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Religious Symbols, American Traditions and the Constitution

*Kelly C. Crabb**

We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it.
Oliver Wendell Holmes[1]

Cases on the constitutionality of government displays or other uses of religious symbols[2] reflect tension between two American cultural themes. One theme—embodied in the Constitution itself—is that religion is a matter of individual conscience and that government should maintain a neutral position between church and state. The other is that America was founded on religious values and belief in God and that public commemoration of that heritage does not offend the Constitution. Strong feelings underlie these positions, adding to the inevitable difficulty of reconciling them. Since a society's symbols reflect its culture,[3] litigation in this area is a struggle to define what America is and is not.

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1. O. Holmes, *John Marshall* in Collected Legal Papers 270 (1921).

2. *See infra* note 7 and accompanying text for a discussion of what constitutes a religious symbol.

3. *See, e.g.,* H. Duncan, Symbols in Society 44 (1968) ("Society arises in, and continues to exist through, the communication of significant symbols."); T. Fawcett, The Symbolic Language of Religion 15 (1970) ("[Signs] are the product of a group of people who share a common heritage or a common interest which is pursued by the use of conventions which everyone in the group upholds. [Signs] are a social phenomenon, arising out of the life and work of a society and having validity only within that society.").

For these purposes the term "culture" means a group of people who share a common way of life that includes basic common attitudes, behavior, and response to material stimuli. *See, e.g.,* R. Wagner, The Invention of Culture 2 (1981) ("When we speak of people belonging to different cultures, then, we are referring to a very basic kind of difference between them suggesting that there are specific varieties of the phenomenon of man."). For another formulation see E. Hall, The Silent Language 51 (1959) (Hall enhances the standard anthropologist's definition of culture stated above; he sees culture as a communication network in which everyone is capable of putting like meaning on like words or symbols).

This article examines the dilemma faced by courts each year in an increasing number of contexts—most recently exemplified by the Supreme Court's decision in *Lynch v. Donnelly*[4]—in which religious symbolism, American traditions and constitutional ideology collide. It first focuses on the role in American society of originally religious symbols and on how the debate over whether the Constitution requires an absolute separation between church and state affects the ability of public institutions to employ these symbols to promote cultural uniformity. This article posits that the Framers of the Constitution did not intend that there be an absolute removal of all religious symbols from public institutions. This article then explores the standards used by the courts to determine whether a religious symbol is constitutionally permissible. It suggests that the traditional establishment clause standards used by the courts do not fit religious symbol cases. These standards have produced a major contradiction in trying to distinguish between two indistinguishable lines of religious symbol cases. Finally, this article articulates a new constitutional test for religious symbol cases and applies the test to two religious symbols that have recently been the subject of constitutional adjudication: the nativity scene and the cross. This article demonstrates that the Constitution allows, and society can benefit from, the public display of symbols that do nothing more than commemorate America's religious past.

I. Religious Symbols in American Society—"Strict" vs. "Benevolent" Neutrality

The first inquiry relevant to understanding the impact of the Constitution on religious symbols is whether the first amendment's establishment clause requires an absolute abstinence by government from the use of symbols that have religious origins. This article takes the view that the Constitution does not require such a result, as evidenced by an analysis of constitutional intent, historic practice and court decisions.

A. *Rationales Favoring Government's Use of Symbols*

"We live by symbols," remarked Justice Holmes in adjourning the Supreme Court in commemoration of the one hundredth anniversary of John Marshall's ascension to the office of chief

4. 104 S. Ct. 1355 (1984).

justice.[5] Celebrations, anthems, mottos, seals, slogans, and days of commemoration are part of the fabric of every society.[6] Such symbols[7] and traditions help to satisfy a basic human need to

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5. O. HOLMES, *supra* note 1, at 270.

6. *See supra* note 3. For an example of the weight placed on symbols of national identity see 18 U.S.C. § 700 (1982) (making it a criminal act to desecrate the flag of the United States); Kime v. United States, 673 F.2d 1318 (4th Cir.) (summarily affirming an unpublished district court opinion), *cert. denied*, 459 U.S. 949 (1982) (holding that criminal penalties for desecration of the flag are constitutional). *But see* Kime v. United States, 459 U.S. 949 (1982) (Brennan, J., dissenting from denial of certiorari) (Justice Brennan argued that important free speech questions were involved); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (arguing that first amendment rights of free speech outweigh the state's interest in the flag as a symbol).

7. For purposes of this article the term "symbol" means a well-defined abbreviation of some aspect of national or local culture. The Supreme Court's statement in West Virginia State Bd. of Educ. v. Barnetta, 319 U.S. 624, 632 (1943), gives a sense of the word's common meaning.

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

Sociologists and others normally differentiate between two types of symbols. Symbols of the first type are called referential symbols (signs) because they refer directly to the things they symbolize. The flag and the national anthem are examples of referential symbols. Other examples include holidays and ceremonies. *See* W. WARNER, THE LIVING AND THE DEAD: A STUDY OF THE SYMBOLIC LIFE OF AMERICANS 19 (1959) (holidays provide common seasonal feelings in American life); H. DUNCAN, *supra* note 3, at 181 ("festivals increase social integration by creating joy in fellowship," giving rhythm and excitement to life); *id.* at 183 ("Ceremonies are social dramas in which we seek to uphold the dignity and majesty of social roles believed necessary to social order."); *see also infra* notes 81-91 and accompanying text.

Symbols of the second type are called condensation symbols (often referred to by anthropologists as merely symbols). This type of symbol refers to a form of "substitute *behavior* for direct expression." *See* E. SAPIR, *Symbolism*, 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 492-93 (1934), *cited in* Lerner, *Constitution and Court as Symbols*, 45 YALE L.J. 1290, 1293 (1937) (emphasis added); T. FAWCETT, *supra* note 3, at 14.

Both uses of the word symbol are critical to constitutional analysis of the public display of religious symbols because persons favoring the abolition of religious symbols often charge that the government's decision to allow a religious symbol to be displayed is akin to a religious act. *See, e.g.*, Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, *rev'd on reh'g*, 254 Or. 534, 459 P.2d 222 (1969), *cert. denied*, 397 U.S. 1042 (1970), *rev'd sub nom.* Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976) (evidence was introduced showing that granting a building permit for construction of a cross on city grounds was a silent witness to city council's faith), *cert. denied*, 434 U.S. 876 (1977). Advocates of religious symbols argue that the use of the symbol is nothing more than direct commemoration of an event or tradition. *See, e.g.*, Eugene Sand &

belong to a group and to share common ties with members of the group.[8] American political institutions, often symbols themselves,[9] are just as often the keepers of these cultural symbols. Congress, the president and even the courts share the goal of preserving and promoting a uniform, patriotic American cultural tradition.

The symbols employed by American public institutions to portray national and regional identity include symbols rooted in religious values and ideals.[10] These symbols—whether celebrations, folklore, phrases, or objects—represent powerful forces in American history. One of many possible illustrations is the tra-

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Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976) (the same cross held invalid in *Lowe v. City of Eugene* passed constitutional muster after the city charter was amended to declare the cross to be a war memorial), *cert. denied*, 434 U.S. 876 (1977); *see infra* notes 242-61 and accompanying text.

8. Even a casual examination of society on the national or local level adequately demonstrates the continuing vitality of symbols. Although the tendency in modern times is away from ascribing metaphysical attributes to inanimate objects, the need for symbols has not seemed to lessen. Symbols have many forms. *See, e.g., infra* note 9 (discussing the Constitution as a symbol); *see also* Lerner, *supra* note 7, at 1293 ("[A]ctually the whole of a culture is shot through with symbolism. Man is under the constant necessity of putting on ceremonial robes and watching himself go by.").

9. Several legal writers have written about the symbolic nature of the Constitution in American society. *See, e.g.*, Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Lerner, *supra* note 7; Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). These writers have commented that the Constitution has to some extent been assigned the function of defining the American way of life both descriptively and prescriptively. A historical illustration is the following statement by Thomas Paine in 1776 urging a "Continental Conference" for the purpose of framing "a Continental Charter or Charter of the United Colonies."

> But where, say some, is the king of America? . . . [T]hat we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law; the word of God; let a crown be placed thereon, by which the world may know that so far as we approve of monarchy, that in America *the law is king*.

T. PAINE, *Common Sense* in 1 THE POLITICAL WRITINGS OF THOMAS PAINE 45-46 (1837). Paine's prediction that the Constitution would carry great symbolic influence was prophetic. *See* Corwin, *supra*, at 1074-75.

For a discussion of the office of president as a symbol, see M. NOVAK, CHOOSING OUR KING: POWERFUL SYMBOLS IN PRESIDENTIAL POLITICS 6 (1974), quoting James David Barber:

> The Presidency is much more than an institution. It is a focus of feelings. . . . The Presidency is the focus for the most intense and persistent emotions in the American polity. The President is a symbolic leader, the one figure who draws together the people's hopes and fears for the political future.

See also H. DUNCAN, *supra* note 3, at 164-65.

For a discussion of the United States Supreme Court as a symbol, see Lerner, *supra* note 7.

10. For a list of symbols that have both a religious and national significance, see *infra* notes 82-91 and accompanying text.

dition of Thanksgiving Day.[11] Thanksgiving Day is directly related to the Pilgrims who came to the New World because of religious oppression in England.[12] Thanksgiving Day has itself become symbolized by a traditional feast, the ingredients of which are known by virtually all Americans.[13] The feast in turn is symbolic of the harvest, peace and cooperation between neighbors, and the bounties of life.[14] There is a deep religious significance in the minds and hearts of many Americans who celebrate Thanksgiving Day. Early proclamations declared Thanksgiving Day to be a day of prayer.[15] Much of the folklore surrounding the Pilgrims emphasizes their religious nature.[16] Today, Thanksgiving Day still carries a strong statement about the religious character of the Pilgrims, recognized by many Americans as part of this nation's heritage.

Two forces underlie public institutions' involvement with tradition that is rooted in the religious beliefs of American forebearers. One impetus comes from the people. People who live together want common signposts and look to government to provide such symbols.[17] Public institutions are convenient or-

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11. *See* 11 ENCYCLOPEDIA BRITANNICA s.v. *Massachusetts* 591 (1975) (calling Thanksgiving Day "the most characteristic celebration of the peoples of the United States"). Thanksgiving Day, though celebrated regularly since 1621, was first declared a national holiday by President Abraham Lincoln in 1863. IX ENCYCLOPEDIA BRITANNICA s.v. *Thanksgiving Day* 922 (1975); *see also* 5 U.S.C. § 6103(a) (1982) (Congressional provision for national holidays).

12. *See, e.g.*, IX ENCYCLOPEDIA BRITANNICA s.v. *Thanksgiving Day* 922 (1975). Thanksgiving Day originated in autumn of 1621 when Massachusetts Pilgrims invited Indians to a three-day feast and festival to commemorate the harvest.

13. *Id.*

14. The original Thanksgiving Day took place following a difficult struggle for survival by both the Pilgrims and the Indians. "Both races had been weakened by the plague . . . . Their common efforts at survival gave rise after the autumn harvests to the feast of Thanksgiving, the first and since 1621 the most characteristic celebration of the peoples of the United States." 11 ENCYCLOPEDIA BRITANNICA s.v. *Massachusetts* 591 (1975).

15. *See* 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 56 (1897) (George Washington's Thanksgiving Day Proclamation of 1789).

16. *See* VII ENCYCLOPEDIA BRITANNICA s.v. *Pilgrim Fathers* 1006 (1975) (noting that the term "Pilgrim Fathers" came into being when Daniel Webster popularized the phrase at a bicentennial speech in 1820. The inspiration for the term was Governor William Bradford's diary, which characterized the flight from England as saints on a pilgrimage).

17. *See, e.g.*, P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 4 (1977) (citing Alexis de Tocqueville's conclusion drawn from his observation of Americans): "In democratic countries the science of association is the mother of science; the progress of all the rest depends on the progress it

ganizers for such symbols.[18] The other impetus comes from the government itself. As a matter of public policy and political savvy, there is a practical benefit to be derived from community spirit and cultural continuity.[19] The very force underlying religious symbols makes their use desirable and even necessary to governmental bodies.[20]

Of course, governmental use of symbols creates tensions. Al-

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has made." Berger and Neuhaus argue that individuals must have symbols and institutions—mediating structures—to achieve a sense of community of association and to protect themselves against losing their identity to the large public megastructures of life. *Id.* at 6. The church and religious symbolism are listed by Berger and Neuhaus as critical mediating structures. *Id.* at 22-33.

18. There is a certain irony in the fact that in America, with its pervasive cultural theme of separation between church and state, the government is by necessity the organizer of religious traditions and the keeper of religious symbols. Paradoxically, since there are so many religious beliefs to be represented and because of rivalries between sects, the civil leadership, which is commanded by the Constitution not to take sides, is virtually the only organizing body on a scale larger than a single church that can, to the satisfaction of the majority, meet the social and psychological need for common cultural ties. *See infra* notes 20, 49 and accompanying text.

19. *See, e.g.,* 7 ENCYCLOPEDIA BRITANNICA s.v. *Feast and Festival* 202 (1975) (noting that a common historical pattern of governments and state religions is to promote festivals and other traditions for the sake of promoting cultural cohesiveness).

In its use of symbols, government has two very important, sometimes opposing, interests. First, political institutions are vitally concerned with fostering a national identity in order to pull diverse groups together. Second, political institutions have a duty to preserve and protect local cultural traditions. This duty can be recognized in various court opinions dealing with the free exercise clause of the first amendment. Although the decisions in these cases are ultimately grounded in the Constitution, they contain significant language dealing with the protection of culture themes. *See, e.g.,* Frank v. State, 604 P.2d 1068 (Alaska 1979). The Alaska Supreme Court overturned a conviction of an Athabascan Indian for killing a moose for the purpose of a tribal potlatch in contravention of an Alaskan wildlife law. The court noted that the potlatch was "an integral part of the cultural religious belief of the [Indian tribe]." *Id.* at 1069. The court found authoritative 42 U.S.C. § 1996 (1982), which provided in part that United States policy protects and preserves American Indians' inherent right of freedom to believe, express, and exercise their traditional religions. *Id.* at 1073-74 n.9. The *Frank* court also cited 16 U.S.C. § 668a (1982) (authorizing the taking of an eagle, a national symbol, for religious purposes) and 25 C.F.R. § 11.87H (1978) (authorizing the use of peyota, a narcotic, in traditional Indian religious ceremonies). *Id. But see* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (Supreme Court upheld the right of Amish parents to educate children for the sake of preserving Amish "way of life"; the Court was careful to note, however, that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulations . . . if it is based on purely secular considerations"); Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1980) (Cherokee claims that a T.V.A. dam project would destroy traditional homeland of the tribe were not sufficient to override the project).

20. *See* H. DUNCAN, *supra* note 3. Duncan notes that the greatest benefit government receives from a symbolic relationship with deity is to "infuse [society] with supernatural power." *Id.* at 217. "The final and most powerful moment in the drama of authority is the invocation of the ultimate power which upholds social order and thus wards off threats to the survival of the community." *Id.* at 234.

though symbols can be used to unite people behind a great cause, they can also be used to unite them behind an evil one.[21] Moreover, while Americans have cherished the idea of being united under a common cause, they have also cherished their individuality and cultural diversity.[22] Part of the symbolism underlying the word "Pilgrim," for example, is the idea that the United States is a nation that provides an atmosphere of religious freedom.[23] Religion is an area in which government may not tread: it is a matter of personal conscience.[24]

These two great forces—the social need for cultural symbols and the individual need for freedom of choice and governmental noninterference in religious matters—underlie one of the most important legal struggles in American constitutional history.

