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Keeping the Faith: The Lower Courts' Dubious Interpretation of Lynch v. Donnelly And Stare Decisis

Donald P. Judges

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Keeping the Faith?: The Lower Courts' Dubious Interpretation of *Lynch v. Donnelly* and Stare Decisis

*Donald P. Judges**

TABLE OF CONTENTS

INTRODUCTION	168
I. <i>LYNCH v. DONNELLY</i>	169
II. <i>LYNCH</i> IN THE LOWER COURTS	174
A. <i>American Jewish Congress v. City of Chicago</i>	175
B. <i>ACLU v. County of Allegheny</i>	176
C. <i>ACLU v. City of Birmingham</i>	177
D. <i>McCreary v. Stone</i>	178
III. CRITIQUE OF <i>LYNCH</i>	179
A. <i>Lynch and Historicism</i>	179
B. <i>Lynch and Lemon</i>	184
IV. ANALYSIS AND CRITIQUE OF LOWER COURTS' TREATMENT OF <i>LYNCH</i>	189
A. <i>Descriptive Discussion of Lower Court Opinions</i>	190
1. The Two-Plastic-Reindeer and City-Hall Rules	190
2. Stare Decisis	192
a. Anticipatory overruling	196
b. Other possible bases for defiance of precedent	197
1. <i>Generalities</i>	197
2. <i>A possible exception</i>	199
3. <i>The case at hand</i>	200
B. <i>Critique of Lower Court Opinions</i>	201
CONCLUSION	207

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INTRODUCTION

On March 5, 1984, the Supreme Court delivered its opinion in *Lynch v. Donnelly*.¹ Although *Lynch* did not open to unanimous acclaim,² there was little doubt what *Lynch* stood for. At the time, the decision was regarded as holding that governments may celebrate the Christmas season by sponsoring the unambiguously Christian symbol of a crèche without running afoul of the establishment clause of the first amendment.³

The Supreme Court has signalled no retreat from *Lynch*; yet surprisingly for those who take seriously traditional concepts of stare decisis, the municipality has prevailed in only one of the four establishment clause challenges to municipally sponsored crèches to reach the courts of appeals since *Lynch*. The other three circuits distinguished *Lynch* on exceedingly doubtful grounds and proceeded to apply the *Lemon v. Kurtzman* test,⁴ the same three-part analysis that in *Lynch* had yielded the opposite result. Thus, in only one post-*Lynch* case has a court of appeals appeared faithful to the Supreme Court's decision in *Lynch*. Recently, the Supreme Court announced its intention to review one of the three contrary cases.⁵

The Supreme Court's decision in *Lynch* is difficult to reconcile with a coherent theory of establishment clause principles. The Court's analysis is troublesome doctrinally and the case's result is disturbing to those who value individual religious freedom and the integrity of civil government.⁶ On one level, *Lynch* raises questions about the Court's commitment to liberty when this country's dominant religious traditions and constitutional aspirations appear to conflict. The reaction to *Lynch* in the lower courts in turn presents difficult questions concerning the responsibilities of inferior federal courts to the sometimes competing dictates of the Supreme Court, the Constitution, and their own consciences.

This article will explore these issues as a case study in judicial method, with special emphasis on judicial interpretation of what has been called

1. 465 U.S. 668 (1984).

2. *E.g.*, Redlich, *Nativity Ruling Insults Jews*, N.Y. Times, Mar. 26, 1984, at A19, col. 2, quoted in L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT, 124-26 (1984). See also *infra* notes 78-88 and accompanying text.

3. See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770; Fairchild, *Lynch v. Donnelly: The Case for the Crèche*, 29 ST. LOUIS U.L.J. 459 (1985). For contemporaneous media accounts of *Lynch*, see Greenhouse, *High Court Rules Cities May Put Up Nativity Displays*, N.Y. Times, Mar. 6, 1984, at A1, col. 6; Barbash, *City-Funded Crèche is Permitted*, Wash. Post, Mar. 6, 1984, at A1, col. 1; *High Court Ruling on Church, State*, San Francisco Chron., Mar. 6, 1984, at 1, col. 1. Greenhouse noted the assertion of the *Lynch* dissenters that a crèche standing alone, unlike the crèche involved in *Lynch*, might call for a different result. Greenhouse, *Court Rules City's Display of Crèche O.K.*, Denver Post, Mar. 6, 1984, at A1, col. 1. This distinction is one of two relied upon by the lower courts in the three cases discussed below.

4. 403 U.S. 602 (1971).

5. *ACLU v. County of Allegheny*, 842 F.2d 655 (3d Cir. 1988), cert. granted, 109 S. Ct. 53 (1988).

