments through the Fourteenth Amendment in a 1940 Supreme Court decision, *Cantwell v. Connecticut*.²

Courts vary in their analysis of government efforts either to accommodate or to recognize specific religious beliefs. Although much of religion—particularly the Christmas holidays and religious symbols such as the dove—has become part of mainstream "secular" society, government efforts to make religious symbols

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1. *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984).

2. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

more visible raises troublesome issues under the Establishment Clause. Clearly, the state cannot advance one type of religious belief to the disadvantage of other beliefs. The display of religious symbols cannot be couched in neutral terms as can aid to (overwhelmingly religious and predominantly Catholic) private schools. At the same time, it is not inconceivable that a religious symbol may have an intrinsic secular meaning. For example, a Christmas tree and Santa Claus are commonly associated with a time of year and not a set of religious beliefs.

What, however, should be done with a publicly funded display of outwardly religious symbols such as the nativity scene or the cross? A display of such objects can be viewed as impermissible governmental approval of a particular type of religious belief. Such public displays, however, are frequently thought of as being cultural symbols and not statements of religious belief. How then should a court resolve a constitutional challenge to a publicly funded display of an outwardly religious symbol?

On the one hand, society should not become so secularized as to exclude any reference to this country's religious heritage. On the other hand, government monies used to advance one particular kind of religious belief might be the principal evil that the Establishment Clause sought to forestall.

Case law on the religious symbol issue is quite inconclusive and frequently at odds with itself. Aside from the nativity scene controversy, this issue has generally arisen in four contexts—namely, postings of the Ten Commandments, displays of the cross, celebration of religious events, and some recognition of religious heritage such as appeals to God printed on items made available to the public through the government. The results in this group of cases are quite mixed and, thus, pointed to the need for the Supreme Court to resolve the religious symbols issue.

Lynch v. Donnelly, however, evidenced an insensitivity on the part of the justices to minority non-Christian views about religious symbols such as the nativity scene. In *Lynch*, the Court virtually ignored the pervasively religious message conveyed by the nativity scene. Instead of balancing the crèche's traditional or historical value against its religious value, the Court simply characterized the nativity scene as a secular display. Such characterization ignores both the significant religious value of the crèche to Christians and the plain fact that the Pawtucket display might have the effect of alienating non-Christians. Additionally, the *Lynch* majority failed to explicate in a principled

manner the standards of judicial review to be utilized in Establishment Clause cases.

THE ESTABLISHMENT CLAUSE

The standard of review most commonly utilized in Establishment Clause decisions is the so-called tripartite test. This test provides that for a legislative enactment to pass constitutional muster, the statute "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and, finally, "the statute must not foster an excessive government entanglement with religion."³ If any one of these three elements is not satisfied, the statute will be found unconstitutional.

Although easily stated, the application of this three-pronged test has been mystifying. The Court itself noted that "in many of these decisions we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."⁴ In a similar vein, the Court has recognized the limited precedential value of its Establishment Clause decisions: "Establishment clause cases are not easy; they stir deep feelings; and we are divided among ourselves. . . . What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches to either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility."⁵ Consequently, although the tripartite test "is well settled, our cases have also emphasized that it provides 'no more than [a] helpful signpost' in dealing with establishment clause challenges."⁶ Recent Establishment Clause decisions suggest that the tripartite test has itself become "unhelpful."⁷

In its 1983 *Marsh v. Chambers*⁸ decision, for example, the Supreme Court devised a historical exemption to the tripartite test. *Marsh* upheld the state of Nebraska's practice of beginning each session of its state legislature with a prayer by a chaplain paid and approved by the state legislature. In upholding this practice, the Court declined, without explanation, to apply the

3. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

4. *Ibid.*

5. *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980).

6. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

7. See, e.g., Neal Devins, "Inconsistent Standards of Review in Last Term's Establishment Cases," *National Law Journal* 3 (October 1983):22.

8. *Marsh v. Chambers*, 103 S.Ct. 3330 (1983).

tripartite test.⁹ Instead, the Court based its decision solely upon the fact that the first Congress had a paid legislative chaplain.

The Court felt that the first Congress would have been acutely aware of the meaning of the Establishment Clause since they crafted it. Had the Court applied contemporary Establishment Clause standards, however, they undoubtedly would have found the legislative chaplain unconstitutional. As Justice William J. Brennan, Jr. noted in his powerful dissent: "That the 'purpose' of the legislative prayer is preeminently religious rather than secular seems to me to be self-evident. . . . I have no doubt that, if any group of law students were asked to apply the tripartite test, to legislative prayer, they would nearly unanimously find the practice to be unconstitutional."¹⁰

Marsh was the first Establishment Clause decision to make explicit use of the historical exemption.¹¹ The notion, however, that religious practices deeply embedded in this history/tradition are beyond the purview of judicial review would appear to apply to several other situations. Examples of this range from the "In God We Trust" motto printed on U.S. currency to the singing of Christmas carols in public schools to possibly publicly funded displays of the nativity scene.¹²

A second exception to the tripartite standard was carved out by the Supreme Court in their 1982 decision, *Larson v. Valente*.¹³ *Larson* invalidated a Minnesota statute that exempted religious organizations from Charitable Solicitations Act requirements *provided* that more than half of their total contributions derive from church members or affiliated organizations. Apparently, this legislation was drafted in order to impose reporting requirements on so-called "cult religions" such as the Unification Church and the Hare Krishnas. Instead of nullifying this enactment on the grounds that its purpose and/or effect was to (dis)favor certain religious organizations, the Court required Minnesota to demonstrate that its enactment was the least restrictive means available

9. The Eighth United States Circuit Court of Appeals had applied the tripartite standard and held that the chaplain provision violated all three elements of the test. *Chambers v. Marsh*, 675 F.2d 229 (8th Cir. 1982).

10. *Marsh v. Chambers*, at 3338-40 (Justice Brennan dissenting).

11. Other Court decisions have made use of history to support their conclusions. For example, in *Waltz v. Tax Commission*, a 1969 decision that upheld New York's practice of granting property tax exemptions to religious and other social welfare organizations, the Court emphasized both the historical roots and apparent beneficial effects of this practice. For the Court: "A page of history is worth a volume of logic" (397 U.S. 664, 676 [1969]).

12. Alternatively, *Marsh* could be read narrowly to apply only to practices adopted by the First Congress. See note 126.

13. *Larson v. Valente*, 456 U.S. 228 (1982).

to attain some compelling state interest—a burden that the state failed to meet. The Court argued that application of this compelling interest-least restrictive means test was appropriate since the Minnesota statute “makes explicit and deliberate distinctions between religious organizations.”¹⁴

Larson, when issued, was considered by some courts to apply to governmental action that either benefited or regulated religion in an uneven manner.¹⁵ Consequently, although *Larson* concerned a discriminatory regulatory scheme, its principle conceivably could extend to the uneven granting of government benefits to religion. Under this interpretation, government displays of religious symbols would invoke the *Larson* test since benefits would extend only to those religions associated with the symbols on display.

