Beyond the "Plastic Reindeer Rule": The Curious Case of County of Allegheny v. American Civil Liberties Union

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I. INTRODUCTION

The United States Supreme Court has long wrestled with the task of giving meaning to the Establishment Clause1 of the First Amendment of the Constitution in modern American society. Despite over forty years of labor,2 the Court's efforts to fashion a clear, predictable and consistent framework for drawing the line between government3 and religion have been largely unsatisfying. Scholarly commentary critical of the Court's Establishment Clause jurisprudence abounds.4 Even individual justices on the Court have expressed dissatisfaction and chagrin at the development of constitutional doctrine in this area.5

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1. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.


3. The Establishment Clause was made applicable to the states through the Due Process Clause of the Fourteenth Amendment in the Everson case. See Everson, 330 U.S. at 8, 15-16.


5. See, e.g., Edwards v. Aguillard, 482 U.S. 478, 639, (1987) (Scalia, J., dissenting) (Establishment Clause jurisprudence is "embarrassing"); Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (White, J., dissenting) ("it would be quite understandable if we undertook to reassess our cases . . . dealing with the Establishment Clause"); Id. at 107 (Rehnquist, J., dissent-
One particularly problematic area of Establishment Clause jurisprudence has involved the display of religious symbols under public auspices. In March, 1984, the United States Supreme Court handed down a major decision in this sensitive area. In the case of Lynch v. Donnelly, a deeply divided Court held that the City of Pawtucket, Rhode Island's inclusion of a nativity scene in an annual holiday display did not violate the Establishment Clause. The highly critical reaction to the Lynch decision echoed the discontent voiced over the Court's Establishment Clause jurisprudence. Moreover, rather than ending litigation over the question of religious displays under governmental auspices, Lynch only served to increase it. Confusion over the Lynch case reigned as various federal courts throughout the nation labored to apply Lynch to displays in different physical contexts.

With the grant of certiorari in the case of County of Allegheny v. American Civil Liberties Union, the United States Supreme Court was presented with an excellent opportunity to settle the controversy over the scope and meaning of Lynch and to provide clear guidelines for future displays of religious symbols. Moreover, with the ascension of Anthony Kennedy to the Court, County of Allegheny provided the vehicle to reassess and to change the much maligned three-pronged Lemon v. Kurtzman test, the Court's
longstanding analytical framework for deciding Establishment Clause cases.

Judged by these expectations, County of Allegheny was a major disappointment. Although the decision in County of Allegheny marked the acceptance of a reformulation of one of the prongs of the Lemon test, the tri-partite framework still remained in tact as the accepted method of Establishment Clause analysis. Moreover, by drawing even finer distinctions between what is constitutionally permissible and impermissible, the Court in County of Allegheny failed to provide any meaningful guidance concerning future holiday displays.

This article is divided into four parts. Sections Two and Three provide the necessary background to the County of Allegheny case by reviewing the Lynch case and the varying interpretations of the scope of Lynch within the lower federal courts. Section Four examines in close detail the County of Allegheny case and the principal opinions connected with that case. Section Five examines the practical implications of the County of Allegheny case. This section concludes that the Supreme Court's new analysis for public displays of religious symbols adopted in County of Allegheny, which can best be described as "beyond the plastic reindeer rule," is destined to produce inconsistent and varying results in practice.

II. LYNCH v. DONNELLY

For over forty years, the City of Pawtucket, Rhode Island erected a lighted Christmas display. The display, which was situated in a private park located in the City's downtown shopping district, was comprised of a number of items, many of which were traditional secular Christmas decorations. Included in the foreground was a "talking" wishing well; Santa's House, inhabited by a live Santa who distributed candy; a grouping of caroler/musician figures in old-fashioned dress, standing on a low platform surrounded by six large artificial candles; a small "village" composed of four houses and a church; four large, five-pointed stars covered with small white electric lights; three painted wooden Christmas tree cutouts; live, 40' Christmas tree strung with lights; a spray of reindeer pulling Santa's sleigh, set on an elevated run-

12. See infra, note 85-86 and accompanying text.
15. The district court listed the following items in the display: a "talking" wishing well; Santa's House, inhabited by a live Santa who distributed candy; a grouping of caroler/musician figures in old-fashioned dress, standing on a low platform surrounded by six large artificial candles; a small "village" composed of four houses and a church; four large, five-pointed stars covered with small white electric lights; three painted wooden Christmas tree cutouts; live, 40' Christmas tree strung with lights; a spray of reindeer pulling Santa's sleigh, set on an elevated run-
ground of the City's holiday display was a nativity scene or creche. The nativity scene consisted of life-sized figurines of the traditional characters: the Infant Jesus, Mary and Joseph, angels, shepherds, kings and animals. The entire display was not only owned and erected by city workers but also illuminated with lights and electricity paid for by the City. Each year the display was opened with elaborate ceremonies conducted by the Mayor.

The plaintiffs, several residents of the City and members of the American Civil Liberties Union, sued to require the removal of the nativity scene from the City's holiday display. The district court declared the nativity scene display unconstitutional and permanently enjoined the City from continuing the practice. The First Circuit Court of Appeals, by a vote of two-to-one, affirmed the district court. Although it used a different analysis than did the district court, the First Circuit Court of Appeals nevertheless affirmed the district court, holding that the City could not demonstrate any way; a long garland hung from candy-striped poles; cutout letters, colored in fluorescent paint, that spell "SEASON'S GREETINGS"; cutout figures representing such varied characters as a clown, a dancing elephant, a robot and a teddy bear; the nativity scene at issue in this case.

Id. at 1155. Chief Justice Burger provided a less comprehensive description in his opinion. See, Lynch v. Donnelly, 465 U.S. at 671.

16. Creche is a French word meaning manger or crib. Webster, NEW INTERNATIONAL DICTIONARY (2d ed. 1953). The term is used to refer to a representation of the stable in Bethlehem where Christ was born using figurines of the Infant Jesus, Mary and Joseph, the shepherds, magi and barnyard animals. The practice of displaying nativity scenes purportedly originated with St. Francis of Assisi in 1233, who arranged animals around a manger during a Christmas Eve mass in order to recreate the humble origins of Christ's birth. See, FOLEY, CHRISTMAS THE WORLD OVER, 47, 64-65 (1963). The tradition of nativity scene displays was brought to America in the eighteenth century by Moravian Protestants. See, KAINEN, AMERICA'S CHRISTMAS HERITAGE 73-75 (1969).

17. The district court gave the following description of the Pawtucket creche:

The figures in the nativity scene are approximately life sized. They include kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling near the manger in which the baby lies with arms spread in apparent benediction. All of the figures face the manger in which the baby lies; several have their hands folded and/or are kneeling. The figures' poses, coupled with their facial expressions, connote an atmosphere of devotion, worship, and awe. The stable is, inexplicably, shored up with two hockey sticks. Some of the figures are chipped, and the paint on several is peeling.

Donnelly, 525 F. Supp. at 1156.

18. Id.

19. Id. According to the district court, the Santa Claus arrived at the park in a fire truck. With the Mayor, he would throw a switch illuminating all of the lights in the Park and at City Hall, some 300 feet away. Id.

20. Id. at 1181.

compelling governmental interest in erecting a nativity scene. The Supreme Court granted certiorari and reversed the decision of the court of appeals.

Writing for the majority, Chief Justice Burger commenced his opinion by criticizing the Jeffersonian metaphor of the Constitution's alleged creation of a wall of separation between church and state. The Chief Justice stated that the Constitution "affirmatively mandates accommodation" between government and religion. The Chief Justice then proceeded to describe a number of examples of official governmental acknowledgments of the role of religion in American life.

Noting that the Court consistently has declined to take an absolutist view of the Establishment Clause, Chief Justice Burger described the Court's analysis of Establishment Clause issues as essentially "line-drawing." In drawing the permissible line of conduct in this area, Chief Justice Burger noted that the Court "often found it useful" to utilize the three-pronged Lemon test.

22. Id. at 1035. The court of appeals majority based its decision upon the Supreme Court's case of Larson v. Valente, 456 U.S. 228 (1982). In Larson, the Supreme Court utilized a strict scrutiny test to invalidate a state law denying an exemption from certain registration and reporting requirements for religious organization receiving a certain percentage of contributions from non-members. 456 U.S. at 252.


24. Lynch, 465 U.S. at 673. Thomas Jefferson's statement of a wall of separation between church and state was made in a letter to the Danbury Baptist Association in 1802. The wall of separation language in Jefferson's letter was first used by the Court in Reynolds v. United States, 98 U.S. 145, 164 (1879), a case involving a Free Exercise Clause challenge to a federal law banning polygamy. The wall of separation metaphor was reintroduced by Justice Black in his opinion in Everson v. Board of Education, 330 U.S. 1 (1947). Chief Justice Rehnquist has been the principal critic of the "wall of separation" metaphor as a shorthand explanation of the Establishment Clause. In his dissenting opinion in Wallace v. Jaffree, 472 U.S. 38 (1985), then Justice Rehnquist declared: "The wall of separation between church and State is a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." 472 U.S. at 107.


26. Id. at 675. The examples cited by Chief Justice Burger included Thanksgiving Proclamations, federal statutes making Thanksgiving and Christmas national holidays, paid chaplains for Congress and the military, the "In God We Trust" motto, the inclusion of the phrase "One nation under God" in the Pledge of Allegiance, government supported art museums displaying artworks depicting religious events, the Supreme Court's frieze including Moses with the Ten Commandments and proclamations for a National Day of Prayer, Jewish Heritage Week and the Jewish High Holy Days. Id. at 675-77.