6. "[T]he establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority." *McGowan v. Maryland*, 366 U.S. 420, 430 (1961).

“intercourt stare decisis”⁷ when federal appellate courts are confronted with Supreme Court constitutional precedent they believe was wrongly decided. I shall examine the options available to a court in such circumstances, the choices apparently made by the courts in the examples I have chosen, and what the possibilities suggest about those courts’ conception of law.

I conclude that, at least in constitutional cases (and probably in other areas as well), when the Supreme Court clearly has announced a decision that embodies a choice from among competing doctrinal, political, moral, and judicial considerations, lower courts are bound to interpret that decision in a way that is faithful to the substance of the principles embodied in the choices made. In reaching this conclusion, I also hope to show that its correctness is not as self-evident as a casual conception of stare decisis otherwise might suggest. There are two bases for my conclusion. First, explicit defiance of such principles, while sometimes yielding desirable results and reflecting the virtue of candor, compromises too many values important to what many members of the legal community regard as a healthy political and moral system of law to be considered a legitimate alternative — at least in most cases. Second, the other option available to those lower courts that seek to avoid the force of such precedent — semantic but not substantive faithfulness to precedent — inflicts all the damage of outright defiance, compounded by the corrosive effect of pretextual or fictive reasoning.

This article is organized into four sections. The first summarizes the facts and reasoning of the Supreme Court in *Lynch*. The second does the same for each of the four circuit court cases. Section three critiques *Lynch*, to establish a foundation for understanding and critiquing the lower courts’ subsequent interpretations of *Lynch*. Finally, section four provides both a descriptive analysis and a critique of the lower courts’ interpretation of *Lynch*, focusing on the issues of stare decisis and judicial method raised by those interpretations.

I. *LYNCH V. DONNELLY*

The facts in *Lynch* as recited by the Supreme Court are simple.⁸ For forty years, the City of Pawtucket, Rhode Island, at its own expense, erected annually “a Christmas display as part of its observance of the Christmas holiday season.”⁹ The display was situated in a privately owned park located in the shopping district. Part of the display was a crèche,

7. The term stare decisis is used to describe both the extent to which a court is bound by its own precedent — “intracourt stare decisis” — and the effect of precedents of higher courts on lower courts — “intercourt state decisis.” See Hardisty, *Reflections on Stare Decisis*, 55 *IND. L.J.* 41, 46 & n.24 (1979).

8. One fact noted by the district court but not recited in the Court’s opinion is the proximity (within 300 feet) to Pawtucket’s city hall of the park in which the crèche was located. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1156 (D.R.I. 1981).

9. *Lynch*, 465 U.S. at 671.

“including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5” to 5’.”¹⁰ The display also included

many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads ‘Seasons Greetings’¹¹

The District Court agreed with the plaintiffs (Pawtucket residents and individual members of the Rhode Island American Civil Liberties Union) that inclusion of the crèche in the display failed all three prongs of the tripartite *Lemon* test, thus violating the establishment clause.¹² A divided panel of the First Circuit Court of Appeals affirmed on the basis that defendants had failed to establish a secular purpose and had in fact endorsed religious beliefs.¹³

The Supreme Court commenced its analysis by noting “the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the court has so often noted, total separation of the two is not possible.”¹⁴ The Court foreshadowed its result by emphasizing that the familiar wall-of-separation metaphor is “not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”¹⁵ Complete separation of church and state is not required; state hostility to religion is at odds with the free exercise clause; and “callous indifference” is not mandated by the establishment clause.¹⁶

The Court proceeded to recite numerous examples, some dating back to the Bill of Rights’ own nativity in 1789, of governmental involvement in religious matters. For example, the First Congress enacted legislation providing for paid chaplains for the House of Representatives and Senate.¹⁷

10. *Id.*

11. *Id.*

12. *Donnelly*, 525 F. Supp. at 1178.

13. *Donnelly v. Lynch*, 691 F.2d 1029, 1035 (1st Cir. 1982).

14. *Lynch*, 465 U.S. at 672.

15. *Id.* at 673. For reference to the “wall” metaphor, usually attributed to Thomas Jefferson’s reply to an address by a committee of the Danbury Baptist Association, see *Everson v. Board of Education*, 330 U.S. 1, 18 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Jefferson’s reply). Then-Justice Rehnquist has argued the Court’s occasional reference to Jefferson’s metaphor takes it out of its historical context: It appeared in a short note of courtesy by Jefferson (who was in France when the Bill of Rights was passed by Congress and ratified by the states) 14 years after passage by Congress of the Bill of Rights. *Wallace v. Jaffree*, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting).

16. *Lynch*, 465 U.S. at 673 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)).

