Government Participation in Holiday Religious Displays: Improving on Lynch and Allegheny

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INTRODUCTION

The Christmas holiday season is a familiar time to most Americans. Many people adorn their houses, inside and out, with symbols of the season. Christmas trees, wreaths, lights, Santa Clauses, reindeer, and creches (Nativity scenes) are some of the typical decorations. Business establishments get into the act as well. So do governmental entities.

Until recently, relatively little turmoil brewed over government involvement in holiday religious displays. Whether it was a city's own ornaments that the city put up or privately owned decorations that the town permitted on public property, not much attention was paid to the legal ramifications of such holiday displays. However, over the last decade, a flurry of cases has confronted courts with the troublesome and difficult issue of whether government participation in holiday displays violates the First Amendment's Establishment Clause.¹

The United States Supreme Court has issued opinions twice on this thorny issue, six years ago in Lynch v. Donnelly,² and two years ago in County of Allegheny v. ACLU.³ Neither opinion has provided any clear guidelines to gov-

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The views expressed in this Article, except as otherwise indicated, are solely those of the author.

1. The First Amendment's Establishment Clause provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Amendment has been applied to state and local governments through the Fourteenth Amendment incorporation doctrine, which holds that the Bill of Rights applies with equal force to the states as well as the Federal Government. See, e.g., Everson v. Board of Educ., 330 U.S. 1, 14-15 (1947) (stating that there is every reason to give the same application and broad interpretation to the "establishment of religion clause" as has been given by the courts, since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action).


ernmental bodies, which commonly partake in holiday displays, or to lower courts, which hear many holiday-oriented religion cases. The Supreme Court has been criticized for failing to elucidate a coherent Establishment Clause analysis in this area.  

This Article analyzes the Supreme Court's Establishment Clause doctrine as applied to government involvement in holiday displays. Part I explores the case law from *Lynch* to *Allegheny*. Part II probes the problems in existing legal doctrine, the historical record on government-backed holiday displays, and the other critical factors to consider in this area. Based on these considerations, Part III proposes a strengthening of the *Lemon* test, the backbone of Establishment Clause analysis for almost two decades. This framework calls for broad-based abstinence of governmental bodies from holiday religious displays, but at the same time protects private religious expression.

### I. Court Cases From *Lynch* To *Allegheny*

The case law from *Lynch* to *Allegheny* depicts major judicial conflicts over the application of the Establishment Clause to government involvement in holiday religious displays. A discussion of this case history sheds light on the key factors to consider in an Establishment Clause analysis of government-backed holiday displays.

4. Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1438 (1987); see *Mather v. Village of Mundelein*, 864 F.2d 1291, 1293 (7th Cir. 1989) (calling for the Supreme Court to decide *Allegheny* "in a way that diminishes the role of architectural judgment in constitutional law"). Beyond holiday religious displays, the Supreme Court has been faulted for its overall treatment of religion clause issues. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 n.9 (1987) (stating that critics who have analyzed the Religion Clause believe the Court's treatment of Establishment Clause issues is unsatisfactory).

I recognize that the Supreme Court will hear an Establishment Clause case in the October 1991 term, *Lee v. Weisman*, 111 S. Ct. 1305 (1991), granting cert. to 908 F.2d 1090 (1st Cir.), aff'g 728 F. Supp. 68 (D.R.I. 1990), that many observers predict will be used by the Court to eliminate the *Lemon* test, see *Review of Supreme Court's Docket*, 60 U.S.L.W. 3181, 3181 (Sept. 24, 1991), in favor of a less stringent and more "accomodationist" Establishment Clause test. Although this Article focuses on holiday religious displays, the analysis (especially in Part II) demonstrates that the direction that the Supreme Court is expected to take is ill conceived and, inter alia, insensitive to the views of religious minorities.

5. The terms "holiday display" and "religious display," as used in this Article, refer to displays erected during the Christmas season, but the analysis in many places can be applied to religious displays generally. The term "government-backed holiday display" denotes any display requiring government sanction, including private displays in public parks as well as displays owned, erected, and maintained by governmental entities.

This Article focuses on Christmastime religious displays because, as the large amount of litigation on such exhibits shows, holiday displays have carved out their own niche in Establishment Clause law, with their own set of special circumstances.

6. One qualm that I have with many articles is that they provide too little objective presentation of cases before the writers start criticizing the opinions. This makes it difficult for the reader who is not familiar with the cases to assess the merits of an author's contentions. Thus, I have included a substantial discussion of the case law from *Lynch* to *Allegheny*. 
A. Lynch v. Donnelly

The *Lynch* case involved a Christmas display in Pawtucket, Rhode Island. The city annually erected its own decor in a privately owned park in the heart of the city's shopping area. The display included "secular" symbols such as a Santa Clause house, a Christmas tree, reindeer, and a "Seasons Greetings" banner. Also exhibited was a creche—a "religious" symbol that depicts the Birth of Christ. A creche had been part of the city's display for at least forty years, the most recent one purchased by the city in 1973 for $1365. Donnelly and the American Civil Liberties Union ("ACLU") brought suit in federal court, alleging that the inclusion of the creche in the display violated the Establishment Clause. The Rhode Island District Court agreed with the ACLU, and the First Circuit Court of Appeals affirmed.

1. The Lynch Majority

The Supreme Court, by a 5-4 margin, reversed the lower courts. Writing for the majority, Chief Justice Burger opened his legal analysis of the *Lynch* case by addressing the general goals of the First Amendment's two religion clauses:

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." At the same time, however, the Court has recognized that "total separation is not possible in an absolute sense."

... [A wall between church and state] is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

Chief Justice Burger argued that the Constitution does not require complete separation of church and state. On the contrary, "it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

In support of his argument that Pawtucket's display of its creche did not violate the Establishment Clause, Chief Justice Burger noted other official ac-

8. *Id.* at 671.
9. *Id.*
10. *Id.*; see infra notes 197-206 and accompanying text (discussing the distinction between secular and religious holiday symbols, and whether that distinction is useful for Establishment Clause purposes).
12. *Id.*
13. *Id.* at 671-72.
14. *Id.* at 688.
15. *Id.* at 672-73 (citations omitted).
16. *Id.* at 673.
17. *Id.*
knowledgments of religion that have been permitted. These acknowledgments include presidential and congressional announcements proclaiming Christmas and Thanksgiving as national holidays in religious terms, government-compensated chaplains in Congress and state legislatures, the national motto "In God We Trust," and the religious decor of Moses and the Ten Commandments in the Supreme Court's own chamber. These official recognitions of religion, Chief Justice Burger argued, indicate that the Establishment Clause is not a clear wall between church and state, but a blurred and variable barrier, depending on the particular case.

Though Chief Justice Burger noted that the Supreme Court has been unwilling to confine itself to any one Establishment Clause test, he did apply the Court's three-part test from *Lemon v. Kurtzman* to the *Lynch* case. Under the *Lemon* test, a government action must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. If a government action fails any prong of the three-part *Lemon* test, the action violates the Establishment Clause.

For the secular purpose portion of the three-part test, Chief Justice Burger stated that the creche must be viewed in the context of the Christmas season. He found that Pawtucket had a secular purpose for including the creche in its holiday display—to depict the historical origins of Christmas. Inclusion of the creche was not a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." To satisfy the primary effect portion of the test, Chief Justice Burger found that the effect of including the creche was no more an advancement of religion than the permitted official acknowledgements discussed above. He also determined that little government entanglement with religion existed, because church authorities were not involved in exhibiting the display, the cost of the display to Pawtucket was minimal, and divisiveness along religious lines did not exist during the forty years that the creche was in Pawtucket's holiday display.

18. *Id.* at 675-77.
19. *Id.* at 674-79. In a dissenting opinion, Justice Brennan took issue with the majority's use of history to support Pawtucket's display of its creche. *Id.* at 720-25 (Brennan, J., dissenting); see also infra notes 46-47, 120-62 and accompanying text (asserting that government-backed holiday displays are a relatively recent development, and not deeply-rooted in this country's history).
24. *Id.* at 680.
25. *Id.*
26. See supra note 18 and accompanying text.
27. *Lynch*, 465 U.S. at 681-85. The Court held that a litigant cannot, by filing a lawsuit, create the appearance of divisiveness and then exploit it as evidence of entanglement. *Id.* Political divisiveness seems more suited for analysis under the "primary effect" prong of the *Lemon* test (divisiveness being an effect of the government action), but the Court has placed it under the entanglement prong. *Id.* at 669.
Having satisfied himself (and four other members of the Court) that Pawtucket's display of the city owned creche met the Lemon test, Chief Justice Burger went on to add:

It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people . . . would so “taint” the city's exhibit as to render it violative of the Establishment Clause.  

Thus, the Court found that Pawtucket did not violate the Establishment Clause by publicly displaying its creche.

2. The Lynch Dissent

Chief Justice Burger's Lynch decision, as noted earlier, was a narrow 5-4 victory for Pawtucket. There was a clear ideological schism between the majority and the dissent over the Establishment Clause's general import. The Lynch majority did not view the Clause as calling for strict separation between church and state. As stated above, the Lynch majority believed that the Establishment Clause is a blurred barrier between church and state, mandating accommodation and not mere tolerance.

The four Lynch dissenters disagreed. Justice Brennan, writing for all four dissenting Justices, argued, "[The Lemon] test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs . . . ." Justice Brennan saw the Establishment Clause as mandating government neutrality with respect to religion, which would mean the government must avoid not only the official establishment of a state religion, but also

Justice Blackmun, in dissent, argued that the majority's application of the Lemon test perverted its meaning. Id. at 726 (Blackmun, J., dissenting). Several commentators agree. See, e.g., Thomas R. McCoy & Gary A. Kurtz, A Unifying Theory for the Religion Clauses of the First Amendment, 39 Vand. L. Rev. 249, 270-71 (1986) (stating that the “Court floundered in Lynch [because] . . . [a]ll the opinion writers attempted to use a test designed for cases with a lower level of political oppression”); William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 784-85 (stating that the Lynch case fits in the literal wording of the Lemon test, and the Lynch decision did not need to be compromised by the majority's “ineffectual attempt to compare the city's illuminated, commercially manufactured, outdoor nativity scene to the mere inclusion of historic religious paintings in a public museum”); see also infra notes 92-109 and accompanying text (discussing problems with the Lemon test).


29. Id. at 687. Justice O'Connor, concurring with Chief Justice Burger's opinion, offered a "clarification" of the Court's Establishment Clause doctrine. Id. (O'Connor, J., concurring). Justice O'Connor's test has been called the "no endorsement" test. Her test holds that a government action passes Establishment Clause muster if it does not foster institutional entanglement with religion, and if the intent and the effect of the action do not amount to endorsement of a particular religion or religious belief. Id. at 689-90; see infra notes 110-18 and accompanying text (discussing problems with Justice O'Connor's test).

30. See supra note 19 and accompanying text.

“sponsorship, financial support, and active involvement of the sovereign in religious activity.”

Based in large part on the ideological differences between the majority and the dissent, the dissent’s application of the Lemon test found Pawtucket’s creche unconstitutional. The dissent determined that each prong of the test was violated. First, there was no secular purpose for including the creche in Pawtucket’s display. Justice Brennan found that the creche, unlike the Santa Claus, reindeer, and the like, reflected a sectarian exclusivity. Justice Brennan did not believe that the city had a legitimate secular purpose in depicting the “religious” historical origins of Christmas. As for other possible secular purposes, such as celebrating the holiday in general and promoting downtown retail sales, Justice Brennan argued that these goals could be accomplished without the creche. He believed the “secular” Christmas symbols in the display were sufficient.

Second, Justice Brennan found that the primary effect of the creche’s inclusion was to advance Christianity. “Those who believe[d] in the message of the nativity scene receive[d] the unique and exclusive benefit of public recognition and approval of their views.” Non-Christians, religious minorities in this country, were made to feel like outsiders in their community, and the creche exerted an “indirect coercive pressure upon religious minorities to conform to prevailing officially approved religion.”