In addition to these two deviations from the tripartite test, the Supreme Court’s application of the tripartite standard has been incredibly uneven. Apparently, the Court will craft its application of the tripartite standard to suit its desired outcome. Two cases decided in the Court’s 1982-83 term, *Mueller v. Allen* and *Larkin v. Grendel’s Den*, support this contention.¹⁶

In *Mueller v. Allen*, the Court upheld (five to four) a Minnesota tuition tax deduction scheme that permitted parents of *public and private* schoolchildren to deduct expenses incurred in providing “tuition, textbooks, and transportation” for their children. Noting that “at this point in the 20th Century we are quite far removed from the dangers that prompted the framers to include the establishment clause in the Bill of Rights,”¹⁷ the Court refused to consider the actual effect of the Minnesota program.¹⁸ Instead, Justice William Rehnquist, writing for the Court, contended: “We would be loathe to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.”¹⁹ In fact, the *Mueller* majority recognized that “the economic consequences of the program in [cases

14. *Ibid.*, at 247, n. 23.

15. See, e.g., *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983); *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1983).

16. See Devins, “Inconsistent Standards of Review”; *Mueller v. Allen*, 103 S.Ct. 3062 (1983); *Larkin v. Grendel’s Den*, 1035 S.Ct. 505 (1982).

17. *Mueller v. Allen*, at 3069, quoting *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Justice Powell concurring in part and dissenting in part).

18. For a detailed analysis of *Mueller* and its impact on government efforts to aid private schools, see Neal Devins, “The Supreme Court and Private Schools. An Update,” *This World* 8 (Spring 1984):13.

19. *Mueller v. Allen*, at 3070.

where the Court invalidated the government program] and that in this case may be difficult to distinguish."²⁰ Under this "deferential" analytical standard, the Court was able to conclude that the Minnesota program satisfied all three elements of the tripartite test.

The *Mueller* ruling is difficult to square with *Larkin v. Grendel's Den*.²¹ In *Larkin*, the Court invalidated, by an eight-to-one margin, a Massachusetts statute that vested in the governing bodies of schools and churches the power to prevent the issuance of liquor licenses for premises within a radius of five hundred feet of the church or school. In so doing, the Court approved the application of strict standards of the variety rejected by the *Mueller* Court, namely: Laws "with only a remote and incidental effect advantageous to religious institutions" can pass constitutional muster.²² Similarly, the *Larkin* Court rejected the proposition advanced in *Mueller* that "the risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote."²³ Instead, the *Larkin* Court approved of the Jeffersonian "wall of separation" between church and state metaphor holding that "under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution demands that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."²⁴ For the Court, "The Framers did not set up a system of government in which important, discretionary govern-

20. Ibid., at 3067, n. 6, 3068. *Mueller*, thus, represents a substantial change in Establishment Clause analysis from a group of early and mid-1970s decisions that severely restricted state efforts to aid private schools. In *Committee for Public Education v. Nyquist*, for example, the Court invalidated a New York statute that, in part, provided tuition reimbursement for low-income parents of children attending nonpublic elementary or secondary schools; 413 U.S. 756 (1973).

Writing for the majority, Justice Lewis F. Powell stressed that the Court would look at the actual effects of the enactment instead of accepting as true the legislature's finding of secular effect. Consequently, the Court found irrelevant the fact that parents received the reimbursement, not private schools: "If the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the establishment clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same" (ibid., at 786 [emphasis supplied]).

21. *Larkin v. Grendel's Den*, at 505.

22. Ibid., at 4026, quoting *Committee for Public Education v. Nyquist*, at 756, 783 n. 39.

23. *Mueller v. Allen*, at 3062, 3069, quoting *Wolman v. Walter*, at 263 (Justice Powell concurring in part and dissenting in part).

24. *Larkin v. Grendel's Den*, at 505, 512, quoting *Lemon v. Kurtzman*, at 602, 625 (1971).

mental powers would be delegated to or shared with religious institutions."²⁵

Taken together, *Larkin* and *Mueller* suggest that the Supreme Court has available to it two tripartite tests—one is a deferential test used to uphold government programs and the other is a strict scrutiny test used to invalidate such programs. Recent Supreme Court decisions suggest that the Court will make increasing use of the deferential test.²⁶ At the time of the *Lynch* decision, however, it was unclear as to whether the Court would make use of the tripartite test and, if the Court utilized the tripartite test, whether it would apply a deferential or strict standard of review.

RELIGIOUS SYMBOL CASE LAW

Prior to *Lynch*, judicial rule making on the religious symbol issue was quite inconclusive. Aside from the nativity scene controversy, this issue has generally arisen in four contexts—namely, postings of the Ten Commandments, displays of the cross, celebration of religious events, and some recognition of this country's religious heritage—such as appeals to God—printed on items made available to the public through the government. The results in this group of cases are quite mixed and, thus, pointed to the need for the Supreme Court to resolve the religious symbols issue.²⁷

THE TEN COMMANDMENTS

Three federal court decisions over the past ten years have been concerned with government displays of the Ten Commandments. In *Anderson v. Salt Lake City Corporation*,²⁸ the Tenth Circuit Court of Appeals upheld the city's maintenance on courthouse grounds of an illuminated "3 X 5 foot granite monolith inscribed with a version of the Ten Commandments and certain other symbols representing the All Seeing Eye of God, the Star

25. *Ibid.*, at 512.

26. See Devins, "The Supreme Court and Private Schools: An Update."

27. One decision that loosely fits into the "religion symbol" category—but is not worthy of textual discussion—is *Goldstein v. Fire Department of the Village of Suffern, New York*, 559 F. Supp. 1289 (SDNY 1983). *Goldstein* summarily invalidated the fire department's posting of a sign that read, "Keep Christ in Christmas." The court followed the so-called *Schempp* rule that government "may not employ religious means to reach a secular goal unless secular means are wholly unavailable" (*ibid.*, at 1389, quoting *Abington School District v. Schempp*, 374 U.S. 203, 294 [Justice Brennan concurring] [1962]).

28. *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973).

of David . . . and Christ of Peace."²⁹ The circuit court reasoned that although the monument "is at once religious and secular, . . . it does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era. . . . The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions."³⁰

This spirit of benevolent neutrality was absent in two other cases concerning the placement of the Ten Commandments in the public schools. In *Ring v. Grand Forks Public District*,³¹ the North Dakota district court invalidated a state law that required each school district to "cause a placard containing the Ten Commandments of the Christian religion to be displayed in a conspicuous place in every school."³² The state argued that "the Ten Commandments, although biblical in origin, are the cornerstone of our legal system and thus have become secular in nature."³³ The court rejected this argument since the first three of the Ten Commandments are explicitly religious. The reasoning of the *Ring* court was adopted by the Supreme Court in *Stone v. Graham*,³⁴ a case involving similar facts and issues. In *Stone*, the Court invalidated a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the state. Although the state required that each plaque contain a printed notation that the Commandments serve as the fundamental legal code of Western civilization, the Court viewed the Commandments as plainly religious and, thus, concluded that the posting served no constitutional educational function. The Court also held that "it does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the state . . . ' that the Establishment Clause prohibits."³⁵

Stone, by viewing the Commandments as purely religious, calls into question the Tenth Circuit's characterization of the Commandments in *Anderson*. Moreover, "*Stone*, has been read as

29. *Ibid.*, at 30.

30. *Ibid.*, at 33-34.

31. *Ring v. Grand Forks Public District*, 483 F.Supp. 272 (D.N.D. 1980).

32. *Ibid.*, at 273.

33. *Ibid.*, at 274.

34. *Stone v. Graham*, 449 U.S. 39 (1980).