17. *Id.* at 674. Based in part on such historical evidence, the Court has held that a state legislature’s employment of official legislative chaplains to open each day of its sessions with a prayer does not violate the establishment clause. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Court noted other examples of "official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."¹⁸

The Court stated that establishment clause analysis consists of a case-by-case application of a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."¹⁹ In drawing that line, the Court noted, it often has been "useful" to apply the tripartite test of *Lemon v. Kurtzman*, which asks (1) whether the challenged activity has a secular purpose, (2) whether its primary effect is to advance or inhibit religion, and (3) whether it creates an excessive entanglement of government with religion.²⁰ The Court pointed out, however, that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."²¹

Nevertheless, the Court applied *Lemon* with the caveat that "the focus of our inquiry must be on the crèche in the context of the Christmas season."²² The Court concluded that the District Court had "plainly erred

18. *Lynch*, 465 U.S. at 674. Those examples include presidential proclamations of a day of Thanksgiving and Christmas as national holidays, *id.* at 675 nn.2-3; acts of Congress providing paid leave for federal employees on such national holidays, *id.*; the motto "In God We Trust" on our national currency, *id.* at 676; inclusion of the language "one nation under God" in the Pledge of Allegiance, *id.*; an act of Congress directing the President to proclaim, and presidential proclamation of, a National Day of Prayer, *id.* at 677; presidential proclamation of Jewish Heritage Week and Jewish High Holy Days, *id.*; and government-funded public display in museums and other public buildings (including the Supreme Court) of artwork depicting religious themes predominantly inspired by one faith, *id.*

19. *Id.* at 678-79 (quoting *Lemon*, 403 U.S. at 614). The examples listed in *Lemon* concerned the issue of excessive entanglement, and were quite removed from the active promotion of Christian symbology in *Lynch*: "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Lemon*, 403 U.S. at 614.

20. *Lynch*, 465 U.S. at 679 (citing *Lemon v. Kurtzman*, 403 U.S. at 615).

21. *Lynch*, 465 U.S. at 679 (citing *Tilton v. Richardson*, 403 U.S. 672 at 677-78 (1971); *Nyquist*, 413 U.S. at 773). The Court's citation to *Nyquist* and *Tilton* is puzzling, for in both cases the Court analyzed the government aid to church-related educational institutions under the elements of the *Lemon* test.

The Court in *Lynch* observed that it had declined to apply the *Lemon* analysis in *Marsh*, 463 U.S. 783, and in *Larson v. Valente*, 456 U.S. 228 (1982). Actually, in *Larson* the Court said that the *Lemon v. Kurtzman* test was "intended to apply to laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate among religions." 456 U.S. at 252. While stating that application of *Lemon* was not necessary to the outcome, the Court concluded that the excessive entanglement prong of *Lemon* would invalidate the law challenged in *Larson*. *Id.* at 252-53. *Marsh* and *Larson* led to speculation that the Court was abandoning the *Lemon* test. Note, *Of Crosses and Creches: The Establishment Clause And Publicly Sponsored Displays of Religious Symbols*, 35 AMER. U.L. REV. 477, 479 (1986). And, as discussed below, although the Court in *Lynch* invoked *Lemon*, its free-wheeling application of the *Lemon* test did little to indicate a reaffirmation of *Lemon*'s vitality. Since *Lynch*, however, the Court has employed *Lemon*'s analysis more vigorously. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985). See *Simson, The Establishment Clause In the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 907 (1987) (1984-85 term showed revitalization of *Lemon* test).

22. *Lynch*, 465 U.S. at 679. To illustrate, the Court referred to *Stone v. Graham*, in which a copy of the Decalogue had been posted in a public school "purely as a religious admonition, not integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* (quoting *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam)). See also *School*

by focusing almost exclusively on the crèche," in that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."²³ The "narrow question" raised by the case under the first prong of *Lemon* was whether there was "a secular purpose" for the display of the crèche.²⁴ The purpose need not be exclusively secular.²⁵ Rejecting the District Court's findings as clearly erroneous, the Supreme Court concluded that among the legitimate secular purposes for the crèche were celebration of the Christmas holiday and depiction of the origins of that holiday.²⁶

The Court also rejected the District Court's conclusion that the primary effect of the crèche was to advance religion. Rather, the crèche "merely happens to coincide or harmonize with the tenets of some religions."²⁷ In that regard, the Court found Pawtucket's inclusion of a crèche in its display as akin to expenditure of public funds for textbooks supplied to children attending church-sponsored schools²⁸ and for transportation of students to church-sponsored schools,²⁹ noncategorical grants to church-sponsored colleges,³⁰ tax exemption for church-owned properties,³¹ Sunday closing,³² school release-time program for religious training,³³ and legislative prayers.³⁴ The benefit to Christianity of a government-sponsored crèche, the Court concluded, was "indirect, remote, and incidental"³⁵

The Supreme Court also found the crèche did not give rise to excessive entanglement with religion. Although the litigation had engendered some political divisiveness, the Court rejected the District Court's conclusion that political divisiveness caused by the litigation rose to the level of excessive entanglement.

