E. GOVERNMENTAL PROPRIETARIES IN RELIGION: CRECHES AND CROSSES

While full-blown chaplaincies represent major government proprietaries in religion, there are a number of lesser forms of government "entrepreneurship" in religion in which the state is, or is alleged to be, the sponsor, promoter or proprietor of a religious enterprise. Such efforts may be undertaken—as the Supreme Court euphemistically put it—in "acknowledgement" of the religious interests and attachments of the populace,[1] but they are nonetheless instances of "state action" in which the government, not just the people, is the actor. If the people were all of the same religious persuasion, then a government proprietary of that persuasion might at least be relatively inoffensive, but that is the case in very few—if any—jurisdictions in the United States. In most—if not all—parts of this country any governmental "acknowledgement" of religion, however broad and generalized, will not include everyone, and those whose ultimate beliefs are not thus recognized will have some cause to feel that they are less fully citizens than others whose beliefs are so favored.

If the municipal government erects a public display of a statue of the Virgin Mary or the Sacred Heart of Jesus on the steps of the City Hall, Roman Catholics may be pleased, but Protestants may not. If the governmental exhibit is of the Holy Family in the familiar Christmas Nativity shrine, however, both Protestants and Catholics may be pleased, but Jews and other non-Christians may not. If the government promulgates pious sentiments of the most generalized theistic nature, such as the national motto—"In God We Trust"—on the currency and coinage, religious people may be pleased, but nonreligious people may not. In each instance, those citizens "left out" by the government that is supported equally by their taxes may rightfully feel that their full belongingness to the civil community has been diminished, in that their government is announcing and approving a faith commitment that is not *their* faith commitment.

But, some will say, the government cannot please everyone all the time and still govern. Whatever it does, someone is bound to disapprove. If it puts fluoride in the drinking water to inhibit tooth decay, someone is sure to protest.[2] If it *fails* to put fluoride in the water supply, someone else will protest. If it tries to preserve historic buildings, developers will protest. If it fails to do so, preservationists will protest. And so on through the litany of public issues that divide the citizenry from day to day. But the difference is that those are not primarily *religious* issues. They are secular policy choices that do not implicate religious commitments—at least not directly. Some people may disagree about them for religious reasons, but the subjects themselves are not primarily religious in character.

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1. *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at § E2d below.
2. See *Kraus v. Cleveland*, 127 N.E.2d 609 (1955).

When the government is seen as "taking sides" in matters of religion, it is verging on what was designed to be prevented by the Establishment Clause, namely, that in this nation the *civil* covenant should be *independent* of the *religious* covenant. Franklin H. Littell pointed out:

> Our fathers dared, for the first time in history, to separate the political and the religious covenants. For long centuries the governments had been victimized by clerical cabals and conspiracies, and the churches had been alternately persecuted and used for political and military purposes. What was done was a risk, and many good men opposed the risk. George Washington and Patrick Henry, for example, did not believe that a society could be made to hold together without an established church.
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> But fortunately, the party led by James Madison and made powerful by the leaders of the Great Awakening in Virginia won the day, and the principle was established which was later incorporated into the Federal Constitution: that men might be good fellow-citizens (in the political covenant) without going to the same church (the religious covenant).[3]

That concept was expressed historically in the Virginia Bill for Establishing Religious Freedom, originally drafted by Thomas Jefferson and adopted in 1785-86, becoming one of the immediate precursors of the federal First Amendment:

> We, the General Assembly, do enact, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[4]

When a government—federal, state or local—expresses favor, approval, endorsement, sponsorship, preference or proprietorship toward certain "religious opinions or belief," it "diminishes" the "civil capacities" of those who do not share that belief, since they to that extent thereby become "outsiders," guests in someone else's house. That government becomes less fully *their* government than it is of those whose belief is favored. This view was expressed in early drafts of this treatise before it was also advanced by Justice Sandra Day O'Connor in her concurring opinion in *Lynch v. Donnelly* (1984), as will be more fully seen below. She wrote:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.... Endorsement [of (a) religion] sends a message to

3. Littell, F.H., "Thoughts on Religious Liberty," *McCormick Quarterly*, March, 1963, p. 28.

4. Stokes, A.P., *Church and State in the United States* (New York: Harper & Bros., 1950), I, 393-394, (latter emphasis added).

> nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[5]

The primary offense of governmental proprietaries in religion is that they tend to disenfranchise and denigrate those citizens who are nonadherents of the favored religion. But such proprietaries can offer offense to adherents as well, as was pointed out by Thomas Jefferson in his Bill for Establishing Religious Freedom (quoted above), viz.,

> That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contribution to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness....[6]

The secondary offense, then, is government's making the choice *for* the *adherent*, "depriving him of the comfortable liberty" of making it for himself or herself. Justice Robert Jackson, dissenting in *Zorach v. Clauson*, made a similar point, "It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar."[7] Religious proprietaries operated by government preempt the voluntary engagement of the adherent and determine when and how and by whom the religious expression shall be expressed. This works to short-circuit the process of free choice and voluntary commitment that is essential to vital religion and to substitute for it a casual, remote, perfunctory and vicarious gesture or tribute that fails to edify or engage the faithful while repelling those of other beliefs.

1. Rites of the Public Cultus

This work has sought to be sensitive to the needs and interests of religion as well as to the rightful concerns of society at large. The largely symbolic government proprietaries to be discussed below may be thought by some to meet certain religious needs and interests in the populace and therefore to respond to, "recognize," "acknowledge," "accommodate" a "public" interest. With respect to the proprietaries discussed in the previous section under the rubric of "chaplaincies," it was apparent that some fairly extensive state-operated institutional structures of religion did seem to meet certain needs for free exercise of religion on the part of persons whose access to nongovernmental instrumentalities of religion was curtailed by state action or by circumstances beyond their control. So it is evident that some government

5. 465 U.S. 668 (1984), O'Connor concurrence.
6. Stokes, *supra*, I, 393 (emphasis added).
7. 343 U.S. 306 91952), discussed at IIIC1b.

proprietaries are not necessarily violations of the Establishment Clause, but only because they are justified by the Free Exercise Clause. But that *sine qua non* of constitutionality does not seem to be as readily apparent in the symbolic state proprietaries that appeal to the populace at large, whose access to private, voluntary institutions of religion is not at all curtailed. Why is it that *government* is expected to supply some acknowledgement, recognition or observance of religion for people who are free to repair to their own churches and synagogues for the consolations of religion? Evidently it is because some other need or interest is to be served beyond that ordinarily subsumed under "Free Exercise."

To identify that element it may be useful to analyze *five different meanings of "public*." It can mean what is common and accessible to all, as a *public park*, which anyone may enter, but no one is required to do so. It can mean what is open, overt, made known to all, as a *public announcement*. It can also mean what is inclusive of all, affecting everyone, as *public health*. It can refer to some particular segment of the populace (as a noun), such as the *church-going public*. And it can mean an official expression by or for the civic community as a whole, as the *public school*, the *public library*, the *public authorities*.[8]

The government is "public" in the last sense in particular, in that by definition it represents and serves and governs *all* the people within its jurisdiction, whether it—or they—like it or not. Any government that represents or serves or governs only a *portion* of the people is worthy of severe criticism under the nondiscriminatory canons of equality basic to democracy. The interest to which government responds in undertaking symbolic proprietaries of religion may be an interest that is widely shared among the populace, but it is not "public" in the way that government is and must be. It is selectively "public," like a public announcement or the church-going public, rather than all-inclusive and official.

Some would maintain that *religion* is not and cannot, under the Constitution, be "public" (in this sense), and therefore it must be *private*. It certainly should not be "public" in the sense of official or inclusive of the entire citizenry. But being "private" is not the only alternative, and indeed the idea of religion's being "private" has led some to expect a kind of *privatization* of religion, its *exclusion* from public life, as though it were something unmentionable in polite society, a status that religion cannot rightfully accept. Rather, religious interests are proper to a *self-selecting segment* of the populace—the "church-going public"—and can find expression in many "public" ways that do not imply officiality, all-inclusiveness or representation of the entire community.

That is, if the religiously interested members of the community—the "church-going public"—wish to celebrate Christmas by erecting a Nativity shrine for all to see who wish to, they can put one up on the front lawn of the Methodist Church and another one on the front steps of the Episcopal Church and another one on the grounds of the Roman Catholic Church and even one on the portico of the Masonic Lodge (if the Masons wish to do so) without implicating the official endorsement of

8. Funk, Charles E., ed., *Funk & Wagnalls New Practical Standard Dictionary of the English Language*, (NewYork: Funk & Wagnalls Co., 1954), p. 1058.

the entire civic community. But to put one on the plaza of the City Hall is to say something very different; that location is "public" in the *official* sense that can offend non-Christians, some Christians and the Establishment Clause of the Constitution. That usage is one that seeks and obtains the sponsorship, endorsement, *imprimatur* (to borrow an ecclesiastical term) of the government for a *sectarian* symbol, i.e., one which does not really represent the *whole* public, but only part of it, and can derogate the rest.

The same can be said of symbolic crosses. If any "private" person, group, society or corporation in the community wishes to display a cross on their own premises at Eastertime (or any other time), they are free to do so. They can thus make "public" their affirmations of faith for all to see, if that is meaningful to them. But when the City Hall or the public library or the public school or the public hospital puts up a cross, it tells a different story: not just active and expressive faith, but an intimation of arrogance and pretension.

City Hall is *not* (just) Christian, nor is the public library, school or hospital. They belong equally and fully to non-Christians as well, and people who do not grasp that truth have missed the basic meaning of the whole American adventure of the First Amendment described by Littell in the quotation at the beginning of this section. They are still living in the inherited mind-set of King George III (or Blackstone), who believed that all right-thinking subjects would of course belong to the Church (of England), and that other, lesser souls would be tolerated to attend their chapels and conventicles if they kept silence and did not cause scandal to the faithful by bruiting abroad their misguided deviant views.

This majoritarian "toleration" of minority religions is not the spirit of the Religion Clauses of the First Amendment of the Constitution of the United States. It is a throwback to the European condition many American colonists left because they wanted a condition of true religious *freedom*, not just toleration. That is not to deprecate the sincere piety that prompts many people to yearn for governmental "recognition" of religion, or the naive fervor of one good lady who remarked to the author, in rejection of non-Christians who criticized a City Hall creche, "Why, they don't even believe in our Jesus!" It may come as a shock to such folk that there are many people in this world, and in American communities, who "don't believe in our Jesus," but who nevertheless are human beings and fellow citizens with rights and liberties that entitle them to have an equal say and share in what symbols are going to be displayed in the public settings that belong equally to all.

It may also be said, as Justice Brennan contended at some length in *Marsh v. Chambers*, that the indiscriminate display of holy symbols in (official) public places is no great boon to religion, quoting this author's words to that effect. Protecting religious symbols from profanation may indeed be a valuable by-product of the separation principle, but one may question—with all due respect of Justice Brennan's solicitude—whether that is primarily the Constitution's "lookout." The Establishment Clause does have a proper concern to protect the autonomy of religious activities and organizations (Brennan's second point) so that the government does not interfere with or distort the expression or development of (a) religion. But keeping religion pure, vital, inspiring, disciplined, devoted or benign is primarily the

responsibility of the religious adherents themselves, not of government or the courts. In fact, one could argue that the latter should not "take sides" for or against a "pure" religion as contrasted with a "less pure" religion, whatever that might be. It is government's responsibility, not to foster high-grade religion (or low), but to *keep out of the way* of whatever developments religious adherents themselves attain by virtue of their own insights, abilities, opportunities and inward leadings.

Whether the pious proclivities of portions of the populace result in lofty forms of civic displays or a degenerate folk cultus is not the concern of courts or constitutions, but rather that the reverently inclined not seek to use the instrumentalities of *government* as the vehicle for their expressions of faith. The contention that prohibiting such expressions interferes with the majority's "free exercise" of their religion was definitively rejected by the Supreme Court in *Abington v. Schempp*:

> While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.[9]

The state is not to be either the mouthpiece for the majority's religious expressions nor the proprietor of such expressions on the majority's behalf, the Court seemed to say in 1963. But it has not been as vigilant in preventing such practices in more recent years, as will be seen. In fact, a continuing struggle has gone on over the propriety of state proprietaries in the form of public displays of creches[10] and crosses. In what follows, two themes or theories will be apparent struggling for ascendancy. One is that such displays are religious proprietaries of government or religious expressions *endorsed* by government and thus prohibited by the Establishment Clause. The other is that they are private religious expressions appearing on governmentally owned premises characterized as a "public forum," and thus claimed to be permissible under the Free Speech Clause. Not only creches and crosses, but menorahs and other religious symbols have made their appearance on public sites under this proffered aegis.

2. Governmental Proprietaries in Religion: Creches or Nativity Shrines

Around the end of each year, the American countryside becomes populated with arrays of figurines of various sizes and materials designed to represent a tableau from the historical tradition of the Christian religion, viz., the birth of the baby Jesus, attended by the Holy Family and three kings or wise men as well as shepherds, angels and assorted livestock. Only when this tableau is connected in some way with *state action* does a situation arise which surfaces in the case law of church and state. Several of those situations will be discussed below.

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9. 374 U.S. 203 (1963), discussed at IIIC2b(2).

10. "Crèche" is a word of French origin meaning "1. A public day-nursery. 2. A foundling asylum. 3. A modeled group representing the Nativity." *Funk & Wagnalls New Practical Standard Dictionary, supra.*. Of course, it is the third meaning that is intended here. The *accent grave* will be omitted hereafter.

a. ***Baer v. Kolmorgen*** **(1958)**. One of the early cases involving a municipal display of a Nativity shrine arose in the Hudson River community of Ossining, New York, whose chief claim to fame at that time was its largest employer, Sing Sing prison. In 1956 a group of citizens formed a committee to erect a Nativity scene within the village. Permission was obtained from the Board of Education to place the creche on the lawn of the public high school, and on December 15, 1956, a few days before Christmas recess, the creche was erected as proposed, with a brief ceremony of dedication, and remained in position until school resumed in January.

When the public high school lawn was again utilized the next year for the placement of the creche, a number of citizens took the matter to court. Summons was served on December 5, 1957, upon the members of the Board of Education by attorneys for a list of ten plaintiffs seeking an injunction against erection of the creche on public school property. The Board employed counsel (at public expense) to defend its members. The Creche Committee voted to join the Board as intervening defendants. Thirteen additional plaintiffs of various faiths joined the first group.

Hearing for permanent injunction was held before Justice Elbert T. Gallagher in the Supreme Court of New York, Westchester County, September 25-26, 1958. Decision was rendered—with the felicitous timing for which courts are noted in these cases—the day before Christmas in 1958.

> The evidence establishes that the 1957 Creche was not erected or displayed while school was in session. The evidence further establishes that no public funds were expended, nor was the time of any public employee involved in its erection or display. Even the electricity used in the illumination of the Crib was paid for entirely by private contribution.
>
> The testimony reveals that it has long been a tradition to receive and grant requests from various groups to erect signs and symbols on the school lawn. This privilege has been accorded to the Heart Fund, the Cancer Fund and the American Red Cross, among others. No similar privilege has been requested by any other religious group nor denied by the School Board.
>
> * * *
>
> [T]here appear to be two general bases for attacking a statute or resolution on the grounds that it violates...the [constitutional provisions]: First: where a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting that unconstitutional requirement; Second: Where a person is deprived of property for unconstitutional purposes (such as a direct or indirect tax to support a religious establishment)....
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> The second basis cannot be seriously or successfully urged in the case at bar.... [T]he erection and display of the Creche involved the use of no public funds nor the time of any school personnel. We consider then whether the first basis supports plaintiff's objection.
>
> Plaintiff points out that...the Education Law requires him to send his minor children to school.... He contends further that the Creche is a sectarian religious symbol. He concludes that "pupils compelled by law to attend public school classes for secular instruction, through such

> displays are subjected to sectarian religious influences and are obliged to attend and participate in the veneration of sectarian religious symbols of a religious faith to which some of them do not subscribe....”
>
> The fallacy in plaintiff's argument is apparent in view of the fact that school was not in session during the period when the Creche was displayed. Moreover, the Court is of the opinion that the influence, if any, of religious symbolism is inescapable during the Christmas season. It would be difficult to say that as a practical matter any greater influence exists by virtue of the fact that the symbol is permitted on public as well as private property.
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> * * *
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> The Creche is undoubtedly a religious symbol. In viewing it, however, we are all free to interpret its meaning according to our own religious faith. If any public body were to limit that freedom or if any public institution were to give instruction as to its meaning there would, unquestionably, be a constitutional violation. That, however, is not this case. Here the School Board has done no more than to make a small portion of its property available for the display. To that extent they have accommodated a religious, though non-denominational group. However, the accommodation of religious groups is not per se unconstitutional....
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> * * *
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> By no process of legal reasoning could the permission granted by [to?] the Creche Committee be construed as an establishment of religion or a denial of the right to worship freely and without discrimination. The site was chosen by the Committee not because it was public school property, but because of its location and the amount of space available. The Board granted the Committee's application in the same spirit of cooperation which prompted it to accord a similar privilege to many other groups within the community....
>
> Privileges and benefits should not be denied to individuals or organizations merely because of their religious affiliation or because they may be engaged in some activity of a religious nature.... The test is the First Amendment. It has not been violated here.[11]

Thus the court concluded that the Nativity shrine was not significantly different from the (secular) fund-raising appeals of the Heart Fund, the Cancer Fund or the Red Cross, and that there was no significant difference between the effect of the symbolism when placed on public, as when placed on private, premises. The blurring of secular and sacred, of public or private, as though they were matters of indifference, cannot be of great service to either the religious or the civic realm. This point was set forth by Leo Pfeffer in the plaintiffs' memorandum of law:

> The insistence upon the use of public property [for religious observance] cannot redound to the dignity or advantage of traditional religious

11. *Baer v. Kolmorgen*, 181 N.Y.S.2d 230 (1958).

> views. This is nowhere more evident than in the sad and ironic fact that...the defendants and the Creche Committee themselves have been brought near a position in which they are compelled to assert that Christmas is a time not predominantly for religious observance but for mundane secular rejoicing. The attitude which they seek most to contend against they thus paradoxically are forced to extend and serve.

Those who sought to "put Christ back in Christmas" were thus heard to deprecate the religiousness of their own symbolism and to seem to say that the depiction of the Birth of the Savior was just part of the general seasonal celebration and not really so very sacred after all.

The decision also proceeded on the assumption or conclusion that the governmental agency (the Board of Education) was not the proprietor of the display but merely provided a "forum" for displays by private parties, a characterization to be encountered in subsequent cases.

b. *Allen v. Hickel* (1970). A decade after *Baer* the creche controversy surfaced at the federal level.

> On December 15, 1969, the President, following a tradition established in 1923 by President Harding, threw a switch lighting the National Christmas Tree. The tree was located in the Ellipse (an elliptically shaped park across the street from the White House). Nearby were 57 other lighted and decorated Christmas trees representing the 50 states and seven of the territories of the United States. Also present were reindeer, a burning Yule log, and the center of the controversy before us: an illuminated life-size Nativity scene, depicting the birth of Christ attended by his mother Mary, St. Joseph, shepherds, animals, and the three Magi. The National Christmas Tree and all the rest of these items, together with singing, instrumental concerts, and other seasonal observances, formed the 1969 presentation of the annual Christmas Pageant of Peace. The Pageant is an event co-sponsored by the National Park Service and a non-profit corporation called Christmas Pageant of Peace, Inc. A prime purpose of the Pageant is to proclaim the message of "peace on earth to men of good will."[12]

Not everyone was enthralled at this elaborate prospect. A group of plaintiffs—including an Episcopalian clergyman, a Roman Catholic priest, a rabbi, the president of the American Ethical Union and others—brought suit against the secretary of the Interior, administrator of the National Park Service, charging violation of the Establishment and Free Exercise Clauses of the First Amendment and seeking an injunction against the construction and maintenance of the creche on federal park land. The federal district court for the District of Columbia, *per* Judge John H. Pratt, dismissed the suit on the ground that the plaintiffs lacked standing and also granted summary judgment in favor of the government.

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12. *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970).

The U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded in an opinion by Judge Harold Leventhal for himself and Judges Charles H. Robb and Edward A. Tamm. The appellate court held that citizens may have standing to sue based on noneconomic interests giving them "a personal stake in the outcome of the controversy" beyond the mere airing of "generalized grievances about the conduct of the government."[13] Plaintiffs were residents of the metropolitan area of the District of Columbia served by the park lands of the District.

> Citizens may sue to enjoin a government holding land in trust as a park for impermissibly diverting the use so as to destroy their beneficial interests as park uses [users?].[14] They likewise have standing to complain when the park lands are impermissibly devoted to uses that contravene the Establishment Clause.
>
> * * *
>
> The standing issue was perhaps clarified, in terms of perspective, when Government counsel put it at argument that if the plaintiffs didn't like to look at the creche, they could avoid walking near the Ellipse while it was occupied by the creche. Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public uses; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional.

To this the court added an interesting footnote:

> The plaintiff who is a Catholic priest also objects to the creche on the ground that the presentation of a profoundly religious theme in the secular setting that surrounds the Pageant of Peace is offensive and sacrilegious. Whatever the merits of the contention, we see no basis for denying to a citizen the right to question, through orderly court procedures, alleged Government sacrilege of the symbols of his religion.[15]

The court turned to the substantive issue: whether the creche offended the Establishment Clause. The court noted that the government did not contend that state action was precluded by the fact of private financing of the creche, since the threshold condition for any such display—however financed—was participation in an event sponsored by the Park Service, and such *sponsorship* by a governmental agency provided the element of state action. Therefore, the court considered whether such state action contravened the First Amendment.

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13. Ibid., quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

14. Citing *Archibold v. McLaughlin*, 181 F. Supp. 175 (D.D.C. 1960).

15. Ibid., n. 7. But compare *Burstyn v. Wilson*, 343 U.S. 495 (1952), discussed at § B1 above, questioning whether "sacrilege" is an offense that is actionable under U.S. law, particularly for purposes of a prior restraint speech.

The Government contends that the use of the creche objected to by the plaintiffs is wholly secular, and therefore avoids any entanglement with the First Amendment. That surely overstates the matter. The creche is not wholly secular. On the contrary, as set forth in the official pamphlet of the Christmas Pageant of Peace: "The spiritual meaning of Christmas is offered in the form of a life-sized Nativity Scene * * *" (emphasis added). But the First Amendment does not require the Government to ignore the existence of certain beliefs and customs on the part of large numbers of its citizens....

The applicable rule may fairly be stated thus: The Government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content.... The creche in the Ellipse...was related to a holiday season that has a clearly secular half; the visual demonstration as a whole included definitely secular symbols of the secular holiday—reindeer, the Yule log, the Christmas trees; and its secular purpose was announced...by the official Pageant of Peace Pamphlet...[which] sets forth that the creche was intended to be simply one of a group of objects assembled to show how the American people celebrate the holiday season surrounding Christmas. As such its purpose is no more objectionable than that of a postage stamp bearing a reproduction of a religious painting[16] or a Government-sponsored museum display illustrating various religious or holiday customs.

* * *

The danger to be apprehended is that it will appear to the public, those on the scene and those seeing it second-hand [via national television coverage], that the Government has given a stamp of approval to the religious content of the Nativity scene, and that this effect will not be limited by the secular purpose stated in the pamphlets which are available to a smaller group and examined by a group still smaller.

The duty of the courts is to strike a proper balance. The area is a sensitive one, involving questions of degree. The question is not whether there is any religious effect at all, but rather whether that effect, if present, is substantial. Obviously, brief references to the Deity in courtroom ceremony, in oaths of office taken by public officials, and on coins of the realm are modest in impact—it may be more accurate to say that they usually go unnoticed altogether.

Whatever our own personal impressions as residents of the area we cannot say as a court, on the record before us and in the absence of evidence, that it is conclusive beyond dispute that the visual impact of the creche does not entail substantial religious impact.... We cannot on this record say that it is impossible to present the creche and other holiday symbols in a manner designed to obviate or at least minimize offense to the sensibilities of citizens who are offended either because they are of different religions (or none), or because they are devoutly

16. See just such an issue in *Protestants and Other Americans United v. O'Brien*, 272 F.Supp. 712 (D.D.C. 1967), discussed at § 6b below.

> Christian and believe that the presentations of profoundly spiritual matter in a light-hearted manner and on Government property amounts to a "profanation" that renders unto Caesar some of what is the Lord's....
>
> We imply no present judgment on these matters, but we think the issues are substantial enough to require attentive examination by the Park Service and by the District Court in the context of a presentation of pertinent evidence.[17]

On remand a trial was held, and Judge Pratt again rendered judgment in favor of the government. The plaintiffs again appealed, and the same panel of circuit judges—Tamm, Leventhal and Robb—again reviewed the case.

c. *Allen v. Morton* (1973). In the intervening three years since *Allen v. Hickel*, a new secretary of the Interior had come into office, Rogers C.B. Morton succeeding Walter Hickel in that capacity as well as in the nomenclature of this case, and the Supreme Court had rendered several new church-state opinions pertinent to it—*Walz v. Tax Commission*[18] and *Lemon v. Kurtzman*[19]— which added the question of excessive entanglement of government with religion to the *Schempp* test of establishment.

The Circuit Court's holding was succinctly expressed in a brief *per curiam* opinion, which read as follows:

> The court is of the view that the judgment [below] must be reversed because the plaintiffs are entitled to a decree enjoining the continuance of the Government's current participation in the Christmas Pageant of Peace, including as it does a membership in planning and organization committees that violates the "entanglement" test of the Establishment Clause of the First Amendment....
>
> Following the reinstatement of the complaint plaintiffs will be entitled to a decree, but a question may arise as to its proper scope. No further legal question arises if the pertinent groups and officials of the Christmas Pageant for Peace conclude that the creche will be discontinued as to future Pageants. If the creche is retained, and the Government decides to terminate all sponsorship or connection with the Pageant, appropriate plaques should be ordered by the District Court, as set forth in Judge Leventhal's opinion [see below]. If the creche is retained and the Government wishes to maintain a connection with the Pageant—say, limited to the financial aid presently provided and/or technical sponsorship—it will have to prepare new regulations or amendments to the existing regulations. These regulations or modifications would have to be grounded in neutral principles and criteria that assure non-discriminatory definition of the events that are afforded any such Government aid or technical sponsorship. It is the opinion of the Court, however, that if the Government promulgates the regulations and the

17. *Allen v. Hickel*, *supra*.

18. 397 U.S. 664 (1970), discussed at § C6b(3) above.

19. 403 U.S. 602 (1971), discussed at IIID5.

> Christmas Pageant for Peace qualifies for financial aid or technical sponsorship thereunder, such Government involvement will not be constitutionally defective. Of course, any proposal for retention of Government connection with the pageant would have to be accompanied by a proposal for appropriate [disclaimer] plaques.[20]

To this concise consensus Judge Tamm added a lengthy concurring opinion which was joined by Judge Robb. Judge Leventhal wrote an even lengthier opinion, also concurring, but explaining his peripheral disagreements with the other two judges. Both opinions reviewed the three elements of the *Lemon* test of establishment—purpose, primary effect and entanglement—and their views on these will be summarized topically.

(1) Purpose. The "purpose" of the Pageant was defined on several levels. Both opinions agreed with the finding of the trial court that the original purpose "was to provide a colorful event during the Christmas season which would attract visitors to Washington and thereby increase the business of local merchants."[21] Judge Tamm expressed that thought as follows: the Pageant of Peace "is a non-sectarian, non-partisan, non-profit civic organization organized and promoted by the Washington Board of Trade; its reason for existence is not the furtherance of a religious mission, but, bluntly speaking, the furtherance of tourism in the District of Columbia." Judge Leventhal agreed that "the Pageant was sparked by the quest for a Winter Event to attract visitors and business to Washington," but observed that different elements in the Pageant may have pursued their own characteristic purposes.

> The plaintiffs have drawn our attention to a number of statements made by Department of Interior officials which may be construed as indicating that their particular purpose in holding the Pageant or including the creche may have been religious. On balance, the members of this Court agree that these statements should be held analogous to statements of legislators which may indicate "motives" but do not present the "natural and reasonable effect" of Executive Branch activity. Use of informal statements to show purpose appears to be even more treacherous an undertaking than in the legislative context. The Christmas Pageant of Peace has been ongoing since 1954, and various officials have made their entrances and exits. Thus, purposes and "motives" may have changed over time....
>
> Turning to more objective indications of purpose, the Pageant as a whole puts its main stress on Peace, and it is fair to conclude that it is probably with this goal that the Government has participated....
>
> Moving on to the purposes of the private sponsors of the event, it appears that religious leaders on the Board of the Pageant have insisted that the creche and its religious message be included within the Pageant.... [T]he business leaders accepted, and indeed promoted, the

20. *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), *per curiam* opinion.

21. *Allen v. Morton*, 333 F. Supp. 1088, 1092 (D.D.C. 1971).

> theme of a religious event as a necessary ingredient of substantial significance.
>
> * * *
>
> As long as the Government officials participated in the planning and sponsorship of the event, they could not escape religious entanglement, because the inclusion of the creche was a sine qua non of participation by church officials, and their participation in turn, was an essential element of the Pageant.... If the government was to preserve the event with their participation, their point of view had to be accommodated.

The extent of the accommodation was instructive.

> In November, 1954, at a time when it had been the practice to limit the official celebration of Christmas to the National Christmas Tree on White House grounds, the Special Committee on the Christmas Program, chaired by Mr. [Edward J.] Kelly of the National Park Service, reported to the D.C. Recreation Board that the Christmas event was to be expanded and moved to the Ellipse. The Report stated: "The program will follow somewhat the usual pattern, with the exception that it is being moved to the Ellipse to permit installation of a Nativity Scene, of life-size characters...." The creche was not only the reason for moving the ceremony to the Ellipse, but it was identified as part of the "backbone" of the Pageant, even though the "principal attraction" was the National Christmas Tree.

Accommodation was carried a step further two years later.

> In 1956 "basic principles" were privately agreed upon, by sponsors including the D.C. Recreation Board, for the organization of the Pageant. The two "basic concepts" were as follows:
>
> 1. That the Christmas Pageant of Peace must adhere to the principle of the Christian concept of Christmas—the celebration of Christ's birthday.
> 2. That the Christian concept must be maintained throughout the Pageant programs and the Pageant exhibits. (emphasis in original)

From this piecing together of elements in Judge Leventhal's opinion it is possible to discern a somewhat greater degree of accommodation by the government to the religious partners' purposes (of foregrounding the creche and shaping the entire Pageant to be consistent with it) than Judge Leventhal himself identified. He seemed willing to concede the secularity of purpose to his colleagues, perhaps for their agreement to insist on correcting the "entanglement" aspect.

> If the issue of purpose were decisive, it would be necessary to assess the significance of the objectives of the private sponsors to be [of the?] combined project. In the one sense the Government lends approval to

> their purposes by co-sponsoring the Event, even if the Government's own purpose is solely to promote peace. On balance, it does not appear necessary in this case to resolve the difficult constitutional issue of "purpose," especially since salient considerations have emerged more clearly in our consideration of the "entanglement" standard.[22]

Judge Tamm also espoused the "peace" purpose.

> On a more philosophical level [the Pageant's] continually expressed purpose has been that of manifesting this "nation's desire for `Peace on Earth, Goodwill Toward Men'...." The creche itself, while obviously a religious symbol, is part of a commemoration of "the Nation's celebration of Christmas as a national holiday, by depicting all the traditional aspects of our national history associated with Christmas." While the creche is utilized neither to promote nor profane any religion, it is "intended to be reverential to the religious heritage aspect of Christmas."
>
> These are the express purposes for both the existence of the pageant as a whole and the creche as one of its many integral parts, and they have been consistently stated throughout the history of the Pageant. We can find nothing in the record to convince us that the Government's involvement, which is similar in kind to its cooperation with other national celebration events, e.g., The Cherry Blossom Festival, the President's Cup Regatta, and the National Independence Celebration, is predicated upon any other, non-secular purpose.

The search for the *purpose or purposes* of a human activity may seem deceptively simple at first glance but can soon deteriorate into a metaphysical morass comparable to the question of *causation*, which can entail efficient cause(s), formal cause(s), material cause(s), proximate cause(s), final cause(s), etc., etc. In the two opinions under discussion the terms "purpose," "motive," "goal" and "objective" appear, apparently interchangeably. Are they equivalent, as they seem intended to be? The original (or at least the 1954) purpose of the Pageant of Peace was said to be to attract tourists and potential customers to the downtown Washington area, in which it was quite successful, attracting over half a million visitors a year at the time of trial.[23]

But that did not seem a sufficiently noble justification for the enterprise, and so, "on a more philosophical level" it was said to "serve as `a visible expression of this Nation's aspiration to foster peace, understanding and friendship between the nations of the world and the American People,'" and all three judges characterized that as the *government's* "purpose" in cosponsoring and assisting the Pageant. But neither peace nor profit necessarily answered the narrower question of the purpose of the inclusion of the Nativity tableau in the Pageant of Peace, which was really the question before the court. Both profit and peace might have served as the purpose of the Pageant

22. Ibid., pp. 86-87, Leventhal concurrence.
23. Ibid., p. 76.

without the inclusion of the creche. Why was it added to the Pageant in 1954, necessitating the move to the Ellipse and various other modifications, such as the statement of two "basic principles" of a theological character adopted in 1956?

Judge Leventhal surmised that the Christological element of Christmas represented by the creche was added at the behest of the Christian clergy whose participation was sought by the business community, so the "purpose" of including the creche might be said to have been to enlist the interest and participation of the religious community (or at least the Christian majority thereof), and that was not quite as "secular" a "purpose" as peace or profit. In the sense of the scenario derivable from Judge Leventhal's opinion, the inclusion of the creche was the motivating or distinctive purpose of the Christian clergy on the Program Committee of the Pageant, and their participation was thought to be dependent upon it; indeed, some of them said as much ("Monsignor Corbett and Father Tavlarides were of the opinion that elimination of the creche would be `another step toward a gradual attempt to abolish the worship of God'."[24])

In order to keep the coalition together, the business leaders and the government's representatives went along with or adopted or shared or espoused or acquiesced in the purpose of the clergy (and some may also have been independently motivated by it themselves, such as Mr. Carr, president of the Pageant.[25])

Whether a purpose is logical, plausible, justifiable, effectual or constructive are further questions that do not necessarily bear on constitutionality, but lend credence to the contention that "purpose is a many-layered thing" that does not necessarily lend itself to easy analysis. The ostensible or formal reason for doing something is not always what actually motivates people to do it, and some people will be actuated by some incentives; others, by others. Each person, indeed, probably acts for a variety of reasons, intentions, motives and impulses, some of them conscious and others unconscious. Of these it is not always easy to select one or a few of the more explicit or rational and characterize them as *the* "purpose(s)" of the activity. Yet courts keep attempting to do so in order to answer the important threshold inquiry: *What were you trying to do?*

The question must be aimed at the appropriate party and the specific action; in this instance, the party was the *government*, and the action was *the inclusion of the creche* in the Pageant of Peace (not the holding of the Pageant as a whole). The answer would seem to be that the government acceded to the wishes of the other partners in the coalition, particularly though not solely the clergy, because that was thought to be necessary to the shared enterprise. Making a success of the Pageant might qualify as a "secular purpose," but mollifying the religious concerns of the clergy might not.

The court's analysis of "purpose" did not reach this result, but—as Judge Leventhal remarked—they came at it from another angle.

(2) Primary Effect. The second element of the *Lemon* test of establishment of religion was that the contested governmental activity should not have a primary

24. Ibid., n. 36.
25. Ibid., n. 37.

effect of aiding or hindering religion. The "effect" test had been slightly broadened in a subsequent decision to contemplate more than one primary effect. Judge Tamm dealt with this question as follows:

> The recent Nyquist opinion elucidates that Government action may have multiple "primary" effects, in the sense that the constitutional propriety of an action depends not on whether the primary effect is legitimately secular but on whether the action in any way has the "direct and immediate effect of advancing religion," or conversely "only a `remote and incidental' effect advantageous to religious institutions...."[26]
>
> * * *
>
> [R]eview of the record convinces us that the evidence clearly shows, when considering the Government's involvement and the overall effect of the creche, that the Government's involvement is constitutionally permissible.... In reaching such a conclusion we are particularly impressed by the following factors: (1) the secularized nature of the Pageant and, to a certain degree, of the Christmas holiday season itself; (2) the utilization of the creche only to manifest the religious heritage aspect of the Christmas celebration, as only one of many "traditional aspects of our national history associated with Christmas;" (3) the presence of explanatory plaques on the grounds of the Pageant which state, inter alia:
>
> > The National Park Service sponsors the Pageant on the basis that this National Celebration Event is wholly secular in character, purpose and main effect. The illuminated creche display is intended to be reverential to the religious heritage aspect of Christmas; but that display is not meant, and should not be taken, either to promote religious worship, or profane the symbols of any religion;
>
> (4) the fact that the Government involvement is limited to the non-creche aspects of the Pageant, and apparently is similar in kind to that regularly supplied by the Government to other national celebration events; and finally, (5) the fact that the creche should not be considered in isolation but as an integral part of the whole of the Pageant, and that the question with which this court is faced is not whether the creche, considered in isolation, has a religious effect, but whether the Government's limited involvement in the Pageant—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—has more than a "remote and incidental" effect advantageous to religion.

Judge Tamm would thus not single out the specific element being challenged—inclusion of the creche in a preexisting event—in determining the *primary effect(s)* of the government's involvement, but would rather view the ensemble as a whole, which is perhaps more permissible in assessing the total impact on the viewer than it would

26. Quotations are from *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 784 (1973), discussed at IIID7a.

be in assessing the *purpose* of the arrangement.

Judge Leventhal, though accepting the rubrics pertaining to "effect" derived from the Supreme Court decision quoted by Judge Tamm, differed with him on how they should be applied.

> In judging whether the activity of the Government has a "substantial religious impact" in advancing religion..., two questions must be asked. First, is the state aid, in the form of sponsorship and management, as well as funds, given to an institution or event of such a nature that "a substantial portion of its functions are subsumed in the religious mission"?[27] If so, can the state involvement be successfully cut off from the religious aspect of the event to avoid "substantial religious impact?"
>
> * * *
>
> On the basis of the record, it is plain that a depiction of the Nativity scene is primarily of religious significance and constitutes a "clear religious symbol." It cannot fairly be put as a mere historical event. As one witness said, when asked to compare the birth of Jesus with that of George Washington, "it would be difficult to parallel the two, simply because Jesus is looked upon as being divine, His birth was that of a virgin. The creche scene depicts the actual event, the occasion of his virgin birth, which makes it quite unique and quite distinctive from the birth of George Washington...."
>
> In my view, appellant has carried its burden of showing that, for the Pageant, "a substantial portion of its functions are subsumed in the religious mission."
>
> Judge Pratt, however, assumed that plaintiffs must not only show that the creche was a clear religious symbol but must also sustain the burden of proof on the issue of whether the creche had a substantial religious effect within the context of the entire Pageant, including the [disclaimer] plaques. In my view, this analysis reflected legal error.
>
> * * *
>
> [O]nce the plaintiffs have made a case for a clear religious symbol a presumption operates that this symbol has substantial religious impact. The burden [then] lies on the Government to bring forth evidence rebutting the presumption. In this case, plaintiffs introduced not only testimony that the creche was a clear religious symbol, but also evidence, by way of a poll, to show that the creche had a substantial religious impact on its viewers.... [P]laintiffs' demonstration that the creche was a clear religious symbol left the Government with the burden...of making an affirmative showing that the setting of the creche in the Pageant diluted its substantial religious effect.
>
> Three possible reasons were raised by defendants for believing the effect of the creche is diluted: (1) the theme and physical layout of the Pageant do not highlight the creche; (2) the secular nature of Christmas as celebrated diminishes the potential impact; and (3) the plaques make clear to viewers that the creche is to carry no religious message.

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27. Quotation is from *Hunt v. McNair*, 413 U.S. 734 (1973), discussed at IIID8a.

> While the creche was not at the physical center of the Pageant and played no role in any of the programmed events, the fact remains that large numbers of the visitors to the Pageant have easy access to view the creche. It is a "backbone" of the Pageant even though it is not as prominent as the National Christmas Tree.
>
> In stating that the potential religious impact of the creche was diminished by its secular setting, the District Court stated that:
>
> > [The creche] is seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday. This fact makes it especially difficult to accept the contention that the display of the creche in the Christmas Pageant of Peace has a significant religious impact....
>
> I find this reasoning unpersuasive. Its unstated premise is that the creche as seen in commercial settings has no substantial religious impact. What seems equally, if not more, likely is that the commercial establishments that display the Nativity scene, a clearly religious symbol, do so in order to invoke its emotional message, as a motivation for purchase of contemporary equivalents of frankincense and myrrh. Whether the commercial establishments are involved in a profanation of religion is not an issue before this court. The claim remains that this is one of the effects of the Government's involvement in the Pageant. Although the use of religious symbols by private enterprise is not of concern to us, the fact that the Government is involved in the Pageant makes the effect of this symbolism a matter for attention under the Establishment Clause. The very issue of proof in this case is whether a secular Christmas setting does diminish the religious impact of the creche. On this important point the Government cannot sustain its burden by mere assertion.
>
> Turning to the plaques, which are in evidence, they are, in my view, plainly insufficient to show requisite diminution of religious impact. These plaques do not even seem designed for this purpose. They are entitled "The Story of the Christmas Pageant of Peace" and the statement of secular purpose is buried in the eighth paragraph of a lengthy textual message. One is reminded of a waiver clause tucked away in an insurance policy. In view of this fact and the additional fact that there were only three plaques placed in the Ellipse, only one in any proximity to the creche, there is little reason to believe that their message of secular purpose was read by many viewers or if read had any impact.... Perhaps a plaque or other means could have been designed to obviate the religious impact of the creche, but the Government did not show that these particular plaques fulfilled that task.[28]

On the issue of primary effect, then, Judge Leventhal's analysis would have resulted in reversal and remand if carried through to its logical conclusion. That his analysis was characterized as a concurrence rather than a dissent may perhaps be attributed to the outcome of the third "prong" of the *Lemon* test.

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28. *Allen v. Morton*, 495 F.2d 65, 87–89 (Leventhal, J., concurring).

(3) Excessive Entanglement. Judge Tamm described the development of the "excessive entanglement" prong in *Walz v. Tax Commission* (1970),[29] but thought that its prior uses had but limited applicability in the instant instance.

> [T]he involvement we consider here today is novel in terms of Supreme Court precedent and thus does not fit well in the pigeonholes of past decisions. The test, however, emanates from the principle that Government involvement with religion should be kept to a necessary minimum, and that there should be avoided not only the actual interference but also the potential for and appearance of interference with religion. Judge Leventhal has enumerated instances where Government officials have been placed in (at best) awkward positions because of the conflict between their roles as representatives of the Government and decision makers on the [Pageant's] planning and other committees. Although the officials involved have maintained an admirable "even keel" and desire for fairness in dealing with the sensitive matters thrust upon them, in view of the limited purpose such membership serves and the goal of minimal contacts, and considering the conflicts of the past, possibilities for conflicts in the future, and inferences some may draw from the Government membership, this type of activity should not be engaged in by representatives of the Government and is constitutionally prohibited by the First Amendment....
>
> When the Government dissociates itself from membership on various committees [of the Pageant] its involvement can be limited to nominal co-sponsorship in terms of labor and equipment provided for the construction and disassembly of the non-creche aspects of the Pageant. The administrative contacts would be minimal—certainly no greater than those found proper in Tilton[30] and Hunt[31]—for there need be only so much as is necessary to assure that the labor and equipment provided is not utilized for the creche.
>
> * * *
>
> To assure that [the Government's] neutrality continues and is not the subject of continuing controversy, we require that if the Government desires to continue its support of the Pageant it must promulgate regulations governing such involvement, as set out in the Court's Per Curiam opinion.[32]

The *per curiam* opinion had referred to Judge Leventhal's statement of explanatory plaques. This occurred in the final segment of his concurring opinion, entitled "Comments on Disposition."

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29. 397 U.S. 664 (1970) discussed at § C6b(3) above.

30. *Tilton v. Richardson*, 403 U.S. 672 (1971), discussed at IIID6.

31. *Hunt v. McNair*, *supra*.

32. *Allen v. Morton*, 495 F.2d at 75–76 (Tamm, J., concurring).

> The court is unanimous in reversing the judgment of the District Court because of excessive entanglement. The question is as to the decree.
>
> 1. No further legal question arises if the sponsors of the event conclude that the creche will be eliminated from the Pageant of Peace.
>
> 2. If the non-government sponsors wish to retain the creche, the Government could avoid all Establishment issues by severing its connection with the Pageant and merely treating it like any other applicant for use of parkland.
>
> * * *
>
> It is clear that some parkland, such as Arlington National Cemetery, is already available to religious groups on a non-discriminatory basis. If the Government chooses to make other areas available, such as the Ellipse, permits must be granted on the same non-discriminatory basis.
>
> Principles of neutrality and non-discrimination do not require all groups to have access to the same parkland simultaneously. Access to the Ellipse during the holding of the Pageant may reasonably be limited by the Government out of consideration to possibilities of disturbance or interference with the objectives of the participants.
>
> If the Government proceeds by terminating its supportive relationship with the event, a question arises by reason of the extent to which the government has been associated in the public mind since 1954 with the Pageant. Vestiges of this association cannot be eliminated by simple termination of support both because of the past association and the misinterpretations that might occur in the future as a result of the participation of government officials, in their private capacities, in the event. On remand, the district court will retain jurisdiction of this case pending a decision by the participants as to which option they will take. If the decision is to have the government terminate its relationship with the Pageant, the district court will enter an injunction requiring the government to post a new set of plaques. These plaques should be designed for maximum exposure and readability to the sole purpose of stating that the government in no way sponsors the Pageant of Peace event. This message should not, as is presently the case, be obscured by a lengthy description of the origins and nature of the Pageant.
>
> 3. If the creche is retained, and the Government wishes to maintain a connection with the Pageant, the majority is of the view that a connection limited to the financial aid presently provided and/or technical sponsorship would not run afoul of the Establishment Clause provided the connection is established in accordance with new regulations grounded in neutral principles and criteria that assure non-discriminatory definition of the events that are afforded any such Government aid or technical sponsorship.[33]

The teaching of this case seems to be that government officials may not serve on committees of otherwise nongovernment groups sponsoring displays or events on

33. Ibid., Leventhal concurrence.

public park land that involve religious symbolism, that such events or displays must be given access to such sites on a neutral and nondiscriminatory basis, and that visual notices must be posted disclaiming governmental sponsorship of the religious symbolism.[34]

d. *Lynch v. Donnelly* (1984). The Supreme Court of the United States did not concern itself with the question of public rites in observance of Christmas until 1984, when it agreed to hear a case involving a Christmas display that included a Nativity shrine.

> Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a non-profit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas Season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads, "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.
>
> The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the City $1365; it now is valued at $200. The erection and dismantling of the creche costs the City about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.[35]

The American Civil Liberties Union brought suit against Dennis Lynch, mayor of Pawtucket, and others, charging that the inclusion of the Nativity shrine, as a religious symbol, violated the Establishment Clause of the First Amendment. The federal district court applied the three-fold *Lemon* test of establishment and concluded that in displaying the creche the city had "tried to endorse and promulgate religious beliefs" and that such action "has the real and substantial effect of affiliating the city with the Christian beliefs that the creche represents,"[36] thus violating the requirements that such state action must have a secular purpose and a primary effect

34. For different results, see, for example, *Concerned Citizens v. Denver*, 481 F.Supp. 522 (D.Colo. 1979); *Denver v. Concerned Citizens*, 628 F.2d 1289 (CA10 1980); *Concerned Citizens v. Denver*, 508 F.Supp. 523 (1981); *Citizens v. Denver*, 526 F.Supp. 1310 (1981).

35. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

36. Ibid., quoting 525 F. Supp. 1150 (1981).

that neither aids nor hinders religion. The First Circuit Court of Appeals affirmed by a divided vote.[37]

The opinion of the Supreme Court was written by Chief Justice Warren Burger for himself and Justices White, Powell, Rehnquist and O'Connor. The chief justice, as in some of his previous church-state opinions, professed great difficulty in discerning clear guidelines on establishment.

> In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.
>
> The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, see, e.g., Everson v. Board of Education.38 The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.
>
> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.... Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

At this point the opinion cited *Zorach v. Clauson*,[39] the Court's sole "accommodationist" interpretation of the Establishment Clause between *Everson* (1947) and the 1980s. Most of the Court's Establishment decisions in those four decades did not strike the note that Chief Justice Burger on this occasion announced that the Constitution "affirmatively mandates." Following on the Court's tack the previous year in *Marsh v. Chambers*,[40] also written by Burger, and *Mueller v. Allen*,[41] written by future Chief Justice William Rehnquist, this reference to *Zorach* seemed to suggest that the Court was moving heavily into an accommodationist mode.

> Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.... President Washington and his successors proclaimed Thanksgiving [Day], with all its religious

37. 691 F. 2d 1029 (1982).
38. 330 U.S. 1 (1947), discussed at IIID2.
39. 343 U.S. 306 (1952), discussed at IIIC1b.
40. 463 U.S. 783 (1983), discussed at § D3a above.
41. 463 U.S. 388 (1983), discussed at IIID7j.

overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance....

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith.... The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments.

There are countless other illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. [followed by more quotations from Zorach]

* * *

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause....

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so....

In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed....

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement with religion [the three-fold Lemon test]. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.... In two cases, the Court did not even apply the Lemon "test." We did not, for example, consider that analysis relevant in Marsh [v. Chambers].[42] Nor did we find Lemon useful in Larson v. Valente,[43] where there was substantial evidence of overt discrimination against a particular church.

* * *

The Court has invalidated legislation or governmental action on the

42. Discussed at § D3a above.

43. 456 U.S. 228 (1982), discussed at IIC5c.

ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations....

The District Court inferred from the religious nature of the creche that the City has no secular purpose for the display.... The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message.... The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday....

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes....

The District Court found that the primary effect of including the creche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular....

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause [secular textbooks and bus transportation for parochial school pupils, tax exemptions for churches, etc.]....

* * *

We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an `indirect,' `remote,' or `incidental' benefit upon [religion] is for that reason alone, constitutionally invalid."[44] Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origin of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

* * *

The creche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of good will in keeping with the season.

* * *

44. *Committee for Public Education & Religius Liberty v. Nyquist*, 413 U.S. 756, (1973), discussed at IIID7a.

> Of course, the creche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause [citing Sunday closing laws, legislative chaplains, etc.]. It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as a part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so "taint" the City's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and the Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings....
>
> The Court has acknowledged that "the fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgement of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.

The final few paragraphs seemed to smack of a bit of judicial overkill: the image of Christmas hymns and carols being rendered in public places juxtaposed with Congress and legislatures being addressed in chorus by paid chaplains suggests a scenario worthy of Cecil B. DeMille or Radio City Music Hall rather than a calm view of the Constitution. And the image of the archbishop of Canterbury or the pope lurking behind the Nativity figurines is vivid in its appeal to absurdity but does not entirely dispose of the aspect of establishment which the chief justice himself had expressed in *Walz*: "the basic purpose of these provisions...is to insure that no religion be sponsored [by the sovereign—the state]."[45] What constitutes "sponsorship" of a religion by an instrumentality of the state was exactly the crux of this case, and the Court's effort to liken the display of the Nativity shrine to an exhibit in a museum was not universally persuasive, as the dissents made clear.

(1) Justice O'Connor's Concurrence. Justice Sandra Day O'Connor wrote a separate concurring opinion (as well as joining the chief justice's opinion for the Court) to suggest a new characterization of establishment that recast and clarified the *Lemon* test.

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions,

45. *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970), discussed at § C6b(3) above.

> which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. E.g., Larkin v. Grendel's Den (1983).[46] The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

There could be no clearer exposition of the very defect of the municipal erection of a *Christian* religious symbol, *viz*., that it disfavors the civic belongingness of non-Christians. Yet, surprisingly, Justice O'Connor did not reach that conclusion.

> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the City's display actually conveyed. The purpose and effect prongs of the Lemon test represent these two aspects of the meaning of the City's action.
>
> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community....
>
> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.
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> * * *
>
> Applying that formulation [of purpose] to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of nonChristian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.
>
> * * *
>
> Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the Lemon test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.... What is crucial is that a government practice not

46. 459 U.S. 116, discussed at § B4 above.

have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche. Although the religious and indeed sectarian significance of the creche...is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

These features combine to make the government's display of the creche in this particular physical setting no more an endorsement of religion than such government "acknowledgements" of religion as legislative prayers of the type approved in Marsh v. Chambers (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the creche likewise serves a secular purpose—celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion.... For these reasons, I conclude that Pawtucket's display of the creche does not have the effect of communicating endorsement of Christianity.

* * *

[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate in invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.[47]

47. *Lynch v. Donnelly, supra*, O'Connor concurrence.

Justice O'Connor's recasting of the meaning of Establishment gave new coherence to the *Lemon* test. As she correctly observed, "It has never been entirely clear...how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." Subsequent references to O'Connor's test of establishment in other court opinions, law review articles and legal briefs have been generally—though not universally[48]—favorable, but many feel that it should have led her to dissent rather than concur in the Pawtucket case. Jewish groups have been particularly vocal in declaring their objections to municipal exhibits of Christian Nativity shrines precisely for the reason that they derogate the civil status of non-Christians.[49] But Justice O'Connor's opinion went further to explain that mere evidentiary facts to the contrary are not necessarily dispositive. The final disposition is not so much a matter of *facts* but of *law*—"a legal question to be answered on the basis of *judicial interpretation* of social facts" (emphasis added). At any rate, her vote gave the chief justice the five he needed for the narrowest possible majority.

(2) Justice Brennan's Dissent. The senior associate justice indited a dissent almost twice as long as the Court's opinion, in which he was joined by Justices Marshall, Blackmun and Stevens.

> [O]ur precedents in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the City's creche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.... After reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas season seems so familiar and agreeable.... In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a creche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the City's annual display reflects nothing more than an "acknowledgement" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. Indeed, our remarkable and precious religious diversity as a nation...,

48. See comment by Justice Kennedy in *Allegheny County, infra,* that Justice O'Connor's "endorsement test" was "most unwelcome."

49. See brief *amicus curiae* of the American Jewish Committee and the National Council of Churches urging this argument, in *McCreary v. Stone*, 739 F.2d 716 (2d Cir., 1948), in the U.S. Supreme Court, discussed at e below.

> which the Establishment Clause seeks to protect, runs directly counter to today's decision.

Justice Brennan devoted several paragraphs to an insistence on reasserting the three-part *Lemon* test of establishment, which the Chief Justice had originally formulated—in *Lemon v. Kurtzman*—but had subsequently departed from in *Marsh v. Chambers* and disparaged in private conversation,[50] leading one to entertain the possibility that Justice Brennan may have had a larger role in developing the *Lemon* test than has been recognized. He certainly displayed in 1983 a greater sense of "ownership" of it than did Chief Justice Burger.

> Applying the three-part test to Pawtucket's creche, I am persuaded that the City's inclusion of the creche in its Christmas display simply does not reflect a "clearly secular purpose." Unlike the typical case in which the record reveals some contemporaneous expression of a clear purpose to advance religion or, conversely, a clear secular purpose, here we have no explicit statement of purpose by Pawtucket's municipal government accompanying its decision to purchase, display and maintain the creche. Governmental purpose may nevertheless be inferred.... In the present case, the City claims that its purposes were exclusively secular. Pawtucket sought, according to this view, only to participate in the celebration of a national holiday and to attract people to the downtown area in order to promote pre-Christmas retail sales and to help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season.
>
> Despite these assertions, two compelling aspects of this case indicate that our generally prudent "reluctance to attribute unconstitutional motives" to a governmental body should be overcome. First, as was true in Larkin v. Grendel's Den, all of Pawtucket's "valid secular objectives can be readily accomplished by other means." Plainly, the City's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display. More importantly, the nativity scene, unlike every other element of the Hodgson Park display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce simply do not encompass. To be found constitutional, Pawtucket's seasonal celebration must at least be non-denominational and not serve to promote religion. The inclusion of a distinctively religious element like the creche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a

50. Several reports have been relayed of his comments uttered at a conference at Colonial Williamsburg while walking with several lawyers across the campus. He was asked about the future of the *Lemon* test and replied, "Lemons, oranges, there's nothing sacred about the Lemon test," or words to that effect.

> nativity scene. That the creche retained this religious character for the people and municipal government of Pawtucket is suggested by the Mayor's testimony at trial in which he stated that...the effort to eliminate the nativity scene..."is a step towards establishing another religion, non-religion...." Plainly, the City and its leaders understood that the inclusion of the creche in its display would serve the wholly religious purpose of "keep[ing] `Christ in Christmas'." From this record, therefore, it is impossible to say...that a wholly secular goal predominates.

Justice Brennan perhaps underrated the problems for the city in excluding the Nativity shrine from its display. Instead of hearing the criticisms of a few rabbis, Jewish laypersons and others, it would have been denounced by Protestant preachers and Catholic priests from their pulpits for dethroning the Baby Jesus, whose Birth the holiday celebrates. So the municipal government may have found itself in the unenviable predicament of being damned if it did and damned if it didn't include the creche. So it may have chosen the course of lesser damns, which may also be a "secular" purpose, except that the First Amendment does not permit governments to placate majorities (or minorities) by allowing them to use the civic machinery as a vehicle for exercising their religious interests.[51] But Justice Brennan also faulted the city on the second prong of *Lemon*—"primary effect."

> The "primary effect" of including a nativity scene in the City's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the City's decision to include the creche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the creche, thereby providing "a significant symbolic benefit to religion..." Larkin v. Grendel's Den. The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit....

Justice Brennan also applied the third element of the *Lemon* test—whether the governmental practice fosters excessive entanglement between government and religion.

> Finally, it is evident that Pawtucket's inclusion of a creche as part of its annual Christmas display does pose a significant threat of fostering "excessive entanglement...." [T]he District Court found no administrative

51. Cf. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b(2).

entanglement in this case..., but it is worth noting that after today's decision, administrative entanglements may well develop. Jews and other non-Christian groups, prompted perhaps 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 involved in accommodating the various demands.... More importantly, although no political divisiveness was apparent in Pawtucket prior to the filing of [this] lawsuit, that act...unleashed powerful emotional reactions which divided the City along religious lines. The fact that calm had prevailed prior to this suit does not immediately suggest the absence of any division on the point for, as the District Court observed, the quiescence of those opposed to the creche may have reflected nothing more than their sense of futility in opposing the majority....

In sum, considering the District Court's careful findings of fact under the three-part analysis called for by our prior cases, I have no difficulty concluding that Pawtucket's display of the creche is unconstitutional.

The Court advances two principal arguments to support its conclusion that the Pawtucket creche satisfies the Lemon test. Neither is persuasive.

First. The Court, by focusing on the holiday "context" in which the nativity scene appeared, seeks to explain away the clear religious import of the creche and the findings of the District Court that most observers understood the creche as both a symbol of Christian beliefs and a symbol of the City's support of those beliefs.... Thus, although the Court concedes that the City's inclusion of the nativity scene plainly serves "to depict the origins" of Christmas as a "significant historical religious event," and that the creche "is identified with one religious faith," we are nevertheless expected to believe that Pawtucket's use of the creche does not signal the City's support for the sectarian symbolism that the nativity scene evokes.... But it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the creche in its Christmas display, Pawtucket has done no more than make use of a "traditional" symbol of the holiday, and has thereby purged the creche of its religious content and conferred only an "incidental and indirect" benefit on religion.

The Court's struggle to ignore the clear religious effect of the creche seems to me misguided for several reasons. In the first place, the City has positioned the creche in a central and highly visible location within the Hodgson Park display....

Moreover, the City has done nothing to disclaim government approval of the religious significance of the creche, to suggest that the creche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalogue of ethnic and religious celebrations, or to dissociate itself from the religious content of the creche.... [W]hen the Court of Appeals for the District of Columbia approved the inclusion of a creche as part of a national "Pageant of Peace" on federal parkland adjacent to the White House, it did so on the express condition that the government would

erect "explanatory plaques" disclaiming any sponsorship of religious beliefs associated with the creche.[52] In this case, by contrast, Pawtucket has made no effort whatever to provide a similar cautionary message.

Third, we have consistently acknowledged that an otherwise secular setting alone does not suffice to justify a governmental practice that has the effect of aiding religion.... The demonstrably secular context of public education... did not save the challenged practice of school prayer....

Finally, and most importantly,... the creche retains a specifically Christian religious meaning. I refuse to accept the notion implicit in today's decision that non-Christians would find that the religious content of the creche is eliminated by the fact that it appears as part of the City's otherwise secular celebration of the Christmas holiday. The nativity scene is clearly distinct in its purpose and effect from the rest of the Hodgson Park display for the simple reason that it is the only one rooted in a biblical account of Christ's birth. It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic re-enactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith. When government appears to sponsor such religiously inspired views, we cannot say that the practice is "`so separate and so indisputably marked off from the religious function,' that [it] may fairly be viewed as reflect[ing] a neutral posture toward religious institutions." Nyquist (quoting Everson). To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause.

Second. The Court attempts to justify the creche by entertaining a beguilingly simple, yet faulty syllogism. The Court begins by noting that government may recognize Christmas day as a public holiday; the Court then asserts that the creche is nothing more than a traditional element of Christmas celebrations; and it concludes that the inclusion of a creche as part of a government's annual Christmas celebration is constitutionally permissible. The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements. 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 indiscriminately embrace the distinctively sectarian aspects of the holiday....

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52. *Allen v. Morton*, 495 F.2d 65 (1973), discussed at § c above.

When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step.... If public officials go further and participate in the secular celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause. But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday, and places the prestige, power and financial support of a civil authority in the service of a particular faith.

The inclusion of a creche in Pawtucket's otherwise secular celebration of Christmas clearly violates these principles. Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the creche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the creche has profound religious significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."

For these reasons, the creche in this context simply cannot be viewed as playing the same role that an ordinary museum display does. The Court seems to assume that forbidding Pawtucket from displaying a creche would be tantamount to forbidding a state college from including the Bible or Milton's Paradise Lost in a course on English literature. But in those cases the religiously-inspired materials are being considered solely as literature. The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression....

In this case, by contrast, the creche plays no comparable secular role. Unlike the poetry of Paradise Lost which students in a literature course will seek to appreciate primarily for aesthetic or historical reasons, the

> angels, shepherds, Magi and infant of Pawtucket's nativity scene can only be viewed as symbols of a particular set of religious beliefs.

(That is, they are not in themselves necessarily "great art," such as might legitimately be treasured in a museum, private or public.)

> It would be another matter if the creche were displayed in a museum setting, in the company of other religiously-inspired artifacts, as an example, among many, of the symbolic representations of religious myths. In that setting, we would have objective guarantees that the creche could not suggest that a particular religious faith had been singled out for public favor and recognition. The effect of Pawtucket's creche, however, is not confined by any of these limiting attributes. In the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the creche will be to remind the average observer of the religious roots of the celebration he is witnessing and to call to mind the scriptural message that the nativity symbolizes. The fact that Pawtucket has gone to the trouble of making such an elaborate public celebration and of including a creche in that otherwise secular setting inevitably serves to reinforce the sense that the City means to express solidarity with the Christian message of the creche and to dismiss other faiths as unworthy of similar attention and support.
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> II
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> Although the Court's relaxed application of the Lemon test to Pawtucket's creche is regrettable, it is at least understandable and properly limited to the particular facts of this case. The Court's opinion, however, also sounds a broader and more troubling theme. Invoking the celebration of Thanksgiving as a public holiday, the legend "In God We Trust" on our coins, and the proclamation "God save the United States and this Honorable Court" at the opening of judicial sessions, the Court asserts, without explanation, that Pawtucket's inclusion of a creche in its annual Christmas display poses no more of a threat to the Establishment Clause values than these other official "acknowledgments" of religion.
>
> Intuition tells us that some official "acknowledgment" is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people. It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs. This does not mean, of course, that public officials may not take account, when necessary, of the separate existence and significance of the religious institutions and practices in the society they govern. Should government choose to incorporate some arguably religious elements into its public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over non-religion. Thus, in a series of decisions concerning such acknowledgments, we have repeatedly held that any active form of

public acknowledgment of religion indicating sponsorship or endorsement is forbidden....

Despite this body of case law, the Court has never comprehensively addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations, and I do not presume to offer such a comprehensive approach. Nevertheless, it appears from our prior decisions that at least three principles— tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause—may be identified. First, although the government may not be compelled to do so by the Free Exercise Clause, it may consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion. That is the essential meaning, I submit, of this Court's decision in Zorach v. Clauson (1952),53 finding that government does not violate the Establishment Clause when it simply chooses to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." And for me that principle would justify government's decision to declare December 25th a public holiday.

Second, our cases recognize that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for government to pursue the practice when it is continued today solely for secular reasons. As this Court noted with reference to Sunday Closing Laws in McGowan v. Maryland,54 the mere fact that a governmental practice coincides to some extent with certain religious beliefs does not render it unconstitutional. Thanksgiving Day, in my view, fits easily within this principle, for despite its religious antecedents, the current practice of celebrating Thanksgiving is unquestionably secular and patriotic....

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form [of] "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases....

The creche fits none of these categories. Inclusion of the creche is not necessary to accommodate individual religious expression. This is

53. 343 U.S. 306 (1952), discussed at IIIC1b.

54. 366 U.S. 420 (1961), discussed at IVA7a.

plainly not a case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land.[55] Nor is the inclusion of the creche necessary to serve wholly secular goals; it is clear that the City's secular purpose of celebrating the Christmas holiday and promoting retail commerce can be fully served without the creche. And the creche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we accept in ceremonial phrases or in other contexts that assure neutrality. The religious works on display at the National Gallery, Presidential references to God during an Inaugural Address, or the national motto present no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the creche begins and ends with reverence for a particular image of the divine.

By insisting that such a distinctively sectarian message is merely an unobjectionable part of our "religious heritage," the Court takes a long step backwards to the days when Justice [David] Brewer could arrogantly declare for the Court that "this is a Christian nation." Church of Holy Trinity v. United States (1892).[56] Those days, I had thought were forever put behind us by the Court's decision in Engel v. Vitale,[57] in which we rejected a similar argument advanced by the State of New York that its Regent's Prayer was simply an acceptable part of our "spiritual heritage."

III

The American historical experience concerning the public celebration of Christmas, if carefully examined, provides no support for the Court's decision. The opening sections of the Court's opinion, while seeking to rely on historical evidence, do no more than recognize the obvious: because of the strong religious currents that run through our history, an inflexible or absolutistic enforcement of the Establishment Clause would be both imprudent and impossible. This observation is at once uncontroversial and unilluminating. Simply enumerating the various ways in which the Federal Government has recognized the vital role religion plays in our society does nothing to help decide the question presented in this case.

Indeed, the Court's approach suggests a fundamental misapprehension of the proper uses of history in constitutional interpretation. Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment Clause. But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action.... Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit

55. Citing *McCreary v. Stone*, 739 F.2d 716 (1981), discussed at § e below.

56. 143 U.S. 457 (1892), discussed at ID1c.

57. 370 U.S. 421 (1962), discussed at IIIC2b(1).

our central inquiry in these cases—whether the challenged practices "threaten those consequences which the Framers deeply feared." In recognition of this fact, the Court has, until today, consistently limited its historical inquiry to the particular practice under review.

* * *

[In this case] the Court wholly fails to discuss the history of the public celebration of Christmas or the use of publicly-displayed nativity scenes. The Court, instead, simply asserts, without any historical analysis or support whatsoever, that the now familiar celebration of Christmas springs from an unbroken history of acknowledgment "by the people, by the Executive Branch, by the Congress, and the courts for two centuries...." The Court's complete failure to offer any explanation of its assertion is perhaps understandable, however, because the historical record points in precisely the opposite direction. Two features of this history are worth noting. First, at the time of the adoption of the Constitution and the Bill of Rights, there was no settled pattern of celebrating Christmas, either as purely religious holiday or as a public event. Second, the historical evidence, such as it is, offers no uniform pattern of widespread acceptance of the holiday and indeed suggests that the development of Christmas as a public holiday is a comparatively recent phenomenon.

The intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread celebration of Christmas did not emerge in its present form until well into the nineteenth century. Carrying a well-defined Puritan hostility to the celebration of Christ's birth with them to the New World, the founders of Massachusetts Bay Colony pursued a vigilant policy of opposition to any public celebration of the holiday. To the Puritans, the celebration of Christmas represented a "Popish" practice lacking any foundation in Scripture. This opposition took legal form in 1659 when the Massachusetts Colony made the observance of Christmas day, "by abstinence from labor, feasting, or any other way," an offense punishable by fine. Although the Colony eventually repealed this ban in 1681, the Puritan objection remained firm.

During the eighteenth century, sectarian division over the celebration of the holiday continued.... American Anglicans, who carried with them the Church of England's acceptance of the holiday, Roman Catholics, and various German groups all made the celebration of Christmas a vital part of their religious life. By contrast, many nonconforming Protestant groups, including the Presbyterians, Congregationalists, Baptists and Methodists, continued to regard the holiday with suspicion and antagonism well into the nineteenth century. This pattern of sectarian division concerning the holiday suggests that for the Framers of the Establishment Clause, who were acutely sensitive to such sectarian controversies, no single view of how government should approach the celebration of Christmas would be possible.

* * *

> As we have repeatedly observed, the Religion Clauses were intended to ensure a benign regime of competitive disorder among all denominations, so that each sect was free to vie against the others for the allegiance of its followers without state interference. The historical record, contrary to the Court's uninformed assumption, suggests that at the very least conflicting views toward the celebration of Christmas were an important element of that competition at the time of the adoption of the Constitution....
>
> In sum, there is no evidence whatsoever that the Framers would have expressly approved a Federal celebration of the Christmas holiday including public displays of a nativity scene.... Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case....
>
> * * *
>
> [T]he City's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the creche conveys.... That the Constitution sets this realm of thought and feeling apart from the pressures and antagonisms of government is one of its supreme achievements. Regrettably, the Court today tarnishes that achievement.[58]

(3) Justice Blackmun's Dissent. In addition to joining Justice Brennan's dissent, Justice Blackmun wrote a brief separate dissent, and Justice Stevens joined both.

> As Justice Brennan points out, the logic of the Court's decision in Lemon v. Kurtzman...compels an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's creche in a municipally sponsored display must be held to be a violation of the First Amendment.
>
> Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," the Court today has declared that presence virtually irrelevant. The majority urges that the display "with or without a creche," "recall[s] the religious nature of the Holiday," and "engenders a friendly community spirit of good will in keeping with the season." Before the District Court, an expert witness for the city made a similar, though perhaps more

58. *Lynch v. Donnelly*, *supra*, Brennan dissent.

> candid point, stating that Pawtucket's display invites people "to participate in the Christmas spirit, brotherhood, peace, and let loose with their money." The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.
>
> The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the creche, I dissent and join Justice Brennan's opinion.[59]

For the reasons so eloquently stated in the dissents, one cannot help feeling that *Lynch v. Donnelly*, by one vote, was wrongly decided, and that Justice O'Connor's vote—by her own perceptive and innovative analysis—was the one that should have gone the other way. Her conclusion that the display of the Christian Nativity shrine by the City of Pawtucket should not be perceived as a municipal endorsement of a particular religion—and therefore no one should be offended by it—imputed to non-Christians an acquiescence that is clearly contrary to fact, as the *amicus* brief submitted in the Supreme Court by the American Jewish Committee (jointly with the National Council of Churches) should have made evident. Subsequent cases in lower courts have suggested some judicial dissatisfaction with the rule announced in *Lynch v. Donnelly*, as will be seen below, and the time would come when Justice O'Connor would apply her "endorsement" test to a municipal creche display with the opposite result.[60]

e. *McCreary v. Stone* (1984). Even after the Supreme Court had spoken on the subject of creches in *Lynch v. Donnelly*, a spatter of lower-court cases continued to ricochet through the literature, some having been initiated prior to the Supreme Court's holding in *Lynch*, others apparently hoping to distinguish *Lynch*. One arose in the upscale community of Scarsdale, New York, in 1983, and posed a question somewhat the reverse of *Lynch*. Instead of a municipal creche challenged by citizens, it was a privately initiated creche display rejected by the municipality for placement in a public park. Two groups of citizens separately brought suit against the village trustees seeking damages, declaratory and injunctive relief enjoining the village from prohibiting a display that had been placed in a small park in the center of the business section for twenty-five years prior to the trustees' voting 4-3 to deny permission in 1982 and 1983. The two suits were consolidated by the federal district court, which (with typical timeliness) on December 8, 1983, granted summary judgment for all defendants in all respects.[61] The decision was appealed to the Second Circuit Court

59. Ibid., Blackmun dissent.

60. See *Allegheny County v. ACLU*, 492 U.S. 573 (1989), discussed at § i below.

61. *McCreary v. Stone*, 575 F. Supp. 1112 (S.D.N.Y. 1983).

of Appeals, where a panel composed of Judges Walter R. Mansfield, Lawrence W. Pierce and George C. Pratt rendered judgment *per* Judge Pierce in June 1984.

The appellate court devoted almost two pages of its opinion to a recital of the variety of uses of five properties for which the Scarsdale trustees had given permission to various community groups (including a Christmas Carol Sing held in various public parks) during the preceding twenty-five years. Permission also was given for the Chamber of Commerce and neighborhood groups to decorate streets, public buildings and trees in various parks with Christmas lights and ornaments. The park in question in the instant action was Boniface Circle, an oval of about 3,257 square feet in the center of town encompassing a tall evergreen tree, two benches, two lampposts, dense hedges, a flagpole and a memorial to veterans of World War II. The placement there of a portrayal of the Holy Family—about nine feet wide, six feet high and three feet deep, containing nine figures carved in wood by a local artist at a cost of $1,625—was not uncontested. An attorney resident in the village brought suit in 1976 in the same court as the 1982 action, which at that time dismissed it for lack of subject-matter jurisdiction.[62] Subsequent murmurings had led the village trustees in 1979, 1980 and 1981 to urge the Creche Committee to seek other sites for its display, such as "rotating the creche among various Village churches in future years." In 1981 the trustees denied permission for the creche to be placed in Boniface Circle, and the Frog Prince Proper Restaurant offered its grounds as a substitute, so the creche was placed there in 1981. Apparently no alternate sites were satisfactory to the Creche Committee, so when permission was again denied in 1982, they went to court.

The district court found that Boniface Circle was a traditional public forum.

> 1) The Village has never shown an inclination to legally establish or even describe Boniface Circle as anything other than a park of the kind that is traditionally dedicated to First Amendment activities, and 2) The Village's pattern of granting and denying access to Boniface Circle belies the conclusion that it is either a limited public forum or no public forum at all....
> Boniface Circle was deeded to the Village in 1971 "for PARK PURPOSES ONLY," and the public since that time has used the park on numerous occasions for a variety of purposes.

The district court also found that the denial of permission to the Creche Committee to use the public forum of Boniface Circle was a content-based prohibition, contrary to the teaching of a number of free-speech cases.[63] The only justification for the village to bar a citizens' display from the public forum was "to serve the compelling state interest of avoiding contravention of the establishment

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62. *Russell v. Mamaroneck*, 440 F.Supp. 607 (S.D.N.Y. 1977), consolidated with *Rubin v. Scarsdale*.

63. *Perry Education Assn v. Perry Local Educators Assn.*, 460 U.S. 37 (1983); *Hague v. CIO*, 307 U.S. 496 (1939), etc.

clause of the first amendment."[64] The district court had used the three-pronged *Lemon* test of establishment to determine whether that state interest was met, and the circuit court tracked its analysis.

> The first prong of the Lemon test asks whether the government's conduct in allowing the display of a creche has a secular purpose. Judge Stewart determined that allowing a creche would not violate the establishment clause for want of a secular purpose. We agree. Widmar[65] teaches that pursuing an open-forum policy that allows equal access for religious as well as nonreligious speech is an acceptable secular purpose....
>
> The excessive-entanglement prong of the Lemon test asks whether the government's conduct...will foster excessive governmental entanglement with religion.... The district judge...determined...that enforcing an exclusion would involve some entanglement...because the Village then would have to determine which symbols presented to it are principally religious.... We agree with these observations. First, merely allowing access to display a creche would not foster excessive administrative entanglement. In reality, when evaluating an application for display of a creche, the Village will have to do no more than when evaluating any other request for access to its public properties.

(That was arguably not the correct analysis of "excessive entanglement," since what might not be excessively entangling in examining a *non*religious application *might* be so in examining a religious one.)

> Further, allowing access would not involve continuing state surveillance, which might be necessary if financial grants were involved.... or which might be necessary to ensure compliance with rules excluding religious speech.
>
> * * *
>
> The primary-effect prong of the Lemon test is violated only if the governmental action has "the direct and immediate effect of advancing religion...." According to the district court, the crucial inquiry in this case was whether "the manner chosen by the plaintiffs to convey their religious message sufficiently relies on the `prestige, power and influence' of the Village to constitute an impermissible state advancement of religion." Using this approach, the district court determined that allowing plaintiffs' creche to stand ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion.[66]

This consideration had persuaded the district court to conclude that the village's

64. *McCreary v. Stone*, 739 F.2d at 723.

65. *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed at IIIE3b.

66. *McCreary v. Stone* (2d Cir.), *supra*.

permitting the creche to stand at Boniface Circle had lent its endorsement to the religious doctrines depicted, and therefore the village was justified in withdrawing its permission in order to avoid that unconstitutional effect. But the district court had reached that conclusion prior to the Supreme Court's decision in *Lynch v. Donnelly* (above), which seemed to require a different result, as the circuit court explained.

> In Lynch, the Court determined that the display of the creche did not advance religion in general or the Christian faith in particular any more than those benefits and endorsements found not violative of the establishment clause in other Supreme Court cases.... The Supreme Court in Lynch acknowledged that the display of the creche would advance religion "in a sense," but determined that the effect was indirect, remote or incidental.... [T]he city involved in Lynch purchased, erected, displayed, sponsored and owned the creche therein. If the Lynch creche was not construed as a primary advancement of religion, a fortiori, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the...establishment clause.... Here, there is no doubt that Boniface Circle is available to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons.

The circuit court accordingly reversed the district court's decision and remanded for the issuance of an injunction against the Village Board of Trustees forbidding it to prohibit display of the creche at Boniface Circle for two weeks at Christmas time, and to require a larger disclaimer sign, since "the sign heretofore displayed appears to us to be too small." (The circuit court quoted *Allen v. Morton* to the effect that "plaques should be designed for maximum exposure and readability,"[67] but had no fault to find with the previous wording: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization.") There was no dissent.

The U.S. Supreme Court granted *certiorari* October 15, 1984, but the case was argued and decided during the extended absence of Justice Powell for surgery and recuperation, and so—like several other church-state cases[68]—was "affirmed by an equally divided court."[69] Of course, as is customary in such instances, no opinions were written, so there is no way to know which justices voted how, or why. But it is an interesting postscript to *Lynch* to know that there were apparently four justices averse to the Scarsdale creche despite the circuit court's "*a fortiori*." Other judges in less exalted stations were likewise resistant to the display of creches in settings that they felt were distinguishable from *Lynch* and *McCreary*, as will be seen below.

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67. *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), discussed at § c above.

68. Such as *Jensen v. Quaring*, 472 U.S. 478 (1985), *affirming Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), discussed at IVA9f.

69. Affirmed by an equally divided court *sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

f. *American Civil Liberties Union v. Birmingham* (1986). The next episode in the battle of the creche arose in Michigan, where the City of Birmingham had annually erected a nativity scene on the lawn of City Hall from late November through early January. The entire display consisted of figurines representing "the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs" and nothing else. (No wise men?)

> In all matters herein, the defendant city was acting as a governmental unit under color of state law, custom or usage, by and through its functionaries, employees, agents or elected officials.... The nativity scene was displayed on public property in front of Birmingham City Hall, a place open to the general public. When not displayed on public property, it was stored on public property. The figures in the nativity scene were built at public expense, and the electricity used in connection with the display was furnished out of public funds. The nativity scene was cleaned, restored, repaired and maintained at public expense, and was dismantled and conveyed to storage by public employees at public expense.[70]

Unlike the Pawtucket display in *Lynch v. Donnelly*,[71] the creche in Birmingham was not part of a larger display that included nonreligious elements. The district court, Anna Diggs Taylor, judge, therefore found *Lynch* distinguishable and held the Birmingham display in violation of all three prongs of the *Lemon* test of establishment[72] in that it had no secular purpose, resulted in a primary effect of advancing religion and by precipitating political divisiveness created excessive entanglement between government and religion.[73]

That decision was appealed to the U.S. Court of Appeals for the Sixth Circuit, where the court's opinion was rendered by Chief Judge Pierce Lively for himself and Judge Gilbert S. Merritt, Jr., seeking to apply the principles of the Establishment Clause to the instant case.

> The particular condition that the Founding Fathers sought to prohibit by inclusion of the Establishment Clause in the First Amendment was the often tyrannical alliance between European governments and their official state religions. There was to be no established national church in the United States. However, the Establishment Clause was concerned with a larger evil, most often embodied in the establishment of official churches. The larger evil is government involvement in individual religious decisions. Every person must be free to make decision in religious matters without any compulsion or interference by government. A statute or government practice that has the effect of

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70. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (1986), quoting district court's statement of admitted facts, 588 F.Supp. 1338.

71. 465 U.S. 668 (1984), discussed at § d above.

72. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

73. *ACLU v. Birmingham*, 588 F. Supp. 1337 (E. Mich. 1984).

> impeding individuals from making free choices in religious matters by appearing either to embrace or reject a particular religion violates the Establishment Clause.

This was an excellent statement, as far as it went, but was perhaps too individualistic; the "larger evil" with which the Establishment Clause is concerned is "government involvement in...religious decisions," whether individual or collective. There are also other evils against which the Establishment Clause guards, such as ecclesiastical persons or bodies wielding governmental authority[74] and government's "playing church."[75]

> The plaintiffs emphasize the repeated references in Lynch to the "inclusion" of the nativity scene within the larger [Christmas] display in contrast to the "unadorned" creche on the city hall lawn in the present case. They maintain that the primary effect of a nativity scene standing alone in a prominent position on city property is to send an unmistakable signal to observers that Christianity is officially endorsed by the city.
>
> The city responds that the absence of other Christmas paraphernalia in the setting of the creche is unimportant. It was inclusion of the creche in the Christmas celebration that was approved in Lynch, not its inclusion in a display containing nonreligious Christmas symbols, the city asserts....
>
> The city relies heavily on McCreary v. Stone,[76] a decision which the district court here declined to follow.... The Scarsdale creche...was "unadorned," that is, it stood alone rather than as part of a larger display including secular symbols of the holiday. The Scarsdale display also contained a small disclaimer sign....
>
> The plaintiffs respond to this argument by pointing out that McCreary involved the denial of an application to place a creche in a park that was a recognized public forum, implicating freedom of speech as well as of worship.... The plaintiffs argue that the public forum issue was critical to the decision in McCreary and that the result might well have been different without this factor and if there had been no disclaimer of city involvement.

The Circuit Court disagreed with the district court on two of the three prongs of the *Lemon* test.

> The district court erred in concluding that the display in Birmingham had no secular purpose and that it fostered excessive government entanglement with religion....

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74. Cf. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) discussed at § B4 above.

75. Cf. *Everson v. Bd. of Education*, 330 U.S. 1 (1947); "Neither a state nor the Federal Government can set up a church... [or] participate in the affairs of any religious organizations."

76. 739 F.2d 716 (2d Cir. 1984), affirmed by an equally divided court *sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985), discussed at § e above.

> The Supreme Court made clear in Lynch that a totally secular purpose is not required.... The same reasoning applies to the display in the present case. The City of Birmingham concedes that the nativity scene has religious significance. However, the city manager testified that the purpose of the display is "to be in keeping with the expression of the total community toward that period of the year." To him the creche was "just one element, an expression of joy, goodwill, that people have for one another in a community sense...." Given the holding in Lynch we cannot find that inclusion of the creche in the celebration of Christmas as a national holiday was devoid of all secular purpose. The record does not support a finding that the "actual purpose" of displaying the creche was to endorse religion.
>
> In Lynch the Supreme Court also made it clear that in the absence of excessive administrative entanglement fostered by the challenged government action, political divisiveness alone cannot render otherwise permissible official conduct invalid. Other than the present lawsuit, apparently no complaints have been registered about the Birmingham creche. Since the city owned the creche and no church or other religious entity was involved in the annual display, there was no evidence of entanglement.

There remained the second, or "primary effect" prong of the *Lemon* test.

> Our most difficult problem is to determine whether the effect of the creche in the Birmingham setting was to endorse Christianity....
>
> * * *
>
> The Birmingham city hall display called attention to a single aspect of the Christmas holiday—its religious origin. A creche standing alone without any of the nonreligious symbols of Christmas affirms the most fundamental of Christian beliefs—that the birth of Jesus was not just another historical event. Rather, to the believer Christ's birth was an act of divine intervention in human affairs that set this birth apart from all others. The same witness who described the city's secular purpose stated that the creche "is consistent with the recognition of the Christmas Day, Holiday that's granted and the significance of that date as being the birth of the Christ Child." He also testified, "There are Nativity Scenes in every church around"; "[t]he Nativity Scene, whether it be at City Hall or any other place does have a religious significance to me."
>
> This reaction to the creche is normal, and presumably universal. The creche has no other significance or message—it is a purely religious symbol. When surrounded by a multitude of secular symbols of Christmas, a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings—accretions of the centuries—are stripped away, there remains only the universally recognized symbol for the central affirmation of a single religion—Christianity. To the extent that the McCreary court's decision may be read to hold that a city may place a creche unaccompanied by any nonreligious symbols of the holiday in a

prominent position on the lawn of the official headquarters building of the municipal government, we disagree.

Since the majority does not need its protections, the Bill of Rights was adopted for the benefit and protection of minorities. From the beginning, Christians have constituted a majority in America and non-Christians are acutely aware of this fact. Their assurance of equality before the law, despite their religious nonconformance, derives from the guarantees of the First Amendment. It is difficult to believe that the city's practice of displaying an unadorned creche on the city hall lawn would not convey to a non-Christian a message that the city endorses Christianity. The creche, thus displayed, sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Lynch...(O'Connor, J., concurring)....

* * *

In our opinion, the city-owned and city-sponsored nativity scene sends quite a different message [from that in Lynch] when it stands alone as the only clearly identifiable symbol chosen by the city to mark its contribution to the celebration [of Christmas]. The direct and immediate effect of such a display is endorsement of a particular religion.

The judgment of the district court is affirmed.[77]

Judge David A. Nelson filed a long and thoughtful dissent.

If it is an "establishment of religion" for a city to display an unadorned nativity scene at Christmas, I would have thought it no less an establishment of religion for the City to display a nativity scene adorned with a panoply of other Christmas symbols, such as lighted Christmas Trees, reindeer, and, as the Christmas poem puts it, "a sleigh full of toys—and St. Nicholas too." The Supreme Court having told us that a nativity scene with other Christmas symbols is constitutional, I am therefore troubled by the conclusion that a nativity scene without them is not.

* * *

Does the conduct of the City of Birmingham in erecting a manger scene on city property during the Christmas season come impermissibly close to the making of a "law respecting an establishment of religion" within the current meaning of those words? I do not read Lynch v. Donnelly as teaching that it does, but this court has drawn from that case a different lesson. The lesson comes down to this: a city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a creche if it throws

77. *ACLU v. Birmingham*, 791 F.2d 1561 (1986).

in a sleigh full of toys and a Santa Claus, too.

The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

The point I am trying to make is a serious one, of course. The holiday we celebrate as Christmas began as a pagan festival millennia before the birth of Christ, and "some people have thought that the Christians invented Christmas to compete against the pagan celebrations of December twenty-fifth."78 The symbolism of Christmas in the 20th century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

* * *

As a practical matter, to be sure, a "St. Nicholas too" approach may not be a bad compromise of the conflict between the view that the Establishment Clause bars all religious symbols on government property and the view—a more traditional view, it is fair to say—that the First and Fourteenth Amendments were intended to do no such thing. The conflict is obviously a sharp one.

Whatever the actual intent of the people who originated Birmingham's nativity scene more than 30 years ago, and whatever their Christological views may actually have been, the plaintiff in this case views the display as "constituting an official endorsement of the Christian religion and of its principal tenet, the divinity of Jesus." The evil of such an "endorsement," she argues in terms taken from Justice O'Connor's concurring opinion in Lynch, is that it sends "a message to non-Christians that they are outsiders and not full members of the Birmingham political community."

But is this really Birmingham's message? The record before us is not particularly illuminating, nor should we expect it to be: The question is "in large part a legal question to be answered on the basis of judicial interpretation of social facts."79 I am not persuaded that the social facts of our time justify the conclusion that the City of Birmingham can reasonably be said to have endorsed Christianity or to have sent non-Christians an impermissible message.

Does the federal government send non-Christians an impermissible message when, without benefit of St. Nicholas, it sells individual postage stamps depicting Mary and the infant Jesus, as it did in one recent Christmas season, or depicting Mary alone, as it did at another

78. Quoting Count, Earl W., *4000 Years of Christmas* (New York: H. Schuman, 1948), pp. 18 and 27.

79. Quoting *Lynch v. Donnelly*...(O'Connor, J., concurring).

> Christmastime? Does the federal government send a message to non-believers that they are "outsiders" when it hires chaplains for its armed forces, its prisons, and its Congress? Or when it places the motto "In God We Trust" on (of all things) its currency? Or when it passes legislation (as it did after some of us reached adulthood) adding the words "Under God" to the Pledge of Allegiance? Evidently not; yet the Establishment Clause is no less binding on the United States, whose Congress the First Amendment expressly names, than on political subdivisions of individual states.
>
> It is not a persuasive rejoinder, I think, that unlike municipal nativity scenes, some of the federal government's accommodations of religion—the hiring of chaplains, e.g.—have been with us since the founding of the Republic. One message conveyed by the relatively recent advent of these nativity scenes, as I shall try to show, is that we have become a more diverse and tolerant society than we used to be. That message hardly stamps nativity scenes with the mark of Cain.

The judge weakened his otherwise cogent dissent by bringing in examples that did not necessarily strengthen his point. The "messages" sent by these "federal" accommodations are not necessarily the same as that of the creche or reachable by the judiciary. The rationale of the military or prison chaplaincy is that it is necessary for the "free exercise of religion" of persons removed from their normal environments by state action, irrespective of what message it may send to nonbelievers.[80] The other "accommodations" may not be justiciable, since standing to challenge them is very iffy,[81] and most have not been challenged, so it is not possible to say whether they are constitutionally permissible or not. It is certainly the case that some non-Christians feel that pictures of the Madonna and Child on postage stamps send a message of endorsement of Christianity to the derogation of other faiths,[82] and some nonadherents of religion may feel the same about the mottoes on the currency or the reference to God in the Pledge of Allegiance to the Flag.[83] But the courts seem unwilling to address these matters, probably for good reason: that they are *de minimis* (from the adage *de minimis non curat lex*: the law does not concern itself with trifles). Yet judges—even those on the Supreme Court—seem prone to review this hodge-podge parade of "accommodations" when seeking to justify more substantial ones, even though it does not prove the point they are trying to make, since no one can know what point it does prove until a court reaches a judgment on their merits.

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80. Cf. *Katcoff v. Marsh*, 755 F.2d 223 (1985), discussed at § D1a above.

81. See *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), discussed at IIID8c.

82. In *Protestants and Other Americans United v. O'Brien*, 272 F. Supp. 712 (D.D.C. 1967), plaintiffs lacked standing to challenge depiction of Madonna on postage stamps, discussed at § 6b below.

83. See *Aronow v. U.S*, 432 F.2d 242 (1970), dismissing challenge to "In God We Trust" as insubstantial, discussed at § 6c below.

