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Richard S. Myers
Case Western Reserve University

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The Establishment Clause and Nativity Scenes: A Reassessment of *Lynch v. Donnelly*

By Richard S. Myers*

**INTRODUCTION**

The Supreme Court's establishment clause decisions have long been criticized. This criticism has usually been directed at *Everson v Board of Education*, the Court's first modern establishment clause decision. In recent years, however, much of the criticism has been reserved for the Court's decision in *Lynch v Donnelly*, which rejected an establishment clause challenge to Pawtucket, Rhode Island's sponsorship of a Nativity scene. *Lynch* is widely reviled. The nature of the criticism can best be understood by noting the frequent comparisons of *Lynch* to the *Dred

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* Assistant Professor of Law, Case Western Reserve University School of Law. The author would like to thank Jonathan Entin, William Marshall, and Mollie Murphy for reading earlier drafts and offering helpful comments and suggestions. The author would also like to thank Lorraine Boorman and Robert Anderle for research assistance.

1 "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I.

2 "[E]stablishment jurisprudence has been universally criticized." Marshall, "We Know It When We See It"* The Supreme Court and Establishment*, 59 S. CAL. L. REV 495, 497 (1986). See id. at 497 and nn.18-20 (citing critical comments from both on and off the Court).


4 See, e.g., G. Bradley, Church-State Relationships in America 1-13, 135-46 (1987) (criticizing the *Everson* Court's view of the history of the establishment clause); R. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982) (same); L. Pfeffer, Church, State, and Freedom 563-71 (rev. ed. 1967) (criticizing the result, although not the history, of the establishment clause set forth in *Everson*).

Scott v Sandford\(^6\) and Plessy v Ferguson\(^7\) decisions. The contempt with which Lynch is regarded by most observers is evident in Professor Tushnet’s comment:

For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why the Court’s decision in Brown v Board of Education was correct. In my view, a criterion for an acceptable theory of the religion clauses is whether that theory explains why the Court’s decision in Lynch was wrong.\(^8\)

All of this criticism of Lynch seems to have had some impact on the lower court decisions involving establishment clause challenges to governmental involvement with Nativity scenes. Most of the recent published decisions have held, despite Lynch, that the particular Nativity scenes being challenged violated the establishment clause.\(^9\) These decisions reflect very real ambiguities in Chief Justice Burger’s majority opinion in Lynch, and, more fundamentally, a lack of any coherent approach to the whole problem of government display of religious symbols.

The continuing criticism of Lynch itself and the annual year-end battles over government involvement with Nativity scenes, as well as other religious symbols,\(^10\) both suggest that Lynch

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\(^6\) 60 U.S. (19 How.) 393 (1857).


\(^9\) See infra notes 57-120 and accompanying text.

\(^10\) In both December 1986 and 1987, the local newspapers were filled with articles describing community battles over public displays of religious symbols. In December 1986, the Cleveland Plain Dealer reported on a controversy in Garfield Heights, Ohio. The American Civil Liberties Union had complained about an “unadorned” creche displayed at a city-owned recreation area. In response, the city added a plastic Santa Claus to the display, “possibly to be joined later by Frosty the Snowman or other
needs to be reassessed. This Article attempts to accomplish that task. Section I briefly discusses the Supreme Court's decision in *Lynch*. Section II discusses post-*Lynch* developments, in particular the varying interpretations of *Lynch* in the context of cases involving Nativity scenes and other religious symbols. Section II also considers the reception *Lynch* has received in the scholarly literature and the need for the Supreme Court to return to the establishment issue.

Section III of the Article sets forth a solution to the establishment clause problems raised by government involvement with Nativity scenes. This section begins with the suggestion that the Supreme Court reformulate its approach to establishment clause issues. This section further suggests that the government does not violate the establishment clause unless a particular religious denomination receives significant legal advantages. In the absence of the sort of institutional arrangement between the government and a particular religious denomination that makes religious coercion possible, no establishment clause issue is presented. Under such an approach, the government's sponsorship of a Nativity scene would rarely violate the establishment clause.

**I. LYNCH v DONNELLY**

In *Lynch v Donnelly*, the Supreme Court considered whether Pawtucket's inclusion of a Nativity scene in its annual Christmas display violated the establishment clause. Chief Justice Burger described the city's display in this fashion:

> Each year, in cooperation with the downtown retail merchant’s association, the city of Pawtucket, R.I., erects a Christmas


display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.12

The district court found that the city's inclusion of the creche in the display violated the establishment clause and permanently enjoined the practice.13 The First Circuit, in a 2-1 decision, affirmed.14 In a 5-4 decision, the Supreme Court reversed.15

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12 Id. at 671. The district court described the "cost" of the Nativity scene in this fashion:

The nativity scene was purchased by the City in 1973 for $1,365. No money has since been expended on its maintenance. This amount was comparable to that expended to purchase the three other large groupings—the carolers, the "village", and Santa's sleigh—that are part of the current display. The creche is assembled, removed, and stored by City workers; these tasks take a total of two worker-hours. Some additional time is spent by the City electrician in hooking up two spotlights to shine on the nativity scene. The Parks director estimated that of the $4,500 spent for these employee services, about $20 was attributable to the creche. The City also spent a small amount, probably under $20, for spotlights, bulbs and holders to light the creche, and some unspecified sum for the electricity these use. Donnelly v. Lynch, 525 F Supp. 1150, 1156 (D.R.I. 1981) (citations to the record omitted), aff'd, 691 F.2d 1029 (1st Cir. 1982), rev'd, 465 U.S. 668 (1984). Although the display was on private property, the city clearly sponsored the creche. See id. at 1176 ("The City's suggestion that, prior to this lawsuit, people did not associate the Hodgson Park display with the City borders on the frivolous.").


15 Lynch, 465 U.S. at 672. Chief Justice Burger wrote the majority opinion, in which Justices White, Powell, Rehnquist, and O'Connor joined. Justice O'Connor also filed a separate concurring opinion. Justice Brennan filed a dissent, in which Justices Marshall, Blackmun, and Stevens joined. Justice Blackmun also filed a separate dissent, which was joined by Justice Stevens.
Chief Justice Burger's majority opinion began by criticizing Jefferson's "wall of separation" metaphor, and stated that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." The Chief Justice then described "an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." According to the Chief Justice, "[t]his history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause."

The Court explained that it "has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." In performing the "line-drawing" necessary to decide this question, the Court, in the last fifteen years, has used the Lemon test. Chief Justice Burger's opinion in Lynch stated, however, that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."

Turning to the constitutionality of Pawtucket's inclusion of a creche in its Christmas display, the Court stated that "the focus of our inquiry must be on the creche in the context of the Christmas season." Considered in this context, the challenged conduct satisfied the Lemon test. Rejecting the propriety of focusing on the religious nature of the creche, the Court found

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16 Chief Justice Burger's opinion is sometimes misdescribed as a plurality opinion. See Braveman, The Establishment Clause and the Course of Religious Neutrality, 45 Md. L. REV 352 (1986).

17 Lynch, 465 U.S. at 673.

18 Id. at 674.

19 Id. at 678.

20 Id.

21 Id.

22 According to the Lemon test, a statute must pass three requirements in order to withstand an establishment clause challenge: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citation omitted) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).


24 Id.
that the city had legitimate secular purposes in sponsoring the display, namely, "to celebrate the Holiday and to depict the origins of that Holiday." Rejecting the district court's conclusion that the city's conduct violated the "primary effect" prong of the Lemon test, the Court stated that it was "unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause." Finally, the Court rejected the argument that the city's conduct resulted in "excessive entanglement."

Justice O'Connor joined in Chief Justice Burger's opinion and also wrote a separate concurrence in which she set forth a modification of the Court's establishment clause doctrine. Ac-

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25 Id. at 681.
26 Id. at 681-82.
27 Id. at 682. Professor Van Alstyne has criticized the Court's apparent adoption of what he describes as an "any more than" test; that is, the establishment clause inquiry asks whether the government action being challenged aids religion "any more than" the assistance the Court has already approved. Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 783.
28 Lynch, 465 U.S. at 683-85. The Court first indicated its agreement with the district court's finding that there was an absence of administrative entanglement. As the Court noted, there was no "ongoing, day-to-day interaction between church and state" with regard to the content, design, or maintenance of the display. Id. at 684. The Court then rejected the district court's emphasis on the political divisiveness caused by the creche as a factor supporting the finding of a constitutional violation. See Donnelly, 525 F. Supp. at 1179-80. Relying on Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983), the Court stated that "[i]n this case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for." Lynch, 465 U.S. at 684 (citation omitted). The Court noted, moreover, that there had been no political friction about the display prior to the initiation of this lawsuit, and then stated that "[a] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." Id. at 684-85. For critiques of the Court's focus on divisiveness, see generally G. Bradley, supra note 4, at 4-9; Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis U.L.J. 205 (1980); Ripple, The Entanglement Test of the Religion Clauses: A Ten Year Assessment, 27 UCLA L. Rev 1195 (1980).
cording to Justice O’Connor, “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”

Justice O’Connor’s proposed modification of establishment clause doctrine would focus on what she views as the two principal ways government can run afoul of this basic principle: institutional entanglement and endorsement or disapproval of religion. In *Lynch*, Justice O’Connor focused on the “endorsement” question and concluded “I cannot say that the particular creche display at issue in this case was intended to endorse or had the effect of endorsing Christianity.” According to Justice O’Connor,

[t]he evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but the celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Justice O’Connor also concluded that, when considered in the context of “the overall holiday setting,” the display “cannot fairly be understood to convey a message of government endorsement of religion.”

Justice Brennan filed a lengthy dissent that both attacked the majority opinion and attempted to narrow the decision. In

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31 Id. at 687-88. According to Justice O’Connor, institutional entanglement may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id. at 688 (citation omitted).
32 Id. at 694.
33 Id. at 691.
34 Id. at 692.
35 Id. at 693.
36 Id. at 694-726 (Brennan, J., dissenting). As stated above, see supra note 15, Justice Brennan’s dissent was joined by Justices Marshall, Blackmun, and Stevens.
his attempt to do the latter, Justice Brennan read the majority opinion as "implicitly leav[ing] open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross." As discussed below, this is neither the only plausible nor the fairest reading of Chief Justice Burger's opinion. Justice Brennan's containment strategy, however, has had considerable success in post-\textit{Lynch} Nativ-ity scene cases.

The major focus of Justice Brennan's dissent was a broad-ranging attack on the majority opinion. Justice Brennan began by criticizing the majority's "less-than-vigorous application of the \textit{Lemon} test." After describing the \textit{Lemon} test as an effort to promote strict separation and government neutrality towards religion, Justice Brennan first concluded that "the city's inclusion of the creche in its Christmas display simply does not reflect a 'clearly secular purpose.'" According to Justice Brennan, "[t]he inclusion of a distinctively religious element like the creche demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene." Justice Brennan next concluded that the city's inclusion of the creche in its display violated the "primary effect" prong of \textit{Lemon} because such conduct "place[s] the government's imprimatur of approval on

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Justice Blackmun also wrote a dissent, which was joined by Justice Stevens, that concluded that the Court had "den[ied] the force of [the Court's] precedents [and] the sacred message that is at the core of the creche" \textit{Lynch}, 465 U.S. at 727 (Blackmun, J., dissenting).

\textsuperscript{37} \textit{Lynch}, 465 U.S. at 695 (Brennan, J., dissenting).

\textsuperscript{38} See infra notes 92-120 and accompanying text.

\textsuperscript{39} \textit{Lynch}, 465 U.S. at 696 (Brennan, J., dissenting). Justice Brennan, who in \textit{Marsh} v. Chambers, 463 U.S. 783 (1983), had criticized the Court for failing to follow the \textit{Lemon} test, see \textit{id.} at 796-801 (Brennan, J., dissenting), expressed his gratification that Chief Justice Burger's majority opinion in \textit{Lynch} "return[ed] to the settled analysis of our prior cases" \textit{Lynch}, 465 U.S. at 696 (Brennan, J., dissenting). Justice Brennan has of course often emphasized that he does not believe that the \textit{Lemon} test "fully capture[s] the analysis that may be necessary to resolve difficult Establishment Clause problems." \textit{Id.} at 696 n.2; see \textit{id.} at 704 n.11 (describing possible alternatives); \textit{Marsh}, 463 U.S. at 801 n.11 (Brennan, J., dissenting) (same).