35. *Ibid.*, at 42, quoting *Abington v. Schempp*, at 203, 222.

permitting a court to infer a nonsecular purpose from government involvement with a symbol or instrument it has determined to be patently religious."³⁶ Considering the inextricably religious message of the first three commandments, the holdings in *Stone* and *Ring* seem correct.³⁷

THE CROSS

Five state court decisions and two federal court rulings, ranging over a fifteen-year period, have addressed the constitutionality of public displays of the cross. The apparent subjectivity and unpredictability of these cases are evidenced by two decisions of the Oregon Supreme Court concerning the same public display. In 1969, that court held in *Lowe v. City of Eugene*³⁸ the issuance of a retroactive building permit to a private party for the erection of a cross (already built) on a municipal park that overlooked the city. The court initially held that the cross was a religious symbol. The court then held that the cross served an impermissible religious purpose since it was "lighted" at Christmas and at Easter. In response to that ruling, a charter amendment was approved by the city accepting as a gift the cross as a "memorial or monument to United States war veterans." The Oregon Supreme Court upheld this gift in 1976 in *Eugene Sand and Gravel v. City of Eugene*.³⁹ Although recognizing that the cross was still a religious symbol and its display very prominent, the court concluded that it served a primarily secular function in the context of a war memorial. The court also noted that a plaque describing the cross as a tribute to veterans was placed next to the cross; and that the cross was lit only "on appropriate days or seasons which fittingly represent the patriotic sacrifice of war veterans."⁴⁰

The display of crosses was also approved in two other decisions. In the 1967 *Paul v. Dade County*⁴¹ decision, the Florida

36. Jill Vutter Fuchs, "Publicly-Funded Display of Religious Symbols: The Nativity Scene Controversy," *University of Cincinnati Law Review* 51 (1982):353, 363.

37. Significantly, *Stone* and *Ring* do not absolutely prohibit public display of the Commandments. Instead, these cases demand that the Commandments be presented in such a way as not to connote government approval of the Commandments' religious message. For example, the Commandments could be displayed in a museum exhibit concerning the history of Western civilization.

38. *Lowe v. City of Eugene*, 463 P.2d 360 (Or. 1969).

39. *Eugene Sand and Gravel v. City of Eugene*, 558 P.2d 338 (Or. 1976).

40. *Ibid.*, at 344. The court probably would have approved of the cross being lit during the Christmas season and on such holidays as Memorial Day, Veterans Day, Thanksgiving Day, and Independence Day.

41. *Paul v. Dade County*, 202 So. 2nd 833 (Fla. 1967).

Court of Appeals upheld the display of a cross at the Miami courthouse. This decision was incomplete, however, since the court failed to determine whether the display had a religious effect. In 1972, the Oklahoma Supreme Court upheld the display of a fifty-foot cross—erected by a local coalition of churches—at a city fair.⁴² The court reasoned that the cross could not have a religious effect since it was displayed “in a distinctly secular environment in the midst of persons in pursuit of distinctively secular entertainment.”⁴³ The Oklahoma court paid no attention to either the prominence of the display or the religiosity of the cross.

The California Supreme Court viewed the public display of the cross in a different fashion when it invalidated Los Angeles’s authorization of illumination of a huge cross on city hall to honor the Christmas and Easter holidays. This 1978 decision, *Fox v. City of Los Angeles*,⁴⁴ viewed the city’s practice as religious favoritism. For the court, “The city hall is not an immense bulletin board whereon symbols of all faith could be thumbtacked or otherwise displayed. . . . To illuminate only the Latin cross does seem preferential when comparable recognition of other religious symbols is impractical.”⁴⁵

The Eleventh Circuit Court of Appeals also disapproved of a public display of the cross in their 1983 decision, *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*.⁴⁶ *Rabun* concerned the constitutionality of a state-approved, illuminated twenty-six feet by thirty-five feet cross in Black Rock Mountain State Park. Although erected and maintained (through funds provided by area churches) by the local chamber of commerce, the federal appellate court held that the placement of the cross on public land violated the Establishment Clause. Central to this ruling was a press release issued by the chamber that suggested that the chamber’s purpose was to advance the Christian religion. The release stated in part: “The cross is a symbol of Christianity for millions of people in this great nation and the world.”⁴⁷ Based on this release and the failure of the chamber to proffer a plausible “secular purpose” for the display, the appellate court concluded that the state of Georgia had an affirmative

42. *Meyer v. Oklahoma City*, 496 P. 2d 789 (Okla. 1972).

43. *Ibid.*, at 792.

44. *Fox v. City of Los Angeles*, 150 Cal. Rptr. 867 (1968).

45. *Ibid.*, at 869.

46. *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983).

47. *Ibid.*, at 1101.

obligation to remove the cross.

Another federal court, however, ruled that in certain instances the public display of the cross is constitutional. In the 1981 *Johnson v. Board of County Commissioners of Bernalillo County*⁴⁸ decision, the United States District Court for New Mexico upheld the county's inclusion of the cross on the county seal. Noting that Catholicism was the state church at the time of Bernalillo County's origin, the district court concluded "that the cross in the seal represents the Spanish and Catholic traditions of early New Mexico and of Bernalillo County."⁴⁹

Bernalillo County seems properly decided. The Catholic Church played a significant role in the development of America's Southwest. Public recognition of this role provides no more than a permissible remote and incidental benefit to religion. At the same time, it is hard to accept the upholding of the public display of the cross in any other of these cases. The display of the crosses in *Fox*, *Paul*, and *Lowe* were all tied to a religious holiday. A cross at a war memorial, as in *Eugene Sand*, is arguably "nonreligious." The prominence of the location and the suspicious change in the use of the Eugene cross, however, makes problematic the *Eugene Sand* holding. Finally, the size and sponsorship of the cross in the Oklahoma and Georgia cases also suggests that those displays had the purpose and effect of advancing religion.

RELIGIOUS HERITAGE

Three federal court decisions have been issued concerning government recognition of America's monotheistic Judeo-Christian heritage. These cases raise the issue of whether and when it is appropriate for government to recognize explicitly that religion is a part of that culture and that Americans believe in God. Courts generally accommodate government practices which recognize that, as Justice Douglas said, "we are a religious people."⁵⁰ In the 1967 *Americans United for Separation of Church and State v. O'Brien*,⁵¹ the Washington, D.C. District Court upheld the Post Office Department's issuance of a commemorative Christmas postage stamp reproducing in miniature

48. *Johnson v. Board of County Commissioners of Bernalillo County*, 528 F.Supp. 919 (D.N.M. 1981).

49. *Ibid.*, at 924.

50. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

51. *Americans United for Separation of Church and State v. O'Brien*, 272 F.Supp. 712 (D.D.C. 1967).