Finally, regarding the potential for excessive government entanglement with religion, Justice Brennan noted that the Mayor of Pawtucket had said that he would include a Jewish menorah in future displays. Justice Brennan worried that this would lead other religious groups to press for inclusion of their symbols, forcing the city to become involved in obliging the many groups. In addition, Justice Brennan disputed Chief Justice Burger’s analysis concerning the political divisiveness issue. The calm that existed before the suit was filed may have merely indicated that minorities considered it futile to oppose the

32. Id. (citations omitted).
33. Id. at 704.
34. Id. at 698.
35. Id. at 699-700.
36. Id. at 713.
37. Id. at 698-700. Chief Justice Burger argued in the majority opinion that even if the city’s objectives could be achieved without including the creche, the point was irrelevant because “[t]he question is whether the display of the creche violates the Establishment Clause.” Lynch, 465 U.S. at 681 n.7. Chief Justice Burger’s response merely begs the question of what the elements of the Establishment Clause test should be. For example, should the availability of less religious alternatives to the creche bear on the legality of it? See infra note 50 (discussing Justice Brennan’s Lynch dissent, where he argues that a government body may not use religious means to reach secular goals where secular means will suffice).
39. Id.
40. Id. at 701-02.
41. Id. at 702.
42. Id.
Christian majority. The powerful, emotional reactions that were unleashed by the suit, Justice Brennan argued, demonstrated that the creche was an issue that brought about community divisiveness along religious lines. Thus, Justice Brennan found that Pawtucket's creche posed an entanglement problem.

Beyond rejecting the majority's Lemon test analysis, the dissent stressed that the majority's use of history was misplaced. Whereas government-paid chaplains in legislatures might be justified on the ground that such chaplains have existed since the framing of the Constitution, Justice Brennan found that government-backed creche displays are a relatively modern phenomenon, not rooted in our past. Thus, failing the Lemon test and lacking "widespread, undeviating acceptance that extends throughout our history," in the dissent's view, the Pawtucket creche violated the Establishment Clause.

B. Lower Court Cases Between Lynch and Allegheny

Although Chief Justice Burger's majority opinion was the "binding precedent" of the Lynch case, the precedent it established was in question. Justice Brennan's dissenting opinion took up this important practical point: the Lynch decision may well have rested on the particular holiday context in which Pawtucket's creche appeared. While a creche amidst a Santa Claus and reindeer could appear unoffensive to the majority, Justice Brennan argued that the Court's decision left many unanswered questions. For example, Justice Brennan asked whether it would be constitutional for a city to be involved in the display of a creche standing alone. Other questions also come to mind. Does

43. Id. at 703.
44. Id. at 702-03. At trial, Mayor Lynch testified that he had never seen people as mad as they were over Pawtucket's creche. Donnelly v. Lynch, 525 F. Supp. 1150, 1162 (D.R.I. 1981), aff'd, 691 F.2d 1029 (1st Cir. 1982), rev'd, 465 U.S. 668 (1984). The district court judge stated that the case smelled of the "acrid fumes of religious chauvinism." Id. at 1180.
46. Marsh v. Chambers, 463 U.S. 783 (1983) (stating that legislative chaplains are constitutional because of historical acceptance).
48. Id. at 725.
49. Id. at 705.
50. Id. at 695. Justice Brennan also pointed out that the majority decision left open the question of the constitutionality of the public display of such clearly religious symbols as a cross. Id. Lower courts have dealt with the cross issue, and no courts before or since Lynch have found a government cross display constitutional. ACLU v. Mississippi State Gen. Servs. Admin., 652 F. Supp. 380, 384 (S.D. Miss. 1987). Many lower court judges, at least in cross cases, have agreed with Justice Brennan that a government body may not employ religious means to reach secular goals where secular means will suffice. See, e.g., ACLU v. City of St. Charles, 794 F.2d 265, 275 (7th Cir.) (holding that ACLU was entitled to a preliminary injunction prohibiting St. Charles' display of a lighted cross), cert. denied, 479 U.S. 961 (1986); ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098, 1111 (11th Cir. 1983) (holding that construction of cross in a state park violated the Establishment Clause, and alleged secular purpose for promoting tourism would
Lynch permit a privately owned creche display on public property? What about a creche standing in front of a public building?

The lower federal courts ran into conflict over these questions. A Virginia district court ruled that a privately owned creche standing alone on the front lawn of a county office building violated the Establishment Clause, because a creche on public property in front of a public building generated a strong message of government endorsement of Christianity. The Seventh Circuit, however, found a similar display on a village hall's front lawn constitutional.

On the other hand, the Seventh Circuit found that a creche standing alone in the lobby of Chicago’s Daley Center (home to the Circuit Court of Cook County, Illinois) violated the Establishment Clause because the creche communicated government endorsement of Christianity. However, privately owned creche and menorah displays placed in Daley Plaza, adjacent to the Daley Center, were deemed constitutional on the basis that the exhibits were merely a form of speech permitted by the First Amendment’s guarantee of freedom of speech in a public forum like Daley Plaza. The Second Circuit arrived at the same conclusion in a similar case, finding a privately owned creche displayed in a public park constitutional.

The same ruling occurred in the case of a privately owned menorah displayed in a public park. See Kaplan v. City of Burlington, 700 F. Supp. 1315 (D. Vt. 1988) (holding that a privately owned menorah display in a public park did not violate the Establish-
C. County of Allegheny v. ACLU

Recognizing the questions left unanswered by the *Lynch* decision and the conflicting lower court opinions on those issues, the Supreme Court took up *County of Allegheny v. ACLU.* Allegheny was actually two cases rolled into one, involving two recurring holiday displays on public property in downtown Pittsburgh. The first was a privately owned creche displayed on the Grand Staircase of the Allegheny County Courthouse, the "main," "most beautiful," and "most public" part of the courthouse. There were no secular symbols like a Santa Claus displayed with the creche. Two banners accompanied the creche, one stating that the creche was donated by the Holy Name Society, a Roman Catholic Group, and another that said "Gloria in Excelsis Deo," meaning "Glory to God in the Highest."

The second display was a privately owned eighteen foot Chanukah menorah, located just outside the City-County Building next to the city's forty-five foot decorated Christmas tree. A sign at the foot of the tree bore the mayor's name and included text declaring the city's "salute to liberty." Though owned by Chabad, a Jewish group, the menorah was stored, erected, and removed each year by the City of Pittsburgh.

The United States District Court for the Western District of Pennsylvania, relying on *Lynch,* found both the creche and menorah displays constitutional, but a divided Third Circuit panel reversed, determining that the exhibits endorsed Christianity and Judaism.

The Supreme Court took up *Allegheny* to show more clearly the Court's position on holiday displays, and to provide better guidance to governmental bodies that are involved in such exhibits. The High Court's opinion, though, indicates that the Justices disagree more now than ever before. The Court found the creche unconstitutional by a 5-4 margin, with Justice Blackmun writing a partial majority opinion on the creche display. Justices O'Connor, Stevens, Brennan, and Marshall sided with Justice Blackmun on the creche display, while Justices Kennedy, Rehnquist, Scalia, and White dissented.

58. *Id.* at 579.
59. *Id.* at 580-81.
60. *Id.* at 580 & n.5.

61. The Chanukah menorah is a religious symbol that represents an eight-day Jewish holiday that starts on the 25th day of the Jewish lunar month of Kislev. *Id.* at 582. It usually falls in December, making it the Jewish holiday closest to Christmas every year. *Id.*

62. *Id.* at 573.
63. *Id.* at 582.
64. *Id.* at 587.
65. *Id.* at 588-89.

66. Summarizing a decision with several lengthy opinions can be quite difficult. The opinion of District Judge Graham in *ACLU v. County of Delaware,* 726 F. Supp. 184 (S.D. Ohio 1989), proved invaluable in isolating the key points in the various *Allegheny* opinions.

However, the Court upheld the menorah display 6-3, with no majority opinion.¹⁸ Justices Blackmun and O'Connor were joined by the creche dissenters in upholding the menorah display's legality, while Justices Stevens, Brennan, and Marshall believed that the menorah display was unconstitutional just as the creche exhibit.¹⁹

Justice Blackmun's partial majority opinion reaffirmed the use of the Lemon test and focused on the "primary effect" prong: whether the government action's principal or primary effect is to advance or inhibit religion.²⁰ The creche majority held that a government action violates the Establishment Clause if it "has the purpose or effect of 'endorsing' religion."²¹ If the government shows preference for one religion or religious belief over another religion or over disbelief, it has unconstitutionally endorsed religion, because "[t]he 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.'"²²

Although five Justices agreed that the endorsement-primary effect test was the correct focus, there were several opinions on how to apply the test. Justice Blackmun, in a part of his opinion joined only by Justice Stevens, concluded that the display's effect depends on whether viewers fairly understand the display's purpose to be government endorsement of religion.²³ Justice O'Connor interpreted the endorsement test somewhat differently. She reiterated her belief, stated in Lynch, that each government action must be judged in its unique circumstances to determine whether it endorses or disapproves of religion.²⁴ The key issue to probe in scrutinizing a holiday religious display was whether the exhibit communicates a message of religious endorsement or a message of cultural pluralism.²⁵ In Justice O'Connor's view, the Allegheny creche, standing alone in front of an important government building, endorsed religion, while the Chanukah menorah and Christmas tree display showed the United States' cultural diversity and "convey[ed] tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens."²⁶

Justice Brennan, concurring on the creche and dissenting on the menorah, argued that government display of a symbol that has a clear religious meaning

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68. Id. at 579.
69. Id. at 637 (Brennan, Marshall, & Stevens, JJ., concurring in part and dissenting in part).
70. See supra note 22 and accompanying text for a discussion of the Lemon test. The Court did not address the "secular purpose" and "entanglement" prongs of the Lemon test because the court of appeals had not addressed them, but Justice Blackmun noted that these prongs could be considered by the lower courts on remand. Allegheny, 492 U.S. at 620-21.
71. Allegheny, 492 U.S. at 592.
72. Id. at 593-94 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984)).
73. Id. at 595 (nonmajority portion of opinion of Blackmun, J.).
74. Id. at 624-25 (O'Connor, J., concurring).
75. Id. at 634.
76. Id. at 626-27, 636.
“is incompatible with the separation of church and state demanded by our Constitution.”\textsuperscript{77} Regarding the menorah display, Justice Brennan wondered how “a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the Mayor’s office shows no favoritism towards Christianity, Judaism, or both.”\textsuperscript{78} He disagreed with Justice O’Connor that the menorah display was a benign depiction of cultural pluralism.\textsuperscript{79} Justice Brennan found that the menorah, a symbol of religious significance to Jews, brought out the religious message of the Christmas tree.\textsuperscript{80}

Justice Stevens, concurring on the creche and dissenting on the menorah like Justice Brennan, did not deal directly with the endorsement test. Rather, he argued that “the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.”\textsuperscript{81} However, the “strong presumption” would block a display only when the message is nonsecular.\textsuperscript{82} Justice Stevens found the creche’s message to be nonsecular. Although he accepted Justice O’Connor’s argument that the menorah display could convey a message of pluralism and freedom of conscience, that message was not clear enough “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.”\textsuperscript{83}

Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and White, felt that both the creche and the menorah displays were constitutional. Justice Kennedy accepted the Court’s use of the “primary effect” test of \textit{Lemon}, but adopted a stance similar to that of the \textit{Lynch} majority: “Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society.”\textsuperscript{84}

Justice Kennedy argued that the case law does disclose two limiting principles on accommodation: (1) government cannot coerce people to support a religion; and (2) government may not, in the guise of avoiding hostility to religion, give benefits to religion so great that it establishes a state religion, or tends to do so.\textsuperscript{85} Applying these principles, Justice Kennedy determined that both the creche and menorah displays were constitutional, as “the city and county sought to do no more than ‘celebrate the season,’ . . . [an interest] well within the tradition of government accommodation and acknowledgement of

\textsuperscript{77} Id. at 637 (Brennan, J., concurring in part and dissenting in part).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 639-40.
\textsuperscript{80} Id. at 640-41.
\textsuperscript{81} Id. at 650 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{82} Id. at 652.
\textsuperscript{83} Id. at 655.
\textsuperscript{84} Id. at 657 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).
\textsuperscript{85} Id. at 659.
religion that has marked our history from the beginning."  