> It would not worry me unduly if a "fastidious atheist or agnostic" found the City of Birmingham's nativity scene offensive on aesthetic or philosophical grounds, or if a modern day Puritan objected to it on religious grounds. I might be able to sympathize with such a point of view, but I would consider it largely irrelevant from a legal standpoint; not everything that gives offense in this world is unconstitutional.
>
> The situation of Birmingham's Jewish citizens, however, calls for special comment; if anyone has a legitimate basis for objecting to the nativity scene, it is they. (It may be appropriate to note, at this point, that there is no Jewish plaintiff in this case.) It was all very well, perhaps, for Benjamin Disraeli to observe, as he did through a character in one of his novels, that "half of Christendom worships a Jew and the other half worships His mother," but the fact remains that for much of the last two millennia the behavior of the Christian church, the Christian state, and many individual Christians toward the people and the religion from which Christianity sprang has ill comported with what many of us understand to be the teachings of Jesus. Our record in this country is better than the record elsewhere, in my submission, and our record has been improving, but there may well be Jews in Birmingham who nonetheless find it discomfiting that their municipal government should make as much as it does of a holiday as closely associated with Christianity as Christmas. I understand that concern, and am less certain of the correctness of my position in this case because of it.
>
> When I examine the "social facts" as dispassionately as I can, however,... I cannot find any constitutional infirmity in what the city has done. I see no anti-Jewish animus in Birmingham's observance of Christmas, and I know of no basis for any claim that the federal courts are empowered, under the First and Fourteenth Amendments, to prohibit Birmingham from observing Christmas in any manner reasonably appropriate to the season. The Fourteenth Amendment, which brought our states and cities under the First Amendment, did not empower the *judiciary* to enact appropriate enforcing legislation, it empowered *Congress* to do so. Congress itself has made Christmas Day a legal public holiday, and has not seen fit to prohibit the display of municipal nativity scenes during the holiday season. It may or may not be wise for Birmingham to erect a Christmas creche—"unadorned" or otherwise—but that strikes me as a question more appropriately answered by the people, through their elected representatives, than by courts of law.[84]

Judge Nelson provided a useful recapitulation of the chain of logic by which the courts arrived at their present view of "establishment of religion," even though his comments suggested that he would have liked to have gotten off some distance back along the trail. He was commendably candid to admit that Jews might have a

84. *ACLU v. Birmingham*, *supra*, Nelson dissent.

legitimate grievance at the display by the city of a symbol central to Christianity, and that that consideration made him "less certain of the correctness of my position," but he took some comfort in the observation that "there is no Jewish plaintiff in this case" (the court's opinion does not indicate the religion of Micki Levin, coplaintiff with the ACLU). Given the harassment and obloquy that often befall Jewish plaintiffs protesting Christian symbols in public institutions, one might forgive them for not pressing forward for that honor and concede that even in silence they might well have no enthusiasm for creches on courthouse lawns. The essential affront of governmental endorsement or sponsorship of sectarian symbols should not require the heroism of minority protest to vindicate its unconstitutionality.

Judge Nelson—like Justice O'Connor in *Lynch v. Donnelly*—came very close to this realization, but then veered away on the basis of the "judicial interpretation" of supposed "social facts" that do not necessarily appear in the record. He could discern no "anti-Jewish animus" in the City of Birmingham's showcasing of the Christian Nativity scene. He was probably correct in that surmise, for such gestures are usually undertaken with unthinking innocence. But once somebody protests, animus can surface quickly enough, and that is a "social fact" also. However, "animus" was not a necessary element in a finding of "establishment," even under Justice O'Connor's perceptive test, which Judge Nelson professed to be applying. Birmingham's creche sent a message to non-Christians that they were outsiders in the political community, whether so intended or not. The O'Connor test was not one of *purpose* (or intention) alone, but of *effect*, which is independent of purpose, and "animus" is an element of intent, not of effect. Anti-Jewish animus would make the effect worse, to be sure, but even absent such animus, the message of implied second-class citizenship is present and constitutes a central strand of what is meant by "establishment"—identification of government with a particular favored religion.

g. *American Jewish Congress v. Chicago* (1987). A year after the Sixth Circuit ruled against a creche in *ACLU v. Birmingham* (1986), the neighboring Seventh Circuit was confronted with a similar controversy arising in Chicago and brought to court by another advocacy organization, the American Jewish Congress (AJC), headquartered—like the ACLU—in New York City. The creche in question in Chicago was a diminutive one compared to those in earlier cases, being composed of figures only twelve inches high. Rather than the full-color representations of the earlier cases, these were plain white, made of plaster as befitted their creators, the Chicago Plasterer's Institute, which had donated them to the city thirty years before. The figures were displayed on a platform three feet high, nine feet wide and eight feet deep with a cloth backdrop rising to ten feet from the floor and bearing the words "On Earth Peace—Good Will Toward Men."

This creche had been to court before, when in 1978 the American Civil Liberties Union and others sued the city for violation of the Establishment Clause. That case was resolved under a consent order that required the city to expend no public funds for the display and to affix signs appurtenant to it disclaiming any governmental endorsement thereof.[85]

85. *DeSpain v. City of Chicago*, unpublished, N.D. Ill., Dec. 6, 1979.

In 1984 the mayor's chief of staff, William Ware, ordered the display dismantled, but this caused such an intense public outcry that Mayor Washington eventually ordered it restored to its place in the central lobby of City Hall. In October 1985, Sylvia Neil, midwest legal director of the American Jewish Congress, wrote to the mayor's chief of staff, Ernest Barefield, asking that the display be discontinued. Barefield responded that the nativity scene would continue to be displayed at City Hall because: (1) it was a traditional part of the city's holiday festivities and had been for many years; (2) the Supreme Court had held in *Lynch v. Donnelly*[86] that such displays were not unconstitutional; and (3) public sentiment favored such holiday displays. The American Jewish Congress took the matter to court, and the federal district court granted summary judgment to the defendant City of Chicago on the grounds that *Lynch v. Donnelly* was controlling.

The plaintiffs appealed to the Seventh Circuit Court of Appeals, where the case was reviewed by a panel composed of Circuit Judges Diane P. Wood, Joel M. Flaum and Frank H. Easterbrook. Judge Flaum delivered the opinion of the court distinguishing the Chicago fact-situation from that of Pawtucket, Rhode Island, found constitutional in *Lynch*, and making its own application of the three-prong *Lemon*[87] test of establishment of religion.

> The district court in this case erred when it concluded that the City Hall nativity scene "matche[d] squarely the Christmas context contemplated by the Supreme Court in Lynch...." The Court in Lynch found it highly significant that the creche in that case was only one element in a larger display that consisted in large part of secularized symbols and decorations.... This case is different.... [T]he evidence supports the conclusion that the nativity scene was self-contained, rather than one element of a larger display. For instance, the closest decoration to the nativity scene—the "Share-It" banner ten feet away, suspended above the intersection of the lobbies in City Hall—was thematically related to the other elements of the "Share-It" display (the Santa Claus, reindeer, and sleigh full of donated canned goods), but not to the nativity scene. Similarly, the wreaths on the wall above the elevators, although perhaps visible to an observer standing near the creche, cannot reasonably be said to have been part of the same "display"....
>
> We need not, however, settle the debate over how far a nativity scene must stand from a Christmas tree or Santa Claus to be considered part of the same display, and hence "neutralized" by secular symbols of holiday cheer. In this case, another aspect of the nativity scene's physical setting plainly distinguishes it from Lynch: its placement in City Hall.
>
> The Establishment Clause is concerned with the messages the government may send to its citizenry about the significance of religion.... The creche in Lynch, although sponsored by the City of Pawtucket, was located in a privately-owned park, a setting devoid of the government's presence. But the display in this case was located within a government

86. 465 U.S. 668 (1984), discussed at § d above.

87. From *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

building—a setting where the presence of government is pervasive and inescapable. The Court's holding in Lynch that the inclusion of a creche in a holiday display located in a private park did not violate the Establishment Clause cannot control this case, where the display was placed inside the "official headquarters building of the municipal government."[88]

* * *

The first requirement of Lemon is that the government action serve a secular purpose. However, this requirement does not mean that the government's purpose must be unrelated to religion.... Rather, the purpose requirement "aims at preventing the relevant governmental decision-maker...from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[89] The City of Chicago has not abandoned neutrality in this case.

The AJC, in arguing that the purpose of the City Hall nativity scene was to promote Christianity, points out that in October, 1959, Mayor Richard Daley said of the scene, "We are a Christian Nation. I think the more religion we can get in politics, the better off we are." This comment, although perhaps relevant to the original purpose of the nativity scene, reveals little about the purpose behind the 1985-86 display. More pertinent is the affidavit of Ernest Barefield, Mayor Washington's chief of staff at the time this litigation began. Barefield's affidavit reveals several purposes behind Chicago's display: (1) recognition of a city tradition of "taking official note of Christmas"; (2) recognition of public sentiment in favor of the nativity scene; and (3) attraction of visitors to the downtown business district. None of these stated purposes is impermissible.

The city's intention to "take official note of Christmas" by permitting the nativity scene to be displayed in City Hall is not an illegitimate purpose under Lemon. "Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." Lynch...(O'Connor, J., concurring). Christmas is clearly a public holiday, as well as a day of religious significance to Christians, and the Establishment Clause does not preclude the City of Chicago from acting with the intent to take "official note" of the day.

The city's recognition of public sentiment in favor of the nativity scene was similarly permissible. The AJC points out that in 1984 the Chicago City Council, in voting to affirm the display of the nativity scene, stated that the creche "symbolized the `true meaning of Christmas' for hundreds of thousands of Christian Chicagoans." But this recognition and accommodation of religious sentiments is not the same as intending to promote a particular point of view in religious matters. The Supreme

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88. Citing *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), discussed immediately above. The court in a footnote also distinguished *McCreary v. Stone*, discussed at § e above, for the same reason: that the creche was situated in a park and not at the seat of government.

89. Quoting *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed at ID4b.

Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"[90].... In the absence of any evidence that the city's stated purposes behind the display of the nativity scene are merely a sham..., we must conclude that the 1985-86 display had no invidious purpose.

The second inquiry under Lemon is whether the government action had the effect of advancing or inhibiting religion. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[91] An important concern of the effects test is thus "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[92] "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." Lynch (O'Connor, J., concurring). In Lynch, the Court found that the Pawtucket display, considered in its context, communicated no message of government endorsement.... This case, however, is different.

* * *

[T]he critical inquiry is whether, considered in its unique physical context, the nativity scene at issue in this case communicates a message of government endorsement. We conclude that it does.

The presence of the government in Chicago's City Hall is unavoidable. The building is devoted to government functions.... Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore creates a clear and strong impression that the local government tacitly endorses Christianity.

The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

The city has attempted to mitigate the impact of this message by posting six disclaimer signs on the display, two on each side, and two on the front. However, the message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers. As the district court correctly noted, "a disclaimer of the

90. Quoting *Hobbie v. Florida*, 480 U.S. 136 (1987), discussed at IVA7i.

91. Quoting *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), discussed at § B4 above.

92. Quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985), discussed at IIID7l.

> obvious is of no significant effect...."
>
> "`Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement... a core purpose of the Establishment Clause is violated.'"[93] The government-approved placement of the nativity scene in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause. The judgment of the district court is, therefore, REVERSED.[94]

The court noted in a footnote that it did not reach the third prong of the *Lemon* test— "excessive entanglement of government with religion"—because the creche had failed to pass the second prong.

The Seventh Circuit thus joined the Sixth[95] in holding—despite *Lynch v. Donnelly*—that a Nativity scene could not, consistently with the Establishment Clause, be placed at the seat of government (as distinguished from a public park), the Seventh going even farther by holding that an array of six disclaimer signs did not counteract the message conveyed by the display's location. The propinquity of secular Christmas decorations did not seem to the court to be dispositive, which is just as well, since holdings of constitutionality based on distance are apt to be as unsatisfactory as those based on counting noses[96] and can lead to legal duels with tape measures.

The court seemed essentially to be offended by the religious favoritism evidenced by the creche in City Hall, which was the view urged by the plaintiffs and by at least one brief *amicus curiae*, that of the American Jewish Committee and the National Council of Churches.

Judge Frank H. Easterbrook filed a lengthy dissenting opinion that contained some interesting thoughts on the proper test of establishment of religion.

> We must decide whether Chicago violates the Establishment Clause...by displaying a creche in City Hall during the Christmas season. To do so we must apply Lynch v. Donnelly. This decision, like others requiring multi-factor balances, gives judges of the inferior federal courts fits. The Court avoided creating a rule about the treatment of religious symbols and instead announced that judges should examine each symbol.
>
> If different elements cut in different directions, what is to be done? It is discomfiting to think that our fundamental charter of government distinguishes between painted and white figures—a subject the parties

93. Quoting *Grand Rapids School Dist. v. Ball, supra*.

94. *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (1987).

95. *ACLU v. Birmingham, supra*.

96. Cf. *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at IIID7j.

have debated—and governs the interaction of elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary. When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.

My colleagues' opinion rises above the subjective and deals thoughtfully with the problems Lynch consigned us. The conclusion is reasoned, and it may well be right—to the extent any resolution under an unfocused balancing test can be "right" or "wrong." I share the majority's belief that government and religion should be separate; their mixture has been the source of oppression in many nations, and ours was founded in part by those fleeing the religious policies of other governments. James Madison, who bequeathed us the Establishment Clause and much of the rest of the Constitution, was a strict separationist.

Yet it is also established that the first amendment does not require government to disregard religious sentiment.... The Establishment Clause was supposed to prevent the federal government from taxing for the support of a church or requiring religious observance.[97] The law was to be impartial among religions and between belief and nonbelief. Symbology is a different matter; the government may persuade when it may not coerce. From the beginning of the Republic much of the federal government's symbology has been Christian—down to the dating of the Constitution itself... ["in the Year of our Lord"].

Our case is about symbology—about the images of Christmas and the event that holiday celebrates. Christmas, no less than the date inscribed on the Constitution, marks the religion of most Americans. Unlike Sunday closing laws, indeed unlike the formal holiday, the display of the creche does not require obedience. People may venerate, disdain, or curse the icons as they please, without reward for the first or reprisal for the last. To hold that Chicago may not use a symbol showing the religious origin and significance of a national holiday is to extend Jefferson's "wall of separation" metaphor beyond its proper scope....

The plaintiffs in this case wanted to present testimony such as some persons' beliefs that white figurines (suggesting alabaster) are more offensive to religious minorities than painted figurines.... It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane. The Supreme Court has treated the issues in Establishment Clause litigation as constitutional facts, on which findings in trial courts are neither necessary nor welcome....

Treating ultimate questions under the religion clauses as constitutional rather than adjudicatory facts reduces the variance in how the judicial

97. Judge Easterbrook cited Levy, Leonard W. , *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Co., 1986).

system handles these contentious cases. Treatment will be more uniform, less influenced by the religious sensibilities of the judges assigned to the case by lot. This is especially important when the court must balance imponderables; if questions of fact predominated, it would be impossible to maintain uniformity of decision. Here, too, the essential conclusions are constitutional facts. And on these questions we should give substantial deference to the political branches. The question under Lynch is not whether... the members of this panel see this creche as part of an integrated secular display, but whether reasonable people could see it so.

Lynch held that Pawtucket, R.I., could include a creche in an ensemble of other symbols of Christmas. Lynch requires us to affirm the district court's judgment.... The Supreme Court thought it significant that the [Pawtucket] display included reindeer, a tree festooned with lights, and other symbols of Christmas—some religious, some secular, and some (a talking wishing-well, for example) irrelevant. The display in Chicago has the same mixture. City Hall and its outdoor plaza contain two [Christmas] trees (18' indoors and 90' outdoors), a mechanical Santa Claus, reindeer and sleigh,...many 42" wreaths, and banners asking people to make contributions of food and supplies for the needy.... Christmas carols, live or recorded, sound constantly....

Whether the secular element of the display nearest the creche is five or twenty feet away is insignificant. In each [case] the creche is part of a larger ensemble, and anyone walking through the park (or building) will see both the religious and the secular elements. Of course someone standing near enough to the creche in Chicago will see little else, but that was true in Pawtucket as well; this comes from the law of perspective rather than the law of the land. The important thing, the Court concluded in Lynch, is that the government's entire activity celebrate all aspects of the holiday and not just the religious aspect. Chicago has not made religious icons the sole feature of its Christmas display....

The court distinguishes Lynch on the ground that Pawtucket's display was in a park, while Chicago's creche is in City Hall. Its location in City Hall, according to my colleagues, conveys an unmistakable impression that the City is behind Christianity. This finesses the question whether one should look at the creche alone or at the whole display. Lynch holds that the government's stance must be discerned from everything the government chooses to exhibit. That principle does not depend on whether the display is in a park or in City Hall. And if the context is conclusive, then this case is, as the district court held, just like Lynch.... Lynch holds that a city may display the symbols of Christmas without thereby endorsing Christianity. That is all Chicago has done....

My colleagues held...that Chicago had a secular purpose for including the creche in its display. That finding should be sufficient to dispose of the case. How is the display of the creche in City Hall necessarily an endorsement of Christianity if the City had a secular purpose? City Hall is the center of government, no doubt— but it is also where the entire Christmas display was located. To emphasize the former over the latter is to break up the display in a way Lynch says should not be done.

Both Pawtucket and Chicago put their creches wherever they put the rest of their display. The display in Pawtucket was in a centrally located park, facing the busiest commercial district, 300 feet from City Hall. The display doubtless got more attention there than it would have in Pawtucket's City Hall, for which it was too big anyway. Chicago has a much larger City Hall and so can fit the whole display within its plaza. Chicago could have put the display in Grant Park on the lakefront, but in December few people brave the winds along the lake. The City is entitled to have its display in a central location. And if Chicago is to have a creche at all, under Lynch it must include the creche with the rest of its display.

The court believes that a creche in City Hall is forbidden because the City endorses everything on display in City Hall, in a way that Pawtucket did not endorse things displayed in the park. But the creche in Pawtucket was officially sponsored. The City bought the creche; the mayor himself settled on details of the display; the City inaugurated the display officially each year.... Pawtucket endorsed its creche at least as much as Chicago does—more so, because Pawtucket owned the creche, paid for city workers' labor to erect and dismantle it yearly, and sponsored the whole display, while Chicago's creche sports disclaimers....

Officials of Chicago will read with amusement the court's assertion that the City endorses whatever appears in City Hall. Do they all believe in Santa Claus, too? In 1979 the City invited John Sefick to display some of his art in the lobby of the Daley Center. One of the pieces Sefick put on display was a life-sized tableau of former Mayor Michael Bilandic and his wife accompanied by a tape recording satirizing Bilandic's response to the previous winter's record snowfall. The City tried to get rid of the art, or at least turn off the tape, and was met by an injunction.[98] Once the City opened the lobby to art, the court concluded, it could not dispose of one piece because it disliked the message.... City Hall is used for displays of many sorts. It is unlikely that passers-by believe that every feature of every display represents the official views of the City, any more than Sefick's art did.

* * *

As a legislator or moral philosopher, I would join Madison in thinking that civil authority should not support religion in any way. If this means leaving the celebration of Christmas to the people without the dubious aid of the pasteurized and homogenized religious symbols that appear in civic displays, that will at once strengthen genuine religious resolve and protect the sensibilities of dissenters. But our function is not to pursue Madison's objective as far as it can be pushed, however beneficent that conclusion may be;.... To the extent the Supreme Court today pursues a different conception of the judicial role under the Establishment Clause, it has yet to justify that conception, which is not congruent with the Court's stated view that it is under the sway of history. Yet for reasons I

98. Citing *Sefick v. City of Chicago* (N.D. Ill. 1979).

> have spelled out..., even the Court's current understanding of the Establishment Clause does not support the plaintiffs. Chicago may exhibit all of the traditional symbols of Christmas during yuletide.
>
> This case puts political and moral philosophies in conflict with constitutional history and text. In that contest there can be but one winner. I respectfully dissent.[99]

Parts of Judge Easterbrook's dissent were lengthy essays on several matters not entirely essential to the case at hand, including observations on the tendency of the Supreme Court to substitute "standards" for "rules," thereby delegating to others the responsibility for determining the outcomes of cases that come under its "standards." More pertinent were his comments on the proper scope of the Establishment Clause. He expatiated upon the theme that "[t]he genesis of the Establishment Clause persuades me that force or funds are essential ingredients of an 'establishment,'" and also contended that governments under the First Amendment should be entitled to freedom of speech, including religious speech, even to the extent of (government's) trying to persuade the voters to amend the First Amendment in order to establish the Anglican Church! Under this curious doctrine, of course, Chicago would be entitled to display not only an unadorned creche in City Hall but a statue of the Sacred Heart of Jesus! (Nevertheless, his words commended themselves to a member of the U.S. Supreme Court, who quoted some of them in dissent in a 1992 case.[100])

h. ***ACLU v. Allegheny County*** **(1988)**. A third circuit was soon heard from on the same subject—the Third Circuit, in Philadelphia, speaking on a case arising in Pittsburgh, where a creche had been displayed annually since 1981 on the grand staircase of the first floor of the county courthouse. It consisted of the traditional figures (including three wise men) from three to fifteen inches in height. Although it was stored in the courthouse, the creche was the property of the Holy Name Society of the Roman Catholic Diocese of Pittsburgh, and a sign posted in front of the display explained: "This display donated by the Holy Name Society." The display was assembled and disassembled each year by the moderator of the Holy Name Society. The county arranged red and white poinsettia plants and evergreen trees around it, and wreaths were placed throughout the building. It remained on exhibit for about six weeks, and during the weeks immediately prior to Christmas the county sponsored Christmas carol programs with the choral groups using the creche for a foreground, and the carols were broadcast throughout the building. At other times of year the grand staircase was used for art displays and other cultural and civic programs and events.

One block away was the City-County Building where a 45-foot Christmas tree was installed by the city. Next to the tree on the steps of the main entrance the City had erected each year since 1982 an 18-foot-high menorah—a nine-branched candelabrum emblematic of the Jewish religious festival of Chanukah, which also occurs in December. The menorah was purchased by Chabad, a Jewish organization,

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99. *AJC v. Chicago*, *supra*, Easterbrook dissent.

100. *Lee v. Weisman*, 505 U.S. 577(1992), (Scalia, J., dissenting), discussed at IIIC2d(11)(d).

and was erected each year, along with the tree, by city employees. In front of the tree appeared a sign bearing the mayor's name and announcing:

> SALUTE TO LIBERTY
> During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.

In December 1986, the American Civil Liberties Union, Greater Pittsburgh Chapter, and various individuals brought suit against the county and city on the ground that the two displays violated the Establishment Clause. Chabad intervened in defense of the menorah. After an evidentiary hearing, the federal district court ruled in favor of the defendants, and the plaintiffs took an appeal. The appeal was heard by Chief Judge John J. Gibbons and Circuit Judges Joseph F. Weis, Jr., and Morton I. Greenberg of the Third Circuit Court of Appeals. The court's opinion was delivered by Judge Greenberg, an excerpt which follows:

> In the district judge's oral opinion, he indicated that the case was controlled by the Supreme Court's decision in Lynch v. Donnelly.101 He found that neither the display of the creche nor of the menorah conveyed a message of governmental enforcement [endorsement?] of religion. He noted:
>
> > ...none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays....
> >
> > The mere displays therefore, are found to be de minimis[102] in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion....
>
> In his subsequent memorandum opinion the judge wrote:
>
> > The Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a `Light of the World' somewhat like the Christmas message `Peace on Earth, Goodwill to Men....'
>
> I fail to see how the display of the menorah violates the establishment clause. It may call to the attention of the public that Jews also have a miracle to remember. Certainly the local governments should not be enjoined from allowing both faiths to call attention to the miracles which enrich their histories, either the virgin birth or the burning of one day's oil for many days while the Jews sought to recapture their temple, so long as the symbols are part of a

101 . 465 U.S. 668 (1984), discussed at § d above.

102 . From *de minimis non curat lex* (the law does not concern itself with trifles).

> holiday season display. I should think the joint displays [send] a message that in Pittsburgh the faiths harmonize and both seek to send some light to the world at the holiday seasons. I cannot conceive that court should forbid such a thing or declare it illegal....

We are in agreement with the trial judge that the starting point of our analysis should be Lynch v. Donnelly....

* * *

Though a decision of great significance, Lynch v. Donnelly has by no means put to rest issues involving use of religious decorations at the Christmas season nor has it foreshadowed any abandonment of the Lemon test which the Supreme Court continues to employ.... Indeed, probably because the opinion was tied so closely to the facts involved and because of the nature of the issues, there has been considerable post-Lynch litigation with the judges as well as the litigants at odds. Of these post-Lynch cases, we find two decisions by divided courts particularly helpful, American Jewish Congress v. City of Chicago[103] and American Civil Liberties Union v. City of Birmingham.[104]

* * *

Application of [their] principles here leads inexorably to the conclusion that the district judge's determination that the second prong of the Lemon test was not violated was incorrect and cannot stand with respect to both the creche and the menorah.... Each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it. Further, while the menorah was placed near a Christmas tree, neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion. Further, the menorah, unlike the creche, is not associated with a holiday with secular aspects. There is public participation, albeit minimal, in both the storage and placement of the displays. Overall, when the record is evaluated in light of these considerations, the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion. While we do not doubt that some persons find this laudable, it is impermissible under the second prong of the Lemon test and thus violates the Establishment Clause of the First Amendment.

> We recognize, of course, that there is a sign near the creche indicating that the display is a donation of the Holy Name Society. That factor, however, cannot possibly outweigh the considerations

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103 . 827 F.2d 120 (7th Cir. 1987), discussed at § g above.

104 . 791 F.2d 1561 (6th Cir.), *cert.* denied, 107 S. Ct. 421 (1986), discussed at § f above.

> which lead us to find that placement of the creche violated the second prong of the Lemon test.[105]

Thus did the Third Circuit deal with a variant of the municipal creche display that might have been supposed by some to cure the vice of "preferring one religion over another" by dispensing its favors "ecumenically" to minority religions as well, but the court did not seem to think that a *row* of religious symbols of various faiths would be an improvement. It would still be an endorsement of religion(s) and therefore still a preference of religion over nonreligion, sending a message that religions were "in" and nonreligions were "out." The row of religious symbols does not cure the constitutional defect, implied the Third Circuit.

Once again, one judge dissented, relying heavily on the dissents in the two preceding Circuit Court decisions. Judge Weis dissented vehemently, chiding his two colleagues for departing from the Supreme Court's (supposed) teaching in *Lynch v. Donnelly*.

> It is unfortunate that plaintiffs have succeeded in stifling governmental commemoration of two miracles that occurred about one hundred-fifty years apart in time, but so few miles in distance—and muffling the message of peace and understanding that pervades the joint observance.[106]

(Is it the function of government to commemorate religious miracles? The majority thought not, beating their dissenting colleague over the back of the trial judge:

> Further we have not ignored the finding by the district judge that the city and county have permitted the faiths to call attention to the miracles enriching their histories. This is undoubtedly so but is exactly what the governments involved here had no lawful right to do... It is not the function of government to assist religions in explaining their ideologies.[107]

The dissent continued:

> This aggressive "neutrality" is contrary to the spirit of religious liberty embodied in the First Amendment and will lead not to accommodation but to animosity, not to tolerance of, but hostility toward, religion.

Judge Weis spelled out the discordant notes the Supreme Court had struck in its Establishment Clause decision, giving ambiguous guidance to lower courts. Following this mordant essay, he turned to the instant case.

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105 . *American Civil Liberties Union v. Allegheny County*, 842 F.2d 655 (CA3 1988).

106 . Ibid., Weis dissent.

107 . Ibid., majority opinion.

The majority agrees that Lynch v. Donnelly should be the starting point of our analysis. I believe that Lynch also ends our analysis. That case directly addresses and conclusively resolves the dispute we encounter here. Because the district court properly applied the holding in Lynch, I would affirm its judgment.

* * *

Despite the clarity of the Supreme Court's holding that a municipal creche display erected during the holiday season does not constitute an impermissible endorsement of religion, two courts of appeals, over strong dissents, have ruled otherwise. These courts have pointed to irrelevant and inconsequential variations in the location of the creche display and its positioning among other Christmas symbols as factors to justify disregarding the clear spirit of Lynch.

* * *

In both instances, the majority opinions reflect less an attempt to apply the Supreme Court's holding in Lynch than a disapproving rejection of its message. But the judicial hierarchical system in this country mandates faithful adherence by lower federal courts to a holding of the United States Supreme Court, "no matter how misguided the judges of those courts may think it to be."

The powerful dissenting opinions in both cases demonstrate the errors of those majorities, critiques to which little need be added here....

* * *

The tone of Lynch is unmistakable. I have found no indication that the Pawtucket display survived constitutional scrutiny because it was situated in a private park rather than a county courthouse, or because it closely resembled a miniature golf course with candy-striped poles, talking wishing-wells, and cut-out elephants. The civil government's recognition of the origins of Christmas during the holiday season simply was not perceived by the Supreme Court as a threat to the aims of the Establishment Clause. The Court all but dismissed the appellant's claim as much ado about nothing and, reading the opinion, one can imagine the Court steadfastly resisting the temptation of chiding, "Bah humbug!"

The facts of the case at hand do not differ significantly from those in Lynch. The placement of the creche in the gallery of the Allegheny County Courthouse, accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent. Neither does placing the creche in the Courthouse during the Christmas season emit any more coercive effect than the paintings displayed in the Courthouse gallery.

Appellants have not challenged the high schools' choral singing programs that take place in the same location at the Courthouse, indeed using the creche as a scenic backdrop. Unlike the creche, the singing is not passive, but rather vocalizes unquestionably religious themes. Yet these carols also are part of this nation's cultural heritage. Should they too be censored from utterance in the Courthouse? What of a municipality's holiday banner bearing Tiny Tim's timeless petition, "God

> bless us, everyone"? [sic] Must the name of the holiday be changed to "Winter Solstice Day" so that there can be no government "endorsement" of a "religious overtone"?
>
> Distilled to its essence, Lynch advocated an approach of moderation, understanding, and a sense of proportion in ruling on displays commemorating the Christmas season. I think the decision in this case strays from that course.[108]

It was remarkable how—for something supposedly *de minimis*—so much highly spirited judicial exposition was devoted to the creche displays at issue in these cases! And it was also remarkable how some judges saw nothing inappropriate about municipal Nativity shrines while others found them constitutionally offensive, both groups drawing diametrically opposite conclusions from the same fact-patterns and the same constitutional and precedential matrix!

Beginning with *Lynch v. Donnelly* (since *Allen v. Morton* presented a mixed outcome), the federal judges who voted on creche cases revealed an interesting division, as shown in Table 1.

Table 1.

Is Creche Constitutional?		**YES**	**NO**
Lynch v. Donnelly:	District Court		1
	Circuit Court	1	2
	Supreme Court	5	4
McCreary v. Stone:	District Court		1
	Circuit Court	3	
	Supreme Court	4	4
ACLU v. Birmingham:	District Court		1
	Circuit Court	1	2
AJC v. Chicago:	District Court	1	
	Circuit Court	1	2
ACLU v. Allegheny Cty.:	District Court	1	
	Circuit Court	1	2
TOTAL JUDGES		**18**	**19**
Weighted: dist.=1; circ.=2; supreme=3		43	43

The table's tally proves nothing except that views on the creche question among federal judges seemed to be rather evenly divided. There also appeared to be some resistance to following the Supreme Court's lead any farther than absolutely necessary. The majorities of the three circuit court panels were unwilling to apply *Lynch* beyond the facts peculiar to that case, and their view seemed to be that

108 . Ibid., Weis dissent.

municipal creches would not be countenanced at the seat of government, a view subsequently affirmed by five justices of the Supreme Court, as will be seen in the next section, bringing the totals above to 22 Yes, 24 No; weighted: 55 Yes, 58 No.

i. *Allegheny County v. ACLU* (1989): The Supreme Court Speaks. In 1988 the Supreme Court agreed to hear the appeal of the Pittsburgh case (see above), and in due course added its weight, if not its wisdom, to the judicial ruminations that had gone before. On the last day of the 1988-1989 term—July 3, 1989, when most right-thinking citizens, reporters and organizational spokespersons were enjoying a five-day Independence Day weekend—the Court announced its opinion(s) in this case, which was somewhat overshadowed by the abortion-rights decision—*Webster v. Reproductive Health Services*—announced the same day. Both decisions were highly controverted within the Court, as in the nation as a whole, and required the deciphering of a splintered array of opinions to discern what the court had decided. The Syllabus in *Allegheny County* "explained" the division of the court in suitably obscure prose:

> Blackmun, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV and V, in which Brennan, Marshall, Stevens, and O'Connor, JJ., joined, an opinion with respect to Parts I and II, in which O'Connor and Stevens, JJ., joined, an opinion with respect to Part II-B, in which Stevens, J., joined, and an opinion with respect to part IV [in which nobody joined]. O'Connor, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which Brennan and Stevens, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C.J., and White and Scalia, JJ., joined.[109]

What all this meant can be set forth in Table 2 on the next page, which may help to clarify what follows:

109 . *Allegheny County v. ACLU*, 492 U.S. 573 (1989), Syllabus.

Table 2.

		Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Blackmun Opinion										
I.	Description of Creche and Menorah					A	j	j		
II.	Action of the Lower Courts					A	j	j		
III-A.	**Prior Tests of Establishment**		**j**		**j**	**A**	**j**	**j**		
III-B.	Adopting "Endorsement" Test					A	j	*		
IV.	**Creche Endorses Christianity**		**j**		**j**	**A**	**j**	**j**		
V.	**Refuting Justice Kennedy**		**j**		**j**	**A**	**j**	**j**		
VI.	**Menorah Is Permissible**	*		*		**A**		*	*	*
VII.	Conclusion					A		j		
O'Connor Opinion										
I.	Reviewing "Endorsement"							A		
II.	Refuting Justice Kennedy		j				j	A		
III.	Menorah Is Permissible							A		
Brennan Opinion										
I.	Menorah Is Not Permissible		A		j		j			
II.	Chanukah Is Religious Holiday		A		j		j			
III.	No Row of Symbols		A		j		j			
Stevens Opinion										
I.	No Religious Symbols at All		j		j		A			
Kennedy Opinion										
I.	Accommodation of Religion	j		j					j	A
II.	Establishment Means Coercion	j		j					j	A
III-A.	Faults of "Endorsement"	j		j					j	A
III-B.	"Jurisprudence of Minutiae"	j		j					j	A
IV.	Both Symbols Are Permissible	j		j					j	A

A = author. j = joins opinion. * = concurs in judgment but not in opinion. **Bold is the holding of the court.**

(1) The Blackmun Opinion and Holding of the Court. This case was significant, not only for its outcome, but for the interplay of opposing views among the justices on the scope and force of the Establishment Clause in its application to municipal displays of seasonal religious symbols. It told more about the internecine struggles within the Court on this matter than it gave easily applicable guidelines to lower courts on similar fact-patterns (if they could even tell what fact-patterns would be "similar"). It also not only reaffirmed the *Lemon* test of establishment but

reiterated the *Everson*[110] no-aid formula, which some scholars thought had been in effect overruled *sub silentio*—or at least had fallen into desuetude or been displaced by the *Lemon*[111] test. Instead, five members of the Court suggested it was still good law, and the *Lemon* test was but a *refinement* or *refocusing* of it. The same five members embraced Justice O'Connor's "endorsement" interpretation of the "effect" prong of the *Lemon* test, first expressed in her concurrence in *Lynch v. Donnelly*[112] and applied in *Grand Rapids v. Ball*[113] At least the five-member majority embraced the endorsement test for purposes of *this* case; Justice Blackmun wanted to embrace it for *all* cases (Part III-B of his opinion), but he was joined in that effort only by Justice Stevens (and by Justice O'Connor in her own opinion). Justice Kennedy and his three allies (Chief Justice Rehnquist and Justices White and Scalia), however, expressed sharp displeasure with that test, calling it "most unwelcome," and proposed their own much narrower idea of the scope of the Establishment Clause.

The fact-pattern and the lower-court decisions in this case have already been reviewed in the preceding pages and need not be repeated. Part III-A of the Blackmun opinion expressed the majority's understanding of the court's Establishment Clause jurisprudence.

> III-A
>
> This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.
>
> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

(Perhaps it is overclaiming a bit to attribute the entire Bill of Rights to the "religious diversity" of the colonial era; due process, equal protection, the right against self-incrimination and quartering of soldiers, etc. surely spring from sources other than religious diversity. However...)

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[114] It is settled law that no government official in this Nation may violate these

110 . 330 U.S. 1 (1947), discussed at IIID2.

111 . 402 U.S. 602 (1971), discussed at IIID5.

112 . 465 U.S. 668 (1984), discussed at § 2d above.

113 . 473 U.S. 373 (1985), discussed at IIID7l.

114 . Quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985), discussed at IIIC2d(8).

fundamental constitutional rights regarding matters of conscience.

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. Although "the myriad, subtle ways in which Establishment Clause values can be eroded" are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause. Thus, in Everson v. Board of Education (1947), the Court gave this often-repeated summary;

> "The `establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form, they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."[115]

In Lemon v. Kurtzman, the Court sought to refine these principles by focusing on three "tests" for determining whether a government practice violates the Establishment Clause. Under the Lemon analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence....

Of course, the word "endorsement" is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause....

Whether the key word is "endorsement," "favoritism," or

115 . *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

> "promotion," the essential principle remains the same. 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." Lynch v. Donnelly (O'Connor, J., concurring).[116]

Justice Blackmun undertook a critique of the earlier Christmas creche case, *Lynch v. Donnelly*, and suggested a community of outlook between the four dissenters in that case—Justices Brennan, Marshall, Stevens and himself—and Justice O'Connor, who had written the concurring opinion announcing the "endorsement" test. In this part of his opinion (III-B), he suggested that the endorsement test was now the accepted rule of law on the Establishment Clause, but he was joined in that contention only by Justice Stevens (and by Justice O'Connor, whose separate opinion reasserted her belief in the endorsement test and by implication supported this element of the Blackmun opinion). Justices Brennan and Marshall seemed willing to endorse the endorsement test for use in this case but not to commit themselves to its applicability in other cases.

> III-B
>
> We have had occasion in the past to apply Establishment Clause principles to the Government's display of objects with religious significance. In Stone v. Graham (1980),[117] we held that the display of a copy of the Ten Commandments on the walls of public classrooms violates the Establishment Clause. Closer to the facts of this litigation is Lynch v. Donnelly, in which we considered whether the city of Pawtucket, R.I., had violated the Establishment Clause by including a creche in its annual Christmas display, located in a private park within the downtown shopping district. By a 5-4 decision in that difficult case, the Court upheld inclusion of the creche in the Pawtucket display....
>
> The rationale of the majority opinion in Lynch is none too clear; the opinion contains two strands, neither of which provides guidance for decision in subsequent cases. First, the opinion states that the inclusion of the creche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this court has approved in the past—but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the creche gave to religion was no more than "indirect, remote, and incidental,"—without saying how or why.
>
> Although Justice O'Connor joined the majority opinion in Lynch, she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound

116. *Allegheny County v. ACLU*, *supra*, Blackmun opinion, Part III-A.

117. 449 U.S. 39 (1980), discussed at IIIC3a.

analytical framework for evaluating governmental use of religious symbols.

First and foremost, the concurrence squarely rejects any notion that this Court will tolerate some governmental endorsement of religion. Rather, the concurrence recognizes any endorsement of religion as "invalid" because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears: "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its "particular physical setting," and further observes: "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion...."

The four Lynch dissenters agreed with the concurrence that the controlling question was "whether Pawtucket ha[d] run afoul of the Establishment Clause by endorsing religion through its display of the creche." The dissenters also agreed with the general proposition that the context in which the government uses a religious symbol is relevant for determining the answer to that question. They simply reached a different answer....

Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in Lynch agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the result of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. These general principles are sound, and have been adopted by the Court in subsequent cases.... Accordingly, our present task is to determine whether the display of the creche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.

Justice Blackmun continued with Part IV of his opinion, in which he was joined by four other members of the Court—Justices Brennan, Marshall, Stevens and O'Connor—so it represents the opinion of the Court.

IV

We turn first to the county's creche display. There is no doubt, of

course, that the creche itself is capable of communicating a religious message. Indeed, the creche in this lawsuit uses words, as well as the picture of the nativity scene, to make its religious meaning unmistakably clear. "Glory to God in the Highest!" says the angel in the creche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.

Under the Court's holding in Lynch, the effect of a creche display turns on its setting. Here, unlike in Lynch, nothing in the context of the display detracts from the creche's religious message. The Lynch display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and reindeer were objects of attention separate from the creche, and had their visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the creche. Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

The floral decoration surrounding the creche cannot be viewed as somehow equivalent to the secular symbols in the overall Lynch display. The floral frame, like all good frames, serves only to draw attention to the message inside the frame. The floral decoration surrounding the creche contributes to, rather than detracts from, the endorsement of religion conveyed by the creche....

Nor does the fact that the creche was the setting for the county's annual Christmas carol-program diminish its religious meaning.... [B]ecause some of the carols performed at the site of the creche were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. No viewers could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

The fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.... Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Finally, the county argues that it is sufficient to validate the display of

> the creche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. It would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. While the county may have doubts about the constitutional status of celebrating the Eucharist inside the courthouse under the government's auspices, this Court does not.[118] The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.
>
> In sum, Lynch teaches that government may celebrate Christmas in some manner and form, but not in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under Lynch, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the creche in this context, therefore, must be permanently enjoined.[119]

The "other shoe" was dropped in Justice Blackmun's treatment of the menorah in Part VI of his opinion, in which he lost all of his supporters and wrote for himself alone. (Part V will be discussed later.)

> VI
>
> The display of the Chanukah menorah in front of the City-County Building [a block away from the county courthouse where the creche was situated] may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions....
>
> The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.
>
> Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause....
>
> Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the [Christmas] tree, the [mayor's] sign [celebrating "Liberty"], and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained secular status in our society. Of the two

118 . The court refers to a colloquy that occurred during oral argument.

119 . *Allegheny County v, ACLU*, *supra*, Blackmun opinion, Part IV.

> interpretations of this particular display, the latter seems far more plausible and is also in line with Lynch.
>
> The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.[120]
>
> Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel [a 4-sided top used in children's gift-giving games at Chanukah] would look out of place, and might be interpreted by some as mocking the celebration of Chanukah....
>
> The Mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise.... Here, the Mayor's sign serves to confirm what the context already reveals: that the display of a menorah is not an endorsement of religious faith but simply a recognition of religious diversity....
>
> The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the Lemon analysis. These issues were not addressed by the Court of Appeals and may be considered by that court on remand.[121]

Although Justice Blackmun's opinion on this issue was a solo effort, his holding that the menorah display was permissible was joined by five other members of the Court, but for somewhat different reasons, as will be seen. Thus he lost Justices Brennan, Marshall and Stevens, but gained Chief Justice Rehnquist and Justices White, Scalia, Kennedy and O'Connor.

So stood the majority's position on the creche and the position of a different majority on the menorah. The "antithesis" was expressed for the minority in the opinion announced by Justice Kennedy, which will be discussed prior to the rebuttals and surrebuttals.

(2) The Kennedy Opinion. Justice Anthony Kennedy's views on the religion clauses were not known at the time of his confirmation, since he had not had occasion during his prior service on the Court of Appeals to write on that subject. It was noted that he was a Roman Catholic, but whether that presaged an affinity for the

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120. Citing *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 271 (CA7 1986), discussed at § 3i below.

121. *Allegheny County v. ACLU*, *supra*, Blackmun opinion, Part VI.

views of Justice Brennan or of Justice Scalia, both Roman Catholics, was matter for conjecture. This case was the first major occasion on which Justice Kennedy expressed his views on the Establishment Clause, and they confirmed the worst fears of church-state separationists: he did not have a very "high" concept of the "wall" between church and state. In fact, he would reduce it to a much narrower scope, scarcely exceeding the Free Exercise Clause. In this he was joined by the chief justice and his colleagues Justice White and Justice Scalia, who had all taken occasion in earlier opinions to express their dissatisfaction with the majority's understanding of that clause.[122]

> The majority holds that the County of Allegheny violated the Establishment Clause by displaying a creche in the county courthouse, because the "principal or primary effect" of the display is to advance religion within the meaning of Lemon v. Kurtzman. This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding. The creche display is constitutional, and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well. On this latter point, I concur in the result, but not the reasoning, of Part VI of Justice Blackmun's opinion.
>
> I
>
> In keeping with the usual fashion of recent years, the majority applies the Lemon test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the Lemon framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area.... Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the Lemon test, when applied with proper sensitivity to our traditions and our caselaw, supports the conclusion that both the creche and the menorah are permissible displays in the context of the holiday season.
>
> The only Lemon factor implicated in this case directs us to inquire whether the "principal or primary effect" of the challenged government practice is "one that neither advances nor inhibits religion." The requirement of neutrality inherent in that formulation has sometimes been stated in categorical terms. For example, in Everson...Justice Black wrote that the Clause forbids laws "which aid one religion, aid all religions, or prefer one religion over another." We have stated that government "must be neutral in matters of religious theory, doctrine and practice" and "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."[123] And we have spoken of a prohibition against conferring "an imprimatur of state

122 . See *Edwards v. Aguillard*, 482 U.S. 578, 636-640 (1987), Scalia, J., dissenting [discussed at IIIC3b(6)]; *Wallace v. Jaffree*, 472 U.S. 38, 108-113 (1985), Rehnquist, J., dissenting [discussed at IIIC2d(8)]; *Roemer v. Maryland*, 426 U.S. 736, 768-9, White, J., concurring in judgment [discussed at IIID8b].

123 . *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968), discussed at IIIC3b(2).

approval on religion,"[124] or "favor[ing] the adherents of any sect or religious organization."[125]

These statements must not be given the impression of a formalism that does not exist. Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.

Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multi-faceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

* * *

The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." Lynch v. Donnelly. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

* * *

As Justice Blackmun observes, some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. That may be true if by "coercion" is meant direct coercion in the classic sense of an establishment of religion that the Framers knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic

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124 . *Mueller v. Allen*, 463 U.S. 388, 399 (1983), discussed at IIID7j, quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), discussed at IIIE3b.

125 . *Gillette v. U.S.*, 401 U.S. 437, 450 (1971), discussed at IVA5k.

> recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. Speech may coerce in some instances, but this does not justify a ban on all government recognition of religion....
>
> This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal....
>
> In determining whether there exists an establishment, or a tendency toward one, we refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our caselaw.... Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.