\textsuperscript{40} \textit{Lynch}, 465 U.S. at 698 (Brennan, J., dissenting).

\textsuperscript{41} \textit{Id.} (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973)).

\textsuperscript{42} \textit{Id.} at 700.
the particular religious beliefs exemplified by the creche." Finally, Justice Brennan concluded that the inclusion of the creche "pose[d] a significant threat of fostering 'excessive entanglement.'" Here, Justice Brennan, although noting administrative entanglement might well develop as local officials are faced with the task of accommodating the demands for the display of other religious symbols, focused on the risk of political division along religious lines.

In considering the majority's application of Lemon, Justice Brennan addressed two other points: the context in which the city's creche appeared and the overall "holiday" context. The "holiday" context, of course, includes government recognition of Christmas as a public holiday. Justice Brennan concluded that the Court's approach failed to appreciate that "even in the context of Pawtucket's seasonal celebration, the creche retains a specifically Christian religious meaning." Moreover, Justice Brennan rejected what he described as the Court's belief "that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional." Such an approach, Justice Brennan argued, is flawed because it would allow the government to "indiscriminately embrace the distinctively sectarian aspects of the holiday" and to "place[] the prestige, power, and financial support of a civil authority in the service of a particular faith."

In addition to criticizing the Court's application of Lemon, Justice Brennan's dissent also criticized Chief Justice Burger's approval of other official acknowledgments of religion. According to Justice Brennan's approach, "[s]hould government choose to incorporate some arguably religious element into its

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43 Id. at 701.
44 Id. at 702 (quoting Walz v. Tax Commission of City of New York, 397 U.S. 664, 674 (1970)).
45 Id. at 702-04.
46 Id. at 708.
47 Id. at 709.
48 Id. at 710.
49 Id. at 711.
50 See id. at 713-18.
public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion." The city's inclusion of the creche in its Christmas display did not satisfy this approach. As Justice Brennan later asserted:

the city's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the creche conveys.

Justice Brennan also criticized the majority's invocation of the American historical experience. Justice Brennan's review of the relevant history led to the conclusion that there is no evidence whatsoever that the framers would have expressly approved a Federal celebration of the Christmas holiday including public displays of a nativity scene. Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case.

II. POST-LYNCH DEVELOPMENTS

A. Cases

The Supreme Court's decision in Lynch has created quite a bit of confusion in the lower courts. Predictably, this confusion has contributed to a steady stream of litigation about govern-

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51 Id. at 714.
52 Id. at 725-26.
53 Id. at 718-25.
54 Id. at 724-25.
ment involvement with a variety of religious symbols. This section of the Article discusses the varying interpretations of Lynch in the context of cases involving Nativity scenes and other religious symbols.

1. Nativity Scene Cases

The lower courts have interpreted Lynch in basically two ways. One view reads Lynch in a narrow, fact-specific manner. This view reflects Justice Brennan's determination that Lynch was a "narrow result which turn[ed] largely upon the particular holiday context in which the city of Pawtucket's nativity scene appeared." According to this view, the constitutionality of a particular Nativity scene depends on a detailed, fact-specific inquiry designed to determine whether the governmental entity has "fostered the inappropriate identification of the [government] with Christianity, and therefore violated the Establishment Clause." The three federal courts of appeals that have adopted this interpretation, the Third, Sixth, and Seventh Circuits, have all concluded that particular governmental displays

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57 This discussion will be limited to cases decided by federal courts of appeals. There have been other Nativity scene cases decided by federal district courts and state courts in the post-Lynch era. See, e.g., Burelle v. City of Nashua, 599 F. Supp. 792, 797 (D.N.H. 1984) (rejecting the Second Circuit's view of Lynch, discussed infra notes 92-120 and accompanying text, and granting a request for an injunction prohibiting the city from granting a license to a private group to erect a creche on the plaza in front of the City Hall "without signs disclaiming the ownership or support of the municipal government of the City of Nashua for the religious doctrine embodied by the sacred figures of said creche or, alternatively, without secular symbols of the holiday season juxtaposed within the plaza grounds"); see also Conrad v. City and County of Denver, 724 P.2d 1309, 1314 (Colo. 1986) (concluding that because of "the striking similarities between the instant facts and those of Lynch," the nativity scene display on steps of city and county building did not violate the state constitution).

58 See infra notes 63-91 and accompanying text.


60 American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) (footnote omitted).
of Nativity scenes violated the establishment clause. The second view, which has been adopted by the Second Circuit, reads the Supreme Court's decision in *Lynch* as permitting most public displays of Nativity scenes. According to this view, neither the physical context in which the creche is displayed nor the precise location of the display is particularly significant. *Lynch* is thus read as endorsing the constitutionality of all such displays.

a. *The Narrow View of Lynch*

In divided decisions, three federal courts of appeals, the Third, Sixth, and Seventh Circuits, have adopted the narrow view of *Lynch*. In *American Civil Liberties Union v. City of Birmingham*, a city resident brought suit challenging the constitutionality of the city's placement and maintenance of a Nativity scene on the lawn of the Birmingham City Hall during the Christmas season. On cross motions for summary judgment, the district court found for the plaintiff and entered "a permanent injunction prohibiting the defendant from erecting, supporting, or maintaining a nativity scene on the lawn of Birmingham City Hall." In rejecting the city's reliance on *Lynch*, the district court emphasized that the Nativity scene on the lawn of the city

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62 The creche may be adorned or unadorned, and its precise location could be on private or public land or in front of or inside of City Hall.


64 *City of Birmingham*, 588 F. Supp. at 1338. The Birmingham creche was displayed annually on the lawn in front of the City Hall from approximately late November to early January. According to the district court:

[The nativity scene is comprised of figurines depicting the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs. Absolutely nothing else is included in the display. When not displayed on public property, the creche was stored on public property. The figures in the nativity scene were built at public expense, and the electricity used in connection with the display was furnished out of public funds. The nativity scene was cleaned, restored, repaired and maintained at public expense, and was dismantled and conveyed to storage by public employees at public expense.

*Id.*
hall stood alone in that "[t]here were no red and green banners, candy canes, or little toy soldiers about. In short, there was nothing to offset the purely religious cast of the display." In addition, the district court thought it clear "that the primary effect of the display must be to advance, affirm, approve and otherwise validate the Christian religion." Furthermore, the district court concluded "that the solely religious character of the display in question is such that it might cause political divisiveness, another evil addressed and forbidden by the Establishment Clause." On appeal, a divided Sixth Circuit affirmed.

Chief Judge Lively's opinion followed the approach of Justice O'Connor's concurring opinion in Lynch, which he read as requiring a focus on "whether the city endorsed Christianity by its display of the creche." The court first found that "the district court erred in concluding that the display in Birmingham had no secular purpose and that it fostered excessive government entanglement with religion." With respect to the "primary effect" issue,
however, the court concluded: "the city-owned and city-sponsored nativity scene sends quite a different message when it stands alone as the only clearly identifiable symbol chosen by the city to mark its contribution to the celebration. The direct and immediate effect of such a display is endorsement of a particular religion."\(^7\)

In *American Jewish Congress v City of Chicago*,\(^7\) the American Jewish Congress brought suit challenging the constitutionality of the display of a creche in the lobby of the Chicago City-County Building. The district court held that *Lynch* was controlling and granted summary judgment for the defendants.\(^7\) The Seventh Circuit, over a strong dissent by Judge Easterbrook, reversed.\(^7\)

The Nativity scene in question had been built in the 1950s by a private group, the Chicago Plasterer's Institute, and donated to the City, which included the creche in its annual Christmas display.\(^7\) After a lawsuit brought in 1978 was settled by...
consent order, "the city was permitted to continue to display the creche in the City Hall lobby, provided that the city expend no public funds for the display, and that it affix written disclaimer-of-endorsement signs to the display." In 1984, the mayor's chief of staff ordered that the display be dismantled, but after a public outcry, the mayor ordered that the display be re-erected.

In finding that the city's display violated the second prong of the Lemon test, the court of appeals rejected the district
court's reliance on Lynch. The court first concluded "the nativity scene was self-contained, rather than one element of a larger display [and] therefore, unlike Lynch, the secularized decorations in the vicinity of the nativity scene were not clearly part of the same display." The court devoted more attention, however, to "another aspect of the nativity scene's physical setting [that] plainly distinguishes it from Lynch: its placement in City Hall." To the court of appeals, the "unique physical context" of the Nativity scene was dispositive:

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

Moreover, "the message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers."

In American Civil Liberties Union v Allegheny County, the plaintiffs challenged the constitutionality of the display of a Nativity scene inside the main entrance of the Allegheny County Courthouse and the display of a menorah on the steps of the

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77 Id. at 127.
78 Id. at 125-26.
79 Id. at 126. Because of this distinguishing fact, the court stated it "need not settle the debate over how far a nativity scene must stand from a Christmas tree or Santa Claus to be considered part of the same display, and hence 'neutralized' by secular symbols of holiday cheer." Id.
80 Id. at 128.
81 Id.
82 Id. Relying primarily on Lynch, the court noted that the city had a secular purpose in taking official notice of Christmas, a public holiday. Id. at 126-27 The court also stated that "'[t]he city's recognition of public sentiment in favor of the nativity scene was similarly permissible [, since there was no indication that the city was] intending to promote a particular point of view in religious matters." Id. at 127. Because it found that the display violated the second prong of the Lemon test, the court said that it "need not go on to consider whether the display resulted in excessive entanglement of government with religion." Id. at 128 n.4.
main entrance of the City-County building.\(^4\) The district court, relying on *Lynch*, entered judgment for the defendants,\(^5\) but a divided Third Circuit reversed.\(^6\)

Since 1981, the county has permitted the display of a creche on the grand staircase of the first floor of the county courthouse for approximately six weeks from late November to early January. In addition,

[for a number of years during the Christmas season the city has installed a 45 foot Christmas tree on a platform on the front steps of the main entrance of the City-County Building and next to the tree on the steps of the main entrance to the building since 1982 the city has annually erected an approximately 18 foot high menorah.\(^7\)

\(^4\) Id. at 656. The City-County Building is jointly owned and operated by the codefendants—Allegheny County and the City of Pittsburgh. *Id.*

\(^5\) For the court's discussion of the district court's opinion, see *id.* at 658-59.

\(^6\) Id. at 663.

\(^7\) Id. at 657. The court of appeals described the Nativity scene in this fashion:

The creche consists of traditional figures ranging in height from three to 15 inches, including a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo" ("Glory to God in the Highest"). The creche, though stored in the basement of the courthouse, is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic men’s organization and thus a sign in front of it recites: "This display donated by the Holy Name Society." Though it is erected, arranged and disassembled each year by the moderator of the Holy Name Society, the county supplies a dolly and minimal aid to transport it to and from the courthouse basement. While the county provides no special security or illumination for the display, its Bureau of Cultural Programs decorates the creche with red and white poinsettia plants and evergreen trees purchased at public expense. The county also displays wreaths purchased through county funds. Other decorations such as trees, Santa Clauses and additional wreaths are displayed by various departments and offices throughout the courthouse building.

The creche is displayed for about six weeks from late November to early January. During the weeks prior to Christmas the county sponsors Christmas carol programs on the first floor of the courthouse with the chorale groups using the creche for a foreground. The choirs, typically high school students, sing popular songs and religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The programs are dedicated to the universal themes of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. The grand staircase and the surrounding area are used throughout the year for art displays and other civic and cultural events.
The Third Circuit, after noting that "there has been considerable post-Lynch litigation with the judges as well as the litigants at odds,"88 found the decisions in the Chicago and Birmingham cases to be "particularly helpful."89 After discussing the case law, the court concluded that [the variables that a court should consider in determining whether a display has the effect of advancing or endorsing religion include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display 90

After considering these factors, the court found that "the only reasonable conclusion is that by permitting the creche and menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion."91

and programs.