D. Lynch and Allegheny Backlash

As Allegheny shows, a diversity of opinion exists on the Supreme Court concerning the proper application of the Establishment Clause to government involvement in holiday religious displays. Allegheny, like Lynch, provides no coherent guidelines for local governments that participate in holiday displays, nor does it help lower federal courts that hear many creche cases. Justices on the Supreme Court disagree over the application of the Lemon test, whether the Establishment Clause calls for "accommodation" or "strict separation," what symbols are too "religious" for governments to display, and how history factors into the holiday display analysis. Part II explores these areas of conflict, which are key to a successful application of the Establishment Clause to government-involved holiday displays.

II. Inputs to a Successful Establishment Clause Analysis

One useful way to analyze a constitutional issue is to break it down into three levels of discussion: (1) doctrinal; (2) historical; and (3) responsive. Doctrinal analysis focuses on past Court decisions that are precedent for the issue at hand. Historical inquiry looks at the original intent of the Constitution's framers, and the historical record on the particular practice at issue. Responsive (or modern) interpretation brings in considerations of today, recognizing that this country is constantly changing and involved in an ongoing process of national self-definition. The factors that come to light under these three levels of constitutional analysis are explored in this section.

A. Analysis of Establishment Clause Doctrine in Holiday Display Cases

The Lemon test has been the foundation of the Supreme Court's Establishment Clause decisions for nearly two decades. It is also a major reason why the Court is so confused in applying the Establishment Clause to holiday displays. That test, as discussed earlier, holds a government action in violation of the Establishment Clause if it does not succeed on three prongs: (1) the government action must have a secular purpose; (2) its principal or primary effect

86. Id. at 663 (citations omitted).
87. At least one lower court judge, Judge Graham, has recognized the imprecision of Allegheny. ACLU v. County of Delaware, 726 F. Supp. 184, 185 (S.D. Ohio 1989) (stating that Allegheny did not provide a clear answer to this case, and holding that a Nativity scene on a courthouse lawn violated the Establishment Clause).
88. Robert Post, Theories of Constitutional Interpretation, REPRESENTATIONS No. 30 13, 19 (Spring 1990).
89. Id. at 20.
90. Id. at 21. Post would put the historical record under responsive interpretation and confine historical interpretation to original intent. Id. at 24. I alter the analysis out of personal preference for treating original intent as just one aspect of the historical record.
91. Id. at 23-24.
must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive entanglement with religion.\textsuperscript{92}

As applied by the Court, the \textit{Lemon} test has produced chaotic and conflicting decisions.\textsuperscript{93} The \textit{Lynch} majority opinion seems to repudiate the \textit{Lemon} test, because the majority's application of the test to the Pawtucket creche runs contrary to basic common sense.\textsuperscript{94} Chief Justice Burger found that the Pawtucket display had a secular purpose, depicting the historical origins of Christmas.\textsuperscript{95} As Justice Brennan noted in his dissent, however, the Birth of Christ is of religious significance because it is important to Christians but not to non-Christians.\textsuperscript{96} The evidence adduced at trial clearly indicated that the creche was a distinctive religious symbol.\textsuperscript{97} Many people, including the Mayor of Pawtucket, wanted to keep the creche in the Pawtucket display to “keep ‘Christ’ in Christmas”—a clearly nonsecular purpose.\textsuperscript{98}

Moreover, the \textit{Lynch} majority opinion flies in the face of another religious symbol case decided just four years earlier, \textit{Stone v. Graham}.\textsuperscript{99} In \textit{Stone}, the Court struck down a Kentucky statute authorizing the posting of the Ten Commandments in public school classrooms.\textsuperscript{100} Kentucky argued that there was a secular purpose in posting the Ten Commandments: to display the fundamental legal code of Western civilization.\textsuperscript{101} The Court did not accept this alleged secular purpose, noting that the Ten Commandments are clearly a sacred text to Christians and Jews.\textsuperscript{102}

If posting a religious text has no secular purpose, how can a secular purpose be found in the display of a creche? The \textit{Lynch} decision is not consistent with \textit{Stone} on the secular purpose prong of the three-part \textit{Lemon} test.\textsuperscript{103} As for the primary effect portion of the test, the \textit{Lynch} majority found that the Pawtucket creche did not advance Christianity, but the empirical evidence showed otherwise.\textsuperscript{104} The plaintiffs in \textit{Lynch} perceived the creche as city support for Christianity, and the majority’s conclusion to the contrary “‘came as a surprise to most Jews,’”\textsuperscript{105} as well as four members of the Court.

\textsuperscript{92} See supra note 22 and accompanying text.
\textsuperscript{93} See Smith, supra note 4, at 269.
\textsuperscript{94} See Gary J. Simson, \textit{The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach}, 72 CORNELL L. REV. 905, 906 (1987) (arguing that \textit{Lynch} seems to repudiate the \textit{Lemon} test).
\textsuperscript{96} Id. at 699-700 (Brennan, J., dissenting).
\textsuperscript{97} Id. at 695.
\textsuperscript{98} Id. at 726 (Blackmun, J., dissenting).
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 41.
\textsuperscript{102} Id.
\textsuperscript{103} See Harry Simon, Note, \textit{Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays under the Federal and California Constitutions}, 37 HASTINGS L.J. 499, 509 (1986) (calling \textit{Lynch} a “radical departure” from decisions like \textit{Stone}).
\textsuperscript{104} \textit{Lynch}, 465 U.S. at 669.
\textsuperscript{105} Smith, supra note 4, at 301 & n.132 (quoting Mark Tushnet, \textit{The Constitution of Reli-}
The conflict between the Court's opinions in *Stone* and *Lynch*, and the dispute within the Court over *Lynch* itself, demonstrate that the *Lemon* test, as applied to holiday display cases, is an ineffective mode of analysis. To solve this problem, Justice O'Connor reframed the *Lemon* test in her *Lynch* concur-rence. Justice O'Connor's test has become known as the "no endorsement" test. The test consists of two prongs. One prong focuses on the purpose and effect of a government action: what the government intended to communicate and what message was actually conveyed. In determining what message the audience received, the focus is on the "objective" meaning of the government action, as seen by the "reasonable observer."

The majority opinion on the Allegheny creche display utilized Justice O'Connor's "no endorsement" test to interpret the "primary effect" prong of the *Lemon* test. A majority of the Court found that the creche, standing alone, endorsed Christianity in violation of the Establishment Clause. On the other hand, the Court found that the Chanukah menorah/Christmas tree display did not have the effect of endorsing the involved religious faiths.

Finding herself in the majority on both Allegheny displays, Justice O'Connor proclaimed her test a success. "I . . . remain convinced that the endorsement test is capable of consistent application." Unfortunately, O'Connor's perception of her test is not accurate. A significant problem exists in the effect prong. Who is this "reasonable" observer, from whose perspective the effect of the government-backed holiday display is judged, and what does that person see? If the observer is a member of the religion whose symbol is being displayed—for example, a Christian looking at a creche—the observer may view the display as innocuous. On the other hand, if the display is viewed from the standpoint of a nonadherent, the symbols may be seen as an advancement of the displayed religion.

As Justice Brennan wondered in *Allegheny*: "I do not know how we can decide whether it was the [Christmas] tree that

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107. See supra note 29.
108. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). The other prong of Justice O'Connor's test is whether the government action fosters excessive entanglement with religious institutions. *Id.* at 689.
109. *Id.* at 690; see also County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring); Smith, supra note 4, at 272.
111. *Id.* at 612-13.
112. *Id.* at 620-21 (nonmajority portion of opinion of Blackmun, J.).
113. *Id.* at 629 (O'Connor, J., concurring).
114. Note, Developments in the Law: Religion and the State, 100 Harv. L. Rev. 1606, 1648 (1987) (arguing that application of the Establishment Clause should turn on the message received by the nonadherent).
stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations. . . ."116

Clearly, the "no endorsement" test is just as indeterminate as the Lemon test.116 Both tests can be manipulated to fit the particular views of the particular judge, and they leave open the key questions that must be answered in an Establishment Clause analysis of holiday displays. The tests do not resolve the ideological clash between accommodation and strict separation. The tests do not tell us how history should factor into the analysis. Moreover, they do not provide us with a definition of religion, a concept critical for intelligent application of the Establishment Clause.117

The search for a single, unifying theory for all Establishment Clause cases may be, as one writer put it, "chimerical."118 However, it is possible to improve on the Supreme Court's doctrinal analysis of holiday displays in Lynch and Allegheny. By focusing on the specific Establishment Clause concerns called forth by government-backed holiday displays, guidelines can be framed that should lead to greater coherence in analyses of such displays.

B. Historical Considerations in Holiday Display Cases

To facilitate an examination of the historical record, the analysis is broken into two sections here: (1) holiday displays specifically; and (2) the Establishment Clause in general.

1. What History Teaches Us About Holiday Displays

If we listen to Justice Kennedy, Chief Justice Rehnquist, and Justices Scalia and White, the historical import of the Establishment Clause dictates "accommodations" of Christianity by government.119 In his Allegheny opinion, Justice Kennedy perused Thanksgiving proclamations by Presidents from George Washington to Franklin D. Roosevelt and pointed out that these Presidents saw the national day as a day of celebration and prayer.120 Using these exam-
pies to justify government-backed creche displays, Justice Kennedy concluded, "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."121

In the eyes of several members of the Court, historical practices have great force in determining the constitutionality of government-backed holiday displays.122 "[T]he meaning of the Clause is to be determined by reference to historical practices and understandings."123 Former Chief Justice Burger's Lynch opinion, which relied heavily on "official acknowledgements"124 that historically have been permitted, arrived at the same result.125

What do these other historical practices tell us about creche displays? As Justice Brennan argued in his Lynch dissent, historical acknowledgements of Christianity, such as Thanksgiving proclamations and state-paid legislature chaplains, do not tell us anything about the constitutionality of government-backed holiday displays:126 "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 19th century."127

With respect to the 1800s, Christmas did not become a public holiday in many states until the middle of the century, and it was not until 1885 that Congress made it a paid holiday for its employees.128 The road to making Christmas a public holiday was bumpy. Much divisiveness existed between Christian sects over the public celebration of Christmas, as some sects saw it as a sacrilegious creation of the Church of England or the Roman Catholic Church.129 As late as 1874, a Congregationalist named Henry Ward Beecher could write: "To me Christmas is a foreign day, and I shall die so. . . . I understood it was a Romish institution, kept up by the Romish Church."130

Id. at 671 (quoting Presidential Proclamation No. 2629, 58 Stat. 1160 (Nov. 1, 1944)).

121. Id.

122. See supra notes 119-21 and accompanying text (noting that historical practices are important to Chief Justice Rehnquist and Justices Kennedy, Scalia, and White).

123. Allegheny, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part).


125. See supra notes 15-19 and accompanying text.

126. Lynch, 465 U.S. at 718 (Brennan, J., dissenting). With respect to the chaplains, Marsh v. Chambers holds that state-paid chaplains for legislatures are constitutional because they have been permitted since the time that the Bill of Rights was framed. 463 U.S. 783, 787-90 (1983). The practice, however, was criticized from the early days of the Republic. James Madison saw congressional chaplains as a mistake, inconsistent with the First Amendment. Van Alstyne, supra note 27, at 776.


128. Id. at 723 & n.31.

129. Id. at 722-23 (referring to Puritans, Presbyterians, Baptists, and Methodists who viewed the celebration of Christmas as sacrilegious).

130. Id. at 722 n.27 (citing ROBERT J. MYERS, CELEBRATIONS: THE COMPLETE BOOK OF AMERICAN HOLIDAYS 314, 316 (1972)).
As for creche displays specifically, Justice Brennan stated that the historical evidence suggests creches were introduced by German immigrants who settled in Pennsylvania in the 1700s, the practice increased with the influx of Roman Catholics in the 1800s, and it gained wider acceptance in the late 1800s. Justice Brennan concluded, "It is simply impossible to tell . . . whether the practice ever gained widespread acceptance, much less official endorsement, until the 20th century." The facts of *Lynch* and *Allegheny* lend strong support to Justice Brennan's conclusion. Pawtucket only could trace its creche display back to the 1930s or 1940s, and Allegheny County's creche dated from the early 1980s. Thus, Justice Brennan stood on firm ground when he asserted:

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.