Justice Kennedy may have overstated the situation somewhat in acknowledging that "some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation." *None* of the Supreme Court's cases *embraced* the view that coercion was the sole touchstone of such violation, and the cases mentioned by Justice Kennedy—*Engel v. Vitale*, *Abington v. Schempp*, *PEARL v. Nyquist*[126]—stated the opposite: that coercion was utterly unnecessary as an indication of "establishment." Justice Kennedy proceeded to apply his novel theory to the *Allegheny* case.

> II
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> These principles are not difficult to apply to the facts of the case before us. In permitting the displays on government property of the menorah and the creche, the city and county sought to do no more than "celebrate the season" and to acknowledge, along with many of their citizens, the historical background and the religious as well as the secular nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning. It cannot be disputed that government, if it chooses, may participate in sharing with its citizens the joy of the holiday season, by declaring public holidays, installing or permitting festive displays, and providing holiday vacations

126. 370 U.S. 421 (1962), discussed at IIIC2b(1); 374 U.S. 203 (1963), discussed at IIIC2b(2); and 413 U.S. 756 (1973), discussed at IIID7a, respectively.

for its employees. All levels of our government do precisely that....

If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspects would signify the callous indifference toward religious faith that our cases and traditions do not require.... Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious....

There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The creche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the creche or the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion. Lynch is dispositive of this claim with respect to the creche, and I see no reason for reaching a different result with respect to the menorah.... If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a creche, displayed in the limited context of the holiday season, can be invalid.

* * *

The fact that the creche and menorah are both located on government property, even at the very seat of government, is...inconsequential.... The prayer approved in Marsh v. Chambers, for example, was conducted in the legislative chamber of the State of Nebraska, surely the single place most likely to be thought the center of state authority.[127]

If Lynch is still good law—and until today it was—the judgment below cannot stand. I accept and indeed approve both the holding and the reasoning of Chief Justice Burger's opinion in Lynch, and so I must dissent from the judgment that the creche display is unconstitutional. On the same reasoning, I agree that the menorah display is constitutional.

III

The majority invalidates display of the creche, not because it disagrees

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127. *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed at § D3a above, upheld the offering of daily prayers by a salaried chaplain of the Nebraska legislature on the basis that the First Congress had likewise employed a chaplain to pray at its sessions contemporarily with the adoption of the First Amendment and therefore presumably did not consider the practice in conflict with the Establishment Clause. A more plausible rationale for this result would be that it is an internal matter in a coequal branch of government and therefore nonjusticiable, which would weaken Justice Kennedy's argument.

> with the interpretation of Lynch applied above, but because it chooses to discard the reasoning of the Lynch majority opinion in favor of Justice O'Connor's concurring opinion in the case. It has never been my understanding that a concurring opinion...could take precedence over an opinion joined in its entirety by five Members of the Court. As a general rule, the principle of stare decisis [the matter is settled by past decisions] directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law. Since the majority does not state its intent to overrule Lynch, I find its refusal to apply the reasoning of that decision quite confusing.

What the majority did, of course, was to reinterpret *Lynch* rather than to overrule it, a tactic much favored in recent times over vacating prior decisions, since it preserved the appearance—if not the actuality—of continuity. The majority *could* have overruled *Lynch* if all five justices wished to do so, but any one or more members of the bare majority could have blocked that course. Justice O'Connor, the crucial swing vote, who abandoned the *Lynch* majority to join the *Lynch* dissenters, may not have wished to be seen to be repudiating her former stand but as remaining true to it.

By embracing Justice O'Connor's "endorsement" test, the *Lynch* dissenters either "took her into camp" or enlarged their camp to include hers, thus in effect transmuting the *Lynch* majority into a minority—so far as it served as a binding precedent—and replacing it with a new *Lynch* principle composed of the former four dissenters plus Justice O'Connor. This sleight-of-hand did not go unnoticed by Justice Kennedy, who pointed to it in a footnote;

> 6. The majority illustrates the depth of its error in this regard by going so far as to refer to the concurrence and dissent in Lynch as "[o]ur previous opinions...."

This implied that the four dissenters and the concurrence represented the opinion of the *Court* in that case, which of course it did not; but it was in fact "*our* [respective] opinions." Justice Kennedy's reproaches about the majority's disregard of *stare decisis* apparently did not inspire such regard in the "conservative" wing of the court, to judge by the devastating and dishonest treatment of precedent in *Oregon v. Smith*[128] in 1990, or its open avowal of overruling 5-4 precedents adopted over "spirited dissents" when a later majority found the precedent "unworkable," expressed in *Payne v. Tennessee* in 1991,[129] both joined in by the four justices who formed the Kennedy minority in this instance.

Justice Kennedy and his three allies were in no wise enamored of the "endorsement" test of Justice O'Connor, and the remainder of the Kennedy opinion was devoted to a vehement rejection of it—so vehement as to suggest that it was

128 . 494 U.S. 872 (1990), discussed at IVD2e.

129 . 501 U.S. 808 (1991).

viewed as a more dangerous threat than the much-criticized *Lemon* standard.

> Even if Lynch did not control, I would not commit this Court to the test applied by the majority today. The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a "reasonable observer" may "fairly understand" government action to "`sen[d] a message to nonadherents that they are outsiders, not full members of the political community,'" is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.... Only one opinion for the Court has purported to apply [the endorsement test] in full,[130] but the majority's opinion in this case suggests that this novel theory is fast becoming a permanent accretion to the law. For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the case before us.
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> A
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> I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence. It is true that, for reasons quite unrelated to the First Amendment, displays commemorating religious holidays were not commonplace in 1791.... But the relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the founding.
>
> Our decision in Marsh v. Chambers illustrates the proposition. The dissent in that case sought to characterize the decision as "carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer," but the majority rejected the suggestion that "historical patterns ca[n] justify contemporary violations of constitutional guarantees." Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and undertakings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion....
>
> If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.
>
> Some examples suffice to make plain my concerns. Since the Founding

130 . See *Grand Rapids v. Ball*, 473 U.S. 373, 389-92 (1985), discussed at IIID7l.

of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. The first such proclamation was issued by President Washington at the request of the First Congress.... Most of President Washington's successors have followed suit, and the forthrightly religious nature of these proclamations has not waned with the years.... It requires little imagination to conclude that these proclamations would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning.

The Executive has not been the only Branch of our Government to recognize the central role of religion in our society. The fact that this Court opens its sessions with the request that "God save the United States and this honorable Court" has been noted elsewhere. See Lynch. The Legislature has gone much further, not only employing legislative chaplains, but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate. The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: "Preserve me, O God, for in Thee do I put my trust." Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag. Some endorsement is inherent in these reasonable accommodations, yet the Establishment Clause does not forbid them.

The United States Code itself contains religious references that would be suspect under the endorsement test. Congress has directed the President to "set aside and proclaim a suitable day each year...as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. §169h. This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." 36 U.S.C. §172. To be sure, no one is obligated to recite this phrase, see West Virginia State Board of Education v. Barnette,[131] but it borders on sophistry to suggest that the "`reasonable'" atheist would not feel less than a "`full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God We Trust," 36 U.S.C. §186, which is prominently engraved in the wall above the Speaker's dias [sic] in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, 31 U.S.C. §§5112(d)(1), 5114(b), must have the same effect.

If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.... Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar

131 . 319 U.S. 624 (1943), the second "flag salute" case, discussed at IVA6b.

> practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.[132]

Any application of the Establishment Clause that threatens a rite of the civic cultus seems invariably to call forth this litany of public pieties that are said to be endangered (See *Lynch v. Donnelly*, Part IIC), though Justice Kennedy reached a somewhat premature conclusion in announcing, "yet the Establishment Clause does not forbid them." That is yet to be determined. They have not been adjudicated for various reasons, and probably never will be. So we may never know whether "the Establishment Clause...[forbids] them," which may be just as well. Justice Kennedy was not in a position to determine their status under the Establishment Clause. At most he was asserting an argument that, in his view, they *ought* not be in conflict with the Establishment Clause.

> B
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> In addition to disregarding precedent and historical fact, the majority's approach to government use of religious symbolism threatens to trivialize constitutional adjudication. By mischaracterizing the Court's opinion in Lynch as an endorsement-in-context test, the majority embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer or other secular symbols as "a center of attention separate from the creche." After determining whether these centers of attention are sufficiently "separate" that each "had their specific visual story to tell," the court must then measure their proximity to the creche. A community that wishes to construct a constitutional display must also take care to avoid floral frames or other devices that might insulate the creche from the sanitizing effect of the secular portions of the display....
>
> My description of the majority's test, though perhaps uncharitable, is intended to illustrate the inevitable difficulties in its application. This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.
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> IV
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> The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends itself to an Orwellian rewriting of history as many understand

132 . *Allegheny County v. ACLU, supra,* Kennedy opinion.

> it. I can conceive of no judicial function more antithetical to the First Amendment.
>
> A further contradiction arises from the majority's approach, for the Court also assumes the difficult and inappropriate task of saying what every religious symbol means. Before studying this case, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and likely is, unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence. This Court is ill-equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so. Indeed, were I required to choose between the approach taken by the majority and a strict separationist view, I would have to respect the consistency of the latter.
>
> The case before us is admittedly a troubling one. It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.
>
> For these reasons, I might have voted against installation of these particular displays were I a local legislative official. But we have no jurisdiction over matters of taste within the realm of constitutionally permissible discretion. Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's historical origins.[133]

Thus did the most recently appointed justice deliver his thoughts on the first church/state case to evoke them, and he was joined in this deliverance by the other three justices of the "conservative" wing of the Court—Rehnquist, White and Scalia. His maiden voyage on this stormy sea provoked a vigorous rebuttal from the other side. Sometimes individual justices will take another to task, but it is not often that the majority opinion of the court will direct a broadside against the dissent with the concerted and continual asperity seen in this instance. Justice Blackmun devoted the entire Part V of his opinion to refuting the dissent, and in that effort he was joined by all four of the other justices, making it fully the *opinion of the court*. In addition,

133 . Allegheny County v. ACLU, supra, Kennedy opinion.

Justice O'Connor, Justice Brennan and Justice Stevens each wrote a separate opinion that in part responded to the dissent, and Justice Marshall joined in two of them, followed by a rattle of smallarms in the footnotes on both sides.

(3) The Majority's Rebuttal. Justice Blackmun, joined by Justices Brennan, Marshall, Stevens and O'Connor, devoted eleven pages (including footnotes)—the longest part of any of the opinions—to chastising the effrontery of the "new kid on the block" (not Justice Blackmun's term). From these interchanges can be discerned some of the dynamics of struggle internal to the august Court.

> V
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> Justice Kennedy and the three Justices who join him would find the display of the creche consistent with the Establishment Clause. He argues that this conclusion necessarily follows from the Court's decision in Marsh v. Chambers, which sustained the constitutionality of legislative prayer. He also asserts that the creche, even in this setting, poses "no realistic risk" of "represent[ing] an effort to proselytize," having repudiated the Court's endorsement inquiry in favor of a "proselytization" approach. The Court's analysis of the creche, he contends, "reflects an unjustified hostility toward religion."
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> Justice Kennedy's reasons for permitting the creche on the Grand Staircase and his condemnation of the Court's reasons for deciding otherwise are so far-reaching in their implications that they require a response in some depth:
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> A
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> In Marsh, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Justice Kennedy, however, argues that Marsh legitimates all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." Otherwise, the Justice asserts, such practices as our national motto ("In God We Trust") and our Pledge of Allegiance (with the phrase "under God" added in 1954) are in danger of invalidity.
>
> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. Lynch (O'Connor, J., concurring) (Brennan, J., dissenting).
>
> * * *
>
> We need not return to the subject of "ceremonial deism" because there is an obvious distinction between creche displays and references to God in the motto and pledge. However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.
>
> Indeed, in Marsh itself, the Court recognized that not even the "unique history" of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in Marsh did not violate

> this principle because the particular chaplain had "removed all references to Christ." Thus Marsh does not stand for the sweeping proposition Justice Kennedy would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today. Nor can Marsh, given its facts and its reasoning, compel the conclusion that the display of the creche involved in this lawsuit is constitutional. Although Justice Kennedy says that he "cannot comprehend" how the creche display could be invalid after Marsh, surely he is able to distinguish between a specifically Christian symbol, like a creche, and more general religious references, like the legislative prayers in Marsh.
>
> Justice Kennedy's reading of Marsh would gut the core of the Establishment Clause, as this Court understands it. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, e.g., Texas Monthly[134]), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another." Larson v. Valente.[135]

Here it is pertinent to include an important footnote to which reference is made later in the opinion that lends force to Justice Blackmun's argument above. It is derived from M. Borden's *Jews, Turks and Infidels* (Chapel Hill, N.C.: Univ. of North Carolina Press,1984):

> Among the stories this scholar recounts is one that is especially apt in light of Justice Kennedy's citation of Thanksgiving Proclamations:
>
> "When James M. Hammond, governor of South Carolina, announced a day of `Thanksgiving, Humiliation, and Prayer' in 1844, he...exhorted `our citizens of all denominations to assemble at their respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world.' The Jews of Charleston protested, charging Hammond with `such obvious discrimination and preference in the tenor of your proclamation, as amounted to an utter exclusion of a portion of the people of South Carolina.' Hammond responded that `I have always thought it a settled matter that I lived in a Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I

134 . *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), discussed at § C6b(4) above.

135 . 456 U.S. 228, 244 (1982), discussed at IIC5c.

> should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if it had not come to pass' (The Occident, January 1845)" (emphasis in Borden).
>
> * * *
>
> Thus, not all Thanksgiving proclamations fit the nonsectarian or deist mold as did those examples quoted by Justice Kennedy. Moreover, the Jews of Charleston succinctly captured the precise evil caused by such sectarian proclamations as Governor Hammond's: they demonstrate an official preference for Christianity and a corresponding discrimination against all non-Christians, amounting to an exclusion of a portion of the political community. Indeed, the Jews of Charleston could not better have formulated the essential concepts of the endorsement inquiry.[136]

There may be those who resonate to Gov. Hammond's view and look with offended incredulity upon those benighted souls who—as one good lady put it to the author—"don't believe in our Jesus"—but perhaps they are still living in another country than that founded by the authors of the First Amendment—possibly in the realm of King George III and his predecessors extending back to the Emperor Constantine. They seem not to be aware that the Founders had in mind something *different* from the establishmentarian regimes that had gone before. Justice Blackmun continued for the majority:

> B
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> Although Justice Kennedy's misreading of Marsh is predicated on a failure to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instance of such favoritism are constitutionally intolerable. He concedes also that the term "endorsement" long has been another way of defining a forbidden "preference" for a particular sect, but he would repudiate the Court's endorsement inquiry as a "jurisprudence of minutiae" because it examines the particular context in which the government employs religious symbols.
>
> This label, of course, could be tagged on many areas of constitutional adjudication.... It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.

Justice Blackmun cited the particularities involved in applying the warrant and probable cause requirements of the Search and Seizure Clause of the Fourth Amendment. It should not have been necessary to remind other justices that the task of courts often is to draw fine lines between the permissible and the impermissible,

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136 . *Allegheny County v. ACLU, supra*, Blackmun opinion for the court, n. 53.

and that that often involves making distinctions between very similar circumstances in what may seem like hair-splitting or "minutiae" to some, but are the unavoidable specificities involved in necessary differentiations—a necessity Justice Kennedy himself did not escape.

> Indeed, not even under Justice Kennedy's preferred approach can the Establishment Clause be transformed into an exception to this rule. The Justice would substitute the term "proselytization" for "endorsement," but his...test suffers from the same "defect," if one must call it that, of requiring close factual analysis. Justice Kennedy "ha[s] no doubt, for example, that the [Establishment] Clause would forbid a city to permit the permanent erection of a large Latin cross on the roof of city hall...because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." He also suggests that a city would demonstrate an unconstitutional preference for Christianity if it displayed a Christian symbol during every major Christian holiday but did not display the religious symbols of other faiths during other religious holidays. But, for Justice Kennedy, would it be enough of a preference for Christianity if that city each year displayed a creche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)? If so, then what if there were no cross but the 40-day creche display contained a sign exhorting the city's citizens "to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world"? See n. 53, supra. [Gov. Hammond's wording]
>
> The point of these rhetorical questions is obvious. In order to define precisely what government could and could not do under Justice Kennedy's "proselytization" test, the Court would have to decide a series of cases with particular fact patterns that fall along the spectrum of government references to religion (from the permanent display of a cross atop city hall to a passing reference to divine Providence in an official address). If one wished to be "uncharitable" to Justice Kennedy, one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed, divided by the number of different non-Christian religions represented in these displays, and then somehow factoring into this equation the prominence of the display's location and the degree to which each symbol possesses an inherently proselytizing quality. Justice Kennedy, of course, could defend his position by pointing to the inevitably fact-specific nature of the question whether a particular governmental practice signals the government's unconstitutional preference for a specific religious faith. But because Justice Kennedy's formulation of this essential Establishment Clause inquiry is no less fact-intensive than the "endorsement" formula adopted by the Court, Justice Kennedy should be wary of accusing the Court's formulation of "using little more than intuition and a tape measure" lest he find his own

> formulation convicted on an identical charge.
>
> Indeed, perhaps the only real distinction between Justice Kennedy's "proselytization" test and the Court's "endorsement" inquiry is a burden of "unmistakable" clarity that Justice Kennedy apparently would require of government favoritism for specific sects in order to hold the favoritism in violation of the Establishment Clause....
>
> Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required "strict scrutiny" of practices suggesting "a denominational preference," Larson v. Valente [supra], in keeping with "`the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause. Bowen v. Kendrick, O'Connor, J., concurring....[137] Thus, when all is said and done, Justice Kennedy's effort to abandon the "endorsement" inquiry in favor of his "proselytization" test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.

At this point Justice Blackmun launched another torpedo in the margin against Justice Kennedy's position.

> It is not clear, moreover, why Justice Kennedy thinks the display of the creche in this lawsuit is permissible even under his lax "proselytization" test. Although early on in his opinion he finds "no realistic risk that the creche...represent[s] an effort to proselytize," at the end he concludes, "the eager proselytizer may seek to use [public creche displays] for his own ends. The urge to use them to teach or to taunt is always present" (emphasis added). Whatever the cause of this inconsistency, it should be obvious to all that the creche on the Grand Staircase communicates the message that Jesus is the Messiah and to be worshipped as such, an inherently proselytizing message if there ever was one. In fact, the angel in the creche display represents, according to Christian tradition, one of the original "proselytizers" of the Christian faith: the angel who appeared to the shepherds to tell them of the birth of Christ. Thus it would seem that Justice Kennedy should find this display unconstitutional according to a consistent application of his principle that government may not place its weight behind obvious efforts to proselytize Christian creeds specifically.
>
> Contrary to Justice Kennedy's assertion, the Court's decision in Lynch does not foreclose this conclusion. Lynch certainly is not "dispositive of [a] claim" regarding the government's display of a creche bearing an explicitly proselytizing sign (like "Let's all rejoice in Jesus Christ, the Redeemer of the world," cf. n. 53, supra). As much as Justice Kennedy tries, there is no hiding behind the fiction that Lynch decides the

137 . 487 U.S. 589 (1988), discussed at IID2d.

> constitutionality of every possible creche display. Once stripped of this fiction, Justice Kennedy's opinion transparently lacks a principled basis, consistent with our precedents, for asserting that the creche display here must be held constitutional.[138]

Returning to the text, the Court asserted its third and final section of rebuttal against the minority:

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> Although Justice Kennedy repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.
>
> Justice Kennedy's accusations are shot from a weapon triggered by the following proposition: if government may celebrate the secular aspects of Christmas, then it must be allowed to celebrate the religious aspects as well because, otherwise, the government would be discriminating against citizens who celebrate Christmas as a religious, and not just a secular, holiday. This proposition, however, is flawed at its foundation. The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.
>
> A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed. Justice Kennedy thus has it exactly backwards when he says that enforcing the Constitution's requirement that government remain secular is a prescription of orthodoxy. It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state. Although Justice Kennedy accuses the Court of "an Orwellian rewriting of history," perhaps it is Justice Kennedy himself who has slipped into a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.

Here Justice Blackmun, when he used the term "secular" to characterize the state, unnecessarily may have given ammunition to the Court's critics who contend, plausibly but fallaciously, that it has "established" a "religion" of "secular

138 . *Allegheny County v. ACLU, supra,* n. 57.

humanism." He might have done better to follow the lead of Chief Justice Burger in using the term "neutral" instead of "secular" (cf. *Walz v. Tax Commission*, 1970[139]). The stance of the state toward religion(s) is better characterized as "neutral" than as "secular," and substituting that word throughout the passage does not weaken Justice Blackmun's point, but in fact might strengthen it.

> To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of an established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.
>
> For this reason, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents must fail. Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: "We rejoice in the glory of Christ's birth!"), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians. To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict "`the logic of secular liberty'" it is the purpose of the Establishment Clause to protect.[140]
>
> Of course, not all religious celebrations of Christmas located on government property violate the Establishment Clause. It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting. The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.
>
> Equally obvious, however, is the proposition that not all proclamations of Christian faith located on government property are permitted by the

139. 397 U.S. 644, discussed at § C6b(3) above.

140. Citing *Larson v. Valente*, [*supra*], quoting B. Bailyn, *The Ideological Origins of the American Revolution* 265 (Boston: The President and Fellows of Harvard College, 1967)

> Establishment Clause just because they occur during the Christmas holiday season, as the example of a Mass in the courthouse surely illustrates. And once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity. It is thus incontrovertible that the Court's decision today, premised on the determination that the creche display on the Grand Staircase demonstrates the county's endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.[141]

(4) Justice O'Connor's Concurrence. Justice O'Connor represented the "swing vote" in this case. Her shift from the position of the majority in *Lynch*—that the creche display in Pawtucket was not unconstitutional—to the position of the new majority in the instant case—that the creche display in Pittsburgh *was* unconstitutional—produced an outcome opposite to the earlier case. And her "endorsement" test, first explained in *Lynch* and then endorsed by the *Lynch* dissenters, was the hinge that swung her away from the "conservative" wing of the Court (which rejected her test) and made the old minority into the new majority. Indeed, the harsh criticism of her test in the Kennedy opinion seemed likely to insure that she would stay with those who had embraced her test on similar cases in the future. But she was at some pains to explain the reason for her seeming "switch."

> I joined the majority opinion in Lynch because, as I read that opinion, it was consistent with the analysis set forth in my separate concurrence, which stressed that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion" (emphasis added). Indeed, by referring repeatedly to "inclusion of the creche" in the larger holiday display, the Lynch majority recognized that the creche had to be viewed in light of the total display of which it was a part. Moreover, I joined the Court's discussion in Part II of Lynch concerning government acknowledgment of religion in American life because, in my view, acknowledgments such as the legislative prayers upheld in Marsh v. Chambers and the printing of "In God We Trust" on our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in our society." Lynch (concurring opinion). Because they serve such secular purposes and because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs. At the same time, it is clear that "[g]overnment practices that purport to

141 . *Allegheny County v. ACLU, supra,* Blackmun opinion for the court, Part V.

> celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."
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> * * *
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> In Lynch, I concluded that the city's display of a creche in its larger holiday exhibit in a private park in the commercial district had neither the purpose nor the effect of conveying a governmental endorsement of Christianity or disapproval of other religions....
>
> For the reasons stated in Part IV of the Court's opinion in this case, I agree that the creche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community. In contrast to the creche in Lynch..., this creche stands alone in the County Courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community" Lynch (concurring opinion).... The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.

Justices Brennan and Stevens joined Part II of her separate opinion, devoted to refuting the views of Justice Kennedy and his allies.

> II
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> In his separate opinion, Justice Kennedy asserts that the endorsement test "is flawed in its fundamentals and unworkable in practice." In my view, neither criticism is persuasive.... We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval toward citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.
>
> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.... To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy. See Abington School District v. Schempp [supra], ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause

violation need not be so attended").[142]....

I continue to believe that the endorsement test asks the right questions about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols.... I also remain convinced that the endorsement test is capable of consistent application. Indeed, it is notable that the three Circuit courts which have considered challenges to the display of a creche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such practice sends a message to nonadherents of Christianity that they are outsiders in the political community.[143]

* * *

By repeatedly using the terms "acknowledgment" of religion and "accommodation" of religion interchangeably..., Justice Kennedy obscures the fact that the displays at issue in this case were not placed at city hall in order to remove a government-imposed burden on the free exercise of religion. Christians remain free to display their creches at their homes and churches. Allegheny County has neither placed nor removed a governmental burden on the free exercise of religion but rather...has conveyed a message of governmental endorsement of Christian beliefs. This the Establishment Clause does not permit.[144]

Justice O'Connor then continued on alone to deal with the menorah.

For reasons which differ somewhat from those set forth in Part VI of Justice Blackmun's opinion, I also conclude that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion. I agree with Justice Blackmun that the Christmas tree, whatever its origins, is not regarded today as a religious symbol.... A Christmas tree displayed in front of city hall, in my view, cannot fairly be understood as conveying government endorsement of Christianity.... In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.... One need not characterize Chanukah as a "secular holiday" or strain to argue that the menorah has a "secular dimension" in order to conclude that the city of Pittsburgh's

142. Citing Laycock, Douglas, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent" ("If coercion is also an element of the establishment clause, establishment adds nothing to free exercise.") 27 *Wm. & Mary L. Rev.* 875, 922 (1986).

143. Citing *Allegheny County v. ACLU*, 842 F.2d 655 (CA3, 1988); *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (CA7, 1987); *ACLU v. Birmingham*, 791 F.2d 1561 (CA6), cert. denied 479 U.S. 939 (1986), all discussed immediately above.

144. *Allegheny County v. ACLU, supra*, O'Connor opinion.

> combined holiday display does not convey a message of endorsement of Judaism or of religion in general.
>
> In setting up its holiday display...the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "During this holiday season, the City of Pittsburgh celebrates liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom." This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom.... Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing religious beliefs.... In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternate beliefs....[145]

(5) Justice Brennan's Opinion. Justice Brennan, joined by Justices Marshall and Stevens, did not look with favor upon *any* of the seasonal symbols at issue in this case.

> I continue to believe that the [government-sponsored] display of an object that "retains a specifically Christian [or other] religious meaning"[146] is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a creche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause.... I cannot agree, however, that the city's display of a 45-foot Christmas tree and an 18-foot menorah at the entrance to the building housing the Mayor's office shows no favoritism towards Christianity, Judaism, or both. Indeed, I should have thought that the answer as to the first display supplied the answer to the second.

Justice Brennan took issue with each of the contentions that had been advanced to justify the constitutionality of the display that included the menorah.

1. *The Christmas tree is a secular symbol*. He contended that when paired with a religious symbol of another faith, the Christmas tree would stand for a Christian religious equivalent rather than a secular message. Furthermore, characterizing it as an expression of "pluralism" (O'Connor) was also faulty. "The display of the tree and the menorah will symbolize such pluralism and freedom only if more than one religion is represented; if only Judaism is represented, the scene is about Judaism, not about pluralism. Thus the pluralistic message Justice O'Connor stresses *depends on*

145. Ibid., O'Connor opinion.

146. Quoting his dissent in *Lynch v. Donnelly*, 465 U.S. 668, 708 (1984), discussed at § 2d(2) above.

the tree's possessing some religious significance."[147]

2. *Chanukah is a partly secular holiday, for which the menorah can stand as a secular symbol*.

> I would venture that most, if not all, major religious holidays have beginnings and enjoy histories studded with figures, events and practices that are not strictly religious. It does not seem to me that the mere fact that Chanukah shares this kind of background makes it a secular holiday in any meaningful sense. The menorah is a religious symbol, used ritually in a celebration that has deep religious significance. ([Indeed,] it is highly relevant that the menorah [in the display] was lit during a religious ceremony complete with traditional religious blessings.) That, in my view, is all that need be said....[148]

3. *The government may promote pluralism by sponsoring or condoning displays on its property having strong religious associations*.

> Justice Blackmun...and, even more so, Justice O'Connor...appear to believe that, where seasonal displays are concerned, more is better. Whereas a display might be constitutionally problematic if it showcased the holiday of just one religion, those problems vaporize as soon as more than one religion is included. I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion.
>
> Nor do I discern the theory under which the government is permitted to appropriate particular holidays and religious objects to its own use in celebrating "pluralism".... To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.
>
> The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar.... It is the proximity of Christmas that undoubtedly accounts for the city's decision to participate in the celebration of Chanukah, rather than the far more significant Jewish holidays of Rosh Hashanah and Yom Kippur.... December is not the holiday season for Judaism. Thus the city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish

147 . Ibid., emphasis in original.

148 . *Allegheny County v. ACLU, supra*, Brennan opinion. Material in parentheses is from an earlier part of Justice Brennan's opinion.

religious holiday...has the effect of promoting a Christianized version of Judaism.... This is not "pluralism" as I understand it.

(6) Justice Stevens' Opinion. As has often been the case, Justice Stevens had his own unique approach to the religion clauses.

> Governmental recognition of not one but two religions distinguishes this case from our prior Establishment Clause cases. It is, therefore, appropriate to reexamine the text and context of the Clause to determine its impact on this novel situation.
>
> Relations between church and state at the end of the 1780s fell into two quite different categories. In several European countries, one national religion, such as the Church of England in Great Britain, was established. The established church typically was supported by tax revenues, by laws conferring privileges only upon members, and sometimes by violent persecution of nonadherents. In contrast, although several American Colonies had assessed taxes to support one chosen faith, none of the newly United States subsidized a single religion. Some States had repealed establishment laws altogether, while others had replaced single establishments with laws providing for nondiscriminatory support of more than one religion.
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> * * *
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> By its terms the initial draft of the Establishment Clause would have prevented only the national established church that prevailed in England; multiple establishments, such as existed in six States, would have been permitted. But even in those States and even among members of the established churches, there was wide opposition to multiple establishments because of the social divisions they caused. Perhaps in response to this opposition, subsequent drafts broadened the scope of the Establishment Clause.... Plainly, the Clause as [finally] ratified proscribes federal legislation establishing a number of religions as well as a single national church.
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> * * *
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> In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. 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 creche 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 the margin at this point Justice Stevens noted that his contention was bulwarked by the *amicus* Governing Board of the National Counsel [Council] of Churches of Christ in the U.S.A., "government acceptance of a creche on public property...secularizes and degrades a sacred symbol of Christianity." n. 8.

> In this very case, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display.... The Establishment Clause does not allow public bodies to foment such disagreement.

Thus Justice Stevens rejected both the creche and the menorah/Christmas tree displays. Concerning the latter, he remarked:

> Although it conceivably might be interpreted as sending "a message of pluralism and freedom to choose one's own beliefs," (O'Connor, J.), the message is not sufficiently clear to overcome the strong presumption that the display, respecting two religions to the exclusion of all others, is the very kind of double establishment that the First Amendment was designed to outlaw.[149]

(7) Musketry in the Margins. This collection of opinions, so full of repartee and collateral exchanges among the justices, displayed as well an unusual amount of skirmishing in the footnotes, some of which will be recounted here as informative miscellany.

> Blackmun (n.47): The county and the city...recognize that this Court repeatedly has stated that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." But they suggest that the Court reconsider this principle.... The Court declines to do so, and proceeds to apply the controlling endorsement inquiry, which does not require an independent showing of coercion.[150]

> Blackmun (n.50): The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time.... In any event, the county's own press releases made clear to the public that the county associated itself with the creche.... In this respect, the creche here does not raise the kind of "public forum" issue presented by the creche in McCreary v. Stone.[151]

> Blackmun (n.51): Nor can the display of the creche be justified as an "accommodation" of religion.[152] Government efforts to accommodate religion are permissible only when they remove burdens on the free

149. Ibid., Stevens opinion.

150. This comment took on added significance when the court agreed in 1991 to hear the commencement prayer case, *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *affirmed sub nom. Lee v. Weisman*, 505 U.S. 577 (1992), at the urging of the Solicitor General, who recommended that the court reconsider the *Lemon* test of establishment and adopt instead the "coercion" test suggested by Justice Kennedy.

151. 739 F.2d 716 (CA2, 1984), aff'd by equally divided court, 471 U.S. 83 (1985), discussed at § 2e above.

152. Citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed at ID4b.

exercise of religion. The display of a creche in a courthouse does not remove any burden on the free exercise of Christianity. Christians remain free to display creches in their homes and churches. To be sure, prohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as [its] own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.

Blackmun (n.55): Justice Kennedy evidently believes that contemporary references to exclusively Christian creeds (like the Trinity or the divinity of Jesus) in official acts or proclamations is justified by the religious sentiments of those responsible for the adoption of the First Amendment.... This Court, however, squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic.[153]

Blackmun (n.56): In describing what would violate his "proselytization" test, Justice Kennedy uses the adjectives "permanent," "year-round," and "continual," as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause. Presumably, however, Justice Kennedy does not really intend these adjective to define the limits of his principle, since it is obvious that the government's efforts to proselytize may be of short duration, as Governor Hammond's Thanksgiving Proclamation illustrates.

Blackmun (n.60): Justice Kennedy is clever but mistaken in asserting that the description of the menorah purports to turn the Court into a "national theology board." Any inquiry concerning the government's use of a religious object to determine whether that use results in an unconstitutional religious preference requires a review of the factual record concerning the religious object—even if the inquiry is conducted pursuant to Justice Kennedy's "proselytization" test. Surely, Justice Kennedy cannot mean that this Court must keep itself in ignorance of the symbol's conventional use and decide the constitutional question knowing only what it knew before the case was filed. This prescription of ignorance obviously would bias the Court according to the religious and cultural backgrounds of its members, a condition much more intolerable than any which results from the Court's effort to become familiar with the relevant facts.

Moreover, the relevant facts concerning Chanukah and the menorah are largely to be found in the record [of this case].... In any event, Members of this Court have not hesitated in referring to secondary sources in aid of their Establishment Clause analysis...because the question "whether a government activity communicates an endorsement

153 . Citing *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985), discussed at IIIC2d(7).

> of religion" is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." Lynch (O'Connor, J., concurring).

This comment posed an interesting problem of judicial methodology. A case is supposed to be decided on the basis of the evidence contained in the record. Yet it is true that most justices have occasionally introduced additional data into their analysis from "secondary sources" outside the record. And just what is to be expected under the heading of "judicial interpretation of social facts"? Which "social facts"? Some observers thought that Justice O'Connor signally failed to take judicial cognizance of the "social facts" contained in the joint brief *amicus curiae* of the American Jewish Committee and the National Council of Churches in *Lynch* to the effect that the creche displayed by the city of Pawtucket did indeed send a message of favoritism *for* Christianity and *against* Judaism and other religions such that her endorsement test in that case should have led her to find the creche in that case *un*constitutional, which would have swung the Court 5-4 the other way. So "secondary sources" may be a kind of open-ended intake that could lead to unexpected results at the last stage of adjudication.

(All of the foregoing footnotes except the first [no.47] are from that part of Justice Blackmun's opinion which constituted the opinion of the Court.)

> Brennan (n.* at 492 U.S. 573, 640) : [T]he pluralism that Justice O'Connor perceives in Pittsburgh's [Christmas tree/menorah] display arises from the recognition that there are many different ways to celebrate "the winter holiday season." But winter is "the holiday season" to Christians, not to Jews, and the implicit message that it, rather than autumn, is the time for pluralism sends an impermissible signal that only holidays stemming from Christianity, not those arising from other religions, favorably dispose the government toward "pluralism."

> Stevens (n.6): The criticism that Justice Kennedy levels at Justice O'Connor's endorsement standard for evaluating symbolic speech is not only "uncharitable," but also largely unfounded. Inter alia, he neglects to mention that 1 of the 2 articles he cites as disfavoring the endorsement test itself cites no fewer than 16 articles and 1 book lauding the test.... Justice Kennedy's preferred "coercion" test, moreover, is, as he himself admits, out of step with our precedents.

> Stevens (n.10): This case illustrates the danger that governmental displays of religious symbols may give rise to unintended divisiveness, for the net results of the Court's disposition is to disallow the display of the creche but to allow the display of the menorah. Laypersons unfamilair with the intricacies of Establishment Clause jurisprudence may reach the wholly unjustified conclusion that the Court itself is preferring one faith over another.

Stevens (n.11): The suggestion that the only alternative to government support for religion is government hostility to it represents a giant step backward in our Religion Clause jurisprudence. Indeed, in its first contemporary examination of the Establishment Clause, the Court, while differing on how to apply the principle, unanimously agreed that government could not require believers or nonbelievers to support religions.[154]

Kennedy (n.7): Contrary to the majority's discussion, the relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts of "official discrimination against non-Christians" perpetrated in the eighteenth and nineteenth centuries by States and municipalities are of course irrelevant to this inquiry, but the practices of past Congresses and Presidents are highly informative. [So much for Gov. Hammond and his Thanksgiving Proclamation!]

Kennedy (n.10): If the majority's test were to be applied logically, it would lead to the elimination of all nonsecular Christmas caroling in public buildings or, presumably, anywhere on public property. It is difficult to argue that lyrics like "Good Christian men, rejoice," "Joy to the world! the Savior reigns," "This, this is Christ the King," "Christ, by highest heav'n adored," and "Come and behold Him, Born the King of angels," have acquired such a secular nature that nonadherents would not feel "left out" by a government-sponsored or approved program that included these carols.... We do not think for a moment that the Court will ban such carol programs, however. Like Thanksgiving Proclamations, the references to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and this Court, they constitute practices that the Court will not proscribe, but that the Court's reasoning today does not explain.

Kennedy (n.11): Justice Blackmun and Justice O'Connor defend the majority's test by suggesting that the approach followed in Lynch would require equally difficult line-drawing. It is true that the Lynch test may involve courts in difficult line-drawing in the unusual case where a municipality insists on such extreme use of religious speech that an establishment of religion is threatened. Only adoption of the absolutist views that either all government involvement with religion is permissible, or that none is, can provide a bright line in all cases. That price for clarity is neither exacted nor permitted by the Constitution. But for the most part, Justice Blackmun's and Justice O'Connor's objections are not well taken. As a practical matter, the only cases of symbolic recognition likely to arise with much frequency are those involving simple holiday displays, and in that context Lynch provides unambiguous guidance. I would follow it. The Majority's test, on the

154 . Citing *Everson v. Board of Education*, 330 U.S. 1, 15-16, 31-33 (1947).

> other hand, demands the Court to draw exquisite distinctions from fine details in a wide range of cases. The anomalous result the test has produced here speaks for itself.

And with that rattle of small arms, the Supreme Court's 1988-89 term came to a close, and a temporary tranquility settled over the marble temple of law behind the Capitol until the following October.

3. Governmental Proprietaries in Religion: Crosses

A similar kind of governmental proprietary in religious symbolism involved the use of the Christian cross. Whatever may be said for or against the sectarian character of Nativity shrines, the symbolism of the Latin cross would seem to be even more distinctively emblematic of Christianity. The cross in its many various forms has been an evocative symbol, both secular and religious, both Christian and non-Christian, since earliest antiquity, ranging from the Egyptian ankh to the Nazi swastika.[155] It came into Christian usage because of the crucifixion of Jesus of Nazareth on a cruel Roman instrument of execution that subsequently—in the eyes of Christians at least—was exalted as the sign of the sacrificial death of the Savior for the sins of the world.

The cross came into public prominence when the Roman Emperor Constantine adopted it at a crucial juncture in his career, as he was approaching Rome with an army seeking to overthrow his rival for the throne, Maxentius. He related afterward on many occasions that he had seen a vision that involved an emblem like a cross and an inscription traditionally reported as *In hoc signo vinces* (by this sign conquer). The descriptions of the sign by Eusebius and Lactantius, who heard Constantine's accounts and provide our only contemporary witness, are confusing, but may represent a chi-rho version of the cross, those being the first two letters of the name of Christ in Greek—XP.[156] Bearing this emblem, Constantine defeated Maxentius at the Mulvian bridge in A.D. 312 and shortly thereafter declared Christianity a licit religion.

Eventually the cross became a symbol common in both church and state. Crusaders wore it to signify their resolve to free the Holy Land from the infidel—on their chests as they approached Jerusalem and on their backs as they returned. The word "crusader" itself is derived from *crux*, the Latin word for cross. The cross surmounted the crowns and scepters of many rulers of the lands of Christendom. Numerous coats of arms and national flags featured the cross as a prominent device. The flag of Great Britain has three of them with a common center: St. George's cross (England), St. Andrew's cross (Scotland), and St. Patrick's cross (Ireland), the latter two being saltires (a cross rotated 45 degrees so that it resembles the letter X). Medals and military decorations often display the cross, as in the German Iron Cross and the Distinguished Service Cross of the United States.

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155. A recent, reversed usage of an equally venerable symbol.

156. See Fox, Robin Lane, *Pagans and Christians* (New York: Alfred A. Knopf, 1986), pp. 612-619.

With the American Revolution and the adoption of the First Amendment, civil usages of such religious symbols as the cross in this country came to seem to many to be inappropriate, incongruous, and contrary to the spirit, if not the letter, of the Constitution, although some vestiges of former customs linger on (like the Distinguished Service Cross?), as will be seen.

Today the Latin cross (with upright longer than the crossbar) is universally recognized as the most common and distinctive emblem of the Christian Church and does not now have any other substantial significance of a non-Christian or secular nature (other than on the flags of Denmark, Finland, Iceland, Norway and Sweden—if that be "secular," given the state churches in those lands). It is the sacred insignia that adorns the tops of church steeples and stands upon the altar of many churches as the central focus of attention in their worship, evoking awareness of Christ's Crucifixion and Atonement. Hymnologists have expressed the spiritual importance of the cross in words dear to many Christians:

> When I survey the wondrous cross
> On which the Prince of Glory died,
> My richest gain I count but loss,
> And pour contempt on all my pride.
> (Isaac Watts)

> In the cross of Christ I glory,
> Towering o`er the wrecks of time;
> All the light of sacred story
> Gathers round its head sublime.
> (Sir John Bowring)

Many Christians today wear a small cross round their necks or on their clothing as an attestation of their commitment to the Christian faith. It is probably the single most revered object of veneration across a wide range of Christian traditions and is recognized and respected by the other traditions and by non-Christians as the sign of Christianity, just as the six-pointed star has come to be the sign of Judaism and the crescent, of Islam.

The use of the cross by civil governments in the United States has led to some litigation of interest here, with mixed results, but not as mixed as with respect to creches.

a. *Paul v. Dade County* (1967). One of the earlier cases of this kind was initiated in Florida by a non-Christian named Nishan Paul, who sued the county in which Miami lies for displaying a lighted cross on the county courthouse during the month of December each year. The trial court denied relief and the Third District Court of Appeal affirmed, *per* Richard H. M. Swann, J., for a unanimous court.

> The evidence reflects that this cross, together with other lights and decorations, was originally placed on the courthouse...at the request of members of the Miami Chamber of Commerce around 1955. This was done in order to help decorate the streets of Miami and attract holiday

> shoppers to the downtown area, rather than to establish or create a religious symbol, or to promote or establish a religion.[157]

The court applied the then-current test of establishment derived from *Abington v. Schempp*,[158] i.e., a secular purpose and a primary effect that neither advances nor inhibits religion. It found a secular purpose, but did not make any serious effort to apply the second part of the test.

> It has also been observed that many symbols, though religious in origin, have ceased to have religious meanings or have also acquired secular meanings.... For example, the dove, the star, the fish, and three intertwined rings have all had, or presently may have, some religious symbolism attached thereto. On the other hand, some have also acquired certain secular meanings.

The court did not indicate what secular meaning it supposed the cross to have acquired.

> The record does not indicate that this temporary string of lights forming a cross was used to support, aid, maintain or establish any religion or religious edifices. Its purpose was not to promote the participation by anyone in the affairs of any religious organizations or sect.
>
> Consequently, we hold that under the Schempp test, this does not amount to the establishment of a religion in violation of the First Amendment, and that it does not amount to a religious activity, controlled, supported or influenced by the government....[159]

Thus, without asking what the primary *effect* of the display was, the court concluded its truncated treatment of the courthouse cross.

b. *Lowe v. City of Eugene* (1969). A protracted turmoil occurred on the West Coast over the erection of a 51-foot-high concrete cross on the crest of Skinner's Butte overlooking the city of Eugene, Oregon. From the late 1930s until 1964 there had been a wooden cross at that site that was replaced periodically as the wood deteriorated. The location was a municipal park, but the cross was erected and maintained by various private groups. In November of 1964 Eugene Sand & Gravel, Inc., and the Hamilton Electric Company put up a more enduring structure of concrete with inset neon illumination to provide a highly visible symbol for the Christmas season. Somewhat belatedly, on December 2, 1964, the two companies applied for a building permit and an electrical permit. The applications were referred to the city council, which held a public hearing that was highly publicized, heavily

157. *Paul v. Dade County*, 202 So. 2d 833 (1967).

158. 374 U.S. 202 (1962), discussed at IIIC2b(2).

159. *Paul v. Dade County*, *supra*, 207 So.2d 690, *cert*. denied, 390 U.S. 1041.

attended and hotly tumultuous. At the end of the meeting the council voted 7 to 1 to issue the permits. Suit was immediately brought by various taxpayers of the city charging violation of the federal and state constitutional provisions against an establishment of religion.

(1) Act One (February 26, 1969). The Circuit Court of Lane County, William S. Fort, J., after a lengthy trial that generated 883 pages of transcript, held that the cross was primarily a religious symbol and that the city council did not have authority to erect or maintain a religious symbol on public premises, so it should be removed. The City of Eugene did not appeal this order, but Eugene Sand & Gravel did, supported by eleven citizens as *amici curiae*, while the American Civil Liberties Union filed an *amicus* brief urging affirmance.

The Supreme Court of Oregon, sitting *en banc*, heard the case on January 6, 1969, five Christmases and four Easters after the cross was erected and had been illuminated on those nine occasions, and issued its conclusions in an opinion written by Justice *pro tem* Virgil H. Langtry, sitting by designation.