Hans Memling's famous painting of "Madonna and Child with Angels." Recognizing that the stamp replication was "a design of religious significance," the court, however, summarily concluded that to suggest that the replication was "a form of proselytizing, is as remote and far-fetched as to be entitled to but scant consideration."⁵² In many respects, the court's analysis was premised on the belief that "religion is an inherent, permeating and pervading strain of our national life. It would be impossible to disarray, sever, or prevent every connection and every contact between religion and government, or to extricate every trace and vestige of religion from government."⁵³

Another case where the courts utilized America's religious heritage as a basis for upholding the government's recognition of religious belief was the 1970 Ninth Circuit Court of Appeals decision in *Arnow v. United States*.⁵⁴ *Arnow* upheld the inscription of "In God We Trust" on United States currency. The *Arnow* court simply held that the motto's "use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."⁵⁵

Unlike the recognition of this religious heritage, when government advocacy of a present belief in God is at issue, courts universally find such practices unconstitutional. In the context of religious symbolism, this issue was raised in a 1980 Fourth Circuit Court of Appeals decision, *Hall v. Bradshaw*.⁵⁶ *Hall* concerned the North Carolina Department of Transportation's printing of a "motorist's prayer" on a state map published and distributed free of charge by the department. This prayer began, "Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car,"⁵⁷ and continued predictably therefrom. The *Hall* court concluded that the printing of this prayer clearly had the impermissible effect of promoting a particular brand of religious belief. For the court: "By printing a prayer on the official map, the state is placing its power and support behind a particular form of theological belief, and state sponsorship of religious belief is one of the primary encroachments the [Establishment] clause seeks to inhibit. . . . The state necessarily offends the sensibilities of [both] non-believers [and]

52. *Ibid.*, at 721.

53. *Ibid.*, at 719.

54. *Arnow v. United States*, 432 F.2d 242 (9th Cir. 1970).

55. *Ibid.*, at 243.

56. *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980).

57. *Ibid.*, at 1019.

devout believers among the citizenry who regard prayer 'as a necessarily private experience.'"⁵⁸

These three cases all seem properly resolved. Considering the clear denominational association with the Madonna, *O'Brien* was a tougher case than the district court let on. America's religious tradition, however—as reflected in many of the great works of art housed in museums—suggests that the district court was justified in its holding. *Arnow* and *Hall* were not closed questions. The "In God We Trust" motto is of historical and cultural value. It neither encourages nor discourages religious practice. The opposite can be said of North Carolina's highway prayer. That prayer is an active call for a specified type of religious practice.

RELIGIOUS EVENTS

Government's erection of a religious symbol for temporary display in order to facilitate the observance of a religious event on public property was disapproved by the courts in the one case that directly raised this issue. In the 1980 *Gifillan v. City of Philadelphia*⁵⁹ decision, the Third Circuit Court of Appeals invalidated the city of Philadelphia's efforts to assume the cost of a papal mass at Philadelphia's Logan Circle. The city, in addition to crowd control and other related expenses, "expended a gross total of \$310,741 to construct and prepare the Papal platform. The platform was designed with the approval of the Archdiocese of Philadelphia, by staff architects employed by the city. . . . A thirty-six foot high Christian cross was constructed on the main platform and was lighted at the city's expense a week before the Pope's arrival. By special order of the mayor, the cross and platform remained in place for over two weeks after the mass."⁶⁰

A divided panel of the third circuit court concluded that the

58. *Ibid.*, at 1020-21, quoting *Abington v. Schempp*, at 203, 285 (1962) (Justice Brennan concurring).

59. *Gifillan v. City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980). *Gifillan* did not hold that public property could not be used for religious purposes. America's religious heritage clearly supports the granting of government permits to religious (and nonreligious) organizations on a nondiscriminatory basis. See, e.g., *Baird v. White*, 476 F.Supp. 442 (D. Mass. 1979) upholding the city of Boston's granting to the local archdiocese control of an area adjacent to the altar on Boston Common where the pope would celebrate a papal Mass; *O'Hair v. Andrews*, 613 F.2d 931 (D.C. Cir. 1979) upholding Department of Interior expenditures for park police services in relation to a papal Mass given on the public national mall located in Washington, D.C.

60. Theodore H. Smith, "Separation of Church and State, a Reaffirmation," *Temple Law Quarterly* 54 (1981):930, 932.

city's actions violated all three prongs of the Establishment Clause test. The secular purpose and secular effect requirements were not satisfied since the platform was specially designed for the celebration of Holy Mass by the pope.⁶¹ Additionally, the joint planning of the Mass by the city and the archdiocese created impermissible excessive entanglement between the city and the church. A dissenting opinion was filed by Judge Aldisert that argued, in part, that the papal Mass was a secular event since the pope is head of a secular state.

The third circuit ruling was a proper response to the city's overzealous effort to share with the archdiocese in the promotion and celebration of the papal Mass. Considering the explicitly religious nature of the Mass, the city's activities must be construed as impermissible government sponsorship of religion.

THE NATIVITY SCENE CONTROVERSY

Lynch v. Donnelly presented the Supreme Court with an opportunity to set up an analytical standard for future judicial review of this type of case. *Lynch* raises two issues essential to the resolution of a "religious symbol" case, namely: whether and when some object associated with both secular and religious events is religious, and whether and when a religious object can convey a predominantly secular meaning. *Lynch* also called into question the viability of the tripartite test for Establishment Clause review. As shall be demonstrated, the Supreme Court's *Lynch* decision provided very little in the way of definitive clarification of either of these issues. At the same time, the tenor of the Court's opinion comes perilously close to endorsing an approach to Establishment Clause adjudication that would uphold most government benefits to (all or select) religions. Apparently, government would have to vest political decision-making authority in religious institutions to violate the Establishment Clause.⁶²

Any object closely tied to some religious holiday, practice, or belief should be defined as religious. This was the message con-

61. The city had asserted that these expenditures served a valuable public relations function. The appellate court flatly rejected this contention, noting that: "By so arguing, the City places itself in a difficult position. Viewers of the ceremony that do not know of the city-sponsorship are likely to believe only that the Archdiocese, not the City, made a special effort. The Archdiocese, not the City, will receive the public relations 'bonanza.' But if the city sponsorship is known, that aid connotes state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent" (637 F.2d 924, 930 [3rd Cir. 1980]).

62. See, e.g., *Larkin v. Grendel's Den*, at 505.

veyed by the Supreme Court in *Abington School District v. Schempp*,⁶³ *Engel v. Vitale*,⁶⁴ and *Stone v. Graham*.⁶⁵ These decisions suggest that the nativity scene will be viewed as clearly religious and, thus, trigger Establishment Clause review. *Schempp* held unconstitutional Bible reading in the public schools. *Engel* similarly invalidated nondenominational school prayer. In both cases, the Court viewed the Bible as an inherently religious instrument and, thus, concluded that the school programs violated the Establishment Clause since government is "utilizing the prestige, power, and influence" of a public institution to bring religion into the lives of citizens."⁶⁶ The Court, however, did note "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."⁶⁷ Similar to these cases involving the Bible, the Court in *Stone* invalidated a Kentucky statute mandating the posting of the Ten Commandments. The Court, as mentioned, held that the Commandments were clearly religious.

63. *Abington v. Schempp*, at 203.

64. *Engel v. Vitale*, 370 U.S. 421 (1962).

65. *Stone v. Graham*, at 39.

66. *Walz v. Tax Commissioner*, 397 U.S. 664, 696 (1970). But see *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). The *Florey* Court found constitutional under the tripartite standard public school Christmas assemblies. The school board claimed that it supported such programs because "one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization" (*ibid.*, at 1314). The eighth circuit court, pointing to language in *Engel* and *Schempp* that approved the study—but not practice—of religion, correctly suggested that the germane question was whether a genuine "secular program of education is furthered by the [program]" (*ibid.*, at 1316). The eighth circuit court answered this question in the affirmative: "Only holidays with both religious and secular bases may be observed; music, art, literature and drama may be included in the curriculum only if presented in a prudent and objective manner and only as a part of the cultural and religious heritage of the holiday; and religious symbols may be used only as a teaching aid or resource and only if they are displayed as a part of the cultural and religious heritage of the holiday and are temporary in nature. Since all programs and materials authorized by the rules must deal with the secular or cultural basis or heritage of the holidays and since the materials must be presented in a prudent and objective manner and symbols used as a teaching aid, the advancement of a 'secular program of education,' and not of religion, is the primary effect of the rules" (*ibid.*, at 1317). Although the circuit court based this decision on school district guidelines and not school practices, *Florey* seems a proper recognition of the central role that religion plays in this culture. Key to the eighth circuit ruling was the fact that affirmative steps would be taken to ensure that students would perceive the Christmas assembly as a cultural event. The nativity scene display upheld by the Supreme Court, however, did not include any sort of statement suggesting that the crèche's cultural significance was the basis of its inclusion in the display.