B. *Legal Aspects of America's Religious Foundations*

Events surrounding the adoption of the Constitution have spawned significant debate over the meaning of the establishment clause. Early constitutional interpretation by scholars and judges determined that the first amendment did not mandate a total separation of government from religion.[25]

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21. The very sight of a swastika quickly brings to mind the dark side of symbolism. In addition, the Japanese government from the 1920's to the 1940's made a religious symbol out of the Emperor. The Emperor as ruler of the nation and Shinto deity became a symbol of Japan's manifest destiny in East Asia. *See generally* R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD 125-32 (1946).

22. Consider the contrasting symbolism in (1) the pledge of allegiance, "one nation under God" (showing America's united spirit); (2) the Declaration of Independence, asserting that all men have the right to life, liberty, and the pursuit of happiness (showing the theme of individualism); and (3) Emma Lazarus's poem at the base of the Statue of Liberty "give me your tired, your poor" (showing America's acceptance of cultural and religious diversity). Balancing these contradictory ideals is a basic part of first amendment adjudication.

23. The Pilgrims' concept of freedom of religion differed from that of the Quakers and others. Pilgrims believed strongly that the state or national government should not interfere in the religious affairs of the community. However, on the community level the Pilgrims' government structure could be classified as a theocracy in which a civil body politic of government officials would interpret God's will and enact laws for the general good. *See* 5 ENCYCLOPEDIA BRITANNICA s.v. *Covenant* 230 (1975); 11 ENCYCLOPEDIA BRITANNICA s.v. *Massachusetts* 592 (1975); 15 ENCYCLOPEDIA BRITANNICA s.v. *History of Protestantism* 111 (1975).

24. For judicial expressions of this theme, see *infra* note 74.

25. This discussion is not meant to be an in-depth historical analysis of constitutional intent. Rather, it is meant to provide the highlights of historical fact and perception that are critical to the analysis of the test proposed in Part III of this article.

1. *The Puritan heritage*

Cultural contributions of the Puritans are often cited for the proposition that the United States is a nation grounded in religious beliefs. For example, in the New Haven Code of 1655, forty-nine of the seventy-nine capital statutes derived their authority from the Bible.[26] It was common practice to read biblical verses before selecting public officials or performing other official tasks.[27] Of the fifteen capital laws of the General Court of Massachusetts, thirteen were based directly on the Ten Commandments.[28] Moreover, a majority of the colonies, both before and after the signing of the Constitution, had state-sponsored churches.[29]

America's public recognition of her citizens' belief in God is also enshrined in one of the most important documents in American history: the Declaration of Independence.[30] The Declaration of Independence has no fewer than four references to deity. The most well-known of these is "We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable Rights."[31] Even to this day a majority of states make reference to God in their state constitutions.[32]

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26. A. Katsh, The Biblical Heritage of American Democracy 97 (1977). Katsh notes that the scriptural reference was an official annotation to the statutory text. *See generally* P. Miller, Errand into the Wilderness, *reprinted in* J. Wilson, Church and State in American History 25-31 (1965).

27. A. Katsh, *supra* note 26, at 97-98.

28. *Id.* at 102-05.

29. *See* R. Cord, Separation of Church and State: Historical Fact and Current Fiction 14 (1982); A. Stokes & L. Pfeffer, Church and State in the United States 36-37 (rev. ed. 1964).

30. *See* Haiman, *Preface* to L. Pfeffer, Religious Freedom at vii (1979). Haiman emphasizes the symbolic impact of the Declaration of Independence.

> That we choose July 4, 1776, the date of the signing of the Declaration of Independence, says something significant about our priorities. It reminds us that what we as a nation honor far more than constitutions or presidents are the "truths" which the Declaration of Independence holds to be self-evident: "that all men are created equal, that they are endowed by their creator with certain unalienable rights."

31. The Declaration of Independence para. 2 (U.S. 1776). Other references to deity include "God," *id.* at para. 1, "Supreme Judge of the world" and "divine Providence," *id.* at para. 32. *See* Pfeffer, *The Deity in American Constitutional History,* 23 J. Church and St. 215, 217 (1981).

32. Pfeffer, *supra* note 31, at 217.

2. *Constitutional intent*

Against this backdrop of public expression of religious feeling stands the Constitution, which does not invoke the name of deity.[33] Why, in the midst of this religious fervor, did the Framers of the Constitution not only fail to invoke God's name, but also include two measures limiting governmental involvement in religion: Article VI, which prohibits the use of any religious test as a qualification for any office of public trust,[34] and the first amendment's religion clauses?[35]

Most scholars agree on certain fundamental propositions that tend to answer this question. First is the preoccupation that men like James Madison (draftsman of the first amendment) and Thomas Jefferson had with the concept of separation between church and state. Although neither man can be categorized as impious or atheistic,[36] Madison and Jefferson like many of their contemporaries were wary of the power of organized reli-

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33. *Id. But see, e.g.*, Murray v. Buchanan, 720 F.2d 689, 693-94 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (arguing that the inclusion of oaths in the text of the Constitution is evidence of the Framers' acknowledgment of deity).

34. U.S. CONST. art. VI, cl. 3. "[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

35. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

36. Although Madison and Jefferson have been categorized as strict separationists, *see, e.g.*, Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 184 (1980), and deists, the evidence supports the view that both men believed in God. Madison wrote:

> It is the duty of every man to render such homage, and *such only*, as he believes to be acceptable to him; this duty is precedent, both in order of time and degree of obligation, to the claims of civil society. Before any man can be considered a member of civil society, he must be considered as a subject of the governor of the universe, and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority [and] . . . *with the saving allegiance to the universal sovereign.*

J. Madison, *A Memorial and Remonstrance on the Religious Rights of Man* (1784), *reprinted in* D. MANZULLO, NEITHER SACRED NOR PROFANE 71-72 (1973). Jefferson wrote:

> And can the liberties of a nation be sure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural influence! The Almighty has no attribute which can take side with us in such a contest.

THE LIBRARY OF AMERICA, THOMAS JEFFERSON 289 (1984) (citing Thomas Jefferson's "Notes on the State of Virginia").

gion.[37] Fresh in their memories was the powerful and jealous grip of the Church of England—the very reason for many Europeans' exodus to the New World.[38] In addition, there was already evidence in America that state-established religions were capable of displaying the same heavy-handed methods as their European counterparts.[39] Although there was no doubt that Christianity was the universal philosophy in the colonies, there were extreme differences and often rivalries among the various Christian sects.[40] To Madison and Jefferson, there was little question that a guarantee of religious freedom in some form had to be included in the Bill of Rights.

Beyond these fundamental propositions there is a difference of opinion on the nature and extent of protection that the first amendment should provide. One view maintains that the Framers of the Constitution intended a narrow interpretation of the first amendment. Proponents of this view argue that the Framers merely intended a separation between church and the federal state.[41] In support of this claim some writers note that several states had state religious establishments that continued to exist for a time after the first amendment became operative.[42] Various proposed wordings of the first amendment provide evidence supporting this view. For example, Madison originally proposed a version with two separate provisions dealing with religious establishment, one directed at the federal government and one directed at the states. The proposed ban on state establishment

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37. *See, e.g.*, Madison, *supra* note 36, at 72. "Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects?"

38. *See* Engel v. Vitale, 370 U.S. 421, 427-32 (1962) (Justice Black recounts the history leading up to the adoption of the first amendment noting the evils the Framers sought to avoid).

39. *Id.* at 431; *see also* 15 ENCYCLOPEDIA BRITANNICA s.v. *History of Protestantism* 111 (1975) (noting ostracizement from Pilgrim community of those who advocated liberal ideas).

40. *See* T. HALL, THE RELIGIOUS BACKGROUND OF AMERICAN CULTURE 186-87 (1930) (noting that three general groups of Christian belief existed at the time of the constitutional convention).

41. Numerous articles and treatises have asserted this position. *See, e.g.*, R. CORD, *supra* note 29, at 3-15, 39-41; M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 1-17 (1978); D. MANZULLO, *supra* note 36, at 22-33; Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645; Note, *Church v. State and the Supreme Court: The Current Meaning of the Establishment Clause*, 5 OKLA. CITY U.L. REV. 683, 684-88 (1980).

42. *See, e.g.*, R. CORD, *supra* note 29, at 14, (Massachusetts did not end its state-sponsored religious establishment until 1833).

was withdrawn by Madison when it became evident that states with state religious establishments might not ratify the Bill of Rights.[43] The second clause, the ban on federal establishment, with some modifications, became the accepted draft of the first amendment.[44] Additional evidence suggests that Jefferson clearly understood the scope of the establishment clause to be a prohibition on the federal government and not on the states. As president, Jefferson refused to proclaim a public day of fasting explaining that there was a "wall of separation between church and state."[45] But as a Virginia state legislator, Jefferson actually sponsored a bill appointing days of fasting and thanksgiving.[46] To Jefferson, who can be presumed to have understood the intent of the establishment clause, the separation was between church and the federal government.[47]A second argument advanced by those who read the establishment clause as allowing some governmental identification with religion is that, although there was to be a separation between church and state, there was never an intent to create a separation between the Christian religion and the state. The wording of the establishment clause and the history of its adoption show an intent to prevent the federal government from establishing an official national church to dominate other Christian sects.[48] Early constitutional scholars took this view. For example, Joseph Story, associate justice of the Supreme Court from 1811 to 1845 and professor at the Harvard Law School from 1829, wrote, "The real objective of the First Amendment was not to countenance, much less advance [non-Christian religions]; but to exclude all rivalry among Christian Sects, and to prevent any national ecclesiastical establishment which should give a hierarchy the exclusive patronage of the national government."[49] According to Story and other constitu-

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43. *See* Note, *supra* note 41, at 685-88.

44. *Id.* at 687. Note that the establishment clause provides only that "Congress shall make no law . . . ." U.S. CONST. amend. I. The first amendment's language does not expressly address state laws.

45. *See* Comment, *supra* note 41, at 645. Jefferson's oft-quoted wall of separation metaphor is taken from a letter that he, as the third president of the United States, wrote to a Presbyterian clergyman in 1808 explaining his refusal to proclaim a national day of fasting. For an interesting contrast of interpretations of this letter, compare A. STOKES & L. PFEFFER, *supra* note 29, at 88, with R. CORD, *supra* note 29, at 40-41.

46. *See* Comment, *supra* note 41, at 647.

47. *See also* R. CORD, *supra* note 29, at 85-101 (discussing how the first amendment came to be applied to the states).

48. *See* M. MALBIN, *supra* note 41, at 14-15; R. CORD, *supra* note 29, at 11-13.

49. J. STORY, TWO COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §

tional law scholars, the Constitution contemplated no absolute separation of church and state, but rather a mere prohibition against the federal government's establishment of one Christian denomination over another.[50]

3. Early court decisions favoring a nonabsolute separation between church and state

Early court opinions commenting on whether the Constitution requires an absolute prohibition of religious involvement substantiate the claim that America is a nation grounded in religious beliefs and that the Constitution does not prohibit public expression of that fact. In *Vidal v. Mayor of Philadelphia*,[51] decided in 1843, Justice Story noted that "the Christian religion is a part of the common law of Pennsylvania."[52] Similarly, in 1892 the Court held in *The Church of the Holy Trinity v. United States*[53] that an act of Congress designed to curtail the burgeoning influx of unskilled labor immigrants was not applicable to an English minister under contract to work in the United States. In ruling that Congress had no intention to keep ministers out, the Court stated that "this is a Christian nation,"[54] and the Court offered evidence in support of its statement.[55] Modern-day echoes of this sentiment are found in the 1952 Supreme

1872, at 591 (2d ed. 1851).

50. It should also be noted here that the express wording of the establishment clause is "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, giving rise to a question whether the executive and judicial branches of government are meant to be included within the scope of its reach. *See* L. PFEFFER, RELIGIOUS FREEDOM 23 (1979) (arguing that "most probably . . . it was an oversight" that the executive and judicial branches were not included); Comment, *supra* note 41, at 647 (noting that Jefferson, in refusing to proclaim a national fast day, must have assumed that the prohibition applied to him). The oversight argument seems weak given the pervasive separation of powers mood that attended the convention, and Jefferson's action should not be read as dispositive in light of the fact that three other presidents present at the time of the Constitution convention and ratification debates—including James Madison—did not hesitate to make such proclamations. R. CORD, *supra* note 29, at 41.

51. 43 U.S. (2 How.) 127 (1843).

52. *Id.* at 198. *But see* Pfeffer, *supra* nota 31, at 220 (citing the relevant segment of Story's opinion).

53. 143 U.S. 457 (1892).

54. *Id.* at 471.

55. *Id.* at 470-72. Among other things, the court noted (1) that article one, section seven of the United States Constitution excepts Sunday from the 10-day period during which the president may approve or veto a bill; (2) the Court oath; (3) the custom of prayers in legielative assemblies; (4) prefatory words of all wills, "In the name of God, amen;" and (5) laws respecting the Sabbath.

Court decision of *Zorach v. Clauson.*[56] Mr. Justice Douglas, writing for the majority said:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . .[57]

Running through the statements of all justices who have taken the view that the Constitution demands less than total separation between church and state is the idea that it is desirable, even necessary, that a people give deference to actual historical fact and its impact on American culture. "The fact is," wrote Justice Jackson in *Illinois ex rel. McCollum v. Board of Education,*[58] "that, for good or for ill, nearly everything in our

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56. 343 U.S. 306 (1952).

57. *Id.* at 313-14. Also note the following widely cited excerpt from Douglas's opinion:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Id. at 312-13.

For other cases reciting a similar list of symbolic ties to religion and a criticism of these recitations see Pfeffer, *supra* note 31, at 222-27.

58. 333 U.S. 203 (1948) (Jackson, J., concurring).

culture worth transmitting, everything which gives meaning to life, is saturated with religious influences."[59]

C. *The Modern Trend Toward Strict Neutrality*

The view that the Constitution allows limited governmental acceptance of religious symbolism has been opposed by those who hold the view that the constitutional mandate of separation between church and state is absolute and that any governmental involvement whatsoever—including the acceptance and exploitation of religious symbols—runs afoul of the first amendment's establishment clause. These absolutists[60] contend that governmental acceptance of religious symbolism in any form is the first step toward the diminution of freedom of conscience. They point to Madison's statement that "it is proper to take alarm at the first experiment on our liberties."[61] They also contend that government's use of religious symbolism of any kind will lead to discrimination and to a host of evils foreseen by the Framers of the Constitution.[62] The absolutists argue, moreover, that it is repugnant to atheists and non-Christian religionists to be forced to accept and even pay for[63] sentiments that they do not share.

The concern held by those who would curtail government's use of religious symbols—that such use constitutes Madison's

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59. *Id.* at 236 (Jackson, J., concurring); *see also* Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) ("Religious values pervade the fabric of our national life."); Stone v. Graham, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("The establishment clause does not require that the public sector be insulated from all things which have a religious significance or origin. This court has recognized that 'religion' has been closely identified with our history and government.") (citation omitted). *Cf.* Marsh v. Chambers, 103 S. Ct. 3330, 3336 (1983) ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.").