> The trial court in the case at bar failed, apparently by oversight, to receive in evidence all of defendants' offered exhibits. These exhibits, which we hold should have been received, are in the record and we are considering them. They indicate that many crosses and other religious symbols traditionally have been used as monuments and memorials upon public property throughout Oregon and the United States, without appellate court challenges except as noted in this opinion [Paul v. Dade County, supra, and an earlier case involving a statute of Mother Cabrini in New Orleans[160]]. This, in itself, is indicative of a feeling among a people who strongly support a constitutional government, that there is no constitutional question involved in such a case, or it is so minimal as not to merit notice. The evidence indicates that to many people the cross, whether it is a Latin cross or some other type, carries connotations that are not essentially religious in character and to such people it has primarily secular meanings. There is nothing in the evidence which reasonably supports an inference that the purpose of the defendants in erecting the cross was to promote the participation by anyone in, or the advancement or inhibition of, any religious belief or organization, or that such was its primary effect.[161]

Justice Arno H. Denecke, of whom more will be heard anon, added a concurring opinion, which tended to confuse the issue further.

> I consider the problem as one arising under the "establishment clause" of the First Amendment, rather than under the "free exercise" clause. Therefore, I would pose the issue: Does the city foster the establishment of the Christian religion by permitting private persons to erect a cross in a city park and to light the cross during the Christmas and Easter season?

160 . *State ex rel. Singelmann v. Morrison*, 57 So.2d 238 (1952), discussed at § 6a below.

161 . *Lowe v. City of Eugene*, 451 P.2d 117 (1969).

> In my opinion it does not.

Justice Denecke seemed to imply that the Langtry opinion rested on the Free Exercise Clause, yet it quoted the *Paul* court's mention of the *Schempp* two-part test of Establishment (the second part of which it had failed to apply) and proceeded to conclude that there was "no evidence" showing a *purpose* to promote, advance or inhibit religion "or that such was its primary effect." Thus the Langtry opinion at least referred to the test of Establishment in use at that time. Justice Denecke, however, proceeded to make his case by reference to *Niemotko v. Maryland*[162] and *Fowler v. Rhode Island*,[163] which are quintessentially Free Speech and *Free Exercise* cases involving use of public parks by private religious groups!

> Both of these decisions concern the free exercise portion of the First Amendment; however, they accept without question the proposition that a city does not violate the establishment clause of the First Amendment by permitting religious groups to hold religious services in public parks. If a city can validly permit groups to hold religious services in parks, why can it not validly permit persons to erect a religious symbol, a cross, in a park?[164]

Why not indeed? Justice Denecke would have been enthused about *McCreary v. Stone*,[165] and other cases that followed the "public forum" rationale. In his view, as in that of the court's opinion, the fact that the city council's permit was "revocable" rendered the 51-foot concrete cross "temporary," though it would have required a major engineering enterprise to remove it. A dissenting opinion suggested why putting a concrete cross up in the park might not be as innocuous as the majority supposed. It was written by Justice Alfred T. Goodwin and joined by Justices William M. McAllister and Kenneth J. O'Connell.

> Much as I would like to join the majority and thus avoid an expression of disunity concerning this locally acrimonious confrontation between "procross" and ["]anticross" factions, the record compels me toward a different conclusion.
>
> The display of the lighted cross during Christian festivals is at least concurrently a religious activity, even if one were to accept the somewhat labored argument of the proponents of the cross that the true motive for the display has been secular, i.e., the commercial exploitation of religious holidays. Indeed, the "procross" faction in this litigation has been embarrassed by its friends. Several witnesses innocently jeopardized the defense by references at the city council hearing to their religious reasons for wanting to keep the cross on display as a silent

162 . 340 U.S. 268 (1951), discussed at IIA2q.

163 . 345 U.S. 67 (1953), discussed at IIA2r.

164 . *Lowe v. Eugene*, *supra*, Denecke concurrence.

165 . 739 F.2d 716 (CA2, 1984), discussed at § 2e above.

> witness to their faith...and furnished ample proof, if any were needed, that the chief purpose of the display was religious. There is no doubt, from the record, that the mayor and council were responding to popular demand. It was to prevent this very kind of response to majority pressure, however, that the establishment clause of the First Amendment was written into our federal constitution.
>
> Turning to our state constitution, and given the majority's acknowledgement that the cross display is that of a religious symbol, there is further reason to rebuke the city council. Government has no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple.[166] The whole point of separation of church and state in a pluralistic society is to keep the majority from using its coercive power to obtain governmental aid for or against sectarian observances....
>
> Finally, I do not believe the difficult constitutional question is one that can be evaded by trivialization. The cross does not occupy a large tract of land, but it is permanent and it is conspicuous. Whether so intended by the city council or not, the city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display.[167]

That was the first act. There were three more acts to follow.

(2) Act Two (October 1, 1969). The losing side petitioned for a rehearing, and four justices—a majority of the bench of seven—agreed. What apparently had happened was that Judge Langtry's ninety-day appointment by designation had expired, Justice Ralph M. Holman had returned to the bench, and when the petition for rehearing was considered, Justice Holman took the opposite view from that taken by Judge Langtry and expressed in his opinion for the majority, *supra*. That change of one vote swung the court to the opposite position, and the former minority became the majority, the former dissent, written by Justice Goodwin, became the ruling of the court. Justice Denecke dissented, joined by Chief Judge William C. Perry. Justice Gordon Sloan, who had previously voted with the former majority, apparently threw in with the former dissenters, Justices Goodwin, McAllister and O'Connell, to make—with Justice Holman—a new majority of five.[168]

(3) Act Three (December 19, 1969). With that marvelous timing for which courts are noted in these cases, the Supreme Court of Oregon managed to keep this litigation going up to the very threshold of Christmas, when it took its final action (or so it seemed) on this cause. With a tenacity worthy of life-or-death struggle, the procross parties (mainly the Eugene Sand & Gravel Company) entered a new petition for rehearing, contending that newly discovered material should be considered and new arguments heard pertaining to it. The court responded in an

166 . But see *Fox v. Los Angeles*, at § 3e below!

167 . *Lowe v. Eugene*, Goodwin dissent.

168 . *Lowe v. City of Eugene [II]*, 459 P.2d 222 (1969).

opinion again written by Justice Goodwin.

> In granting the first rehearing..., this court did not write a new opinion dealing point by point with the various arguments which had been discussed in the earlier majority and dissenting opinions. Perhaps this economy of words has misled the petitioners. It cannot be fairly asserted, however, that this litigation has suffered at any stage from inadequate debate or want of deliberation....
>
> First, as to the factual record, the petition is not well taken. The petition asserts that the only governmental act in support of the erection of the cross by private parties was the issuance of building and electrical permits. This assertion overlooks the important fact that the city also turned over to private parties the city-maintained public land in which the cross was imbedded in concrete so that it would last, as one of the defendants testified, "forever...."
>
> Turning to another argument urged by the petition, the proponents of the display seek to reopen the case for the purpose of introducing evidence that the public park atop Skinner's Butte in Eugene is a "War Memorial Park" and therefore is a fit site for a lighted cross regardless of reasons which might militate against such a display on other types of public land or buildings. The petitioner's argument seems to be that because the park was dedicated to secular purpose it must be assumed that a principally secular purpose motivated the city's participation in the display of the cross. This argument was made in the original trial, and all the evidence the petitioners now seek to have reconsidered was in the record which we examined when the case was first before us. The trial court decided that the secular purpose of the park dedication had no relevance to the city council's action then under review. We agree.
>
> The war-memorial argument was never passed upon by the city council. The city's action in this case was taken, and defended during the trial below, primarily as an action taken by the city in response to the political power of the majority of the townspeople. At the trial, the city argued that the city council intended to aid the business community, some of whose members expressed a desire to display the cross in order to enhance the commercial exploitation of the principal Christian holidays: Christmas and Easter.... At the same time, the record shows, a majority of the people in the community apparently viewed the display with approval because it reinforced their religious preferences. These religious views also had been brought to bear upon the city government.
>
> A majority of this court was of the opinion in October, and remains of the opinion now, that the allegedly commercial purposes behind the erection of the cross were, like the war-memorial argument, largely after-thoughts which were developed and embellished in response to this litigation.
>
> The principal purpose which motivated the city council was its desire to conform to the desires of a majority of the citizens of the community, who conscientiously believed that their preferred religious symbol was entitled to preferential public display simply because the majority

> wished it so. Such a response to majority religious pressure is, of course, exactly what specific guarantees of rights in the state and federal constitutions were designed to prevent.
>
> If the hilltop in question were private property, the petitioners and their supporters would be constitutionally entitled to erect their cross under the free-exercise clause of the First Amendment. However, the land is public, and its custodian is a governmental subdivision. This is the decisive factor.
>
> Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement....
>
> * * *
>
> Religious freedom and majority rule must live side by side. The majority, no matter how pure its intentions, has no right under our system of government to exert its political muscle to gain a preferred place for its testimony to its religious beliefs.
>
> * * *
>
> It is not the emblem of a religious belief which is objectionable under the state and federal constitutions; it is the enlistment of the hand of government to erect the religious symbol which offends the constitutions.
>
> The petition for [re-]hearing is denied.[169]

Justice Denecke again dissented, for the same reasons as before, and Chief Judge Perry joined him.

The belated effort to characterize the cross as a "war memorial" had a certain unintended but ironic appropriateness, for the procross and anticross factions had certainly skirmished over the geographic and legal topography in a furious and unedifying struggle that might fittingly be captioned "The Bloody Battles for the Emblem of the Prince of Peace." Even that, however, would be preferable to the display's being justified—as the city urged—as a mere "commercial exploitation of the principal Christian holidays" (the court's characterization), a result arrived at in the next case, *Meyer v. Oklahoma City*. The fourth act of the drama over the Eugene cross will be related below in chronological order, when the war memorial theme will be heard again.

c. *Meyer v. Oklahoma City* (1972). A similar cause in Oklahoma three years later involved another Latin cross 50 feet high erected permanently on a triangular plot (129 feet by 126 feet by 177 feet) located at the Fairgrounds on property of

169 . *Lowe v. City of Eugene [III]*, 463 P.2d 360 (1969).

Oklahoma City. The cross was erected by the Oklahoma City Council of Churches (presumably at its expense), but the city landscaped the land and supplied electricity to the area for illuminating the cross. The plaintiff alleged that, although the cross had been designed to "stand forever, it has been somewhat abandoned, is presently in a state of disrepair, and as such is an egregious insult to many Christians and followers of other faiths."[170] Curiously, the plaintiff charged a violation of the Oklahoma constitution, but not of the federal First Amendment, perhaps on the theory that the Oklahoma provision was stricter than the federal. It read:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[171]

The court therefore confined its decision to the state constitution, and it dismissed the case. The Supreme Court of Oklahoma unanimously affirmed the dismissal, *per* Denver N. Davison, Vice Chief Justice.

> Our prior decisions make it clear that whenever public money or property became operative in an effective way to be appropriated, applied, donated or used for the use, benefit or support of any sect, church, denomination, system of religion or sectarian institution as such, the proscribed practices have been enjoined. But here the maintenance of this cross...cannot conceivably be said to operate for the use, benefit or support of any of the institutions or systems named in [the Constitution]. The cross is in a distinctly secular environment in the midst of persons in pursuit of distinctly secular entertainment. Notwithstanding the alleged sectarian conceptions of the individuals who sponsored the installation of this cross, it cannot be said to display, articulate or portray, except in a most evanescent form, any ideas that are alleged to pertain to any of the sectarian institutions or systems named in [the Constitutional prohibition]. The alleged commercial setting in which the cross now stands and the commercial atmosphere that obscures whatever suggestions may emanate from its silent form, stultify its symbolism and vitiate any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution as such. On the basis of the foregoing we hold that plaintiff's petition did not state grounds for injunctive relief.[172]

Thus did the Supreme Court of Oklahoma unanimously avoid disturbing the *status quo*, embarrassing the city or the Council of Churches or exciting the ire of the Bible

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

171 . Ibid., quoting Oklahoma State Constitution, art 2, section 5.

172 . Ibid.

Belt faithful. It is a pity that no justice of the eight on the bench was moved to dissent and thus stimulate the court to a more presentable analysis, even if not to a different outcome.

No clearer statement could be found of the secularizing effect, at least in the eyes of the law, of erecting a sacred religious symbol in a secular setting. It must have been a pyrrhic victory indeed for the sponsors and proponents of the cross to be told that their ambitious effort to erect a 50-foot high symbol of the Christian faith at the Fairgrounds in a setting landscaped and floodlighted to showcase it for all to see had achieved at most a mere "evanescent" effect that did not "display, articulate or portray...any ideas that...pertain to any...system of religion"! Instead, its prominent elevation in a "commercial setting...and...atmosphere...obscures whatever suggestions may emanate from its silent form;" they "stultify its symbolism and vitiate any...benefit...for...religion...."!

If the court was correct in its contention, then the well-meaning efforts of the Oklahoma City Council of Churches had resulted in the loss of the precise advantage sought to be achieved and had fulfilled the fate warned against by St. Paul, "lest the cross of Christ be emptied of its power" (I Cor. 1:17, RSV). If the court was incorrect, and the towering symbol did retain its religious effect for some (few? many?), then the court was resorting to a transparent judicial fiction to avoid confronting the constitutional issue. In any event, the result is one of which neither court nor Christian should be proud.

Meanwhile back on the Pacific coast, the 50-foot concrete cross still towered o'er the wrecks of its opponents.

d. *Eugene Sand & Gravel v. City of Eugene*, Act Four (1976). Seven years after its previous action on this subject, the Supreme Court of Oregon again confronted the cross in Eugene, and Act Four unfolded. Again, by masterful timing, the court managed to deliver its opinion during the Christmas season, on December 16, 1976. A new justice named Thomas Tongue wrote the opinion of the court.

> The cross has never been removed. In June 1970 plaintiff filed this suit. The amended complaint alleges that subsequent to our [1969] decision the circumstances have changed materially in that on May 26, 1970 a charter amendment was approved by the voters of the City of Eugene accepting the cross as a "memorial or monument to United States war veterans" and that a deed of gift to the cross was delivered to and accepted by the city.
>
> The City of Eugene, named as one of the defendants, filed an answer and cross-complaint admitting these allegations and also asking that the [earlier] decree...be set aside. That answer also alleged that pursuant to the charter amendment the cross had been dedicated in a public ceremony as a "Veterans War Memorial Cross" by the American Legion and that a suitable plaque had been prepared by it and affixed to the cross.
>
> * * *
>
> In opposing the relief demanded by plaintiff and by the City of Eugene [as well as by American Legion Post No. 3 as intervenor] it is contended

by defendants [Raymond N. Lowe and the victorious plaintiffs in the prior action] that the "real issue" is "whether the charter amendment transformed an essentially religious symbol into something secular...." In support of these contentions reference is also made to testimony to the effect that many people in Eugene regarded the cross as "an essentially religious symbol" both before and after the charter amendment.

* * *

We believe that the basic issue to be decided is not whether this cross was and still is a religious symbol. Instead, we believe the controlling issue to be whether the display of the cross on city-owned property under the circumstances existing at the time of the trial of this case, as compared with its display at the time of Lowe [the prior case] under the circumstances then existing, satisfies or fails to satisfy the test established by the Supreme Court of the United States for application in such cases [the Lemon test, from Lemon v. Kurtzman (1971)[173]].

* * *

The "circumstances" at the time of Lowe included the following:

(1) A large concrete cross was erected in city park by a private party without permission from the city;

(2) A building permit from the city was then sought and was issued by the city after a public hearing;

(3) No contention was made at that hearing that the cross was a "war memorial" and that contention was never considered or passed upon by the city council;

(4) That cross was "lighted" at Christmas and at Easter.

From the testimony in the trial of that case this court found that:

(1) The cross was a "religious symbol";

(2) The "chief purpose" of those who desired the display of the cross was "religious";

(3) The majority of people in the community at that time viewed its display with approval because it "reenforced their religious preference";

(4) The primary purpose of the city council in issuing the building permit was to conform to such desires by the majority; and

(5) The "war memorial argument" (which was not considered by the city council) was an "afterthought" in response to litigation.

This court in Lowe then held... that because the "chief purpose" of the [cross] display was "religious," the issuance by the city of a building permit to "set apart" public land for the display of such a "religious symbol"... was improper. In other words, the "purpose" test, as stated by the Supreme Court of the United States, was not satisfied. That holding was alone sufficient as a basis for the decision in Lowe.

In view of the basis for the decision in Lowe and the "circumstances" existing at that time, it is important to note the "circumstances" under which the cross was being displayed at the time of the trial in this case:

(1) Instead of being sponsored by a private party, as in 1964, the

173 . 403 U.S. 602 (1971), discussed at IIID5.

> sponsorship for display of the cross in 1970 was the American Legion, a wholly secular organization;

(One wonders if "secular" is different from "private," and if the American Legion is any more "secular" than the original sponsor. Who *was* the original "sponsor" anyway? The record does not indicate, unless perhaps it was the sole appellant in 1969, Eugene Sand & Gravel, Inc., which would seem to be at least as "secular" as the American Legion.)

> (2) Instead of having a "religious purpose" as [was] the purpose of those who desired the display of the cross in 1964, the purpose of the American Legion in 1970 was a secular purpose, i.e.,... as a memorial to all war veterans of all wars in which the United States has participated, to be known as the "Veteran's War Memorial Monument";
>
> (3) Instead of seeking to authorize display of the cross by the obtaining of a building permit from a city council which never considered the purpose of the display to be as a war memorial, as in 1964, the authorization for its display was sought directly from the people of Eugene in 1970, and by a proposed charter amendment which specifically stated that the purpose of the display was to be as a war memorial;
>
> (4) Instead of being displayed by being lighted only during the "religious festivals" of Christmas and Easter, as under the original proposal in 1964, that 1970 charter amendment provided that the cross be lighted "on appropriate days or seasons which fittingly represent the patriotic…sacrifice of war veterans," including the national holidays of Memorial Day, Independence Day, Veteran's Day, Thanksgiving and the Christmas season.
>
> (5) Instead of being displayed on public property without designation as to its purpose, as in 1964, the 1970 charter amendment also provided that the American Legion, at its expense, prepare and affix to the cross a suitable "plaque…consistent with the intendment of this act";
>
> (6) It also appears that in 1970, pursuant to that charter amendment, an appropriate ceremony was conducted by the American Legion to dedicate the cross as the "Veteran's War Memorial Monument";
>
> (7) Also pursuant to that amendment, memorial ceremonies have been subsequently conducted by the American Legion regularly at the site of the cross;
>
> (8) Plans have also been made to place lettering on the crossbar of the cross reading: "Bravely They Died, Honored They Rest."

(In other words, everything had been done to "legitimate" the cross display constitutionally *except* the one thing that would have eliminated the problem entirely, as suggested by the *Lowe* court. If, instead of deeding the cross to the city, the city had deeded the cross and the land on which it stood to the American Legion or some other private party, then—and only then—would the city have ceased to be what it

otherwise remained despite all of the diversionary gestures, the sole owner and proprietor of the cross.)

> Although plaintiff may believe that Lowe was decided incorrectly, plaintiff's position neither depends upon nor requires a reversal of Lowe. Lowe was decided in the light of circumstances then existing and the validity and controlling effect of that decision is limited to those circumstances. Thus, the decision in Lowe is not binding on this court in a case involving the display of a cross in the park of another Oregon city under different circumstances. Neither is Lowe binding on this court in a petition for review based upon "new matter" if a sufficient "change in the circumstances" is proved.
>
> * * *
>
> (1) "Purpose."
>
> Conceding that a large Latin cross is a religious symbol, it has been uniformly held that in determining the validity of the display of either a cross or a nativity scene on public property, the controlling question is not whether such a cross or nativity scene is a religious symbol, but whether the purpose of its display is religious or secular....[174]
>
> Accordingly, we hold that when the American Legion sponsors the display of a cross in a city park as a memorial to war veterans, and when a city accepts such a cross as a war memorial, the requirement of a secular purpose is satisfied.
>
> (2) "Primary Effect."
>
> In order to satisfy this test it is necessary that the display of the religious symbol have a "primary effect" that neither advances nor inhibits religion as distinguished from an "incidental effect." All of the cases cited above hold that the display of a religious symbol such as a cross, nativity scene, or crucifix [none of the cases involved a crucifix] on public property does not have a "primary effect" to either advance or inhibit religion....
>
> In this case the display of this cross is not only sponsored by the American Legion (a secular organization) as a Veteran's War Memorial (a secular purpose), but the requirements of the charter amendment, as adopted by vote of the people of Eugene, are that it be lighted only on secular national holidays, but not including Easter (a religious day, not a national holiday), as in the past. The charter amendment, as adopted by the people, also requires that the secular purpose of the display be made clear by an appropriate plaque, which has since been attached to the cross. In addition, the cross has been dedicated as a Veteran's War Memorial by appropriate public ceremonies sponsored by the American Legion and memorial services have subsequently been conducted regularly by it at that site.
>
> * * *
>
> After considering all of these circumstances we hold, in accordance with what we believe to be decisions by other courts, that the display of

174 . Citing *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), discussed at § 2c above.

> this cross in a city park as a war memorial under these circumstances does not have a "primary effect" which either "advances" or "inhibits" religion.
>
> (3) "Entanglements."
>
> In order to satisfy this test, which is a comparatively new test, the display of the religious symbol on public property must involve no "excessive government entanglement." As held in Allen v. Morton, the most recent and authoritative decision on this subject, this requirement is not violated by the fact of payment by the government for maintenance of the display of a religious "symbol," although the requirement is violated if the government participates in an active manner in the planning and organization of activities which involve such a display. Because there is no evidence of such participation by the City of Eugene in connection with the planning or organization of any activities which involve the display of this cross, we hold that the fact that the cross is to be owned and maintained by the city is not alone sufficient to violate the test of "excessive government entanglement."
>
> * * *
>
> Accordingly, we hold that the decree of the trial court in this case [dismissing the complaint] and the decision by the Court of Appeals affirming that decree must be reversed and that the decree as previously entered in Lowe must be set aside.[175]

Thus the same concrete cross was permitted to remain, now called a "War Memorial" and illuminated on Memorial Day, Independence Day, Veteran's Day and Thanksgiving, but not on Easter—but still during the Christmas *season*, with plaques and insignia declaring its memorial purpose. The American Legion, its ostensible "sponsor," seems to have reaped a windfall reward of a prominent site for its memorial observances, but the city remained the cross's owner and proprietor.

Justice Denecke, having in the interim become chief justice, was still to be heard from, again in *dissent*, in which he was joined by Justices Holman and O'Connell, who had previously been on the opposite side in this matter.

> I dissent for the reason that a majority of this court, rightly or wrongly, decided in 1969 that this same cross had to be removed. In my opinion, nothing has happened subsequently which affords any logical basis to set aside that decision, and the law is clear and settled that parties are not permitted to relitigate matters that have already been decided although the personnel of the court which previously decided the issue has changed.
>
> * * *
>
> The only change in circumstances is the amendment to the City Charter and the action taken pursuant to it....
>
> * * *
>
> The majority now holds in this case that because of the changes listed

175. *Eugene Sand & Gravel v. City of Eugene*, 558 P.2d 338, 346–47, 349 (Or. 1976).

> above [the impermissible] effect and entanglement [found in Lowe] have been completely changed. I do not believe that the shield with which the Bill of Rights protects the minority is so thin or that a decree of this court can be so easily bypassed.[176]

It cannot be denied that the metamorphosis of the cross into a Veteran's War Memorial did significantly change the terms of the dispute, though perhaps not enough to warrant the complete turnaround of Act Four. But one cannot help but wonder if all of the veterans memorialized thereby and their surviving heirs were Christians and, if not, whether they all rejoiced to have the distinctive symbol of the Christian religion set up as their not-entirely-fitting memorial.

In any event, with the next decision, *Fox v. Los Angeles*, the tide with respect to crosses began to turn.

e. *Fox v. Los Angeles* (1978). One of the more extensive judicial explorations of the use of the Latin cross as a symbol displayed on governmental premises occurred in a California case decided by the state supreme court in 1978. It seems that the municipal authorities of Los Angeles had for thirty years arranged for certain lights to be left on in the City Hall on Christmas Eve and Christmas night so that the illuminated windows formed the image of a huge "single-barred cross" visible for miles around. This practice was later extended to include Easter Sunday and then, more recently the Sunday following, which was the date celebrated as Easter by Eastern Orthodox Christians.

(1) California Supreme Court Opinion. Suit was filed two days before Christmas in 1975, and a preliminary injunction was issued prohibiting the display of the cross on City Hall. The city appealed, and the case eventually reached the state supreme court, which three years later delivered its opinion—as might be expected—just two weeks before Christmas in 1978. Judge Frank C. Newman wrote the opinion for the majority, which included Judges Mathew O. Tobriner, Stanley Mosk and Wiley W. Manuel. Chief Judge Rose Bird wrote a concurring opinion, joined by Judge Tobriner. Judge Frank K. Richardson filed a dissenting opinion, joined by Judge William P. Clark, and Judge Clark also filed a separate dissent. The majority based its opinion on the California Constitution, which it considered to be more restrictive than the federal First Amendment.

> The city hall is not an immense bulletin board whereon symbols of all faiths could be thumbtacked or otherwise displayed. Would it be justifiable, say, to allow only a Star of Bethlehem, a Star of David, and a Star and Crescent?....
>
> In the California Constitution there is no requirement that each religion always be represented. To illuminate only the Latin cross, however, does seem preferential when comparable recognition of other religious symbols is impracticable....
>
> The city attorney stressed the significance of "a 30-year backdrop of

176. Ibid., Denecke dissent.

near total passivity and disinterest within a metropolis as religiously and philosophically diverse as Los Angeles…." He urged that we treat as inescapable the conclusion that "if the challenged custom really conferred a measurable benefit upon religion, members of various sects and faiths would have either expressed a desire for equal recognition and aid or... lodge their objection to the practice of prejudicial sovereign endorsement."

We do not find in this record persuasive evidence of "disinterest" in Los Angeles. Indeed there may be complex and troubling reasons why residents who are non-Christian have chosen not to seek "equal recognition or...lodge their objection."

The city attorney argued that official action as to the cross constituted no more than "participation in the secular aspects of the Christian and Easter holidays." Yet he quoted public works committee reports...reading in part as follows: "It is noted that this approval is predicated upon the display being a further symbol of the spirit of peace and good fellowship toward all mankind on an interfaith basis, particularly toward the eastern nations in Europe."

Action that effects the display of only a Latin cross does not constitute "interfaith" recognition. A gesture to "eastern nations in Europe" hardly demonstrates an interfaith concern for "all mankind...." We cannot conclude here that the city, particularly as to Easter holidays, did not "promote...such spiritual content."[177] Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus.... Governments must commit themselves to a "position of neutrality" whenever "the relationship between man and religion is affected."[178] To be neutral surely means to honor the beliefs of the silent as well as the vocal minorities.

The order granting the preliminary injunction is affirmed.[179]

(2) Chief Justice Bird's Concurrence. The chief justice of the California Supreme Court, Rose Bird, added a significant analysis of the issues in her ten-page concurrence.

I concur in the judgment of the majority. I write separately to express the reasons that persuade me that both the California and United States Constitutions prohibit the City of Los Angeles from displaying a symbol unique to one religion on the face of the very building housing the representatives of all the people.

* * *

When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share

177 . Quotation is from *Allen v. Hickel*, 424 F.2d 944 (1970), discussed at § 2b above.

178 . Quotation is from *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b(2).

179 . *Fox v. Los Angeles*, 587 P.2d 663 (1978).

those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status.

The simple but crucial fact at issue is that the city government of Los Angeles has identified itself with the central symbol of one religion. As judges, it is our unmistakable constitutional duty to protect those of other faiths or no faith from the coercion toward conformity that attaches to every official endorsement of any religion, particularly the majority religion. Our ancestors would ask nothing less of us. Having experienced religious intolerance themselves, they understood that faith flourishes more freely in a sanctuary protected from the dictates of the majority. City-sponsored display of the Latin cross invades that sanctuary....

This court's judgment cannot be affected by appellant's suggestion that the preferential effect of the city's display of the cross is trivial. A towering cross on the city hall of this state's largest metropolis is hardly a sight to be overlooked....

The city argues that no preference was given to any religion, since the purpose of displaying the cross was the wholly secular one of promoting "peace and good fellowship toward all mankind." Whatever the city's subjective purpose, an impermissible religious preference has objectively resulted. Had the city delivered its message by simply lighting the words "Peace on Earth" on City Hall, no constitutional questions would have been raised. Instead, the city chose to deliver its "secular" message through a religious vehicle. The medium was the message. Once the cross blazed from the top stories of City Hall, some individuals obtained the satisfaction of knowing their faith was officially approved. Others had to pursue their faith knowing that beliefs they did not share had received official blessing.

* * *

The particular and dramatic way in which the cross was lit on City Hall contributed to its substantial religious impact. This was not the creation of a "secular" Christmas scene, replete with Santas, reindeer and trees. This was an isolated cross stretching for several stories atop City Hall tower. The religious symbol, visible from a distance, stood without qualification or explanation, like the cross atop a traditional church. The city made no significant attempt to cushion the feelings of those, such as respondent, who were offended by the use of their tax funds to display the symbol of a religion whose beliefs they did not share.

Further, whatever may be said for the secular nature of the Christmas holiday, the same cannot be argued for Easter. Easter Sunday is no more a legal holiday in this state than any other Sunday. To the extent that non-Christians observe the day, they do not typically share in the display of the Latin cross. Indeed, that the spiritual content of the cross is central to the spiritual significance of Easter is a matter of common knowledge. The appearance of governmental identification with one religious tradition is thus even greater at Easter than at Christmas.

The display of the cross on Eastern Orthodox Easter has a substantial

> religious impact as well. The decision to display the cross on that holiday was taken after a member of the Orthodox religion requested such a display in 1971.... [T]he city council henceforth was engaged in displaying a sectarian symbol on a holy day having no independent secular significance. The only effect of the city's action was to equalize the recognition bestowed upon various branches of Christianity. Clearly, such an extension of recognition to another Christian sect only reinforces the conclusion that the City of Los Angeles was furthering one particular religion.[180]

The majority had held the display of the cross on City Hall unconstitutional under the California constitution. Chief Justice Bird would have held it in violation of the First Amendment of the U.S. Constitution as well. She voiced a concern for the diminishment of the standing of non-Christians in the political community because of the favor shown the religious emblems of their faith by the municipal authority, a theme advanced by Justice Sandra Day O'Connor in the United States Supreme Court in her concurring opinion in *Lynch v. Donnelly* and subsequent opinions.[181]

(3) Justice Richardson's Dissent. Two justices dissented. Justice Richardson applied the three-part test of Establishment used by the U.S. Supreme Court in *Lemon v. Kurtzman*[182] and most subsequent cases. With reference to the first part, a secular purpose, he reasoned that the cross was merely part of a broader seasonal display.

> The display was coincident with installation of strings of colored lights, Christmas trees, and other ornaments on public buildings. Under these circumstances it seems to me readily apparent that the general purpose was secular and probably two-fold in nature: (1) to promote a general spirit of peace, warmth, good fellowship, and good will during what has become a traditional holiday period, characterized by the exchange of gifts and greeting cards and general secular activity, and (2) to provide an attractive and relatively inexpensive decoration for the city hall tower to accompany the bright exterior lighting of adjacent and nearby buildings. While some of the intended tranquillity, harmony, and good will, very unfortunately, may have been dissipated by the rancor and rhetoric of the present litigation, I find nothing in the factual record, or in any of the circumstances of which we may take judicial notice, which prevents us from accepting at face value the intended purposes expressed by the city officials. Certainly, there is nothing before us which indicates, even indirectly, that the city council had an undisclosed purpose or secret, conspiratorial plan to promote or advance a particular religion. We can fairly assume that it acted in complete good faith over many years....

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180 . Ibid., Bird concurrence, emphasis in original.

181 . 465 U.S. 668 (1984), discussed at § 2d above; also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), discussed at § 2i above.

182 . 403 U.S. 602 (1971), discussed at IIID5.

* * *

> Christmas, by very definition has obvious religious characteristics, but it has become by general acceptance, an important secular festival as well. It is recognized by law as an official state holiday. In terms of business and community life, Christmas has developed strong, some say too strong, secular overtones. We depart from important precedent when we reject, on the barren transcript before us, the reasons which local civil practice which is within the area of appropriate political discretion and judgment vested in local public officials.[183]

Curiously enough, Justice Richardson couched his argument in terms applicable solely to Christmas. Nowhere does he mention Easter, although two of the four nights on which the cross appeared each year were on Easter and on Eastern Orthodox Easter, and his accommodationist rationale does not fit the Easter occasions nearly to the degree it might fit the Christmas ones (even if it were adequate for those). Furthermore, he discerned no principal or primary effect advancing or hindering religion.

> There is nothing whatever before us to show that the display had any effect, temporary or permanent, good, bad, or indifferent. The display stirred no visible passions for or against. Its impact, culturally, theologically, philosophically, or socially, was undisclosed. The 30-year practice has passed unchallenged either by the general public, or by any individuals or groups, religious or otherwise. Far from generating controversy, the display seems to have been received by the public either with favor in the spirit of the holiday season, or with general passive indifference or apathy...
>
> The record discloses that only two organizations sought display of similar symbolic expressions. They were both granted equal treatment. These were the heart symbol of the Heart Fund and the cross symbol of the Easter Seal Society.184 It is difficult to conclude that any preference is worked until the city has both received and rejected similar applications from someone....
>
> * * *
>
> If we inquire, what does the record disclose as to the principal or primary effect which the display of the cross had on millions of people in the largest metropolitan area in California over a period of 30 years, the answer is a thundering silence. The record before us totally fails to demonstrate that the display either encouraged or inhibited any particular religion in the Los Angeles area or anywhere else.[185]

Justice Richardson also found no "excessive entanglement" of government with religion, which he seemed to equate with expenditure, interference or frequency.

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183 . *Fox v. Los Angeles, supra,* Richardson dissent.

184 . Presumably with two crossbars.

185 . *Fox, supra,* emphasis in original.

> [T]he lighted display of the cross involved an estimated expense of $103 annually.... I believe it fair to conclude that the ratio of $103 to the budget [of Los Angeles] may sink from minimal to infinitesimal. No claim is made that the practice interfered with any governmental operations or activities....
>
> Not only in terms of the funding involved but in the temporal aspects of the display as well, the city's action herein was minimal.... Of the 365 days in the year, we are concerned with the evening hours of 4 days. The case does not represent a religious benefit, preference, gain or advantage of any constitutional significance. Los Angeles has neither "excessively entangled itself with religion," nor imposed any "irreparable injury" upon plaintiff or others which would warrant injunctive intervention.

Justice Richardson then devoted two and half pages to an argument that the cross display should be treated as an instance of benign accommodation by government to the religious interests of the people (citing *Zorach v. Clauson*[186]) or as an instance of "room for play in the joints productive of a benevolent neutrality" (*Walz v. Tax Commission*[187]) ending with the usual "parade of horribles" that would follow if such a strict interpretation of the Establishment Clause were to be applied to other manifestations of religion in public life.

> We would, to cite but a very few random examples, delete the references to the Deity in the Preamble to our California Constitution, erase the likeness of George Washington at prayer from our postage stamps, remove the Biblical description of the Creation from the face of the current state telephone directory, strike the expression "In God We Trust" from all our currency, sandblast the term "Anno Domini" from the very cornerstone of the public building in which these opinions are written, and muffle the prayer, "God save the United States and this Honorable Court" which convenes the only court to which our judgments may be appealed.[188]

Judge Clark expressed agreement with Judge Richardson and criticized the majority opinion—which seems quite clear to the average reader—for not explaining its rationale to his satisfaction. To a lay observer, the majority's rationale seemed quite plain, straightforward and persuasive.

f. *ACLU v. Rabun County Chamber of Commerce* (1983). Another cross made its appearance in Georgia in 1979 when the Rabun County Chamber of Commerce prevailed upon the State of Georgia to permit it to erect an illuminated Latin cross on an 85-foot-high structure in Black Rock Mountain State Park. This design supplanted an earlier one that had fallen into disrepair. The iron structure was erected

186 . 343 U.S. 306 (1952), discussed at IIIC1b.

187 . 397 U.S. 664 (1970), discussed at § C6b(3) above.

188 . *Fox v. Los Angeles, supra,* Richardson dissent.

atop a rock outcropping on Black Rock Mountain in 1956, and when lighted it formed the shape of a Christmas tree. In 1957 a second circuit of lights was superimposed upon the first, which formed the shape of a cross. The two designs were illuminated alternately during the ensuing years. Easter Sunrise Services, which had been held at the site even before 1956, continued to be held at the base of this structure following its construction (presumably with the cross illuminated rather than the Christmas tree). The 1979 structure was placed on a knoll in the corner of the park where it illuminated two camping areas and could be seen from miles away on major highways. It was about 25 feet by 35 feet and was lit for 2½ to 4 hours nightly.

> In March and April of 1979, several press releases were issued by the Chamber [of Commerce]. The March 19, 1979 release stated in part:
>
> The cross is a symbol of Christianity for millions of people in this great nation and the world.... There are now 33 days before Easter. Mayor Savage says "Wouldn't it be great if we could dedicate our cross on Easter morning—the most meaningful day for a cross."... Although the construction of the cross was not completed by Easter morning, the district court found that it was dedicated at the Easter [Sunrise] services.[189]

The ACLU of Georgia expressed objections to the Chamber of Commerce and the Department of Natural Resources, contending that the placement of a Latin cross on state parkland violated the Establishment Clause. The Department—apparently following the lead of *Eugene Sand & Gravel*, *supra*—suggested that the cross be designated "a memorial for deceased persons" (the court's characterization). A resolution to that effect was drafted but never passed. In June of 1979 the Department ordered the Chamber to remove the cross, but the Chamber refused, and the state took no further action. The ACLU filed suit in federal district court, which ordered the cross removed. The Chamber of Commerce appealed. The U.S. Court of Appeals for the Eleventh Circuit ruled on February 4, 1983, Judges Phyllis A. Kravitch and Frank Johnson, Jr., and Senior Circuit Judge Elbert P. Tuttle (one of the famous "Four" who sustained the civil rights revolution in the South[190]) issuing a unanimous opinion *per curiam*. Most of it was devoted to the question of "standing" of the plaintiffs, but after much weighing and distinguishing, the court found two of the individual plaintiffs to have experienced personal though noneconomic injury sufficient to confer standing, even after *Valley Forge Christian College*[191] cut back on Establishment Clause standing the year before.

> Plaintiffs Karnan and Guerrero are residents of Georgia, who have the

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

190. See Bass, J., *Unlikely Heroes* (New York: Simon & Schuster, 1981).

191. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), discussed at IIID8c.

> right to use the state parks for camping purposes. They have demonstrated the effect that the presence of the cross has on their right to the use of Black Rock Mountain State Park both by testifying as to their unwillingness to camp in the park because of the cross and by the evidence of the physical and metaphysical impact of the cross. In explaining why the plaintiffs in Abington [v. Schempp][192] had demonstrated a sufficient injury in fact, the Supreme Court in Valley Forge specifically emphasized the dilemma facing the plaintiffs: the school children were "subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." No less can be said of the plaintiffs in the instant case. Plaintiffs Guerrero and Karnan are presently forced to locate other camping areas or to have their right to use Black Rock Mountain State Park conditioned upon the acceptance of unwanted religious symbolism. In addition, because the cross is clearly visible from the porch of his summer cabin at the religious camp which he directs as well as from the roadway he must use to reach the camp, plaintiff Karnan [a Unitarian minister] has little choice but to continually view the cross and suffer from the spiritual harm to which he testified. Karnan's injury is particularly disturbing because it manifests itself at his special place of religious contemplation and retreat.
>
> * * *
>
> Thus we find that the plaintiffs Guerrero and Karnan have sufficiently demonstrated particular and personalized noneconomic injury to distinguish them from the general citizenry who may be as equally offended on a philosophical basis but who are not as specifically or perceptibly harmed...to provide them with a "personal stake in the controversy."

With that weighty conclusion, the court turned to the Establishment Clause issue, disposing of it in half the space devoted to standing.

> In the instant case, the district court concluded that the erection of the cross in Black Rock Mountain State Park violated each of the three principles announced in Lemon v. Kurtzman.[193] Although both parties agree that the district court applied the correct legal standard, the Chamber asserts that the district court's decision is erroneous. More specifically, the Chamber asserts that the district court erred in finding that the cross was erected with a religious purpose rather than the Chamber's alleged secular purpose of promoting tourism. Similarly, the Chamber challenges the district court's finding that the primary effect of the cross was to advance Christianity and that the presence of the cross created a potential for political divisiveness.
>
> At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion.

192 . 374 U.S. 203 (1963), discussed at IIIC2b(2).

193 . 403 U.S. 602 (1971), discussed at IIID5.

> Although courts have rarely looked behind the stated legislative purposes, it is clear that an avowed secular purpose, if found to be self serving, may "not be sufficient to avoid conflict with the First Amendment." Stone v. Graham.[194]
>
> In the instant case, the district court specifically found that the cross was erected "out of religious stirrings and for a religious purpose." In reviewing this decision on appeal, we note that findings of fact made by a district court can only be set aside if they are determined to be clearly erroneous.... The district court's finding of religious purpose in this case is supported by ample evidence in the record. Numerous qualified witnesses testified at trial that the latin cross is universally regarded as a symbol of Christianity. Moreover, the selection of an Easter deadline for completion of the cross, the decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in the Chamber's press releases all point to the existence of a religious purpose. Thus we are unable to conclude that the district court's finding was clearly erroneous.
>
> Moreover, even if the district court had found that the purpose for constructing the cross was to promote tourism, this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause. Although the promotion of tourism is a secular goal commonly pursued by states, cities and counties alike, a government may not "employ religious means to reach a secular goal unless secular means are wholly unavailing." School District of Abington Township v. Schempp...(Brennan, J., concurring).... Finding that the Chamber has failed to establish a secular purpose, we hold that the maintenance of the cross in a state park violates the Establishment Clause of the First Amendment.... Accordingly, the cross must be removed.[195]

The court referred approvingly to other cases of similar character in which a secular purpose was lacking: *Gilfillan v. Philadelphia*,[196] *Citizens Concerned v. Denver*[197] (reversed on other grounds), and *Fox v. Los Angeles*.[198] It mentioned *Eugene Sand & Gravel*,[199] *Meyer v. Oklahoma*,[200] and *Paul v. Dade County*,[201] but found them unpersuasive.

g. *Houston ACLU v. Eckels* (1984). Similar events occurred near the city of Houston, Texas, at about the same time. Harris County, northwest of Houston, is divided into four precincts. In Precinct Three was a 2,700 acre tract of land leased by

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194 . 449 U.S. 39 (1980) (posting of Ten Commandments in public school classrooms did not have a secular purpose) discussed at IIIC3a.

195 . *ACLU v. Rabun County*, *supra*.

196 . 637 F.2d 924 (1980), discussed at § 6f below.

197 . 481 F. Supp. 522 (1979), discussed at § 2e above.

198 . 150 Cal. Rptr. 867, 587 P.2d 663 (1978), *supra*.

199 . 558 P.2d 338 (1976), *supra*.

200 . 496 P.2d 789 (1972), *supra*.

201 . 202 So.2d 833 (1967), *supra*.

the U.S. Army Corps of Engineers to Harris County for use as a multipurpose public park called Bear Creek Park. Precinct Three was the responsibility of Commissioner Robert Eckels, one of several elected commissioners of the county.

> Following a series of town hall meetings in 1980, Commissioner Eckels, at the insistence of some of his constituents, decided that a portion of Bear Creek Park should be devoted exclusively for use as a passive area for personal reflection and meditation. Additionally, his constituents suggested that the placement of crosses in this area would be conducive to the meditative process and Commissioner Eccles concurred....
>
> After the site was selected [by Commissioner Eckels, he] instructed the park superintendent, a county employee, to construct three Latin-style crosses on the meditation site. County employees subsequently erected the three crosses on top of a grassy knoll using some of the county's surplus or salvage building materials....
>
> At some point after the construction of the crosses, Commissioner Eckels was approached by an unspecified number of his Jewish constituents regarding the possibility of the erection of a Star of David in the meditation area. To satisfy these requests, Commissioner Eckels ordered the construction of the Star of David in the same general vicinity as the crosses. Like the three crosses, the Star of David was built with salvage building material and county labor....[202]

The Greater Houston Chapter of the American Civil Liberties Union (ACLU) wrote a letter of complaint to the Harris County attorney requesting that the symbols be removed and the county be reimbursed for the tax funds spent erecting them. Commissioner Eckels acknowledged that county funds should not have been used and reimbursed the county with his personal check for $114.96, but the County Commissioners Court took no action on the request to dismantle the symbols. Consequently, the ACLU and several individuals filed suit in January 1982, charging violation of the Establishment Clause. Commissioner Eckels denied all of the plaintiffs' allegations and asserted as an affirmative defense that removal of the symbols would represent the establishment of the religion of Humanism. After trial, decision was rendered by Judge Carol O. Bue, Jr., of the U.S. District Court for the Southern District of Texas, Houston Division, on May 22, 1984.

> Plaintiffs...called Commissioner Eckels as an adverse witness.... [He] testified that, in addition to being used as a meditation area, organized church services have been conducted at this site. Specifically Easter sunrise services have been held each Easter Sunday since the symbols were first placed in the park and there has been at least one wedding ceremony. However, the Commissioner stressed that the county has

202. *Greater Houston Chapter of the American Civil Liberties Union v. Robert Eckels*, 589 F. Supp. 222 (1984).

> never sponsored these church services but merely scheduled reservations for the orderly use of the site by various church groups.

The commissioner explained about the idea of a war memorial, which had become linked with the controversial religious symbols after the litigation had arisen. Prior to the ACLU's first communication he had obtained permission of the Commissioners Court to designate certain county park areas as memorial sites. Subsequently a contest was held by the Veterans of Foreign Wars (VFW) to select a design for a war memorial, and the location where it was to be built turned out to be 239 feet from the crosses and the Star of David, with a large shelter in between. The two elements together were characterized as the "war memorial" by defendant's witnesses—a member of the VFW, an American Legion member, the president of the Gold Star Mothers, a member of the Vietnam veterans and a general contractor who had undertaken to build the war memorial on a nonprofit basis.

The court analyzed the application of the Establishment Clause under three different standards—that of *Lemon v. Kurtzman*, of *Marsh v. Chambers*, and of *Larson v. Valente*, but since the outcome was the same under each, only the *Lemon* test—as the most comprehensive— need be described here.