27. Id. at 678.

28. Id. at 679. In dissent, Justice Brennan argued that the majority's application of the three-pronged Lemon test was less than vigorous. See infra note 46 and accompanying text. Many commentators support Brennan's contention. See, e.g., Braveman, The Establishment Clause and the Course of Religious Neutrality, 45 Mo. L. Rev. 352 (1986); Of Crosses and Creches: Establishment Clause and Publicly Sponsored Displays of Religious
Although emphasizing that the Court was not necessarily bound to apply *Lemon* in all Establishment Clause cases, the majority examined the Pawtucket display in light of the *Lemon* criteria.29

Addressing initially the issue of whether the Pawtucket nativity scene had a secular purpose, Chief Justice Burger declared that the district court had erred by focusing exclusively on the religious nature of the creche. "Focus exclusively on the religious component of any activity," the Chief Justice declared, "would inevitably lead to its invalidation under the Establishment Clause."30 Thus, in the Chief Justice's view, the focus of the *Lemon* inquiry in this case must be the creche within the context of the Christmas season.31 Viewed in this perspective, Chief Justice Burger concluded that the secular purpose prong of the *Lemon* test was satisfied because the nativity scene display was sponsored by the City to celebrate the Holiday and to depict the historical origins of an event long recognized as a national holiday.32

The Chief Justice next stated that the nativity scene in *Lynch* did not have a primary effect of advancing religion.33 In making this determination, the Court stated that the inclusion of the nativity scene conferred no greater benefit to religion than those practices which were found constitutional in prior cases.34 While conceding that the display of a nativity scene would advance religion "in a sense," the Court nevertheless found such aid or benefit to be "indirect, remote and incidental."35

Finally, the majority found that the nativity scene in *Lynch* did

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30. *Id.* at 679.
31. *Id.*
32. *Id.* at 681.
33. *Id.*
not create an excessive entanglement between government and religion. The majority in *Lynch* noted the absence of any excessive administrative entanglements between the government and religion surrounding the erection of the City’s nativity scene. The Court added that in the absence of such administrative entanglement, claims of political divisiveness alone were insufficient to invalidate otherwise permissible government conduct.

In conclusion, Chief Justice Burger emphasized that banning the creche from the municipal display in question “would be a stilted overreaction.” The Chief Justice labeled the notion that a municipal display of a nativity scene posed a real danger of establishment of a state church as “far-fetched indeed.”

Although joining in the majority opinion of the Court in *Lynch*, Justice O’Connor wrote a concurring opinion suggesting a clarification of Establishment Clause doctrine based upon the notion of governmental endorsement or disapproval of religion. The Justice initially stated that the purpose of including the nativity scene in the Pawtucket display was the “celebration of the public holiday through its traditional symbols.” She concluded: “Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.”

Justice O’Connor further declared that the display of a creche did not actually communicate a message of government endorsement of Christianity. While noting “the religious and indeed sectarian significance of the creche,” the Justice found that “the overall holiday setting . . . negates any message of endorsement of that content.”

Justice Brennan wrote the chief dissenting opinion in the case. In his opinion, the Justice contended initially that the Pawtucket nativity scene could not meet a “vigorous application” of the

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36. *Id.* at 684.
37. *Id.*
38. *Id.*
39. *Id.* at 686.
40. *Id.*
41. *Id.* at 688 (O’Connor, J., concurring).
42. *Id.* at 691
43. *Id.*
44. *Id.* at 692.
45. Justice Brennan’s dissent was joined by Justices Marshall, Blackmun and Stevens. Justice Blackmun also wrote a separate dissenting opinion which was joined by Justice Stevens. In his short dissent, Justice Blackmun stated that the majority had misapplied the *Lemon* test and permitted the “misuse of a sacred symbol.” *Id.* at 726-27.
Lemon test.\textsuperscript{46} He further stated that Pawtucket's valid secular objectives of celebrating the holiday and promoting retail sales and goodwill could be "readily accomplished" without inclusion of a creche.\textsuperscript{47} The addition of the religious symbol to the display, Justice Brennan argued, demonstrated that the government's purpose was to deliver a clear sectarian message: Keep Christ in Christmas.\textsuperscript{48}

Justice Brennan went on to state that the primary effect of the City's nativity scene was "to place the government's imprimatur of approval on the particular religious belief exemplified by the creche."\textsuperscript{49} By singling out a particular religion for special treatment, Justice Brennan declared that Pawtucket was promoting "religious chauvinism" by conveying a message to other religious groups and atheists that their views were unworthy of recognition and support.\textsuperscript{50}

Concluding his Lemon analysis, Justice Brennan noted that the inclusion of the creche "pose[d] a significant threat of fostering excessive entanglement."\textsuperscript{51} In Justice Brennan's view, the display of one religion's symbol was bound to produce demands from other religions for inclusion of their symbols.\textsuperscript{52} The Justice opined that the likely result of local officials' attempts to accommodate such demands was community divisiveness along religious lines.\textsuperscript{53}

Justice Brennan's dissent also attacked the principal arguments advanced by the Lynch majority to support their conclusion that the Pawtucket display satisfied Lemon. The Justice maintained that "it blinks reality" to claim that the context of the season can mask the inherent religious significance of the creche.\textsuperscript{54} Additionally, Justice Brennan rejected as a "faulty syllogism" the majority position that once the Court finds designation of Christmas as a public holiday constitutionally acceptable then every form of governmental association with the holiday is also constitutional.\textsuperscript{55} This argument was "fundamentally flawed," in Justice Brennan's view, because it risked placing "the prestige, power and financial support

\begin{itemize}
\item[46.] Id. at 696 (Brennan, J., dissenting).
\item[47.] Id. at 699
\item[48.] Id. at 700-01.
\item[49.] Id. at 701
\item[50.] Id.
\item[51.] Id. at 702.
\item[52.] Id.
\item[53.] Id.
\item[54.] Id. at 706.
\item[55.] Id. at 709.
\end{itemize}
of a civil authority in the service of a particular faith." The Justice concluded his dissenting opinion by criticizing the majority's uncritical approval of the notion of governmental acknowledgment of religion and the majority's use and analysis of history to justify the constitutionality of the creche.

III. POST-LYNCH CASE LAW

Despite the seeming clarity of the Supreme Court's holding in Lynch that a municipal nativity scene erected during the Christmas holiday season did not constitute any real danger of an establishment of religion, the Lynch decision was subjected to a variety of interpretations within the lower federal courts.

A. The Narrow Interpretation of Lynch

Taking their cue perhaps from Justice Brennan's dissenting opinion in Lynch, several federal courts hearing challenges to holiday displays subsequent to Lynch gave that decision a very narrow interpretation. These courts seized upon such things as Chief Justice Burger's detailed description of the Pawtucket display to justify distinguishing Lynch on its facts, reapplying the Lemon test and finding a nativity scene in a different physical context viola-

56. Id. at 711.
57. Id. at 714. While Justice Brennan conceded that acknowledgment of religion, he viewed governmental acknowledgment as essentially falling into three limited categories: (1) affording opportunities to practice religion such as declaring December 25th a public holiday; (2) practices which were once religious but which now have a secular purpose like Sunday closing laws; and (3) official public practices such as the "In God We Trust" motto and the references to God in the Pledge of Allegiance which constitute a "ceremonial deism". Id. at 714-16.
58. Id. at 718. Brennan's criticism of the majority's historical argument was two-fold. First, Brennan argued that the Court had "until today, consistently limited its historical inquiry to the particular practice under review." Id. at 719. Secondly, Brennan declared that the majority had failed to follow the historical analysis utilized in such cases such as McGowan, Walz and Marsh. According to Brennan, these cases validated practices accepted over the entire course of the Nation's history. Brennan observed that the practice of displaying nativity scenes was "a comparatively recent phenomenon" and thus could not be reconciled with the long settled practice evidence required by the Court in prior cases. Id. at 720.
59. Justice Brennan seemed to invite such treatment of the holding in Lynch by declaring: '[T]he Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the city of Pawtucket's nativity scene appeared. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross. Id. at 694-95.
tive of the Establishment Clause. The cases which gave Lynch a narrow scope fell into two categories. The first category of cases created an "unadorned creche" exception to Lynch. This particular category of post-Lynch case was exemplified by Burelle v. City of Nashua and American Civil Liberties Union v. City of Birmingham.

In City of Nashua, a taxpayer filed suit against the City of Nashua, New Hampshire for permitting a non-profit merchants organization to erect a nativity scene on City Hall plaza, an area in front of the town's governmental offices. In enjoining the practice, Chief Judge Devine reviewed the Lynch decision and several post-Lynch display cases and agreed with the view that Lynch was bound to its particular facts. Judge Devine found as a factual matter that the creche stood alone, unaccompanied by either secular Christmas symbols or a disclaimer sign renouncing any governmental interest in the religious aspect of the display. Under these circumstances, Judge Devine found the City failed the Lemon test, ruling that "the display of the creche indicates that the municipal government of Nashua believes that the Trinitarian theory of Christianity is a favored religious practice."

In City of Birmingham, the Sixth Circuit Court of Appeals was confronted with a display essentially similar to the one in City of Nashua. Each year from late November to early January the City of Birmingham, Michigan erected a nativity scene. The display, which was unaccompanied by any other figurines or decorations,

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60. 599 F. Supp. 792 (D.N.H. 1984)
62. City of Nashua, 599 F. Supp. at 794. The district court indicated that the City of Nashua owned and erected the nativity scene. At the time of the initiation of the lawsuit, the City conveyed title to the nativity scene to a group called Heart of Nashua Foundation, Inc. and granted the Foundation a license to erect the display. Id.
63. Id. at 795-96. Judge Devine specifically reviewed the cases of McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984) and American Civil Liberties Union v. City of Birmingham, 588 F. Supp. 1337 (E.D. Mich.1984). Judge Devine declared that he had read and re-read Lynch and concluded that the Birmingham court's interpretation of Lynch was the better one. City of Nashua, 599 F. Supp. at 795-96.
64. Id. at 797. The City argued that the nativity scene was not unaccompanied by secular decorations and pointed to lights and trees erected by the Foundation and lights and a large sign reading NOEL on the second floor of the City Hall. Id. at 796. Judge Devine, however, determined that these decorations were too far away from the nativity scene and thus "do not serve to overshadow, balance or neutralize the symbol of the Trinitarian doctrine of Christianity." Id. at 797.
65. Id. at 796-97. Interestingly, Judge Devine's injunction order provided that the City could continue to have a municipal nativity display if it also erected a disclaimer sign. Id.
was located on public property in front of City Hall. The entire display was owned by the city and was erected, illuminated, maintained and dismantled by public employees at public expense. Distinguishing the Birmingham display from the one in Lynch, the district court enjoined the City's display as violative of the Establishment Clause. By a two-to-one vote, the Sixth Circuit affirmed.

In his opinion for the majority, Judge Lively rejected the city's argument that the absence of other Christmas decorations was unimportant. The Judge declared: "In our opinion, the city-owned and city-sponsored nativity scene sends quite a different message when it stands alone as the only clearly identifiable symbol chosen by the city to mark its contribution to the celebration." Utilizing the language of Justice O'Connor's concurring opinion in Lynch, Judge Lively stated that an unadorned creche sent a message to non-Christians that they were outsiders, non-favored members of the community.

Judge Nelson's dissenting opinion in City of Birmingham ridiculed the majority's reading of Lynch as creating a "St. Nicholas too" test. Judge Nelson wrote:

The lesson comes down to this: a city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too.