2. What History Teaches Us About the Establishment Clause In General

There is no historical support for government-backed holiday displays specifically. That fact, however, did not dissuade Chief Justice Burger in *Lynch* or Justice Kennedy in *Allegheny* from attempting to link creche displays with other official acknowledgments on a more general level. Both justices argued that the historical record mandates "accommodation" of religion in the public sphere.

However, just as history does not support government-involved holiday displays specifically, it does not demonstrate a clear message of accommodation. When the Bill of Rights was being framed, there was a deep division between states over church-state relations. Seven states had adopted a separationist philosophy, while six permitted not just accommodation, but also established

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131. Id. at 724.
132. Id.; see also Grant, supra note 106, at 790 (quoting Justice Brennan's *Lynch* dissent).
134. County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989). The Chanukah menorah was first displayed in the early 1980s, and the Christmas Tree, displayed with the menorah, had been displayed "[f]or a number of years." Id. at 581. Other cases indicate that government-backed creche displays are a relatively new phenomenon. See, e.g., Mather v. Village of Mundelein, 864 F.2d 1291 (7th Cir. 1989) (creche displayed on village hall front lawn for 25 years); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) (creche donated to city in 1950s).
136. See supra notes 18-19, 84-86 and accompanying text.
137. *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 677-78.
religions and the use of public power to support and further religion.\textsuperscript{138} James Madison attempted to put into the Bill of Rights a general guarantee of religious liberty, a safeguard adopted in Madison's home state of Virginia.\textsuperscript{139} However, Madison's proposal, which would have forced the states to respect broad religious rights, failed.\textsuperscript{140}

The Framers did agree on one thing: Congress was to stay out of religious affairs.\textsuperscript{141} Thus, we have a First Amendment that reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."\textsuperscript{142} The only unifying theme that the Framers saw in the religion clauses was a policy of federalism, which allowed states, but not the national government, to deal with religious matters.\textsuperscript{143}

As for the framers of the Fourteenth Amendment in the 1860s, they probably did not intend to make the Establishment Clause applicable to the states. There is persuasive evidence that, even though some congressmen may have thought that the later amendment incorporated portions of the Bill of Rights, the Establishment Clause was not incorporated. Nobody in Congress made mention of the Establishment Clause when the Fourteenth Amendment was debated, and in 1875 and 1876, Congress rejected a constitutional amendment providing, "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."\textsuperscript{144} One might argue that Congress saw the proposed amendment as superfluous given the Fourteenth Amendment, but the legislative history shows that supporters and opponents of the amendment saw it as novel.\textsuperscript{145} Religion was still considered a state issue in this era, and divisions existed among the states over the degree of separation

\textsuperscript{138} Conkle, \textit{supra} note 118, at 1132-33 (citing \textsc{Leonard W. Levy, The Establishment Clause} 25-62 (1986)). A fourteenth state, Vermont, admitted to the Union after Congress passed the First Amendment, but before the states ratified it, also maintained a system of established religion. \textit{Id.} at 1133 n.98. Therefore, at the time of ratification, one-half of the states in existence endorsed such policies: Vermont, Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, and South Carolina. \textit{Id.} at 1132 n.97. The half that did not were Virginia, Delaware, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island. \textit{Id.} at 1132 & n.96.

\textsuperscript{139} \textsc{Irving Brant, James Madison, Father of the Constitution} 1787-1800, at 268-73 (1st ed. 1950), cited in Van Alstyne, \textit{supra} note 27, at 773 n.8.

\textsuperscript{140} \textit{Id.} at 273. As for Thomas Jefferson, Van Alstyne points out that Jefferson would not issue presidential Thanksgiving proclamations, finding them contrary to the Establishment Clause. Van Alstyne, \textit{supra} note 27, at 775. This fact undermines the argument by Justice Kennedy that such proclamations have been accepted historically. See \textit{supra} notes 119-21 and accompanying text.

\textsuperscript{141} Conkle, \textit{supra} note 118, at 1133; \textsc{Mark D. Howe, Religion and Race in Public Education}, \textit{8 Buff. L. Rev.} 242, 245 (1958-59).

\textsuperscript{142} \textsc{U.S. Const. amend. I} (emphasis added).

\textsuperscript{143} Conkle, \textit{supra} note 118, at 1135. Conkle takes issue with Van Alstyne's argument that the First Amendment also embodied policies of voluntarism and separatism. \textit{Id.} Some framers may have had those goals, but since the states maintaining established religions did not support them, they cannot be seen as general underlying goals of the Establishment Clause. See \textit{id.} at 1135 n.109 (taking issue with Van Alstyne, \textit{supra} note 27, at 772-78).

\textsuperscript{144} Conkle, \textit{supra} note 118, at 1136-39 (quoting \textsc{4 Cong. Rec. 205} (1875)).

\textsuperscript{145} See \textit{id.} at 1138 (quoting \textsc{4 Cong. Rec. 5561} (1876) (statement of Senator Frelinghuysen)).
that should be afforded between church and state.\textsuperscript{146}

The historical record, therefore, does not provide uncontroverted support for a general policy of government "accommodation" of religion, which would permit government-backed holiday displays. At the same time, history does not demonstrate a preference for "strict separation." To the extent that history does support Justice Kennedy's view, however, it is questionable whether that history is a desirable one upon which to rely, for it is a history wrought with religious discrimination.

When the First Amendment was framed, the United States was overwhelmingly Protestant and hostile to other faiths. As Professor Douglas Laycock found, tolerance of non-Protestant faiths was a major accomplishment; acceptance of other faiths as equals lay far in the future.\textsuperscript{147} John Jay, the country's first Supreme Court Justice, attempted to have Catholics banished from New York, and John Adams was quite pleased "that Catholics and Jacobites were as rare as comets and earthquakes in his hometown of Braintree[, Massachusetts]."\textsuperscript{148} Non-Protestants could practice their religions, but in many places they could not vote, hold office, or publicly criticize Protestantism.\textsuperscript{149}

Discrimination in favor of certain Christian sects lasted well into the 1800s. Established religion was not abandoned by all states until 1833.\textsuperscript{150} Even in the mid-1800s, mob violence, church burnings, and deaths occurred when Catholics objected to the use of the Protestant Bible in public schools.\textsuperscript{151} And the anti-immigrant and anti-Catholic Know Nothing Party emerged victorious in eight states' elections.\textsuperscript{152}

Religious protections that did exist were limited. The early history of the Republic indicates that although some, such as James Madison and Thomas Jefferson, believed in broad religious freedom and a broad separation between church and state, most people believed that only the Christian diversity deserved the utmost religious respect.\textsuperscript{153} Discrimination against non-Christians

\begin{itemize}
\item \textsuperscript{146} Howe, supra note 141, at 246-47.
\item \textsuperscript{147} Douglas Laycock, Nonpreferential Aid to Religion: A False Claim about Original Intent, 27 WM. & MARY L. REV. 875, 918 (1986).
\item \textsuperscript{148} JAMES HENNESSEY, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES 77 (1981) (quoting JOHN ADAMS, WORKS 355 (C. Adams ed., 1856)).
\item \textsuperscript{149} Laycock, supra note 147, at 918.
\item \textsuperscript{150} Van Alstyne, supra note 27, at 773 n.8 (citing LEO PFEFFER, CHURCH, STATE, AND FREEDOM 126 (rev. ed. 1967)).
\item \textsuperscript{151} Laycock, supra note 147, at 918. Today, reading of the Bible in public schools is unconstitutional, unless the Bible is presented objectively as part of a secular program of education—for example, in a comparative religion course. See Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963).
\item \textsuperscript{152} Laycock, supra note 147, at 918.
\item \textsuperscript{153} For example, Joseph Story wrote: "The real object of the [First] Amendment was not to countenance, much less to advance, Mahometism or Judaism, or infidelity; but to exclude all rivalry among Christian sects..." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877, at 631-32 (5th ed. 1891); see also County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) (stating that perhaps in the early days the Bill of Rights was only
was permissible. Justice Blackmun, in that part of his Allegheny opinion supported by a majority of the Supreme Court, cited an incident in 1844 when the Governor of South Carolina issued a Thanksgiving proclamation. The Governor called on the people of South Carolina "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 took issue with the Governor, charging him with "such obvious discrimination and preference . . . as amounted to an utter exclusion of a portion of the people of South Carolina." The Governor responded:

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 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 it possible, if it had not come to pass.

Justice Kennedy and his allies could use examples like this, instances of clear official discrimination against religious minorities, to support the idea that the Establishment Clause mandates accommodation of Christianity and government-backed Christmas displays. Such a use of history, however, a history replete with discrimination against religious minorities, is no more persuasive today than the use of history by the Plessy v. Ferguson Court that found Jim Crow laws to be legal: "In determining the question of reasonableness, [a state government] is at liberty to act with reference to the established usages, customs and traditions of the people . . . ."

In Brown v. Board of Education, Chief Justice Warren recognized that a history of racial discrimination could not be used to justify the doctrine of

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The convention debated the issues of established religion and blasphemy. As the speeches indicate, on the issue of blasphemy the delegates were only concerned with disrespect of sacred aspects of Christianity. One delegate remarked that "the religious professions of the Pagan, the Mahomedan, and the Christian, are not, in the eye of the law, of equal truth and excellence." Id. (comment of Mr. King in debate on religion, Oct. 30, 1821).

155. MORTON BORDEN, JEWS, TURKS, AND INFIDELS 142 n.2 (1984) (quoting THE OCCIDENT (Jan. 1845)). As Justice Blackmun noted, the story is especially apt in light of Justice Kennedy's use of Thanksgiving proclamations to support creche displays. See supra notes 119-21.
157. Id. (quoting THE OCCIDENT (Jan. 1845)).
158. Plessy v. Ferguson, 163 U.S. 537, 550 (1896); see Laurence H. Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 HARV. L. REV. 592, 610-11 (1985) (stating that "one cannot avoid hearing in Lynch a faint echo of the Court that found nothing invidious in the Jim Crow policy of 'separate but equal'").

"separate but equal." On the issue of racially separate schools, the Chief Justice wrote for a unanimous Court:

In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.\textsuperscript{160}

In the context of religion, even Chief Justice Burger recognized that "historical patterns cannot justify contemporary violations of constitutional guarantees."\textsuperscript{161} Moreover, as Justice Blackmun recognized, in the part of his Allegheny opinion supported by a majority of the Court, that this country has changed dramatically in its cultural composition. The United States may have been almost entirely Christian in the 1700s and 1800s, but "[s]ince then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion."\textsuperscript{162}

Overall, history teaches us four lessons about the Establishment Clause and government-backed holiday displays. First, government-backed holiday displays are a relatively modern phenomenon. Second, history does not provide clear evidence of a trend favoring either accommodation or strict separation. Third, many of the historical "accommodations" of Christianity that the conservative members of the Court see are practices that occurred against a background of officially established religion in some states and discrimination against religious minorities in general. To rely on those historical accommodations to justify creche displays is equivalent to relying on past racial discrimination to justify the doctrine of "separate but equal." Fourth, this country has changed and is now more culturally diverse today than in the past. Thus, like the Warren Court's evaluation of segregation in public schools, an analysis of government-involved holiday displays must focus on our situation today, not on an ideologically uncertain and intolerant past.

\textbf{C. A Modern Interpretation of the Establishment Clause For Holiday Display Cases}

Several considerations must be addressed in analyzing holiday displays in a modern context, based on the needs and circumstances of the contemporary United States. These issues include the doctrine of "incorporation," a critical factor in applying the First Amendment to state as well as federal actions. Also included are the many factors that guide us in determining the extent to which we draw the line between church and state—factors that include such important considerations as the view of religious minorities and freedom of

\textsuperscript{160} Id. at 492-93.
\textsuperscript{162} County of Allegheny v. ACLU, 492 U.S. 573, 589 (1989).
speech. These issues are the subject of this section.

1. Incorporation

The first problem to resolve in a modern analysis involves the application of the First Amendment to the states. As discussed above, the Fourteenth Amendment was not adopted with the explicit intent to incorporate the First Amendment. Everson v. Board of Education, the first Supreme Court case to elaborate on the meaning of the Establishment Clause, inaccurately interpreted the historical record to find that the framers of the Fourteenth Amendment intended that Amendment to incorporate the First Amendment. The Supreme Court’s use of history has been in error ever since.