> (a) Secular Purpose. Under the traditional three part Lemon test, the first inquiry is whether the challenged governmental activity or practice has a secular purpose....
>
> In the instant case, two purposes for the erection of the symbols have been articulated by Commissioner Eckels. The initial purpose advanced for the presence of the symbols was to designate a place in the park where park-users could go to meditate. The second and later avowed purpose is that the symbols were to be part of a planned war memorial to honor the country's war dead. Today, these stated purposes have merged and both are advanced by Commissioner Eckels to support a finding of secular purpose. Considered separately or together, the Court is still unable to conclude that a secular purpose exists.
>
> Perhaps the most glaring evidence of the symbols' religious purpose is a letter written by Commissioner Eckels...to the Reverend Stanley Aronson.... That letter, which, parenthetically, is devoid of any reference to the symbols as either part of a planned war memorial or as aids to meditation, evinces the Commissioner's concern about both the spread of Humanism and the preservation of our Judeo-Christian heritage. In the letter, he characterized this lawsuit as "an important step in returning to the values that America has deserted to her peril." That letter was written about seven months after the filing of this lawsuit.
>
> Further proof of the Commissioner's religious purpose in erecting the symbols is [his] own repeated admissions that the use of county funds to construct the symbols was violative of the Constitution. Obviously, the Commissioner recognized that the symbols were erected for religious purposes in order to arrive at such a conclusion. In other words, if the erection of these religious symbols truly had a secular purpose,

Commissioner Eckels would not have made such admissions and thereafter concerned himself with reimbursing the county for the cost of construction of the symbols.

The Commissioner's belated purpose of using the symbols as an integral part of a planned war memorial still fails to resurrect the symbols from the depths of constitutional infirmity. This is true because the use of religious means to achieve secular goals where nonreligious means will suffice is forbidden.[203] The removal of these four symbols, which are located over 230 feet from the planned war memorial, would in no way hinder the county's ability to honor its war dead. Indeed, the evidence reflects that the recently dedicated Vietnam War Memorial in Washington, D.C. achieves this secular purpose without the use of any religious symbols.... Moreover, there is no evidence of a history or tradition of honoring the dead with crosses or Stars of David in public parks. In sum, because the county can effectively recognize its war dead without resort to the use of these religious symbols, it must do so.

(b) Effect. The second prong of the Lemon test instructs the Court to determine whether the challenged actions of Commissioner Eckels have the primary or principal effect of either advancing or inhibiting religion. The Court can reach no other conclusion but that the symbols' primary or principal effect, like their purpose, is religious.

That the cross and the Star of David are the primary symbols for Christianity and Judaism respectively is beyond question. That religious symbols such as these may be a powerful medium for communicating messages has been recognized by the Supreme Court. In West Virginia Board of Education v. Barnette,[204] the Court noted the power of symbolism when it stated:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followers to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

The messages conveyed by these symbols are not lost when they are removed from the churches and synagogues with which they are traditionally associated. There is no danger here that the government's use of these symbols will be mistaken as merely a temporary governmental celebration of a religious holiday that has acquired some secular flavor. These permanent symbols become state symbols when placed in a public park, and they convey purely religious messages. If Commissioner Eckels is "utilizing the prestige, power, and influence" of

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203 . Citing *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), discussed at § B4 above.

204 . 319 U.S. 624 (1943), discussed at IVA6b.

his public office to bring religion into the lives of his constituents, the Establishment Clause is violated.[205]

Further, even if one strains to view the symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county. The evidence is clear that these are not the only two religions in Harris county nor the only two religions of the county's war dead. "The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion."[206] The Commissioner's overt favoritism of only two beliefs is a breach of the First Amendment's neutrality mandate, even if the symbols are considered to be aids to meditation or as part of a war memorial. To some, the Commissioner's endorsement may appear to be trivial and a tempest in a teapot. However, the power of a commissioner in county government is enormous. As the Supreme Court has stated, the "breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[207]

Finally, that the effect of the symbols' presence is religious is evidenced by what the site has been used for since the symbols were constructed. While the record is devoid of any evidence of the site being used by meditators, there is ample testimony from Commissioner Eckels that the site had been used for Easter sunrise services and at least one wedding. The symbols have had the effect of converting this site into an open air church on those occasions. There is nothing remotely secular about church worship, and the religious overtones of most weddings are undeniable [Emphasis added].

(c) Excessive Entanglement. The final inquiry under Lemon is whether the existence of the symbols in a county park fosters excessive entanglement between the county and religion.... [T]he Court is of the opinion that the entanglement here is de minimis [trifling]....

* * *

In short, under the traditional three-prong Lemon test, the Commissioner's placement of the symbols in Bear Creek Park fails prongs one and two of the tripartite test but passes part three. Thus, under this test, the symbols must be removed.

* * *

In a somewhat frenetic effort to save his actions from constitutional condemnation, defendant warns that a court-ordered removal of the symbols from Bear Creek Park would result in the Court's establishment of the non-theistic religion of Humanism.... The Court disagrees, however, with the Commissioner's contention that the removal of the symbols will result in the creation of a Humanist haven in western

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205 . The quotation is from *Walz v. Tax Commission*, 397 U.S. 664 (1970) (Harlan, J., concurring) (quoting *Abington School Dist. v. Schempp*, 374 U.S. at 307, Goldberg, J., concurring).

206 . Quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at IIIC3b(2).

207 . Quoting *Abington v. Schempp*, 374 U.S. at 255.

> Harris County.
>
> The testimony of Reverend Stevens and Reverend Schulman plainly illustrate that an affirmative belief such as Humanism is not established by saying nothing about it. On the other hand, their testimony...suggest[s] that if Commissioner Eckels was concerned about combatting the spread of Humanism, he would not want to weaken the religions that he endorses by secularizing their symbols in the park as he has done.
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> * * *
>
> In view of the foregoing, the Court concludes that as a matter of law the presence of three Latin-style crosse[s] and a Star of David in Bear Creek Park offends the Establishment Clause of the First Amendment, and, consequently, they must be removed.[208]

The *Eckels* court thus joined the California Supreme Court (*Fox v. Los Angeles, supra*) and the federal Eleventh Circuit (*ACLU v. Rabun County Chamber of Commerce*, *supra*) in moving away from the stance of the three earlier cases.

h. *Friedman v. Bernalillo County* (1985): Cross on County Seal. A permanent—and purely emblematic—use of the cross as symbol was challenged in New Mexico. On the day *after* Christmas in the same year (1985), the U.S. Court of Appeals for the Tenth Circuit delivered its decision on the constitutionality of the use of the Latin cross as a prominent element in the official seal of Bernalillo County (the jurisdiction in which Albuquerque is located), New Mexico. The seal was encircled by the names of the state and county. Within the disc of the seal appeared a Spanish motto "CON ESTA VENCEMOS," meaning "With This We Conquer," which arched over a golden Latin cross that occupied about half of the seal, "highlighted by white edging and a blaze of golden light." The cross and motto were set in a blue background of sky above four mountains of darker blue and a green plain, on which eight white sheep were standing. Use of that seal was traced back to 1925, with expanded usage since 1975—on county documents, stationery, motor vehicles and the shoulder patches of sheriff's officers—ostensibly to differentiate the county from the City of Albuquerque.

Plaintiffs, represented by a cooperating attorney of the ACLU of New Mexico, challenged the use of the cross by the county as a violation of the Establishment Clause of the First Amendment. The federal district court denied relief, and a divided panel of the Tenth Circuit affirmed. The bench of the Circuit agreed to rehear the case *en banc* and reversed in an opinion delivered by Circuit Judge James K. Logan, joined by Judges Monroe G. McKay, Stephanie K. Seymour, and John P. Moore. Dissents were filed by Judges James E. Barrett and Robert H. McWilliams, Jr.. It was not apparent how Chief Judge William J. Holloway, Jr., who wrote the panel opinion that was overturned, voted, but since he was not recorded as dissenting or abstaining, he must have been willing to acquiesce in the outcome.

Each of the courts applied the three-part *Lemon* test of "establishment," and none

208 . *ACLU v. Eckels*, *supra*.

found the cross symbol on the county seal clearly violative of the first ("secular purpose") or third ("excessive entanglement") prongs of that test. The district court and the appellate panel had also found no violation of the second prong, but the full bench disagreed on whether there was a primary or principal effect that either advanced or inhibited religion. Judge Logan wrote:

> Our view of the record convinces us that the district court's finding in favor of the county on the second prong of Lemon—the "effect" test—was clearly erroneous. "The Establishment Clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community." Lynch [v. Donnelly] O'Connor, J., concurring)....[209] "The effect prong asks whether...the practice...conveys a message of endorsement or disapproval." In other words, the existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action. This contrasts with the subjective examination under the purpose test. If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so.
>
> In addition, the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough....
>
> > "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred...."[210]
>
> * * *
>
> Some uses of the seal at issue in the case before us might not give an appearance or imprimatur of impermissible joint church-state authority. Use similar to a notary seal on county documents or a one-color depiction in which the seal and especially the cross are not easily discernible might not pass the threshold. But this is not such a case. Here the county prominently displays the seal on county vehicles and uses it to identify law enforcement officers. Plaintiffs presented highly persuasive evidence that the seal leads the average observer to the conclusion that the county government was "advertising" the Catholic faith. A rabbi testified that the seal suggested to him that there was an "officialness" about Christianity in the state and county. In addition, he pointed out that the cross had at times symbolized outright oppression and persecution of Jewish people. It cannot be denied, as one amicus brief argues, that the cross probably would have a similarly threatening connotation for a Lebanese Moslem or Northern Irish Protestant. We are compelled to draw the same conclusion with regard to the reactions of Native Americans who reside in Bernalillo County. The seal certainly does not memorialize their "Christian heritage" but rather that of those who sought to extinguish their culture and religion.

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209 . *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at § 2d above.

210 . *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), discussed at § B4 above.

> At the least, then, the seal as used conveys a strong impression to the average observer that Christianity is being endorsed. It recalls a less tolerant time and foreshadows its return. Religious minorities may not be made to feel like outsiders because of government's malicious or merely unenlightened endorsement of the majority faith. It is not decisive that defendants' heraldic and historical experts, and lay witnesses who are members of Christian sects, reacted less emotionally to the seal. It is to be expected that members of Christian sects would be more comfortable with a seal endorsing their beliefs than would individuals who adhere to different beliefs. The comfort of the majority is not the main concern of the Bill of Rights.
>
> This case is not like the creche display upheld in Lynch [v. Donnelly].[211] The religious significance of the cross, as of the creche, is undisputed; the district court correctly observed that any statement to the contrary would be disingenuous. But the seal, unlike the creche, pervades the daily lives of county residents. It is not displayed once a year for a brief period on a single parcel of government land. Rather it appears on all county paper work, on all county vehicles, even on county sheriff's uniforms. Further, Bernalillo County residents do not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents do the creche. The context of the cross and motto is quite different. The cross is the only visual element on the seal that is surrounded by rays of light. The motto may be fairly regarded as promoting the religion the cross represents. Indeed that religion seems to be embraced as the instrument by which the county "conquers."
>
> A person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious convictions might conclude that secular benefit could be obtained by becoming a Christian....
>
> In view of the seal's composition and use, the county has violated the Establishment Clause.[212]

Judge McWilliams (who had been a member of the panel) dissented, adhering to the views expressed by Chief Judge Holloway for the majority of the panel that had originally affirmed the dismissal by the district court. Judge Barrett also dissented but added his own thoughts along the lines of the Supreme Court's views in *Lynch v. Donnelly*, *supra*.

> The Court there held that the display was justified because of legitimate secular purposes, and that a dual purpose can be served in the public

211 . 465 U.S. 668, discussed at § 2d above.

212 . *Friedman v. Bernalillo County*, 781 F.2d 777 (1985).

> display of a religious symbol. Such is the case at bar.... Here, too, the display of the Christian symbol of the Cross, in combination with the secular symbols, has deep historical and cultural significance to Bernalillo County; thus, as in Lynch, the Cross and the Motto serve a dual purpose, justifying the entire seal because of legitimate secular purposes in the overall scheme.
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> * * *
>
> In the context of the seal of Bernalillo County involved in this case, it is my view that the religious symbols do not advance religion.[213]

This was the first of several challenges to Christian symbolism on official seals, some successful and some not.

i. ***American Civil Liberties Union v. St. Charles*** **(1986)**. In the early 1960s this author wrote a whimsical satire entitled "The Faith Kick" on the periodic resurgence of civil religion in which he portrayed an imaginary epidemic of pious fervor sweeping the land, one of the excesses of which—intended as a *reductio ad absurdum*—was the announcement by a volunteer fire company that it would henceforth be known as the "Christian Fire Brigade," complete with a cross atop the firehouse. *Mirabile dictu*, a phenomenon of that kind appeared in the case-law of the 1980s, not once, but twice! The first involved the Cos Cob (Connecticut) Volunteer Fire Company, which was taken to court on a complaint of violation of the Establishment Clause for the display of a three-by-five foot illuminated cross on the facade of the firehouse during the Christmas season.[214] The second was seen in the city of St. Charles, Illinois, a suburb of Chicago, where for fifteen years an illuminated Latin cross formed by lights on the 35-foot-high television aerial and 18-foot-wide crossbar had been placed atop the fire department. It was easily the tallest and most visible element in the city's elaborate display of colored lights throughout a six-acre area of the center city. Two citizens and the Illinois affiliate of the American Civil Liberties Union sued the city and its mayor and obtained a preliminary injunction from the federal district court, which was appealed to the Seventh Circuit. Judge Richard Posner delivered the opinion of the court (on June 6, 1986, for once not in the midst of the Christmas season!).

The court first struggled with the question of the plaintiffs' standing to bring suit. It concluded that only the individual plaintiffs, not the ACLU as an organization, could claim standing, and they did not have standing as taxpayers, since the firehouse television aerial was already standing and the cost of illuminating it was defrayed by voluntary contributions, not by tax funds. The court found that because one of the plaintiffs regularly detoured out of her way during the Christmas season to avoid having to see the cross, she had demonstrated an "injury" sufficient to confer standing under the Establishment Clause to challenge the practice.

> To the argument that the plaintiffs have inflicted this cost on

213 . Ibid., Barrett dissent.

214 . *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D. Conn. 1985).

> themselves and can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the lighted cross, the decision in Abington...v. Schempp[215] is a complete reply. The [Supreme] Court held that school children and their parents had standing to complain that the reading of the Bible and the recitation of the Lord's Prayer in the public school which the children attended violated the establishment clause. That the injury to the plaintiffs could have been averted by the parents' taking their children out of public school and putting them in a secular private school did not deprive the plaintiffs of standing....
>
> Behind the result in Schempp lies the practical recognition that if the injury, tenuous though it be, suffered by the involuntary audience for a display alleged to constitute an establishment of religion does not confer standing to sue, there will be no judicial remedy against establishments of religion that do not depend on public funds. Suppose the City of St. Charles conceived, proclaimed, organized—in a word, established—the "Church of St. Charles" but appropriated no moneys for its support, counting instead on voluntary contributions to pay for the acquisition and upkeep of the city's religious edifices and the salaries of its ministers, and suppose that as a result of this establishment a resident of the city, deeply offended, moved away. If he lacked standing to attack the establishment, no one would have standing. This would not matter if the Supreme Court took the view that violations of the establishment clause are not justiciable in the absence of public expenditures (after all, not all violations of the Constitution are justiciable...),[216] but quite obviously the Court does not take that view, and that is conclusive of the issue of standing in this case as it was in Schempp.[217]

The court turned to the merits, reflecting on the Supreme Court's recent interpretations of the scope of the Establishment Clause.

> Tested by the standards of these cases[218] St. Charles must lose, at least on the record compiled so far.... The plaintiffs testified—what is anyway obvious—that the Latin cross (a cross whose base stem is longer than the other three arms) is a symbol of Christianity. It is, indeed, the principal symbol of Christianity as practiced in this country today. When prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. 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 (though few Protestants would say any longer, "the sign and image of

215 . 374 U.S. 203 (n.9), discussed at IIIC2b(2).

216 . Citing *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937).

217 . *ACLU v. St. Charles*, 794 F.2d 276 (1984).

218 . *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5, and *Stone v. Graham*, 449 U.S. 39 (1980), discussed at IIIC3a.

the cross is now, as of old, in the forefront of the pagan assault upon the simplicity of the faith of God in Christ."[219] 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 clause, so the more strictly the clause is applied....

The city places almost the whole weight of its argument on Lynch v. Donnelly,[220] which allowed the town of Pawtucket, Rhode Island to include in its Christmas display a Nativity tableau (creche). The Nativity scene...is an unequivocal Christian symbol..., and the City of St. Charles argues that there is consequently no difference between including the Nativity scene in a Christmas display and including a cross. But there is a difference. Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians, as well as by believing Christians. It owes its status, in part anyway, to the fact that most Christmas symbology either is unrelated to Christianity or is no longer associated with it in popular understanding....

But the Latin cross has not lost its Christian identity, though some other crosses may have.... The Red Cross has lost the religious connotation it once had, as has the Iron Cross (a Maltese—eight-pointed—cross that is the principal German military decoration); but these are not shaped like the Latin cross.... The St. Charles cross unmistakably signifies Christianity, as the reindeer and Santa Claus, and even the star and the wreath, do not.

* * *

Even if the inclusion of the Nativity scene has some effect in promoting Christianity (which realistically speaking, it does), the Supreme Court may have felt that the effect was not great enough to warrant the mutilation of traditional Christmas displays in order to remove every trace of religion from Christmas. The "wall of separation" is not so impermeable as to require that the manger be shown empty...or the angels purged from the scene. Our culture has taken much of the Christian flavor out of Christmas. Christianity took the idea of a holiday coinciding with the winter solstice (along with much symbology) from the pagans (Romans, Persians, Celts, others...); and some would say that the pagans have had their revenge. But the establishment clause does not require that the remaining traces of Christianity be banished from public celebrations of Christmas. The spirit of Scrooge does not inform the establishment clause.

The district judge found, however—we cannot say clearly erroneously—that the cross is not a traditional Christmas symbol. None of the books we have been able to find on the history of Christmas lists "cross" as an index entry.... The reason is easy to see. The cross was a device for inflicting a slow and painful death on traitors, pirates, and other serious miscreants. The device that the Romans used to execute

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219. Ward, Henry D., *History of the Cross*, iii (London: J. Nisbet & Co.; Philadelphia: Claxton, Remsen, & Haffelfinger, 1871).

220. 465 U.S. 668 (1984), discussed at § B2f above.

> Christ, it became the symbol of death, resurrection, and salvation, not of birth—of Easter, not of Christmas. It is "the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death." III Encyclopedia Britannica 256....
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> * * *
>
> St. Charles concedes that if it lit the cross on the roof of the fire house year round, it would be violating the establishment clause; and if as the district judge found the cross is not a traditional Christmas symbol—if it is the symbol not of Christmas but of Christianity—then it cannot gain the shelter of the lawful Christmas displays that adjoin it. The evidence indicates that the cross occupies a highly prominent place in the display, that it is integrated with the other components of the display only in the sense that it is one more lighted structure, and that it is understood to signify public support for Christianity rather than celebration of the Christmas season....
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> * * *
>
> As for irreparable harm to the defendants [if the preliminary injunction is granted], this may well be zero. Their main argument on the merits is that the St. Charles cross is just another Christmas symbol. If so it can be replaced, with no loss of value—entertainment value, tourist-attracting value—by a star or a reindeer or a Santa Claus. The truth of course is that the principal harm from the injunction is to those Christian residents of St. Charles who want to see the prime symbol of Christianity prominently displayed.... It may seem therefore that the cross is either a secular decoration, in which event there are many equally or more decorative substitutes at hand, or an attempt to establish Christianity as the officially recognized religion of St. Charles, and that whichever it is the defendants have not shown that enjoining it will cause irreparable harm....
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> * * *
>
> The record shows that the owner of a private building near the firehouse is ready, willing, and able to display a similar cross on his building. This substitution will give the Christian residents of St. Charles all the lawful satisfaction they derive from the cross on the firehouse. The only thing they will not get is the additional, but unlawful, satisfaction of knowing that the city government is using public property to promote Christianity.[221]

The court in *Libin v. Greenwich* reached a similar conclusion after determining that the fire company there, though a "private" organization of volunteers, partook of the element of "state action" because it served a public function delegated to it by the town government, and therefore its display of the religious symbol implicated the Establishment Clause.[222]

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221 . *ACLU v. St. Charles*, *supra*.

222 . *Libin v. Greenwich, supra*.

j. *Gonzales v. North Township of Lake County* (1993). Not just a cross, but a huge crucifix, came to the attention of the Seventh Circuit Court of Appeals in 1993. It was erected in Wicker Memorial Park near Hammond, Indiana, in 1955, "as a `memorial'... ostensibly to honor the heroic deeds of servicemen who gave their life in battle."[223] The memorial erected for that purpose was a crucifix 18 feet in height, on a cross made of wood, with a terra cotta figure of Jesus nailed to it 6 feet in height and with arms extended 6 feet across. It was erected by the Knights of Columbus, a fraternal organization of Roman Catholic men. The court quoted an article appearing in the *Chicago Tribune* just before the crucifix was dedicated:

> [I]t was one of five statutes that the Knights intended to erect near busy intersections throughout Northern Indiana. The article quoted a Knights spokesperson who stated that "the purpose of erecting the crucifixes was to remind motorists of the importance of religion in everyday life and `to make Lake County...the most God-fearing area in the mid-west.'"

This expression of pious-patriotic fervor was not universally accepted, even among other Christian groups. Several ministerial associations in the area protested the "memorial" and sought to have it removed because (a) it violated "the revered American principle of separation of Church and State," and (b) it was a symbol identified mainly with the Roman Catholic Church. In response to this protest, the Township trustee announced that in his opinion the crucifix was "not a symbol of one religion but of all Christianity." (The court quoted this comment and added, "Apparently the trustee was unaware of the fact that religions other than Christianity exist.")

For many years, there was a dedicatory plaque affixed to the base of the crucifix with the inscription: "For God and Country. Dedicated to the memory of men and women whose love for this nation enabled them to make the supreme sacrifice of life itself in its defense." The plaque was obscured by shrubs surrounding the base of the statue, and in 1983 (five months after suit was filed) Park officials discovered that the plaque had disappeared but did not replace it. A similar neglect befell the lawsuit itself. "This case has languished for years. It was filed in the district court in June 1983, where it remained until September 1992 when an appeal was filed in this court [the Seventh Circuit].... The end of this protracted litigation should be at hand."
Decision was rendered *per* Chief Judge William J. Bauer for a panel that included Judge Ilana Diamond Rovner and Senior Judge William H. Timbers (of the Second Circuit, sitting by designation), to which there was no dissent.

> We must first determine whether the challenged symbol is a religious one. The district court struck one of the plaintiffs' documents...that identified the crucifix as a religious symbol. But we are masters of the obvious, and we know that the crucifix is a Christian symbol.... In fact, the crucifix is arguably the quintessential Christian symbol because it

223 . *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (CA7 1993).

depicts Christ's death on the cross and recalls thoughts of his passion and death.

* * *

In this case, the purpose behind the display of the Wicker Park crucifix arises from religious stirrings.... The record illustrates that the Knights' goal was to spread the Christian message throughout Lake County, Indiana. The historical documents, as well as the nature of the monument, convey the unassailable impression that memorializing the crucifix was simply a means to this end. The Township's claim that the war memorial purpose is the primary reason the crucifix is displayed is unpersuasive. We can imagine no secular purpose served by a crucifix that is free from any designation or memorialization. Moreover, the Township has offered no evidence to show that the crucifix has ever been used for memorial purposes. We believe the evidence contradicts the Township's statement of purpose and that, indeed, the religious symbol here was not intended to, and does not now, serve a secular purpose.... We find that Lemon[224] does not permit a municipality to exempt a[n] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to our honored dead.[225]...

* * *

In this case, the crucifix has stood for nearly forty years, and although the Township does not argue that the duration of the display gives the crucifix landmark or cultural status, it does argue that the duration of its display reinforces its secular effect. It claims that "the very essence" of a memorial is its permanency. We believe this argument is much like the one advanced in Carpenter [supra]—the longer the violation, the less violative it becomes. The longer the cross is displayed in the Park, the more the effect is to memorialize rather than sermonize. We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation....

We believe that the crucifix's presence in the Park conveys the primary message of the Township's endorsement of Christianity.... [W]e believe that the crucifix does not convey any secular message, whether remote, indirect, or incidental. The only way to receive a secular message before 1983 was to look behind the shrubbery at the base of the crucifix to find the plaque that designated the statue as a war memorial. Since the plaque's disappearance there is no chance that anyone without special knowledge of the curifix's history would know that it was purportedly intended to memorialize fallen soldiers.

The crucifix in Wicker Park does not bear secular trappings sufficient to neutralize its religious message. It is not seasonally displayed in conjunction with other holiday symbols. It does not have historical

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224 . Reference is to *Lemon v Kurtzman*, 402 U.S. 602 (1971), discussed at IIID5.

225 . Rejecting the reasoning to the contrary of *Eugene Sand & Gravel v. City of Eugene*, 558 P.2d 338 (1976), discussed at § 3d above; For similar rejections, see *Jewish War Veterns v. U.S.*, 695 F.Supp., 3 (D.D.C. 1988); and *Carpenter v. City & County of San Francisco*, 803 F.Supp. 337 (N.D.Cal. 1992).

> significance [apart from its religious significance]. But, it is permanent government speech in a prominent public area that endorses religion, and violates the Establishment Clause.[226]

Thus did the Seventh Circuit cut through a lot of persiflage to reach the essence of the merits, despite efforts to camouflage the crucifix as a secular memorial, landmark or time-neutralized accretion.

k. The Supreme Court Approves a Cross: *Capitol Square Review Board v. Pinette* (1995). The time came, however, when the Supreme Court of the United States did review a case involving the placement of a cross on a public square, but the majority chose to view it under the "equal access" principle rather than the endorsement rubric. The justices splintered among five opinions, including two dissents.

The scene of the contested occurrence was a ten-acre state-owned plaza surrounding the capitol building in Columbus, Ohio. "For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious,"[227] which use was authorized by statute, and the Capitol Square Review and Advisory Board was authorized to regulate and supervise public access to that area.

> In November 1993, after reversing an initial decision to ban unattended holiday displays from the square during December 1993, the Board authorized the State to put up its annual Christmas tree. On November 29, 1993, the Board granted a rabbi's application to erect a menorah. That same day, the Board received an application from...the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993. The Board denied that application on December 3....

The Ku Klux Klan took the matter to federal district court, which ruled that the square was a traditional public forum open to all without any policy against free-standing displays, that the Klan's cross was a private expression entitled to First Amendment protection, and that the display could not be considered an endorsement of Christianity by the state. The Sixth Circuit Court of Appeals affirmed that ruling, stating, "The potency of religious speech is not a constitutional infirmity; the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum. Zealots have First Amendment rights too." Its holding was consonant with that of the Eleventh Circuit in a similar case.[228] Two other circuit courts had reached an opposite conclusion,[229] so the Supreme Court agreed to hear

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226. *Gonzales v. North Township, supra.*

227. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 757 (1995).

228. *Capitol Square v. Pinette*, 30 F.3d 675 (CA 6, 1994); *Chabad-Lubavitch v. Miller*, 5 F.3d 1383 (CA 11, 1993).

229. *Chabad-Lubavitch v. Burlington*, 936 F.2d 109 (CA2, 1991), cert. denied, 505 U.S. 1218 (1992); *Kaplan v. Burlington*, 891 F.2d 1024 (CA2, 1989), cert. denied, 496 U.S. 926 (1990); *Smith*

the case to resolve the division in the circuits, examining only the question whether the cross display offended the Establishment Clause.

(1) The Court's Opinion. The judgment of the Court was announced by Justice Scalia and an opinion for the Court on part of the discussion.

> [The Ku Klux Klan's] religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.[230] Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince....
>
> It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. If the former, a State's right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive content only if such restriction is necessary, and narrowly drawn, to serve a compelling state interest....
>
> Petitioners [the Board] do not dispute that respondents [the Klan], in displaying their cross, were engaging in constitutionally protected expression. They do contend that the constitutional protection does not extend to the length of permitting that expression to be made on Capitol Square.... [They] advance a single justification for closing Capitol Square to [the] cross: the State's interest in avoiding official endorsement of Christianity, as required by the Establishment Clause.
>
> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Whether that interest is implicated here, however, is a different question. And we do not write on a blank slate in answering it. We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content.
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> * * *
>
> Quite obviously, the factors we considered determinative in Lamb's Chapel and Widmar exist here as well. The State did not sponsor [the Klan's] expression, [it] was made on government property that had been

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v. County of Albemarle, 895 F.2d 953 (CA 4, 1990), cert. denied, 498 U.S. 823 (1990).

230. Citing *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993), discussed at IIIE3h; *Board of Ed. v. Mergens*, 496 U.S. 226 (1990), discussed at IIIE3g; *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed at IIIE3b; and *Heffron v. ISKCON*, 452 U.S. 640 (1981), discussed at IIC5a.

> opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.[231]

So ended the opinion of the Court, apparently holding that the case was controlled by *Lamb's Chapel* and *Widmar*. That opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, David Souter, Clarence Thomas and Stephen Breyer, who also concurred in the judgment affirming the lower courts' decision(s).

(2) The Plurality Opinion. In the next portion of his opinion, Justice Scalia lost Justices O'Connor, Souter and Breyer and retained only Chief Justice Rehnquist and Justices Kennedy and Thomas, meaning it did not represent a majority and thus was not the opinion of the Court. It dealt with whether the instant case was distinguishable from *Lamb's Chapel* and *Widmar* because the cross was placed so near the "seat of government," which would imply that the cross was approved by the state. That was the question that led to a sharp division in the court's majority, and it revolved around the "endorsement" test that Justice O'Connor had suggested in *Lynch v. Donnelly* and the court had adopted (at least for purposes of weighing the use of religious symbols by government) in *Allegheny County v. ACLU*.[232]

> [The Board] urge[s] us to apply the so-called "endorsement" test and to find that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional.
>
> We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that [the Board urges] upon us. "Endorsement" connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy.... The test [the Board] propose[s], which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.
>
> ...In Allegheny County we held that the display of a privately-sponsored creche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the County was favoring sectarian religious expression.... In Lynch we held that a city's display of a creche did not violate the Establishment Clause because, in context, the display did not endorse religion. The opinion does assume, as [the Board contends], that the government's use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief. But the case neither holds

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231. *Capitol Square v. Pinette*, *supra*.

232. *Lynch*, 465 U.S. 668 (1984), discussed at § 2d above; *Allegheny*, 492 U.S. 573 (1989), discussed at § 2i above.

nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional.

[The Board argues] that absence of perceived endorsement was material in Lamb's Chapel.... We did state in Lamb's Chapel that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed." But that conclusion was not the result of empirical investigation; it followed directly, we thought, from the fact that the forum was open and the religious activity privately sponsored. It is significant that we referred only to what would be thought by "the community"—not by outsiders or individual members of the community uninformed about the school's practice. Surely some of the latter...might leap to the erroneous conclusion of state endorsement. But, we in effect said, given on open forum and private sponsorship, erroneous conclusions do not count....

What distinguishes Allegheny County and the dictum in Lynch from Widmar and Lamb's Chapel is the difference between government speech and private speech.... [The Board asserts], in effect, that that distinction disappears when the private speech is conducted too close to the symbols of government. But that, of course, must be merely a subpart of a more general principle: that the distinction disappears whenever private speech can be mistaken for governmental speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.

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

* * *

Since [this] "transferred endorsement" principle cannot possibly be restricted to squares in front of state capitols, the Establishment Clause regime that it would usher in is most unappealing. To require (and permit) access by a religious group in Lamb's Chapel, it was sufficient that the group's activity was not in fact government sponsored, that the event was open to the public, and that the benefit of the facilities was shared by various organizations. [The proposed] rule would require school districts adopting similar policies in the future to guess whether some undetermined critical mass of the community might nonetheless perceive the district to be adopting a religious viewpoint. Similarly, state universities would be forced to reassess our statement that "an open forum in a public university does not confer any imprimatur of state

> approval on religious sects or practices"[233] Whether it does would henceforth depend upon immediate appearances. Policy makers would find themselves in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other. Every proposed act of private, religious expression in a public forum would force officials to weigh a host of imponderables. How close to government is too close? What kind of building, and in what context, symbolizes state authority?...
>
> If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such. That would be a content-neutral "manner" restriction which is assuredly constitutional. But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.[234]

Consideration of portions of the plurality opinion that responded to other opinions in this case is deferred until after those opinions have been discussed.

(3) Justice Thomas' Opinion. The Court's only black justice had some comments to express on the sponsorship of the cross in this case that were not particularly pertinent to the legal issues at stake, but which needed to be said by someone.

> [T]he fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one.
>
> There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross-burning.
>
> * * *
>
> [T]o the extent that the Klan has a message to communicate in Capitol Square, it is a political one.... The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate. In my mind, this suggests that this case may not have truly involved the Establishment Clause, although I agree with the Court's disposition because of the manner in which the case has come before us. In the end, there may be much less here than meets the eye.[235]

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233 . *Widmar, supra*, at 274.

234 . *Capitol Square, supra,* plurality opinion.

235 . Ibid., Thomas concurrence.

(4) Justice Souter's Opinion. Though reported following Justice O'Connor's opinion because of her higher seniority on the Court, Justice Souter's opinion is discussed here in the reverse order because it provided the basis for some of Justice O'Connor's comments. Justice Souter lifted up the consideration that "unattended" displays might not enjoy as full a free-speech protection as those expressions offered by real live persons present and speaking. (Those were not his exact words, but they suggest the basis for legitimate time, place and manner regulations of private speech in public forums.)

> I...want to note specifically my agreement with the Court's suggestion that the State of Ohio could ban all unattended private displays on Capitol Square if it so desired. The fact that the Capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures....
>
> Otherwise, however, I limit my concurrence to the judgment. Although I agree in the end that, in the circumstances of this case, [the Board] erred in denying the Klan's application for a permit to erect a cross on Capitol Square, my analysis of the Establishment Clause issue differs from Justice Scalia's, and I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.
>
> The plurality's opinion declines to apply the endorsement test to the Board's action, in favor of a per se rule: religious expression cannot violate the Establishment Clause where it (1) is private and (2) occurs in a public forum, even if a reasonable observer would see the expression as indicating state endorsement. This per se rule would be an exception to the endorsement test, not previously recognized and out of square with our precedents.
>
> My disagreement with the plurality on the law may receive some focus from attention to a matter of straight fact that we see alike: in some circumstances an intelligent observer may mistake private, unattended religious displays in a public forum for governmental speech endorsing religion....
>
> An observer need not be "obtuse,"[236] to presume that an unattended display on government land in a place of prominence in front of a government building either belongs to the government, represents government speech, or enjoys its location because of government endorsement of its message. Capitol Square, for example, is the site of a number of unattended displays owned or sponsored by the government, some permanent (statues), some temporary (such as the Christmas tree and a "Seasons Greetings" banner), and some in between (flags, which are, presumably, taken down and put up from time to time).... Given the domination of the square by the government's own displays, one would

236. Quoting *Doe v. Small*, 964 F.2d 611, 630 (CA7, 1992) (Easterbrook, J., concurring).

not be a dimwit as a matter of law to think that an unattended religious display there was endorsed by the government, even though the square has also been the site of three privately sponsored, unattended displays over the years (a menorah, a United Way "thermometer," and some artisans' booths left overnight during an arts festival)..., and even though the square meets the legal definition of a public forum.... When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.

In sum, I do not understand that I am at odds with the plurality when I assume that in some circumstances an intelligent observer would reasonably perceive private religious expression in a public forum to imply the government's endorsement of religion. My disagreement with the plurality is simply that I would attribute these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis under our precedents, where I believe that such reasonable perceptions matter.

In Allegheny County, the Court alluded to two elements of the analytical framework supplied by Lemon v. Kurtzman[237] by asking "whether the challenged governmental practice either has the purpose or effect of `endorsing' religion." We said that "the prohibition against governmental endorsement of religion `preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'"[238]...

Allegheny County's endorsement test cannot be dismissed, as Justice Scalia suggests, as applying only when there is an allegation that the Establishment Clause has been violated through "expression by the government itself" or "government action... discriminat[ing] in favor of private religious expression." Such a distinction would, in all but a handful of cases, make meaningless the "effect-of-endorsing" part of Allegheny County's test. Effects matter to the Establishment Clause, and one principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer.... If a reasonable observer would perceive a religious display in a government forum as government speech endorsing religion, then the display has made "religion relevant, in...public perception, to status in the political community." Unless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize public perception of endorsement as a harm only in that subclass of cases in which the government owns the display....

* * *

237. 403 U.S. 602 (1971), discussed at IIID5, setting forth the three-part test of Establishment: (1) secular purpose, (2) primary effect that neither advances nor hinders religion, and (3) nonfostering of excessive entanglement between government and religion.

238. *Allegheny County*, quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment), discussed at IIIC2d(8).

Even if precedent and practice were otherwise, however, and there were an open question about applying the endorsement test to private speech in public forums, I would apply it in preference to the plurality's view, which creates a serious loophole in the protection provided by the endorsement test. In Justice Scalia's view, as I understand it, the Establishment Clause is violated in a public forum only when the government itself intentionally endorses religion or willfully "foster[s]" a misperception of endorsement in the forum, or when it "manipulates" the public forum "in such a manner that only certain religious groups take advantage of it." If the list of forbidden acts is truly this short, then governmental bodies and officials are left with generous scope to encourage a multiplicity of religious speakers to erect displays in public forums. As long as the governmental entity does not "manipulat[e]" the forum in such a way as to exclude all other speech, the plurality's opinion would seem to invite such government encouragement, even when the result will be the domination of the forum by religious displays and religious speakers. By allowing government to encourage what it can not do on its own, the proposed per se rule would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself.

Something of the sort, in fact, may have happened here. Immediately after the District Court issued the injunction ordering [the Board] to grant the Klan's permit, a local church council applied for a permit, apparently for the purpose of overwhelming the Klan's cross with other crosses. The council proposed to invite all local churches to erect crosses, and the Board granted "blanket permission" for "all churches friendly to or affiliated with" the council to do so. The end result was that a part of the square was strewn with crosses, and while the effect in this case may have provided more embarrassment than endorsement, the opportunity for the latter is clear.

As for the specifics of this case, one must admit that a number of facts known to the Board, or reasonably anticipated, weighed in favor of upholding its denial of the [Klan's] permit. For example, the Latin cross the Klan sought to erect is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point. It was displayed immediately in front of the Ohio Statehouse, with the government's flags flying nearby and the government's statues close at hand. For much of the time the cross was supposed to stand on the square, it would have been the only private display on the public plot (the menorah's permit expired several days before the cross actually went up). There was nothing else on the Statehouse lawn that would have suggested a forum open to any and all private, unattended religious displays.

Based on these and other factors, the Board was understandably concerned about a possible Establishment Clause violation if it had granted the permit. But a flat denial of the Klan's application was not the Board's only option to protect against the appearance of endorsement,

> and the Board was required to find its most "narrowly drawn" alternative. Either of two possibilities would have been better suited to this situation.... The Board...could have granted the application subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross was there to "demonstrat[e] the government's allegiance to, or endorsement of, Christian faith." In the alternative, the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.
>
> With such alternatives available, the Board cannot claim that its flat denial was a narrowly tailored response to the Klan's permit application and thus cannot rely on that denial as necessary to ensure that the State did not "appea[r] to take a position on questions of religious belief." For these reasons, I concur in the judgment.[239]

Justice O'Connor and Justice Breyer joined Justice Souter's opinion. Accompanying Justice Souter's opinion were two photographs of the Statehouse lawn showing a plethora of crosses of various sizes and shapes in addition to a Christmas tree.

(5) Justice O'Connor's Opinion. Justice O'Connor came to the defense of her "endorsement" test and was joined therein by Justices Souter and Breyer.

> Despite the messages of bigotry and racism that may be conveyed along with religious connotations by the display of a Ku Klux Klan cross, at bottom this case must be understood as it has been presented to us—as a case about private religious expression and whether the State's relationship to it violates the Establishment Clause. In my view, "the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds...,"[240] even where a neutral state policy toward private religious speech in a public forum is at issue. Accordingly, I see no necessity to carve out, as the plurality opinion would today, an exception to the endorsement test for the public forum context....
>
> For the reasons given by Justice Souter, whose opinion I also join, I conclude on the facts of this case that there is "no realistic danger that the community would think that the [State] was endorsing religion or any particular creed"[241] by granting [the Klan] a permit to erect their temporary cross on Capitol Square. I write separately, however, to emphasize that, because it seeks to identify those situations in which government makes "adherence to a religion relevant...to a person's

239 . *Capitol Square, supra*, Souter opinion concurring in part and concurring in the judgment.

240 . *Allegheny County v. ACLU, supra*, (O'Connor, J., concurring in part and concurring in the judgment).

241 . *Lamb's Chapel, supra*.

standing in the political community,"[242] the endorsement test necessarily focuses upon the perception of a reasonable, informed observer.

* * *

While the plurality would limit application of the endorsement test to "expressions by the government itself,... or else government action alleged to discriminate in favor of private religious expression or activity," I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism....

* * *

To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community. This factor is important because, as Justice Souter makes clear, certain aspects of the cross display in this case arguably intimate government approval of [the Klan's] private religious message—particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings....

Our agreement as to the outcome of this case, however, cannot mask the fact that I part company with the plurality on a fundamental point: I disagree that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with State endorsement." On the contrary, when the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid. The plurality today takes an exceedingly narrow view of the Establishment Clause that is out of step both with the Court's prior cases and with well-established notions of what the Constitution requires. The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form.

Where the government's operation of a public forum has the effect of endorsing religion, even if the government actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of "transferred endorsement" or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at

242 . *Allegheny County, supra,* quoting *Lynch, supra* (O'Connor, J., concurring).

issue, actually convey a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.... Other circumstances may produce the same effect—whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise....

Conducting the review of government action required by the Establishment Clause is always a sensitive matter.... Today, Justice Stevens reaches a different conclusion regarding whether the Board's decision...constituted an impermissible endorsement of the cross' religious message. Yet I believe it is important to note that we have not simply arrived at divergent results after conducting the same analysis. Our fundamental point of departure, it appears, concerns the knowledge that is properly attributed to the test's "reasonable observer [who] evaluates whether a challenged governmental practice conveys a message of endorsement of religion." In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by the dissent.

Because an Establishment Clause violation must be moored in government action of some sort, and because our concern is with the political community writ large..., the endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of a faith to which they do not subscribe. Indeed, to avoid "entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens,"[243] our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry.

I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passerby would perceive a governmental endorsement thereof. In my view, however, the endorsement test creates a more collective standard to gauge "the `objective' meaning of the [government's] statement in the community."[244] In this respect, the applicable observer is similar to the "reasonable person" in tort law, who is "not to be identified with any ordinary individual, who might occasionally do unreasonable things" but is "rather a personification of a community ideal of reasonable

243 . Ibid., O'Connor opinion.

244 . *Lynch, supra*, O'Connor opinion.

behavior, determined by the [collective] social judgment."[245]... Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent"[246] nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: there is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.... Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display. Today's proponents of the endorsement test all agree that we should attribute to the observer knowledge that the cross is a religious symbol, that Capitol Square is owned by the State, and that the large building nearby is the seat of government. In my view, our hypothetical observer also should know the general history of the place where the cross is displayed. Indeed, the fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Ohio Statehouse.... This approach does not require us to assume an "`ultra-reasonable observer' who understands the vagaries of this Court's First Amendment jurisprudence." An informed member of the community will know how the public space in question has been used in the past—and it is that fact, not that the space may meet the legal definition of a public forum, which is relevant to the endorsement inquiry.

The dissent's property-based argument fails to give sufficient weight to the fact that the cross at issue here was displayed in a forum traditionally open to the public.... To the extent there is a presumption that "structures on government property—and, in particular, in front of buildings plainly identified with the State—imply state approval of their message,"[247] that presumption can be rebutted where the property at issue is a forum historically available for private expression. The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer.

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245. Keeton, W., et al. *Prosser & Keeton on The Law of Torts*, 5th ed. (St. Paul: West, 1984), p. 175.

246. Quoting Tribe, L., *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), p. 1293.

247. Quoting Justice Stevens' dissent in the instant case.

> In this case, I believe, the reasonable observer would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct.... Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit..., and the content of which the Board could have defined as it deemed necessary as a condition of granting the Klan's application. On the facts of this case, therefore, I conclude that the reasonable observer would not interpret the State's tolerance of the Klan's private religious display in Capitol Square as an endorsement of religion.... [T]he State has not presented a compelling justification for denying...the permit.[248]

Thus did Justice O'Connor seek to characterize the "reasonable observer" who would know enough more about the setting of the contested display than the "casual passerby" not to make hasty or prejudicial judgments of state sponsorship. Her effort seemed somewhat strained compared to the more straightforward analysis of the dissent.

(6) Justice Stevens' Dissent. The most senior associate justice did not join any of the majority's opinion but wrote a vehement dissent to the whole idea of religious symbols on government property.

> 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 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.
>
> 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 placing a "symbol for the Jewish belief" in the Square. 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

248 . *Capitol Square, supra*, O'Connor opinion.

disrespect for a particular religious sect. Under the first interpretation, the cross is plainly a religious symbol. 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. This principle is no less binding if the anti-religious message is also a bigoted message....

Thus, while this unattended, free-standing 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 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'"[249]... 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." It is especially important to take account of the perspective of a reasonable observer who may not share the 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. 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.

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.... Like other speakers, a person who places a sign on her own property has the autonomy to choose the content of her own message. Thus, the location of a stationary, unattended sign generally is both a component of the message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location.

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 government

249. *Allegheny County, supra*, quoting *Lynch, supra*, O'Connor opinion.

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 of 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 redress of grievances—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 freestanding, 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 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. Today the Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum.... The First Amendment affords protection to a basic liberty: "the freedom of speech" that an individual may exercise when using the public streets and parks. 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....

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 message with which the state does not wish to be identified....

* * *

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, 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 message of endorsement as if she had erected it herself.