60. *See, e.g.*, L. PFEFFER, CHURCH STATE AND FREEDOM 91-127 (1967). *But see* R. CORD, *supra* note 29, at 81 ("The Pfeffer thesis . . . is an absolute one that is logically disproven by the mere showing of one exception."). Professor Cord takes Pfeffer's historical arguments and counters them one by one. *Id.* at 18-82. *See also* Hitchcock, *supra* note 36, at 194 (using the terminology separatist and accommodationist to distinguish between the two philosophies).

61. Madison, *supra* note 36, at 72.

62. For a discussion of the discriminatory effects of government-sponsored religious symbols, see Engel v. Vitale, 370 U.S. 421, 425-29 (1961).

63. Standing to sue in cases involving the establishment clause is virtually always based on the status of the plaintiff as a taxpayer. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 206 (1948); Donnelly v. Lynch, 691 F.2d 1029, 1030-32 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). *But see* Citizens Concerned for Separation of Church and State v. City of Denver, 628 F.2d 1289 (10th Cir. 1980) (standing denied in case similar to *Donnelly*).

"first experiment with our freedoms"—harks back to the Constitutional Convention of 1787 and the secular atmosphere surrounding it.[64] The stark contrast between the Constitution and the Declaration of Independence, with its reference to deity, has already been noted.[65] At least one eminent scholar has pointed out that this lack of reference to God was not an oversight.[66] Indeed, attempts by clergymen of the day to rectify the "problem" were made, but to no avail.[67] It is argued that the meaning of this constitutional silence is expressed by Jefferson's statement that there should be a "wall of separation between church and state."[68] This theme lay dormant for over a hundred years,[69] but was rearticulated clearly by the United States Supreme Court in *Everson v. Board of Education.*[70] In deciding whether a publicly funded school busing service could be used to transport parochial school students, Justice Black used Jefferson's wall metaphor to warn the state that it was walking dangerously

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64. *See* Corwin, *supra* note 9, at 1073.

> The atmosphere of the Convention was, in fact, almost scandalously secular. Despite the social preeminence of the cloth in 1787, not a clergyman was listed among its fifty-five members; and when Franklin suggested that one be recruited to open the meetings with prayer, the proposal was shelved by his obviously embarrassed associates with almost comical celerity.

See also T. HALL, *supra* note 40, at 185-86. Hall explains that at the time of the War of Independence there were three types of Protestant groups with political power: the Episcopal type, the Presbyterian-Calvinist type, and the dissenting type, which embraced the Congregationalists, Baptists, Quakers, and other groups. The Episcopals lost their voice after the war, and the leaders of the second group did not take part in the Constitutional Convention. This left only the third type, those who favored separation, to participate in the framing of the Constitution.

> Hence, as it happened, the new republic was born in as secular a spirit as the later French republic. Not that many individuals were not powerfully under the influence of religion, but that no organized religion had any place, even in the thoughts of the founders, and to speak of a "Puritan Republic" is talking wild historic nonsense.

Id. at 187.

65. *See supra* note 33 and accompanying text.

66. Pfeffer, *supra* note 31, at 217-18. *But see* Marsh v. Chambers, 103 S. Ct. 3330, 3333 n.6 (1983) (noting that Franklin's proposal to have prayer at the constitutional convention was rejected, "not because the convention was opposed to prayer, but because it was thought that a mid-stream adoption of the policy would highlight prior omissions and because '[t]he Convention had not funds' ") (citations omitted).

67. Pfeffer, *supra* note 31, at 218-19.

68. *See supra* note 45.

69. *See, e.g.*, Hitchcock, *supra* note 36, at 185-86 (noting that there was a quiet period in constitutional litigation regarding the establishment clause from about 1840 to 1940); R. CORD, *supra* note 29, at 103 (noting that before *Everson* there were only two cases that interpreted the meaning of the phrase "an establishment of religion").

70. 330 U.S. 1 (1946).

close to the edge of permissibility.[71] Justice Black concluded that the wall created by the Constitution meant that government, including state government,[72] must avoid all favoritism, all actions that could result in political discord and in governmental involvement with religion.[73]

In subsequent Supreme Court cases, Justice Black's interpretation of constitutional intent developed into a neutrality test[74] designed to explore the height and breadth of the wall. Three criteria emerged to form a new standard. First, any governmental action, in order to be constitutionally valid, must have a "secular purpose." Second, the "primary effect" of the action must be neither to advance nor inhibit religion. Third, there must be no "excessive entanglements" by government with religion.[75] The neutrality test proved to be no solution to the separatist versus accommodationist debate.[76] Both sides have

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71. *Id.* at 15-16.

72. *Everson* laid to rest the question of whether the establishment clause was applicable to the states. *Id.* at 8; *see* Cantwell v. Connecticut, 310 U.S. 296 (1940) (making first amendment applicable to states through the fourteenth amendment); Schneider v. State, 308 U.S. 147, 160 (1939); Gitlow v. New York, 268 U.S. 652 (1925). *But see* Adamson v. California, 332 U.S. 46 (1947) (the word "liberty" in the fourteenth amendment does not have universal application); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908). For a critical discussion of the process that nationalized the establishment clause, see R. CORD, *supra* note 29, at 85-101.

73. *See* Commentary, *Secularism in the Law: The Religion of Secular Humanism*, 8 OHIO N.U.L. REV. 329, 342 (1981).

74. The theme of constitutional neutrality is widely discussed in religion clause cases. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 15 (1946) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."). *Compare* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1176 (1974) (suggesting that a distinction should be made between absolute and benevolent neutrality and that benevolent neutrality is preferred) *with* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981) (arguing that the standard should be absolute neutrality). *See generally* Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615 (1981).

75. The cases most often cited for the development of the three-prong test for establishment clause litigation are Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973) and Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see also* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (discussing the first two requirements); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (which added the entanglement prong to the test).

76. *See* Hitchcock, *supra* note 36, at 182-83 (describing the terms "separatist" and

decried the standard as being capable of supporting the other side's—and consequently the wrong—point of view.[77] Recent cases under the establishment clause, however, lead to the conclusion that the courts' trend in applying the three-pronged test is toward strict neutrality.[78] There is even an indication that some courts are willing to go beyond the test to apply a strict scrutiny standard when discrimination is alleged to result.[79] In this sense, the trend toward strict neutrality in religious symbol cases parallels, and may be motivated in part by, a trend in other areas of the law toward more aggressive assertion and court protection of minority rights.[80]

"accommodationist").

77. *Compare* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause, supra* note 74, *with* Commentary, *Secularism in the Law: The Religion of Secular Humanism, supra* note 73.

78. *See infra* notes 142-54 and accompanying text.

79. *See infra* notes 155-69 and accompanying text.

80. For example, consider the increased activity in the courts in the equal protection area in the past thirty years and the proliferation of organized bodies such as the ACLU and the NAACP to pursue constitutional rights in the courts.

The dramatic increase in litigation under the establishment clause is aptly illustrated by the fact that before *Everson* there were only two establishment clause cases; cases after *Everson* include the following: Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (public aid to parochial schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exempt status of religious organizations); Epperson v. Arkansas, 393 U.S. 97 (1968) (antievolution statute); School Dist. of Abington Township v. Schempp, 374 U.S. 293 (1963) (Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in schools); Zorach v. Clauson, 343 U.S. 306 (1952) (release time from school for religious education); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law); Illinois *ex rel* McCollum v. Board. of Educ., 333 U.S. 203 (1948) (religious education in schools).

Cases involving religious symbolism include Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (nativity scene); Marsh v. Chambers, 103 S. Ct. 3330 (1983) (state legislative chaplain); Stone v. Graham, 449 U.S. 39 (1980) (Ten Commmandments plaque in classrooms); McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) (lighted cross); Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir.) (Christmas hymns and programs in school), *cert. denied*, 449 U.S. 987 (1980); Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (Christmas symbolism on public grounds); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir.) (Ten Commandments on memorial), *cert denied*, 414 U.S. 879 (1973); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (national motto inscription on coins and currency); Fausto v. Diamond, No. 80-05205, slip op. (D.R.I. June 19, 1984) (alleged attempt by sponsors of monument to "unknown Child" to include on attached plaque a figure of Mary and Jesus; the court, using the three-pronged *Lemon* test, held that there was insufficient evidence to link the figure to the Madonna, despite the monument's close proximity to a Catholic church); Johnson v. Board of County Comm'rs, 528 F. Supp. 919 (D.N.M. 1981) (cross on county seal); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978) (national motto), *aff'd*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979); Protestants and Other Americans United for Separation of Church and

D. Religious Symbols and the Federal Government: Historical Anomaly or Evidence of Constitutional Intent

Immediately after ratification of the Constitution and continuing after ratification of the first amendment, religious symbols were given executive, legislative and judicial recognition.[81] Religious symbolism accepted and exploited by the branches of the federal government included, for example, oaths of allegiance for government and court officers;[82] presidential proclamations making Thanksgiving Day and Christmas national holidays;[83] institution of the office of Congressional Chaplain;[84] a

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State v. O'Brien, 272 F. Supp. 712 (D.D.C. 1967) (Madonna on postage stamp); Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (Christmas lights forming a cross); Paul v. Dade County, 202 So. 2d 833 (Fla. Dist. Ct. App.) (lighted cross), *cert. denied*, 207 So. 2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968); Lewis v. Allen, 11 A.D.2d 447, 207 N.Y.S.2d 862 (1960) (pledge of allegiance modification), *aff'd*, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied*, 379 U.S. 923 (1964); Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976) (cross monument), *cert. denied*, 434 U.S. 876 (1977).

81. The Constitution was set into operation on March 4, 1789, with ten states having ratified (the thirteenth state to ratify, Rhode Island, did so on May 29, 1790). U.S.C.A. Const. Art. 1, at 33-34 n.1 (1968). The first ten amendments were ratified by ten of the thirteen original states by December of 1791 (Massachusetts, Connecticut, and Georgia did not ratify them until 1939). *Id.* at 45 n.1 (1968). For a discussion of religious symbolism adopted by the branches of government, see *infra* notes 82-91 and accompanying text.

82. U.S. CONST. art. VI, para. 3; *see* Engel v. Vitale, 370 U.S. 421, 446 n.3 (1962) (Stewart, J., dissenting) (noting the presidents who have sworn oaths and their deference to deity in inaugural speeches); *see also supra* note 33.

83. *See* R. CORD, *supra* note 29, at 34-35 (Thanksgiving Day Proclamation of President James Madison of 1815); *id.* at 51-53 (Proclamation of President George Washington of 1789); *id.* at 251-60 (Thanksgiving Day Proclamations by Presidents Washington, Adams, Madison); *see also* 5 U.S.C. § 6103(a) (1982) (congressional act declaring Thanksgiving Day and Christmas Day as legal public holidays).

84. *See* Marsh v. Chambers, 103 S. Ct. 3330, 3333-36 nn.5-12 (1983) (tracing the history of legislative prayers from before 1776 until modern times and noting that the practice was unambiguous and unbroken for more than 200 years); Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (noting that when the First Congress met in 1789 after the adoption of the Constitution, the first order of business after adopting procedural rules was to establish the office of Congressional Chaplain). Of course, it can be argued that this act of the First Congress was before the ratification of the first amendment in 1791, but this fact can also be used to add credence to the argument that the intent of the first amendment was not to preclude governmental involvement with religion. *See, e.g.*, R. CORD, *supra* note 29, at 53-54 (noting that the First Congress specifically reenacted the chaplaincy after the ratification of the first amendment); *see also* Murray v. Buchanan, 720 F.2d at 696-97 (MacKinnon, J., dissenting) (noting that in the mid-nineteenth century, Congress reconsidered the issue and expressly decided that, "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," and refused to give up the office of the Congressional Chaplain); Marsh

national anthem containing a statement of religious belief;[85] a motto ("In God We Trust"[86]) displayed on all United States coins and currency;[87] a pledge of allegiance that recognizes a religious heritage;[88] a national day of prayer;[89] customary court oaths ("so help me God");[90] and ceremonial judicial protocol ("God save the United States and this Honorable Court").[91]

In the face of acceptance of these religious symbols, advo-

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v. Chambers, 103 S. Ct. at 3334 n.10.

85. In the last verse of "The Star-Spangled Banner" is the phrase, "And this be our motto 'In God is our Trust.'" Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting). The Star-Spangled Banner was adopted as the national anthem on March 3, 1931. 36 U.S.C. § 170 (1982).

86. The motto "In God We Trust" was officially adopted on July 30, 1956. 36 U.S.C. § 186 (1982).

87. 31 U.S.C. § 324 (1976); *see* G. SHANKLE, STATE NAMES, FLAGS, SEALS, SONGS, BIRDS, FLOWERS, AND THE OTHER SYMBOLS 171 (1941) (noting that the motto was first used on two-cent pieces in 1864, on silver dollars in 1865, and on all coins from 1875); *id.* at 171-72 (noting that the suggestion to put the motto on U.S. coins was made by Reverend M. R. Watkinson of Pennsylvania to Salmon P. Chase, the Secretary of State, on Nov. 13, 1861: "If the republic should be shattered beyond recognition . . . the antiquaries of succeeding centuries would rightly conclude that America had been a heathen nation . . . ."; *see also* S. REP. No. 637, 84th Cong., 1st Sess. 1, *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2417 ("Currency has been issued by the United States Government since 1861. Thus, for almost a century, there has been no inscription on our currency reflecting the spiritual basis of our way of life.").

88. 36 U.S.C. § 172 (1982). Adopted in 1942, the Pledge of Allegiance was amended in 1954 to include the phrase "under God." *See* H.R. No. 1698, 83rd Cong., 2d Sess. 1, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 2339. The House Report gives an interesting insight into the purpose of the addition of "under God" to the pledge.

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on a concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

Id. at 1, 1954 U.S. CODE CONG. & AD. NEWS at 2340.

89. 36 U.S.C. § 169b (1982). "The President shall set aside and proclaim . . . a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." This act was enacted April 17, 1952.

90. O'Hair v. Paine, 312 F. Supp. 434 (W.D. Tex. 1969) (noting that court oaths are part of American court tradition), *aff'd per curiam*, 432 F.2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); *see infra* notes 118-19 and accompanying text.

91. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (rev. ed. 1926) (noting that the crier of the Supreme Court has used the phrase, "God save the United States and this Honorable Court").

cates of the absolute separation view must take one of two approaches. The first is that these symbols were adopted by the majority at a time when minority views were not presented to challenge the use of such symbols,[92] and that in actuality their use violates the Constitution. Several facts outweigh this argument. The Constitution itself acknowledges oaths.[93] Many participants in the framing of the Constitution and the first amendment were members of the First Congress, which selected chaplains and authorized their pay.[94] Moreover, the same First Congress authorized the president, on March 3, 1791, to appoint a chaplain for the military establishment.[95] George Washington (one of the fathers of the Constitution and president of the Constitutional Convention), John Adams (a member of the Constitutional Convention), and James Madison (draftsman of the first amendment and one of the most outspoken about separation between church and state) made public proclamations while president, as requested by Congress,[96] calling for a "day of public thanksgiving and prayer."[97] Madison's proclamation of July 23, 1813 (over twenty years after the ratification of the first amendment), is instructive:

> I do therefore issue this my proclamation, recommending to all who shall be piously disposed to unite their hearts and voices in addressing at one and the same time their vows and adorations to the Great Parent and Sovereign of the Universe that they assemble on the second Thursday of September next in their respective religious congregations to render Him thanks

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92. Governmental use of these symbols has been challenged relatively recently. *See, e.g.*, Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (constitutional validity of the motto is challenged); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978) (motto challenged), *aff'd*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979); Lewis v. Allen, 11 A.D.2d 447, 207 N.Y.S.2d 862 (1960) (validity of the amendment of the Pledge of Allegiance challenged), *aff'd*, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied*, 379 U.S. 923 (1964). None of the challenges succeeded.