However, the Supreme Court is not limited to original intent and “historical” understandings in applying the Constitution. If it were, we might still have “separate but equal” as a legitimate tool of political policy. Instead, it has been recognized that the Constitution is a broad and flexible document, and that the Court has the power to interpret the Constitution for the right answers to political/moral problems—answers founded on reasoned arguments of principle and policy.

Thus, disposing of Plessy and focusing on current evidence, the Warren Court could find that separate is not equal, in violation of the Fourteenth Amendment’s mandate that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Likewise, the Court can determine that the First Amendment’s restraint on Congress in the area of religion can be applied to the states through the Equal Protection Clause of the Fourteenth Amendment as well as the Fourteenth Amendment’s demand that “[n]o State shall . . . deprive any person of . . . liberty . . . without due process

163. See supra notes 144-46 and accompanying text.
165. Conkle, supra note 118, at 1145. Of course, people such as James Madison and Thomas Jefferson did favor strict separation of church and state, but as discussed earlier, the framers of the Bill of Rights and the later framers of the Fourteenth Amendment were divided on the issue. See supra notes 138-40 and accompanying text.
167. Conkle, supra note 118, at 1162; see also Levinson, supra note 166, at 142 (noting that the Constitution has generated a form of “political rhetoric that allows one to grapple with every important political issue imagineable”).
168. Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954) (interpreting U.S. CONST. amend XIV). The Court noted studies showing that blacks felt inferior due to the segregation in public schools. Id. at 494. Separation of blacks from whites limited a black’s ability to study, engage in discussions with other students, and the like—critical factors, on the psychological level, which led blacks to feel inferior. Id.
of law."169 Where a state government aids a religion or prefers some religions over others it violates these mandates, because in such cases not all persons are being treated equally, and religious liberties may be unfairly infringed upon.170

2. Accommodation Versus Strict Separation

Given incorporation of the Establishment Clause into the Fourteenth Amendment's mandate to the states, do we enforce the separation between church and state strongly, or do we give government "accommodation" in handling religion, as the conservative members of the Court have interpreted the Establishment Clause?

Literally, complete church-state separation would not make sense. For example, it would be absurd to deny police and fire protection to religious institutions. There is a clear secular purpose in public safety, and to require religious organizations to have their own private police and fire departments would be unduly harsh and would jeopardize many financially.171

On the other hand, a general consensus exists that certain church-state relations should not take place. For example, governments cannot officially establish churches, nor can taxes be collected to support religious activities.172 As discussed earlier, such separations, taken for granted today, were the source of controversy in this country's early years.173

Why has this country moved toward stricter separation of church and state? For one, the United States is much more culturally diverse today than in the past.174 In addition, today we recognize the value of that cultural diversity. For example, in Regents of the University of California v. Bakke,176 the Supreme Court recognized that students of varying backgrounds each add some-

169. U.S. CONST. amend. XIV.
170. See Everson v. Board of Educ., 330 U.S. 1, 15 (1947); see also Larson v. Valente, 456 U.S. 228 (1982) (holding Minnesota statute, which imposed registration and extensive reporting requirements only upon religious groups that solicit over half of their funds from nonmembers, was unconstitutional because it treated religious groups unequally, favoring well-established churches over new ones); Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 HARV. L. REV. 933, 987-89 (1989) (arguing government preference for a religion increases atmospheric burdens on religious minorities' free exercise of their religions).

As for local governments, the Fourteenth Amendment applies to them as well since they are creations of the states. See, e.g., Civil Rights Cases, 109 U.S. 3 (1883) (holding the Fourteenth Amendment applies to state action of every kind).

171. See Smith, supra note 4, at 303. An argument could be made that religious institutions should pay for such protections, but it seems fair to exempt religious groups from taxation, a burden placed on profit-making activities, and thereby help to prevent religious organizations from falling into financial trouble and potential reliance on the state. See Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970).

173. See supra notes 138-40 and accompanying text.
174. See supra note 162 and accompanying text (noting that, since the 1700s, adherents of numerous religions have immigrated to the United States).
thing unique to a college class. Keeping religion and state separate recognizes the value of cultural diversity, for such separation forges an inclusive and strong political community, avoiding divisiveness along religious lines, and protecting Christian sects and religious minorities alike. As Professor Kenneth Karst has argued, the American political community is tied together by "the American civic culture—a mixture of behavior and belief that infuses our law and our institutions, transcending race, religion, and ethnicity, and allowing individual citizens to preserve their separate cultural identities and still identify themselves as Americans."177

With respect to most Americans—those in the white, Christian majority—identification with the American political community is easy and automatic. The ties of religious minorities, though, are not as strong.178 By avoiding church-state relations that would make those disfavored feel excluded, we expand the community and strengthen community members' loyalty.179 On the other hand, we weaken the community through actions of exclusion, ones which restrict the community's membership or make those disfavored feel left out.180 As Justice Blackmun wrote in Allegheny: "Perhaps in the early days of the Republic [the First Amendment was] understood to protect only the diversity within Christianity, but today [it is] recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.' "181

3. The Impact of Government-Backed Holiday Displays on the Political Community

To what extent should we worry about the impact of government-backed holiday displays on the political community? This question is quite basic, and the Lynch and Allegheny opinions both address it. As the various opinions in the two cases demonstrate, however, the Court divides on the issue of how concerned we should be about government participation in holiday religious displays.

According to Justice Kennedy, we need not be concerned with government-backed holiday displays like those in Allegheny because they pose no real threat of coercing people to support a religion or of taking "the first step down the road to an establishment of religion."182 Former Chief Justice Burger's

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176. Id. at 311-14. The Court struck down the Cal-Davis medical school's special admissions program, which set aside a quota of spaces for minorities. But the Court expressed approval for less rigid programs, without fixed quotas, where race and ethnicity are considered pluses in the admissions process. Id. at 315-19.
178. Id. at 374 (quoted in Conkle, supra note 118, at 1178).
179. See Conkle, supra note 118, at 1167.
180. Id.; see Lupu, supra note 170, at 987; supra note 170 and accompanying text.
182. Id. at 664 (Kennedy, J., concurring in part and dissenting in part).
Lynch decision arrived at the same result in evaluating the Pawtucket creche display. He stated, "[T]he inclusion of the creche [was not] a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message." These Justices would only be troubled by extreme cases, such as if a city chose to recognize every significant Christian holiday through religious displays and ignored the holidays of other faiths.

On the other hand, where a city seeks to do no more than to "celebrate the season," there is no problem.

Chief Justice Burger, Justice Kennedy, and their supporters have interpreted the Establishment Clause problem here quite narrowly. In essence, they have showed concern only for the purposes behind religious displays. Those who place religious displays on public property may have, in many cases, no interest other than to express their joy for the holiday. Even so, the purposes behind a display are not the only concerns. Effects are equally important. As Professor Laurence Tribe has stressed, "[T]he dissenting Justices, and Justice O'Connor in her concurring opinion, asked the important question: does the ‘endorsement send[] a message to nonadherents that they are outsiders, not full members of the political community?’" In the view of Chief Justice Burger and Justice Kennedy, this question is not vital when it comes to holiday religious displays, because the benefits of government-sponsored creches, such as bringing about a friendly community spirit, outweigh any "remote" costs of an "incidental" endorsement of one faith over others.

The analyses of Chief Justice Burger and Justice Kennedy are majoritarian, in that they adopt the Christian majority's perspective in deciding whether a government-backed holiday display has improperly endorsed religion. As Professor Tribe has commented, "One cannot avoid hearing in Lynch a faint echo of the Court that found nothing invidious in the Jim Crow policy of ‘separate but equal.’" Ignoring the black minority's perspective, the Court in Plessy v. Ferguson held:

Laws permitting, and even requiring, [racial] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . .

. . . . If [the law at issue does place a badge of inferiority on blacks] . . ., it is not by reason of anything found in the act, but solely because the colored

184. Allegheny, 492 U.S. at 664-65 n.3 (Kennedy, J., concurring in part and dissenting in part).
185. Id. at 663.
186. Tribe, supra note 158, at 610 (quoting Lynch, 465 U.S. at 688 (O'Connor, J., concurring); id. at 701 (Brennan, J., dissenting)). The same question was asked in Allegheny, 492 U.S. at 626 (O'Connor, J., concurring).
187. See Allegheny, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part); Lynch, 465 U.S. at 683, 685; Tribe, supra note 158, at 610-11.
188. Note, supra note 114, at 1659.
189. Tribe, supra note 158, at 611 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).
race chooses to put that construction upon it.\textsuperscript{190}

The Warren Court, as discussed above, viewed the issue from the black perspective and recognized the reality of Jim Crow laws: separate is not equal, and such laws generate in blacks feelings of inferiority and of being outsiders in their communities.\textsuperscript{191} A similar problem can be found with government-backed holiday displays. In comparison to the majoritarian view that creche displays do no more than celebrate the season, the view from a non-Christian perspective is quite different. In \textit{Lynch}, for example, substantial evidence was produced that showed religious minorities saw the Pawtucket creche as an unambiguous promotion of and preference for Christianity.\textsuperscript{192} A child psychiatrist testified that a non-Christian child, after viewing the creche display, would wonder if he and his parents were normal.\textsuperscript{193} Justice Brennan noted in his dissenting opinion that the court battle over the Pawtucket creche “unleashed powerful emotional reactions which divided the city along religious lines.”\textsuperscript{194}

The hard facts of cases like \textit{Lynch} indicate that the costs of such religious displays are not “remote” but visibly concrete. Quite compelling are the ramifications of the “left-out” feelings that religious minorities derive from these government-backed holiday displays. When a city displays a creche, and the Court hands down a decision like \textit{Lynch}, a message of exclusion is sent to religious minorities that tugs at their ties to the American political community.\textsuperscript{195} As Justice O’Connor has succinctly put it, “Endorsement [of Christi-

\textsuperscript{190} Plessy v. Ferguson, 163 U.S. 537, 544, 551 (1896).
\textsuperscript{192} See supra notes 97-98 and accompanying text.
\textsuperscript{193} Note, supra note 114, at 1657 n.85 (citing Donnelly v. Lynch, 525 F. Supp. 1150, 1159 (D.R.I. 1981), aff’d, 691 F.2d 1029 (1st Cir. 1982), rev’d, 465 U.S. 668 (1984)).
\textsuperscript{194} Lynch v. Donnelly, 465 U.S. 668, 703 (Brennan, J., dissenting). Chief Justice Burger argued that a litigant cannot file a suit and use it to create the appearance of divisiveness; however, Justice Brennan effectively countered that argument by pointing out that no opposition may have been voiced against the creche before the suit because religious minorities saw protesting the Christian majority’s creche display as futile. See supra note 43 and accompanying text.

Another example of a religious symbol causing divisiveness along religious lines can be found in Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988) (large cross on Marine Corps base, to show national resolve to account for all MIAs, caused religious-based political division and was thus unconstitutional).

As for \textit{Allegheny}, the parties did not argue the issue of political divisiveness as was done in \textit{Lynch}, and the appeals did not address the issue. The Court left the issue open. See \textit{Allegheny}, 492 U.S. at 621.

\textsuperscript{195} The message of \textit{Allegheny} is ambiguous. On the one hand, it may appear to embrace religious minorities by striking down the Pittsburgh creche display and by upholding the display of the menorah, a minority religious symbol. On the other hand, the lack of a strong majority decision in \textit{Allegheny}, combined with the firm “accommodationist” position of the Kennedy four, hints that the creche portion of the \textit{Allegheny} decision may be reversed now that Justices Brennan and Marshall have retired, and if Justices Souter and Thomas agree with the Kennedy four. Also, the menorah/tree display does not embrace non-Christian, non-Jewish individuals whose faiths may be hostile to the displayed religions. \textit{Allegheny}, 492 U.S. at 643-44 (Brennan, J., concurring in part and dissenting in part).
Religious displays 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. Such government actions make it difficult for religious minorities to preserve their religious identities and still identify themselves as Americans.