Id. The court noted that the menorah was purchased by Chabad, a Jewish organization. The court also noted that:

[i]n front of the tree a sign bearing the mayor's name has been erected. It recites: "SALUTE TO LIBERTY. During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." The display, which includes the tree and its ornaments, the platform, the sign and the menorah, is installed by city employees. In addition, the City has placed signs advertising a charity fund drive and a seasonal celebration of a flower display in front of the building.

Id. at 657-58.

88 Id. at 660.

89 Id.

90 Id. at 662. Because it found that the religious displays violated the second prong of the Lemon test, the court stated that it "need not consider whether either the first or third prong of the Lemon test has been violated." Id. at 663. The court had already noted, however, that public entities "usually [are] able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." Id. at 662.

91 Id. (footnote omitted).
b. *The More Expansive View of Lynch*

The Second Circuit in *McCreary v Stone* and the dissenters in *City of Birmingham, City of Chicago*, and *Allegheny County* have all adopted the broader reading of *Lynch*, which permits most public displays of Nativity scenes. *McCreary* involved a challenge by two private groups, the Scarsdale Creche Committee and the Citizens Group, to the Village of Scarsdale’s denial of access to a Village-owned park for the purpose of displaying a privately-owned Nativity scene. From 1957 to 1980, the Scarsdale Creche Committee sponsored the display of a creche for approximately two weeks each December. The site of the display was Boniface Circle, a publicly-owned park in the center of the Village’s retail business district. In 1981 and 1982, after increasing community controversy about the display of the creche on public property, the Village’s board of trustees denied the Creche Committee’s request for permission to display the creche at Boniface Circle.

In a decision rendered while *Lynch* was pending before the Supreme Court, the district court concluded that the plaintiffs’ free exercise and free speech rights had not been violated and that it was proper for the Village to deny access to Boniface Circle to avoid violating the establishment clause. The court concluded that, although Boniface Circle was a public forum and the denial of access was content-based, the denial was necessary to serve a compelling state interest, i.e., avoiding violating the establishment clause. The court found that the creche was a religious symbol and that the primary effect of the public involvement with the creche was to advance religion in violation

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93 The Scarsdale Creche Committee “is a private unincorporated association of seven Protestant and Catholic churches.” *McCreary*, 575 F Supp. at 1116. The Citizens Group is “a private unincorporated association of persons not representing churches.” *Id.* at 1116.

94 The Board of Trustees was the governing body of the village.

95 The Board had granted the committee’s request in each year from 1957-1980.

96 575 F Supp. at 1133.

97 *Id.* at 1126.
of the establishment clause. In addition, the court found that "[t]he advancement problems are not cured by the placement of a sign [disclaiming public sponsorship] next to the creche." 

On appeal, the Second Circuit, which now had the benefit of the Supreme Court's decision in Lynch, reversed and remanded. The court of appeals rejected the district court's conclusion "that allowing plaintiffs' creche to stand ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion." The court concluded, therefore, that the Village could not rely on the establishment clause as a reason for denying the plaintiffs access to a public forum. In reaching this conclusion, the court of appeals relied principally on Lynch:

the city involved in Lynch purchased, erected, displayed, sponsored and owned the creche therein. If the Lynch creche was not construed as a primary advancement of religion, a fortiori, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no

\[9^9 \text{Id. at 1129-33. The district court found a legitimate secular purpose, namely, "providing equal access to a public forum." Id. at 1128. The district court noted that "while allowing the creche does generate some entanglement potential, this potential is not enough to constitute an Establishment Clause violation." Id. at 1129. According to the court, the entanglement potential arose because of the potential for favoritism in "making available scarce time and space." Id. The court also noted that "[t]he record does indicate the existence of a 'divisive political potential' over the creche issue, another aspect of entanglement." Id. Nevertheless, the court concluded that since "a result in this lawsuit, one way or the other, would seemingly leave little to future political debate, [it did] not see the divisiveness element as contributing much to entanglement." Id.}

\[10^9 \text{Id. at 1132. The sign stated: "[t]his creche has been erected and maintained solely by the Scarsdale] Creche Committee, a private organization. The dimensions of the sign are approximately 10-3/4 inches by 14-1/2 inches, its decal letters measure 1/2 inch high." Id. at 1118 (citation omitted). The court stated that if cases such as this were to turn on minutiae like the visibility or lack of ambiguity of disclaiming signs, the size or relative size of the symbol, the length of time for the display, or the potentially myriad other factors which possibly could be held to affect the outcome, the courts would become hopelessly entangled in the problem, and, perhaps more importantly, villages like Scarsdale would endlessly be in and out of court. Id. at 1133 (citation omitted) (emphasis in original).}

\[10^0 \text{McCreary, 739 F.2d at 730.}

\[10^1 \text{Id. at 726.} \]
expense to it cannot be viewed as a violation of the primary-effect prong of the \textit{Lemon} test.  

The court of appeals disagreed with the district court's conclusion about the inadequacy of the disclaimer sign and "instructed the district court [on remand] to conduct proceedings and to enter an order concerning the size, visibility and message of an appropriate disclaimer sign or signs." In addition, the court of appeals rejected the argument that the context of the display in \textit{Lynch}, i.e., the presence of items other than the creche, was significant. As the Second Circuit stated, "[t]he Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated; rather, the Court consistently referred to 'the creche in the context of the Christmas season,' or the 'Christmas Holiday season.'"

In \textit{City of Birmingham}, Judge Nelson's dissent rejected the majority's conclusion that \textit{Lynch} suggests that an "unadorned" creche should be treated differently from a creche "balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin." Judge Nelson

\textit{Id.} at 728 (quoting \textit{McCreary}, 575 F. Supp. at 1118-19).

\textit{Id.} at 729 (quoting \textit{Lynch}, 465 U.S. at 679-80).

\textit{City of Birmingham}, 791 F.2d at 1569 (Nelson, J., dissenting). Judge Nelson derided what he termed "a 'St. Nicholas too' test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too." \textit{Id.} Judge Nelson, who noted that he was strengthened in his conclusion by the Second Circuit's decision in \textit{McCreary}, see \textit{id.} at 1569, 1572,

question[ed] whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations, and [stated that he was] reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

\textit{Id.}

Judge Nelson did note that the Birmingham creche was not completely unadorned—
also disagreed with "the conclusion that the City of Birmingham can reasonably be said to have endorsed Christianity or to have sent non-Christians an impermissible message." According to Judge Nelson, "[o]ne message conveyed by the relatively recent advent of these nativity scenes is that we have become a more diverse and tolerant society than we used to be." Judge Nelson concluded: "[I]t may or may not be wise for Birmingham to erect a Christmas creche—'unadorned' or otherwise—but that strikes me as a question more appropriately answered by the people, through their elected representatives, than by courts of law."

In his dissent in *City of Chicago*, Judge Easterbrook stated that *Lynch* required that the district court's judgment, which had upheld the constitutionality of the City's display, should be affirmed. According to Judge Easterbrook, the majority erred in focusing on the creche alone. As Judge Easterbrook stated, "*Lynch* holds that the government's stance must be discerned from everything the government chooses to exhibit. *Lynch* holds that a city may display the symbols of Christmas without thereby endorsing Christianity. That is all Chicago has done." Chicago had not made the mistake of making the creche the only item in its display. Moreover, the location of the display—in City Hall—no more communicated an endorsement of Christianity than did the display involved in *Lynch*, which was clearly officially sponsored.

Judge Easterbrook also undertook a broader re-examination of the establishment clause and expressed his view that Chicago would not have violated the establishment clause even if it had

"Immediately behind the nativity scene grows an evergreen tree—a typical Christmas tree—which the city decorates, during the holiday season, with colored lights. The city hall property as a whole has perhaps twelve trees, each of which is decorated at Christmastime with five or six strings of lights." *Id.* at 1570 n.4. Judge Nelson concluded that the majority apparently did not view these trees as satisfying the 'St. Nicholas too' test, and that he "obviously ha[d] no basis for quarrelling with that judgment." *Id.*

106 *Id.* at 1570.
107 *Id.*
108 *Id.* at 1572.
109 *City of Chicago*, 827 F.2d at 128-40 (Easterbrook, J., dissenting).
110 *Id.* at 131.
111 *Id.* at 131-32.
endorsed Christianity explicitly. According to Judge Easterbrook, “force or funds are essential ingredients of an ‘establishment’” In the absence of coercion, according to Judge Easterbrook, there is no establishment clause problem. Judge Easterbrook “offer[ed his] conclusion in the spirit of constructive criticism, because [he acknowledged that this view] is plainly not the law today.” According to Judge Easterbrook, because governmental acknowledgement of religion and governmental sponsorship of religious symbols “share with Chicago’s creche the absence of coercion,” they should not be viewed as running afoul of the establishment clause.

Judge Weis’ dissent in Allegheny County maintained that the majority’s “aggressive ‘neutrality’ is contrary to the spirit of religious liberty embodied in the First Amendment and will lead not to accommodation but to animosity, not to tolerance of, but hostility toward, religion.” Judge Weis, who concluded that the district court had properly applied Lynch, criticized the decisions in City of Chicago and City of Birmingham, explaining that “[t]hese courts have pointed to irrelevant and inconsequential variations in the location of the creche display and its positioning among other Christmas symbols as factors to justify disregarding the clear spirit of Lynch.” Judge Weis, who commended the dissents of both Judges Nelson and Easterbrook, also endorsed the Second Circuit’s decision in McCreary, which, Judge Weis commented, had “rejected both the government location and adorned/unadorned distinctions.” Nor was Judge Weis troubled by the inclusion of the menorah when he stated that “[b]y marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country.” In conclusion, Judge Weis commented that

112 Id. at 132-37.
113 Id. at 137.
114 Id.
115 Id. at 133.
116 Allegheny County, 842 F.2d at 663 (Weis, J., dissenting).
117 Id. at 668.
118 Id. at 669.
119 Id. at 671.
[t]hese displays pose no threat to religious freedom, yet their suppression forebodes ominous consequences.”

2. Cases Involving Other Religious Symbols

_Lynch_ has also created some, albeit less, confusion in cases involving other religious symbols. In cases involving symbols with unambiguous religious connotations, for example, government display of crosses, the courts have typically found establishment clause violations. In certain cases in which the courts reject the contention that the “symbol” is religious or in which the religious message of the symbol is muted in some fashion, however, the courts have failed to find establishment clause violations. This section of the Article discusses the major, post-_Lynch_ cases involving other religious symbols.

In _Friedman v Board of County Commissioners_, the plaintiffs challenged the constitutionality of Bernalillo County’s use of a seal that included a golden Latin cross and the Spanish motto “CON ESTA VENCEMOS,” which means “With This We Conquer.” The district court upheld the constitutionality

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120 Id.

121 For discussions of pre-_Lynch_ cases involving religious symbols, see Devins, _Religious Symbols and the Establishment Clause_, 27 J. Church & St. 19, 25-32 (1985); Comment, _supra_ note 56, at 490-95; Comment, _Publicly-Funded Display of Religious Symbols: The Nativity Scene Controversy_, 51 U. Cin. L. Rev. 353 (1982). The American University Law Review Comment also contains an early account of post-_Lynch_ cases involving religious symbols. That Comment notes that _Lynch_ “has created confusion and conflict among the federal courts attempting to apply the establishment clause doctrine in religious symbol cases.” Comment, _supra_ note 56, at 498.


123 _Friedman_, 781 F.2d at 779.