93. U.S. CONST. art. II, § 1 (requires that the president take an oath to uphold his office); *see* Murray v. Buchanan, 720 F.2d 689, 693 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (citing the constitutional provision and other sources that define oath as "a formal calling upon God or a god to witness to the truth of what one says.") (citations omitted); *see also id.* at 693-94 (noting that oaths are also required of senators, representatives, and other officers).

94. *See supra* note 84.

95. *See* R. CORD, *supra* note 29, at 53.

96. *Id.* at 39-40.

97. *Id.*

for the many blessings He has bestowed on the people of the United States.[98]

The foregoing demonstrates that those who drafted and framed the Constitution and who in their public positions were sworn to uphold it did not view the Constitution as requiring an absolute separation between government and religion. Moreover, Madison's proclamation shows his sensitivity to the scope of the first amendment. His proclamation merely recommended prayer to those "piously disposed." It acknowledged America's religious roots but was fastidiously nondenominational.[99] In fact, a close examination of the religious symbolism listed above reveals the same characteristics: it respectfully acknowledges the religious belief of America's forefathers but is noncoercive and nondenominational.[100]

In light of this analysis, absolutists are forced to argue that historical evidence is irrelevant in a modern context.[101] In 1983, however, the United States Supreme Court reaffirmed the relevance of the framer's intent and historical reaffirmation of that intent by the three branches of government. In *Marsh v. Chambers*,[102] the Court upheld the Nebraska legislature's use of a legislative chaplain. In so doing the Court placed great weight on the fact that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice au-

98. 2 J. Richardson, *supra* note 15, at 517.

99. This is consistent with Justice Story's interpretation of the first amendment. *See supra* note 49 and accompanying text.

100. This phenomenon has been described by some scholars, notably Professor Robert Bellah, as the "American Civil Religion." *See, e.g.*, Bellah, *Civil Religion in America*, in The Religious Situation: 1968, at 331 (D. Cutler ed. 1968) (listing symbols associated with the American civil religion); Levinson & Bellah, *A.A.L.S. Law and Religion Panel: Law as our Civil Religion*, 31 Mercer L. Rev. 477, 483 (1980) (debata between Bellah and Professor Levinson on the nature of the civil religion); *see also* Agus, *Jerusalem in America*, in The Religion of the Republic 94, 96 (E. Smith ed. 1971) ("The character of the American Faith is clear enough. It is 'faith in faith'—a generalized reverence for the 'common core' of Western religion."); M. Novak, *supra* note 9:

> What, then, is the civil religion? It is a public perception of our national experience, in the light of universal and transcendent claims upon human beings, but especially upon Americans; a set of values, symbols, and rituals institutionalized as the cohesive force and center of meaning uniting our many peoples.

Id. at 127 (emphasis deleted).

101. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 237-40 (1963) (Brennan, J., concurring) (arguing that reliance on Framers' intent is misplaced because modern society is far more heterogeneous than that of the Framers).

102. 103 S. Ct. 3330 (1983).

thorized by the First Congress—their actions reveal their intent."[103]

Whatever can be said about the prohibitions of the first amendment, their wisdom, or even their fairness in light of the tremendous diversification of philosophical values in America, it is difficult to conclude that the Constitution imposes an absolute ban on governmental use of religious symbols. Indeed, the actions of presidents, Congress and even the Supreme Court over the course of nearly two centuries seem to encourage the use of religious symbolism that meets the rigors of Madison's test.

The second argument advanced by the absolutists is that somehow the symbols mentioned above—the national motto, the national anthem, Christmas, Thanksgiving Day, chaplains, oaths, and so on—differ from much of the symbolism employed by state and local governments. This argument underlies many, if not all, of the problems regarding constitutional adjudication today and is the focus of discussion in the next section.

II. THE NEED FOR A STANDARD

Having concluded that the Constitution does not impose a total ban on religious symbolism, it becomes necessary to address the problem of determining which symbols are permissible and which are not. Some recent cases have shown a trend toward applying a strict neutrality or even a strict scrutiny standard to religious symbol cases. Both of these approaches, however, ignore the fact that their application will likely lead to a major contradiction in two lines of religious symbol cases, and both are insensitive to the needs of local governments in promoting cultural identity.

A. Contradiction in the Courts

There is a blatant anomaly in court opinions involving governmental acceptance and use of religious symbols. The courts accept certain national symbols, such as the national motto and the Pledge of Allegiance almost without question, while they subject other forms of symbols—usually as proposed by state and local governments—to the fullest rigor of court scrutiny as to purpose and effect, often finding them unconstitutional. A comparison of the issues and court analysis in the cases illus-

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103. *Id.* at 3334.

trates this contradiction. The first case is *Stone v. Graham*,[104] one of three United States Supreme Court cases dealing directly with a religious symbol.[105] The second is the New Hampshire Supreme Court's decision in *Opinion of the Justices*.[106]

The issue in *Graham* was whether a Kentucky statute violated of the establishment clause by requiring copies of the Ten Commandments, provided by private contributions, to be posted on the wall of each public classroom in the state. The statute required that the sixteen-inch by twenty-inch copies of the Decalogue include a written explanation of the secular nature of the Ten Commandments as "the fundamental legal code of Western Civilization and the Common Law of the United States."[107] The Court found the statute not to have a sufficient secular purpose and therefore to be constitutionally invalid. The Court's language has been said to establish a new standard for applying the purpose test in establishment clause cases.

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104. 449 U.S. 39 (1980).

105. *See* Note, Stone v. Graham: *"Thou Shalt Not Post the Ten Commandments": The Constitution and Religious Symbolism*, 8 OHIO N.U.L. REV. 201-11 (1981).

The second case dealing with religious symbolism decided by the United States Supreme Court is Marsh v. Chambers, 103 S. Ct. 3330 (1983), which held that Nebraska's practice of hiring a chaplain for its state legislature was constitutionally permissible. *See supra* note 84.

The third case is Lynch v. Donnelly, 104 S. Ct. 1355 (1984), which reversed the First Circuit's decision banning a publicly sponsored nativity scene as part of a larger Christmas display. *See supra* notes 126-86 and accompanying text.

A fourth case, Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985), *aff'g by an equally divided court*, 739 F.2d 716 (2d Cir. 1984), discussing a city's refusal to allow a nativity scene to be placed on public grounds, ended in a four to four deadlock and thus affirmed without opinion the lower court's decision.

106. 108 N.H. 97, 228 A.2d 161 (1967).

107. The Kentucky statute provided in its entirety:

> (1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
>
> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'
>
> (3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasury for the purposes of this Act.

KY. REV. STAT. § 158.178 (1980), *quoted in* Stone v. Graham, 449 U.S. at 39-40 n.1.

> [A]n "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. . . .
>
> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.[108]

In *Opinion of the Judges,* the New Hampshire Supreme Court faced a similar statute. The state legislature was considering a law requiring that a copy of the national motto "In God We Trust," in letters not less than three inches high, be "displayed, and maintained, on the wall of each and every class room in all [state] public education[al] institutions."[109] The court held in a very brief opinion citing dictum from two previous United States Supreme Court decisions that the law did not violate the Constitution.[110]

The major problem with these two decisions is not that either of them was wrongly decided. The New Hampshire opinion is fully consistent with other opinions dealing with the constitutional validity of the national motto,[111] and it cannot be denied

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108. 449 U.S. at 41 (footnote omitted). The five-to-four majority went on to note that "the Ten Commandments do not confine themselves to arguably secular matters . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 41-42.

109. The operative provisions of the New Hampshire resolution read as follows:

> That there should be prominently displayed, and maintained, on the wall of each and every class room in all of our public education institutions, a suitable plaque, on which should appear the following words, 'IN GOD WE TRUST,' in letters not less than three inches in height. These words should be clearly legible to any person in the room * * *
>
> That copies of this Resolution be sent to our State Department of Education, to the various Boards of Education, to the various Boards of Trustees of all educational institutions in our State, with the request that they arrange the installation of these plaques as outlined in this Resolution.

108 N.H. at 99, 228 A.2d at 164.

110. *Id.* The New Hampshire Supreme Court, without applying any purpose test, disposed of the issue in a 49-word paragraph supported by dictum in Engel v. Vitale, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) (noting that the "words 'In God We Trust' are over the entrance to the Senate Chamber") and School Dist. of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) ("'In God We Trust' on currency, on documents and public buildings and the like may not offend the [establishment] clause. It is not that the use of those four words can be dismissed as 'de minimis' . . . . The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.").

111. For cases upholding the constitutional validity of the national motto, see Aro-

that the Kentucky statute might indeed have the religious purpose that the Supreme Court ascribed to it in *Graham*. The problem is that these cases illustrate a contradictory tendency to apply different standards, or, put another way, to acknowledge the importance of tradition, ceremony, and culture in one line of cases and to ignore such factors in the other.

Occasionally, attempts are made to draw a distinction between the two lines of cases.[112] Such distinctions are superficial, as the two statutes discussed above demonstrate. The motto, "In God We Trust," carries with it a religious exhortative message.[113] The very reason for its adoption, first as an inscription on United States coins and currency, and then as the national motto, was its "spiritual and psychological value to [the] country."[114] It follows that the New Hampshire statute itself could be found to be as religious in purpose and effect as the Kentucky statute. Ironically, however, there was no requirement in *Opinion of the Justices*, as there was in *Graham*, to link the motto to a secular purpose. The motto was to hang in front of the same

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now v. United States, 432 F.2d 242 (9th Cir. 1970); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979); *see also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (*see* quotation at *supra* note 110); Engel v. Vitale, 370 U.S. 421, 438-40 (1962) (distinguishing prayer in school from the national motto); Hall v. Bradshaw, 630 F.2d 1018, 1022-23 (4th Cir.) (distinguishing a prayer printed on a highway road map from the national motto), *cert. denied*, 450 U.S. 965 (1980).

112. *See* cases cited *supra* note 111. Justice Brennan, dissenting in Marsh v. Chambers, 103 S. Ct. 3330, 3349 (1983), did not know what to do with the distinction: "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,''In God We Trust,''One Nation Under God,' and the like." Brennan concluded that he "might well adhere to the view" that these have lost "any true religious significance." For a rebuttal of this tenuous position, see *infra* notes 119-21 and accompanying text.

113. Note, for example, that the phrase can be read as a statement or exhortation. One is an affirmation that America is a religious nation; the other is encouragement to believe.

Justice Brennan's comment that the motto is "so deeply [interwoven] into the fabric of our civil polity," School Dist. of Abington Township v. Schempp, 374 U.S. at 303, may be applied with equal force to the Ten Commandments as the basis of Western law. The Court's finding in Aronow v. United States, 432 F.2d at 243, that the motto's "use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise" likewise does not convincingly distinguish the Ten Commandments. As proposed in the Kentucky statute, the Ten Commandments were very much in the nature of a passive ceremonial character. *See* Stone v. Graham, 449 U.S. 39, 44 (1980) (Rehnquist, J., dissenting); Anderson v. Salt Lake City Corp., 475 F.2d 29, 34 (10th Cir.) (noting the passive nature of a monument containing a representation of the Ten Commandments and holding the monument valid), *cert. denied*, 414 U.S. 879 (1973).

114. *See supra* notes 86, 87, and citations therein.

impressionable school children[115] with what is arguably the same basic message.

Of course, it can be argued that the cases are distinguishable because the Ten Commandments are linked to the Bible, which represents Christianity and Judaism. This fact brought the statute in *Graham* within the first amendment's prohibition, because, under this argument, passages from the Bible are "plainly religious in nature."[116] This argument is not persuasive for a number of reasons. First, both the Ten Commandments and the national motto are equally offensive to an atheist. It is inconsistent to argue under the Constitution that government may freely offend atheists with the national motto but may not offend devotees of non-Christian religions such as Buddhism with the Ten Commandments simply because of their connection to the Bible. Moreover, if the Bible is the fatal distinction between *Graham* and *Opinion of the Justices*, courts must then distinguish other public uses of the Bible. For example, it is customary in presidential inaugurations and in many courts to swear an oath on the Bible.[117] The use of the Bible in those con-

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115. The impressionability of school children has been noted as a critical factor in cases involving prayer in public places. *Compare* Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980) ("Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement [with prayer] might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."), *cert. denied*, 454 U.S. 1123 (1981) *with* Bogen v. Doty, 456 F. Supp. 983, 985 (D. Minn. 1978) (distinguishing prayer-in-school cases, the court upheld the practice in county board meetings of opening with prayer. Citing Justice Goldberg in *Schempp*, the court noted that they must "distinguish between real threat and mere shadow"), *aff'd*, 598 F.2d 1110 (5th Cir. 1979).

Notwithstanding the fact that the distinction between school and nonschool context is not applicable to either *Graham* or *Opinion of the Justices* (both are school cases), the distinction seems misplaced because of the visibility of symbolic references to religion in other visible contexts. The Pledge of Allegiance is an example. Also consider the impact of a presidential address on television. Presidents Carter and Reagan, for example, used strong statements in their inaugural addresses linking the destiny of America with God. Given the media's wide reach and the symbolic power of the president's office, these statements can be said to be just as potent a symbolic inference as a prayer in school. *See also* Engel v. Vitale, 370 U.S. 421, 446 n.3 (1962) (Stewart, J., dissenting) (citing religious statements of Washington, Adams, Jefferson, Madison, Lincoln, Cleveland, Wilson, F. D. Roosevelt, Eisenhower, and Kennedy); Murray v. Buchanan, 720 F.2d 689, 694 n.8 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (noting that all presidents have acknowledged God in their inaugural addresses); NOVAK, *supra* note 9, at 6 (discussion on the office of president as a symbol).

116. 449 U.S. at 41.

117. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring) ("The Bible is used for the administration of oaths."); Chambers v. Marsh, 675 F.2d 228

texts is arguably no less symbolic than in the Kentucky statute.[118]

Another effort to distinguish symbols like the motto is seen in Justice Brennan's statement that such symbols "no longer have a religious purpose or meaning."[119] But this assumption would be true only if the word "God," as it appears in the Ten Commandments or in the motto or pledge, could be taken to have different meanings. The history behind the motto, for example, shows quite clearly that it was intended to express the idea that America is a religious nation whose people believe in a supreme being consistent with the God found in the Bible.[120] Although it is true, as Justice Brennan expressed, that the motto and similar religious symbols have acquired a clearly secular meaning and purpose that inspire patriotism and cultural unity, it does not follow that these symbols have therefore lost all of their religious meaning. Moreover, even in this regard, it is difficult effectively to distinguish the Ten Commandments. Over the ages they also have acquired a secular meaning and use not far removed from the patriotic purpose underlying the motto. Americans are generally proud of America's legal heritage, an undeniable part of which is of biblical origin.[121]

Graham is not the only decision to fail to give weight to the anomaly. *Wooley v. Maynard*,[122] a case decided under the free exercise clause of the first amendment, held that the New Hampshire state motto "Live Free or Die" imprinted on state license plates was constitutionally infirm because it "invade[d]

(8th Cir. 1982) ("Ceremonial recitals have a widespread role in many of our institutions: our presidents traditionally have taken their oath of office on a Bible . . . ."), *rev'd*, 103 S. Ct. 3330 (1983); Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712, 720 (D.D.C. 1967) ("Oaths are administered to witnesses and jurors in the courts with an invocation to the Deity, and the Bible is frequently used for that purpose.").