67. *Abington v. Schempp*, at 203, 225.

The apparently pervasive religiosity of the nativity scene suggests that a public display of the crèche in isolation (and not as part of some larger seasonal display) would be found unconstitutional. Supportive of this conclusion is *McCreary v. Stone*,⁶⁸ a 1983 decision of the Federal District Court for the Southern District of New York. *McCreary* upheld the city of Scarsdale, New York's denial of access to the Scarsdale Crèche Committee of a village-owned park for the purpose of displaying a privately owned nativity scene. In reaching this decision, the *McCreary* court was forced to determine that the public display violated the Establishment Clause. Otherwise, the city would have improperly limited the Crèche Committee's First Amendment freedom-of-speech right of equal access to a public forum.⁶⁹ The *McCreary* court, applying the tripartite test, concluded that the display clearly had the impermissible "primary effect" of advancing the Christian religion. Central to this ruling was a significant amount of evidence that suggested that both area residents and sponsors of the crèche considered the display of primarily religious significance.⁷⁰

McCreary, although significant, does not speak to the issue raised in other nativity scene cases, namely, can government either sponsor or display a crèche in the context of purportedly secularly seasonal display.⁷¹

68. *McCreary v. Stone*, 575 F.Supp. 1112 (S.D.N.Y. 1983). A nearly identical challenge had been dismissed in 1977 on procedural grounds. *Rubin v. Village of Scarsdale*, 440 F.Supp. 607 (S.D.N.Y. 1977).

69. *McCreary v. Stone*, at 1122. The Supreme Court's 1983 decision, *Perry Education Association v. Perry Local Educators Association*, mandates this conclusion, 103 S.Ct. 948 (1983). *Perry* held that in regard to "quintessential public forums [such as streets or parks] . . . the state [may] enforce a content based exclusion [only if] it . . . show[s] that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" (*ibid.*, at 955). In *McCreary*, the city claimed that its "denial [of access] was necessary to serve a compelling state interest because to allow the erection of the crèche on public property would violate the Establishment Clause" (575 F.Supp. 1112, 1126 [S.D.N.Y. 1983]).

70. Examples include: (1) a statement of the clergy from the Scarsdale churches that noted: "In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement" (*McCreary v. Stone*, at 1112, 1118); (2) a significant number of those letters received by the city in opposition to its decision "perceived the problem as one stemming from a difference between Christians and Jews. . . ." (*ibid.*, at 1119); and (3) a petition subscribed to by about eighty or so signatures, stated, "Unless we are mistaken the United States is regarded by the world as a Christian country, and the crèche is simply a symbol of our Christianity" (*ibid.*).

71. Two lower New York State court decisions, however, contradict *McCreary's* holding. See, *Baer v. Kolmorgen*, 181 N.Y.S. 2d 230 (1958); *Lawrence v. Buchmueller*, 243 N.Y.S. 2d 87 (1963). Both of these cases, however, were decided prior to the Supreme Court's 1971 adoption of the tripartite test. Additionally, there are apparent analytic defects in both cases. In *Baer*, the court effectively eliminated the "secular effect" requirement, noting that "the

The Second Circuit Court of Appeals, however, relying on the Supreme Court's ruling in *Lynch v. Donnelly*, overturned the district court ruling in *McCreary*.⁷² Agreeing with the district court's determinations that the village-owned park is a traditional public forum, and that the nativity scene display is a form of speech,⁷³ the appellate court ruled that " 'in order to justify discriminatory exclusion from a public forum based on the religious content of the group's intended speech, the [City] . . . must show that its [decision] is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " ⁷⁴ 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 court. The appellate court argued that "the Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the crèche was situated; rather, the Court consistently referred to 'the crèche in the context of the Christmas season,' or the 'Christmas Holiday Season.' " ⁷⁵ As noted later,⁷⁶ the appellate court was accurate in its characterization of the majority ruling in *Lynch*. At the same time, the Supreme Court has agreed to review during this term the appellate court's decision.

The fact that a nativity scene is labeled religious does not necessarily mean that the government is absolutely prohibited from either funding the display of the nativity scene or permitting a private party to erect such a display. In fact, two lower federal courts have held that displays of the nativity scene on public grounds do not promote religion. The Washington, D.C. Court of Appeals held in the 1973 *Allen v. Morton*⁷⁷ decision that

Crèche is undoubtedly a religious symbol. In viewing it, however, we are all free to interpret its meaning according to our own religious faith" (181 N.Y.S. 2d 230, 238 [1958]). In *Lawrence*, the state court simply failed to provide any justification for its ruling.

72. *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984).

73. *Ibid.*, at 722-23.

74. *Ibid.*, at 723, quoting *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

75. *Ibid.*, at 729, quoting *Lynch v. Donnelly*, at 1355, 1362. The appellate court, however, required the city to erect a sign stating that the display has been erected and maintained by a private group; *ibid.*, at 728.

76. See pages 38-45.

77. *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973). The court, however, held the display unconstitutional since federal participation in the planning of the display constituted excessive governmental entanglement in religious matters. See also *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) overturning district court grant of defendant's summary judgment motion on this issue since "secular effect" question was substantial enough to require district court resolution.

the federal government did not promote religion by permitting the display of an illuminated life-size nativity scene on federal park land. The *Allen* court recognized that "'aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise essentially secular setting.'" ⁷⁸ The court, however, felt that several other factors spoke to the constitutionality of the display. First, the display was part of the annual Pageant of Peace—"an admittedly secular event whose only 'religious' content is that it recognizes the religious heritage aspect of Christmas by means of an admittedly religious symbol."⁷⁹ Second, explanatory plaques were placed on the grounds of the pageant that explained both the secular nature of the pageant and the role of the nativity scene in such a secular event. Third, government involvement in the pageant did not include activities relating to the financing, maintenance, or storage of the nativity scene. The court thus concluded that the display "should not be considered in isolation but as an integral part of the whole of the [secular] Pageant."⁸⁰

These mitigating factors were not present in *Citizens Concerned for Separation of Church and State v. City and County of Denver II*,⁸¹ a 1981 decision of the Colorado district court that upheld a publicly funded display of a nativity scene on public property. The key to this decision was the district court's holding that the nativity scene is not a pervasively religious symbol and consequently the plaintiffs must demonstrate a "direct and immediate" religious effect. For the court, "The nativity scene has been used sufficiently in secular settings, and has been sufficiently integrated into our nation's folklore that [its] message . . . [may have] a sign of the holiday season on a par with Santa and mistletoe."⁸² *Engel, Schempp, and Stone*, by defining the

78. *Allen v. Morton*, at 72, n. 12, quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

79. *Ibid.*, at 74.