The circular seal contains the phrases, “Bernalillo County,” and “State of New Mexico,” separated by two diamonds along its outermost green edge. Within an inner circle, the Spanish motto, “CON ESTA VENCEMOS,” which translates into English as, “With This We Conquer,” or “With This We Overcome,” arches over a golden Latin cross, highlighted by white edging and a blaze of golden light. The motto and cross are set in a blue background depicting the sky over four darker blue
of the seal, but the Tenth Circuit, by a 5-2 vote, ultimately reversed on establishment clause grounds.

The district court acknowledged that the cross had religious significance but concluded that the purpose and primary effect of the seal was to promote an appreciation for the Spanish and Catholic heritage of Bernalillo County, New Mexico, and therefore did not violate the establishment clause. The Tenth Circuit, sitting en banc, reversed, concluding "that the district court's finding in favor of the county on the second prong of Lemon—the 'effect' test—was clearly erroneous." The appellate court concluded that "the seal as used conveys a strong impression to the average observer that Christianity is being endorsed." The court distinguished Lynch on the grounds that "the seal, unlike the creche, pervades the daily lives of county residents."

Bernalillo County residents do not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents do the creche. The context of the cross and motto is quite different. The cross is the only visual element on the seal that is surrounded by rays of light.

mountains and a green plain. Eight white sheep stand on the plain. Id. at 779 (footnote omitted). There was some dispute about the origins and meaning of the motto. One of the plaintiff's witnesses testified that although he found the motto "to be a militant statement[,] it presented 'no problem.'" Johnson v. Board of County Commissioners, 528 F Supp. 919, 922 (D.N.M. 1981), rev'd, 781 F.2d 777 (10th Cir. 1985) (en banc), cert. denied, 476 U.S. 1169 (1986). Of course, references to Constantine have not been uncommon. See id. at 923; Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & MARY L. REV 875, 921 (1986).

The interpretation to be given the appearance of the sheep on the seal was also the subject of some dispute. Plaintiff testified that the sheep apparently represented the "flock of Jesus." The defendants' experts, on the other hand, saw the sheep as symbolic of the importance of the sheep-raising industry in Bernalillo County history, and not of the Christian "lamb of God" or "good shepherd" or "flock of Jesus."

Friedman, 781 F.2d at 779.

124 Johnson, 528 F Supp. at 919.

125 Friedman, 781 F.2d at 777. A divided panel of the Tenth Circuit had affirmed the district court, but on rehearing en banc, the panel opinions were vacated.

126 Id. at 780.

127 Id. at 782.

128 Id.
The motto may be fairly regarded as promoting the religion the cross represents.\textsuperscript{129}

In American Civil Liberties Union \textit{v.} City of St. Charles,\textsuperscript{130} the plaintiffs challenged the constitutionality of the City's display of a lighted Latin cross in its annual Christmas display.\textsuperscript{131} The district court held that the display violated the establishment clause because the primary effect of displaying the cross atop the City's fire station "was to place the government's imprimatur on the particular religious beliefs associated with the Latin cross."\textsuperscript{132} The court distinguished Lynch, concluding "that, unlike a creche displayed in the midst of, among other things, a Santa Claus house, clown, elephant and teddy bear, the apparent governmental endorsement of Christianity is not 'negated' by the overall holiday display of lights in St. Charles."\textsuperscript{133} The Seventh Circuit affirmed, in part relying on the district court's conclusion that the cross is not a traditional Christmas symbol, and that, therefore, the cross "signified public support for Christianity rather than celebration of the Christmas season."\textsuperscript{134}

\textsuperscript{129} Id.
\textsuperscript{131} [B]etween Thanksgiving day and New Year's day [, St. Charles has for many years] festooned a six-acre area of trees and public buildings with colored lights to celebrate Christmas. The display includes Christmas trees, wreaths, snowflakes, reindeer, Santa Claus, and other common Christmas symbols, but it also includes (and has for 15 years) a cross. On top of the fire department (a three-story building, clearly marked as the fire department) is a 35-foot-high television aerial. About three-fifths of the way up the aerial is an 18-foot metal cross-bar, which is no longer a functional part of the aerial. When lit up at night the aerial and cross-bar form the unmistakable symbol of Christianity. \textit{City of St. Charles}, 794 F.2d at 267
\textsuperscript{132} \textit{City of St. Charles}, 622 F. Supp. at 1546.
\textsuperscript{133} \textit{Id.} (quoting Lynch, 465 U.S. at 692 (O'Connor, J., concurring)).
In contrast to these decisions involving symbols that the courts view as having unambiguous religious connotations, there are several decisions that have rejected constitutional attacks on governmental involvement with what are alleged to be religious symbols. If the court concludes that the "symbol" is not in fact religious, then the establishment clause challenge is quickly resolved. In *American Civil Liberties Union v City of Long Branch*, the court rejected the argument that the city's authorization of a creation of an eruv on public property violated the establishment clause.

An eruv, under Jewish law, is an unbroken delineation of an area. The demarcation of the eruv boundary is primarily created using existing telephone poles and fences with wires connecting them and with small half-rounds attached to the sides of the poles. The designation of an eruv allows observant Jews to carry or push objects from place to place within the area during the Sabbath.

In rejecting the plaintiffs' establishment clause arguments, although expressing the view that "governments cannot construct religious symbols," the court found that

> [t]he eruv which the city has allowed the Congregation to create is not a religious symbol. Neither the boundary workers of the eruv nor the eruv itself have any religious significance. They are not objects of worship nor do they play any theological role in the observance of the Sabbath.

The court found that

> the existence of the eruv does not impose the Jewish religion on other residents of Long Branch, it merely accommodates the religious practices of those residents who are observant Jews. As long as there is no evidence that Long Branch has refused to accommodate other religious groups and since

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136 *Id.* at 1294. As the court explained, "[p]ushing and carrying are not permitted in the public domain on the Sabbath; however, the creation of an eruv district permits such actions by creating the legal fiction of a 'private domain.'" *Id.*
137 *Id.* at 1295.
138 *Id.* at 1296.
the city will spend no money on the eruv, permitting the eruv is an acceptable accommodation and does not improperly advance religion.\textsuperscript{139}

Even when a symbol is acknowledged to have some religious significance, the courts sometimes reject constitutional challenges if the religious message of the symbol is muted in some fashion. In \textit{Foremaster v City of St. George},\textsuperscript{140} for example, the plaintiffs challenged the constitutionality of the City of St. George's use of a logo that included a sketch of the St. George Temple of the Church of Jesus Christ of Latter-day Saints.\textsuperscript{141} The district court concluded that St. George's "logo is distinguishable from the seal in \textit{Bernalillo} and properly passes the effects prong of \textit{Lemon}."\textsuperscript{142} The court reached this conclusion even though it acknowledged the temple's religious significance. The court noted that in \textit{Lynch} the Court had approved certain governmental aids to religion. In the court's view,

\begin{quote}
[t]he logo of the City of St. George is no more an endorsement of religion than the numerous examples given by the Supreme Court of cases where a governmental benefit or endorsement of religion has passed Constitutional scrutiny The religious significance of a Mormon temple is not so pervasive as necessarily to overcome an otherwise secular message concerning the beauty and attractiveness of a particular area.\textsuperscript{143}
\end{quote}

In \textit{Fausto v Diamond},\textsuperscript{144} the plaintiffs challenged the constitutionality of a public display of a memorial dedicated to the "Unknown Child." The Memorial included a fountain and two plaques with mother and child etchings. One of the plaques

\begin{footnotesize}
\begin{enumerate}
\item[139] \textit{Id.} at 1296.
\item[140] 655 F Supp. 844 (D. Utah 1987).
\item[141] \textit{Id.} at 850.
\item[142] \textit{Id.} at 852.
\item[143] \textit{Id.} at 850.
\end{enumerate}
\end{footnotesize}
contained a quotation from the Book of Deuteronomy. The court rejected the plaintiffs' establishment clause arguments, although the court acknowledged the religious aspects of the display. The court noted that Lynch had warned against "concentrating 'exclusively on the religious component of any activity'".

The Memorial is located in Cathedral Square, a public park in front of the Cathedral of Saints Peter and Paul (a Roman Catholic church) in the downtown area of Providence, Rhode Island. The Square includes "[a] large, cylindrically shaped waterfall fountain". In 1979, the Committee for the Memorial to the Unknown Child "proposed to repair the fountain[, which had fallen into disrepair,] at no cost to the City if it could be established as a Year of the Child Memorial to the 'unknown child,' and denominated as 'The Fountain of Life.'" The Committee repaired the fountain and installed two engraved plaques with engravings of a mother and child. One plaque contained the words "FOUNTAIN OF LIFE: A MEMORIAL TO THE UNKNOWN CHILD." The other plaque contained a passage from the Book of Deuteronomy that read: "I have set before you life and death, the blessing and the curse. Choose life, then, that you and your descendants may live." The City did not spend any municipal funds for the installation, erection or purchase of the plaques, but municipal funds have been used to maintain Cathedral Square (including the Memorial) and to pay for running the fountain.

One of the plaintiffs testified at trial that she had seen the Memorial and believed it to be a religious statement on abortion. As a taxpayer, she objected to this use of municipal funds. She emphasized the importance of viewing the fountain and plaques in the context of Cathedral Square (the dominant point of which is the Cathedral from which the Square takes its name). Because the Memorial's backdrop is the Cathedral, the engravings of the mother and child, together with the quotation from Deuteronomy, in her view gained a religious significance which would be absent if seen in a more nondescript setting. She testified that she believed the engravings to be renditions of the Madonna and Child, figures with great religious significance to Christians (and especially, Roman Catholics).

The court said that "the Memorial is neither overtly religious nor a theologic symbol per se." The court acknowledged the difficulty of determining whether a symbol is religious, particularly since the various components of the Memorial "may transmit conflicting signals," to different observers. The court expressed concern about the "overtly religious" character of one of the two ceremonies at which the Memorial was dedicated and about the religious character of the meeting of the Board of Park Commissioners at which the Board voted to allow the plaques to be permanently affixed to the fountain. In the end, the court, after noting that the plaintiffs were trying to prohibit the continued display of the Memorial, downplayed the significance of these two events.

The court concluded that it did "not share the plaintiffs' impression that the Memorial, dispassionately viewed, constitutes a theistic symbol."
Applying the newly-crafted objective standard of *Lynch*, [the court was] unable to discern that the Memorial is a greater aid to the Roman Catholic faith than was the creche in *Lynch*; and certainly, any benefit to religion which inheres in the Memorial does not rise to the level of importance of those emoluments catalogued and approved by the *Lynch* court.\(^{148}\)

**B. Commentators**

*Lynch* has also prompted considerable controversy in the scholarly literature. Much of the commentary has been critical of the Court’s decision, although the decision has received significant scholarly support. The wide disagreement about *Lynch* should not be too surprising—these responses principally reflect broader disagreements about the proper interpretation of the establishment clause. This section of the Article outlines briefly the principal scholarly reactions to the *Lynch* decision. These diverse reactions suggest, as did the various lower court responses, that a reassessment of *Lynch* is in order. The disagreements about *Lynch* reflect disagreements about fundamental principles. Such a reassessment must, therefore, necessarily begin with a more general reassessment of the Court’s approach to the establishment clause.