The remainder of the majority opinion was devoted to rebuttal of a point sharply raised in Justice Brennan's dissent. Brennan pointed out the unmistakably denominational character of the crèche: "a mystical recreation of an event that lies at the heart of the Christian Faith."³⁶ The

Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (invalidation of daily Bible reading in public schools does not preclude study of the Bible "objectively as part of secular program of education. . . .").

23. *Lynch*, 465 U.S. at 680.

24. *Id.* at 681 (emphasis added).

25. *Id.* at 680-81.

26. *Id.* at 681.

27. *Id.* at 682 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

28. *Board of Education v. Allen*, 392 U.S. 236 (1968).

29. *Tilton*, 403 U.S. 672 (1971).

30. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

31. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

32. *McGowan*, 366 U.S. 420.

33. *Zorach v. Clausen*, 343 U.S. 306 (1952).

34. *Marsh*, 463 U.S. 783. On the other side of that line lay *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (vesting government licensing power in churches); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction in public school classrooms, because it provided sectarian groups with pupils for religious education through use of compulsory education laws).

35. *Lynch*, 465 U.S. at 683.

36. *Id.* at 711 (Brennan, J., dissenting).

majority characterized Brennan's concern as "a stilted overreaction contrary to our history and our holdings."³⁷ The dissent's view, the majority reasoned, would require invalidation under the establishment clause of "a host of other forms of taking official note of Christmas, and of our religious heritage."³⁸

Justice O'Connor's concurrence sought to clarify the appropriate analytical model suggested in *Lemon v. Kurtzman*. She would examine two questions: (1) whether the challenged activity gives rise to excessive entanglement with religious institutions, and (2) whether the activity constitutes government approval or disapproval of religion. The problem with activity that endorses religions is that it communicates "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to the adherents that they are insiders, favored members of the political community."³⁹

For Justice O'Connor, the central question in *Lynch* was whether the Pawtucket crèche constituted government approval of Christianity. That question depends both on what Pawtucket intended to communicate ("subjective" content) and what message actually was conveyed ("objective" content). O'Connor concluded that the "evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols" — a legitimate secular purpose.⁴⁰ As to the "objective" message, O'Connor believed that the "overall holiday setting" changes what viewers may otherwise fairly understand to be the purpose of the display — just as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.⁴¹ The crèche, therefore, constituted government "acknowledgment," as opposed to "endorsement," of religion.⁴²

Justices Brennan, Marshall, Blackmun, and Stevens dissented, arguing that application of the standards under *Lemon v. Kurtzman* requires invalidation of Pawtucket's sponsorship of the crèche. The dissenters inferred a sectarian purpose from the premise that Pawtucket's alleged secular interest — promotion of Christmas spirit, goodwill, and retail sales — could have been served without including the crèche. Inclusion of the crèche manifested "the wholly religious purpose of 'keep[ing] Christ in Christmas'."⁴³ The minority asked the same question as did Justice O'Connor concerning the primary effect of the activity, but concluded that minority religious groups and atheists clearly would understand the crèche "to convey the message that their views are not similarly worthy of pub-

37. *Id.* at 686 (majority opinion).

38. *Id.*

39. *Id.* at 688 (O'Connor, J., concurring).

40. *Id.* at 691.

41. *Id.* at 692.

42. *Id.* at 692-93.

43. *Id.* at 700-01 (Brennan, J., dissenting) (quoting district court opinion, *Donnelly*, 525 F. Supp. at 1173).

lic recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit."⁴⁴

The minority accused the majority of blinking reality by claiming that inclusion of such a distinctly religious object, and one so strongly identified with a particular faith, amounts to nothing more than use of a traditional holiday symbol and bestowal of only an incidental, indirect, and remote benefit of religion.⁴⁵ The minority further rejected the majority's syllogism that once the Court finds designation of Christmas as a public holiday constitutional, it follows that all government association with the holiday is permissible. Christmas, and government accommodations of a national holiday in recognition thereof, have secular impacts that lie within the confines of the establishment clause. The crèche, by contrast, goes beyond recognition of an historic event to representation of one of the central elements of Christian dogma — "that God sent His Son into the world to be a Messiah."⁴⁶