80. *Ibid.* This balancing approach was recently criticized by the district court in *McCreary*. According to that court: "[I]f cases such as this were to turn on minutiae like the visibility or lack of ambiguity of disclaiming signs, the size or relative size of the symbol, the length of time for the display, or the potentially myriad other factors which possibly could be held to affect the outcome, the courts would become hopelessly entangled in the problem, and perhaps more importantly, villages like Scarsdale would endlessly be in and out of court" (575 F. Supp. 1112, 1133 [S.D.N.Y. 1983]).

81. *Citizens Concerned for Separation of Church and State v. City and County of Denver II*, 526 F. Supp. 1310 (D. Colo. 1981). But see *Citizens Concerned*, 481 F. Supp. 522 (D. Colo. 1979) *rev'd* 628 F.2d 1289 (10th Cir. 1980). In the earlier case, the district court enjoined the city from including the nativity scene in its Christmas display. The tenth circuit reversed, claiming that plaintiffs lacked standing to bring the suit. A state constitutional claim on this issue is presently pending before a state trial court in Colorado. See *Conrad v. City and County of Denver*, 659 P.2d 662 (Colo. 1983).

82. *Citizens Concerned v. Denver II*, at 1310, 1313. To support this claim, the court noted

Bible and Ten Commandments as pervasively religious, held that plaintiffs need only demonstrate a "remote and incidental" effect.

The court in *Citizens Concerned II* then held that "[the nativity scene] is part of an overall [secular] Christmas display of traditional Christmas symbols of short duration and is displayed with equal prominence as such holiday favorites as Santa and Rudolph."⁸³ Finally, the *Citizens Concerned II* court disregarded testimony by psychologists and Denver residents that they considered the display religious, holding that "the First Amendment does not require the prerogatives of government [to] be limited by the sensibilities of its most sensitive or fastidious citizens."⁸⁴

Ironically, the Colorado district court had earlier ruled in a nearly identical case that the display of the Denver crèche violated the Establishment Clause. This 1979 decision, *Citizens Concerned for Separation of Church and State v. City and County of Denver I*,⁸⁵ was overturned on jurisdictional grounds in 1980 by the Tenth Circuit Court of Appeals.⁸⁶ The district court in *Citizens Concerned I* placed great emphasis on the testimony of psychologists, theologians, and Denver residents⁸⁷—evidence considered irrelevant by the *Citizens Concerned II* court. Based on such evidence, the *Citizens Concerned I* court concluded "that the

"that nativity scenes are seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday" (ibid.).

83. Ibid.

84. Ibid., at 1315. See note 87.

85. *Citizens Concerned v. Denver I*, 481 F. Supp. 522 (D. Colo. 1979). For an extensive discussion of this case, see Jonathan J. Chase, "Litigating a Nativity Scene," *Saint Louis University Law Journal* 24 (1980):237.

86. *Citizens Concerned v. Denver I*, 628 F.2d 1289 (10th Cir. 1980).

87. Examples of this evidence include the following: (1) A professor of religious studies "saw the crèche as the incarnation of God in Christ, and he described Christmas symbols such as Santa Claus, lights, trees, and others as different from the Nativity Scene because they are decorations which are not universally Christian" (*Citizens Concerned v. Denver I*, 481 F. Supp. 522, 526 [D. Colo. 1979]); (2) "A clinical psychologist with an expertise in child psychology testified that in her professional opinion such a public display of apparent governmental support of a majoritarian view has negative effects on the children in religious minority families because it tends to encourage prejudice among the majority, and because it encourages self-degradation and diminished self-esteem among the minority" (ibid., at 526); and (3) Letters sent to the mayor in support of the crèche that included statements such as: "God and Christ in our lives has always been what America is all about"; "We as taxpayers have a right to express to the people that we are Christian"; and "... if we are a Christian nation we should do something to demonstrate that fact" (ibid., at 529). See also note 71. See *Citizens Concerned II*, however, which cited expert testimony suggesting that "the secular and religious sides of Christmas have been intertwined throughout history and it is difficult to separate the two"; and that "the nativity scene is being increasingly used in juxtaposition to the secular symbols of Christmas" (*Citizens Concerned v. Denver II*, 526 F.Supp. 1310, 1313 [D. Colo. 1981]).

City's placement of the Nativity Scene on the front steps of the City and County Building (the very building to which the citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith."⁸⁸ In reaching this conclusion, the court in *Citizens Concerned I* alleged that "the mere fact that the rest of the Christmas display is secular, and so recognized, does not mitigate this constitutionally objectionable result."⁸⁹ The court based its approach on Supreme Court Establishment Clause decisions holding that "aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting."⁹⁰

The Supreme Court's majority ruling in *Lynch v. Donnelly* was quite similar to the district court decision in *Citizens Concerned II*.⁹¹ Factually, *Lynch* was nearly identical to *Citizens Concerned*. The only real difference (which was ignored in the lower and Supreme Court decisions) was that Pawtucket's city-owned nativity scene was displayed in a privately owned park.

The district and appellate courts in *Lynch* disagreed with the *Citizens Concerned II* reasoning. Unlike *Citizens Concerned II*, which claimed "that the nativity scene has been used sufficiently in secular settings, and has been sufficiently integrated into our nation's folklore that the message conveyed by its use as a symbol is ambiguous,"⁹² the district court in *Lynch* reasoned that unlike other Christmas symbols such as a star, a bell, or a tree, which "attains a religious dimension only if the viewer understands that it is intended to connote something more than its facial significance . . . [the nativity scene] is more immediately connected to the religious impact of Christmas because it is a direct representation of the full biblical account of the birth of Christ."⁹³ This determination led the district court in *Lynch* to apply the "remote and incidental" benefit to religion standard.

88. *Citizens Concerned v. Denver I*, 481 F.Supp. 522, 529 (D. Colo. 1979).

89. *Ibid.*

90. *Ibid.*, at 530.

91. See David O. Stewart, "Taking Christ Out of Christmas?" *American Bar Association Journal* 69 (December 1983):1832. For example, in addition to the crèche, the Pawtucket display "includes Santa's house, stars, Christmas trees, a model of reindeer pulling Santa's sleigh, (etc.)" (*ibid.*). Additionally, "for the plaintiffs, a Methodist minister emphasized the religious symbolism of the nativity scene, and a clinical psychologist stressed the negative impact that [the public display of a crèche] would have on non-Christian children. The city presented a philosophy professor who specializes in religious matters. He said the nativity scene . . . was without religious significance in such a secular setting" (*ibid.*, at 1835).

92. *Citizens Concerned v. Denver II*, 526 F. Supp. 1310, 1313 (D. Colo. 1981).

93. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1167 (D.R.I. 1981).