One of the major attacks on *Lynch* has been that the Court misapplied the *Lemon* test. For example, Professor Van Alstyne has stated that “[i]n an artless sense—but in no sense that will withstand even the mildest scrutiny—the *Lynch* case can . be fitted within the literal wording of the ‘three-prong’ test a majority of the Court has declared that it will usually apply to establishment clause claims.”\(^{149}\) Chief Justice Burger’s opinion in *Lynch*, particularly the passage emphasizing that “the Con-

\(^{148}\) Id. at 468.

stitution [does not] require complete separation of church and state; it affirmatively mandates accommodation not merely tolerance, of all religions, and forbids hostility toward any,"\textsuperscript{150} surely fits uneasily within the framework set forth in \textit{Lemon}, which tends to highlight separationist concerns.\textsuperscript{151} In fact, the Chief Justice's application of the \textit{Lemon} test in \textit{Lynch} and his pointed remarks that the Justices "have repeatedly emphasized [their] unwillingness to be confined to any single test or criterion in this sensitive area,"\textsuperscript{152} seemed to support the view that the Court was in the midst of a shift in establishment clause doctrine.\textsuperscript{153} The Court seemed to pull back from such a re-examination during the next term,\textsuperscript{154} however, and the Court has since re-established the prominence of the \textit{Lemon} test in establishment clause adjudication.\textsuperscript{155} The Court has not, however, disavowed \textit{Lynch}, and so the tension between \textit{Lynch} and \textit{Lemon} remains a source of confusion for the lower courts.\textsuperscript{156}

\textsuperscript{150} \textit{Lynch}, 465 U.S. at 673.
\textsuperscript{152} \textit{Lynch}, 465 U.S. at 679.
\textsuperscript{153} See McConnell, supra note 149, at 3; Oaks, \textit{Separation, Accommodation and the Future of Church and State}, 35 \textit{DE PAUL L. REV} 1, 13 (1985); Redlich, supra note 151, at 1127; Van Alstyne, supra note 27, at 771.
\textsuperscript{155} See \textit{Bowen}, 108 S. Ct. 2562, 2570-79 (applying the \textit{Lemon} test); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862, 2867-68 (1987) (rejecting suggestion that it not apply \textit{Lemon}); see also Simson, \textit{The Establishment Clause in the Supreme Court: Rethinking the Court's Approach}, 72 \textit{CORNELL L. REV} 905 (1987) (noting that the Court has revived the \textit{Lemon} test but suggesting that the \textit{Lemon} test ought to be modified).
\textsuperscript{156} For example, in \textit{Stein v. Plainwell Community Schools}, 822 F.2d 1406 (6th Cir. 1987), Judge Milburn, in a concurring opinion that made no reference to \textit{Lynch}, stated
In addition to the critique of *Lynch* based primarily on precedent, commentators have criticized *Lynch* from a variety of doctrinal perspectives. To those commentators who favor a strict separation of church and state, *Lynch* is obviously terribly misguided. For example, Leo Pfeffer has compared *Lynch* to the *Dred Scott* decision.157 Professor Redlich, another separationist, views *Lynch* as a "flagrant departure from the constitutional principle of church-state separation."158 *Lynch* has also been severely condemned by those commentators who do not adopt a strict separation approach. A number of commentators who have endorsed, at least in part, Justice O'Connor's attempt to reformulate establishment clause doctrine,159 have criticized *Lynch* because the Court did not "prohibit government from symbolically endorsing religion."160 According to this view, the principal reason endorsement is improper is that "[b]y adopting the language and precepts of a religion as its own, government implies that non-adherents are outsiders."161 In deciding whether governmental sponsorhip of a creche impermissibly conveys a message of endorsement, these commentators have
emphasized that it is necessary to adopt "the viewpoint of those who reasonably claim to have been harmed." From this viewpoint, Pawtucket’s sponsorship of the creche clearly "convey[s] a message of government endorsement of religion" and therefore offends and stigmatizes.

Another attack on Lynch has come from commentators who invoke the idea of the American civil religion. This critique is somewhat analogous to the critique made from the "no endorsement" perspective. Yehudah Mirsky has argued that there is a distinction "between civil religion, an essentially secular, political phenomenon, and traditional, sacral religion." According to this approach, public manifestations of religion are permissible as long as they do not go beyond the American civil religion. Nativity scenes are impermissible because "they are traditional, sacral symbols that have no place in front of City Hall."

Lynch has also been criticized by those commentators, such as Professor Laycock, who emphasize neutrality in interpreting the establishment clause. Professor Laycock has explained his neutrality theory in this fashion:

[t]he principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions. I do not mean neutrality in the formal sense of a ban on religious classifications, but in the

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164 For a brief overview of the concept of civil religion in the establishment clause context, see Developments in the Law—Religion and the State, supra note 162, 1651-59.


166 See Stein, 822 F.2d at 1409 (footnote omitted) ("So long as the invocation or benediction on these public occasions does not go beyond 'the American civil religion,' so long as it preserves the substance of the principle of equal liberty of conscience, no violation of the Establishment Clause occurs"); Note, supra note 165, at 1255-57

167 Note, supra note 165, at 1256.

168 Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 NW U.L. Rev. 1, 8 (1986); see also Braveman, supra note 16.
substantive sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice.¹⁶⁹

According to this view, Lynch is "wholly unprincipled and indefensible. A little bit of government support for religion may be only a little bit of establishment, but it is still an establishment."¹⁷⁰

Lynch has not, however, been universally condemned. Commentators who emphasize the establishment clause's role in promoting religious liberty have argued that symbolic uses of religion are not unconstitutional. For example, in commenting on Lynch and Marsh v Chambers,¹⁷¹ the legislative chaplaincy case, Michael Paulsen has stated: "[N]either a creche nor a legislative chaplaincy abridges the religious liberty of the nonadherent through either compulsion or inducement, and these symbolic uses of religion do not themselves communicate a message of disapproval of such nonadherence."¹⁷² Some commentators have explained Lynch under a "cultural heritage" rationale. Professor Marshall supports Lynch as the Court's acceptance of "a fact of public life."¹⁷³ As Professor Marshall states, "[T]here are certain religious symbols and practices that the establishment clause leaves untouched. Establishment doctrine must reconcile anti-establishment principles with a 'de facto establishment' reality."¹⁷⁴

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¹⁶⁹ Laycock, supra note 123, at 922 (footnotes omitted).
¹⁷⁰ Laycock, supra note 168, at 8. Professor Laycock argues that the establishment clause prohibits placing "In God We Trust" on coins, opening court sessions with "God Save the United States and this honorable Court," and naming a city Corpus Christi or Los Angeles. Id. at 8. But see Marshall, supra note 2, at 507-09.
¹⁷² Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV 311, 353 (1986) (emphasis in original). Professor McConnell, who has argued that the establishment clause was intended to prevent governmental "interfer[e] with religious liberty," McConnell, Coercion: The Lost Element of Establishment, 27 WM. & MARY L. REV 933, 941 (1986), has "suggest[ed] that the courts are wasting their time when they draw nice distinctions about various manifestations of religion in public life that entail no use of the taxing power and have no coercive effect." Id. at 939; see Laycock, supra note 123, at 922 n.240 (discussing Professor McConnell's willingness to allow "preferential displays of religious symbols, lest the public sphere be wholly secularized.").
¹⁷³ Marshall, supra note 2, at 508.
¹⁷⁴ Id. at 509 (footnote omitted); see also Crabb, Religious Symbols, American
Professor Bradley, after making an extensive search for the original meaning of the establishment clause, also supports the constitutionality of the display of religious symbols on public property, as long as the governmental body in question does not seek to exclude particular religious symbols.\textsuperscript{175} In Professor Bradley's view, "[a] rigorous historical inquiry into the adoption of the Establishment Clause has shown that it prohibits sect preferences in the government's dealings with religion.\textsuperscript{176}

According to this sect-equality position,

[t]he creche could be recognized as the Christian sign that it is and not as some neutered, universal folk symbol. The question need no longer be whether government sponsored religion but whether it did so on an evenhanded basis. The issue is perhaps best cast in terms of equal access: is government willing to aid other groups endeavoring to clothe the public square in sacred garb?\textsuperscript{177}

III. REVISING LYNCH v DONNELLY

The Supreme Court's decision in Lynch v Donnelly\textsuperscript{178} has generated substantial controversy. The Court's opinion has led to substantial confusion in the lower courts, as the above discussion evidences.\textsuperscript{179} The decision has also been widely, although not universally, condemned in the scholarly literature.

All of this confusion is not, however, surprising. There are very real ambiguities in Chief Justice Burger's opinion in Lynch.

\textsuperscript{175} G. BRADLEY, supra note 4, at 145.

\textsuperscript{176} Id. at 135.

\textsuperscript{177} Id. at 145; see also G. GOLDBERG, CHURCH, STATE AND THE CONSTITUTION 8 (1984).


\textsuperscript{179} See supra notes 55-148 and accompanying text.
Despite these ambiguities, the broad view of *Lynch* seems most persuasive. The Court emphasized that the focus on the religious nature of the creche was misplaced and that the proper context was that of the Christmas holiday season rather than the physical context in which the creche appeared.\(^{180}\) Adopting this broader view of *Lynch* would have the benefit of avoiding the fact-specific inquiry that is necessary under the narrower view. This broader reading of *Lynch*, however, would do little to resolve cases involving other religious symbols. In addition, it must be acknowledged that the limiting construction suggested by Justice Brennan in his *Lynch* dissent and adopted by the Sixth, Seventh, and Third Circuits is a plausible reading of Chief Justice Burger's opinion.\(^{181}\)

Perhaps the confusion in the post-*Lynch* cases simply reflects the unsettled nature of establishment clause doctrine. The Court's establishment clause decisions have long been criticized both for their internal inconsistencies and for their departure from the critic's view of "the" proper reading of the establishment clause. The confusion is, however, cause for concern, because such confusion contributes to acrimonious litigation, as the post-*Lynch* experience reveals.\(^{182}\)

\(^{180}\) *See supra* notes 92-120 and accompanying text; *see also* Note, *supra* note 151, at 201-203; *Case Comment*, *American Civil Liberties Union v. City of Birmingham: Establishment Clause Scrutiny of a Nativity Scene Display*, 62 Notre Dame L. Rev 114 (1986) (arguing that the Sixth Circuit's opinion in *City of Birmingham* misinterpreted *Lynch*).

\(^{181}\) The strength of Justice Brennan's construction is aided by a reading of Justice O'Connor's concurring opinion. Justice O'Connor did join in Chief Justice Burger's opinion, but since her vote was necessary to the result in the case her assessment of the constitutional issue takes on increased importance. At several places in her opinion, Justice O'Connor did emphasize the larger display in support of the conclusion that Pawtucket did not intend to endorse religion and that the city's actions did not have the effect of endorsing religion. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring). Justice O'Connor, like the Chief Justice, also emphasized "the overall holiday setting" and did not rely on the conclusion that the religious significance of the creche had been "neutralized by the setting" in concluding that "the display of the creche cannot fairly be understood to convey a message of government endorsement of [Christianity]." *Id.* at 692-93. The broader reading of *Lynch*, therefore, seems most persuasive.

\(^{182}\) *See, e.g.*, Johnson, *Concepts and Compromises in First Amendment Religious Doctrine*, 72 Calif. L. Rev. 817, 831 (1984) ("[B]y encouraging persons who are easily offended by religious symbolism to believe that the courts stand open to remedy their complaints, the courts foster divisive conflicts over religion."); *Comment, supra* note 56, at 479 (footnotes omitted) ("Local governments [have been] left with little
All of this indicates a very real need for the Supreme Court to reassess *Lynch*. This section of the Article offers the Court one solution to the problem. The section begins with a suggestion that the Court revise establishment clause doctrine and adopt a position that most accurately reflects the original understanding of the clause. The Court should adopt the view that the government does not violate the establishment clause unless the government creates an institutional arrangement with a particular religious denomination from which coercion is likely to flow. Under such an approach, the government’s involvement with a Nativity scene would rarely violate the establishment clause.

A. *Theoretical Framework*

Most observers would probably agree with Professor Smith’s view that “establishment doctrine undoubtedly needs re-examination.”183 Most such re-examinations begin by resorting to guidance in determining whether they constitutionally may display certain symbols. The result has been political controversy and religious divisiveness in communities where allegedly religious symbols have been displayed.”); *Judge in Mississippi Bars a Cross Display On a State Building*, N.Y. Times, Dec. 13, 1986, at A34, col.4 (noting that a lawsuit seeking to remove a lighted cross from a state building had prompted protests at the office of the Mississippi chapter of the ACLU and death threats against the executive director of the ACLU’s Mississippi chapter).