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 existence of a "public forum" in itself cannot dispel the message of endorsement. A contrary argument would assume an "ultra-reasonable observer" 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;" 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. But the plurality's 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. In my opinion, both displays are equally objectionable. Moreover, the fact that the State has placed its stamp 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, as well as the official endorsement of religion in preference to nonreligion....

The record identifies two other examples of freestanding 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." Both of these 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 adorn the Capitol grounds. 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" 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....
>
> 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. Our Constitution wisely seeks to minimize such strife by forbidding state-endorsed religious activity.[250]

Justice Stevens thought it appropriate to try to remind the other members of the Court of the values served by the Establishment Clause, so he reproduced an extensive quotation from Justice Black's majority opinion in *Everson v. Board of Education* (pp. 8-10, 15, 16), including the famous no-aid formula that the Court has reiterated verbatim four times since, plus a paragraph from Justice Jackson's dissent in the same case. He observed that if placement of symbols on the lawn of the state capitol conveyed no implication of state favor or endorsement, then why was it considered so important to get one's symbols up there? That was probably the most cogent observation of all the creative writing that went into this tangled discussion.

(7) Justice Ginsberg's Dissent. Justice Ginsberg did not join Justice Stevens' dissent, but wrote a brief one of her own.

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250. *Capitol Square, supra*, Stevens dissent.

> We confront here, as Justice O'Connor and Justice Souter point out, a large Latin cross that stood alone and unattended in close proximity to Ohio's Statehouse.... Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.
>
> If the aim of the Establishment Clause is genuinely to uncouple government from church, a State may not permit, and a court may not order, a display of this character.[251]

Curiously, her conclusion was more consonant with Justice Stevens' than with Justice O'Connor's or Justice Souter's, but she gave no credit to Justice Stevens, though she cited the *Everson* decision as the source for her reference to the "aim of the Establishment Clause," and also cited "Sullivan, Religion and Liberal Democracy"[252]—a secularist article that makes Justice Stevens seem almost an accommodationist in comparison.

A significant new thought emerged in this debate that had scarcely been intimated before: all the opinions focused to some degree on the fact that the display of the cross was "unattended," implied that that fact might attenuate the free-speech, public-forum rationale, and considered that a limitation on "unattended" symbols might be a legitimate "time, place and manner" restriction on a public forum—a clear invitation for the State of Ohio and other proprietors of such forums to reduce the area of turbulence by confining them to actual, personally present speakers.

l. Recapitulation of Cases Involving Crosses. In this sequence of cases involving civic use of crosses over twenty years, a significant trend is observable representing a 180 degree reversal of the courts' original inclinations. In *Paul v. Dade County* (1967) and *Meyer v. Oklahoma City* (1972), the courts declined to intervene in the municipal displays of Latin crosses, and the Oregon case, though starting out to disallow the cross [*Lowe v. Eugene* (1969, 1970)], ended with acquiescence in the same cross when it was characterized as a "war memorial" [*Eugene Sand & Gravel v. City of Eugene* (1976)]. Beginning with *Fox v. Los Angeles* (1978) and strengthening with *ACLU v. Rabun County* (1982) and *Houston ACLU v. Eckels* (1984), the courts shifted to a general disapprobation of *crosses* as civic ornaments in *Friedman v. Bernalillo County* (1985), *Libin v. Greenwich* (1985) and *ACLU v. St. Charles* (1986)—despite the Supreme Court's favorable holding on *creches* in 1984 (*Lynch v. Donnelly*). So although creches might be *in* (and even that was doubtful, as noted in §§ 2h above), crosses seemed to be generally *out*— at least until the Supreme Court muddied the waters with its "equal access" approach in *Pinette*.

The Supreme Court of the United States did not take a case involving a cross until 1995, but it did advert to the Latin cross in *dicta* in *Allegheny County v. ACLU*,

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251 . Ibid., Ginsberg dissent.

252 . Sullivan, Kathleen, "Religion and Liberal Democracy," 59 *U. Chi. L. Rev*. 195 (1992).

although no use of a cross was before the Court in that case. Oddly, both the majority and the minority referred to the use of the cross under government auspices as a clearly impermissible symbol.

Justice Blackmun, writing for the Court, said, "It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase."[253]

Justice Kennedy, writing for the minority and contending that virtually any religious symbol in a seasonal display on governmental premises would be constitutional, thought of a clearly limiting case that even he would find impermissible: "Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall...because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[254]

Thus all nine justices had suggested in dicta that symbolic use of the Latin cross by governmental entities would not find favor in the highest court of the land. But when the Court finally did confront such a case, it splintered in the tension between "equal access" and "endorsement," with the result that all factions of the Court rallied to the possibility that the dilemma could be avoided by *banning all "unattended" private displays* from a public forum.

4. Governmental Proprietaries in Religion: Menorahs

As a counterpoint to the proliferation of civic creches and crosses, a third sort of aspirant to municipal display began to appear in the 1980s. An Orthodox Jewish group, the Lubavitcher Hasidim, through its various branches across the country, initiated a campaign to get the symbols of their faith right up there on the premises of city halls alongside those of the *goyim*. The symbol chosen was the *menorah*, a nine-branched candlestick commemorative of a miracle celebrated on the Judaic holiday of Hanukkah, as described in *Allegheny County v. ACLU, supra.* That holiday and its symbol were apparently chosen because their observance fortuitously coincided—approximately—with the Christmas season. (Since the dates of the eight-day period of Hanukkah are determined—like Easter—by the lunar calendar, their incidence may vary considerably from the solar calendar that brings Christmas on December 25 every year.)

This zeal for civic recognition was not greeted with enthusiasm by some other branches of Judaism, which considered that it distorted the Judaic faith by elevating a

253. *Allegheny County v. ACLU, supra,* 492 U.S. 573 (1989), Blackmun opinion, between n. 48 and n. 49.

254. Ibid., Kennedy opinion, citing *Friedman v. Bernalillo County*, 781 F.2d 777 (CA10 1985) (*en banc*); and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (CA11 1983), discussed at §§ h and f above, respectively.

minor observance into a major one and assimilating it to the Christian (and secular) patterns of Christmas observance. Some of them also considered that placing a menorah on the civic green was no more appropriate than placing Christian symbols there and violated the separation of church and state.

The menorah has made its appearance in some of the cases already considered—*Allegheny County, supra,* and *Pinette, supra*—in the latter instance inspiring the Ku Klux Klan to erect its cross as a countermeasure. But the menorah usage took on in the law a life of its own independent of creches and crosses, in which emerged again the tension between the anti-state-endorsement principle of the Establishment Clause and the equal-access/public-forum principle of the Free Speech Clause. When is a symbol of religious faith an expression of governmental favoritism to one religion at the expense of others, and when is it a private expression entitled to equal access to a public forum used by other private speakers? As was apparent in *Allegheny County* and *Pinette*, these questions were disputed on grounds of proximity to "the seat of government" and whether solitary, unattended symbols on governmental premises could be fairly viewed as "private" speech.

a. *Kaplan v. City of Burlington* (1989). In the northern reaches of Vermont, the menorah made its appearance in 1986 in City Hall Park, a plot of two acres in front of the seat of city government of Burlington. With the permission of the City, a menorah 16 feet tall and 12 feet wide was erected bearing a sign that stated "Happy Channukah" and explained that the symbol was "Sponsored by: Lubavitch of Vermont." On December 28, 1986, the menorah was lit in a ceremony following religious customs and attended by over 100 people. The same thing occurred in 1987, and suit was brought in June 1988, by a Jewish attorney named Kaplan, a rabbi of Reform Judaism and a Unitarian minister to prevent further permits for display of the menorah. Both the rabbi and the minister offered the use of the front lawns of their respective religious institutions as prominent private sites for the display of the menorah. The federal district court, per Franklin S. Billings, Jr., J., ruled (on December 8, 1988) in favor of the city, holding that the menorah did not violate the Establishment Clause.[255] That result was appealed to the Second Circuit Court of Appeals, where decision was rendered, with the admirable timing for which these occasions are noted, on December 12, 1989, by Judge Wilfred Feinberg for himself and Judge Edward Lumbard.

> We are called upon once again to consider the constitutionality of the unattended, solitary display on public property of an obviously religious symbol during the Christmas holiday season. This time, however, the symbol on display is not a creche, as it was when this court last wrestled with the issue,[256] but a menorah....
>
> There has been a limited history of religious activities in the Park. In the period 1982-1988, the City issued some 13 permits...that suggested religious activity in the Park [naming them].... However, none of these

255. 700 F.Supp. 1315 (1988).

256. Citing *McCreary v. Stone*, 739 F.2d 716 (CA2 1984), aff'd by an equally divided court *sub nom. Scarsdale v. McCreary*, 471 U.S. 83 (1985), discussed at § 2e above.

activities involved the use of the Park for as lengthy a period as that at issue here. Also, none of the permits involved display in the Park of an unattended, solitary religious symbol. Indeed, the Park has never before been used for this purpose.

The Vermont Lubavitch group is associated with a larger group of Orthodox Jews known as the Chabad Lubavitch, under the spiritual guidance of a respected rabbi who lives in Brooklyn, New York. The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism.... [T]he Lubavitch movement advocates display of menorahs all over the country....

We are aware that [the city] would have a much stronger case were it not for Allegheny, because of our own court's decision five years ago in McCreary.... However, for reasons set forth below, we believe that McCreary is not dispositive here....

As we see it, Allegheny teaches that the display of a menorah on government property in this case conveys a message of government endorsement of religion in violation of the Establishment Clause.... The facts here with regard to the menorah are very much like those in Allegheny with regard to the creche. The menorah, like the creche in that case, is displayed alone on public property closely associated with a core government function.... The parties in this case have stipulated that the menorah is a religious symbol..., and the menorah here, unlike the menorah in Allegheny, was displayed alone so that there was nothing to indicate that the thrust of its message was secular rather than religious....

In one respect, however, the facts in this case differ from Allgheny and thus arguably suggest a different result. Unlike the County Courthouse, where the creche in that case was located, City Hall Park is indisputably a traditional public forum. [The city argues] that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place and manner regulations. If this were so, however, the public forum doctrine would swallow up the Establishment Clause.... [But] the city, prior to the grant of the permit for the display of the menorah, had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols....

Moreover, even if the City, by granting permits in the past for uses suggesting religious activity, may be deemed to have created a forum open to religious symbols, its granting of a permit in this case would nevertheless violate the Establishment Clause. The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement. Here, unlike in McCreary, the park involved is not any city park, but rather City Hall Park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. During the years in issue...the menorah was located only some 60 feet away from the westerly steps of City Hall; from the general direction of the westerly public street, the menorah appeared superimposed on City Hall. In light of these facts, "[n]o viewer could reasonably think that it occupies this

> location without the support and approval of government." Allegheny. It is true that the district court reached a different conclusion in this respect, but we believe that it was mistaken as a matter of law.[257]...
>
> Thus, here, unlike in Widmar [v. Vincent],[258] the City's equal-access policy is incompatible with the Establishment Clause. Central to the [Supreme] Court's conclusion in Widmar that an equal-access policy on the part of the university would not violate the Establishment Clause was the factor that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," any more than such a policy confers approval on such eligible groups as the "`Students for a Democratic Society [or] the Young Socialist Alliance.'" The same cannot be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government, as underscored by the City's need to call a press conference disavowing City responsibility for the menorah. Indeed, the City Attorney acknowledged that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds." Thus, while previous, apparently noncontroversial, uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor.... We believe that refusing to allow the unattended, solitary display of such emotion-laden religious symbols as a creche, a cross or a menorah on public property and encouraging the placement of them instead in places of worship and in the home will, in the long run, tend to diminish "unintended divisiveness."[259]

Judge Thomas J. Meskill, the third member of the panel, was not convinced. He entered a dissent that rejected the majority's rationale.

> The parties...agree that the park is a traditional public forum.... The proper question is whether the City may exclude from this place that has historically been held open for free expression a category of speech based on its content. The answer to that question cannot depend solely on whether the expression is attended or unattended. The answer lies in assessing whether the City, by permitting a private group to erect a menorah in a public forum, has conveyed a message of endorsement of religion in violation of the Establishment Clause....
>
> Permitting religious speech in a public forum in and of itself "does not confer any imprimatur of state approval on religious sects or practices" any more than permitting political speech conveys governmental

257. The appellate court also observed that the district court issued its decision prior to *Allegheny*.

258. 454 U.S. 263 (1981), discussed at IIIE3b.

259. *Kaplan v. City of Burlington*, 891 F.2d 1024 (CA2 1989).

> endorsement of a political group. Widmar.... Moreover, I cannot agree that merely because City Hall is located on one side of the park, which is also surrounded by a host of sundry businesses and shops, the park loses its special status as a traditional public forum. The record illustrates that the park has been used for a wide variety of expressive purposes, some attended and some unattended. The display of a menorah should be viewed as just part of this diverse group of uses of the park.
>
> The majority also contends that the display of the unattended menorah, unlike other religious uses of the park in which live speakers are present to whom the religious expression can be attributed, results in the perception that the City is the sponsor of the menorah. The menorah display, however, has something that fulfills the role of the live speaker in identifying the sponsor of the display: a sign. The sign, which the district court found was visible for some distance when viewed from the west side of the park, stated that the menorah was sponsored by "Lubavitch of Vermont." We can assume that anyone who is interested in determining the sponsorship of the menorah would read the sign.[260]

This was one of the early instances of recognition of the importance (or unimportance, in the view of the dissent) of a religious symbol's appearance as "unattended" in the public forum. It later played a prominent role in the Supreme Court's discussion of *Capitol Square v. Pinette*,[261] where all the justices agreed that a governmental entity could ban *all* unattended displays from a public forum without violating the Free Speech Clause, though Burlington had not done so. The dissent felt that a sign identifying the private sponsor cured whatever misconceptions might arise from the symbol's placement—unattended by a live speaker—near the seat of government. The majority felt that such a sign would not offset the proximity of governmental authority, quoting in a footnote from a Seventh Circuit decision, "[A] disclaimer of the obvious is of no effect."[262] Once again, the concerns of nonestablishment were at war with the concerns of noncensorship of symbolic speech.

b. *Chabad-Lubavitch of Vermont v. City of Burlington* (1991). Two years later the same issue was back in the same court, but with the shoe on the other foot. The Lubavitch group had been denied a permit to erect its menorah in Burlington and was suing to obtain an injunction against the city to compel it to issue the permit. Some might have thought the matter had been settled in *Kaplan, supra*, but apparently Nathan Lewin of Washington, D.C. (who had written the brief *amicus curiae* for Lubavitch in *Kaplan*) thought that doctrines of *stare decisis* (the principle is settled) and *res judicata* (the issue has been decided) didn't apply, for he represented Chabad-Lubavitch in the new effort. The only significant difference between the 1989 and 1991 issues seemed to be that a private citizen, Stephen C. Brooks, had independently obtained a permit to place a nonreligious exhibit in City Hall Park

260 . Ibid., Meskill dissent.

261 . 515 U.S. 753 (1995), discussed at § 3k above.

262 . *American Jewish Congress v. Chicago*, 827 F.2d 120 (CA7 1987), discussed at § 2g above.

consisting of two 4 x 8 foot plywood sheets, one announcing "Season's Greetings" and "An American Salute to Liberty" and the other "Peace on Earth" and "Happy Holidays," and Chabad-Lubavitch offered to place its menorah near the Brooks display in an effort to create a consolidated secular ensemble that would meet the Establishment Clause concern. The district court, Fred I. Parker, J., was not taken with this offer and declined to issue the injunction. Chabad-Lubavitch appealed to the Second Circuit, where it was heard by a panel composed of Chief Judge James L. Oakes, Circuit Judge Ralph K. Winter, Jr., and District Judge Michael B. Mukasey sitting by designation, who issued a decision *per curiam*, by the court, rather than by any individual justice(s).

> In a futile effort to ward off judicial deja vu, Lubavitch cites inconsequential factual differences between Kaplan and this case. Specifically, Lubavitch emphasizes that the permit application proposed to place the menorah next to a secular display, and that, because the proposed location of the menorah was further from City Hall than the location of the menorah in Kaplan, City Hall would not appear as a backdrop to the menorah when viewed from most vantage points.... [But] the viewer could not view the menorah and the Brooks displays "as a whole" because they were not to appear as a single display, nor so far as appears from the record were they originally conceived as a unitary symbol. Moreover, the menorah, with its inherently religious message, was visible from almost all vantage points, whereas the Brooks display looked like nothing more than two blank pieces of plywood from almost all vistas. As to...[the] second factual distinction, every square foot of the Park is linked to the seat of municipal government, and any attempt to carve the Park into areas that do or do not have a direct view of City Hall is therefore meaningless for purposes of the Establishment Clause.
>
> Lubavitch's legal arguments fare no better than its factual ones. Although Lubavitch wishes otherwise, neither this Court nor the Supreme Court has overturned Kaplan.[263]

Thereafter, apparently, Burlington, Vermont, was not favored with a menorah to light the precincts of City Hall Park, but the struggle went on elsewhere.

c. *Chabad-Lubavitch of Georgia v. Miller* (1993). In the capital of Georgia, a 15-foot-tall stainless steel menorah made its appearance in 1989 on the plaza in front of the state capitol building during the eight-day celebration of Chanukah, adorned with a bright yellow sign announcing "HAPPY CHANUKAH FROM CHABAD OF GEORGIA." Each evening a forty-five minute candle-lighting ceremony was conducted by members of Chabad. "Other than during this ceremony, no Chabad representative stayed with the menorah," observed the court whose decision is discussed hereinafter. The next year Chabad again sought a permit to erect its menorah on the paved plaza, but on advice of the attorney general of Georgia, the governor's office denied permission, and the federal district court and the Eleventh

263 . *Chabad Lubavitch v. Burlington*, 936 F.2d 109 (CA 1991).

Circuit Court of Appeals refused to issue an injunction requiring the permit to be issued. (The defendant was Georgia Governor Zell Miller.)

In January of 1991, Chabad tried again, starting early in the process of seeking a permit. Not having received a response by the end of April, Chabad went to court again, seeking an injunction to require permission to place the menorah either on the plaza or in the Rotunda of the State Capitol. Not having obtained satisfaction by November, Chabad moved for summary judgment on the Rotunda placement. With the engaging timing for which these cases are noted, the district court on December 5, 1991, issued a judgment for the state. Chabad appealed, and a divided panel of the Eleventh Circuit affirmed the district court's decision.[264] In April 1993, the Eleventh Circuit agreed to rehearing *en banc* and issued its decision in October *per* Chief Judge Gerald B. Tjoflat for all eleven judges on the bench.

> The district court properly identified Georgia's exclusion of Chabad's menorah display from the Rotunda as based solely upon the religious content of Chabad's speech. A state's content-based exclusion of a display from a public forum is permissible only if the exclusion withstands strict scrutiny review.... In particular, we observe that Georgia's claim that it must exclude Chabad's display to avoid an Establishment Clause problem gives short shrift to the Rotunda's status as a public forum.[265]

The court noted that "Georgia has opened the Rotunda to Georgia's citizenry for their expressive activities both secular and religious in nature." Several were enumerated, including several religious ones that consisted mainly of an invocation by a Methodist minister at the presentation of a state-sponsored Christmas tree and a religious benediction at two Holocaust Commemoration ceremonies. "Additionally, certain groups have erected and maintained unattended displays in the Rotunda for various periods of time..." (none of them notably religious). From this it appeared that Georgia—like a number of other states and the federal government—had found the large, ornate central cavern beneath the dome of the capitol building itself useful for little other than ceremonial and public-relations purposes (state funerals, award presentations, memorial statues, press conferences, public placardings of the kind at issue and a brief pause in guided tours for visitors). Aside from those uses, the Rotunda seemed to be mainly a lengthy stretch of nothing to be traversed by functionaries hurrying between wings of the statehouse from one house of the legislature to the other with little attention to whatever inconsequential protocols might currently be playing there. Rather than the *sanctum sanctorum* of the state's sovereignty at the very heart of the "seat of government," the Rotunda appeared to be a kind of no-one's-land—a political vacuum inhabited by vagrant aspirants for public attention in the last place where anyone would look for anything of importance.

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264 . *Chabad-Lubavitch of Ga. v. Miller*, 976 F.2d 1386 (CA11 1992).

265 . *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (CA11 1993).

> Chabad seeks access to the Rotunda for its private religious speech pursuant to a neutral open-access policy; it does not seek a special state-granted dispensation. In no way does Georgia seek to exhibit the display on its own behalf; it neither solicits the display nor provides Chabad with preferential treatment. In sum, Georgia neutrally opens the Rotunda as a public forum available to all speakers, and Chabad seeks to exercise its constitutional right to speak in that public forum.... Part of the majesty of the public forum is that it insulates the government from the necessity of scrutinizing the content of the citizenry's speech. Through a broad policy of content-neutral inclusion, the public forum is uniquely situated to avoid the need for the State to make religion-based exclusionary judgments....

The state had sought to justify its policy by reference to *Allegheny County v. ACLU*,[266] in which a Nativity shrine on the Grand Staircase of the City Hall had been held to violate the Establishment Clause, and the Rotunda was likened—in the state's argument—to the Grand Staircase. But the court thought otherwise.

> Allegheny is not a public forum case. This case is.... Thus, we must apply the Supreme Court's public forum jurisprudence....Pursuant to its policy of equal access to the public forum, Georgia may allow, without endorsing, private religious speech in the Rotunda.
>
> To a reasonable observer, no display actually stands alone in [a] public forum. In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the [forum] was opened. The reasonable observer knows that other speakers have used the [forum] before, and will do so again. Instead of concluding that religious zealots have stormed the gates with the city's endorsement, the reasonable observer recognizes this display as yet another example of free speech.[267]...
>
> The whereabouts of public fora matter only to the extent that satisfaction of the state's burden of familiarizing the public with the nature of public fora (and the state's corresponding neutrality) may vary in difficulty. The public may be less inclined to attribute private speech to the government when the speech is communicated in a public park rather than, as here, in a core government building.
>
> Before it establishes a public forum, the state should take many factors into account, including the difficulty of maintaining a public forum and educating the public about its attributes. The state controls its property and is under no obligation to designate as public fora locations that

266 . 492 U.S. 573 (1989), discussed at § 2i above.

267 . *Americans United v. Grand Rapids*, 980 F.2d 1538, 1549 (CA6 1992). The same opinion warned against the "`Ignoramus's Veto,' [which] lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine." Ibid., at 1553, quoted by 11th Circuit in n. 11.

> traditionally are not....
>
> Once the state decides to designate a public forum, however, the monkey is on the state's back. The state shoulders the burden of surmounting the public's perception of the intrinsically governmental character of a public forum located, as here, in a core government building.... If the state is concerned that those who hear or view the private religious speech may not appreciate the strictly private nature of the speech, the state has the burden of informing the public that speech in a public forum does not enjoy state endorsement.
>
> The state cannot constitutionally penalize private speakers by restricting either their right to speak or the content of their speech simply because the state exhibited dubious wisdom in creating, or has been slovenly in its maintenance of, its public fora.... Any perceived endorsement of religion in a true public forum is simply misperception; the Establishment Clause is not, in fact, violated.... We refuse to strip Georgia's citizens of their constitutionally guaranteed right to speak simply because the State has not taken steps to disabuse the uninformed or unreasonable of an erroneous attribution of private religious speech to the State. It is Georgia's responsibility to ensure that reasonable observers of Chabad's menorah display do not mistakenly believe that Georgia endorses Judaism.

Judge R. Lanier Anderson III concurred, though with some reluctance.

> [S]everal facts point toward endorsement [by the state]. It is clear that the location in a core government building, a beat away from the very heart of the government, would tend to induce an inference of state complicity. Also..., it is...true that in this particular forum, the speakers have not all been private speakers, but the State itself has also spoken.... I conclude in this case that appropriate signage would dispel any reasonable inference of state endorsement.[268]

Judge Emmett R. Cox concurred in the result. Judge Stanley R. Birch concurred in the court's opinion and also in Judge Anderson's. Judges Peter T. Fay, Phyllis A. Kravitch, Joseph W. Hatchett, J.L. Edmondson, Joel F. Dubina, Susan H. Black and Ed Carnes agreed *sub silentio*. This was one of several menorah decisions swinging heavily to the public forum principle and away from the endorsement principle, based on the state's apparent creation of a public forum, often entered into without the state's realization of the implications that would flow from letting the United Way or some "harmless" outfit put up a sign or something on the state's premises. The state, of course, had always the option of closing the public forum, attaching dislaimers of state endorsement or creating rules governing time, place and manner that would remedy any earlier missteps. But that might not be easy to do after the

268 . *Chabad v. Miller*, 5 F.3d 1383, 1396–97 (11th Cir. 1993) (Anderson, J., concurring).

matter had become highly controverted and the populace polarized for and against particular exhibits.

A footnote to the rumble of turbulence above appeared in the press in 1995, announcing that the Hon. Dickinson R. Debevoise, a senior judge of the federal district court for the district of New Jersey, on December 18, 1995, approved a civic display in front of City Hall in Jersey City that he had banned on November 29. The earlier exhibit consisted only of a creche and a menorah, and was too religious in the view of the judge. But when the city added a plastic Santa Claus and a plastic snowman, the judge concluded that it had "sufficiently demystified the holy." The ACLU, which brought the suit, announced it would appeal. The Becket Fund and the city announced they would appeal the original order against the creche-menorah-only display.[269]

5. Good Friday as State Holiday

One of the ways in which governments have taken proprietorship of religious institutions is by the adoption and endorsement of religious observances, making them governmental observances, thus conferring the sponsorship of the whole society, including citizens not of the favored faith. That has occurred in a few instances with regard to Good Friday, one of the holiest days of Christian tradition and one having little or no non-Christian or secular significance. While only a few such instances appear in the case law, they serve to illuminate a key element of the church-state problematic: when is a religious holy day not a holy day?

a. *Mandel v. Hodges* (1976). Since the 1950s, at least, the governor of California had by executive order closed all state offices from noon until 3:00 P.M. on Good Friday each year, but had not done so on Yom Kippur, a day of similar solemnity for Jews, or for any other religion's holy days. An employee of the state sued the head of the Department of Health (in which she worked), the governor and the state for violating the Establishment Clause of the federal First Amendment and the California constitutional prohibition against preference for one religion over others. The plaintiff prevailed in the state Superior Court for Alameda County, Robert Bostick, J., and the state appealed. The Court of Appeal, First District, Division Four, issued an opinion *per* Joseph A. Rattigan, J., with Thomas Caldecott, Presiding Judge, and Winslow Christian, J., concurring.

> [T]he Governor's order by which the three-hour period of [Good Friday] is "appointed...for a public...holiday" upon which State employees "shall be entitled" to time off from work with pay cannot plausibly be characterized as serving any "secular purpose".... [T]he order is directly "beneficial to religious institutions." Its promulgation by the Governor, and its execution throughout the State office complex, amount to an observance by the State itself (in the sense of its recognition, if not its active ceremonial participation), of the "wholly religious day" which the trial court found Good Friday to be. In the implementation of the order,

269. Judson, George, "Judge Rules a Varied Holiday Scene Legal," *N.Y.Times*, Dec. 19, 1995.

> State employees are given paid time off "for worship" [quotation from a State personnel manual].
>
> * * *
>
> The Governor's order obviously reaches the thousands of state employees who are directly involved by reason of their being given time off from work during the designated three-hour period of Good Friday. It reasonably may—and realistically must—be presumed to reach the countless members of the public who are denied access to State offices by the closure it causes, and by the people of California whose public business is perceptibly interrupted, during the period. There is no reason for these results other than the State's observance of a "wholly religious day" as a holiday.[270]

In view of this extensive impact, the appellate court affirmed the trial court's finding of unconstitutionality of the governor's order and the California statute mentioning Good Friday, and also upheld the trial court's award of attorney's fees to the prevailing party in excess of $25,000 because of the resulting saving to the people of the state of more than $2 million in salaries for work not performed during those three hours.[271]

b. ***Griswold Inn v. Connecticut*** **(1981).** A slightly different issue arose in Connecticut, where a state statute prohibited sale of alcoholic beverages on Good Friday and *only* on Good Friday. The Griswold Inn wished to sell such beverages and so challenged the constitutionality of the statute. The Supreme Court of Connecticut considered the matter and issued a decision *per* Justice Joseph W. Bogdanski.

The Connecticut situation was unique in that it was the heir of two diverse and mutually opposed traditions with regard to Good Friday. The observance of Good Friday by prescribed church attendance, fasting and abstention from secular business was the venerable tradition of the mainstream of Christian adherents until the seventeenth century, when a dissenting movement arose in England that rejected many of the outward rites and customs of the Established Church. This group—known as Puritans—retained days of fasting for spiritual purposes on occasions of public danger or calamity. The Puritans who settled Connecticut, however, observed an annual spring fast as early as 1659 on a date proclaimed by the civil authorities. "This annual spring fast day was appointed and observed to seek divine favor upon the undertakings of the coming year and generally carried a somber theme of prospective hope for the ensuing year especially in regard to the planting of the fields."[272]

In 1795, Governor Samuel Huntington of Connecticut, in order to avoid conflict with Easter week (when the fast had often previously been held) and with court and legislative recesses, appointed the annual fast day to be held on Good Friday, which coincided with the fast day observed by the Anglican Church in New England, and—

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270 . *Mandel v. Hodges*, 127 Ca. Rptr. 244 (1976).

271 . Ibid., n. 16.

272 . *Griswold Inn v. Connecticut*, 441 A.2d 16, 18 (1981), quoting from a statement of stipulated facts agreed to by the parties.

the Puritan rigor having become somewhat relaxed—that pattern continued without objection thereafter. On the day proclaimed each year by the governor all state and municipal offices were closed as well as public schools, libraries, banks and some businesses, although others—including restaurants and retail stores—usually remained open.

The state contended that the purpose of the legislation at issue was to prohibit sale of liquor on a holiday that enjoyed statewide celebration, and its primary effect was to promote traffic safety and encourage moderation in recreational activities on a day celebrated throughout the state. The court was skeptical of this rationale and tested it by the standards set by the U.S. Supreme Court to detect a violation of the Establishment Clause of the federal First Amendment (whether the enactment had a secular purpose, a primary effect that neither advanced nor inhibited religion, and did not foster excessive entanglement of government and religion[273]).

> A reading of [the statute] shows that that could not be the legislative intent. Good Friday is the only day of the year when liquor cannot be obtained in restaurants. Had the legislature been concerned with celebrating a secular holiday, it would have prohibited the sale of alcohol on other holidays. Given the traditional Christian significance of Good Friday and Christian exhortation to fast and abstain on that day in mourning for the death of Christ, the singling out of Good Friday reveals that there is no clear secular purpose which justifies the prohibition of liquor sales on this day.
>
> The conclusion that a religious purpose stands behind the prohibition is not negated by the fact that Connecticut governors regularly proclaim a day of fasting and prayer pursuant to [statute]. Good Friday is conspicuously absent from the [same statute's] list of civil holidays. It becomes a holiday only by special proclamation of the governor. This proclamation initially set the date for the Puritan's day of fasting and prayer. Although the Puritans rejected Anglican observance of Good Friday, their spring fast day was clearly a religious day of holiness. Moreover, the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins.... Despite gubernatorial proclamations, there is no doubt that Good Friday lacks widespread public popularity or acceptance as a secular holiday. Indeed, a California court has found that Good Friday is "a wholly religious day."[274]...
>
> [The statute's] Good Friday liquor prohibition advances religion in general and in particular the Christian religion by preventing the sale and drinking of liquor in restaurants on only one day a year, Good Friday, a religious holiday on which Christians traditionally fast to mourn the death of Christ.... [T]he very existence of that legal prohibition on this major Christian religious holiday gives the state's clear stamp of approval both to the Christian rites and practices observed on that day

273 . Cf. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

274 . Citing *Mandel v. Hodges*, 127 Cal.Rptr. 244 (1976), discussed immediately above.

> and to Christianity in general. It indicates a bias in favor of Protestant and Catholic forms of Christianity over Eastern Orthodox, non-Christian and nonreligious practices and beliefs....
>
> Second, beyond merely indicating state approval of Christian Good Friday rites, the law imposes their observance on Connecticut citizens, Christian and non-Christian alike.... [The state argues] that Good Friday presents special highway safety and recreational problems, since after a dreary cold winter, it is for many the first time when weather permits outdoor recreational activity. The facts agreed upon by the parties do not stipulate that Good Friday presents any such special problems. Any problem of alcohol abuse on this day is at most speculative and incidental to the primary religious impact.[275]

Ellen A. Peters, Anthony J. Armentano and Douglass B. Wright concurred. Justice Arthur H. Healey thought that the first prong of the *Lemon* test was dispositive: the statute had no secular purpose. There was no need to go beyond it to reach the other prongs, so he concurred only in the first one.

c. *Cammack v. Waihee* (1991). On the other side of the world from the inclement clime of the Puritans, the Good Friday issue arose in another setting. The Territory of Hawaii enacted a bill making Good Friday a holiday. When Hawaii became a state, the statute was ratified, and Good Friday became one of thirteen state holidays, along with New Year's Day, Martin Luther King Day, President's Day, Memorial Day, Independence Day, Admission Day, Labor Day, Veterans Day, Thanksgiving and Christmas, plus Prince Jonah Kuhio Kalanianaole Day and King Kamehameha Day. Thus it had been observed as a state holiday for fifty years prior to the first legal challenge and—the appellate court remarked—Good Friday was a public holiday in twelve other states: Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee and Wisconsin.

Several Hawaii taxpayers brought suit in federal court against Governor John Waihee and various state and labor union officials, charging that the Good Friday law was a violation of the Establishment Clause and seeking an injunction against expenditure of public funds under state and municipal collective bargaining agreements providing for paid leave to public employees on that day. The federal district court decided against the plaintiffs, and they appealed to the Ninth Circuit Court of Appeals, where argument was heard by a panel on November 14, 1988, and decision announced on April 30, 1991—two and a half years later—per Judge Diarmuid F. O'Scannlain for himself and Judge Stephen S. Trott, applying the *Lemon* test of Establishment, *supra*.

With regard to the "purpose" prong, the court concluded that *a* secular purpose would suffice, even if there were also nonsecular purposes. Reviewing the legislative history of the 1941 enactment and earlier unsuccessful efforts to designate Good Friday a holiday, the court reasoned that the primary consideration was whether there were too many holidays or not enough, and whether another holiday was

275 . *Griswold Inn, supra*.

needed in the springtime. Even if there had been an impermissible religious purpose in the original enactment, that was fifty years in the past, and like the Sunday-closing laws at issue in *McGowan v. Maryland*,[276] the past purpose might no longer be the *present* purpose.

> The most ardent proponents of the statute in this litigation are the labor unions who have incorporated the statutory holidays into their collective bargaining agreements with the state and local governments. This is a strong indicant that the purpose animating the challenged act is not so much state sponsorship of religion as state sensitivity to the concerns of organized labor....
>
> It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an "unavoidable consequence of democratic government" the majority's political accommodation of its own religious practices and corresponding "relative disadvantage [to] those religious practices that are not widely engaged in."[277]...

The court drew upon the Supreme Court's early accommodationist decision, *Zorach v. Clauson*, for the teaching that "a legislative act motivated by a legitimate secular purpose is not unconstitutional simply because it accommodates the religious practices of some citizens."[278] The court also distinguished Hawaii's arrangement from California's, that it thought rightly found unconstitutional in *Mandel v. Hodges, supra*, because it released (all) public employees for three hours in Good Friday so that they could attend religious services, whereas Hawaii made no effort to encourage employees to use the holiday for worship. "We conclude that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday...."

Turning to the second prong of *Lemon*, the court concluded that the Good Friday state holiday had no primary effect of advancing religion, but instead—like the Sunday-closing laws upheld in *McGowan, supra*—were primarily a source of family togetherness and extended leisure, described in terms as idyllic as a travel brochure.

> [T]he Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefitted from the three-day weekend created as a result of the holiday. Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii.... Under Hawaii's scheme, recognition of the holiday is simply accomplished by closing the office doors; the freed employees can enjoy virtually any leisure activity imaginable. In contrast, the Sunday Closing Laws were

276. 366 U.S. 429 (1961), discussed at IVA7a.

277. *Cammack v. Waihee*, 932 F.2d 765 (CA9 1991), citing *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e.

278. 343 U.S. 306 (1952), discussed at IIIC1b; the quoted material is the Ninth Circuit's characterization of the teaching of *Zorach*.

> originally designed to funnel people into Church. Thus, most leisure activities were restricted...[unlike] Hawaii's simple release of its workforce to do whatever tickles the fancy....
>
> Good Friday's mere placement on the roll of public holidays, along with other important days of secular and (in some cases) religious significance, diminishes the likelihood of an "endorsing" effect.... Good Friday is surrounded by patriotic and historic dates which are all selected for their importance to the citizens of Hawaii....
>
> Because the primary effect of the Good Friday holiday is secular, we cannot conclude that the holiday is unconstitutional merely because the holiday may make it easier to worship on that day for those employees who may wish to do so.[279]

Needless to say, the court did not find any "excessive entanglement" of government with religion and thus cleared the statute of any taint of establishment. But one judge was not persuaded. Judge Dorothy W. Nelson wrote a vigorous dissent.

> The holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this is not. What this case is about is Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone....
>
> [With respect to the "purpose" prong of Lemon,] I firmly believe that "primary" or "actual" purpose is both the test that the Supreme Court has articulated and a far preferable formulation. If a legislature need merely come up with any secular purpose that is sincere and not a sham, we have effectively gutted this prong. For instance, a legislature could decide that a state building would be enlivened by decoration, surely a reasonable secular purpose, and then install a beautiful creche on its staircase or a decorated Star of David on its lawn. Both could undoubtedly adorn otherwise dreary government buildings and thereby create an improved aesthetic appearance, but I cannot believe either would pass constitutional muster....
>
> [T]he obvious place to start [in finding the actual purpose] is the legislative history. Though I agree with the majority that the committee report on the 1939 bill is the best evidence of purpose, I cannot subscribe to the majority's exegesis of this report.... The heart of this [report] is the juxtaposition of the following two sentences:
>
> > Some feel that we already have too many holidays to the detriment of both public and private business. On the other hand, others feel equally strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction.
>
> This excerpt makes manifest that the division was not between those who thought there were too many holidays and those who thought there

279 . *Cammack v. Waihee, supra.*

were too few. On the contrary, the division was between those who wished to create Good Friday as a legal holiday because of its religious significance and those who felt there were too many holidays....

Even if the primary purpose behind creating a new holiday was secular, the decision to choose the specific date of Good Friday was not. In other words, if we look at the decision in two parts—to create a holiday and then to choose a date—the second decision clearly bore a religious purpose. It is difficult to think of more perspicuous language than "in view of the religious significance of Good Friday."... The purpose of picking the date of the Friday before Easter was primarily motivated by religious concerns. There is no primary secular purpose for picking that date instead of any other.

The majority attempts to rebut this two-part analysis by relying on the principle of accommodation.... However, the Supreme Court has made equally clear that "[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion."[280]... Just as Allegheny County found no burden on Christians wishing to display creches, the evidence has not established that any exists here for those who wish to observe Good Friday in a religious manner.... Christians may take Good Friday off or seek leave to at least go worship for a few hours. To be sure, not to proclaim Good Friday a state holiday "deprives Christians of the satisfaction of seeing the government adopt their religious message as [its] own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes."[281] Without this statute, Christians would not be prohibited from honoring Good Friday; rather, the day would simply not be a public holiday.

In sum, the actual purpose of the Hawaii's bill [sic] was to "give legal sanction" to the observance of Good Friday. Since accommodation cannot save this statute, I believe that it is clearly violative of Lemon's purpose prong and thus unconstitutional.

The second prong of the Lemon test requires the statute's "principal or primary effect..[to] be one that neither advances nor inhibits religion."... The majority supports its effects section with two different arguments. The first is that this case is similar to McGowan v. Maryland, where the Supreme Court upheld the constitutionality of Sunday closing laws. The second is that by placing Good Friday in the same context as other secular holidays, the state has negated any impermissible endorsement of religion.... To say that [Sundays and Good Friday] are of comparable secular magnitude is to argue that a candle and the sun are similar because they both give off light. While Sunday holds unique meaning for those of many faiths as well as none, Good Friday is still essentially a holiday with Christian connotations.... We need think only of the schoolchild who asks her teacher why she gets Sunday and Good Friday

280. Ibid., Nelson dissent, quoting *Allegheny County v. ACLU*, 492 U.S. 573, 601, n. 51, emphasis added by Judge Nelson.

281. Quoting *Allegheny County, supra.*

off. The answer must be that the former are days of rest and the latter a commemoration of the death of Jesus Christ. Selecting a state holiday does much more than enable citizens to relax; it communicates a critical message about the state's priorities. While the present effect of Sunday is not to favor one sect over another, that of Good Friday endorses Christianity....

Finally, to argue that Christian employees alone are not given the day off is to erect a man of material flimsier than straw. The fact that such a statute would be so patently unconstitutional does not shed any light on the present one. Christians and non-Christians alike were free to gaze upon Allegheny's creche, but that, quite obviously, did not cure the constitutional flaw....

[U]nder the majority's context rationale, the state could decide tomorrow that all of holy week or any of the numerous saints' days should be holidays and that their placement on the holiday roll would be balanced by all the other secular holidays. It seems that the majority would support as a state holiday any uniquely religious day on the grounds that because it is a state holiday, it must be of primarily secular content. A greater switch in cause and effect is difficult to imagine....

Overall, I cannot believe that the establishment of Good Friday as a state holiday can survive the endorsement test.... In this case, the legislature sends the message to non-Christians that it finds Good Friday, and thus Christianity, to be worth honoring, while their religion or nonreligion is not of equal importance.... No other state holiday in the calendar bears anywhere near the religious implications of Good Friday, with the exception of Christmas, whose religious and secular traditions are intertwined. Hawaii's benefit to religion is not "indirect," "remote" or "incidental"; on the contrary, it is an open and obvious bestowal of approval on a critical religious day for Western Christians.

To order time and mark its passing are unique means by which communities define themselves. In selecting particular state holidays, the polity does more than honor the past; it identifies the people, events, and values from which it draws inspiration and seeks guidance. The celebrations provide a sense of continuity with remote times, bestowing upon the present the virtues of the past. Hawaii's decision, therefore, should not be dismissed as a bagatelle or applauded simply because it provides an additional day of repose; on the contrary, it should be regarded as a weighty, solemn statement, at once reflecting and shaping the collectivity's character.

The majority, I fear, underestimates the importance of such decisions. And yet, we are reminded daily of their role and significance to people around the globe.... Indeed..., fierce debates over the celebration of Martin Luther King Day attest to our own extreme sensitivity to this issue.

There is...good reason for such emotional reactions. By honoring a given day, the state endorses an event as a fair reflection of its beliefs; it establishes that event as a privileged repository of its values. Despite the potential for impassioned disputes, a state is free to do this as far as

> secular occurrences are concerned.... But the First Amendment must exclude from this list those days that are remembered for their religious significance alone. Today, and with the blessing of the majority, we are told that it need not. I believe that by declaring Good Friday a state holiday, Hawaii has endorsed a day thoroughly infused with religious meaning.... I am unable to countenance such an endorsement.[282]

Judge Nelson added a coda to her dissent distinguishing Good Friday from Christmas, Thanksgiving and even Easter as holidays that have acquired secular aspects or related traditions that can appropriately be celebrated by the civic polity.

> Simply stated, Good Friday has no secular symbols or accompanying secular celebration.... While Good Friday is associated with the religious symbol of Jesus Christ on the cross, it is, very much unlike Thanksgiving and Christmas, associated with no secular symbols at all. In fact, I think that we would insult observing Christians by characterizing Good Friday, a solemn day of worship and reflection on the death of Jesus Christ, as a day of convivial secular celebration.... I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to a holiday they could not imagine honoring.

d. *Cammack v. Waihee*: Another Dissent. There was yet another act to the drama of the Hawaiian Good Friday. The plaintiffs petitioned the Ninth Circuit for rehearing and suggested rehearing *en banc* (by the entire bench of some twenty-six active judges!). Judges O'Scannlain and Trott voted to deny the petition. Judge Nelson voted the other way. The full court was advised of the *en banc* suggestion, and an active judge requested a vote by the entire bench. A majority of the active judges voted to reject the suggestion. Judge Stephen Reinhardt wrote a vigorous dissent from the denial of rehearing *en banc*, in which he was joined by Judges Proctor Hug, Jr., Harry Pregerson, Cecil F. Poole, and William A. Norris. In addition, Judge Alex Kozinski dissented separately. Some of the points emphasized by Judge Reinhardt are worth noting. Among other things, he quoted in a footnote a comment by the noted playwright Arthur Miller:

> People ought to ask themselves why such good men as Washington, Jefferson and the rest took such explicit steps to keep praying out of politics. It was to spare America the inevitable misuse of religiosity-by-government that had helped to fasten tyranny on Europe.... For the United States to take a single step down that road is not merely folly but a destruction of policy that has worked beautifully for two centuries and

282 . *Cammack v. Waihee, supra*, Nelson dissent.

> has attracted the respect and envy of persecuted people everywhere in the world.[283]

Judge Reinhardt also pointed out one unique defect in the selection of Good Friday as a state holiday: it doesn't hold still.

> Indeed, it would be difficult to imagine a less appropriate holiday to select on the basis of "calendar" concerns, since Good Friday does not occur on a fixed date or even in the same month each year. Rather, it is defined—pursuant to ecclesiastical law—as the Friday preceding the first Sunday after the first full moon after the vernal equinox.[284]

In fact, it migrates with seeming randomness (in company with Easter and Lent), according to the vagaries of the lunar calendar's superimposition on the solar calendar, from as early as March 21 (in 2008, e.g.) to as late as April 22 (in 2011, e.g.) and everywhere in between, making for an engaging irregularity in planning civic and social schedules.

Justice Reinhardt's main concern, however, was with majoritarianism.