Also supportive of the application of a strict standard of review, the district court concluded that the nativity scene "had not been included for cultural or traditional reasons as an example of how Americans celebrate the [Christmas] holiday, for it found that no attempt had been made to disclaim any endorsement of the religious message, and more importantly that the only religious heritage and customs acknowledged by the display were those of the Christian majority of Pawtucket's citizenry."⁹⁴ Finally, the district court, unlike *Citizens Concerned II*, viewed the nativity scene in isolation rather than as part of a secular display. For the court: "So long as the viewer possesses the background knowledge necessary to comprehend what the symbol is meant to stand for, the symbol does not lose its power as a communicative device simply by being taken out of its original, or optimal, context."⁹⁵

The *Lynch* district court strictly applied the tripartite standard in its invalidation of the Pawtucket display. Following guidelines established by the Supreme Court in cases like *Stone*, *Engel*, and *Schempp*, (and most recently applied in *Larkin v. Grendel's Den*), the lower court placed a nearly impossible burden on the state to justify its display of a patently religious object.⁹⁶ In affirming the district court's opinion, a divided panel of the First Circuit Court of Appeals applied the *Larson* compelling state interest-least restrictive means standard. Application of this standard was comprehensible since the Supreme Court did not clarify in *Larson* whether the "compelling interest" test applied solely to uneven regulatory interference or whether that test extended to uneven government benefits.⁹⁷ The first circuit held that the test applied to uneven government benefits of the sort at issue in *Lynch*, namely, the government's singling out of Christianity.⁹⁸

The Supreme Court rejected both the appellate court's use of the *Larson* standard and its ruling that the Pawtucket display had the effect of advancing the Christian religion. Instead of utilizing the *Larson* standard, the justices applied a deferential tripartite test. At the same time, the majority explicitly recognized that the *Larson* standard could, on occasion, be a viable

94. *Donnelly v. Lynch*, 691 F.2d 1029, 1033 (1st Cir. 1982).

95. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1167-68 (D.R.I. 1981).

96. See Fuchs, "Publicly-Funded Displays of Religious Symbols," 365-72.

97. See notes 13-15.

98. According to the court: "*Larson* makes clear that because the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions it must be evaluated under the test of strict scrutiny" (691 F.2d 1029, 1034 [1st Cir. 1982]).

alternative to the tripartite test.⁹⁹ The majority, however, failed to specify when application of the *Larson* test is appropriate.¹⁰⁰ The five-member majority then concluded that the Pawtucket display satisfied all three prongs of the tripartite test.¹⁰¹

Setting the tone for the majority, Chief Justice Warren E. Burger noted at the outset of his opinion that "some relationship between government and religious organizations is inevitable" and that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."¹⁰² This notion of "affirmative accommodation" represents a retreat from the Court's previously stated view on the purposes of the Establishment Clause.

In the 1971 school aid decision, *Lemon v. Kurtzman*,¹⁰³ Chief Justice Burger, writing for the Court, contended that the "authors [of the Establishment Clause] did not simply prohibit the establishment of a state church or a state religion."¹⁰⁴ Instead, they sought to forestall "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"¹⁰⁵ In *Lynch*, however, the chief justice quoted Joseph Story to support a nearly opposite interpretation of the Establishment Clause: "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."¹⁰⁶ With this in mind, the *Lynch*'s approval of the Pawtucket display is not surprising.

The *Lynch* Court did not speak of the nativity scene display as presenting a minimal risk of a state-sponsored church, however. Instead, the Court ultimately rested its decision on the purportedly secular nature of the Pawtucket display. For the Court: "The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday."¹⁰⁷ Conse-

99. *Lynch v. Donnelly*, at 1355, 1362.

100. The majority opinion merely stated that "we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*" (*ibid.*, at 1366, n. 13).

101. *Ibid.*, at 1365.

102. *Ibid.*, at 1359.

103. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

104. *Ibid.*, at 612.

105. *Ibid.*, quoting *Waltz v. Tax Commission*, 397 U.S. 664, 682 (1969).

106. *Lynch v. Donnelly*, at 1355, 1361, quoting Joseph Story, *Commentaries on the Constitution of the United States* (1803), 728.

107. *Ibid.*, at 1363.

quently, the district court view that the city display was religiously motivated since the nativity scene is pervasively religious was rejected.¹⁰⁸ Instead, the *Lynch* majority concluded that "the display is sponsored by the City [for legitimate secular purposes, e.g.] to celebrate the Holiday and to depict the origins of that Holiday."¹⁰⁹

This aspect of the Court's ruling seems consistent with the bulk of Supreme Court Establishment Clause decisions.¹¹⁰ In *Mueller v. Allen*,¹¹¹ for example, the Court explicitly noted its "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute."¹¹² Pawtucket's argument that the crèche served important cultural values as well as enhanced seasonal goodwill thus satisfies this secular purpose requirement.

The *Lynch* majority also overturned the lower court finding that the Pawtucket display had the impermissible effect of favoring or sanctioning Christian beliefs over other religious beliefs. First, the majority rejected the district court view that the nativity scene be independently scrutinized and instead insisted that "the focus of our inquiry must be on the crèche in the context of the Christmas season."¹¹³ The focus of this inquiry, however, was not on the otherwise secular character of the display. Instead, the majority emphasized that all Christmas-time celebrations are rooted in religious belief. For the majority: "To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and our holdings."¹¹⁴

Second, the *Lynch* majority sought to support their conclusion by way of analogy. For example, the majority noted that the "display of the crèche is no more an advancement or endorse-

108. The district court in *Lynch* applied the analytical standard apparently approved by the Supreme Court in *Stone v. Graham*, namely, that a "court [may] infer a nonsecular purpose from government involvement with a symbol or instrument it has determined to be patently religious" (Fuchs, "Publicly-Funded Displays of Religious Symbols," 363).

109. *Lynch v. Donnelly*, at 1355, 1363.

110. But see discussion of *Stone v. Graham*, notes 35-37.

111. *Mueller v. Allen*, at 3062 (1983).

112. *Ibid.*, at 3066. See also *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Wolman v. Walter*, 433 U.S. 299, 236 (1977).

113. *Lynch v. Donnelly*, at 1355, 1362.

114. *Ibid.*, at 1365.

ment of religion that the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums" and that "to conclude that the primary effect of including the crèche is to advance religion . . . would require that we view it as more beneficial to and more an endorsement of religion . . . [than] expenditures of public funds for transportation of students to church-sponsored schools" and several other expenditures of large sums of public money to support church-sponsored schools approved by this Court.¹¹⁵ These analogies are unconvincing, however. Aid to private schools can be couched in neutral terms (e.g., provision of secular services); it serves a vital public function, and most importantly—extends to secular and non-Christian sectarian private schools. Religious paintings displayed in museums are works of art, despite their denominational message. Finally, in regard to government recognition of Christmas day as a public holiday, "to say that government may recognize the holiday's traditional, secular elements of gift-giving, public festivities and community spirit, does not mean that government may indiscriminantly embrace the distinctively sectarian aspects of the holiday."¹¹⁶

Emphasizing these (and other) limitations in the majority's analogies as well as disagreeing with the majority's conclusion that a Christmas-time crèche is a passive secular symbol, Justice William Brennan, writing for four dissenting justices, vigorously attacked the majority opinion. First, Justice Brennan criticized the majority's conclusion that inclusion of the nativity scene in the Pawtucket display served a secular purpose. For Justice Brennan: "The nativity scene, unlike every other element of the . . . display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce [in the downtown area surrounding the park] simply do not encompass."¹¹⁷ On this issue, Justice Brennan's analysis is more comprehensive than the district court, which simply held that government involvement with a patently religious object is a per se violation of the Establishment Clause's secular purpose requirement.

The dissent was equally critical of the majority's conclusion that the nativity scene display had a secular effect. According to Justice Brennan: "I refuse to accept the notion implicit in to-

115. *Ibid.*, at 1364.

116. *Ibid.*, at 1373 (Justice Brennan dissenting).