The Court’s continuing use of the *Lemon* test should not be regarded as a bar to a new approach. I would agree with Professor Laycock that “the three-part [*Lemon*] test does not help explain the Court’s results and actually hampers understanding of the real issues.” Laycock, *A Survey of Religious Liberty in the United States*, 47 OMO ST. L.J. 409, 450 (1986); see Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 347 (“A fundamental defect in the Court’s establishment clause jurisprudence is that the three-part test—or any one of its three parts—has become the ultimate inquiry. That is wrong. The inquiry should not be whether there is entanglement; the inquiry should be whether there is an establishment of religion.”); *McConnell, supra* note 172, at 941 (“Not what flunks the three-part test, but what interferes with religious liberty, is an establishment of religion.”).

In the same vein, stare decisis should not be regarded as a bar to a major change in the Court’s approach to these issues. Even if one acknowledges that stare decisis has a role to play in constitutional litigation, *but see* J. Giraud, *Realism, Positivism and Adherence to Stare Decisis: Has the Doctrine Outlived its Usefulness?*, (unpublished manuscript) (copy on file with author) (arguing that stare decisis should have no role to
history, and this Article is no exception. My approach to constitutional law is based on originalist premises, but this approach is not as unusual in the religion clauses area as it is in other areas of constitutional law. For example, Justice Black's opinion in *Everson v Board of Education*, the first modern establishment clause case, relied on history for its understanding of "establishment," and both Justice Rehnquist and Justice Brennan appeal to the original understanding, albeit in somewhat different fashions, in arguing for widely varying views of the establishment clause.

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play in constitutional adjudication); Note, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. Rev 345, 371-76 (1986) (same), the Court's establishment clause cases would not appear to be prominent candidates to receive the protection of the doctrine. Professor Bradley expressed this point well:

First, the precedents are so erratic and so often inscrutable that few responsible actors rely heavily on them, a factor that belies the other main reason for stare decisis: avoiding the appearance given by conflicting results that mere judicial will, and not constitutional principle, is at work. Second, many of the rulings have been so contrary to American culture and popular sentiment that repudiating the cases will harmonize rather than disturb expectations. Third, and unlike most other provisions of the Bill of Rights (including the Free Exercise Clause), government institutions and corporate bodies of believers, and not individuals as such, are the ordinary subjects of the Court's haphazard nonestablishment rulings. Finally, the practical effects of switching to a sect-neutral constitutional order are, most emphatically, not to be confused with turning the clock back to 1790. The intellectual reorientation attending the switch is certainly much greater than the everyday consequences.

G. BRADLEY, *supra* note 4, at 135-36; cf. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. Rev 401, 410 (1988) (explaining that stare decisis would probably be appropriate to avoid chaos, which might well be the case if the Court overturned the Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) or the commerce clause cases that provide the foundation for the administrative state).


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The view of the establishment clause advanced here follows in a long tradition, whose modern proponents range from John Courtney Murray to now-Chief Justice Rehnquist. As Chief Justice Rehnquist has stated, "[t]he Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others." As Professor Bradley has recently documented in detail, this view makes the best sense of the constitutional language.

The no-preference position is, of course, not consistent with everything James Madison or Thomas Jefferson ever said about church-state relations. Nor does this view provide a solution to every question about the interaction between religion and the legal order. Neither point is particularly troubling. Neither Madison's Memorial and Remonstrance nor Jefferson's Letter to the Danbury Baptists ever became a part of the written Con-

with Abington School District v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) ("A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."). See Lynch, 465 U.S. at 719-25 (Brennan, J., dissenting); see also Laycock, supra note 123, at 920 (Professor Laycock reaches different conclusions than those advanced in this Article, but he does state that in interpreting the establishment clause "we can try to identify an intelligible principle that makes sense of what the Framers ratified [and] apply the principle of the establishment clause to the situation that exists today.").


Wallace, 472 U.S. at 100, 106 (Rehnquist, J., dissenting).

Id. at 113. I will also accept Chief Justice Rehnquist's assumption that the "states are prohibited as well from establishing a religion or discriminating between sects." Id.

See G. BRADLEY, supra note 4.

This is not to say that the historical record is uncomplicated. As one detailed study of the history notes, "[t]he events and ideas. . . (of the Founding era) provide no simple solution to the determination of the intention of the Founding Fathers embodied in the First Amendment." C. ANTEAUX, A. DOWNEY, & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 204 (1964) [hereinafter C. ANTEAUX]. Although the historical record is indeed complex, the contention here is that the no-preference view is the position with the most persuasive support. See, e.g., G. BRADLEY, supra note 4.

For a reprint of the Memorial and Remonstrance, see Everson, 330 U.S. at 63-72 (Appendix).

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There is, moreover, no reason to believe that the establishment clause, even together with the free exercise clause, sets forth a comprehensive view of the proper relationship between religion and the law. It is not, therefore, relevant to the constitutional inquiry to contend that "the available interpretive approaches [to the religion clauses] yield[] [un]satisfactory results [because] [t]hey all license and prohibit too much interaction between religion and government." Some questions about the proper "interaction between religion and government" may simply not present questions to which the Constitution provides an answer. The principal virtue of the no-preference position described herein is that it makes the best sense of the relevant constitutional language.

The no-preference position best comports with the constitutional language, the explanation of that language in the First Congress, and the historical understanding of the key term ("establishment") by those who ratified the first amendment. As then-Justice Rehnquist noted in Wallace, Madison, in the House debates on the religion clauses, had explained that "he appre-

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195 The extent to which the views of Madison or Jefferson should influence the interpretation of the establishment clause has, of course, been much debated. Compare Wallace, 472 U.S. at 91-106 (Rehnquist, J., dissenting) (questioning the extent to which Jefferson's views as expressed in his letter to the Danbury Baptists and the views expressed by Jefferson and Madison in the context of debates in Virginia should be regarded as authoritative in interpreting the first amendment) and G. Bradley, supra note 4, at 3, 136 (questioning the extent to which the views of Madison and Jefferson on church-state relations should control the meaning of the first amendment) and Murray, supra note 188, at 27-28 and Paulsen, supra note 172, at 318-26 and Comment, Mueller v. Allen: Tuition Tax Relief and the Original Intent, 7 HARV. J.L. & PUB. POL'Y 551, 576 (1984) with Abington School District, 374 U.S. at 214 (footnote omitted) ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.") and Everson, 330 U.S. at 11-13 and id. at 33-43 (Rutledge, J., dissenting) and Van Alstyne, supra note 27, at 771 (examining Lynch "by the light of an understanding of the first amendment that Jefferson and Madison may have shared."). My view is in accord with those who believe that "it proves too much to assume that [the] experiences and ideas [of Madison and Jefferson] control the historical meaning of the First Amendment." Comment, supra, at 576.

196 See G. Bradley, supra note 4, at 70 ("[The Framers] were not concerned with the whole problem of church and state"); Dunsford, Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome, 1984 UTAH L. REV. 1, 26-28.


198 Wallace, 472 U.S. at 95-96 (Rehnquist, J., dissenting).
hended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. 199 Madison later added "that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 200 As Professor Corwin concluded, "to establish' a religion was to give it a preferred status, a pre-eminence, carrying with it even the right to compel others to conform. 201 The establishment clause prevents, therefore, a particular type of institutional relationship between a particular religious denomination and the federal government. The fear, as Professor McConnell has emphasized, was the prospect of religious coercion, 202 although the actual existence of coercion is not an essential element of an establishment. While coercion was certainly what the establishment clause was trying to prevent, one can imagine an establishment without coercion. 203 The establishment clause simply prevents a certain institutional arrangement—that is, according a particular religious denomination significant legal privileges—from which coercion is likely to flow. 204

199 1 ANNALS OF CONG. 730 (J. Gales ed. 1789).
200 Id. at 731. Madison was commenting on a version of the religion clauses that stated that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." Id., see infra note 208 (discussing the different versions of the establishment clause).
201 Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROBS. 3, 11 (1949).
202 McConnell, supra note 172, at 940-41; see American Jewish Congress v. City of Chicago, 827 F.2d 120, 132-37 (7th Cir. 1987) (Easterbrook, J., dissenting) (defending an approach to the establishment clause that emphasizes coercion).
203 Corwin, supra note 201, at 19.
204 C. ANTIÉAU, supra note 192, at 21. My focus on institutional arrangements is somewhat of a departure from some statements of the no-preference view. In this sense, my view draws on the rhetorical appeal of Jefferson's "wall of separation" metaphor. My view also draws on Story's comment that [t]he real object of the [First] amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages) and of the subversion of the rights of conscience in matters of religion which had
The historical evidence for this basic position has been exhaustively documented over the years, in particular in an excellent book by Professor Bradley. I will not, therefore, rehearse the evidence in this Article. I will, however, comment on an article by Professor Laycock, which contains perhaps the most thorough critique of the no-preference position. Professor Laycock’s first major argument against the no-preference view is that “the First Congress considered and rejected at least four drafts of the establishment clause that explicitly stated the ‘no preference’ view.” The basic error in this view is that Laycock presents no evidence to explain that the changes in language reflect a rejection of the no-preference view. The main reason

been trampled upon almost from the days of the Apostles to the present age.


206 Laycock, supra note 123.

207 Id. at 879.

208 Although his understanding of the establishment clause is somewhat different than the one advanced in this Article, Judge Easterbrook has made the same point. After quoting Madison’s explanation of the establishment clause, see text accompanying note 200 supra, Judge Easterbrook concluded: “Although the language was altered after that remark, none of the changes affects Madison’s point: that the government should eschew the business of funding religion or penalizing adherence to any system of beliefs.” City of Chicago, 827 F.2d at 136 (Easterbrook, J., dissenting).

The religion clauses went through a number of versions before the first Congress approved the language that ultimately became the first amendment. See C. Antieau, supra note 192, at 123-31 (tracing the various versions of the religion clauses); G. Bradley, supra note 4, at 87-95 (same); Laycock, supra note 123, at 879-881 (same). Madison’s initial proposal stated: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” 1 Annals of Cong., supra note 199, at 451. This proposal, which reflected the states’ demand for a prohibition of sectarian preferences, see G. Bradley, supra note 4, at 69-81, was sent to a select committee, along with other proposed amendments. The select
Laycock views the changes as significant is that he views the meaning of "establishment" differently than do scholars, such as Bradley, who support the no-preference or sect equality in-

committee presented to the House a version that stated: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 ANNALS OF CONG., supra note 199, at 757. During the debates on this version, Samuel Livermore, apparently to allay concerns that the amendment might interfere with the situations in the states, see G. BRADLEY, supra note 4, at 92, proposed that the amendment should read: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONG., supra note 199, at 759. This version was passed by a Committee of the Whole by a vote of 31-20. Id. When the full House considered the amendments, Fisher Ames moved to alter Livermore's proposal so as to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." Id. at 796. This version was adopted by the House and forwarded to the Senate. Id. On Sept. 3, 1789, the Senate considered the amendments agreed upon by the House, and a motion was made to amend the religion clauses to read: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed." 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 151 (Senate Journal) (L. De Pauw ed. 1972) [hereinafter DOCUMENTARY HISTORY]. This version was first rejected and then passed. Id. After a proposal to eliminate the amendment entirely was defeated, the Senate rejected two versions, one that read "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and one that read "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Id. The Senate then rejected a motion to approve the version that had been forwarded from the House, and finally, after a motion was made to delete the "rights of conscience" provision from the House version, the amendment, which then read "Congress shall make no law establishing religion, or prohibiting the free exercise thereof," was approved. Id. On Sept. 9, 1789, the Senate adopted a new version of the religion clauses that stated: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." Id. at 166. The House rejected this version, see C. ANTEA U, supra note 192, at 130, and after a conference committee changed the religion clauses to read "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," both houses approved the amendment. 3 DOCUMENTARY HISTORY, supra, at 228-29 (House Journal). For a general history, see Laycock, supra note 123, at 879-81. There is no evidence that the House and Senate rejected the no-preference understanding of "establishment." In fact, the overall picture of this whole process, from the proposals for amendments submitted by the states through the debates on and the modifications of the the religion clauses, supports the no-preference understanding of establishment. See G. BRADLEY, supra note 4, at 69-97. The change from the Senate version approved on Sept. 9 to the version that actually became a part of the first amendment, which Laycock views as indicating a rejection of the no-preference view, might well simply reflect the view that an establishment might involve more than prescribed articles of faith and modes of worship. See C. ANTEA U, supra note 192, at 139.
terpretation of the establishment clause.\textsuperscript{209} If, in contrast to Laycock, one accepts what Bradley views as the settled understanding of "establishment," then Laycock's contention that the Framers explicitly rejected the no-preference view is unconvincing. The "respecting an establishment" formulation simply ensures "that the national government may neither effect an establishment nor interfere with states that do."\textsuperscript{210}

Laycock's entire argument, which includes his discussion of the historical materials beyond the debates in the First Congress, rests on the view that there is a fundamental difference between the meaning of a version of the establishment clause the Framers did not adopt and the meaning of the clause as adopted. For example, Laycock sees a fundamental difference between the version that stated that "Congress shall make no law establishing any particular denomination of religion in preference to another"\textsuperscript{211} and the version that ultimately became a part of the first amendment: "Congress shall make no law respecting an establishment of religion"\textsuperscript{212} Despite his efforts to support this contention, the historical evidence is clearly to the contrary.