Judge Nelson continued:

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

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67. Id.
68. Id. 1339
69. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986).
70. Id. at 1567.
71. Id. at 1566, quoting Lynch, 465 U.S. at 688 (O'Connor, J., concurring).
72. City of Birmingham, 791 F.2d at 1569 (Nelson, J., dissenting).
The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for federal courts to tell the towns and villages of America how much paganism they need to put into their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.\textsuperscript{73}

The second type of case giving \textit{Lynch} a very narrow interpretation is what can be called the public property exception. This particular rationale for narrowing the scope of \textit{Lynch} was advanced in the Seventh Circuit's decision in \textit{American Jewish Congress v. City of Chicago}.\textsuperscript{74}

For thirty years, the City of Chicago erected or permitted the erection of a nativity scene in the lobby of the Chicago City-County Building.\textsuperscript{75} The scene consisted of several white plaster figures, each under twelve inches in height, displayed on a platform decorated with tree branches strung with miniature holiday lights and a banner reading "On Earth Peace—Good Will Toward Men."\textsuperscript{76} Within ten to ninety feet away from the nativity scene, the City erected a number of other decorations. They included: eight Christmas wreaths, a decorated Christmas tree, a mechanical Santa Claus with two reindeer and sleigh, and banners and cartons associated with a food drive for needy citizens.\textsuperscript{77} In addition to the decorations, the City attached six disclaimer signs to the nativity scene. The signs read: "Donated by the Chicago Plasterer's Institute—this exhibit is neither sponsored nor endorsed by the Government of the City of Chicago."\textsuperscript{78}

A divided panel of the Seventh Circuit Court of Appeals reversed a district court's ruling that the Chicago display did not violate the Constitution.\textsuperscript{79} Writing for the majority, Judge Flaum stated that the district court had erred by concluding that \textit{Lynch} was controlling in the case.\textsuperscript{80} The Chicago holiday display was different from the \textit{Lynch} display, Judge Flaum opined, in two re-
spects. The first difference was that the nativity scene in *City of Chicago* was "self-contained, rather than one element of a larger display." 81 The second difference was that the Chicago display was located within a government building. 82 Given these differences, Judge Flaum concluded that *Lynch* was "plainly" distinguishable and an analysis of the display under *Lemon* was required. 83

Applying the *Lemon* test to the particulars of the Chicago display, the *City of Chicago* majority held that the display had the effect of advancing religion because the nativity scene at issue communicated governmental endorsement of religion. 84 This impermissible message of endorsement, the majority maintained, was created simply by the display’s location on government property. Judge Flaum explained:

> Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity. 85

Moreover, Judge Flaum stated that the message of endorsement created by the display of “an unequivocal Christian symbol” on government property existed not only in reality but on a symbolic level as well. Judge Flaum declared:

> Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity. 86

Judge Easterbrook’s dissenting opinion in *City of Chicago* was more critical of the Supreme Court’s decision in *Lynch* than the majority opinion’s conclusions. Judge Easterbrook complained that:

> The *Lynch* decision, like others requiring multi-factor balances, gives judges of the inferior federal courts fits. The Court avoided creating a rule about the treatment of religious symbols and instead announced that judges

81. *Id.*
82. *Id.* at 126.
83. *Id.*
84. *Id.* at 128. The court of appeals initially concluded that the Chicago display did not violate the purpose prong of *Lemon*. *Id.* at 127.
85. *Id.* at 128.
86. *Id.*
should examine each symbol’s context. But which items of the context matter?

* * *

When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt. 87

Judge Easterbrook’s dissent argued that governmental endorsement could not be implied simply because of a display’s location on government property or because of the absence of accompanying secular holiday decorations. 88 After examining closely what he called governmental “religious speech” since the founding of the nation, Judge Easterbrook contended that “force or funds are essential ingredients of an establishment [of religion].” 89 Because Chicago’s creche display lacked these coercive elements, Judge Easterbrook concluded that there was no unconstitutional establishment.90

B. The Broad Interpretation of Lynch

Not all of the lower federal courts which had occasion to interpret the Lynch decision gave that case a narrow reading. In McCreary v. Stone,91 the Second Circuit Court of Appeals upheld the display of a privately owned nativity scene. In McCreary, two citizens organizations92 sought permission from the Board of Trustees of Scarsdale, New York to erect as in previous years a nativity scene in a park located in the Village’s central retail business district.93 When the Board of Trustees denied permission for the display, the citizens groups commenced separate actions against the Board seeking damages, declaratory and injunctive relief. The United States District Court for the Southern District of New York entered judgment for the municipality and the citizens

87. Id. at 128-29 (Easterbrook, J., dissenting).
88. Id. at 130-31. Judge Easterbrook was especially critical of the majority’s view that location on public property is per se indicative of governmental endorsement. To refute this notion, Judge Easterbrook recounted an episode where an artist exhibited an art work critical of Chicago’s then Mayor. Attempts by the City to remove the artwork were met with an injunction. Id. at 132.
89. Id. at 137.
90. Id. at 140.
91. 739 F.2d 716 (2d Cir. 1984), aff’d by an equally divided Court sub nom. Board of Trustees v. McCreary, 471 U.S. 83 (1985).
92. The citizens organizations were called “the Citizens’ Group” and the Scarsdale Creche Committee. McCreary, 739 F.2d at 717-18.
93. Id. The practice of displaying a nativity scene in the park began in 1956. Id. at 720.
groups appealed.94

In the court of appeals, the Village of Scarsdale ("Village") contended that its denial of permission to display a nativity scene in the traditional public forum of the village’s park served a compelling state interest of avoiding a violation of the Establishment Clause.95 Rejecting this argument, the Second Circuit panel repeatedly cited Lynch and declared that the erection of the display would not contravene the Establishment Clause.96 Most significantly, the Court rejected the Village's attempt to distinguish the Lynch decision on its facts.97

The court of appeals labeled as "erroneous" the Village's initial argument that Lynch could be distinguished based upon the particular physical context of a display. The Court declared, "The Supreme Court did not decide the Pawtucket case [Lynch] based upon the physical context within which the display of the creche was situated. . . ."98

Further, the McCreary Court dismissed the claim that Lynch was distinguishable because the creche in Lynch was displayed on private property. The court of appeals stated: "We fail to find substantiability in this asserted private/public land distinction when comparing the creche in Lynch with either creche in this case."99

C. The 1988 Holiday Cases

While the County of Allegheny case awaited argument before the United States Supreme Court, litigation over the constitutionality of holiday displays intensified throughout the nation. In an overwhelming majority of the cases decided during the pendency of County of Allegheny, the holiday displays were determined to be constitutional.

In Doe v. City of Warren,100 the City of Warren Michigan's inclusion of a nativity scene and menorah as part of a holiday display on the front lawn of city hall was challenged as a violation of

95. McCreary, 739 F.2d at 723. Supreme Court caselaw provides that a content-based restriction on speech in a public forum can be justified only upon the showing of a compelling governmental interest and that the restriction is narrowly drawn to achieve that end. See, e.g., Carey v. Brown, 447 U.S. 455 (1980).
96. McCreary, 739 F.2d at 724-28, 730.
97. Id. at 728.
98. Id. at 729.
99. Id.
the Establishment Clause. In upholding the constitutionality of the display, the District Court for the Eastern District of Michigan maintained that the fact-specific interpretation of Lynch given by other courts was exaggerated. The Court declared:

[T]he Supreme Court in Lynch contemplated a flexible analysis in deciding holiday display disputes, in which the 'effect' prong of the Lemon test must be tempered by the recognition of the Christmas season and the secular and religious history underlying its celebration. In this framework, the symbolic-counting and geographic placement factors relied on in the circuit opinions would have some relevance, yet would not in and of themselves dictate the end result.

A display similar to the one upheld in the City of Warren case was upheld by a divided panel of the Seventh Circuit Court of Appeals in Mather v. Village of Mundelein. In Village of Mundelein, the Seventh Circuit reversed a district court's ruling that the Village's display of a nativity scene along with other secular holiday decorations on the lawn of its village violated the Establishment Clause. In a per curiam opinion, the panel majority in Village of Mundelein declared that the holiday display in Village of Mundelein was more like the display upheld by the Supreme Court in Lynch rather than the display disallowed in the Seventh Circuit in City of Chicago. The panel majority concluded their per curiam opinion by expressing the hope that the Supreme Court would decide the County of Allegheny case "in a way that diminishes the role of architectural judgment in constitutional law."

American Civil Liberties Union v. Wilkinson presented a constitutional challenge to a slightly different type of holiday display. In Wilkinson, the State of Kentucky built, with public funds, a structure resembling a biblical-age stable on the grounds of the Kentucky State Capitol Building in Frankfort. The stable was used by various groups invited by the state to participate in pageants

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101. Id. at ___.
102. Id. at ___.
103. 864 F.2d 1291 (7th Cir. 1989).
104. Id. at 1293.
105. Id. at 1292. In an interesting turn of events, Judge Easterbrook, the dissenting judge in City of Chicago was part of the two-to-one panel majority in Village of Mundelein. Judge Flaum, the author of the majority opinion in City of Chicago, was the dissenting judge in Village of Mundelein.
106. 864 F.2d at 1293.
reenacting the birth of Christ. Other secular decorations were on the grounds, but not within one hundred yards of the nativity scene.

The District Court for the Eastern District of Kentucky first reviewed the *Lynch* decision and the later applications of *Lynch* in various federal appellate courts. In the district court's view, the *Lynch* decision's context of the season analysis and the *City of Birmingham*’s physical setting analysis served as the correct basis to determine the constitutionality of the Kentucky display. In adopting this framework, the district court specifically rejected the view set forth in the *City of Chicago* case that the location of a religious display at the seat of government constituted an endorsement of religion. The district court interpreted the *City of Birmingham* case as requiring the presence of some secular decorations near the nativity display. Relying upon observations made during a view of the display, the district court concluded that the decorations around the Capitol grounds were sufficient to satisfy the *City of Birmingham* requirements.

Although the district court rejected the plaintiffs' basic contention that the state capitol display was unconstitutional, the Court did impose conditions regarding the display. Drawing upon the Second Circuit Court's decision in *McCreary v. Stone*, the district court required the state to erect a disclaimer sign in front of the display. The court also required the state to adopt a written policy regarding the availability of the grounds for ceremonies, pageants and displays, public notice of that policy and to defray public expenditures for the display from private contributions.