The minority criticized the majority's analysis of and reliance on history. First, the minority observed that the court "until today, consistently limited its historical inquiry to the particular practice under review."⁴⁷ Second, the dissenters' research revealed that at the time the Bill of Rights was adopted, there was no settled pattern of celebrating Christmas either publicly or privately. Moreover, the historical evidence suggests that "development of Christmas as a public holiday is a comparatively recent phenomenon."⁴⁸

II. *LYNCH* IN THE LOWER COURTS

The constitutionality of a municipally sponsored crèche has been challenged in the Second, Third, Sixth, and Seventh Circuits since *Lynch* was decided. Only the Second Circuit has found the crèche to be permissible under the Establishment Clause as interpreted in *Lynch*. The other three circuits, using the same test applied by the Supreme Court in *Lynch*, have found some basis for avoiding having *Lynch* determine the result. This section will review briefly the facts and analyses in each of those cases. In each of the three negative outcomes, one member of the appellate panel has dissented, arguing that *Lynch* and respect for stare decisis compel validation of the crèches. Although the distinctions retailed by the three circuits may enjoy a superficial plausibility, I will attempt to show in section four of this article that a principled reading of *Lynch* will not bear the interpretation placed on it by those courts.

44. *Id.* at 701 (footnote omitted). The dissenters also suggested that the risk of excessive entanglement with religion was significant. *Id.* at 702.

45. *Id.* at 705-06.

46. *Id.* at 711.

47. *Id.* at 719. See, e.g., *McGowan*, 366 U.S. at 445 (history of Sunday Closing laws); *Walz*, 397 U.S. at 676-80 (history of property tax exemptions for religious organization); *Marsh*, 463 U.S. at 787-91 (history of legislative chaplains).

48. *Lynch*, 465 U.S. at 720.

A. American Jewish Congress v. City of Chicago

*American Jewish Congress v. City of Chicago*⁴⁹ was a challenge to inclusion of a nativity scene in the display and decorations for the 1985 Christmas season. The nativity display, located inside Chicago's City Hall, consisted of white plaster figures of Jesus, Mary, Joseph, the three wise men, shepherds, and animals, all under twelve inches in height; it was backed by a banner reading: "On Earth Peace — Good Will Toward Men." Only minimal public funds were contributed for electricity to illuminate the privately owned scene. The display also contained six rectangular disclaimer signs, seven and one-half inches by ten inches, which announced: "Donated by the Chicago Plasterer's Institute — this exhibit is neither sponsored nor endorsed by the Government of the City of Chicago."⁵⁰ Within ten to ninety feet of the crèche, the City of Chicago erected a number of other seasonal decorations in City Hall, including wreaths, a Christmas Tree, and a mechanical Santa Claus accompanied by the reindeer and a sleigh.⁵¹

The majority in *American Jewish Congress* rejected the District Court's conclusion that *Lynch* mandated approval of the crèche, asserting two primary bases for distinction. First, the majority described the Chicago crèche as "self-contained, rather than some element of a larger display."⁵² The other decorations, in the Court's view, were too far away from or did not bear a sufficiently close "thematic" relationship to the crèche to render the crèche simply one element of a larger Christmas display. The disclaimer signs, instead of accomplishing their ostensible purpose, served only to distinguish the crèche further from its surroundings. "In this case, therefore, unlike *Lynch*, the secularized decorations in the vicinity of the nativity scene were not clearly part of the same display."⁵³ Second, the crèche's placement in City Hall — much more closely associated with government than a privately owned park in a shopping district and therefore a more powerful message from government to citizen — "plainly" distinguished the Chicago crèche from *Lynch*.⁵⁴

Having disposed of *Lynch*, the Seventh Circuit proceeded with a much more exacting application of *Lemon* than that undertaken by the Supreme Court in *Lynch*. The rub for the Seventh Circuit was the crèche's effect of advancing religion.⁵⁵ Like the dissenters in *Lynch*, the Seventh Circuit regarded the crèche as "an unequivocal Christian symbol."⁵⁶ Its presence

49. 827 F.2d 120 (7th Cir. 1987).

50. *Id.* at 122-23.

51. *Id.* at 122. Other seasonal decorations adorned City Hall at a greater distance from the crèche, including large and small Christmas trees, Christmas lights, a contribution box, and an artificial snowman. Seasonal performances, including caroling by the local school children, were held in this complex; and recorded holiday music played continuously in the plaza.

52. *Id.* at 125.

53. *Id.* at 126.

54. *Id.*

55. *Id.* at 127. The Seventh Circuit found legitimate the city's stated secular purposes — recognition of a tradition of official acknowledgment of Christmas, recognition of public sentiment in favor of the crèche, and the attraction of visitors to the downtown district.