As Thomas Curry states,

\begin{quote}
[i]n order to understand Americans' usage of "establishment of religion" in 1789, one has to dispense with [the] assumption] that Americans during the colonial and revolutionary eras made a conscious distinction between two kinds of establishment of religion, between an exclusive state preference for one Church and a non-exclusive assistance to all churches—what historians have subsequently described as a "multiple establishment."\textsuperscript{213}
\end{quote}

\textsuperscript{209} See Laycock, \textit{supra} note 123, at 899 ("When they focused on the question, [Americans] concluded that nonpreferential aid was a form of establishment and inconsistent with religious liberty.").


\textsuperscript{211} I DOCUMENTARY HISTORY, \textit{supra} note 208, at 151 (Senate Journal).

\textsuperscript{212} U.S. CONST. amend. I.

\textsuperscript{213} T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE
Professor Bradley, in his careful review of the historical materials, reaches the same conclusion: "[t]he term *multiple establishment* does not occur at all in the historical materials, and it could not. Since *establishment* meant sect preference, eliminating the preference eliminated, not multiplied, the establishment." 216

The no-preference view of the establishment clause has the virtue of being in accord with the conduct of the First Congress and the predominant understanding of those who ratified the first amendment. The record of the First Congress is, in general, consistent with a no-preference view 215 Supporters of this position do not need to resort to explanations such as Professor Laycock's, which essentially states that the Framers did not think about "establishment" outside the context of taxation.216 The conduct of Congress in the years after 1789 supports the position advanced here. The establishment clause was intended to prevent a certain institutional arrangement, that is, according a particular religious denomination legal privileges from which coercion was

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214 G. BRADLEY, supra note 4, at 38-40.

215 G. BRADLEY, supra note 4, at 97-104.

216 Laycock, supra note 123, at 913-19.
likely to flow. As Professor Bradley also explains in detail, those who ratified the establishment clause largely accepted the traditional understanding that establishment involved sect preference.

B. Application

This section of the Article discusses the implications of this version of the no-preference approach for constitutional chal-

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217 The focus on "institutional arrangements" explains why the early Congresses did not regard either subsidies for missionary work among the Indians or provisions for legislative chaplains as running afoul of the establishment clause. Professor Laycock views it as significant that "[s]upplying a Catholic priest to a tribe of Catholic Indians may be a cheap way to buy land, but it is not a form of nonpreferential aid." Laycock, supra note 123, at 915. The error in this view is that it isolates a particular Indian treaty and labels the practice preferential. As one commentator noted: "the Federal Government financially supported—without preference or favoritism—mission activities of many religious organizations among the Indians." C. ANTIER, supra note 192, at 208. When one examines the overall behavior of the federal government, the Indian treaties did not run afoul of the principle embodied by the establishment clause because they did not create an institutional arrangement with a particular religious denomination from which religious coercion was likely to flow. Legislative chaplains, although typically preferential, do not run afoul of the establishment clause because hiring a chaplain does not create an institutional arrangement between the government and a particular religious denomination from which coercion is likely to flow. As a Senate Report in the 32nd Congress expressed the point:

If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a "law respecting an establishment of religion," and, therefore, in violation of the constitution. But no law yet passed by Congress is justly liable to such an objection. Take, as an example, the chaplains to Congress. At every session two chaplains are elected—one by each house—whose duty is to offer prayers daily in the two houses and to conduct religious services weekly in the hall of the House of Representatives. Now, in this, no religion, no form of faith, no denomination of religious professors, is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. There is no compulsion exercised or attempted, upon any member or officer of either house, to attend their prayers or religious solemnities. No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend.


218 G. BRADLEY, supra note 4, at 111-20.
lenges to governmental involvement with Nativity scenes. One thing is clear: the proposed approach would greatly limit the role of the establishment clause in church-state disputes. As the Court has frequently acknowledged, the likelihood of an institutional arrangement between the government and a particular religious denomination from which religious coercion is likely to flow seems rather remote at the present time. This certainly does not mean that all problems in this area have been solved. This approach simply contends that many of the problems we have become accustomed to viewing in "establishment" terms do not present constitutional problems, at least not establishment clause problems. There would, of course, continue to be struggles about church-state or religion-and-the-law problems, but these debates would not be conducted in establishment clause terms.

219 As Professor Smith has stated: alienation produced by Supreme Court decisions may be even more severe than alienation provoked by actions of legislatures or lower government officials. Legislative or municipal action, after all, represents temporary and possibly correctable policy—often of only a particular state or municipality. Offensive constitutional decisions, on the other hand, send a message telling the disfavored that their central beliefs and values are incompatible with the fundamental and enduring principles upon which the Republic rests. Smith, supra note 29, at 311. This is not to say, of course, that the Court should refuse to perform its constitutional responsibilities. As Professor Johnson has noted, "American society might be more peaceful if the Supreme Court stopped enforcing constitutional rights altogether." Johnson, supra note 182, at 831. There may be, however, important benefits to "deconstitutionalizing" an aspect of social life when the Constitution properly supports such a course of action. See Bradley, The Uncertainty Principle in the Supreme Court, 1986 DUKE L.J. 1, 3-4, 54-57 (Although Professor Craig Bradley is critical of Lynch, he argues that it might have been better for the Court to deny certiorari so as to avoid the adverse consequences that would inevitably flow from any decision on the merits.)

220 Examples of such institutional arrangements are church attendance requirements or compulsion to accept particular religious tenets.


Under this view of the establishment clause, most Nativity scene cases present relatively easy constitutional issues. I would agree with Professor Bradley that the issue is better viewed in terms of equal access.\textsuperscript{222} Cases such as \textit{McCreary v. Stone},\textsuperscript{224} which essentially involve private groups' access to a public forum, would be straightforward; no establishment clause issue would be involved by allowing those with a religious message to have equal access to a public forum.\textsuperscript{225} Some religious groups might "benefit" more from such an equal access policy either because a particular group represents a larger share of the population or because a particular group is more aggressive in publicly manifesting its religious convictions.\textsuperscript{226} No establishment clause issue, however, would be presented. The "disproportionate" benefit would be the result of private conduct, rather than

\textsuperscript{222} G. BRADLEY, supra note 4, at 145; see P. BERGER & R. NEUHAUS, \textsc{To Empower People: The Role of Mediating Structures in Public Policy} 32-33 (1977).


\textsuperscript{225} See Widmar v. Vincent, 454 U.S. 263, 271-75 (1981) (a University could not justify excluding religious groups and speakers from open forum by contending that allowing equal access would violate the establishment clause). See generally Laycock, \textit{supra} note 168.

The public forum cases do not present the likelihood of coercion, unlike, for example, the cases involving the injection of religion into the public schools, in which coercion has played a very prominent role. See McConnell, \textit{supra} note 172, at 935 (noting that prayer in the public schools involves indirect coercion); Note, \textit{Church Control of a Municipality: Establishing a First Amendment Institutional Suit}, 38 STAN. L. REV. 1363, 1371-73 (1986) (noting that possibility of coercion raised by church control of a municipality makes that situation more analogous to the situation presented in public school cases such as Stone v. Graham, 449 U.S. 39 (1980), than the situation presented in \textit{Lynch}, which did not involve coercion since a person could voluntarily avoid the symbol).

the result of any institutional arrangement between church and state.\textsuperscript{227}

One of the benefits of this approach is that it avoids the issue which has perplexed the courts in cases involving symbols that are alleged to be religious: namely, whether the challenged symbol is "religious" or "secular." Justice Brennan's discussion in \textit{Lynch}, in which he distinguished Nativity scenes from "such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance [or other symbols] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content . . .,"\textsuperscript{228} reflects the seemingly evanescent quality of such distinctions. Justice Brennan's conclusion about the religious content of the national motto is highly problematical.\textsuperscript{229} Moreover, the lower courts' conclusions about the "religious" or "sectarian" character of various symbols further reflect the troublesomeness of such determinations.\textsuperscript{230}

\textsuperscript{227} In discussing indirect aid to religious groups, Professor McConnell contends that no establishment clause issue is presented since "each group should be permitted to 'flourish according to the zeal of its adherents and the appeal of its dogma'" McConnell, \textit{Political and Religious Disestablishment}, 1986 B.Y.U. L. Rev. 405, 456 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)); see Comment, \textit{supra} note 195, at 578. Even Ruth Teitel concedes that it is inappropriate to "distinguish religious and political speech when government sponsorship is de minimis—for example, in the public park." Teitel, \textit{supra} note 226, at 185.

The amount of public money spent to "support" the display should not be regarded as troublesome. The precise amount of financial support has not been dispositive in the cases involving religious symbols. See, e.g., American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 267-68 (7th Cir. 1983), cert. denied, 107 S. Ct. 458 (1986). This is appropriate, because "the establishment clause is not a pocketbook right." Paulsen, \textit{supra} note 172, at 335 (emphasis in original). As others have noted, "[a] legislatively mandated tithe is significantly and meaningfully different from allowing individuals to use 'their share,' as it were, of the largesse of the welfare state in the manner of their own choice." \textit{Id.} at 335 n.110; see McConnell, \textit{supra}, at 450-52 (distinguishing taxes specifically earmarked for religious groups and distributions from general revenues).

\textsuperscript{228} \textit{Lynch}, 465 U.S. at 716 (Brennan, J., dissenting).

\textsuperscript{229} See \textit{Loewy}, \textit{supra} note 7, at 1059 (suggesting that national motto and inclusion of the phrase "under God" in the Pledge of Allegiance are unconstitutional); Laycock, \textit{supra} note 168, at 8 (arguing that the national motto is unconstitutional). But see \textit{O'Hair v. Blumenthal}, 462 F Supp. 19 (W.D. Tex. 1978) (national motto does not violate the establishment clause), \textit{aff'd per curiam}, 588 F.2d 1144 (5th Cir. 1979), cert. denied, 442 U.S. 930 (1979); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (same).

\textsuperscript{230} See \textit{supra} notes 121-48 and accompanying text.
particularly if one adopts the viewpoint of the nonadherent, usually the plaintiff. The equal access approach, which avoids this sort of definitional inquiry, shifts the focus from the character of the symbol to more substantive concerns, such as the institutional relationships involved.