> By making Good Friday a public holiday, the Hawaii statute officially consecrates that event. It incorporates a purely religious holy day into the state calendar and says to those not of the majority religion: "Thou shalt celebrate this religious occasion." By doing so, the state of Hawaii establishes religion in violation of the Constitution. Nevertheless, by a 2-to-1 vote, a panel of this court found the Hawaii statute constitutional. Our refusal to reconsider that decision en banc substantially undermines one of the First Amendment's most critical provisions.
>
> It is not surprising that the Hawaii legislature selected Good Friday rather than, say, Yom Kippur or Ramadan as the date for its additional state holiday. Good Friday is after all the holy day celebrated by members of the majority religion in this country. There are many reasons to be concerned when the government seeks to clothe itself in the religious ritual of the majority, not the least of which is the effect upon those with different views. By consecrating a Christian holy day, the Hawaii legislature has effectively sent the rest of the population a message. That message is not only that the state officially recognizes the religious preference of the majority, but more important, that the state considers the beliefs of those in the minority to be unworthy of similar respect. While official recognition of any or all religions is prohibited by the constitution, the preference of the majority religion over all others is certainly among the principal offenses the first amendment condemns.
>
> Additionally troubling is the impact this message will have on children

283. *Cammack v. Waihee*, 944 F.2d 466 (CA9 1991), Reinhardt dissent, quoting A. Miller, "School Prayer: A Political Dirigible," *N.Y.Times*, Mar. 12, 1984, A17.

284. Ibid., citing *Random House College Dictionary* 416, 568 (rev. ed., New York: Random House, 1980), emphasis in original.

> for whom school is closed on Good Friday. How can parents forthrightly explain to their children the reasons for the official school holiday except by stating that it commemorates the crucifixion of Jesus Christ? Such an explanation is sure to arouse feelings of discomfort, of differentness, of isolation from their teachers and classmates in non-Christian school children, who are even more susceptible to feelings of social alienation than are their parents. It is unfortunate that, still today, so many adherents of the majority religion fail to comprehend the psychological effect that the state's endorsement of that religion has upon children whose views and upbringing differ from their own.
>
> Our refusal to grant en banc consideration is disturbing for other reasons as well. The significance of our decision in this case goes beyond the issue of religion: the majority opinion reflects a growing willingness to accept the imposition of majoritarian control at the expense of individual rights. Ours is a heterogeneous society in which tolerance of different ideologies and views has historically been enforced and encouraged through the first amendment. Yet in recent years we have witnessed increasing legislative restrictions on individual freedom in laws regulating religious practice, sexual conduct, and nonobscene expression. And we have witnessed an increasing willingness on the part of the judiciary to allow the social, moral, and cultural precepts of the majority to dictate the choices available to those with different views.
>
> We are creeping closer and closer to a state-imposed orthodoxy—an orthodoxy firmly outlawed by a Bill or Rights that the courts are supposed to enforce with vigilance.... While the sanctioning of an official religious holiday may appear to be only a minor Constitutional violation, every measure by which the majority is enabled to exert dominion over the personal beliefs and values of the minority does serious injury to our fundamental liberties.... [T]he majority opinion does not merely misapply the law; it creates a substantially weaker Establishment Clause jurisprudence in our circuit. It is particularly unfortunate that, at a time when official tolerance for minority views is decreasing, our court is not even willing to pause momentarily in order to reflect en banc before joining the rush toward unrestrained majoritarianism.

But Judge Reinhardt and his several dissenting colleagues did not prevail upon the rest of the bench, and the huge Ninth Circuit rolled ponderously on its way without troubling itself further with the Hawaiian state observance of Good Friday. Perhaps some of them—like many good Christians encountered by the author over the years—resonated to the idea that in a pluralistic society adherents of various religious views should be more tolerant of one another, and that a good way to begin would be for everyone to be more tolerant of the religion of the majority!

e. *Metzl v. Leininger* (1995). The next appearance of Good Friday on the litigative stage was in Illinois, where a public school teacher challenged the constitutionality of a state law that selected Good Friday as one of twelve holidays

to be observed by the closing of all public schools of the state.[285] The federal district court, Ann Claire Williams, J., ruled for the plaintiff.

> Good Friday is considered by Christians as one of the holiest days of the liturgical year. A solemn, even mournful day, Good Friday commemorates for Christians, Jesus Christ's suffering and death on the cross.[286] Unlike Christmas, Good Friday is generally seen as having no secular components.
>
> * * *
>
> Good Friday remains a wholly religious day. "While non-believers may associate Sunday with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion—and nothing else."[287] Clearly, the Illinois legislature was well aware of Good Friday's purely religious nature when it enacted [the statute]. Connecting the dots, it hardly strains one's imagination to surmise that the Illinois legislature's [choice]...was motivated at least in part by a desire to officially endorse the holiday's religious message....
>
> [The state asserts] that the...designation of Good Friday as a legal school holiday was motivated by a sincere and legitimate desire to accommodate the religious practices and beliefs of a large percentage of its students and ensure that the smooth operation of its schools would not be impaired by their absence.... [But] defendants offer scant evidence in support of their broad assertion that if Good Friday were a regular school day, absenteeism would be so great that the schools would be unable to function effectively.... To assert...that Illinois public schools would be unable to function if Good Friday were a regular school day is quite a stretch.... Conspicuously absent from defendants' case is any indication that any of these institutions [of higher education] or state agencies [for which Good Friday was not a holiday] have suffered as a result of excessive absenteeism by Christian students and employees on Good Friday.... Moreover, even if a legitimate showing could be made that particular school districts would be unable to function effectively on Good Friday..., the State's asserted purpose would still be suspect. [The state's School Code grants] school-closing discretion to individual school districts [which] obviates any need for the declaration of a state-wide

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285. *Metzl v. Leininger*, 850 F.Supp. 740 (N.D.Ill. 1994). The holidays so designated were the same as those in the Hawaii case immediately above with the exception of Prince Jonah Kuhio Kalanianaole Day, King Kamehameha Day and Admission Day, for which were substituted Columbus Day and Casimir Pulaski's Birthday.

286. Ibid., Note 5 stated: "As plaintiff's expert, Reverend Dean Kelley explains: `Good Friday is not an occasion for frivolity or festivities. Among practicing Christians, having a party or a wedding on Good Friday would be unthinkable.... In many Christian churches, the altar paraments for Good Friday are black, a color used only on that one day of the year (aside from funerals), and the cross on the altar and crosses carried in procession by acolytes are often veiled in black or violet gauze as a sign of mourning.'"

287. Ibid., quoting *Cammack v. Waihee, supra*, Reinhardt, J., dissenting.

> school holiday on Good Friday. [emphasis in original]
>
> As Justice Souter explained in his concurring opinion in [Lee v.] Weisman, "[w]hatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion." Here, however, it is not at all clear precisely what governmental burden on religion the state is lifting.... Illinois has had a long standing policy of allowing school students and school employees the opportunity to take days off for religious reasons. Indeed, to the State's credit, the Illinois School Code further provides for make-up examinations and assignments for students who miss class for religious reasons, and "that [n]o adverse or prejudicial effects shall result to any child because of his availing himself of the provisions [for excusal]." Thus, in contrast to the typical accommodation case, the State's designation of Good Friday as a legal school holiday does not relieve individuals "from generally applicable rules that interfere with their religious calling."[288]

The court found that the Illinois statute did not have a secular purpose and that its primary effect was to endorse the religious usages of the Christian majority. The plaintiff's motion for summary judgment against the state was granted.

f. ***Metzl v. Leininger***: **Appellate Decision (1995).** The defendant, Robert Leininger, Illinois State Superintendent of Education, appealed to the Seventh Circuit Court of Appeals, which in due course issued an opinion per Chief Judge Richard A. Posner for himself and Judge Walter A. Cummings.

> Christians believe that Jesus Christ was crucified on a Friday afternoon in the spring and that he rose from the dead the following Sunday. The crucifixion is commemorated on Good Friday, the resurrection on Easter Sunday. In 1941 Illinois made Good Friday a state holiday.... In 1989, the Illinois legislature rescinded Good Friday as a state holiday but retained it as a school holiday, and so it remains.
>
> * * *
>
> The law may...be defensible as an accommodation of the rights of religious persons to the free exercise of their religion. But that is not a factor here..., since, wholly apart from the challenged law, public school students in Illinois who want to be excused from school on Good Friday for religious reasons are entitled to be excused without penalty save what is implicit in missing a day of school when school is in session.
>
> Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public that government measures to promote them, as by making them holidays or even by having the government itself celebrate them, have only a trivial effect in promoting religion. Even Easter is becoming gradually secularized; in the week before this

288. Ibid., quoting *Lee v. Weisman*, 505 U.S. 577 (1992), discussed at IIIC2d(11).

past Easter Sunday, a radio station in Chicago was advertising an opportunity to have your pet photographed with the Easter Bunny on Easter Sunday for $5. Good Friday, however, is not a secular holiday anywhere in the United States (with the possible exception of Hawaii, as we shall see).[289]... Good Friday has accreted no secular rituals.... It is a day of solemn religious observance, and nothing else, for believing Christians, and no one else. Unitarians, Jews, Muslims, Buddhists, atheists—there is nothing in Good Friday for them, as there is in the other holidays we have mentioned despite the Christian origin of those holidays.

...School districts are free to close their schools on the major holidays of other religions, but all public schools throughout the state are forced to close on Good Friday regardless of the preference of local school districts and no matter how small the number of students or teachers in a particular district who want to use the day for religious observances. The state has accorded special recognition to Christianity beyond anything that has been shown to be necessary to accommodate the religious needs of the Christian majority.... The state law closing all public schools on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions.... Such inconveniences are slight..., [b]ut the First Amendment does not allow a state to make it easier for the adherents of one faith to practice their religion than for adherents of another faith to practice their religion, unless there is a secular justification for the difference in treatment....

...Suppose, as the state argues, that the current purpose of the law is merely to save the school system the expense of keeping schools open on a day when very few teachers and students can be expected to attend....

It is a question of fact, however, how many students and teachers, in each of the state's public school districts, would absent themselves from Good Friday if the challenged state law did not require schools to be closed that day. It is a question of fact upon which no evidence was presented.... We do not need evidence to determine that Christianity is the predominant religion of the people of Illinois; but we do need evidence to determine how many Christians, in each district, observe Good Friday. Not all, certainly. Perhaps not most. For we know that many Christians do not belong to a church, and it is a matter of common knowledge that many who do belong to a church (especially to a Protestant church) do not go to Good Friday services and also that those services are conducted in the early morning and in the evening, as well as during school hours. And since many religious Christians send their children to parochial schools or educate them at home, secular Christians may well predominate in the public schools, though this is another question on which there is no evidence.... The fact that six years ago the state rescinded Good Friday as a holiday for all state employees is some indication that nonobservance of Good Friday is widespread....

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289. *Metzl v. Leininger*, 57 F.3d 618, 619–20 (7th Cir. 1995). The statement that Good Friday is not a secular holiday anwhere in the United States was corrected later in the opinion.

> When there is no evidence concerning a critical fact,...the allocation of the burden of production of evidence becomes critical. We think that it properly belongs to the state in this case.... Economy in litigation requires that the burden of presenting evidence fall on the party that in the absence of such evidence would probably have no case, which here is the State of Illinois.... [W]hen the facts necessary for judgment...are missing in a case, the court has to decide who shall bear the onus for having failed to place them before the court. It seems to us that where as in this case the challenged law places the support of the state behind a wholly sectarian holiday and the only possible justification concerns the internal operations of a branch of state government, the burden of presenting whatever type of fact might support the justification should rest on the state. It was the state's decision to pitch its defense on the infeasibility of keeping the schools open on Good Friday. The question of feasibility is not one that can be settled as a matter of first or general principles. It requires a showing of fact that the state has not attempted to make.
>
> Only one other case has directly addressed the question whether a Good Friday closing law violates the establishment clause, even though such laws are in effect in twelve other states besides Illinois.[290] [I]t upheld the law...in part on the basis of a factual determination (whether or not correct—for there was a vigorous dissent both to the panel opinion and to the denial of rehearing en banc) that in Hawaii Good Friday has been secularized, becoming the first day of a three-day spring weekend devoted to shopping and recreational activities that have about them, as Hamlet would have said, no relish of salvation. Illinois is not Hawaii. No one goes water-skiing on Lake Michigan in mid-April.... Apparently in Hawaii Good Friday has acquired secular trappings.... Had Illinois made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case....
>
> ...All we hold today is that the State of Illinois has failed to show that its law closing the public schools throughout the state on Good Friday is necessary to prevent a wasteful expenditure of educational resources.[291]

As seemed to be *de rigueur* in these cases, one judge dissented. Judge Daniel A. Manion contended that the plaintiff should bear the burden of persuasion throughout and that the plaintiff had not borne that burden in this case. The evidence the majority thought the state should produce was probably nonexistent, and in its absence the court should respect the state's contention that it was acting from secular prudence unless the plaintiff could prove an intent to discriminate against non-Christians.

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290 . Ibid., citing *Cammack v. Waihee, supra,* and correcting the assertion made earlier that Good Friday is not a legal holiday elsewhere.

291 . *Metzl v. Leininger, supra*, emphasis in original.

> Good Friday has been a school holiday for 54 years. Thus, it is not surprising that the Board did not ask present students whether they would take the day off if there was no holiday. And it would be silly and irrelevant to ask former students whether they would have skipped school if Good Friday was not a holiday.... Under these circumstances..., I do not agree that the Board's failure to produce evidence of absenteeism defeats its claim that the purpose of the Good Friday holiday is an accommodation of religion rather than religious discrimination.... Ms. Metzl has produced even less evidence than the Board. [I]n order to upset a 50 year law on the ground that it is a "law respecting an establishment of religion," she should bear the burden of proof and the risk of nonpersuasion.... [S]he has failed to satisfy that burden, and therefore, her claim must fail.[292]

Thus, the laboratory of social experimentation among the several states continued. Good Friday was dispossessed of legal endorsement in California (*Mandel v. Hodges, supra*), in Connecticut (*Griswold Inn, supra*), and in Illinois (*Metzl v. Leininger, supra*), while its state-sanctioned observance in Hawaii was upheld (*Cammack v. Waihee, supra*), and in twelve states it apparently continued to be a legal holiday without challenge. The judges who expressed themselves on the merits divided heavily against the constitutionality of Good Friday as a legal observance—eighteen to four. One judge thought the issue should be decided *en banc* by the Ninth Circuit but did not reach the merits, while at least fourteen judges of that bench voted not to rehear the case, which—for each judge—may or may not have had anything to do with the merits.

6. Other Governmental Uses of Religious Symbols or Practices

Several other usages by governmental entities of religious symbols or references may be added at this point to round out the section on governmental proprietaries in religion. Some of these may also be described, particularly by their proponents, as "accommodations" of the religious interests of (some of) their constituents.

a. *Louisiana ex rel. Singelmann v. Morrison* (1952): **Saint's Statue.** A lay member of a Protestant sect, joined by a group of Protestant clergy as intervenors, brought suit against the Mayor of New Orleans, de Lesseps S. Morrison, to compel the removal from public property of a memorial statue of St. Frances Xavier Mother Cabrini. The trial judge denied the relief sought, and the Court of Appeal affirmed in an opinion consisting of seven pages of quotation from the trial court and one from the appellate tribunal.

The statue was erected by The Order of the Alhambra, a social affiliate of the Knights of Columbus, a Roman Catholic men's fraternal society, at the intersection of two main public thoroughfares in a "fine residential section" of New Orleans. The trial judge recited at some length a catalogue of statues and memorial plaques erected to distinguished citizens and benefactors and placed at various locations on the public

292 . Ibid., Manion dissent.

streets and parks of New Orleans by authorization of the Commission Council of the City and concluded that the statue in question was no different from those enumerated. The fact that Mother Cabrini was characterized on the identifying plaque at the foot of the statue as a Saint of the Roman Catholic Church and was portrayed as garbed in the habit of her religious order did not constitute an inappropriate recognition of religion. The trial judge, in an early paragraph, disposed of any federal cause of action by announcing, "At the outset, I must hold that the provision of the federal constitution [First Amendment] is not properly invoked and there is no federal question involved, since the erection of the statue here complained of cannot be held to be the establishment of a religion...."[293] This unsupported *ipse dixit* (unproven assertion) was not inconsistent with the rather undeveloped state of Establishment Clause awareness at that time, even though the Supreme Court had by then twice uttered the memorable no-aid formula in *Everson v. Bd. of Education* (1947)[294] and *McCollum v. Bd. of Education* (1948)[295]: "Neither a state nor the Federal Government...can pass laws which aid one religion, aid all religions or prefer one religion over another..."— which might seem to have merited at least a little discussion. Instead, the court focused entirely upon the state constitution, which contained wording identical with the federal First Amendment plus additional restrictions, such as "nor shall any preference ever be given to, nor any discrimination made against, any church, sect or creed...." The court resolutely refused to consider any of these provisions implicated by the statute of St. Frances Xavier Mother Cabrini, and the appellate court affirmed *in toto*.

b. *Protestants and Other Americans United for Separation of Church and State v. O'Brien* (1967): Christmas Postage Stamp. An organization formed in 1947 to defend a strict-separationist interpretation of the Establishment Clause sued Postmaster General Lawrence F. O'Brien for violating the clause by issuance of a commemorative Christmas postage stamp portraying a painting of the "Madonna and Child with Angels" by Hans Nemling, the original of which could be viewed at the National Gallery of Art in Washington, D.C. The plaintiffs contended that the likeness of the Madonna is a religious symbol commonly associated with the Roman Catholic Church and that a postage stamp bearing that likeness and disseminated to and used by millions of patrons of the Post Office would result in preferential publicity for that particular church at the expense of others.

Judge Alexander Holtzoff of the federal district court for the District of Columbia issued a decision in this case September 14, 1967.

> A dispute over the image on a postage stamp seems hardly of sufficient magnitude to occupy the time and attention of the courts. This matter, standing alone, is within the scope of the maxim "de minimis non curat lex" [the law does not concern itself with trifles]. Unfortunately, however, issues have been raised and presented in which there are lurking potential implications and far-reaching ramifications

293 . *State ex rel. Singelmann v. Morrison*, 57 So.2d 238 (1952).

294 . 330 U.S. 1 (1947), discussed at IIID2.

295 . 333 U.S. 203 (1948), discussed at IIIC1a.

> beyond the confines of this petty controversy. It becomes necessary, therefore, to devote consideration to the questions that confront the court out of all proportion to the insignificance of the minor and captious complaint filed by the plaintiffs.[296]

The court then devoted five pages to the question whether the plaintiffs had standing to sue and concluded that they did not under the rule of *Frothingham v. Mellon*,[297] that federal taxpayers do not have sufficient personal stake in governmental actions beyond that common to the public at large to pose a "case or controversy" such as is required to confer jurisdiction on the federal courts. Concluding, therefore, that the court did not have jurisdiction in the case, the court went ahead and ruled on the merits anyway, devoting another two pages to the importance of accommodating the religious interests of the American people, with copious quotes from the Supreme Court's sole "accommodationist" decision at that time, *Zorach v. Clauson*,[298] and ended on the following note:

> The publication of a postage stamp, even if it consists of a design of religious significance, is...outside of the ban of either of the two restrictions on the powers of government [in the religion clauses].... The suggestion of counsel that the reproduction of a painting of a Madonna on a postage stamp publicizes a particular religion and, therefore, is a form of proselytizing, is so remote and far-fetched as to be entitled to but scant consideration.... The defendant's motion to dismiss the complaint is granted.[299]

c. *Aronow v. United States* (1970): "In God We Trust." Stefan Ray Aronow brought suit in federal district court for the Northern District of California against the United States challenging the use of the phrase "In God We Trust" as the national motto and its inscription on the coins and currency of the nation. The district court ruled that the plaintiff, as taxpayer and citizen, lacked standing to challenge the validity of the statutes in question and that the merits of the claim were insubstantial.

On appeal, the Ninth Circuit Court of Appeals, Circuit Judges Benjamin C. Duniway and James M. Carter and Bruce R. Thompson, district judge from the district of Nevada, sitting by designation, ruled in a unanimous opinion by Judge Thompson. Reversing the usual order of things, the appellate court remarked, "Inasmuch as we agree on the insignificance of the charge of unconstitutionality, we do not reach the question of standing." (Standing being a threshold consideration, a court normally reaches it before reaching anything else.)

> It is quite obvious that the national motto and the slogan on coinage

296. *POAU v. O'Brien*, 272 F. Supp. 712 (D.D.C. 1967).

297. 262 U.S. 447 (1923), discussed at IIID4, modified with respect to the Establishment Clause by *Flast v. Cohen*, 392 U.S. 83 (1968).

298. 343 U.S. 306 (1952), discussed at IIIC1b.

299. *POAU v. O'Brien, supra.*

> and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.[300]

This language was derived from the Supreme Court's opinion in *Engel v. Vitale* (1962), which struck down the New York Regents' Prayer prescribed for use in public schools. The court quoted from that decision:

> There is of course nothing in the decision reached here that is inconsistent with the fact...that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[301]

On the strength of that *dictum*, the Ninth Circuit affirmed the district court's judgment.

d. *Anderson v. Salt Lake City* (1973): Ten Commandments. The Fraternal Order of Eagles obtained informal permission from the Board of Commissioners of Salt Lake City and County (Utah) to erect a 3 x 5 foot granite monolith on the courthouse grounds inscribed with the Ten Commandments and bearing symbols representing the All-Seeing Eye of God, the Star of David, the Order of Eagles, letters of the hebraic alphabet and Christ or peace. The Board of Commissioners subsequently arranged for the illumination of the monument at public expense. A number of taxpayers brought suit against the city and county, claiming that the monument violated the Establishment Clause. The federal district court agreed, saying that the message conveyed by the inscriptions was "clearly religious in character" and that the Board of Commissioners must be deemed by their actions to have adopted the program of the Order of Eagles, with the purpose and primary effect of advancing the cause of religion and certain religious concepts, thus inhibiting the ideas of persons with other beliefs.[302] The city and county appealed to the Tenth Circuit Court of Appeals, where the issue was considered by a panel composed of Judges Alfred P. Murrah, Oliver Seth and William E. Doyle and a unanimous opinion delivered by Circuit Judge Murrah.

> Although one of the declared purposes of the monolith was to inspire respect for the law of God, yet at the same time secular purposes were also emphasized [by the Order of Eagles]. It is noteworthy that the Order of Eagles is not a religious organization—it is a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based, but this creed does not include any element of coercion concerning these beliefs, unless one considers it coercive to look upon the

300. *Aronow v. U.S.*, 432 F.2d 242 (1970).
301. 370 U.S. 421 (1962), discussed at IIIC2b(1).
302. *Anderson v. Salt Lake City*, 348 F. Supp. 1170 (1972), *per* Chief Judge Willis W. Ritter.

> Ten Commandments. (Although they are in plain view, no one is required to read or recite them....)
>
> So the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions....
>
> 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. Although an accompanying plaque explaining the secular significance of the Ten Commandments would be appropriate in a constitutional sense, we cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects.
>
> No one can be the judge of his own objectivity. It may well be that in this blurred, indistinct area of our national life and environment, opinions about the purpose and effect of the monolith are influenced by orthodox or unorthodox propensities. But be that as it may, we are brought to the conclusion that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief.
>
> The judgment of the District Court is, accordingly, reversed.[303]

No mention was made of the hodgepodge of symbols also inscribed on the monolith. One wonders what symbol was thought to represent "Christ or peace," perhaps a dove or lamb. The appellate court had noted that the monument was one of many erected in public places across the United States and Canada, nine of them in Utah alone, as part of the Eagles' established and continuing "youth guidance program" designed "to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life."[304] Here was an instance of a lay organization pressing religious placarding upon a public body as a kind of talisman against evil, hoping somehow—perhaps by osmosis—to make the younger generation be good.

A similar pious motivation apparently inspired the Lexington Heritage Foundation to prevail upon the legislature of Kentucky to authorize the posting of the Ten Commandments (supplied by the Foundation) in every public school classroom in the state. The United States Supreme Court in 1980, in a *per curiam* opinion, without hearing oral argument, struck down the statute as an establishment of religion, saying,

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular

303 . *Anderson v. Salt Lake City*, 475 F.2d 29 (1973).

304 . Ibid., apparently quoting Order of Eagles sources.

> matters.... Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the sabbath day.[305]

Lacking this guidance, the Tenth Circuit allowed the Eagles' curious granite announcement to stand on the courthouse premises. The author of this work is not suggesting that it is improper for nonecclesiastical persons or organizations to utilize religious symbols or language—far from it. Ecclesiastical bodies have no monopoly on religion. If the Fraternal Order of Eagles wanted to disseminate copies of the Ten Commandments bedizened with symbols of the All-Seeing Eye of God (also found on the one dollar bill), the Star of David and "Christ or peace," to all and sundry, or to display the same on their own or other private premises, they are by all means fully free to do so. But that, apparently, would not do. The display must be made somehow seemingly "official" by placing it on the premises of *government*, and that is precisely where and why the Establishment Clause became implicated because the message then ceased to be a *private* message and became a *governmental* message, and government belongs to all, not just to the Eagles or to those who might favor their particular folk-faith propaganda, however meritorious some or all of its content might be if severed from the element of *state action*. It was that element that triggered the resentment of citizens who might have had little or no quarrel with the *content* of the message under other auspices, but who considered it presumptuous of their government to seem to lecture them on matters not appropriately the responsibility of government, since government has no greater expertise therein than private citizens. (The reference here, of course, is not to the injunctions against stealing, murder, false witness, etc., but to the individual's proper relationship to God.) As Justice Robert Jackson stated for the Supreme Court in *West Virginia v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no *official*, high or petty, can prescribe what shall be *orthodox* in politics, nationalism, *religion*, or other matters of opinion...."[306]

e. *O'Hair v. Andrus* (1979): The Pope on the Mall. In October 1979, Pope John Paul II came to America, and a flurry of church-state litigation resulted. Perhaps the most visible case was that filed by the noted (in some circles, notorious) atheist, Madelyn Murray O'Hair, against Secretary of the Interior Cecil Andrus, seeking an injunction to deny use of the National Mall in Washington, D.C., for celebration of the Mass on Sunday, October 7, 1979. The district court denied the request for an injunction on October 3. A motion for a preliminary injunction pending appeal was filed in the Circuit Court of Appeals for the District of Columbia Circuit on October 4. The next day argument was heard in that court by Circuit Judges Harold Leventhal, George E. McKinnon and Patricia M. Wald. The court's decision was issued on October 5 *per* Leventhal, J. (The American Civil Liberties Union and

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305 . *Stone v. Graham*, 449 U.S. 39 (1980), discussed at IIIC3a. See the discussion preceding that case at that location.

306 . 319 U.S. 624 (1943) (emphasis added), discussed at IVC2.

Americans United for Separation of Church and State—both ardent advocates of church-state separation—as *amici curiae* independently urged the court to *affirm* the denial of the injunction!)

> On August 1, 1979, in accordance with its regulation, the Department of the Interior issued a permit...to William Cardinal Baum, Archbishop of the Roman Catholic Archdiocese of Washington, authorizing a public gathering...of an estimated 500,000 people at the National Mall, the Washington Monument grounds, the Ellipse, and the Lincoln Memorial green for the purpose of an outdoor Mass by His Holiness John Paul II.
>
> The National Park Service has issued regulations that specifically govern applications for permits for the use of national parks for demonstrations, with "demonstrations" defined as including all "forms of conduct which involve the communication or expression of views...[having] the effect, intent or propensity to draw a crowd of onlookers." The parties agree that the Interior Department treats all applicants for demonstrations the same, be they religious or non-religious in nature. They further agree that the application of the Archdiocese was treated in the same manner as any application for a permit projecting a similar turnout would have been treated.
>
> In connection with the outdoor Mass, the Interior Department...is to provide Park Police services for crowd and traffic control, a chain link fence for crowd control, portable water fountains, and some electrical current. The estimated cost of the Park Police service is between $100,000 and $150,000 and an estimated additional $28,450 will be required for other services. The type of expenses that will be incurred by the Interior Department are no different from those regularly incurred with any large public gathering.... The District of Columbia will provide police service for crowd control involving approximately 200 to 225 officers....
>
> In connection with the Mass, the Roman Catholic Archdiocese of Washington will expend in excess of $400,000. This will cover the construction of the platform, including the alter [altar?] and other accouterments connected with the Mass. It will also cover the expense of fencing, sound equipment, electrical facilities (including supplemental electric current), portable toilets, first aid stations, chairs and other physical facilities. After the gathering, it will pay for the removal of all of the facilities constructed for the event and for the clean-up. Moreover, the Archdiocese has agreed that, within the overall Mall area, attendance at the service will be open to members of the public regardless of religious preference or belief.
>
> * * *
>
> No "preference" [in use of the Washington, D.C. parkland] is present. This undercuts appellants' establishment claim. When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madelyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of religion," and there cannot be a meaningful perception of one.

* * *

> Plaintiffs conjecture that any ruling permitting this use opens the door to conversion of the Mall into an outdoors church. The law has the ability of preventing sound doctrine from being pushed to unsound extremes.
>
> * * *
>
> The motion for an injunction...is denied.[307]

The court had concluded that the assembly on the Mall was *not* a governmental proprietary in religion but simply a standard accommodation in a public forum of any large assembly, religious or secular. Another court reached a different conclusion on a similar but significantly different fact-situation.

f. *Gilfillan v. City of Philadelphia* (1980): The Pope on the Fountain. The same visit by Pope John Paul II produced another case, in Philadelphia, focusing on a Mass celebrated by the pontiff on October 3, 1979, at Logan Circle in the presence of more than a million people. Unlike the event in Washington a few days later (described above), the City of Philadelphia expended more than $200,000 to construct a ceremonial platform and "to provide other extraordinary assistance for the papal ceremonies at Logan Circle."[308] This expenditure was challenged under the federal Establishment Clause by Susan Gilfillan and a number of other plaintiffs. Under a stipulation by the Roman Catholic Archdiocese of Philadelphia that it would reimburse the city if the expenditures were found to be unconstitutional, the litigation proceeded at a more leisurely pace than in the District of Columbia. On November 9, 1979, Judge Raymond Broderick of the U.S. District Court for the Eastern District of Pennsylvania found the challenged expenditures unconstitutional, and the city appealed. The Third Circuit Court of Appeals, Judges Ruggero J. Aldisert, Max Rosenn and Leonard I. Garth sitting, heard argument September 15, 1980, and ruled on December 30, 1980, *per* Judge Rosenn. The opinion was effusive in praise of the pope's visit and the event at Logan Circle.

> The liturgical service, the largest event during the Pope's two-day visit to Philadelphia, generated an unprecedented outpouring of warmth and goodwill felt throughout the City for months following. No one disputes that the historic visit of the Pope had a lasting and beneficial effect on the people of Philadelphia. It also favorably enhanced the image of the City.... Without reflecting in any way on the brilliant success of the Pope's visit to Philadelphia, what we must examine in this case is whether certain governmental actions by the City were permissible under the Establishment Clause....
>
> City officials [held] a series of meetings with the leaders of the Archdiocese of Philadelphia in preparation for the Pope's visit. Out of these meetings grew plans for a Mass at Logan Circle. In accordance with those plans...the City designed and built, over Swann Fountain in Logan Circle, a large platform to be used as the dais from which the Pope

307 . *O'Hair v. Andrus*, 613 F.2d 931 (1979).

308 . *Gilfillan v. Philadelphia*, 637 F.2d 924 (1981).

> would celebrate Mass and distribute Holy Eucharist, a sacrament of the Roman Catholic Church, and bring his message to Philadelphia.
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> * * *
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> The finished platform was an impressive creation that significantly helped beautify the Mass offered by the Pope. Paid for entirely by the City, the platform was cylindrical in shape, 28 1/2 feet high and 144 feet in diameter. Fifty-seven steps, 60 feet wide, extended 110 feet from the platform to the street. On the platform was a 16-step, 4-sided pyramid, 45 feet on a side and 14 feet high. On this pyramid was another small, 5-step pyramid upon which was placed a throne used by the Pope. The platform was painted white; the top of the large pyramid and portions of the steps were carpeted in red. In one corner of the large pyramid stood a white 36-foot high cross.... The City encircled the platform with nearly $50,000 worth of shrubbery and yellow chrysanthemums. The City also rented 20,000 chairs for seating of selected guests; it supplied a sound system, part rented and part purchased at a cost of more than $50,000; and it constructed a nearby, separate platform for a 360-voice choir.
>
> On the afternoon of October 3, 1979, Pope John Paul II led a procession from the Cathedral of Saints Peter and Paul to the Logan Circle platform. There he began a service that lasted more than two hours, during which he delivered a homily and personally distributed Communion to 150 worshippers. With him on the platform were a large number of clergy, but no city officials. The 20,000 seats nearest the platform, the chairs rented by the City, were available only to ticket holders, and tickets could be obtained only through the Archdiocese. The platform, illuminated for six days prior to the service, was left in place over Swann Fountain for more than one week after the service, but it was used for no other purpose....
>
> The plaintiffs opposed only a few items. Not challenged was the City's construction of a platform at the airport, a platform used by city as well as religious officials in welcoming the Pope to Philadelphia. Not challenged was the City's deployment of police along the parade route and at all events attended by the Pope. Not challenged was the Pope's use of public areas such as Logan Circle for his religious activities. Rather, plaintiffs contested only the City's payment for the construction of the platform at Logan Circle, a platform used exclusively for a religious service, and a few other extraordinary expenditures, all [of] a kind never offered to other organizations, religious or non-religious. Specifically, these additional expenditures were for renting of the chairs, and a sound system, the planting of shrubbery and flowers, and the building of the smaller platform for the choir.

The total expenditure challenged as improper came to $310,741, but the trial court allowed the city to deduct the cost of reusable items, such as $28,894 spent on lumber, $2,618 spent on bunting, $48,860 spent on shrubbery and flowers, $5,800 spent on carpeting and $20,000 of the amount spent on sound equipment, leaving a

balance of $204,569 to be reimbursed by the Archdiocese if the trial court's decision was upheld.[309]

The trial court reached its conclusion of unconstitutionality by using the three-prong *Lemon* test of establishment.[310] "The City does not contend [on appeal] that some other test should be applied...but does argue that the district court erroneously applied the test."[311] The trial court flunked the city on all three prongs of the test. The appellate court reexamined all three. With respect to the first prong—a secular purpose—the city contended that it had two secular purposes: (1) protecting the pope from the crowd and (2) the possibility of "public relations bonanza" (a purpose first proposed on appeal and apparently not considered by the trial court).

> The asserted purpose of protecting the Pope is, at best, suspect. At all other events attended by the Pope, he was protected by, at most, police and barricades. At Logan Circle, the platform was surrounded by barricades and police officers and these, much more than the platform, protected the Pope.... The City argues that by providing the platform to make the Pope widely visible it prevented a rush of persons attempting to see the Pope. This claim of protection is only partly true because the Pope's position on the platform made him a clear target in any direction. On the other hand, we cannot accept the City's argument as a sufficient secular purpose for the platform in light of its design and primary purpose to create a splendid setting for the religious service. The district court found that the platform was not designed, constructed or used for a civil purpose but for the celebration of Holy Mass by the Pope, assisted by the bishops of the Catholic Church. This finding is not plainly erroneous.
>
> Nor can we accept the City's claim of protecting the Pope as a purpose sufficient to justify several of the other contested preparations: the 36-foot high cross; approximately $50,000 in flowers and shrubbery; the $55,950 sound system; and the stand for the choir. Unless some other rational secular purpose is advanced for these expenditures, they...must be found unconstitutional....
>
> On appeal, the City asserts a public relations purpose, claiming that by funding these extraordinary items, it helped put Philadelphia in a good light. 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 the state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent.... Finally, if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed, for it is hard to imagine a city expenditure that will not look good in someone's eyes.... Because the City failed to satisfy the first part

309 . Ibid., n.2.

310 . From *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

311 . *Gilfillan*, *supra*.

> of the constitutional test, the district court properly held that the City expenditures violated the Establishment Clause of the first amendment.

With respect to the second prong of the *Lemon* test—a primary effect that directly and immediately advances religion—the court ruled as follows:

> The City presents several imaginative arguments.... First, it asserts that the "unique" nature of the Pope's visit somehow makes the effect not primarily religious, because "there is little risk that the expenditures will have the effect of placing the City's imprimatur of approval on the Catholic religion." We see no merit to that disclaimer. City officials went out of their way to align themselves and collaborate with the Archdiocese.... In addition, the district court found that the City had in effect "ceded control of the Logan Circle area to the Archdiocese," as evidenced by the Archdiocese's sole responsibility for the distribution of tickets for admission to the area in the vicinity of the platform. Further, regardless of imprimatur, the City's assistance had effectively enabled the Pope to reach large numbers of persons and to perform a religious service. A religious effect of such magnitude may itself be unique.
>
> The City maintains that the "transitory nature" of the aid—the Pope used the platform once and it was removed within two weeks—means that no religious institution was aided. But the aid need not be continuing to have an impermissible religious effect. The service was viewed directly by more than a million persons. It cannot be argued that its effect was not great. The platform itself was, on the City's orders, left standing for more than a week to enable Philadelphians to visit it. The City thus created a temporary shrine. Such activity is not compatible with the Constitution.
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> * * *
>
> The City also reasons that any religious effect was the result of the Mass and not the City's providing the platform and related support.... This claimed distinction between sources of effects would, if accepted, emasculate the Establishment Clause.
>
> The religious effect was both plain and primary. The Pope, admittedly on a pastoral mission to this country, was, with the aid of a magnificent setting provided by the City, able to celebrate a Mass and deliver a sermon. In so doing, he brought a religious message with the help of the City, from the Roman Catholic Church to millions of persons. This is an effect that can only be considered as advancing religion. We therefore affirm the district court's holding that the City's action created an impermissible establishment of religion.[312]

At another point in this work[313] the suggestion has been made that government activities, to be characterized as "establishment of religion," should constitute

312 . Ibid.

313 . See the text at IVD3c, note 107.

"*systematic* state action." Is an event that occurs only *once*, then, *not* establishment? The "systematic state action" formula is essentially a concept for surmounting the *de minimis* threshold on the supposition that a singular occurrence does not in itself constitute a pattern and therefore might be but a fluke or aberration; only if it *keeps on happening* does it rise above the level of "trifles." But there are certainly events of such magnitude that they cannot be considered trifles, even if they happen only once, and the papal extravaganza in Philadelphia was certainly one of them. It was not an impromptu or impulsive gesture, such as a public official might undertake as in voicing a prayer on the occasion of the assassination of a president. Instead, it was the result of much planning, elaborate coordination between the archdiocese and the city government, and extensive activities of construction, purchasing, arranging and decorating, not to mention the postevent exhibit of the premises as a kind of shrine.

On the third prong of the Lemon test—excessive entanglement between government and religion—the district court found against the city on two grounds: (1) the joint planning engaged in by the city and the archdiocese over several months (which tends to supply an element of "systematic state action" even if the pope arrived only once), and (2) the potential for community divisiveness along religious lines that such joint planning created. The city disputed each such conclusion on the ground that any church-state relationship was not a continuing one. The appellate court looked to *Allen v. Morton*,[314] the District of Columbia Pageant of Peace creche case seven years earlier, for guidance and noted that the D.C. Circuit had found excessive entanglement between the federal government and the Pageant because federal officials sat on the planning committee. The city tried to distinguish the two cases by contending that in *Allen* the government had an active role in management of the pageant and also cosponsored it. The Circuit Court in *Gilfillan* thought the situation there very similar to *Allen*.

> Despite the City's claim, the only contact between [the City and the Archdiocese] was not "to discuss provision of normal government services." Philadelphia Commissioner La Sala, in his deposition, indicated that for each aspect of the preparations, the Philadelphia official in charge had a counterpart in the Archdiocese. Admittedly, the City alone designed the platform, but the design was approved by the Archdiocese before it was built. Finally, the Archdiocese alone handled the access to the 20,000 reserved seats.... At the service, Archdiocese "marshals" turned away non-ticket holders from the several square block area where the 20,000 seats were located. Thus, in preparation, joint efforts were the norm, and at the event the religious organization apparently took over some government functions. We therefore affirm the district court's finding of entanglement based on the facts of the preparation.
>
> An alternative basis for the district court's conclusion that the City's activity caused entanglement was a finding that the assistance tended to promote divisiveness among and between religious groups.... Again, the

314 . 495 F.2d 65 (D.C. Cir. 1973), discussed at § 2c above.

> City argues that the ephemeral nature of the Pope's visit makes this finding incorrect, reasoning that any divisiveness will be evanescent.... Judge Broderick's finding of divisiveness was based on the number of plaintiffs. At least three separate groups brought suit to enjoin the City's assistance. We believe the district court could find entanglement from the divisiveness evidenced by the number of legal actions.[315]

Elsewhere this work has noted the flimsy, if not erroneous, basis in history for the idea that "preventing political divisiveness along religious lines" was a purpose of the Establishment Clause,[316] and members of the Supreme Court have expressed uneasiness about the use of that test except as a "kicker" to more substantial defects.[317] Certainly it should not be triggered by the evidence of the lawsuit itself without significant independent corroboration. Having found the city's actions to have failed all three of the *Lemon* prongs on other grounds, the Circuit Court could have abandoned this supererogatory one.

The court rejected the contentions of the city that failure on its part to assist the Logan Circle Mass as it did would have infringed on the pope's and the archdiocese's free exercise of religion. The court pointed out that the pope's use of a city park at Logan Circle was not at issue but whether the city was obliged to build a platform, etc., to facilitate the church's free exercise.

> The question then is whether the Archdiocese would have a colorable claim against the City for reimbursement [for these facilitations] if the City had declined the challenged assistance. Such a claim would obviously be without merit. To have the City reimbursed for such expenditures then cannot be denial of the right of free exercise of religion.
>
> O'Hair v. Andrus,[318] which the City cites repeatedly as supporting their free exercise argument, does not in any way suggest a different conclusion. That case also involved Pope John Paul II's visit to the United States. The Pope held a service on the National Mall.... The challenge there was primarily directed to this use of the property, a use the court sustained.... The court noted specifically that the Washington Archdiocese would expend in excess of $400,000 for construction of the platform and the altar, other physical and electrical equipment, sound equipment, chairs and clean-up, the very items the City of Philadelphia paid for. In this case, the plaintiffs agree the Pope had a right to use the city property. Their objection is to the extraordinary city expenses, an issue not raised in O'Hair.[319]

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315. *Gilfillan, supra.*

316. See IIE4j.

317. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984): O'Connor, J., concurring: "We have never relied on divisiveness as an independent ground for holding a government practice unconstitutional."

318. 613 F.2d 931 (D.C. Cir. 1979), discussed immediately above.

319. *Gilfillan, supra.*

Judge Aldisert filed a dissenting opinion in which he took a more expansive view of the situation, noting that the city had spent $1.2 million during the papal visit, of which the plaintiffs were challenging only a minuscule $204,569, which he viewed as a mere bagatelle, totally incidental to and subsumed in the city's overall secular responsibility to provide a suitable welcome and proper security for a visiting head of a "secular state, albeit a theocratic one." Judge Aldisert devoted several pages to that interesting theme, explaining the civil functions of the Holy See and comparing them to theocratic attributes of Israel and Iran. He also labored earnestly in support of the city's contention that this was a singularity, a unique one-time event that did not alone constitute an establishment of religion. He thought the city's concern for the safety and security of its citizens (and the pope) and its concern for the enhancement of its reputation as an attractive city, fully justified the city's expenditures, but his colleagues (properly) were not persuaded. The U.S. Supreme Court declined to hear the case.[320]

g. *ben Miriam v. Office of Personnel Management* (1986): "Anno Domini." Perhaps the ultimate instance of the genre in this section was a complaint brought by a Jewish employee of the federal government against the use on governmental forms of the abbreviation "A.D."—standing for *Anno Domini*, meaning "in the year of our Lord," that is, Jesus Christ. Judge Richard C. Erwin of the U.S. district court for the Middle District of North Carolina (Durham Division) dealt with the complaint as follows:

> The abbreviation "A.D."...traces its evolutionary lineage directly back to legislative action. The Appointment Affidavit...[on which it appears in this instance] exists because Congress requires documentation of the appointment of government employees. Yet, despite the obvious governmental involvement in the origin of the abbreviation on the form in question, the religious impact of the abbreviation is negligible....
>
> The court takes judicial notice that the Constitution, the very document plaintiff relies upon, contains the phrase "in the Year of our Lord." Plaintiff thus asks the court to order the government to strike from its official [f]orms[s]...an abbreviation of a phrase which appears in the highest law of the land, the Constitution, wherein the right to free exercise of religion is established. This the court cannot do.
>
> The court finds the use of the abbreviation in question by the government...to be a constitutionally permissible chronological referent. The abbreviation, "A.D.,"...has a purely secular usage. The court finds that the extended use of "A.D." through recent centuries as an annual or chronological reference point and its incorporation into the Constitution have worked to evolve the term into an entirely secular designation in the context of its appearance on [governmental forms].
>
> * * *
>
> [T]he court can only conclude that the impact upon the exercise of

320. *City of Philadelphia v. Gilfillan*, 451 U.S. 987 (1981).

> plaintiff's religious belief is so minimal as to be nonexistent. Therefore, there is no burden imposed on the exercise of plaintiff's religious belief and, consequently, no need to require the government to put forward a compelling state interest. Finally, there is no need for an exemption. Plaintiff has created his own exemption by simply striking out the offending abbreviation....[321]

The plaintiff's complaint was dismissed "with prejudice" (meaning it could not be reinstated).

With these widely varied cases the consideration of governmental proprietaries in religion comes to a close. The results of litigation in this area has been mixed. Some proprietaries have been sustained and others nullified by the courts, sometimes for reasons persuasive and sometimes for reasons not-so-persuasive. In the early or "primitive" efforts by courts to adjudicate Establishment Clause challenges to rites of the public cultus, there seemed to be an unwillingness to disturb the *status quo* (as in the cases of creches and crosses), but with the fuller development of Establishment Clause theory (guided to some extent by the Supreme Court lower courts had become less indulgent of folk pieties adopted by governments. Countervailing considerations were found, however, in two directions: (1) protections of rights guaranteed by the Free Exercise Clause (some chaplaincies); and (2) equal access by private speakers to public forums conducted under government auspices. These in turn had their limiting considerations, when "equal access" verged into "endorsement," or when "accommodation" went beyond removing governmentally imposed burdens.

321 . *ben Miriam v. Office of Personnel Management*, 647 F. Supp. 84 (1986).