56. *Id.* (quoting *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986)).

in City Hall, where the presence of government is unavoidable in both a real and a symbolic sense, "inevitably creates a clear and strong impression that the local government tacitly endorses Christianity."⁵⁷

Judge Easterbrook, in dissent, saw the similarities between the display in *Lynch* and Chicago as far more substantial than the differences. For him, the crèche's location among the City's entire Christmas display was dispositive; the location of the entire Christmas display in a park or City Hall did not matter. In both *Lynch* and *American Jewish Congress*, the government sponsorship of the crèche was patent.⁵⁸

B. ACLU v. County of Allegheny

The Third Circuit found *American Jewish Congress* to be more instructive than *Lynch* in considering the constitutionality of a crèche in *ACLU v. County of Allegheny*.⁵⁹ The Allegheny County crèche was located on the first floor of the county courthouse, and consisted of the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, shepherds, animals, and an angel holding a banner that read "Gloria in Excelsis Deo." The crèche was owned by a Catholic organization which erected, arranged, and disassembled the display every year; and a sign in front of the display stated: "This display donated by the Holy Name Society."⁶⁰ The county provided a "dolly and minimal aid" to transport the crèche to and from storage in the courthouse basement. The crèche was decorated at public expense, with poinsettia plants and evergreen trees. The courthouse building was also decorated throughout with wreaths, trees, and Santa Clauses; and the grand staircase behind the crèche was the scene of Christmas carol programs sponsored by the County.⁶¹

The Third Circuit disagreed with the District Court's conclusion that *Lynch* required denial of an injunction. After reciting the facts in *Lynch* and describing the post-*Lynch* case law, the court focused on the second element of the *Lemon* test — whether the challenged activity has the primary effect of advancing or inhibiting religion. To the majority, application of its embellishment of the *Lemon* test to the case at hand led "inexorably" to the conclusion that the Allegheny County crèche violated the

57. *American Jewish Congress*, 827 F.2d at 128. (The disclaimer signs, the court noted, failed to dispel the message of government endorsement of Christianity.)

58. *Id.* at 131-32. Judge Easterbrook also volunteered criticism of the Supreme Court's recourse to "multifactor balances": "When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt." *Id.* at 128-29 (Easterbrook, J., dissenting). While Judge Easterbrook's complaint is well taken as a general matter, it is misplaced in the context of *Lemon*. *Lemon* does require a court to consider several factual variables in deciding the case; but it does not, precisely speaking, call for the assessment of the relative "weights" of the values at stake. See Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 945 & n.8 (1987) (*Lemon* not within Aleinikoff's definition of balancing test).

59. 842 F.2d 655, 660 (3d Cir. 1988), cert. granted, 109 S. Ct. 53 (1988).

60. *Id.* at 657.

61. *Id.* The City of Pittsburgh erected annually in front of the City and County building, one block from the courthouse, an 18-foot-tall menorah owned by a private Jewish organization. The menorah was set up next to a 45-foot-tall Christmas tree, also erected by the City.

establishment clause. The display was conspicuously situated in a public building "devoted to core functions of government," could not "reasonably be deemed to have been subsumed by a larger display of nonreligious items," "would be viewed as pertaining to a particular religion," and involved public participation (albeit minimal) in its handling.⁶²

Judge Weis dissented. *Lynch*, he believed, "directly addresses and conclusively resolves the dispute we encounter here."⁶³ He characterized the post-*Lynch* appellate cases as reflecting "less an attempt to apply the Supreme Court's holding in *Lynch* than a disapproving rejection of its message."⁶⁴ Like Judge Easterbrook, Judge Weis read *Lynch* as clearly upholding government observance of the Christmas holiday by recognizing its origin. He "found no indication [in *Lynch*] that the Pawtucket display survived constitutional scrutiny because it was situated in a private park rather than a county courthouse, or because it closely resembled a miniature golf course with candystriped poles, talking wishing wells, and cutout elephants."⁶⁵

C. ACLU v. City of Birmingham

The third post-*Lynch* case, *ACLU v. City of Birmingham*,⁶⁶ involved a crèche erected annually in front of the Birmingham, Michigan City Hall. The display consisted of the figures of the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs. The display was publicly owned, erected, and maintained. No other objects were included in the display.