117. *Ibid.*

day's decision that non-Christians would find that the religious content of the crèche is eliminated by the fact that it appears as part of the city's otherwise secular celebration of the Christmas holiday."¹¹⁸ "Those who do not share [Christian] beliefs [will find] the symbolic reenactment of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with the Christian Faith."¹¹⁹

Justice Brennan was correct in insisting that the majority should have looked at the crèche in isolation—apart from both the Christmas holidays and the otherwise secular display. As noted in the district court opinion: "So long as the viewer possesses the background knowledge necessary to comprehend what the symbol is meant to stand for, the symbol does not lose its power as a communicative device simply by being taken out of its original, or optimal, context."¹²⁰ At the same time, this "religious effect" should be measured against contextual factors such as the seasonal nature of the display and the relationship of the crèche to other objects in the display. In any event, the pervasively religious nature of the nativity scene combined with the fact that Pawtucket included no other religious symbols in the display clearly suggests that the overall effect of the display was the impermissible advancement of religion.

Finally, the Brennan dissent pointed to possible future entanglements between government and religion that might be the consequence of the majority ruling: "Jews and other non-Christian groups, prompted [in Pawtucket] by the Mayor's remark that he will include a Menorah in future displays, can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become in-

118. *Ibid.*, at 1377 (Justice Brennan dissenting).

119. *Ibid.*, Justice Brennan further noted: "For Christians, of course, the essential message of the nativity is that God became incarnate in the person of Christ. But just as fundamental to Jewish thought is the belief in the 'non-incarnation of God. . . . [t]he God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth.' Martin Buber, *Israel and the World* (1948) (reprinted in F. Talmadge, *Disputation and Dialogue: Readings in the Jewish-Christian Encounter* 281-282 (1975)). This distinction, according to Buber, 'constitute[s] the ultimate division between Judaism and Christianity.' *Ibid.*, at 281. See also R. Ruether, *Faith and Fratricide* 246 (1974). Similarly, those who follow the tenets of Unitarianism might well find Pawtucket's support for the symbolism of the crèche, which highlights the trinitarian tradition in Christian faith, to be an affront to their belief in a single divine being. See J. Williams, *What Americans Believe and How They Worship* 316-317 (3d ed. 1969). See also C. Olmstead, *History of Religion in the United States* 296-299 (1960)" (*ibid.*, at 1377, n. 14).

120. *Donnelly v. Lynch*, 525 F. Supp. at 1167-68.

volved in accommodating the various demands."¹²¹

The Brennan dissent is a stronger, more comprehensive, argument than that proffered by the Burger majority. Unlike other symbols, the nativity scene's secular value cannot be readily divorced from its religious significance. Consequently, government should make special efforts to "secularize" such a display. Exemplary of such special efforts were actions taken by the federal government in *Allen v. Morton*.

Admittedly, the issue raised in *Lynch* calls into play both the religious heritage of the American people and the antimajoritarian principles of the Bill of Rights. The Supreme Court has recognized the centrality of both values. In the case of an identifiable pervasively religious symbol, however, the balance must be struck in favor of the Bill of Rights. As the district court in *Lynch* noted: "We cannot have it both ways—a government that scrupulously honors each person's freedom of belief and yet publicly aligns itself with one particular set of beliefs. The endorsement of one is a disparagement of others that were not chosen, and it becomes increasingly difficult to accord equal respect to what has been publicly marked as less worthy."¹²²

In addition to this substantive ruling, the Supreme Court's *Lynch* decision is deficient for its failure to clarify analytical standards in Establishment Clause lawsuits. Instead of specifying the circumstances in which any of the three "approved" standards of review in Establishment Clause cases should be utilized, the Court merely acknowledged that there were, in fact, three viable standards of review.¹²³ As mentioned, the Court did not even bother to specify why the first circuit was wrong in applying the *Larson* test.

This inconclusiveness was noted by Justice Brennan who understandably remarked: "It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results."¹²⁴ At the same time, the tenor of the Burger opinion is indicative of what probably will happen in future Establishment Clause decisions. First, the Court seems more-or-less committed to make use of the tripartite test. Although its comment concerning the inapplicability of *Larson* is opaque, the Court's failure to utilize that standard

121. *Lynch v. Donnelly*, at 1355, 1374 (Justice Brennan dissenting).

122. *Donnelly v. Lynch*, 525 F. Supp. at 1180-81.

123. *Lynch v. Donnelly*, at 1355, 1362. "[Although] we have often found it useful [to apply the tripartite test] . . . we have repeatedly emphasized our unwillingness to be confined to any single test of criterion in this sensitive area."

124. *Ibid.*, at 1372, n. 4, 1373 (Justice Brennan dissenting).

in an uneven benefit case like *Lynch*¹²⁵ suggests that the compelling interest-least restrictive means test will only be used in uneven regulatory interference cases. Similarly, the majority's failure to extend the *Marsh* historical exemption into a more general cultural or traditional exception suggests that the *Marsh* standard is limited to practices whose origin can be traced to the First Congress.¹²⁶

The language in *Lynch* is also suggestive of how the Court will utilize the tripartite test. The *Lynch* Court's changes in perspective as to the meaning of the Establishment Clause¹²⁷ and its emphasis on acceptable government interfaces with religion¹²⁸ suggest that the Court will be deferential in its applications of the tripartite test. This conclusion is buttressed by two of the three 1982-83 term Establishment Clause decisions, *Mueller v. Allen* and *Marsh v. Chambers*.¹²⁹ The other 1982-83 term decision, *Larkin v. Grendel's Den*, can be distinguished from these other rulings since government vested rule-making authority in religious institutions.¹³⁰ Apparently, *Lynch* supports the trend set by the previous term's rulings, namely, that government may benefit religion in an even or uneven manner *provided* that such government benefits do not limit the government's rule-making authority.

To many, the days of strict separation between church and state may now seem past. This may provide both benefits and disadvantages. On the positive side, there is much truth to the contentions that in a complex society, government and religious organizations will have contact with each other in myriad ways. Additionally, the government should be able to permit Medicaid and Medicare benefits to patients at church-affiliated hospitals, to advance the goal of equal education opportunity by permitting disadvantaged students attending private schools to share in federal aid to education programs, and to provide funds to church-related universities to conduct medical and scientific research. Put simply: Society should not become so secularized as to exclude any reference to religion. Finally, America's religious heritage need not be totally ignored by the secular government. *Lynch* clearly recognizes that church and state cannot and should not be absolutely separated.

125. *Lynch* is arguably an uneven benefits case. Justice Brennan, for example, noted in his dissent that "Pawtucket itself owns the crèche and instead of extending similar attention to a 'broad spectrum' of religious and secular groups, it has singled out Christianity for special treatment" (ibid., at 1374 [Justice Brennan dissenting]). See also notes 13-15.

126. See ibid., at 1370, n. 1 (Justice Brennan dissenting).

127. See notes 104-7.

128. See notes 115-52.

129. See notes 8-12, 17-21.

130. See notes 22-25.

At the same time, government moneys or government support of one particular kind of religious belief might be the principal evil that the Establishment Clause sought to forestall. School prayer and public-funded displays of the cross or the nativity scene are examples of such nonpermissible government support of a particular kind of religious belief. *Lynch*, thus, poses the danger of permitting the sort of church-state entanglements that will alienate individuals subscribing to minority religious views.

All in all, it is hard to assess whether society is better off with an overly strict or overly deferential interpretation of what constitutes an establishment of religion. It is unfortunate, however, that the Supreme Court has never been able to recognize simultaneously the centrality of both separation and accommodation.