118. An oath is by definition an appeal to God. *See* Lackey v. Mesa Petroleum Co., 90 N.M. 65, 66, 559 P.2d 1192, 1193 (1976) ("An oath is an appeal by a person to God to witness the truth of what he declares."); O'Reilly v. People, 86 N.Y. 154, 157-58 (1881) ("[S]ome form of an oath has always been required . . ., and the *sanctions of religion add their solemn and binding force to the act.* While these sanctions have grown elastic, and gradually accommodated themselves to differences of creeds, and varieties of beliefs, . . . yet through all changes, and under all forms, the religious element has not been utterly destroyed.") (citations omitted) (emphasis added); *supra* note 93.

119. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

120. *See supra* note 86.

121. *See generally* A. KATSH, *supra* note 26.

122. 430 U.S. 705 (1977).

the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[123] Justice Rehnquist, in dissent, summarized the contradiction of the court's conclusion.

> The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. . . . The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.[124]

Justice Rehnquist's statement highlights the awkward results of failing to recognize the similarity of the two lines of religious symbols, a failure that could have serious and far-reaching effects on the ability of state and local governments to continue the use of time-honored social traditions.

B. Weaknesses of Traditional Standards— Lynch v. Donnelly

The ramifications of drawing conceptually difficult distinctions between established national symbols and other symbols, or ignoring the existence of accepted symbols altogether, are aptly illustrated by the controversy surrounding the display of a nativity scene on public property—a controversy recently addressed by the United States Supreme Court in *Lynch v. Donnelly*.[125] Two lower court opinions, the First Circuit's opinion in *Lynch*[126] and *Citizens Concerned for Separation of Church and State v. City of Denver*[127] (*Citizens II*), exemplify how tradi-

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123. *Id.* at 715 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942)).

124. *Id.* at 722 (Rehnquist, J., dissenting).

125. 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). The Solicitor General, the Honorable Rex E. Lee, who argued the case on behalf of the government as amicus curiae, based at least part of his oral argument on an unpublished manuscript of this article. Letter from Rex E. Lee to Kelly C. Crabb (Jan. 9, 1984).

126. 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

127. 526 F. Supp. 1310 (D. Colo. 1981). The history of *Citizens II* is complicated. It was first argued before Judge Matsch of the United States District Court for the District of Colorado, who issued an injunction against the creche on entanglement grounds. 481 F. Supp. 522 (1979). On appeal the injunction was vacated for lack of standing. 628 F.2d

tional establishment clause tests have failed to reach consistent results in factually similar cases. In both cases the municipal government's custom of erecting a display of Christmas objects, including a life-sized creche, was well established.[128] In both cases the funding for the creche was from public, not private, sources.[129] In both cases the nativity scene, although part of a larger display including purely secular items symbolizing the Christmas festival,[130] was a main part of the display.[131] In both cases the courts faced high emotions and wide press coverage.[132] However, while both courts applied the same standard[133]—in full view of the other court's reasoning[134]—the courts reached opposite conclusions.

Although ultimately reversed by the United States Supreme Court,[135] the district and circuit courts in *Lynch* found first that display of the creche, considered as an independent symbol,[136] did not have any legitimate secular purpose under the *Lemon v. Kurtzman* three-part test of constitutionality. More significantly, the First Circuit found it necessary to apply a strict scru-

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1289 (10th Cir. 1980), *cert. denied,* 452 U.S. 963 (1981). In February of 1981, a year after the Tenth Circuit's opinion, the suit was brought again. Judge Winder, sitting by designation, found that the plaintiff had met the standing requirement, ruled for the defendants, and denied the preliminary injunction. 508 F. Supp. 823 (D. Colo. 1981). In December of that same year, the case was again brought before Judge Winder, who again ruled for defendants. 526 F. Supp. 1310 (D. Colo. 1981). A case involving the same Denver display, but with different plaintiffs, was then brought in state trial court, alleging violation of the Constitution of Colorado. The trial court denied injunctive relief, but the Colorado Supreme Court, en banc, vacated the judgment of the trial court, holding that the plaintiffs had established a prima facie case under the *Lemon* test, and remanded to the trial court for evidentiary proceedings. Conrad v. City of Denver, 656 P.2d 662 (Colo. 1983).

128. The Pawtucket display was over 40 years old. 525 F. Supp. at 1179. The Denver custom was already a tradition before 1974. Chase, *Litigating a Nativity Scene Case,* 24 St. Louis U.L.J. 231, 242 (1980) (quoting J. Michener, Centennial 861 (1974)).

129. 525 F. Supp. at 1154-56; 526 F. Supp. at 1311.

130. 525 F. Supp. at 1155; 508 F. Supp. at 827-28.

131. 525 F. Supp. at 1154-55; *Conrad,* 656 P.2d at 666 n.3 (noting that the position of the creche varies from year to year).

132. *See, e.g., Lynch,* 691 F.2d at 1034; Chase, *supra* note 128, at 268-69.

133. The First Circuit's opinion in *Lynch* can be read as applying strict scrutiny. *See infra* notes 170-83 and accompanying text. But because the court reached the conclusion that there was no legitimate purpose, *Lynch* can also be read as an application of the tripartite test used by the district court.

134. Both courts cite each other. *See* 526 F. Supp. at 1311; 691 F.2d at 1035.

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

136. Both courts stated that "the creche did 'not lose its power to make a theological statement' merely because it was erected amidst non-religious decorations." 691 F.2d at 1032; 525 F. Supp. at 1168.

tiny test[137] because the use of the creche "discriminate[d] between Christian and non-Christian religions."[138] The First Circuit found it unnecessary to reach the excessive entanglements question.[139] Consequently, the court enjoined the city of Pawtucket, Rhode Island, from displaying a creche with its annual Christmas display.

Citizens II, on the other hand, held that there was a sufficient secular purpose in the city of Denver, Colorado's use of the creche. The court distinguished *Graham* because of its school context[140] and followed *Allen v. Morton,* an earlier nativity scene case, noting that "[t]he purpose of a challenged display can only be discerned by considering the entire display and the context in which it is presented."[141] The fact that the creche was surrounded by secular objects was, to the court, an indication that the purpose of the entire display was "to show how the American people celebrate the holiday season surrounding Christmas."[142] Secondly, the *Citizens II* court differed from *Lynch* on the issue of effect. The court rejected the *Lynch* analysis that "the nativity scene is so exclusively religious that its use by the state is per se objectionable."[143] Rather, because of the secular context in which the creche was placed—one item among a group of other secular items—the effect was secular.[144] The *Citizens II* court gave weight to the testimony of experts, who expounded the probable effect on persons viewing the creche, and to other witnesses who described their own feelings while viewing the creche.[145] However, after considering the evidence, "the court remain[ed] convinced that City's use of the

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137. 691 F.2d at 1034 (citing Larson v. Valente, 456 U.S. 228, 246-52 (1982)).

138. 691 F.2d at 1034.

139. In fact the court implied that the entanglements analysis was questionable. *Id.* at 1035. *See generally* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court is 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). This article does not discuss the entanglements test in detail because it is virtually never dispositive by itself, it is steeped in controversy and courts rarely reach it.

140. 508 F. Supp. at 827; *see supra* note 115.

141. 508 F. Supp. at 827.

142. *Id.* (quoting Allen v. Hickel, 424 F.2d 944, 949 (D.C. Cir. 1970), *rev'd on other grounds,* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973)).

143. 526 F. Supp. at 1313.

144. *Id.* at 1313-14.

145. *Id.* at 1314-15. The court rejected the use of letters and petitions as unscientific and hearsay. *Id.* at 1314.

nativity scene . . . [did] not have the primary or the direct and immediate effect of advancing or inhibiting religion."[146]

1. The purpose-effect test

All arguments of purpose and effect in religious symbol cases carry significant amounts of fiction and undeniable truth. As a result courts are often misguided in their analysis. In the end a court often must simply apply its own sensitivity and preconception to the case. The cases described above bear this out.

a. Purpose. In the two nativity scene cases, the cities advanced secular rationales for including the creches. They maintained that the creche was designed to increase commerce,[147] to promote civil morale and good will,[148] and to show how Christmas is celebrated in America.[149] The plaintiffs, contended that there was another unseen purpose: to promote the Christian religion.[150] As evidence, the plaintiffs pointed out that the city fathers failed to publisb their intent.[151] This point gains or loses weight depending on where the burden of proof is placed. If the creche is viewed as a religious symbol per se, the city has the burden of proving that its purpose was not religious.[152] If the creche is viewed in a secular manner, however, the plaintiff has the burden of proving religious intent.[153] In both cases above, the perception of the creche[154] and the concomitant placing of

146. *Id.* at 1315. Unlike the court of appeals in *Lynch*, the *Citizens II* court reached the entanglements analysis and found that no excessive entanglements existed because "the nativity scene is planned entirely by government officials without any assistance or involvement with religious figures or institutions." *Id.*

147. 691 F.2d at 1033.

148. 508 F. Supp. at 826; 525 F. Supp. at 1158.

149. 508 F. Supp. at 826; 525 F. Supp. at 1162-64.

150. 525 F. Supp. at 1156-57; 526 F. Supp. at 1312.

151. 691 F.2d at 1033. *See* Allen v. Morton, 495 F.2d 65, 73-74 (D.C. Cir. 1973). The creche in *Allen* was accompanied by brochures and plaques explaining that the creche was simply representing one of the many aspects of Christmas. *But cf.* Stone v. Graham, 449 U.S. 39 (1980) (an explanation with the Ten Commandments not sufficient to pass constitutional muster).

152. This was the *Lynch* view, 691 F.2d at 1033; *see supra* note 146.

153. This was the *Citizens II* view. *See* 526 F. Supp. at 1312-13 ("[Plaintiffs] cannot prevail on a mere showing that tbe nativity scene . . . has only a remote or indirect tendency to advance or inhibit religion.").

154. The proper focus for the purpose test should not go to the object (creche) but to the intent of the city fathers. *See* Stone v. Graham, 449 U.S. 39, 43 (1980) (Rehnquist, J., dissenting) (criticizing the majority for concluding by its "own *ipse dixit*" that the Court rejects the secular purpose argument by tbe state because the Decalogue "is undeniahly a sacred text") (footnote omitted). To Rehnquist, it is equally undeniable, as the elected representatives of Kentucky determined, that the Ten Commandments have had

the burden of proof—rather than an analysis of purpose—were dispositive.

b. Effect. A plaintiff could theoretically shift the burden to the city by proving that the creche is an inherently religious object. However, there is virtually no way to do this without proving the creche's religious effect—the second arm of the tripartite test. Of course, to many people Mary, the mother of Jesus Christ, is a figure of adoration and even worship.[155] The nativity scene is undeniably linked to the biblical account of Jesus' birth, and seeing the figures has the effect of reminding viewers of the original meaning of Christmas. However, it is probably also true that many people are not religiously affected by the creche. Many, if not most, people who see a creche are likely to recognize it only as a sign of the Christmas holiday.

The courts' efforts to weigh these divergent effects through use of experts seem misplaced. It is difficult to imagine that experts can definitively pronounce the creche's effect on the entire community. Likewise, calling witnesses to testify of their feelings will not help; one, two, even fifty people cannot speak to the sensitivities of all.[156]

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a significant impact on the development of secular legal codes throughout the Western world.

155. *See* W. WARNER, THE LIVING AND THE DEAD: A STUDY OF THE SYMBOLIC LIFE OF AMERICANS 379-80 (1959).

> The figure of Mary, the Mother, is in many ways the most controversial one in the whole of Christian symbolism. The Catholic Church officially venerates her and many of its communicants officially worship her. Most Protestant churches recognize her position as the human mother of Christ who at the Annunciation conceived Jesus and gave him birth on Christmas Day. Yet for most Protestants and Catholics the amount of attention and significance given the Virgin Mary, the mother of Christ, is a crucial test of what it means to be a Catholic or a Protestant.

Cf. Fausto v. Diamond, No. 80-05205, slip op. (D.R.I. June 19, 1984).

156. *See* 526 F. Supp. at 1312 (citations omitted) (italics added).

> *Citizens* contends that the impermissible effect of advancing or inhibiting religion arises if any reasonable person perceives the display as an endorsement by the City of the Christian faith. The City argues that before a violation of the Establishment Clause can be found the consensus of the viewers must perceive the impermissible endorsement.
>
> In the court's view, neither test advanced by the parties is completely appropriate. Requiring that a consensus of the community perceive the religious endorsement before the effect is impermissible does not provide adequate protection for members of the community who endorse a faith (or lack of faith) other than that of the majority. However, it seems equally clear that City does not directly advance or inhibit religion merely because a reasonable person or indeed a group of reasonable people perceive the City's display as an endorsement of religion. Reasonable people, as the evidence in this case illustrates, can

c. Shortcomings of the purpose-effect test. In the final analysis, judges are forced to resort to their own sensitivities and preconceived notions about the inherent qualities of the creche. Because of the overemphasis on the inherent nature of the symbol, the effect test, like the purpose test, is powerless to aid the courts in drawing a meaningful line in religious symbol cases. In essence, the courts are forced to try to prove effect from purpose, or purpose from effect; it is a confusing test yielding arbitrary results.[157]

These problems with the purpose-effect test as applied to religious symbols were further manifested by the Supreme Court's decision in *Lynch v. Donnelly*.[158] The Court held that notwithstanding the religious nature of the nativity scene, the city of Pawtucket did not violate the establishment clause by including the symbol in its annual Christmas display.[159] Four justices declined to apply the purpose-effect analysis rigidly.[160] Rather, the Court reasoned, citing numerous examples of public acceptance of religiously significant symbols,[161] that "some advancement of religion" does not offend the establishment clause as long as the benefit to one faith or religion is "indirect, remote, or incidental."[162] The Pawtucket creche, displayed in the context of the Christmas season, was held to have a legitimate secular purpose: to celebrate Christmas and depict its origins.[163]

Justice O'Connor's deciding vote was framed along the lines of traditional purpose-effect analysis. At the heart of her analysis was a refusal to adopt the lower court's holding that the religious nature of the creche raises an "inference of [governmental]

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find endorsement by the government of religion in ceremonies and traditions that the Supreme Court has stated, at least in dicta, do not violate the First Amendment.

157. By ignoring the context in which the creche was placed, the district court in *Lynch* was forced to conclude that the creche had religious effect in any setting—it was per se a religious object. From this analysis it is a simple matter to find religious purpose and effect because no other results are possible. The purpose-effect test, if employed at all, should rather be a weighing of all the attendant circumstances. This article agrees with *Citizens II* on this point but disagrees with the case to the extent it stands for the proposition that experts and other witnesses can aid in determining whether or not an object in context with other objects promotes or inhibits religion.

158. 104 S. Ct. 1355 (1984).