Cases such as American Civil Liberties Union v City of Birmingham, which involved the city's sponsorship of a creche on the lawn of the city hall, present somewhat more troublesome issues. Here, the focus should be on whether the city's overall conduct departs from the establishment clause's equality mandate. If the city were to operate in an evenhanded manner by responding to requests to display other religious symbols, then no establishment clause issue would be presented. Unless the governmental entity's sponsorship of a particular religious display suggests the sort of ongoing, institutional contact between

231 See Smith, supra note 29, at 299-300.
232 See id. at 331 (Professor Smith concludes that a symbolic approach is misguided because it purports to avoid "all the hard analytical, interpretive, or historical work" and therefore neglects development of "substantive criteria or rules for regulating church-state relations.").
234 As Judge Weis noted in his dissent in American Civil Liberties Union v. Allegheny County: "[i]ncluding a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country." American Civil Liberties Union v. Allegheny County, 842 F.2d 655, 670-71 (3d Cir. 1988) (Weis, J., dissenting), cert. granted, 57 U.S.L.W 3230 (U.S. Oct. 3, 1988) (Nos. 87-2050, 88-80, and 88-96). Some contend that an emphasis on equality would present difficult pragmatic questions, see Laycock, supra note 123, at 920-21, but perfect equality would not be required under the approach advanced in this Article. The key inquiry is whether the government has created an institutional arrangement from which coercion is likely to flow. If the government systematically rejects attempts by certain religious groups to have their religious symbols displayed, then the establishment clause is violated. Cf. McConnell, supra note 149, at 40. An approach that did not require that governments evidence a willingness to accommodate the interests of religious groups seeking access to the public sphere would likely present difficult problems for minority faiths. See Lubavitch of Iowa, Inc. v. Walters, 684 F Supp. 610 (S.D. Iowa 1988) (stating that because Christmas trees are viewed as secular symbols the state's display of Christmas trees did not require that the state permit the display of a menorah); Society of Separationists, Inc. v. Clements, 677 F Supp. 509 (W.D. Tex. 1988) (denying a request to enjoin the singing of two religious Christmas carols at a holiday program in the Texas state capitol because the religious component was only a small part of the program).
the government and a particular religious denomination that
makes religious coercion possible, no establishment clause issue
would be presented.\textsuperscript{235}

This view neither solves all problems in this area nor suggests
that it is desirable for governments to sponsor Nativity scenes.
As others have frequently noted, many nonadherents are of-
fended by governmental displays of the religious symbols of a
particular faith.\textsuperscript{236} Professor Tushnet has stated that he finds it
“difficult to believe that the majority would have reached the
result it did had there been a Jew on the Court to speak from
the heart about the real meaning of public displays of creches
to Jews.”\textsuperscript{237} Judge Nelson, who candidly wrestled with this con-
cern in his dissenting opinion in \textit{City of Birmingham}, stated that

there may well be Jews in Birmingham who find it dis-
comforting that their municipal government should make as
much as it does of a holiday as closely associated with Christ-
ianity as Christmas. I understand that concern, and am less

\textsuperscript{235} In his opinion in \textit{Lynch}, Chief Justice Burger suggested that this sort of rela-
tionship is unlikely when he noted that “[a]ny notion that these symbols pose a real
danger of establishment of a state church is farfetched indeed.” \textit{Lynch}, 465 U.S. at
686. The focus on the institutional relationships created explains why religious symbols
on government seals should not be regarded as violations of the establishment clause,
even if equal access is not possible. This is not to suggest, of course, that it is a good
idea for governments to use such symbols; the point is simply that not everything that
might be regarded as an unwise connection between church and state violates the
establishment clause.

\textsuperscript{236} See, e.g., Dolgin, supra note 7; Dorsen & Sims, supra note 149; Redlich, supra
note 151; Van Alstyne, supra note 27. It should be noted that this problem, which
Professor Smith discusses under the heading “Alienation and Messages of Exclusion,”
see Smith, supra note 29, at 305, is very different from the one suggested by Justice
O’Connor’s focus on “a person’s standing in the political community.” \textit{Lynch}, 465
U.S. at 687 (O’Connor, J., concurring). As Professor Smith has noted:
endorsements [of religion] do not appear to alter anyone’s actual political
standing in any realistic sense; no one loses the right to vote, the freedom
to speak, or any other state or federal right if he or she does not happen
to share the religious ideas that such practices appear to approve.

Smith, supra note 29, at 307. In fact, the sharp distinction between political standing
and feelings of alienation explains why the frequent comparison of \textit{Lynch} and \textit{Plessy v.
Ferguson}, 163 U.S. 537 (1896), is not effective; “the analogy with \textit{Plessy} is not so much
strained as it is nonexistent. By that infamous ruling blacks were not simply symbolically
offended; they were, in terms of everyday behavior and opportunity, legally excluded

\textsuperscript{237} M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL
LAW 256 n.31 (1988).
Certain of the correctness of my position in this case because of it.238

These are certainly serious concerns, and they suggest that a government, in the interest of maintaining community harmony, might well voluntarily decide to forego sponsoring a religious display, even if there were no constitutional barrier to doing so.239 A no-preference position, as described herein, helps to alleviate the offense-to-nonadherents problem because such objections are greatly minimized when the governmental unit in question establishes a policy such as the equal access policy involved in McCreary240 or the practice at issue in Allegheny County,241 where there were displays of a creche and a menorah. Under the approach advanced here, however, these concerns do not raise establishment clause issues.

Another concern is that placing religious symbols on public property poses as great a threat to the church as it does to the

238 City of Birmingham, 791 F.2d at 1572 (Nelson, J., dissenting). Judge Nelson concluded that he saw “no anti-Jewish animus in Birmingham’s observance of Christmas.” Id.

239 Professor Tushnet, whose view of Lynch is very different from the view advanced here, has expressed this point well. M. Tushnet, supra note 237, at 275-76 (building on the approach advanced in Sutherland, Establishment According to Engel, 76 HARV. L. REV. 25 (1962)). Professor Tushnet stated:

In bringing out the possibility of mutual forbearance rather than the Constitution as the basis for resolving issues of the relation between government and religion, Sutherland drew on the tradition of civic republicanism. One consequence of a vital republicanism might well be the kind of culture of mutual forbearance to which Sutherland appealed. Citizens would understand that the polity was intended to advance the public good. They might conclude that civic actions that generate intense hostility are unlikely to advance the public good and forbear from taking them. They might also conclude that civic actions designed to promote intensely held values are likely to advance the public good, even if some think those actions unwise or even troublesome on grounds of conscience. They might then forbear from challenging such actions. A culture of mutual forbearance might result in a pattern of public actions that superficially resemble the current marginality of religion in public life. Marginality would not be the principle; it would be a characteristic that citizens decide, on balance, to give their public life.

M. Tushnet, supra note 237, at 276 (footnote omitted).

240 For a discussion concerning the equal access policy and the case in general, see supra notes 92-104 and accompanying text.

241 For a review of this case, see supra notes 83-91 and accompanying text.
As Justice Brennan noted in *Lynch*, "[m]any Christian commentators have voiced strong objections to what they consider to be the debasement and trivialization of Christmas through too close a connection with commercial and public celebrations." This is certainly a cause for concern, although it should be noted that, as in the aid-to-parochial-school context, the religious entity involved typically does not make this argument. Under the approach to establishment advanced here, however, this concern simply does not present a constitutional issue.

One "solution" would be to banish religious symbols from the public square. This solution is troublesome, however, particularly if one shares the founders' view that "religion [was] an essential precondition of social order and a crucial prop for the novel sort of government they were creating." From this per-

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242 The view that a wall of separation between church and state must be maintained so that government does not "bring the corruptions of the wilderness into the holiness of the garden" is often traced to Roger Williams. M. Howe, *The Garden and the Wilderness* 149 (1965). See generally W. Miller, *The First Liberty: Religion and the American Republic* 151-224 (1986) (discussing Roger Williams's contributions to the American tradition of religious liberty); J. Murray, *We Hold These Truths* 54-56, 60-67 (1960) (same).

244 *Lynch*, 465 U.S. at 712 n.19 (Brennan, J., dissenting). For a more recent expression of this concern, see *Bowen v. Kendrick*, 108 S. Ct. 2562, 2590 n.10 (1988) (Blackmun, J., dissenting) ("Religion plays an important role to many in our society. By enlisting its aid in combating certain social ills, while imposing the restrictions required by the First Amendment on the use of public funds to promote religion, we risk secularizing and demeaning the sacred enterprise.") Justice Blackmun's concern seems to be confining religious groups to their proper, wholly private, sphere. See Myers, *supra* note 184, at ——(forthcoming) (discussing Justice Blackmun's views about the proper role religious and moral principles should play in influencing secular legislation).

246 See Laycock, *supra* note 183, at 450 (Professor Laycock notes the incongruity of "permit[ting] nonbelievers to file taxpayer suits to save the churches from 'inhibition' and 'entanglement,' whether or not the churches want to be saved."); Paulsen, *supra* note 172, at 348.


spective, public displays of religious symbols might be viewed as affirmations of the important role religion and religiously-based principles play in preserving the American experiment. The Jewish scholar Will Herberg expressed this point well twenty-five years ago:

we should understand from our theological and political traditions, a society, and the state through which it is organized politically remain "legitimate," "righteous" and "lawful" only unsofar as they recognize a higher majesty beyond themselves, limiting and judging their pretensions. Once the state forgets or denies this, once it sets itself up as its own highest majesty, beyond which there is nothing, it becomes totalitarian: in effect, it divinizes itself, and thereby ceases to be a "legitimate" state in the theological understanding of the term. Therefore the "established order"—the state, above all—ought to include within itself signs, symbols, and ceremonials constantly reminding itself and the people that it is subject to a majesty beyond all earthly majesties. That is the indispensable function of religious symbols and ceremonials in public life, one that no responsible theologian, however resentful he may be of trivialization and superficiality in religion, can afford to forget.

A concern about excluding only religious voices seems to have motivated Judge Weis' comment in Allegheny County that the...


[f]rom a self-consciously Jewish standpoint, such figures as Irving Kristol, Murray Friedman, Milton Himmelfarb, and the late Seymour Siegel have argued forcefully that an American political culture uninformed by religious beliefs and institutions itself poses a danger to the position and security of Jews. If even today this view can hardly be said to represent the mainstream Jewish consensus, which for the most part remains committed to the old doctrine of separatism, at least it commands greater intellectual force and weight than ever before. In this it owes something, however unrecognized and unacknowledged, to the example of Will Herberg.

Id. at 43.
religious displays involved “pose no threat to religious freedom, yet their suppression forebodes ominous consequences.”248 This is not to say, of course, that the establishment clause requires public sponsorship of Nativity scenes. Under the approach to the establishment clause advanced here, the decision to sponsor a Nativity scene would largely involve prudential judgments, which might well include the sorts of arguments advanced by Professor Herberg.

CONCLUSION

The Supreme Court should reassess *Lynch v Donnelly*249 Such a reassessment should, at a minimum, bring an end to the acrimonious litigation that has been in part attributable to the ambiguities in the decision. When it reassesses *Lynch*, the Court should revise its approach to the establishment clause and adopt the view that makes the best sense of the original understanding of “establishment.” The government does not violate the establishment clause unless it creates an institutional arrangement with a particular religious denomination that makes religious coercion possible. Under this approach, governmental involvement with a Nativity scene will rarely violate the establishment clause.

Adopting this view would not, of course, end disputes about the interaction of law and religion. Adopting this view would, however, greatly reduce the role of the establishment clause in their resolution, and, more importantly, would limit the establishment clause to the role that makes the best sense of its language.*

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248 Allegheny County, 842 F.2d at 671 (Wess, J., dissenting).
* As this Article was going to press, the Supreme Court agreed to review American Civil Liberties Union v. Allegheny County, 842 F.2d 655 (3d Cir. 1988), cert. granted, 57 U.S.L.W 3230 (U.S. Oct. 3, 1988) (Nos. 87-2050, 88-90, & 88-96). The Court now has the opportunity to end the confusion that *Lynch* has created. See supra notes 55-177 and accompanying text (discussing post-*Lynch* developments). If the Court decides to reaffirm *Lynch*, the Third Circuit’s decision in *Allegheny County* should be reversed. See supra notes 180-81 and accompanying text. In fact, *Allegheny County* is one of the “easiest” of the post-*Lynch* cases since the defendants there seem to have operated in an evenhanded manner. See supra note 234 and accompanying text. Since reaffirming *Lynch* would probably not help to resolve cases involving other religious symbols, the Court should (as this Article argues) take the opportunity to revise its entire approach to these issues.