While litigation involving holiday displays has been primarily conducted in the federal courts, a significant pre-*County of Allegheny* decision was handed down in a state court. The case of *Okrand v. City of Los Angeles* involved the constitutionality of the display of the Katowitz menorah in the rotunda of the Los An-

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108. Id. at 1298-99.
109. Id. at 1301. These decorations included a thirty-foot Christmas tree.
110. Id. at 1310.
111. Id.
112. Id. at 1311.
113. Id. at 1311-12.
114. Id. at 1312-13.
115. Id. at 1313-14.
117. The Katowitz menorah was a specially crafted menorah presented to the Jewish congregation of the Great Synagogue in Katowicz, Poland. Id. at 914. See generally infra,
geles City Hall. In affirming the decision of the trial court, the California Court of Appeals rejected arguments based upon the City of Chicago, City of Birmingham and County of Allegheny cases that the Los Angeles display was unconstitutional because of its location or lack of secular decorations. In particular, the Court of Appeals noted that the rotunda of City Hall, an area used for historical, cultural and artistic displays in the past, provided a "museum-like setting" which negated any message of endorsement of the Jewish religion. Additionally, the Court of Appeals rejected the argument that the menorah display violated the California Constitution's "preference test." The Court stated that the menorah was more of a museum piece than a symbol of religious worship. Consequently its display near a Christmas tree indicated no preference for religion.

The case of Smith v. Lindstrom was the only case decided during the pendency of County of Allegheny that found a holiday display to be unconstitutional. In Smith, a group of local citizens sued to enjoin the erection of a nativity scene on the front lawn of a county office building in downtown Charlottesville, Virginia. The Smith case arose in December, 1987 when the local Jaycees asked and were granted permission by the Albemarle County Supervisors to erect a nativity scene on the lawn of the county office building. The creche erected by the Jaycees was unaccompanied by any other seasonal decorations. No government funds were expended in erecting the creche. Additionally, a disclaimer sign indicating private sponsorship was placed near it.

In declaring the Charlottesville Jaycee nativity display unconstitutional, District Judge Michael initially looked to the Lynch decision for guidance. Judge Michael stated that Lynch commanded an examination "in a particularistic manner [of] the effect of the creche in the context before us." Concluding that the facts of the

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note 147.

118. Id. at 915-16.
119. Id. at 920. The rotunda had been the site of numerous displays and exhibits of a historical, cultural and artistic nature. Id. at 914. The Katowitz menorah was accompanied by a decorated Christmas tree. Id. at 915.
120. Id. at 921, citing Fox v. City of Los Angeles, 22 Cal.3d 792, 150 Cal. Rptr. 867, 587 P.2d 663 (1978).
121. Okrand, 254 Cal. Rptr. at 922.
124. Id.
125. Id.
126. Id. at 554.
case "differs markedly from those in Lynch," Judge Michael then proceeded to examine the decisions of other post-Lynch display cases. Based upon his reading of Lynch and these precedents, the Judge concluded that the Charlottesville display violated the effects prong of Lemon. In the District Court's view, the location of the display at the seat of government and the lack of other seasoned symbols and decorations communicated a message of government endorsement of religion.

IV. COUNTY OF ALLEGHENY V. ACLU

Although brought as one case, County of Allegheny v. American Civil Liberties Union was essentially two separate and distinct lawsuits involving two separate holiday displays in two different buildings under the auspices of two different governmental entities. The facts of the case were simple and relatively undisputed.

Since 1968, Allegheny County has invited various choirs to participate in a Christmas carol program. The performances for the program were scheduled during the weeks preceding the Christmas holiday and were held in two locations: the rotunda of the Greater Pittsburgh International Airport and the first floor of the County Courthouse in an architecturally impressive area known variously as the Grand Staircase and the Courthouse Gallery/Forum. Each performance consisted of various choirs, typically high school students, singing both popular songs as well as

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127. Id. at 555.
128. These cases included City of Birmingham, City of Chicago, and County of Allegheny.
129. Id. at 559. The Court, however, did conclude that the display satisfied the purpose and entanglement prongs.
130. Id. at 561-62.
132. Allegheny County is a county of the second class under the laws of the Commonwealth of Pennsylvania, PA. STAT. ANN. tit. 16, § 3101 et. seq. (1956). Allegheny County includes metropolitan Pittsburgh and has a population of about 1.4 million people. Interview with G. Thomas, Director, Allegheny County Department of Communications in Pittsburgh, (Nov. 27, 1989). Allegheny County government is headed by a three member board of commissioners. PA. STAT. ANN. tit. 16, § 3203, 3401(a)(1).
133. County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989) Joint Appendix filed October Term 1988 (Nos. 87-2050, 88-90, 88-96), at 157, 163. The Allegheny County Courthouse was built in 1886. The Courthouse was designed by famed architect H. R. Richardson and is considered an outstanding example of Romansque Revival in American architecture. The Courthouse is on the National Register of Historic Places. Interview with G. Thomas, Director, Allegheny County Department of Communications, in Pittsburgh, (Nov. 27, 1989).
religious and secular Christmas carols. The program was annually dedicated to the universal themes of world peace and brotherhood and to the memory of the missing in action of the Vietnam War. The carol program was publicized by a large banner hung outside the County Courthouse and by press releases. At the Courthouse, the caroling was broadcast by loudspeakers to the public at large.

On the steps of the Grand Staircase where the choirs performed was erected a nativity scene. The nativity scene consisted of the traditional figures—a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, the Shepherds, various animals and an angel holding a banner reading “Gloria in Excelsis Deo.” The figurines ranged in height from three to fifteen inches. The nativity scene was enclosed by a fence and took up a small area on one of the landings of the Grand Staircase.

The entire area of the Courthouse where the Christmas carol program was held and the nativity scene was displayed was decorated in traditional Christmas fashion—red and white poinsettia plants, evergreen trees with red bows and Christmas wreaths. These decorations were purchased and arranged by the County’s Bureau of Cultural Programs. Other decorations, including wreaths, trees and Santa Clauses, were displayed by various departments and offices throughout the Courthouse building.

Although a nativity scene had been displayed in conjunction with the choral program since the program’s inception, the particular nativity scene displayed on the steps had only been used as part of the choral program since 1981. This nativity scene was not owned by the County, but was the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic mens’ organization. Ownership of the creche was noted by a sign in front of the nativity scene which read: “This display donated by the Holy

134. Joint Appendix at 169.
135. Id. at 160, 175.
136. Id. at 159, 167.
137. Id. at 161, 164.
138. Id. at 186.
139. Id. at 161.
140. Id. at 167. In addition to the Offices of the Board of Commissioners, the Courthouse serves as the offices of the County’s Controller, Sheriff, Treasurer and Clerk of Courts. Also, the Courthouse houses the courtrooms of the Criminal Division as well as the arbitration section of the Court of Common Pleas of Allegheny County. Id. at 69.
141. Id. at 164.
Name Society."\(^{142}\)

Other than providing storage space in the basement of the Courthouse for a short period and a dolly to transport the display to and from its place of storage, the County had no other involvement with the nativity scene.\(^{143}\) The County provided no special security, lighting or maintenance for the display. Moreover, the creche was erected, arranged and disassembled each year by the moderator of the Holy Name Society without the assistance of County personnel.\(^{144}\)

In addition to serving as one of the locales for the annual Christmas carol program, the Grand Staircase—Gallery/Forum Area of the County Courthouse was used throughout the year for art displays and for other civic and cultural events and programs.\(^{145}\)

Like Allegheny County, the City of Pittsburgh also permitted a holiday display to be erected on government property. For a number of years, the City of Pittsburgh erected a large Christmas tree on the front steps of the main entrance to the City-County Building,\(^{146}\) a government office building located on the block next to the Allegheny County Courthouse. The tree, which sat upon a large platform, was decorated with lights and ornaments by City employees.

Beginning in the early 1980's, the City included a Chanukah menorah\(^{147}\) as part of its display. The menorah, which was approximately eighteen feet tall, was owned by a Jewish group named

\(^{142}\) Id.

\(^{143}\) Id. at 165.

\(^{144}\) Id.

\(^{145}\) Id. At the time of commencement of the litigation, artworks made by mentally handicapped individuals were on display in the Gallery/Forum area of the Courthouse. County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989), Joint Exhibit Volume filed October Term 1988 (Nos. 87-2050, 88-90, 88-96), at 36.

\(^{146}\) As the name implies, the City-County Building is jointly owned by the City of Pittsburgh and the County of Allegheny. The two governmental bodies split maintenance responsibilities for the building. The side of the building having the menorah and Christmas tree display was the responsibility of the City. Joint Appendix at 194. The City-County Building houses the offices of the County Register of Wills and Prothonotary, the Civil Division of the Court of Common Pleas and the Courtroom and Prothonotary of the Pennsylvania Superior and Supreme Court. The City-County Building also contains most of the offices of City government, including the Mayor and Council. Joint Appendix at 114.

\(^{147}\) Chanukah is an eight day holiday which commemorates the recapture of the Holy Temple in Jerusalem by the Maccabees in 165 B.C.E. from the Syrian Greeks. In rededicating the temple, the Maccabees had only enough oil to burn in the Temple's candelabrum or menorah for one day. Miraculously, the oil burned in the menorah for eight days until new oil was obtained. Id. at 138-39, 229; Brief for Petitioner Chabad at 4, County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989) (No. 88-90).
Chabad\textsuperscript{148} and erected adjacent to the display.\textsuperscript{149}

In addition to the tree and menorah, the City's 1986 holiday display included a separate standing sign setting forth the City's goal in the year's United Fund campaign, a sign advertising a floral display at the City's floral conservatory and a sign attached to the tree platform. The platform sign read:

\begin{quote}
\textbf{SALUTE TO LIBERTY} \\
DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM. \\
RICHARD S. CALIGUIRI, MAYOR\textsuperscript{150}
\end{quote}

In November, 1986, the American Civil Liberties Union (ACLU) sent letters to the County's Board of Commissioners and the Mayor of the City requesting removal of the nativity scene and menorah.\textsuperscript{151} In a written response to this letter, the County Commissioners disavowed any intent to endorse any particular religion through the display.\textsuperscript{152} The Commissioners wrote that the purpose of the display of the nativity scene, along with other holiday symbols, was simply to express the wish of "Good Will to All Men."\textsuperscript{153} Similarly, the Mayor's letter rejected the ACLU's demand that the displays be eliminated.\textsuperscript{154}

B. Lower Court Decisions

On December 10, 1986, the ACLU and several individuals filed a complaint in the United States District Court for the Western District of Pennsylvania seeking to enjoin the County of Allegheny from displaying a nativity scene inside the Courthouse, and the City of Pittsburgh from displaying a Chanukah menorah outside the City-County Building. After denying an application for a temporary restraining order, the District Court scheduled a hearing on