Thus, in determining how much we should worry about the effect of government-backed holiday displays on the American political community, the views of religious minorities must be considered. As the evidence in cases such as *Lynch* shows, government-backed holiday displays pose a serious threat to the American political community along religious lines—precisely the sort of divisiveness at which the Establishment Clause is aimed.

4. The Distinction Between Religious Symbols and Secular Symbols

Religious symbols, not secular symbols, raise Establishment Clause concerns. To determine what holiday symbols cause concern under the Establishment Clause, we need a definition of religion. Unfortunately, the Supreme Court has provided no such definition. In litigation over government-backed holiday displays, a distinction frequently is made between “secular” and “religious” symbols. Secular symbols include Santa Clauses, reindeer, candy canes, wreaths, and the like. These objects are associated with the gift-giving and community spirit aspects of Christmas and are thought to have relatively little “religious” significance. Things such as creches and Latin crosses are considered religious symbols, for they convey a clear religious message.

The distinctions made in these cases are unsatisfactory, because alleged secular symbols may convey strong religious messages. Justice Brennan hit on this point in *Allegheny* when he addressed the Chanukah menorah/Christmas tree display. Does the tree remove the religious connotations of the menorah, or does the menorah open up the religious significance of the tree? Even Chief Justice Burger conceded in *Lynch* that “the traditional, purely secular displays existent at Christmas, with or without the creche, would inevitably recall the religious nature of the Holiday.”

So how do we distinguish religious from secular symbols? Several authors have hit on the concept of “civil” religion. The focus of this civil religion is

196. *Id.* at 625 (O’Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).
197. See Dolgin, supra note 117, at 496; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 263 (1989). Dolgin points out that religion is an illusive concept, and by no means do I maintain that my conceptualization is all-encompassing. Rather, the distinctions drawn here are those that are most useful for analysis of holiday displays.
political, not sacral. In contrast to traditional religion, American civil religion draws upon a distinctively American heritage. At the same time, American civil religion has many elements similar to traditional religion. Our civil religion has its myths of origin (for example, the American Revolution), martyrs (Lincoln, the Unknown Soldier), sacred places (Lincoln Memorial, Statue of Liberty, Arlington Cemetery), sacred texts (Declaration of Independence, Constitution, Bill of Rights), ritual calendar of consecration and remembrance (Fourth of July, Memorial Day, Presidents Day), and an all-embracing world view (the American Way of Life).203

Individually, these things might be considered political artifacts, but together they comprise something more: a civil religion, an integrated network of rituals, meanings, and symbols through which American society expresses the deepest truths of its political life.204 These political truths include an unbending faith in democracy, a civic piety (that it is good to be a responsible citizen and, for example, vote), and a belief that destiny has great things in store for the United States.205

The concept of civil religion provides the foundation for evaluating holiday displays and distinguishing what is part of the American civic culture from what is religious in a sacral sense. Symbols qualifying as “secular” or religious in a civic sense are those that draw upon the nation’s heritage and provide a sense of identity with the political community for all members.206

In this light, none of the holiday symbols qualify as secular symbols. Whether it is a Christian creche or a Jewish menorah, a Santa Claus, Christmas tree, or reindeer, the symbol draws its significance from the practices of a sacral religion and not America’s civic heritage. Contrasting with these symbols are such things as a display of the Declaration of Independence or the Statue of Liberty, symbols that derive their value from America’s civic history. Given our desire for an inclusive and strong political community—at the heart of our concern for keeping church and state separate—governmental entities should not participate in holiday religious displays. Such government-backed displays convey the message that alliance with a particular religion (almost always Christianity) is an important element of celebrating the American identity.207 By avoiding ties to such a message, governments will avoid

Yehuda Mirsky, *Civil Religion and the Establishment Clause*, 95 *Yale L.J.* 1237, 1248 (1986); see also Karst, *supra* note 177, at 361 (discussing the concept of the “American civic community”); Levinson, *supra* note 166, at 118 (discussing the “American creed”).

202. Mirsky, *supra* note 201, at 1251; see also Dolgin, *supra* note 117, at 502-03 (stating that each country develops myths about the nation’s meaning, history, and people, along with corresponding rituals).


204. *Id.* at 1252.

205. *Id.* at 1252-57. Mirsky applies the concept of civil religion to Marsh v. Chambers, 463 U.S. 783 (1983), discussed *supra* note 126. In place of state-paid chaplains offering “nondenominational” religious prayers, legislatures could open sessions with a nonreligious speaker drawing from, say, the Declaration of Independence for inspiration. Mirsky, *supra* note 201, at 1255-57.

sending the message to nonadherents that they are not full members of the political community, and the corresponding message to adherents that they are favored members of the political community.

5. Freedom of Speech and Expression in Public Forums

A framework for adjudicating holiday display cases would not be complete without consideration of the First Amendment's free speech mandate. The Speech Clause of the First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech . . . ." Like the Establishment Clause, the Speech Clause "is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action." In addition, the Supreme Court has recognized that its protection is not limited to spoken or written words, but also includes conduct "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

The Speech Clause issue raised by holiday displays centers around the concept of the public forum. The Supreme Court has recognized that areas such as public parks and streets often are used for speeches, demonstrations, displays, and the like. Reasonable "time, place, and manner" regulations of public forums are permitted to further significant governmental interests.

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207. This section presents the Speech Clause considerations related to holiday displays simply to show that this interest weighs against certain restrictions on holiday displays. This Article does not deal in detail with each of the Speech Clause concerns: for example, the concept of the public forum, and the various justifications for limiting speech in certain circumstances.

208. U.S. CONST. amend. I.


211. Two things are not implicated here. First, private holiday displays on private property are not at issue. Certain types of expression on private property may be regulated—for example, obscenity. See Young v. American Mini Theatres, 427 U.S. 50 (1976) (stating that city may use zoning power to limit areas where adult movies may be shown). However, it is not seriously disputed that private groups can put up privately owned religious displays on private property: there are no interests in such cases to conflict with and outweigh the First Amendment's mandates of freedom of speech and free exercise of religion. See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 601 n.51 (1989); Donnelly v. Lynch, 525 F. Supp. 1150, 1180 (D.R.I. 1981) (deeming Pawtucket's publicly owned creche inconsistent with the Establishment Clause, but noting that Christians could still put up creches in homes, yards, businesses, and churches), aff'd, 691 F.2d 1029 (1st Cir. 1982), rev'd, 465 U.S. 668 (1984). Second, the notion of the government as a speaker is not in issue here. Government communications on religious matters are directly restricted by the Establishment Clause. See U.S. CONST. amend. I.


213. For example, using streets for traffic requires limiting street use for speech activities. Using parks for rest, relaxation, and recreation also may require restrictions on competing speech uses. See, e.g., EDWARD L. BARRETT & WILLIAM COHEN, CONSTITUTIONAL LAW 1178 (7th ed.
but regulations aimed at the content of the expression are subject to strict scrutiny by courts because content-based regulations amount to censorship, in conflict with "free speech and expression."214

The problem raised by holiday displays in public forums can be put as follows: Suppose a city allows a park to be used for speeches, demonstrations, displays, and the like. If a private group wants to put up a religious display but is denied permission, does this constitute a content-based restriction on free speech and expression in public forums? On the other hand, if the display is permitted, does it give the impression that the city is endorsing the particular religion, in violation of the Establishment Clause?218

This problem is quite compelling and has been raised in holiday display litigation.216 It is an especially thorny issue when the public forum happens to be adjacent to an important government building.217 The public forum/freedom of expression question must be taken into account in creating guidelines for government-involved holiday displays.

6. A Note on Minority Religious Symbols

Since this country is predominantly Christian, displays of minority religious groups may not appear to cause significant First Amendment issues. For example, the government of a largely Christian city like Pittsburgh might not appear to be endorsing Judaism by permitting a Chanukah menorah to be displayed in front of a government building.

Even so, there are problems raised by such minority religious displays. Justice Blackmun noted in Allegheny that if the Chabad, a Jewish group, was using the menorah in front of the Pittsburgh City-County Building as part of

1985).

214. Texas v. Johnson, 491 U.S. at 406-07; Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972); McCrerey v. Stone, 739 F.2d at 730. The "strict scrutiny" test holds that if a government action burdens a constitutional right of a person, the government must advance a compelling interest for the action, and there must be no "less restrictive alternatives" that could achieve the same government interest with a lesser burden on the constitutionally protected activity. Attorney General v. Soto-Lopez, 476 U.S. 898, 904, 909-10 (1986); Larson v. Valente, 456 U.S. 228, 246-51 (1982).


216. See, e.g., McCrerey v. Stone, 739 F.2d at 725.


Justice Blackmun noted the public forum dilemma in County of Allegheny v. ACLU, 492 U.S. 573, 600 n.50 (1989). It was not at issue in Allegheny because the Grand Staircase of the county courthouse was not "the kind of location in which all were free to place their displays for weeks at a time." Id.
its proselytizing mission, the menorah display could be challenged.\textsuperscript{218} Such a use of the display, directly in front of a government building, could give the appearance of government approval of the Chabad's activity and entail the same type of negative impact on the political community that government-supported Christian symbols have, especially on people who are neither Jewish nor Christian. Problems can also exist in towns where a minority religious group comprises a substantial percentage of the population. For example, in a town where the majority is Jewish, a menorah display in front of the town hall clearly would appear to endorse Judaism.

In addition, it would seem odd to permit minority religious symbols in public places where we would not permit Christian symbols. The Allegheny creche was struck down because, standing alone in front of a government building, it had the effect of demonstrating government endorsement of Christianity. A menorah placed in front of a government building that is used by a Jewish group to proselytize (albeit next to a Christmas tree) would appear to have the same effect, at least from the perspective of a non-Jewish and non-Christian individual.\textsuperscript{219} Whether the religious symbol is that of the majority or a minority religion, government involvement tugs at some groups' ties to the political community.\textsuperscript{220} Given our desire for a political community free of divisiveness along religious lines, the best solution is to treat all religious symbols on the same level,\textsuperscript{221} a solution discussed further below.

III. A Framework For Handling Government Participation In Holiday Displays

A. General Considerations

Before laying out a framework for dealing with government-involved holiday displays, a summary of the key "inputs" to these guidelines is in order. On the doctrinal level, the above analysis demonstrates that the Lemon and "no endorsement" tests are indeterminate and can be manipulated to fit the particular ideological view of each judge. On the historical level, government-backed holiday displays are a modern phenomenon, and any accommodations of Christianity that existed in the past occurred against a backdrop of discrimination against religious minorities. Today, the United States is more culturally

\begin{itemize}
\item \textsuperscript{218} Allegheny, 492 U.S. at 620 n.70 (nonmajority portion of opinion of Blackmun, J.). The proselytizing issue was not before the Court, but Blackmun noted that the lower courts could address it on remand. \textit{Id.}
\item \textsuperscript{219} Also, as noted by the Second Circuit in Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), \textit{cert. denied}, 110 S. Ct. 2619 (1990), if a minority religious symbol such as a menorah is permissible, "it would also seem permissible to display, standing alone, a symbol of the majority faith—a creche or a cross—and this could well lead members of minority religions or nonbelievers to think that 'adherence to a religion' was relevant to 'standing in the political community.'" \textit{Id.} at 1030 (quoting \textsuperscript{County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989)} (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))).
\item \textsuperscript{220} \textit{Id.} at 1031.
\item \textsuperscript{221} \textit{Id.}
\end{itemize}
diverse than ever before, and we desire a strong and inclusive political community that gives weight to the opinions of minorities, as well as those in the majority. Religious displays are not unifying themes for all Americans, and nonadherents are made to feel like outsiders when the government appears to express approval for a particular religion through close ties with that religion's holiday displays.

Given these factors, the best policy is for governments to treat religions evenhandedly. This policy can also be viewed as emanating directly from the wording of the Equal Protection Clause of the 14th Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." To attain this policy of evenhandedness, governments should look to remove themselves as far as possible from ties to religious practices. Prohibiting governments from adopting or expressing approval for certain religions means that all religions are treated equally, and no perceptions of official discrimination will exist. Elimination of state religious endorsements permits each religion to "flourish according to the zeal of its adherents and appeal of its dogma." Evenhandedness thus strengthens the political community, for it maximizes the religious liberty in this country, making no one feel like an outsider.