159. *Id.* at 1366.

160. *Id.* at 1361-62.

161. *E.g.*, legislative chaplains, *id.* at 1359; Thanksgiving Day proclamations, *id.* at 1360; the national motto, *id.*; religious paintings in national galleries, *id.* at 1361.

162. *Id.* at 1364.

163. *Id.* at 1363.

intent to endorse [religion]."[164] Justice O'Connor found a secular purpose in the fact that the creche was part of a larger display consisting mainly of purely secular symbols.[165] She also found from this fact that there was no governmental promotion of religion.[166]

Justice Brennan's dissent also applied the three-prong test. Unlike Justice O'Connor, however, the dissent found that the inherently religious nature of the creche was dispositive; the fact that it was displayed with other secular symbols could not erase its primarily religious character.[167] If the purpose of the city is to celebrate Christmas, argued the dissent, other purely secular means can suffice.[168] The dissent concluded that the inclusion of the creche would have an adverse effect on minority beliefs and believers.[169]

The Supreme Court's opinion leaves the law in this area far from settled. It is possible to argue that the purpose-effect test is not applicable to certain establishment clause cases involving symbols. However, the majority opinion leaves some doubt as to what the proper test should be. Justice O'Connor's concurrence and Justice Brennan's dissent suggest that the purpose-effect analysis is still the proper one. But the critical question—whether to emphasize the inherent religiousness of the symbol, as suggested by the dissent, or to let the existence of a valid secular purpose and context refute any inference of establishment intent, per Justice O'Connor—remains unanswered. Also left unanswered is the weight to be accorded historical factors in determining the constitutionality of religious symbols.

2. The strict scrutiny test

The First Circuit in *Donnelly v. Lynch* raised the spectre of strict scrutiny for religious symbol cases.[170] Strict scrutiny

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164. *Id.* at 1368.
165. *Id.*
166. *Id.*
167. *Id.* at 1371-72 & n.4.
168. *Id.* at 1371.
169. *Id.* at 1373-75.
170. 691 F.2d at 1034. The court cited Larson v. Valente, 456 U.S. 228, 252 (1982): "[T]he *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions." *But see* Conrad v. City of Denver, 656 P.2d 662 (Colo. 1982) (rejecting the *Larson v. Valente* strict scrutiny for creche case). *Cf.* Colo v. Treasurer and Receiver General, 378 Mass. 550, 392 N.E.2d 1195 (Mass. 1979) (rejecting strict scrutiny in case in which same

seemed warranted, the court said, because the creche favored Christian beliefs over non-Christian beliefs—that is, the effect was discriminatory.[171] The court's reasoning has two serious flaws. First, the only way to show discrimination in this context is to show discriminatory effect or purpose. If it exists, strict scrutiny adds nothing because the courts will encounter the same problems that plague the purpose-effect test.[172]

Strict scrutiny can also mean the creation of a suspect class of objects that are presumed to have discriminatory effect and are constitutionally invalid absent a compelling governmental interest.[173] This approach also has its problems as discussed above with regard to *Graham*.[174] The defined class for strict scrutiny analysis may simply reach too far. For example, as with the Bible in *Graham*, which by force of tradition[175] finds its way into many accepted ceremonial uses,[176] virtually every religious symbol can be shown to have a commonly recognized secular side.[177] Strict scrutiny, however, ignores this possibility and demands that the government's interest be compelling in using the religious symbol rather than some other symbol or practice.[178] Such a test would certainly invalidate a creche displayed on public ground.[179] If displaying a creche is unconstitutional, then

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legislative chaplains had served for 20-24 years. The court used the *Lemon* analysis and held that expenditure of funds for the chaplain's office was constitutional).

171. 691 F.2d at 1034-35.

172. *See supra* notes 148-57 and accompanying text.

173. This formulation is intended to make the strict scrutiny standard here analogous to strict scrutiny in the equal protection and substantive due process areas of constitutional law.

174. 449 U.S. 39 (1980).

175. *See supra* notes 104-21 and accompanying text.

176. *See supra* notes 117-18.

177. *See, e.g., supra* note 80 and cases cited therein.

178. *See, e.g.,* Larson v. Valente, 456 U.S. 228 (1982).

179. *See Donnelly v. Lynch*, 691 F.2d at 1034 ("[B]ecause the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions it must be evaluated under the test of strict scrutiny."). *But see* Conrad v. City of Denver, 656 P.2d 662, 671-72 (Colo. 1982) (rejecting the strict scrutiny test for a creche).

> *Larson v. Valente* apparently mandates the use of strict scrutiny analysis in every case where governmental discrimination among religions is demonstrated . . . . [W]e find that the issues involved and the specific text and purpose of our state constitutional provision make application of strict scrutiny analysis inappropriate. In *Larson v. Valente*, the preferential effect of the statute under consideration was self-evident upon its application to different religious groups. In the present litigation, however, the existence of preferential treatment, which triggered the use of strict scrutiny in *Larson v. Valente*, remains the major unresolved point of contention.

certainly no compelling governmental interest can be found to uphold the validity of the postmaster general's act of putting a famous religious painting on a commemorative stamp.[180] Certainly, no valid compelling governmental interest would permit the singing of Christmas carols or the portrayal of the story of the first Christmas in school programs.[181] Other than culture and tradition,[182] there is also no compelling governmental interest for preserving Christmas as a national holiday. In short, the strict scrutiny test is like using acid to remove a spot of grease from soiled cloth; it will simply sterilize American society by removing all vestiges of America's religious past. As noted above, this result is not required by the Constitution.[183]

Neither Christmas nor Thanksgiving Day, the national anthem, nor certain other national symbols with religious significance are presently in danger. Courts have shown an inclination toward distinguishing or ignoring the contradiction described above.[184] The curious result of this tendency is that while the

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This article agrees with the Colorado Supreme Court's view that strict scrutiny is inappropriate in creche cases.

180. *See* Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712 (D.D.C. 1967) (holding that the inclusion of a picture of the Madonna on a postage stamp during Christmas time does not violate the Constitution).

181. Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980) (holding that a school district's rules regarding Christmas programs were valid under the Constitution), *cert. denied*, 449 U.S. 987 (1980).

182. The district court in Donnelly v. Lynch, 525 F. Supp. 1150, 1170-71 (D.R.I. 1981), expressly rejected the contention that tradition was a valid purpose. *But see infra* note 195 and accompanying text.

183. *See supra* notes 58-59, 81-105 and accompanying text.

184. Efforts to distinguish Christmas from the symbolic representations of it are unpersuasive. The party making the distinction between Christmas and the creche, for example, must disavow the arguments he or she employed to attack the validity of the creche. For example, plaintiffs often use the argument, which applies with equal force to Christmas, that merely calling the creche secular will not "disguise its religious significance or origins." *See* American Jewish Congress, Memorandum on Display of Crosses, Crucifixes, Creches and Other Religious Symbols on Public Property 15 (1957) [hereinafter cited as American Jewish Congress, Memorandum] (Professors Pfeffer, Polier, and Maslow, arguing against the constitutional validity of religious symbols, state as one of their main postulates: "The constitutional prohibition of religious symbols on publicly owned property—cannot be evaded by designating the symbols 'non-sectarian' or 'secular.' "); *cf.* Donnelly v. Lynch, 691 F.2d 1029, 1035-37 (1st Cir. 1982) (Bownes, J., concurring) (Judge Bownes is careful to distinguish Christmas as a nonreligious holiday). *But cf. id.* at 1037-39 (Campbell, J., dissenting), in which Judge Campbell notes that the word "Christmas" is derived from "Christ's Mass" and then cites Webster's Third New International Dictionary on the definition of Christmas: "An annual church festival kept on December 25 or by the Armenians on January 6 in memory of the birth of Christ, celebrated generally by a particular church service, special gifts and greetings, and ob-

nation retains its link with the religious past, one by one, the states and local municipalities are forced to give up their time-honored religious traditions.[185] This result would astound Madison and Jefferson given the evidence that they understood the original intent of the first amendment to be a prohibition on the federal government, and not on the states.[186] But if strict scrutiny becomes the standard, as decisions such as *Graham* and the First Circuit in *Lynch* portend, the ironical result would be stripping public religious symbols at the local level while leaving them intact on the federal level.

III. A Proposal for Balancing Interests and Improving the Standard in Religious Symbol Cases

The contradiction in decisions dealing with national and local religious symbols presents the courts with difficult choices. Regardless of whether courts use a *Graham* approach or a strict scrutiny approach—both of which will almost certainly invalidate local traditions such as the Pawtucket and Denver

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served in most Christian communities as a legal holiday."

Whatever can be said for the creche as primarily representing the birth of Jesus Christ, the same argument seems relevant for Christmas itself. Merely calling it a secular celebration does not eradicate its religious meaning. *See* Justice Douglas's concurrence in Engel v. Vitale, 370 U.S. 421, 442 n.8 (1961):

> Some communities have a Christmas tree purchased with the taxpayers' money. The tree is sometimes decorated with the words "Peace on earth, goodwill to men." At other times the authorities draw from a different version of the Bible which says "Peace on earth to men of goodwill." Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants.

185. *See* Hitchcock, *supra* note 36, at 193-204. A cursory poll of decisions involving religious symbols in recent years tends to illustrate this point.

State/Local Use of Symbols	Valid	Invalid
1. Ten Commandments (1980)		X
2. Creche (1981-84)	X	X
3. Cross (1982)		X
4. School Christmas Programs (1980)	X	
5. Legislative Chaplains (1983)	X	
Federal Use of Symbols		
1. Motto on Coin (1978)	X	
2. Madonna on Stamp (1967)	X	

186. *See supra* notes 41-47 and accompanying text. Despite the Supreme Court's holding that the establishment clause is applicable to the states, given the evidence that the original intent was to prohibit Congress (i.e., the federal government), as opposed to the states, from taking any act "respecting an establishment of religion," at least as much deference should be given to state and local governmental use of symbols as to the federal government.

creches—courts must decide how to reconcile their decisions with national religious traditions, such as the national motto and the pledge of allegiance. They may decide to distinguish the national traditions and let the contradiction stand. Conversely, the courts may decide that all symbolism linked to religious purpose impermissibly establishes religion and discriminates against nonbelievers and is therefore unconstitutional. This approach would open the door to a complete divestiture of many established American traditions, a result that one writer has labeled "symbolic nakedness."[187]

This article rejects these approaches. By adopting a test that accounts for the unique characteristics of symbols and their role in American society, the courts can avoid the problems raised by the purpose-effect and strict-scrutiny tests. The proposal set forth below seeks to reconcile the constitutionally accepted commemorative traditions and their goal of cultural continuity with the vital concern of governmental neutrality toward religion as embedded in the establishment clause.

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187. *See* P. BERGER & R. NEUHAUS, *supra* note 17, at 32-33:

> Nobody has a legal right not to encounter religious symbols in public places and thus to *impose his aversion* to such symbols on the community that cherishes them. As long as public space is open to the full range of symbols cherished in that community, there is no question of one religion being "established" over another. Public policy is presently biased toward what might be called the symbolic nakedness of the town square. [Such a policy denies] the democratically determined will of the people to celebrate themselves—their culture and their beliefs—in public . . . .

Significantly, Judge Campbell, dissenting from the First Circuit's decision in *Donnelly v. Lynch,* pointed out that symbolic nakedness would be the logical result of the majority's refusal to acknowledge the similarity of Christmas and the creche.

> Because Christmas memorializes the founder of Christianity and is a church festival, it might be argued that the state and national governments should not be allowed to recognize it at all. Such an argument—unlike, I submit, the court's present position—would at least be logically consistent. In my opinion, the two most logically consistent positions are as follows: either Christmas itself, because of its inextricably intertwined religious roots, cannot constitutionally be a national holiday, in which case displays of the type here in issue would also be unconstitutional; or else Christmas is constitutional, in which case all its relevant symbols, including those depicting the nativity, are likewise constitutional, *so long as displayed for the purpose of announcing the holiday.*

691 F.2d at 1038; *see supra* note 184; *see also infra* notes 205-06 and accompanying text (Judge Campbell's formulation "purpose of announcing" is approximated in the "commemoration test").

A. *Establishing Constitutional Boundaries: Commemoration Not Promotion*

Because the standard set down by the establishment clause has been widely disputed, at this point it is possible to state only generally what the standard is. First, the Constitution almost certainly demands that church and state be separated so that no public institution may be permitted to set up a church.[188] Moreover, the Constitution demands that the government not directly or affirmatively aid one religious denomination over another.[189] However, the Constitution does not demand that there be a total removal of all things that have a religious significance or origin.[190] Somewhere between these extremes lies the correct constitutional goal. As Justice Goldberg wrote in *School District of Abington Township v. Schempp*,[191]

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.[192]

The test proposed by this article rests on the assumption that certain religious symbols as employed by the national and, to some extent, state governments have been constitutionally accepted and approved. This assumption relies on evidence of the Framers' intent and on significant court pronouncements and practice since the ratification of the Constitution and the first amendment.[193] The proposed test also assumes the presumptive constitutionality of religious symbols employed by state or local governments and that are essentially tied to and have the same characteristics as an established national tradition. In short, this article suggests that a distinction must be drawn between the promotion of a religious organization and the commemoration of

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188. *See supra* notes 37-40 and accompanying text.
189. *See supra* notes 58-80 and accompanying text.
190. *See supra* notes 51-59, 81-100 and accompanying text.
191. 374 U.S. 203 (1963).
192. *Id.* at 308 (Goldberg, J., concurring).
193. For a discussion of what constitutes an established national tradition, see *infra* notes 195-202 and accompanying text.

a national or area tradition that has religious origins. If local use of a religious symbol can be identified as commemorating an already constitutionally established American tradition, that use should be considered constitutional.[194]

B. *Definition of "Established National and Area Tradition"*

Certain American traditions, despite their religious origins, have been interwoven "so deeply into the fabric of civil polity" that they have been virtually accepted by the courts as being outside the "type of involvement which the First Amendment prohibits."[195] Christmas and Thanksgiving Day exemplify such traditions. Though obviously related to religious values, these events have acquired not only the strength that widespread recognition and long historical celebration brings, but also the imprimatur of congressional and presidential decrees.[196] These three criteria—the test of time, public recognition in a defined geographical area, and some form of enduring official sanction—are keystones to recognizing whether a tradition with a religious origin has become accepted and established.[197]

Established traditions with religious origins may exist on a local or regional level. The same factors which sustain the national traditions[198] will substantiate a regional or state tradition, although deciding what constitutes an accepted local or regional tradition may require a more careful weighing of historical and

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194. For another formulation of this idea, see Judge Campbell's statement, *supra* note 187.

195. This formulation is taken from Mr. Justice Brennan's lengthy and often quoted concurrence in *School Dist. of Abington Township v. Schempp*. See *supra* note 113 for the context of this quotation.

196. *See supra* notes 11-16, 83, 184. *See generally* R. MEYERS, THE COMPLETE BOOK OF AMERICAN HOLIDAYS (1972). Other examples of accepted national cultural traditions with religious underpinnings include the national anthem and certain other patriotic songs, *see supra* note 85; the pledge of allegiance, *see supra* note 88; the use of the Bible in administering oaths of inauguration, *see supra* notes 82, 117-18; and congressional and military chaplains, *see supra* notes 84, 94-95.