\textsuperscript{148}. Chabad is a group or movement within the Orthodox branch of Judaism which looks for spiritual guidance and leadership from the Lubavitcher Rebbe. \textit{Joint Appendix} at 228-29.
\textsuperscript{149}. \textit{Id.} at 207.
\textsuperscript{150}. Brief for Petitioner City of Pittsburgh at 3-4, County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989) (No. 88-90).
\textsuperscript{151}. \textit{Joint Appendix} at 89, 104
\textsuperscript{152}. \textit{Joint Exhibit Volume} at 26-27.
\textsuperscript{153}. \textit{Id.}
\textsuperscript{154}. \textit{Id.} at 2.
a motion for a preliminary injunction.\textsuperscript{155} At the conclusion of the hearing, the District Court denied the motion for a preliminary injunction.\textsuperscript{156}

In a brief oral opinion, the district court judge indicated that the case was controlled by \textit{Lynch v. Donnelly}.\textsuperscript{157} The District Court found that the display of the creche and the menorah conveyed no message of government endorsement and were de minimus in the context of the application of the Establishment Clause.\textsuperscript{158}

Subsequent to the hearing on the motion for a preliminary injunction, Chabad, which unsuccessfully attempted to intervene in the case during the preliminary injunction hearing, filed a formal motion to intervene. The District Court granted Chabad’s motion to intervene and a second hearing was held for the limited purpose of permitting Chabad to present evidence concerning the menorah.\textsuperscript{159}

By opinion and order dated May 8, 1987, the district court denied the ACLU’s motion for a permanent injunction and declaratory relief.\textsuperscript{160} On May 29, 1987, judgment in the case was formally entered in favor of the County and the City, and an appeal followed.\textsuperscript{161}

In a decision dated May 15, 1988, the Third Circuit Court of Appeals reversed the judgment of the district court.\textsuperscript{162} By a vote of two-to-one, the court of appeals held that the display of a nativity scene inside the County Courthouse had the effect of endorsing religion and thus violated the second prong of the three-part establishment test of \textit{Lemon v. Kurtzman}.\textsuperscript{163}

In reversing the district court’s decision, the Third Circuit’s

\begin{itemize}
\item \textsuperscript{155} \textit{Joint Appendix} at 3.
\item \textsuperscript{156} \textit{Id.} at 8.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 9.
\item \textsuperscript{159} \textit{Id.} at 61.
\item \textsuperscript{160} The District Court stated its conclusion denying the requested injunction in terms of the \textit{Lemon} test. The Court declared:
\begin{quote}
Were one to apply the three pronged test in \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971) the plaintiffs have failed to show enough to justify our intervention because we find that the displays have a secular purpose, their purpose was not to advance or prohibit religion and they did not create an excessive entanglement of government with religion. Nor is there evidence that the displays have caused political division.
\end{quote}
\item \textsuperscript{161} \textit{Joint Appendix} at 11.
\item \textsuperscript{162} \textit{American Civil Liberties Union v. County of Allegheny}, 842 F.2d 655 (3rd Cir. 1988).
\item \textsuperscript{163} \textit{Id.} at 662.
\end{itemize}
panel majority did not rely upon any specific factor in declaring the dual displays unconstitutional. Instead, the majority listed six so-called objective "variables" that a court should consider in determining whether the use of a religious symbol in a display on public property or by a public entity has the effect of advancing or endorsing religion. These factors were: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. Applying these factors to the facts of record, the Third Circuit panel declared: "The only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and the county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." The dissenting opinion of Judge Weis agreed with the district court that the Lynch decision "directly addresses and conclusively resolves the dispute we encounter here." The dissent declared that "irrelevant and inconsequential variations" in the location and arrangement of a display did not "justify disregarding the clear spirit of Lynch." In Judge Weis' view, "the placement of the creche in the gallery of the Allegheny County Courthouse, accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent." Judge Weis further opined that inclusion of the menorah in the City's display "did no more than broaden the commemoration of the holiday season" and "called attention to the great pluralism that is the hallmark of religious toleration in this country."

On April 19, 1988, the Third Circuit Court of Appeals denied the County's petition for rehearing before the Court en banc. Five judges of the Court voted in favor of granting rehearing by the
Court *in banc* and the panel's dissenting judge voted in favor of panel rehearing.\(^{172}\) The County,\(^{173}\) City\(^{174}\) and Chabad\(^{175}\) all filed petitions for certiorari and the United States Supreme Court granted all three petitions.

C. *The Supreme Court's Decision*

To say that the Supreme Court was deeply divided in *County of Allegheny*\(^{176}\) would probably be an understatement. Five separate opinions were written in the case.\(^{177}\) Moreover, except for only two sections, Justice Blackmun's opinion announcing the judgment of the Court was a plurality opinion.\(^{178}\)

Perhaps best illustrating the deep division of the Court over *County of Allegheny* was the case's mixed result. By a narrow five to four margin, the Court affirmed the judgment of the Third Circuit Court of Appeals that the nativity scene displayed inside the Allegheny County Courthouse violated the effects prong of *Lemon*.\(^{179}\) But, by a combined vote of six-to-three, the Court reversed the court of appeals and held that the display of a Chanukah menorah outside the City-County Building did not have the effect of endorsing religion.\(^{180}\)

While each of the respective opinions in *County of Allegheny* is important, the opinions of Justices Blackmun, O'Connor and Kennedy are especially relevant in understanding the Court's peculiar resolution of the case. Accordingly, each of these opinions will be separately reviewed.

1. *Justice Blackmun's Opinion*

Justice Blackmun began his opinion in *County of Allegheny* by addressing two important issues. First, the Justice addressed the

\(^{172}\) *Id.*


\(^{177}\) *Id.*

\(^{178}\) *Id.* at 3093.

\(^{179}\) *Id.* The five Justices voting to affirm the judgment were Blackmun, O'Connor, Brennan, Marshall and Stevens.

\(^{180}\) 109 S. Ct. 15 3093. Justices Blackmun and O'Connor joined the dissenters on the judgment on the creche, Kennedy, White, Rehnquist and Scalia, to provide the six votes to reverse the judgment of the Court of Appeals on the menorah.
question of whether the *Lemon* test should still be used in deciding Establishment Clause cases.\(^{181}\) Secondly, he discussed to what extent *Lynch* was applicable to the case.\(^{182}\)

Justice Blackmun declared that the *Lemon* analysis had been "applied regularly in the Court's later Establishment Clause cases."\(^{183}\) But, in more recent cases, the Justice noted that the Court's attention had been drawn to determining "whether the challenged government practice either has the purpose or effect of 'endorsing' religion."\(^{184}\)

Although the notion of endorsement was of recent vintage, Justice Blackmun stated that the concept derived its meaning from language such as "preference," "favoritism" and "promotion" used in other Establishment Clause cases.\(^{185}\) According to Justice Blackmun, all of these concepts expressed a similar principle: "The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community."\(^{186}\)

Next, addressing the specific question of the applicability of *Lynch v. Donnelly* to the facts at hand, Justice Blackmun rejected using the rationale of the majority opinion in *Lynch*. Calling the majority opinion "none too clear,"\(^{187}\) the Justice instead looked to Justice O'Connor's concurring opinion in *Lynch* and the views of the *Lynch* dissenters for guidance in evaluating governmental use of religious symbols.\(^{188}\) In Justice Blackmun's view, the concurring

\(^{181}\) 109 S. Ct. at 3100.

\(^{182}\) *Id.* at 3101.

\(^{183}\) *Id.* at 3100.

\(^{184}\) *Id.*


\(^{187}\) 109 S. Ct. at 3101. Justice Blackmun stated that the two "strands" of the *Lynch* majority opinion were unclear:

First, the opinion states that the inclusion of the creche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past,—but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the creche gave to religion was no more than "indirect, remote, and incidental."—without saying how or why.

*Id.* at 3101-02 (citations omitted).

\(^{188}\) *Id.* at 3102.
and dissenting opinions in Lynch set forth a better analytical framework than the Lynch majority opinion because the concurrence and dissents were ideologically unified under the notion of endorsement. Though diverging on the bottom line, Justice Blackmun declared that both the concurrence and the dissents in Lynch would determine governmental endorsement by examining the physical context of the government’s use of a religious symbol. With this analytical framework in mind, the Justice stated that “our present task is to determine whether the display of the creche and the menorah, in their respective ‘particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.”

Justice Blackmun first turned his attention to an examination of the nativity scene display in the County Courthouse. Writing in this instance for a majority of the Court, he concluded that the effect of the County display was to endorse Christian doctrine. In support of this conclusion, the Justice made specific reference to four physical features of the Courthouse display. First, Justice Blackmun took note of the language used in the display. The presence of an angel figurine holding a banner reading “Glory to God in the Highest,” the Justice declared, served only to enhance in sectarian terms the religious message of the creche. Second, he compared the display in Lynch with the display in County of Allegheny. According to Justice Blackmun, the display in Lynch consisted of a number of figurines and objects arranged to have separate focal points. In this case, the Justice observed that the creche stood alone with nothing to detract from its religious message.

Justice Blackmun additionally rejected the County’s argument

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189. Id. at 3102-03.
190. 109 S. Ct. at 3103.
191. Id.
192. Id.
193. Id.
194. 109 S. Ct. at 3103. The angel figurine holding the banner was approximately six inches in height and seven inches wide. The banner was seven-eighths of an inch wide and was nine inches long. Measurements provided by G. Thomas, Director, Allegheny County Department of Communications. The inscription on the banner was written in Latin. Joint Appendix at 94.
196. Id. at 3104. Justice Blackmun used this focal point theory to reject the County’s argument that the other decorations arranged throughout the Courthouse should also be considered as part of the display. Id. at 3104 n.48.
197. Id. at 3104.
that the County's floral decorations around the nativity scene display and the choral program served as the functional equivalent of the secular decorations present in *Lynch*. In Justice Blackmun's view, the floral decorations created a frame which only accentuated the display's religious message. Furthermore, the Justice declared that the choral program was of too short a duration to negate the religious effect of the display.

A third factor cited by Justice Blackmun as indicating governmental endorsement was the situs of the display. The Justice declared that a display could simply not be located in a prominent area such as the Courthouse's Grand Staircase for an extended period of time without creating an impression of governmental support and approval. Justice Blackmun further maintained that the County's use of press releases and its arrangement of the floral decorations only confirmed the understanding that any display located on the Grand Staircase certainly received the support and endorsement of government.