Following *Lynch* on the purpose and entanglement elements of *Lemon*, the Sixth Circuit found a secular purpose in celebration of Christmas as a national holiday by displaying a crèche and found no excessive entanglement with religion.⁶⁷ Under the effects element, however, the Birmingham crèche yielded a different result:

The Third Circuit regarded the menorah as subject to the same analysis as the crèche, and stated that the case's outcome would have been the same whether both or either symbol were in issue. *Id.* at 662, n.1. Notwithstanding testimony that a menorah, unlike a torah scroll, has "no inherent religious significance," the majority concluded that the general public would miss that "religious fine point" and would perceive the menorah's placement as an endorsement of religion. *Id.* at 662. See also *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656, 657 (8th Cir. 1986) (affirming denial of preliminary injunction sought to compel state officials to allow placement of menorah on public grounds next to a Christmas tree).

62. *Allegheny*, 842 F.2d at 662. Out of *Lemon*, in the light of *Lynch*, the court squeezed six variables to consider in making that determination: "(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." *Id.* The court reached the same conclusion with respect to the menorah, with the added observation that: "the menorah, unlike the crèche, is not associated with a holiday with secular aspects." *Id.*

63. *Id.* at 666 (Weis, J., dissenting).

64. *Id.* at 668. Evenhandedness requires notation that Judge Weis' dissenting opinion manifested his obvious approving acceptance of *Lynch's* message.

65. *Id.* at 669.

66. 791 F.2d 1561, 1562 (6th Cir. 1986), cert. denied, 479 U.S. 939 (1986).

67. *Id.* at 1565-66.

When surrounded by a multitude of secular symbols of Christmas, a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings are stripped away, there remains only the universally recognized symbol for the central affirmation of a single religion — Christianity.⁶⁸

The majority read the Supreme Court's directive to view the crèche "in the context of the Christmas Holiday season" as referring to the Pawtucket crèche's inclusion among secular symbols of the season, and distinguished the Birmingham crèche on the basis that it stood alone.

Judge Nelson dissented. He found nothing in *Lynch* that required the inclusion of secular Christmas symbols in a display to bring a government-sponsored nativity scene into compliance with the establishment clause. He doubted that "it is appropriate for the federal courts to tell the towns and the villages of America how much paganism they need to put in their Christmas decoration, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication."⁶⁹

D. McCreary v. Stone

Each of the preceding cases expressly repudiated the Second Circuit's ruling in *McCreary v. Stone*.⁷⁰ The Scarsdale crèche in *McCreary*, like the one in *Birmingham*, stood alone rather than as part of a larger holiday display and was erected on city-owned land by a private organization at no expense to the city.⁷¹ A small sign in front of the Scarsdale display disclaimed: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."⁷² Objections to the crèche prompted the city to deny the Scarsdale Creche Committee's request to erect the crèche in 1981. The Committee challenged the denial on free exercise grounds and the Second Circuit ruled that denial was not necessary to serve a compelling state interest — compliance with the establishment clause under *Lemon* — because permitting the display did not have the primary effect of advancing religion.⁷³ The *McCreary* court concluded that the absence of secular Christmas symbols was immaterial to the application of *Lynch* to the establishment clause question.⁷⁴ The court

68. *Id.* at 1566.

69. *Id.* at 1569 (Nelson, J., dissenting).

70. 739 F.2d 716, 730 (2d. Cir. 1984), *aff'd* by an equally divided court *sub nom.* Board of Trustees of the Village of Scarsdale v. McCreary, 471 U.S. 83 (1985) (per curiam). The Supreme Court's affirmance by an equally divided court does not itself demonstrate the correctness of *McCreary* relative to the other three cases; for such affirmances, according to the Supreme Court, have no precedential value. *United States v. Pink*, 315 U.S. 203, 216 (1942).

71. *McCreary*, 739 F.2d at 726-27.

72. *Id.* at 720.

73. *Id.* at 726-30.

74. *Id.* at 729. "The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated. . . ." The Second Circuit also rejected the argument that the siting of the Pawtucket crèche on private land constituted a material distinction. *Id.*

also found that a properly presented disclaimer would support the conclusion that the display did not convey a message of government endorsement of Christianity.⁷⁵

III. CRITIQUE OF *LYNCH*

Lynch plainly was a difficult case for the Supreme Court, not because the pertinent establishment clause principles are obscure but because they lead to a result at odds with powerful competing considerations.⁷⁶ The lower courts had an equally difficult time with *Lynch*. Their problem, like the Supreme Court's, was not one of opaque legal standards, but rather the unpalatable result produced by application of those standards. This section will examine the problematic resolution by the Supreme Court of the conflict it confronted, as an aid to understanding what may have motivated the lower courts to avoid its mandate. The subsequent section will analyze and critique the lower courts' resolution of the dilemma *Lynch* created for them.

Lynch has been severely, but justifiably, criticized.⁷⁷ As described above, the Court offered two basic justifications for its result in *Lynch*: (1) the weight of history supports government recognition of religious themes; and (2) governmental association with religious symbolism is rendered harmless because it advances a secular purpose and occurs in a context that also has secular elements. Neither proposition is satisfying.