B. The Strengthened Lemon Test

Although the existing Lemon test has proven to be an unsatisfactory tool for Establishment Clause analysis, that test can be reworked, based on the above "inputs," into an effective framework for examining government-backed holiday displays. To achieve a policy of neutrality by minimizing the extent to which governments involve themselves with holiday religious displays, I propose a strengthening of the Lemon test along the lines of strict scrutiny. The
test will be laid out and then applied to specific cases.

First, the government action with regard to a holiday religious display must have more than just any secular purpose. The government action must have a "substantial" secular purpose, and that purpose must be unrelated to showing any form of favoritism to a particular religion.\textsuperscript{226} Such a strengthening of the secular purpose test recognizes that government involvement with religious displays can demonstrate favoritism for the involved religion and have a negative impact on the political community, making nonadherents (usually religious minorities) feel like outsiders. This important concern might be outweighed only by very important conflicting interests: for example, freedom of expression in public forums.

Second, the government involvement with the holiday display must not have the effect of "endorsing" the involved religion, as seen from the perspective of the "reasonable nonadherent."\textsuperscript{227} This improves on the "primary effect" test of \textit{Lemon} because the focus here is placed directly on the perspective of nonadherents. This focus effectively blocks the unacceptable use of historical "accommodations," which came hand-in-hand with blatant discrimination, as a basis for holiday display analysis. In cases involving creches and other Christian symbols, this effect test ensures that the views of religious minorities are not ignored or de-emphasized in the way that they were in Chief Justice Burger's \textit{Lynch} opinion and Justice Kennedy's \textit{Allegheny} opinion.\textsuperscript{228}

Third, the government ties to the holiday display will not be condoned if there are effective alternatives that lessen government involvement with religion. This prong is stronger than the "excessive entanglement" test of \textit{Lemon} because it leaves no room for maneuvering over the term "excessive," as oc-

\textsuperscript{691} F.2d 1034-35 (1st Cir. 1982), rev'd, 465 U.S. 668 (1984), but Chief Justice Burger refused to do so in the Supreme Court's disposition of the case, summarily dismissing strict scrutiny in a footnote at the end of his opinion. Lynch v. Donnelly, 465 U.S. 668, 687 n.13 (1984). The Chief Justice did not find Pawtucket's creche sufficiently discriminatory to employ strict scrutiny, but as shown earlier in this Article, he was insensitive to the protests of religious minorities on this point. \textit{See supra} notes 183-96 and accompanying text.

The test put forth in this Article could be framed simply as a strict scrutiny test. I choose to use the \textit{Lemon} test as my basis for two reasons. First, \textit{Lemon} has been the Establishment Clause tool for nearly two decades. Strengthening the \textit{Lemon} test seems to be less of a departure from existing Establishment Clause doctrine than a full jump to strict scrutiny, which the Court refused to employ in \textit{Lynch}. Second, despite its problems, the \textit{Lemon} test more clearly isolates the key Establishment Clause inquiries (purpose, effect, and degree of government involvement) than does strict scrutiny.


227. Tribe has proposed use of the "reasonable nonadherent test." \textit{Laurence H. Tribe, American Constitutional Law} 1296 (2d ed. 1988), \textit{cited in} County of Allegheny v. ACLU, 492 U.S. 573, 620 (1989). Other words that can be used besides "endorsing" include "advancing" and "promoting." \textit{See} \textit{Allegheny}, 492 U.S. at 593.

228. \textit{See supra} notes 182-96 and accompanying text (discussing the \textit{Allegheny} and \textit{Lynch} opinions).
Searching for government alternatives to involvement in holiday display cases ensures that government links to religion are minimized, thereby eliminating, as far as possible, perceptions of official religious discrimination and permitting each religion to “flourish according to the zeal of its adherents and appeal of its dogma.” In some cases, the concept of “civil religion” may be useful in the search for alternatives—for example, where the government purpose appears legitimate but could be accomplished by means not involving religious symbols.

C. Application of the Strengthened Lemon Test

With the new holiday display test laid out, an application of the test to various cases can take place. Lynch and Allegheny are relatively easy to analyze under the new test. However, as will be shown, there are harder cases even with a stronger Establishment Clause test.

1. Lynch v. Donnelly (the Creche)

The answer in Lynch is simple. Pawtucket’s display fails on all three prongs of the new test. First, government ownership and display of a creche offers no “substantial” secular purpose. While the Lynch majority could pervert the meaning of the Lemon “secular purpose” test to find that there is a secular purpose in depicting the historical origins of Christmas, such a purpose is not even arguably “substantial.” Second, the evidence in Lynch clearly established that nonadherents viewed the government-owned creche as an endorsement of Christianity. This evidence would satisfy the effect test as seen from the perspective of the “reasonable nonadherent.”

Third, there is an obvious, less government-involved alternative to the City of Pawtucket’s display. In place of a government-owned display in a private park, private groups could erect their own creche in the same place, thus removing government ties from the display. This would provide Pawtucket’s Christian citizens with all the religious satisfaction that they derive from the government-owned creche, except for explicit government endorsement of Christianity, which alienates religious minorities from the political community.

2. County of Allegheny v. ACLU

The analysis of Allegheny is not quite as easy as that of Lynch, but the end

229. See supra notes 20-29, 41-45 and accompanying text.

230. Zorach v. Clauson, 343 U.S. 306, 313 (1952); see also ACLU v. City of St. Charles, 794 F.2d 265, 276 (7th Cir.) (holding that placing cross on private building gives Christians in St. Charles “all the lawful satisfaction they [can] derive from the cross on the firehouse”), cert. denied, 479 U.S. 961 (1986).

231. I take up the “secular” Christmas symbols (reindeer, Santa Clauses, etc.) at the end of this section, as they are a more difficult issue.

232. See supra notes 93-98 and accompanying text (discussing the Lynch majority opinion).

233. See supra notes 96-97 and accompanying text.
result is the same. Both the creche display and the Chanukah menorah/Christmas tree display fail the strengthened *Lemon* test. First, there are no substantial purposes for putting these displays directly in front of government buildings, or in the case of the menorah display, for Pittsburgh to store and erect it. The Grand Staircase of the County Courthouse, where the creche was placed, is not "the kind of location in which all were free to place their displays for weeks at a time." Since the Grand Staircase is not a public forum, no free speech interest is implicated as would be if the Grand Staircase were a public forum. The same appears to hold true for the menorah/tree display located in front of the Pittsburgh City-County Building, though the Court did not address the public forum issue on the menorah/tree display.

Justice O'Connor argued that there was a legitimate purpose in the menorah display's "theme of liberty and pluralism." Such a theme is certainly founded upon important American political values; however, utilizing the third prong of the *Lemon* test, Allegheny County could achieve this purpose through less religious means. The county could draw upon our "civil religion" to convey the liberty theme (through, for example, a mural depicting a scene from the American Revolution, and the creation of the Constitution) and use nonsacral means to demonstrate the pluralism theme (through, for example, a painting showing friendship among people of different backgrounds). Such a display would avoid the problems inherent in the menorah/tree display of making those neither Christian nor Jewish feel like outsiders in the political community.

With respect to the second prong of the new *Lemon* test (whether a reasonable nonadherent would view the two Allegheny displays as official endorsements of the involved religions), five members of the Court found that the creche, standing directly in front of the county courthouse, endorsed Christianity under the less stringent "primary effect" test of *Lemon*. The focus was on what the "reasonable observer" saw in the display. If the analysis concentrates on the "reasonable nonadherent," then the outcome on the creche clearly remains the same: Non-Christians would see in the creche a message of official endorsement of Christianity.

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235. Id. (citing McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd sub nom. Board of Trustees v. McCreary, 471 U.S. 83 (1985)).
236. Id. at 588 n.38.
237. Id. at 635 (O'Connor, J., concurring).
238. See supra notes 177-81 and accompanying text.
240. Id. at 635 (O'Connor, J., concurring).
241. This conclusion flows from the findings in *Lynch*. See supra notes 39-40, 105 and accompanying text. The Allegheny Court addressed the endorsement issue as each Justice personally saw it. There was no evidence on what religious minorities saw in the displays as there was in *Lynch*. The Court invited further examination of this issue on remand. See *Allegheny*, 492 U.S. at 621 (permitting the lower courts to look at the "purpose" and "entanglement" prongs of the *Lemon* test).
The menorah/tree display should fail the second prong as well. First, the city stored, erected, and removed the display every year. That type of government involvement alone could lead a person neither Christian nor Jewish to believe that the government endorses those two religions. Second, from the standpoint of the reasonable observer, a look at the display may or may not have conveyed a message of endorsement. As Justice Brennan noted, "Both are reasonable interpretations . . . ." The same should hold true when the menorah display was viewed from the perspective of the reasonable nonadherent, especially since the entrance to the City-County Building was not a public forum, and a nonadherent reasonably could think that the government only allowed select displays there. However, many of the Justices would feel otherwise.

Even if some justices would allow the Allegheny displays to pass muster on the first two prongs of the new Lemon test, the third prong would clearly settle the issue. As noted above, the theme of liberty and pluralism that Justice O'Connor saw in the menorah/tree display could be achieved by the County of Allegheny through nonreligious means. In addition, instead of placing the Allegheny displays in front of government buildings, the private groups could place their displays on prominent private property in Pittsburgh. The displays would receive significant visibility in such private locations, and at the same time would avoid the appearance of official endorsement, which occurs when the displays are placed directly in front of government buildings. Thus, both Allegheny displays should be moved away from government buildings.

The third prong of the stronger Lemon test answers the question of the legitimacy of the Allegheny displays, but it also raises an important question: Are private displays in public parks satisfactory alternatives?

3. Private Displays in Public Forums

The issue of private religious displays in public forums has no clear answer. No matter what test is employed, two important interests come into conflict: (1) avoiding government favoritism for certain religions; and (2) free speech in public forums. Such a problem does not exist in Lynch- and Allegheny-type cases because there is no strong interest running up against Establishment Clause concerns. As discussed earlier, if a private group is denied permis-

242. Allegheny, 492 U.S. at 642 (Brennan, J., concurring in part and dissenting in part); see also supra note 115 and accompanying text (noting that Justice Brennan would have struck down the menorah display in Allegheny because religious endorsement was a reasonable interpretation of the display).

243. See, e.g., Allegheny, 492 U.S. at 616-17 (non-majority portion of opinion of Blackmun, J.) (concluding that a reasonable nonadherent would not see the menorah/tree display as a double endorsement of Judaism and Christianity).

244. A proponent of Justice Kennedy's analysis may argue that "accommodation" weighs in here, but as shown in Part II, supra notes 136-62 and accompanying text, Justice Kennedy's viewpoint is based on a faulty interpretation of history and on a lack of concern for those who do not adhere (usually non-Christians) to the religion (usually Christianity) involved in a particular religious display (usually creches).
tion to place a religious display in a public forum, government endorsement of religion may be averted, but the denial may constitute a content-based restriction on free speech. If the group is allowed to place the display in the public forum, the free speech interest is protected, but the display could give the impression that the city is endorsing the involved religion, in violation of the Establishment Clause.\(^4\)

Courts that have dealt with the issue of private displays in public forums have shown more concern for the speech interest. In *McCreary v. Stone*,\(^246\) for example, the Second Circuit applied the *Lemon* test and found that a private creche display in Scarsdale's Boniface Circle, a prominent public park, succeeded on all three *Lemon* prongs: (1) a secular purpose was found in permitting free speech in a public forum; (2) no primary effect of advancing the involved religion was found because any religious group could get a permit to place its symbols in the public forum, and a disclaimer sign was attached to the display indicating that it was erected by a private organization; and (3) government entanglement with religion was minimal because the display cost the village no money, and as noted, the disclaimer sign showed that the village was not participating in the display.\(^247\) Even when the public forum is adjacent to a government building—raising the same concern about a perceivable message of government endorsement that existed in *Allegheny*—courts have upheld the speech interest in the religious display.\(^248\)

The strengthened *Lemon* test will not provide one general mandate in cases involving private displays in public forums. Such a mandate is probably impossible when two strong competing interests run up against each other. Rather, the new *Lemon* test provides cities (which have to decide whether to grant permits for public forum displays) and courts (which often are asked to review city decisions) with the key inquiries to balance effectively the competing speech and Establishment Clause concerns in the context of the specific circumstances of the particular display and the particular public forum.