198. *Id.*


200. *County of Allegheny*, 109 S. Ct. at 3104. The choral program was presented during the lunch hour. Each performance lasted about forty-five minutes to one hour. *Joint Appendix* at 182.


202. *Id.* at 3104 n.50. The nativity scene was erected on November 26, 1986 and taken down on January 9, 1987. *Joint Appendix* at 59, 172.

203. *Id.* *County of Allegheny*, 109 S. Ct. at 3104 n.50. Justice Blackmun stated that the press releases associated the County with the creche. The press releases, however, simply announced the respective groups participating in the choral program and the various times and dates of performances. The only reference to the nativity scene contained in the press releases was as follows: "The setting for the holiday festivities at the Courthouse is a manger set loaned to the County by the Holy Name Society of the Diocese of Pittsburgh, and fresh greens and poinsettias provided by the Allegheny County Bureau of Cultural Programs." *Joint Exhibit Volume* at 36.

Additionally, Justice Blackmun stated that the "County created a visual link between itself and the creche" by placing two evergreen trees next to official signs directing visitors to various governmental offices located in the Courthouse. *County of Allegheny*, 109 S. Ct.
Finally, Justice Blackmun stated that the disclaimer sign did not alter the endorsement effect of the nativity scene display. Rather than disclaiming a religious message, the Justice stated that the sign indicated governmental adoption of the religious message of a sectarian organization.

In conclusion, Justice Blackmun stated that government could "acknowledge Christmas as a cultural phenomena," but not observe the occasion as a Christian holy day. Since the County's celebration of Christmas had "the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ," Justice Blackmun declared that the County's display in this context must be enjoined.

Before addressing the constitutionality of the City of Pittsburgh's menorah display, Justice Blackmun, on behalf of a majority of the Court, presented a lengthy rebuttal to Justice Kennedy's criticisms in dissent of the Court's decision on the creche. Justice Blackmun stated that the dissenting opinion grossly misinterpreted the Court's decision concerning legislative prayer in *Marsh v. Chambers*. Justice Blackmun maintained that the dissent's reading of *Marsh* "would gut the core of the Establishment Clause" by legitimating unconstitutional practices on the basis of history.

Justice Blackmun's opinion also took strong exception to the dissent's characterization of the majority's endorsement analysis as "a jurisprudence of minutiae." Justice Kennedy's "proselytization test," argued Justice Blackmun, was not only as equally a fact specific inquiry as the endorsement inquiry of the majority but also created an unacceptable burden of proving governmental favorit-

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204. *County of Allegheny*, 109 S. Ct. at 3105.
205. *Id.* at 3105. To support this argument, Justice Blackmun cited as an example the case of Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989). In that case, the Court held that a tax exemption to religious periodicals was an endorsement of the religious beliefs in these publications.
207. *Id.*
208. *Id.*
210. *County of Allegheny*, 109 S. Ct. at 3106. Justice Blackmun declared that history contained numerous examples of official governmental endorsement of Christianity. One example noted by Justice Blackmun was an 1845 Thanksgiving Proclamation in South Carolina. *Id.* at 3106 n.53.
211. 109 S. Ct. at 3107.
ism for a particular sect or creed. Justice Blackmun declared that the dissenters' proselytization test was simply an effort to lower the level of scrutiny of the Court in Establishment Clause cases.

Finally, Justice Blackmun responded to the dissenting opinion's view that the majority's decision concerning the County nativity scene display indicated a "latent hostility or callous indifference toward religion." Dismissing the dissenters' contention as "offensive" and "absurd," Justice Blackmun stated that the dissenters' criticism was founded upon the faulty proposition that government must be permitted to celebrate both the secular and religious aspects of the Christmas holiday. Justice Blackmun declared that the Constitution mandates that the state remain secular and avoid discrimination on the basis of religion. Confining the government's celebration of Christmas to the holiday's secular aspects, the Justice stated, would ensure no preference or favoritism of religion.

Unlike his statements on the nativity scene, Justice Blackmun's views on the constitutionality of the City of Pittsburgh's display were not joined by any other member of the Court. For Justice Blackmun, the relevant question was whether the City's display, consisting of a Christmas tree, menorah and a sign, was an endorsement of Christmas and Chanukah as religious holidays or secular events. After examining each item included in the City's display, Justice Blackmun concluded that the display did not have the effect of endorsing a religious faith.

Justice Blackmun initially examined the City's Christmas tree. He declared that, unlike the menorah, a Christmas tree was not an inherently religious symbol. Moreover, the overwhelming size of

212. Id. at 3108-09. Justice Blackmun maintained that fact specific inquiries were a normal part of the judicial process of interpreting the broad language of the Constitution. Id. at 3108.
213. Id. at 3109.
214. 109 S. Ct. at 3110.
215. Id.
216. Id. at 3111. While he opened that governmental celebration of Christmas must remain secular, Justice Blackmun maintained that the religious celebration of the holiday need not be confined to private property. Thus, commonplace celebrations of the holiday occurring on public property such as caroling in a park were not constitutional. Id.
217. 109 S. Ct. at 3113.
218. Id. at 3115.
219. Id. Justice Blackmun cited the case of American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) to support his view that a Christmas tree is a secular holiday symbol. In City of St. Charles, Judge Posner stated that a Christmas tree
the City's Christmas tree gave further evidence in the Justice's view that the City display was a secular celebration acknowledging Chanukah as "a contemporary alternative tradition." 220

With respect to the menorah, Justice Blackmun noted that a secular representation of Chanukah was not a reasonable alternative. 221 Because of the lack of a reasonable alternative, the Justice concluded that an inference of endorsement which could be drawn when government uses a religious symbol to serve secular ends was not present. 222

Finally, Justice Blackmun stated that the sign accompanying the City's display further negated any possible endorsement of a religious faith. 223 He declared that the statements on the sign saluting liberty and referring to the theme of light demonstrated the secular nature of the display. 224 Thus, in Justice Blackmun's view, the sign simply confirmed cultural diversity and not an endorsement of religion. 225 In view of all of these considerations, Justice Blackmun concluded that a reasonable observer would not perceive the City's display as conveying a simultaneous endorsement of the Christian and Jewish faiths but rather as a "secular recognition of different traditions for celebrating the winter-holiday season." 226 Therefore, in Justice Blackmun's view, the menorah display did not violate the effect prong of the Lemon test. 227

2. Justice O'Connor's Opinion

Justice O'Connor's concurring opinion 228 in County of Allegheny was regarded by most people as a purely decorative symbol. Id. at 271. The secular nature of the tree has been supported in other cases. See, Lubavitch of Iowa, Inc. v. Walters, 684 F. Supp. 610, 615 (S.D.Iowa 1988).

While he noted that the Christmas tree was "the preeminent secular symbol of the Christmas holiday season," 109 S. Ct. at 3113, Justice Blackmun declared that this secular symbol could take on religious significance if decorated with religious objects. Id. at n.65.

220. County of Allegheny, 109 S. Ct. at 3114.
221. Id.
222. Id. According to Justice Blackmun, the only acceptable secular alternative to the menorah would have been a driedel. A driedal is a child's toy, a four-sided top with Hebrew letters referring to the Hannukah miracle. Joint Appendix at 241-42.
223. County of Allegheny, 109 S. Ct. at 3114.
224. Id.
225. Id. at 3115.
226. Id.
227. Id. Justice Blackmun left open the possibility that the menorah display violated the purpose and entanglement prongs. On remand, the Third Circuit held that the menorah display did not violate either of the remaining prongs. American Civil Liberties Union v. County of Allegheny, Civil Nos. 87-3395 & 3436 (3rd Cir. September 13, 1989).
228. County of Allegheny, 109 S. Ct. at 3117 (O Connor, J., concurring).
had a threefold purpose: one, to give her interpretation of the meaning of *Lynch v. Donnelly*; two, to respond to Justice Kennedy's criticisms of her endorsement analysis; and three, to explain her conclusion as to why the inclusion of a menorah in the City of Pittsburgh's holiday display was constitutional.

Justice O'Connor declared that her concurrence in *Lynch* was based on her understanding that "the creche had to be viewed in light of the total display of which it was a part."\(^{229}\) The fact that the *Lynch* majority intended the creche to be viewed in its physical context, Justice O'Connor continued, was evidenced by the majority opinion's repeated references to the inclusion of the creche within the larger holiday display.\(^ {230}\) Unlike the display in *Lynch*, Justice O'Connor noted that the nativity scene in *County of Allegheny* stood alone in a public area of a core governmental building.\(^ {231}\) Thus, the County Courthouse creche was unconstitutional, in Justice O'Connor's view, because it conveyed a message that religion was relevant to one's standing in the political community.\(^ {232}\)

Justice O'Connor also used her concurring opinion as a vehicle to vigorously defend her Establishment Clause endorsement analysis.\(^ {233}\) The Justice first defended her endorsement test as doctrinally sound. She declared that the endorsement test expressed the essential command of the Establishment Clause that religion should have no relevance to a person's standing in the political community.\(^ {234}\) To rely simply upon an Establishment Clause standard prohibiting coercive governmental practices, Justice O'Connor argued, was an insufficient protection of religious liberty.
and diversity because it failed to take into account the numerous, subtle ways that government can show favoritism or disapproval of particular beliefs.\textsuperscript{225}

In addition to being sound in theory, Justice O'Connor contended that the endorsement test was "capable of consistent application."\textsuperscript{226} Justice O'Connor supported this contention by noting that all three circuit courts that had considered the constitutionality of an unadorned creche had reached the same result utilizing her endorsement analysis.\textsuperscript{227} Though admitting that the endorsement test "may not always yield results with unanimous agreement at the margins,"\textsuperscript{228} Justice O'Connor asserted that such was true of many standards in constitutional law.\textsuperscript{229} Justice Kennedy's modified coercion test, O'Connor declared, was no different.\textsuperscript{230}

Justice O'Connor further denied that an endorsement test was inconsistent with prior precedent and traditions because the test's application created a need to create artificial exceptions in order to legitimate many long-standing governmental acknowledgments of religion in public life.\textsuperscript{231} The Justice stated that these examples of ceremonial deism did not survive Establishment Clause scrutiny because of their historical longevity. Rather, the Justice declared, the longevity and ubiquity of these practices or acts of ceremonial deism were factors that were relevant in evaluating whether the practices or acts convey a message of endorsement.\textsuperscript{232}

\textsuperscript{225} County of Allegheny, 109 S. Ct. at 3119. The lack of coercion was raised by the City and the County to support the displays in the case. See Reply Brief for County of Allegheny and City of Pittsburgh, at 1-6. In his opinion announcing the judgment of the Court, Justice Blackmun specifically declined to consider this factor, 109 S. Ct. at 3103 n.47, relying instead upon dicta in other cases wherein the lack of coercion was not viewed as a requirement for finding an Establishment Clause violation. Id. at 3103 n.47, (citing Committee for Public Education v. Nyquist, 413 U.S. 756, 786 (1973); Abington School District v. Schempp, 374 U.S. 203, 222-23 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962)). Justice O'Connor also declined to reconsider coercion as a factor because she felt that it would make the Free Exercise Clause redundant. 109 S. Ct. at 3119. But see, Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. PITT. L. REV. 673 (1980).