197. Contrast the holiday of Easter. Easter, though time-tested, is not an official national holiday. This may be for good reason; Easter is by far the most significant religious celebration in Christianity. More than commemorating the death of Christianity's founder, Easter commemorates a religious tenet—the resurrection of Jesus Christ. *See* Fox v. City of Los Angeles, 22 Cal. 3d 792, 809, 587 P.2d 663, 673, 150 Cal. Rptr. 867, 877 (1978) ("[W]hatever may be said for the secular nature of the Christmas holiday, the same cannot be argued for Easter."); *cf.* Brown v. Thomson, 435 U.S. 938 (1978) (Supreme Court stayed federal court decision allowing New Hampshire statute ordering flags to be flown at half-mast on Good Friday).

198. *See infra* notes 261-65 and accompanying text.

other data because (in contrast to national symbols) judicial opinion or dictum may omit the subject.[199]

The concept of an established national or local tradition, of course, must be narrowly drawn. Mere longevity of a custom with religious origins should not be sufficient to validate it. In addition to a widely recognized historical basis, there must be other evidence that the custom is part of the fabric of a region, state or locality. Care must be taken, however, not to overstate this concern. Established traditions by their very definition are easily recognized by analogy to the accepted symbols discussed above.[200]

Symbols represent traditions, although in proper circumstances symbols can also become traditions. The words "In God We Trust," for example, symbolize and commemorate the American tradition of acknowledging a belief in God in affairs of state.[201] This link or connection from the words to the tradition, plus the fact that the government uses the words in a way that acknowledges religion (but does not promote it), validates the symbol.[202]

C. *The Commemoration Test: A Proposal*

Answers to two questions will determine whether a municipality's or state's use of a symbol is constitutional: (1) Is the *symbol itself* linked to an established American or local tradition? (2) Is tbe state or local government's *use* of the symbol likewise linked to that established American or local tradition?

1. *The religious symbol must be linked to the commemoration of a constitutionally established tradition*

The first test provides the critical means, lacking in the First Circuit's opinion in *Lynch*[203] and the Supreme Court's

199. For example, many judicial opinions have discussed the national symbols to distinguish them from, or compare them to, the local religious symbols in question. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (arguing that the stata motto was not different from the national motto); School Dist. of Abington Township v. Schempp, 374 U.S. 293, 300-01 (1963) (Brennan J., concurring) (distinguishing tbe national motto—permissible involvement—from Bible reading—a nonpermissible involvement); Zorach v. Clauson, 343 U.S. 306, 312-13 (1952) (using certain national symbolism as examples of permissible governmental involvement with religion).

200. *See supra* notes 81-91 and accompanying text.

201. *See supra* note 86.

202. *See infra* note 205 and accompanying text.

203. 691 F.2d 1029 (1st Cir. 1982).

opinion in *Graham*,[204] for assessing the nature of a symbol. A court should examine whether the symbol relates to a tradition already deemed acceptable. If the court finds a valid link—if the symbol can be seen to commemorate or announce[205] an acceptable tradition—then the court presumes that the symbol may be constitutionally acceptable despite any religious purpose.[206] Some factors establishing a link would include evidence that the symbol has been customarily used to commemorate or announce the accepted tradition,[207] the presence of an obvious reference to such tradition,[208] and the absence of references to unacceptable traditions.[209] This inquiry should not weigh the relative strength of the link to the tradition in comparison with its link to religion. This arm of the test merely ensures that the symbol in question has a commemorative purpose.

2. Governmental use of the symbol must have a valid link to the commemoration of the constitutionally established tradition

The first step demonstrates that the symbol in question has a valid secular purpose: commemoration. The second step determines whether commemoration is a primary function of the symbol. Important factors in this inquiry are (1) whether the local government's use of the symbol resembles the symbol's con-

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204. 449 U.S. 39 (1980).

205. The term "announce" was used by Judge Campbell in his dissent, *Donnelly v. Lynch*, 691 F.2d at 1038 (Campbell, J., dissenting), and, because of its emphasis on nonreligious purpose, is in many ways superior to the word "commemorate." Commemoration is used because it applies more easily in more contexts, but emphasis is given to the announcement connotation of the word.

206. Stated another way, if a valid link exists the local symbol may be presumed not to be in any suspect class of symbols that are inherently religious. For a discussion and critique of the application of strict scrutiny to cases involving religious symbols, see *supra* notes 170-73 and accompanying text.

207. It would be significant, for example, if the symbol in question were widely accepted and used in many settings (including private business) to announce a particular tradition. Examples include the star atop a Christmas tree, angel choirs, and Christmas carols to announce Christmas. These symbols are used to decorate windows, greeting cards, and shopping centers.

208. An obvious reference is one that is recognized with little or no explanation. It would not be necessary to explain, for example, a group of angels singing in a store window in December.

209. The more exclusive the reference, the stronger the presumption of validity. For example, a symbol such as a cross has strong references to more than one tradition; a permanently erected cross, therefore, cannot be said to make an exclusive reference to Christmas.

sistent, longstanding use by other government organizations to commemorate the same tradition,[210] and (2) whether the local government's employment of the symbol is seasonally or otherwise connected to the established tradition. Evidentiary weight, although not necessarily dispositive weight, can be given to the religious object's use in conjunction with other objects designed to commemorate the tradition.[211] Moreover, contrary to the majority in *Graham*, weight should be given to the government institution's publicizing that its use of a religious symbol is linked to the commemoration of an accepted tradition.[212] While such evidence is not always necessary to establish a link between the use and the tradition—there are some situations in which the link between the use and the national tradition is already publicly accepted[213]—such action on the part of government officials should be recognized as a good faith effort to meet the demands of constitutional neutrality and cultural continuity, rather than as an effort to whitewash their actions for the benefit of the courts.[214] The presumption of good faith seems warranted once a link is established under the first prong of the proposed test between the symbol and a constitutionally valid tradition.

It might be noted, however, that consideration of the contextual evidence and other evidence is designed only to establish the quality of the link between the questioned symbol and the established tradition; it is not an effects analysis.[215] For example, little or no weight should be given to whether the symbol has a primarily religious significance in other contexts. Moreover, little weight should be given to the testimony of experts or selected persons from the community. Consideration of such evidence, as

210. Not only must the symbol itself be related to the holiday or other tradition, but the government's use of it must be so related. Therefore, it is important to note anything unique about a particular use. Suppose, for example, a particular city erected a creche and allowed a local congregation to hold mass next to it. Such a use is not linked to the commemoration of Christmas and would be invalid under this test.

211. Unlike the First Circuit in *Lynch*, this article takes a position similar to that taken in Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) and *Citizens II*—that the context of the symbol does carry evidentiary weight once the first inquiry has been satisfied. *See supra* notes 147-54 and accompanying text.

212. *See supra* note 108 and accompanying text. For a case holding that a recital of secular purpose has significance, see Allen v. Morton, 495 F.2d 65, 73-74 (D.C. Cir. 1973).

213. *See supra* note 196.

214. This was the Court's underlying suspicion in *Stone v. Graham*, 449 U.S. at 42. *See supra* note 196. The Court based its decision on the conclusion that the Ten Commandments were inherently religious and that no secular purpose was therefore possible.

215. *See supra* notes 155-57 and accompanying text.

discussed above, leads to an irreconcilable, contradictory, all-or-nothing position.[216] Rather, reliance should be placed on the validity of the link between the constitutionally accepted tradition and the use of the local symbol; once that link is established, the threat is deemed to be "mere shadow."

Court opinions contain several arguments related to the principles underlying the use of the commemoration test. These arguments attack the use of culture and tradition in determining the constitutional validity of a religious symbol.[217] The first argument is that time alone is not sufficient to establish culture or tradition.[218] The district court in *Lynch* phrased the argument as follows:

> Particularly when a belief or practice has been common to the majority for a long time, it becomes easy to regard the belief or practice as a matter of culture or tradition and thereby imply that they have somehow attained a neutral, objective status. . . . [T]he fact that a belief is held by sufficient members of society to render it part of our culture as a whole, or that a practice is observed for a sufficient length of time to give it the status of one of our traditions does not mean that the belief or practice ceases to be religious or to be identified with one group.[219]

The commemoration test is not based on the fact that time alone has legitimized the underlying tradition. Rather, in each case the established cultural tradition must have been accepted by some form of enduring official sanction (for example, the declaration of Christmas as a national legal holiday by the president

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216. *See supra* note 156 and accompanying text.

217. *See* Donnelly v. Lynch, 525 F. Supp. 1150, 1170-71 (1981). The district court's opinion deals at length with the city's contention that the city put up the creche for purposes of culture, heritage, and tradition.

218. *See, e.g.,* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)) ("[H]istorical acceptance without more [does] not alone [suffice], as 'no one' acquires a vested right in violation of the Constitution by long use"). *But cf.* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), *cited with approval in* Marsh v. Chambers, 103 S. Ct. 3330, 3334 (1983) (an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of its true meaning"); Colo v. Treasurer and Receiver General, 378 Mass. 550, 557, 392 N.E.2d 1195, 1199 (1979). In *Colo*, after citing *Walz*, the court noted, "The long history of a certain practice, however, and its acceptance as an uncontroversial part of our national and State tradition do suggest that we should reflect carefully before striking it down."

219. 525 F. Supp at 1170-71.

and Congress, and court acquiescence or legitimization).[220] Therefore, the commemoration test meets the concern that local governments will have unrestrained discretion to promote religious customs because local governments do not have the latitude to name just any local custom a tradition. The local government must link the local custom to the type of tradition that has become established.

The second argument is that the line between acknowledgement or commemoration and promotion is too thin. The district court in *Lynch* argued that when the religious beliefs at the center of a tradition are those of the majority, the acknowledgment of this tradition becomes promotion of the religious ideals.[221] This concern is met by the second part of the commemoration test: government's employment of the symbol must be linked, in an acceptable way, to the commemoration of the established tradition. Thus, a government is compelled to use a creche, for example, in a way that broadcasts its link to Christmas and nothing more.[222] Thus, the test encourages the caution that is mandated by the Constitution but avoids the symbolic nakedness that is not.

D. *Accommodation of Minority Religious Groups Under the Commemoration Test*

Perhaps the most persuasive argument against the commemoration test is that the only established religious traditions are those that represent majority values and that the commemoration test, which relies on already established traditions only, does nothing but insure further cultural alienation of the minority religion.[223] It does appear, for example, that under the commemoration test as formulated above the mayor of a large city

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220. *See supra* note 196 and accompanying text.

221. 525 F. Supp. at 1170-72.

222. This article argues that in cases like *Stone*, when the question is close, it is good that the commemoration test compels the local government to have a recital because it publicizes the government's concern for the minority culture.

223. The terms "minority" and "majority" in this context are in many ways misguided. It is true that a religious tradition, by definition, discriminates between persons who have religious beliefs and those (like atheists) who do not; however, as illustrated by Madison's Thanksgiving Day Proclamation of 1813, *see supra* note 98 and accompanying text, all established American civil religious traditions have been made scrupulously general and nondenominational. Singling out a religious denomination in any way is prohibited by the Constitution. It follows, therefore, that the religious majority in America means a large heterogeneous group with no single organization to plan or plot an establishment of religion.

could not, for example, publicly acknowledge—even for the purpose of promoting intercultural understanding and community spirit—the celebration of Chanukah[224] because Chanukah is not an established national American tradition. Therefore, it may be appropriate to modify the commemoration test in cases in which government acknowledges minority symbols and traditions. A modification of the test might provide that when a city acknowledges[225] or accommodates a non-Christian religious group, a presumption of commemoration (as opposed to promotion) is warranted. This would be especially appropriate when there exists in a community a number of persons who belong to a non-Christian group whose tradition is a recognized seasonal event in the nature of a festival.[226] This kind of acknowledgment is consistent with the important governmental goal of fostering community cultural identity and cooperation.[227] In this situation, the commemoration test would be applied as follows: (1) the symbol or symbolic act[228] involved must be linked to the commemoration of an established minority tradition,[229] and (2) the govern-

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224. Chanukah is the Jewish festival of lights celebrated in December.

225. "Acknowledge" was the term used by the defendants in *Lynch. See* 525 F. Supp. at 1170. "Accommodation" is a term used in a number of United States Supreme Court decisions around which the concept of benevolent neutrality has developed. As explained by several justices, for government not to engage in certain types of accommodation would be tantamount to hostility between government and religion. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976) ("A hermetic separation as among religion and between religious and other activities is an impossibility [the Court] has never required."); Zorach v. Clauson, 343 U.S. 306, 313-14 (1951) ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs."); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4, at 822 (1978). "[T]here are necessary relationships between government and religion; . . . government cannot be indifferent to religion in American life; and . . . far from being hostile or even truly indifferent, it may, and sometimes must, accommodate its institutions and programs to the religious interests of the people." *Id.*

226. *See generally* E. JAMES, SEASONAL FEASTS AND FESTIVALS (1961). *See also* H. DUNCAN, *supra* note 3, at 181 (a festival promotes community excitement and goodwill).

227. *See* E. JAMES, *supra* note 226, at 202. James explains that the cohesiveness engendered in the celebration of feasts and festivals in minority groups often provides a position of strength to the minority group in influencing the institutions of society.

228. For example, one could envision the city fathers publishing in a local newspaper an announcement wishing members of a minority group well during their religious festivities.

229. For a discussion of factors that are relevant in determining whether a tradition is constitutionally accepted or established because of its cultural and historical significance, see *supra* nota 209 and accompanying text.

ment's use of the symbol must likewise be appropriately linked to the commemoration of that minority tradition.

On the other hand, problems attend the creation of such an exception. A local government might regularly acknowledge one minority group's tradition but fail to recognize another's. Drawing the line between accepted and unaccepted local traditions may be difficult and problematic for municipalities and courts. All in all, however, the benefits of this acknowledgment of minority customs breathe into the commemoration test the flexibility so important to the viability of the American Constitution in an increasingly diverse society.

IV. Application of the Proposed Standard

The proposed commemoration test can be illustrated and clarified by applying it to two symbols that have recently been the focus of litigation: nativity scenes and crosses.

A. *The Creche Cases*

It may be instructive to apply the proposed test to the facts of *Lynch* and *Citizens II* discussed above.[230] First, there is an obvious link between the creche[231] and the national holiday of Christmas. The festival of Christmas, although intertwined with many secular and pagan customs and rituals,[232] is firmly rooted in the biblical account of the birth of Jesus Christ.[233] Symbols used to represent the biblical aspects of Christmas are numerous. The star atop the traditional Christmas tree,[234] angel choruses and the singing of carols,[235] mangers,[236] even the giving of gifts[237] to some degree symbolize the original biblical account. The nativity scene is perhaps the most direct symbol of the bib-

230. *See supra* notes 126-46 and accompanying text.

231. The creche, or "Christmas crib," was popularized by St. Francis of Assisi in 1223. See 4 Encyclopedia Britannica s.v. *Church Year* 603 (1975) (Modern-day displays usually try to pull together most of the symbols associated with the biblical account: Mary, Joseph, the babe in the manger, the star over the stable, the wise men bearing gifts, and the shepherds); *see infra* notes 234-37.

232. *See Lynch*, 691 F.2d at 1035-37 (1982) (Bownes, J., concurring); J. Barnette, The American Christmas: A Study in American Culture (1954); R. Meyers, *supra* note 196.

233. *See supra* note 184.