Is there a substantial secular purpose in permitting such displays? The answer is yes. Such displays are a form of speech, a core First Amendment interest.\(^249\)

Does the display give the reasonable nonadherent the impression that the city is endorsing the displayed religion? The answer in a *McCreary*-type case is not clear. The display is in a public park not next to government buildings; any religious group could place its symbols in Boniface Circle; and a dis-

\(^{245}\) See *supra* notes 207-17 and accompanying text (explaining the inherent conflict between the First Amendment's free speech guarantee and the Establishment Clause's prohibition of state-endorsed religion).

\(^{246}\) 739 F.2d 716 (2d Cir. 1984), *aff'd sub nom.* Board of Trustees v. McCreary, 471 U.S. 83 (1985).

\(^{247}\) Id. at 725-30.

\(^{248}\) See *supra* note 217 and accompanying text.

\(^{249}\) See *supra* notes 207-17 and accompanying text; see also *McCreary v. Stone*, 739 F.2d at 730 (recognizing that areas such as public parks and streets are often used for speeches, demonstrations, displays, and similar other uses).
claimer sign designed for "maximum exposure and readability" was attached to the creche display, stating that the display belonged to a private group.\textsuperscript{250} Given these factors, which tend to show no village endorsement of religion, a governmental entity could conclude that it would be unreasonable for a non-Christian to find government endorsement of Christianity in the Boniface Circle display—the village seems to be completely removed from the display.\textsuperscript{251}

Even so, there are factors cutting the other way. Boniface Circle is a prominent public park, and that prominence could lead a non-Christian to see ties between the village and the creche. The evidence in \textit{McCreary} also indicated that there was division in Scarsdale over whether the creche should be permitted in Boniface Circle.\textsuperscript{252} If the creche display is examined in the way that Justice Brennan viewed the \textit{Allegheny} menorah/tree display, the resulting conclusion is that a reasonable non-Christian may or may not see government endorsement in the Boniface Circle display. Both views are reasonable.\textsuperscript{253} These considerations lean toward finding that the creche display in Boniface Circle fails the second prong of the new \textit{Lemon} test.\textsuperscript{254} However, it is by no means clear-cut because if anyone could place a religious symbol in the public forum and a disclaimer sign was attached, it would seem that no reasonable perception of endorsement would remain.

Whatever the result on a \textit{McCreary}-type display, religious displays in public forums adjacent to government buildings should be less acceptable under the second prong of the new \textit{Lemon} test because the location, next to a government building, more likely presents a nonadherent with a message of government endorsement of the displayed religion than exists in public forums removed from governmental edifices.\textsuperscript{255} But this case is not clearcut either. For example, consider Daley Plaza in Chicago.\textsuperscript{256} Although Daley Plaza is adjacent to Daley Center, home to the Circuit Court of Cook County, Daley Plaza is clearly a public forum. It has been used hundreds of times for speech-related activity.\textsuperscript{257} If minority religious symbols as well as creches are permitted to be displayed on Daley Plaza, is there really any worry about nonadherents' perceptions of government endorsement for the various displays?

The second prong of the stronger \textit{Lemon} test provides no clear answer to private holiday displays in public forums, but the specific factors identified in

\begin{itemize}
  \item \textsuperscript{250} \textit{McCreary}, 739 F.2d at 728-29.
  \item \textsuperscript{251} This is essentially what the Second Circuit found in \textit{McCreary}. \textit{Id.} at 726-28.
  \item \textsuperscript{252} \textit{Id.} at 718-21.
  \item \textsuperscript{253} See supra note 115 and accompanying text.
  \item \textsuperscript{254} The Scarsdale Board of Trustees focused on these factors when it denied permission to display the creche in 1981 and 1982. \textit{McCreary}, 739 F.2d at 721. The church group that wanted to display the creche in Boniface Circle sued and won in \textit{McCreary}. \textit{Id.}
  \item \textsuperscript{255} The Second Circuit recognized this critical distinction—between religious displays in public forums adjacent to and not adjacent to government buildings—in \textit{Kaplan v. City of Burlington}, 891 F.2d 1024, 1029 (2d Cir. 1989), \textit{cert. denied}, 110 S. Ct. 2619 (1990).
  \item \textsuperscript{256} See Grutzmacher v. Public Bldg. Comm'n, 700 F. Supp. 1497 (N.D. Ill. 1988) (noted \textit{supra} note 217).
  \item \textsuperscript{257} \textit{Id.} at 1500.
\end{itemize}
the analysis of what a reasonable nonadherent sees provide a valuable basis for judging the use of particular public forums for religious displays. Many of these factors come up in the third prong of the new Lemon test, the prong that examines whether there are alternatives that involve the government less. Governments may employ reasonable "time, place, and manner" restrictions in regulating public forums to achieve important government interests that may compete with the speech interest in public forums. In balancing the speech and Establishment Clause interests at issue in private holiday displays placed in public forums, cities can place reasonable limits on the length of time that a creche is displayed in a public park. In McCreary, the Second Circuit found that it was fair to limit the Boniface Circle display to two weeks during the Christmas season. Contrast this with the quite common displays that go up immediately after Thanksgiving and come down after New Year's Day. Longer displays certainly are permissible on private property, but placing a reasonable time limit on a private display in a prominent public forum balances religious groups' speech interests and the Establishment Clause interest of avoiding the impression that a city is endorsing the displayed religion.

In addition, towns may place reasonable "manner" restrictions on holiday displays. For example, a local government can demand that a disclaimer be attached, indicating that the display is sponsored by a private religious group and not the town. Such a disclaimer can go a long way towards removing any notion that the city endorses the particular display.

As for "place" restrictions, it seems fair for local governments to balance the competing speech and Establishment Clause interests and determine that the displays are permissible in certain public forums but not in others. Due in part to the division that existed in Scarsdale over the Boniface Circle creche, the Scarsdale Board of Trustees asked the church group to place its creche in a different park. The Second Circuit found that denying the church group access to Boniface Circle was an impermissible content-based regulation of speech. The Second Circuit's decision seems based, in part, on the fact that only a creche was at issue in McCreary; only one religious group was being singled out. Suppose Scarsdale were to come up with a general regulation denying access to all religious displays in Boniface Circle, but permitting them in other public forums. In such a situation, courts should not strike down the regulation if the record shows that the Scarsdale Board carefully considered the factors underlying the competing speech and Establishment Clause interests. The "place" regulation would be reasonable because it does not single out one religious group but treats religion evenhandedly in weighing the conflicting

258. See supra notes 211-17 and accompanying text.
259. McCreary, 739 F.2d at 730.
261. McCreary, 739 F.2d at 720-21.
262. Id. at 730.
Such a place regulation also would seem reasonable when the public forum is next to a government building, avoiding the impression that the local government is endorsing the exhibited religion.

4. "Secular" Symbols in Holiday Displays

Besides private displays in public forums, symbols such as Christmas trees, reindeer, and Santa Clauses raise a difficult issue. Such symbols are generally viewed as nonreligious, for they represent the "gift-giving" and "positive community spirit" aspects of the Christmas season—even the Lynch dissenters believed this. However, Justice Brennan, joined by Justices Stevens and Marshall, did recognize in Allegheny that Christmas trees have religious significance, and that it is reasonable for people to see government approval of Christianity when such symbols are too closely associated with government, as were the displays in Allegheny. Also, as discussed earlier, allegedly "secular" symbols of Christmas draw their significance from the practices of Christianity, a sacral religion, and not America's civic heritage.

Applying the strengthened Lemon test, some may argue that there is a substantial government interest in promoting goodwill and merchants' business during the winter holiday season. But reasonable nonadherents may find that government-owned "secular" symbols demonstrate a government preference for the displayed religion (usually Christianity), and that private displays on the steps of government buildings demonstrate government endorsement as well. Moreover, obvious alternatives exist which would yield less government involvement with religion. Presumably there are some symbols from America's civic heritage that could accomplish the "goodwill" goal just as well as allegedly "secular" Christmas symbols. Cities could erect displays including a

263. See Porth & George, supra note 166, at 167 (stating that public schools could exclude all controversial material in the realm of religion and irreligion, or could provide a reasonably balanced presentation of opposing views).

264. The district court judge in the Daley Plaza case reached the opposite conclusion, stating that Chicago could not block erection of all religious exhibitions during the holiday season absent a showing of a compelling government interest. Grutzmacher v. Public Bldg. Comm'n, 700 F. Supp. 1497, 1501 (N.D. Ill. 1988). The Establishment Clause concerns inherent in such cases comprise a compelling interest, see Kaplan v. City of Burlington, 891 F.2d 1024, 1030 (2d Cir. 1989), cert. denied, 110 S. Ct. 2619 (1990), and they deserved more careful consideration than given in Grutzmacher.


267. See supra notes 197-206 and accompanying text.


270. Non-Christmas symbols would probably achieve the goodwill goal better, given that non-
Statue of Liberty, Abraham Lincoln, the Washington Monument, or other national symbols. Each of these symbols could promote goodwill in a civic and not sacral sense. Private displays of trees, Santas, and the like on private property would accomplish the goodwill (at least for Christians) and business goals as well, as long as government participation and the attendant perception of government endorsement of Christianity were eliminated.

Finally, as for private “secular” displays in public forums, the private display/public forum analysis described above provides governments with the foundation for weighing the conflicting speech and Establishment Clause interests at issue in such exhibits. Whatever the result from such an analysis, it seems clear that the government should not be placing the symbols in the public forum, for the private groups can easily accomplish that end themselves.

CONCLUSION

As mentioned earlier, no one test will solve every case that arises under the Establishment Clause. Even when the analysis is confined to holiday displays, the notion that there will be a clear-cut answer in every case is illusory. It is possible, though, to formulate coherent guidelines so that the right questions always are asked.

The framework laid out in this Article will put local governments and courts on better footing when they encounter holiday displays. Building up from the key inputs (doctrinal, historical, and modern) necessary in an evaluation of government-involved holiday displays, a test has been framed that properly weighs the concerns at issue in such displays. The basic policy underlying the proposed strengthening of the Lemon test is government evenhandedness, which can best be achieved by minimizing government ties to holiday displays. Governments should not buy, erect, or maintain religious displays, and religious displays should not be placed directly in front of government buildings, except, possibly, when a public forum is involved. By removing themselves as far as possible from religious displays, governments will avoid creating the perception that they endorse the displayed religions.

Under the strengthened Lemon test, holiday display analyses will not be.

Christians feel left out when they see those displays because they do not celebrate Christmas. Many actually may feel hostile towards such displays, thus defeating the goal of goodwill. Id. at 645.

271. See supra notes 244-64 and accompanying text.

272. In Lubavitch Chabad House v. Public Bldg. Comm’n, No. 88-C-8708, 1989 WL 157661 (N.D. Ill. Dec. 11, 1989), aff’d sub. nom. Lubavitch Chabad House v. City of Chicago, 917 F.2d 341 (1990), the court held that under Lynch, Chicago could have its employees place the city’s Christmas trees and wreaths in the public forum areas of O’Hare Airport. The judge found that such symbols, along with “secular” Christmas music, serve the airport’s interest in “lightening the burdens and anxieties of the anxious traveler during this season. . . . It makes ‘people moving’ easier . . . .” Id. at *11. Such displays do not “lighten the burden” for non-Christians, and as for music, the ordinary Muzak played in airports accomplishes the same result, without a sectarian preference.
“hostile” to religion, as Justice Kennedy and his *Allegheny* supporters might fear. “If preventing preferential treatment of dominant or politically appealing religions is ‘hostile’ to religion, it is so only in refusing to place state approval on majoritarian religious belief; it is not hostile to the value of religious pluralism.”273 The strengthened *Lemon* test will ensure that adherents and nonadherents to a particular religion are fairly accommodated, and that religious minorities are not made to feel like outsiders in the political community, thus providing “the respect for religious diversity that the Constitution requires.”274

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