\textsuperscript{226} County of Allegheny, 109 S. Ct. at 3120.

\textsuperscript{227} Id. at 3120. See American Civil Liberties Union v. Allegheny County, 842 F.2d 655 (3rd Cir. 1988), American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987), ACLU v. Birmingham, 791 F.2d 1561 (6th Cir. 1986), cert. denied, 479 U.S. 939 (1986). But see supra, notes 91 to 99 and accompanying text for discussion of McCreary v. Stone.

\textsuperscript{228} County of Allegheny, 109 S. Ct. at 3120.

\textsuperscript{229} Id.

\textsuperscript{230} Id.

\textsuperscript{231} Id. The practices cited by Justice O'Connor were legislative prayers and opening court with "God Save the United States and this honorable Court". Id.

\textsuperscript{232} Id. at 3121.
Additionally, Justice O’Connor responded to the charge that the application of the endorsement test in this case reflected a hostility toward religion. She agreed that government can acknowledge the role of religion in modern society and that government was constitutionally obligated to accommodate religion in particular cases. Justice O’Connor argued, however, that Justice Kennedy’s interchangeable use of the terms “acknowledgment” and “accommodation” ignored the essential fact that the placement of a nativity scene was not necessary to remove a governmentally imposed burden on religion.

Finally, although she agreed with Justice Blackmun’s conclusions that the City’s inclusion of a menorah in its holiday display was constitutional, Justice O’Connor strongly disagreed with Justice Blackmun’s reasoning concerning this display. She contended that Justice Blackmun’s inquiry into whether the City’s display was a dual endorsement of Christianity and Judaism was mistaken because it downgraded the religious significance of both the menorah and the holiday of Chanukah itself. Additionally, Justice O’Connor contended that Justice Blackmun’s “double endorsement or secular acknowledgment of the winter holiday season” incorrectly intimated that an endorsement of a minority faith was not possible. In Justice O’Connor’s view, a menorah standing alone was capable of sending a message of endorsement just as the creche in the County Court House standing alone sent a message of endorsement. Further, the Justice strongly disagreed with Justice Blackmun’s statements concerning the necessity of the use of a more secular alternative to the display of religious symbols. Justice O’Connor labeled this rule as “irrelevant” and criticized it “too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented...”

243. *Id.*
244. *Id.* at 3121-22. The term accommodation can be used in two ways. The first usage would relate to seeking an exemption from some governmental regulation or practice that has a significantly harmful impact on the religious practice of an individual. This usage relates primarily to the Free Exercise Clause. See, e.g., Corporation of Presiding Bishops v. Amos, 107 S. Ct. 2862 (1987); Hobbie v. Unemployment Appeals Comm’n, 408 U.S. 136, 107 S. Ct. 1046 (1987); Sherbert v. Verner, 374 U.S. 398 (1963). The second usage of the term accommodation would refer to efforts to facilitate the exercise of religion in public life or the recognition of religion in public life through the display of symbols. See, *Developments in the Law—Religion and the State*, 100 Harv. L. Rev. 1606, 1641-44 (1987). Justice Kennedy’s use of the term accommodation is clearly with reference to the latter meaning.
246. *Id.* at 3135.
247. *Id.* at 3123.
by each case." Instead, Justice O'Connor concluded that the City's display "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season."

3. Justice Kennedy's Dissenting Opinion

Like Justice Blackmun's plurality/majority opinion, Justice Kennedy's dissenting opinion also began with a discussion of the Lemon test. Justice Kennedy observed that the Lemon framework had received "persuasive criticism." Despite such criticism, the Justice nevertheless declared that Lemon need not be reconsidered at this time. In Justice Kennedy's view, the Lemon test, "applied with proper sensitivity to our traditions and caselaw," satisfactorily resolved the issues presented by County of Allegheny.

Although he specifically disavowed any attempt to change Lemon, Justice Kennedy nevertheless presented an alternative to Lemon. The Justice stated that government policies of accommodation, acknowledgment and support of religion were an accepted part of American political and cultural life. According to Justice Kennedy, governmental latitude in recognizing and accommodating religion under the Establishment Clause was limited by two factors: one, a prohibition on government coercion to support or participate in any religion; and two, a prohibition of direct benefits which establishes or tends to establish a religion.

Addressing initially the necessity of governmental coercion, Justice Kennedy stated that case law evidenced without exception that the Court would invalidate coercive government conduct furthering religious interests. While he acknowledged that the dicta of recent cases rejected the need to show coercion to prove an Es-

248. *Id.* at 3124.
249. *Id.* at 3123.
251. *Id.* at 3134 (Kennedy, J., dissenting). *See also supra* notes 4 to 5 and accompanying text.
253. *Id.* at 3135.
254. *Id.* at 3136.
establishment Clause violation, Justice Kennedy stated that these cases were of limited applicability because they dealt only with the necessity of proving direct governmental coercion. According to Justice Kennedy, passive or symbolic accommodation of religion, absent some showing of coercion, posed little danger to religious liberty.

Concerning the second factor of the establishment of religion, the Justice referred to the permissible church-state contacts cited in the *Lynch* and *Marsh* cases. In Justice Kennedy's view, these cases recognized that symbolic acknowledgment of religion and traditional acts of assistance of religion conferred no substantial benefit upon religion. Thus, Justice Kennedy opined that a violation of the Establishment Clause would require the demonstration of a benefit to religion "more direct and more substantial than practices that are accepted in our national heritage."

Applying these factors of coercion and benefit to the facts presented in *County of Allegheny*, Justice Kennedy declared that the two holiday displays at issue were constitutional. He noted preliminarily that the County's and City's interests in celebrating the season and acknowledging the religious aspects of the holiday fell well within the nation's tradition of governmental acknowledgment and accommodation. Justice Kennedy further declared that an enforced recognition of only the secular elements of the holiday would signify "a callous indifference" toward religion. The Justice observed that there was no evidence of governmental coercion concerning the two displays. Additionally, Justice Kennedy stated that *Lynch* was dispositive of the question whether a

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257. *Id.* Justice Kennedy did concede that religious symbols can be used in a coercive manner. As an example, Justice Kennedy referred to the permanent erection of a cross on the roof of city hall. *Id.* The display of crosses on public property has been the subject of numerous court challenges. See supra, note 199.
259. *Id.* at 3138.
260. *Id.* at 3139.
261. *Id.* at 3138, (citing Brief for Petitioner, County of Allegheny, at p. 27. Justice Kennedy took issue with the majority's contention that the creche display could not be "justified as an accommodation of religion because the display did not remove a burden on the exercise of Christianity." Justice Kennedy declared that limits of permissible state accommodations of religion are not coextensive with the non-interference with religion required by the Free Exercise Clause. 109 S. Ct. at 3138 n.2. (citations omitted).
262. *Id.* at 3138.
263. *Id.* at 3139.
creche or menorah represented a serious risk of establishment of religion.\textsuperscript{264} Furthermore, Justice Kennedy rejected the principal arguments advanced to distinguish the \textit{Lynch} display from the displays in \textit{County of Allegheny}. Justice Kennedy stated that the differences in the physical arrangements of the particular displays were unimportant.\textsuperscript{265} The crucial fact in \textit{Lynch}, Justice Kennedy declared, was not the physical features of the display but the recognition that a seasonal display of a creche itself simply poses no danger of the establishment of religion.\textsuperscript{266} Furthermore, Justice Kennedy declared that the location of the displays on public as opposed to private property was equally inconsequential.\textsuperscript{267} The Justice observed that not only did the \textit{Lynch} decision never suggest that use of public property converted permissible governmental conduct into an Establishment Clause violation, but also that the First Amendment may require access to government property by religious groups.\textsuperscript{268}

Justice Kennedy's dissenting opinion also took strong exception to Justice O'Connor's endorsement analysis. He criticized the endorsement test as flawed both as a concept and in its application.\textsuperscript{269} According to Justice Kennedy, any standard for deciding Establishment Clause issues must comport with precedent and traditional practices.\textsuperscript{270} Thus, the Justice declared any test which invalidated well-established traditions and practices was simply an improper reading of the Establishment Clause.\textsuperscript{271} Justice Kennedy further stated that the endorsement test was flawed because few of the traditional governmental practices acknowledging the role of religion in modern society could withstand scrutiny under this test.\textsuperscript{272}

Citing numerous examples of official recognition of religion, Justice Kennedy observed that some endorsement was inherent in all

\begin{itemize}
\item\textsuperscript{264} \textit{Id.}
\item\textsuperscript{265} \textit{Id.} at 3139-40.
\item\textsuperscript{266} \textit{Id.} at 3140.
\item\textsuperscript{267} \textit{Id.}
\item\textsuperscript{268} \textit{Id.}
\item\textsuperscript{269} \textit{Id.} at 3141.
\item\textsuperscript{270} \textit{Id.}
\item\textsuperscript{271} \textit{Id.} at 3141-42. Justice Kennedy conceded that the practice of having public holiday displays was of recent vintage. But Justice Kennedy maintained that a practice need not date back to the founding of the County in order to be constitutional. Justice Kennedy declared that Marsh v. Chambers, 463 U.S. 783 (1982), did not carve out an exception but rather stood for the broad proposition that history and understanding are the determinent of Establishment Clause validity. \textit{County of Allegheny}, 109 S. Ct. at 3141-42.
\item\textsuperscript{272} \textit{Id.}
\end{itemize}
these practices.\textsuperscript{273} The end result of the endorsement test, in Justice Kennedy's view, was an unacceptable choice between invalidating scores of traditional practices recognizing religion in American life or creating numerous exceptions to the rule for these traditional practices while invalidating other public practices of less duration with no greater endorsement effect.\textsuperscript{274}

Justice Kennedy also argued that the application of the endorsement test threatened to trivialize constitutional adjudication. Justice Kennedy declared that the majority had embraced a "jurisprudence of minutiae" which would require courts to examine displays in exhaustive detail to determine their constitutionality.\textsuperscript{275} This "unguided examination of marginalia," Justice Kennedy continued, was "irreconcilable with the imperative of applying neutral principles in constitutional adjudication."\textsuperscript{276}

In conclusion, Justice Kennedy opined that the majority's approach in \textit{County of Allegheny} contradicted the values of accommodation and acknowledgment implicit in the Establishment Clause.\textsuperscript{277} Labeling the majority's efforts to limit governmental acknowledgment of religion as "an Orwellian rewriting of history," Justice Kennedy declared that communities should be free to make reasonable judgments regarding the accommodations and acknowledgment of the cultural and religious aspects of holidays.\textsuperscript{278}

V. THE NEW CONSTITUTIONAL ANALYSIS OF HOLIDAY DISPLAYS

A. The Rewriting of Lynch

Although the Supreme Court's decision in \textit{Lynch} was subjected to extensive criticism, the basic message of the case seemed rela-
tively clear: In the context of the holiday season, holiday displays with religious symbols do not violate the Establishment Clause. In County of Allegheny v. American Civil Liberties Union, the Supreme Court provided a new interpretation of Lynch. This new interpretation emphasized the physical rather than the seasonal context of a display. The majority's attempt in County of Allegheny to place a fact-specific, physical context interpretation on Lynch is strained and unconvincing for several reasons.