234. *Matthew* 2:2.

235. *Luke* 2:13-14.

236. *Luke* 2:12.

237. *Matthew* 2:11.

lical account (although it can be argued that the singing of traditional Christmas songs and dramatic portrayals like those that were the subject of *Florey v. Sioux Falls School District*[238] are at least as direct). In sum, the creche has traditionally been used to symbolize the Christmas season,[239] even though its emphasis is on the historical and religious, rather than the secular, nature of Christmas.

The second inquiry concerns the link between the cities' use of the creche and commemoration of the holiday of Christmas. In *Lynch* and *Citizens II*, the creches were displayed only during the Christmas season.[240] Both were displayed with other symbols traditionally used to commemorate Christmas.[241] This contextual evidence is significant because on different facts there could be a different conclusion. For example, the dissenting judge in *Lynch* noted, "Had a solitary creche been displayed in July, one might see it as designed to serve chiefly religious ends, since there would then be no holiday with which it was particularly identified."[242] Under the commemoration test analysis, it would be correct to state that the creche in Judge Campbell's hypothesis could not stand under the second inquiry, since

238. 619 F.2d 1311 (8th Cir. 1980). The challenged school programs typically included, among others, the following songs: "Come Shepherds, Leave Your Flocks," "Follow His Star," "He Whom Joyous Shepherds Praised," and "What Shall I Give to This Child in the Manger." Pevar, *Public Schools Must Stop Having Christmas Assemblies*, 24 ST. LOUIS U.L.J. 327, 336-37 (1981); *see also* 619 F.2d at 1323 (McMillian, J., dissenting) (discussing the carols "Silent Night" and "O Come All Ye Faithful"). The songs arguably accomplish no less with words than does the creche with objects.

239. No argument need be made in the commemoration test that the creche contains no objects that have deep religious significance to certain people. That much is conceded. *See supra* notes 155-57 and accompanying text. Applying the first prong of the commemoration test merely points out that the creche (in addition to any religious significance) may be used to commemorate Christmas.

240. The Denver Christmas display is put in place by mid-December and is maintained until the end of the National Western Stock Show in the latter part of January. Conrad v. City of Denver, 656 P.2d at 666 (Colo. 1982). The Pawtucket creche is erected each year in November. *Lynch*, 525 F. Supp. at 1154. The seasonal factor was also important in *Florey*. For example, the school district's policy for holding school programs stated that, "The use of religious symbols such as a cross, menorah, crescent, Star of David, creche . . . is permitted as a teaching aid or resource provided such symbols are . . . *temporary* in nature." *Florey*, 464 F. Supp. at 918 (emphasis added). *But cf.* Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (seasonal nature of cross display was not significant enough for California Supreme Court).

241. Both displays contained figures associated with Sante Claus as well as other secular symbols. *See supra* notes 130 and 136.

242. 691 F.2d at 1037-38.

there is no link between any accepted tradition and the city's use of the creche in July.

The facts of a recent New York case, *Goldstein v. Fire Department of Suffern*,[243] provide an instructive contrast with the *Lynch* and *Citizens II* cases. In *Goldstein* the plaintiff sued under the establishment clause to enjoin a fire department's use of a banner that read "Keep Christ in Christmas."[244] The first inquiry of the commemoration test shows that, like the creche, there was an obvious link between the symbol and the holiday of Christmas. Notwithstanding a valid commemorative link with the Christmas holiday, however, the motto is suspect under the second inquiry. The use of the motto did not have a commemorative link to Christmas. The motto was not used with other symbols or in a context traditionally designed to commemorate the Christmas season.[245] Moreover, the motto itself is new and lacks the force of enduring custom; the use of the motto is more readily linked by circumstance to organized counterattacks on groups such as the American Civil Liberties Union and others[246] who have been plaintiffs in religious symbol cases. The lack of this last link is fatal, as it would be to a creche if evidence could be shown that it was not used to commemorate Christmas. The net effect of having failed the second inquiry is that the presumption of constitutional validity is rebutted; the burden of proof shifts back to the defendant, and, as noted above,[247] the shift is usually dispositive.

B. The Cross Cases

In many ways, cases involving the maintenance of a Latin cross by public institutions provide a much closer and therefore more interesting analysis than the creche. Perhaps the leading cross case is *Eugene Sand and Gravel, Inc. v. City of Eugene*.[248] In Eugene, Oregon, a succession of large wooden Latin crosses had existed since the 1930's on a portion of prominent ground owned by the city. The city had not participated in erecting any

243. 559 F. Supp. 1389 (S.D.N.Y. 1983).

244. *Id.* at 1390.

245. *Id.* The opinion does not mention other symbols. For the purpose of this analysis, it is assumed that there were none. However, even if used with other symbols, the motto still has problems. *See infra* notes 246-48 and accompanying text.

246. *See, e.g., Lynch*, 525 F. Supp. at 1161-62.

247. *See supra* notes 142-51 and accompanying text.

248. 276 Or. 1007, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

of the crosses nor given its permission, but in 1964 Eugene Sand and Gravel, after replacing a weatherworn cross with a permanent cement cross, applied for and was granted a building and electrical permit by the city. Evidence at the trial showed that the cross was to be lighted at the Christmas and Easter seasons. A local citizen brought suit to enjoin the action, and the trial court granted the injunction. The Oregon Supreme Court reversed[249] but on rehearing reversed again,[250] holding that the cement cross was unconstitutional. Then, rather than remove the cross, the city amended the city charter to designate the cross as a war memorial and ordered a plaque erected announcing this purpose.[251] When suit was brought again in the Oregon Supreme Court, the city's use of the cross was sustained.[252]

The cross, before being designated as a war memorial, has trouble with both parts of the commemoration test. First, although there is a clear link between the cross and Jesus Christ[253]

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249. Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117 (1969).

250. Lowe v. City of Eugene, 254 Or. 518, 459 P.2d 222, *aff'd on rehearing*, 254 Or. 518, 463 P.2d 360 (1969).

251. The Charter amendment read in part,

> BE IT ENACTED BY THE ELECTORS OF THE CITY OF EUGENE, OREGON,. . .
>
> . . . That the City of Eugene be and is hereby empowered . . . [to] accept a deed of gift of the concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park.
>
> . . . That the concrete cross structure shall remain at said location and in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be known as the "Veterans War Memorial Cross."
>
> . . . That the American Legion . . . is hereby authorized at its own expense to prepare . . . a suitable and fitting plaque . . . consistent with the intandments of this act.
>
> . . . [T]he Park and Recreation Department of the City of Eugene . . . is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited to, Memorial Day, Independence Day, Thanksgiving, and the Christmas season, and Veterans Day.

Eugene Sand and Gravel, Inc. v. City of Eugene, 276 Or. 1007, 1009-10 n.1, 558 P.2d 338, 340 n.1, *cert. denied*, 434 U.S. 876 (1977).

252. *Id.* at 1026, 558 P.2d at 349.

253. *See, e.g.*, T. FAWCETT, *supra* note 3, at 21-24 ("[The cross] was chosen . . . because it represented an event in the career of Jesus which expressed his character and the nature of his mission."). *Compare* H. DUNCAN, *supra* note 3, at 164 ("For the Christian there is nothing greater than the cross.") and ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1111 (11th Cir. 1983) (ruling the cross unconstitutional even though the county recited tourism as a purpose), *with* Meyer v. Oklahoma City, 496 P.2d 789, 792-93 (Okla. 1972) (allowing the cross after noting that the cross had a secular meaning because it was in a commercial setting). Under the commemoration test, the

and the festival of Easter, the link between the cross and established national holidays, such as Christmas, is less clear. Second, the city's use of the cross is difficult to link to an established national tradition because (1) the cross, unlike the creche, was permanent, and (2) because it was lit on Easter, an unofficial American holiday. Under the commemoration test, therefore, the city's use of the cross would be invalid.

By contrast, however, the commemoration test applied to the facts of *Eugene Sand and Gravel* after the cross was dedicated as a war memorial might yield a different analysis. By amending the city charter,[254] the city fathers implied a link between the cross and the custom of marking the gravesites of America's war dead. Assuming that using the cross to mark the gravesites of war dead passes muster under the definition of an established American tradition,[255] the city fathers could have asserted that the first prong of the commemoration test is met. Although not a universal grave marker—indeed persons of a Jewish background, for example, would object to having the gravesite of a loved one marked with a cross[256]—the city fathers might have contended that the cross is the most common and

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crosses in both *Rabun* and *Meyer* would be held outside of the permissible scope of constitutional intent. In both cases there was no link between the use of the religious symbol and an established American tradition. *Cf.* Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (if the cross is temporary and linked primarily to the commemoration of Christmas, application of the commemoration test would probably lead to a different result than was reached by the California Supreme Court, which invalidated the city's practice); Smith, Fox v. City of Los Angeles: *The State, the Cross and Constitutional Religious Symbolism,* 11 Sw. U.L. Rev. 713 (1979) (criticizing the California Supreme Court for taking a strict neutrality stance when application of *Lemon* tripartite test would demand benevolent neutrality).

254. *See supra* note 251.

255. A crucial issue of fact in this or any case employing the commemoration test is whether the underlying tradition—in this case marking the grave sites of war dead with a cross—is in fact an established American tradition. In cases such as Christmas, the issue is resolved both by a long continuous national practice of Christmas celebration and official national pronouncements that Christmas is a national holiday. *See supra* note 196 and accompanying text. The use of a cross as a marker is a much closer case. *See infra* note 258 and accompanying text.

256. *See, e.g.,* 4 Jewish Encyclopedia 368 (1916), *quoted in* American Jewish Congress, Memorandum, *supra* note 184, at 20.

> [The cross] being a Christian symbol, . . . has always been scrupulously avoided by Jews. Pious Jews would not even wear badges or decorations with the cross attached to them, whereas some more liberal ones do not hesitate to wear either the Iron Cross as German soldiers, or the Red Cross as members of the Red Cross Society. . . . The Jewish aversion to using any sign resembling a cross was so strong that in books on arithmetic or algebra written by Jews the plus sign was represented by an inverted "kamez."

historically accepted form of grave marker employed in this context. The presence of the plaque[257] reciting that the cross's use was linked to the purpose of remembering war dead and the lighting of the cross only on civil holidays such as Memorial Day carry evidentiary weight toward satisfying the second prong of the test. *Eugene Sand and Gravel,* however, is a close case because the evidence establishing the use of a cross to mark the gravesites of fallen American soldiers as an accepted American tradition is not clear. Research uncovered no direct official pronouncements upholding the cross as a sanctioned American tradition.[258] Moreover, despite the frequent employment of a cross as a matter of individual choice, there appears to be no definitive historical pattern showing the use of the cross for public memorial purposes.[259] Finally, the city's use of the cross in *Eugene Sand and Gravel* may be suspect under the second prong of the commemoration test because of the case's unique history.[260] A third case, *Johnson v. Board of Commissioners,*[261] provides a chance to examine the commemoration test with symbols

257. *See supra* note 255.

258. *Cf.* 32 C.F.R. § 553.20 (1983) (noting only that headstones for national cemeteries be appropriate, which is defined in 38 U.S.C. § 906(c) (1981) as "aesthetically compatible with the area of the cemetery in which [the marker] is to be placed"); *id.* § 553.21 (noting that "[e]xcept as may be authorized for marking group burials, ledger monuments of freestanding cross design, [etc.] . . . are prohibited." This implies that in certain circumstances a freestanding cross monument may be authorized); *but see* Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983) (holding unconstitutional a department of transportation plan to erect a statue of Jesus on a condemned cemetery, but holding constitutional the erection of latin-cross grave markers, or other religious symbols, according to the desires of the descendants).

259. A recent case, ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984), touched upon the issue of whether the cross as a war memorial has its roots in American tradition. In that case the county had approved the erection of a latin-style cross as well as a Star of David on county property that had been designated "a passive area for personal reflection and meditation." When constitutional challenges were raised, the county proposed to turn the area into a war memorial. After finding the symbols in violation of the purpose and effect branches of *Lemon v. Kurtzman,* the court stated that "[a]lthough these religious symbols may be used in American veterans' cemeteries around the country and abroad, there is no history or pattern of their use in public parks for commemorating the war dead." 589 F. Supp. at 237.

The court's statement, though not substantiated by the evidence in the case, may indeed correspond to the research discussed above. *See supra* note 258. This research has not proved that there is an established national tradition for using a cross as a general—as opposed to a freely chosen, individual—marker for grave sites. Local uses, acceptable under the commemoration test, however, do exist. *See infra* notes 261-65.

260. *Eugene Sand and Gravel, Inc.,* 276 Or. at 1026-30, 558 P.2d at 349-51 (Denecke, C.J., dissenting).

261. 528 F. Supp. 919 (D.N.M. 1981).

commemorating local traditions. Bernallilo County, New Mexico, employed a seal that contained a cross.[262] In upholding the seal against attack under the establishment clause, the court found the historic and cultural relationship between the county and the Catholic church to be significant. The area had first been discovered and settled by Catholic explorers.[263] In the area's early history, Catholicism was the state religion.[264] The court noted that the translation of the name Santa Fe, a city within the same general area, means "the city of the Holy Faith."[265] The court also noted that the seal in question (including the cross) had been used at least since 1925. Although there is no established national tradition with which the cross can be linked under the commemoration test, there is an obvious and direct link to the *local* culture and history that has been interwoven with the Catholic Church. As with an established national tradition that has lost much of its religious significance and is associated with American culture and history, the commemoration test recognizes that when the facts are compelling, as in *Johnson*, governmental links with established local traditions can also create a presumption of commemoration as opposed to promotion.

V. Conclusion

This article has presented for consideration a new way to approach the adjudication of disputes involving the constitutionality of religious symbols. Several critical concepts underlie this proposed method. The first is that societies generally and public institutions specifically need to promote cultural uniformity. Symbols are a natural means of accomplishing this end. Second, since much of America's history surrounds people who held devout religious convictions, many of America's symbols, on the national as well as the local level, reflect that historical fact. Third, while the Framers of the Constitution undoubtedly promoted the important ideal of separation between church and state, evidence abounds from the writings and actions of the Framers themselves and from the actions and opinion of Congress, the presidents, and the Supreme Court, that this ideal was

262. The seal is described in full, *id.* at 920-21.
263. *Id.* at 922.
264. *Id.*
265. *Id.* at 924.

not intended to censor from civic America all symbolism with religious significance or origin. Fourth, contradictions in modern court decisions in religious symbol cases exist largely because the standards applied in these decisions have failed to account for the relationship between local practice involving symbols and established national or local traditions.

America was founded by, and has continued to be a land of, peoples with different backgrounds and philosophical beliefs. This fact in no way escaped the notice of the Framers, nor has it escaped the notice of the interpreters of the Constitution. The Constitution was designed to protect even those who adhere to beliefs not widely held. This article, however, has proposed that constitutional protection of the minority does not mandate the removal from public society of all vestiges of America's religious past. It is not helpful to suggest that America's religious nature is best promulgated outside of the public domain by private groups and individuals, a suggestion that misses a vital point. Although worship is an individual matter, culture and tradition are a community, state, and national concern. There is a symbolic representation that can only be employed by public institutions. Over the years, in full view of the constitutional requirement of neutrality, examples of this type of symbolism have been accepted as part of the American way of life. The commemoration test proposed by this article is one way to provide an understanding and application of the principles underlying this acceptance.