Both Justices Blackmun and O'Connor repeated Chief Justice Burger's detailed description of the Pawtucket display in an attempt to emphasize the importance of the physical setting to the Lynch decision. But other than his initial description of the Pawtucket display, Chief Justice Burger never again mentioned the secular decorations, let alone attributed any special significance to their presence.

Additionally, Justice Blackmun cited the particular floral arrangement surrounding the Courthouse creche, the limited length of the choral program and the sign disclosing the ownership of the creche to support his contention that the County did not do enough to detract from or negate the message of endorsement conveyed by the creche. But this assertion that the secular decorations and figurines were necessary to cover up the religious meaning of the creche is expressly contradicted in Lynch. Both Chief Justice Burger's and Justice O'Connor's opinions in Lynch specifically disavowed that secular decorations were necessary to camouflage the religious significance of the creche. More pointedly, Justice O'Connor's concurring opinion in Lynch stated that the presence of secular decorations did not drain or nullify the religious and sectarian significance of the creche.

280. Id. at 3102, 3117.
281. Id. at 3104-05. In comparing the Lynch display, Justice Blackmun espoused a "focal point" theory to support his contention that the Courthouse display was too intensely religious. The description of the arrangement of the Lynch display provided by the district court indicate that all of the items in the display were not located in one central area but were spread throughout the park area. See Donnelly, 525 F. Supp. at 1155. Arguably, the multiple points of the various items in the Lynch display were so far apart that they could not detract from the religious message of the creche.
283. Id. at 692 (O'Connor, J., concurring).
Finally, the Court in *County of Allegheny* disregarded the explicit instructions contained in *Lynch* regarding the proper analytical framework for determining the constitutionality of a public display of a religious symbol. In *County of Allegheny*, Justice Blackmun declared that the concurring and dissenting opinions in *Lynch* provided the relevant constitutional principles to govern the case and the applicable principle was that the effect of the government's use of religious symbolism depends upon its physical setting. This mysterious interpretation of *Lynch* by Justice Blackmun, however, completely ignores the statements that the context of the season was the applicable governing principle. Twice in his opinion, Chief Justice Burger referred in *Lynch* to “the creche in the context of the Christmas season.” The Chief Justice concluded:

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and our holdings.

Justice O'Connor also disregarded “the context of the season” standard articulated by the *Lynch* majority. Justice O'Connor justified her change in position on the creche display in *County of Allegheny* by maintaining that her concurring opinion in *Lynch* was premised on the *Lynch* majority's recognition of the necessity of viewing the creche in light of the total display of which it was a part. Justice O'Connor supported her interpretation of *Lynch* by citing the repeated references made in the majority opinion to “the inclusion of the creche.” While Justice O'Connor’s explanation of her changed vote in *County of Allegheny* is defensible, it nevertheless ignores that her concurring opinion also employed a “context of the season” standard. Justice O'Connor stated:

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious

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286. *Id.* at 686 (emphasis added).
content of a religious painting, negates any message of endorsement of that context.\textsuperscript{289}

Clearly, a fair reading of the \textit{Lynch} decision does not support the majority's fact-specific, physical context interpretation in \textit{County of Allegheny} of the \textit{Lynch} decision.

\textbf{B. The Endorsement Test: Will it Work for the Holiday Displays?}

In writing about the \textit{Lynch} decision, some commentators accused the Supreme Court of creating a plastic reindeer rule.\textsuperscript{290} According to these \textit{Lynch} critics, the Supreme Court tacitly adopted such a rule to govern public displays of religious symbols by suggesting that a display of a religious symbol would not violate the Establishment Clause if it was accompanied by secular objects and secular Christmas figurines subduing the religious element of the display.

If the Court in \textit{County of Allegheny} had adopted a plastic reindeer rule, then perhaps the decision might not have been so disappointing. At least with a plastic reindeer rule, there would have been a clear and predictable basis for determining the constitutionality of holiday displays. Instead, by rewriting \textit{Lynch} and opting for Justice O'Connor's endorsement analysis, an approach which looks to all of the circumstances regarding a display,\textsuperscript{291} the Court has regrettably embarked on a course destined to produce even more confusion and uncertainty over public holiday displays than existed after \textit{Lynch}. The uncertainty and confusion bound to be created under the Supreme Court's new formula for holiday displays, an analysis which can be labelled as "beyond the plastic reindeer rule," can best be illustrated by several examples suggested by the Court's analysis in \textit{County of Allegheny}.

In \textit{County of Allegheny}, Justice Blackmun observed that the location of a display on public property does not make the display unconstitutional \textit{per se}.\textsuperscript{292} Justice O'Connor, however, seemed to adopt the position advanced by the American Civil Liberties Union and hinted that the location of a creche at a core governmental building was a significant factor in making the Allegheny County

\textsuperscript{289} \textit{Lynch}, 465 U.S. at 692.
\textsuperscript{291} \textit{County of Allegheny}, 109 S. Ct. at 3118 (O'Connor, J., concurring).
\textsuperscript{292} Id. at 3111.
Courthouse display unconstitutional.\textsuperscript{293} Since Justice O'Connor's views in this area have been of crucial importance, the issue of what constitutes a core government building would seem to be of importance. But the Court provides no guidance as to what constitutes a core function of government. Is it a park? An airport? A nursing facility? Ironically, the Court has eschewed such a core function standard as unworkable in other cases, but indirectly suggests its significance in cases involving religious displays.\textsuperscript{294}

Another example of the uncertainty promoted by the "beyond plastic reindeer rule" analysis is the indoor versus outdoor location of a display. After \textit{Lynch}, one of the unsettled questions was whether the display of a religious symbol could be located on public property.\textsuperscript{295} After \textit{County of Allegheny}, one must ask whether the Court has implicitly adopted an inside/outside display rationale. The display in \textit{Lynch} which was constitutional was an outdoor display; the display inside the Courthouse in \textit{County of Allegheny} was unconstitutional while the display outside the City-County Building was constitutional.

Still another example from the \textit{County of Allegheny} case illustrating the difficulty of applying the physical context standard of the reindeer rule is holiday floral decorations. Under the analysis of both Justices Blackmun and O'Connor in \textit{County of Allegheny}, the display of a Christmas tree is most likely constitutional.\textsuperscript{296} However, the specific items decorating the tree, if religious in nature, could create an Establishment Clause problem. In \textit{County of Allegheny}, the large Christmas tree near the menorah display was permissible; on the other hand, smaller evergreen trees surrounding the creche created a visual link between government and the religious meaning of the creche.\textsuperscript{297} Does this mean that in future cases not only the arrangement but also the size of the floral decorations in a display is an important factor in determining the display's constitutionality?

Although these examples seem facetious, they illustrate the serious flaw in the approach chosen by the Court in \textit{County of Allegheny}.

\begin{itemize}
\item \textsuperscript{293} \textit{Id.} at 3119.
\item \textsuperscript{294} \textit{See} Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In \textit{Garcia}, the Court rejected as "unsound in principle and unworkable in practice" a function standard for purposes of determining state regulatory immunity under the Commerce Clause. \textit{Id.} at 546-47.
\item \textsuperscript{295} \textit{See supra,} note 59.
\item \textsuperscript{296} \textit{County of Allegheny,} 109 S. Ct. at 3113, 3122.
\item \textsuperscript{297} \textit{Id.} at 3104 n.50. \textit{See also supra,} note 203.
\end{itemize}
gheny. Under the physical context approach adopted by the Court, variations in the location, arrangement and content of a holiday display must be intensively scrutinized to determine their endorsement effect. Moreover, these factors must be examined from the perspective of "a reasonable observer." Though couched in objective terms, the analysis required under this approach is invariably subjective and indeterminate. Nothing is of special importance; therefore, everything is relevant. If everything is relevant, a court can look to no one factor as dispositive. Inevitably, a court's view of the jumble of variations in location, arrangement and content results in what Judge Easterbrook described in the City of Chicago case as an announcement of gestalt, an expression of personal preference and feeling and not the application of a constitutional rule.

Under the Lynch analysis, a seasonal context standard made an inquiry into the minutiae of location, arrangement and content of a holiday display inconsequential. Thus, while the basic rationale of the standard of Lynch could be criticized on policy grounds, the rationale of Lynch was capable of consistent application in future cases and avoided the necessity of artificially elevating trifling details about the particulars of a municipality's display into matters of high and vital constitutional importance.

VI. CONCLUSION

Because of the uncertainty and confusion caused by the Supreme Court's decision in Lynch v. Donnelly, it was hoped that the Court would settle once and for all the question of the constitutionality of the public display of religious symbols by setting forth a bright line rule to govern such displays. Rather than providing a rule, even one like the so-called "plastic reindeer rule," the Court provided an indeterminate analytical framework where everything is relevant but nothing is singularly decisive. In short, by going beyond the "plastic reindeer rule," the Court has made answering the question of what type of display of religious symbols under governmental auspices is constitutionality permissible even more difficult than after Lynch, and has made likely the possibility of more controversy, litigation and inconsistent results in this sensitive area.

299. American Jewish Congress v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1986), (Easterbrook, J., dissenting).