A. *Lynch* and Historicism

Lynch's reliance on history has much in common with that in *Marsh v. Chambers*.⁷⁸ Both suffer from use of history in what Professor Michael McConnell has characterized as "original intent subverting the principle of the rule of law."⁷⁹ Under this jurisprudential technique, the Court recites

75. *Id.* at 725-30. The Second Circuit regarded *Widmar v. Vincent*, 454 U.S. 263 (1981), as controlling on the question of access by religious groups to use of government property generally open to the public. That issue was presented in *McCreary* by the secular-purpose prong of *Lemon. McCreary*, 739 F.2d at 724-25. *Lynch* controlled the primary-impact and excessive-entanglement prongs. *Id.* at 726-27.

76. 465 U.S. at 696 (Brennan, J., dissenting).

77. Professor Mark Tushnet, for example, has described an acceptable religion clause theory as one that explains why *Lynch* is wrong. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 n.4 (1986). See also, Van Alstyne, *supra* note 3. Cf. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 927 (1986).

78. 463 U.S. 783 (1983).

79. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988). I recognize that Professor McConnell may agree with the result in *Lynch*, but it appears that he would not approve of the Court's historical analysis. In a previous article, he contended that the proper inquiry under the establishment clause is whether the challenged governmental activity "has the purpose and effect of coercing or altering religious belief or action." McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) [hereinafter *Coercion*]. Under that test, he argues that "the courts are wasting their time when they draw nice distinctions about various manifestations of religion in public life that entail no use of the taxing power and have no coercive effect," citing *Lynch*. *Id.* at 939 & n.40. See also *American Jewish Congress*, 827 F.2d at 132-37 (Easterbrook, J., dissenting) (coercion test "as the central concern of the religion clauses has a solid footing"). Part of the reasoning that drives Professor McConnell's theory is the need to account

selected instances of history that bear something more (in the case of *Marsh*) or less (in the case of *Lynch*) in common with the challenged activity.⁸⁰ In *Marsh*, the Court reasoned that if the First Congress appointed legislative chaplains, then such activity must be an accurate reflection of the Framers' original intent concerning the establishment clause and therefore constitutional today. The problem with such a formulaic, uncritically historicist approach — even if one accepts the premise that the Framers' individual contemporary subjective intent, somehow averaged or otherwise rendered in collective form, has relevance to constitutional interpretation today — is that it fails to identify any enduring, coherent set of principles, connected to constitutional purposes, upon which contemporary conduct might reasonably be ordered.⁸¹

for the numerous instances of early governmental support of religious activity, such as the appointment of congressional chaplains. *Coercion*, *supra*, at 939. There are several questions about his conclusion that a coercion test provides all the answers. First, some of the early examples such as legislative chaplains, and the later example of *Lynch* itself, do involve use of the taxing power. Public funds were disbursed to support both endeavors, and even Professor McConnell probably would agree that it is no answer to say that only relatively small amounts were spent. It is the principle, not the principal, that matters. Madison, *A Memorial and Remonstrance Against Religious Assessments* (c. June 20, 1785), reprinted in *TWO WRITINGS OF JAMES MADISON* 186 (G. Hunt ed. 1901) (expenditure of three pence of tax money is cause for concern). Madison's *Memorial and Remonstrance* is appended to Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. at 63-72. *But see* Simson, *supra* note 21, at 924 (suggesting adoption of a standard of materiality for questions of expenditures of public funds for religious purposes). Second, and more fundamentally, a test that looks only at "coercion" fails to bridge adequately the gap between the historical evidence and the circumstances of modern society. *See* Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 WM. & MARY L. REV. 875 (1986). *See also*, Tushnet, *supra* note 77, at 998 (describing definitional inadequacies of "coercion").

80. The Court's use of history in *Lynch* seems even less principled. In contrast to *Marsh*, the *Lynch* majority's historical review does not focus on the particular practice in question. Such a focus at least arguably suggests that a majority of Framers sitting in the First Congress were not overcome by concern that legislative chaplains constituted an impermissible establishment of religion. *Lynch*, 465 U.S. at 723-25 (Brennan, J., dissenting).

81. *See* R. DWORKIN, *LAW'S EMPIRE*, 359-69 (1987) (describing deficiency in "speaker's meaning" view of historical intent, weakness of recourse to arguments about representative democracy in constitutional interpretation, and the inapplicability of arguments based on stability and certainty to questions of individual liberty). Professor McConnell objects that "[u]nless we can articulate some principle that explains why legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause." McConnell, *supra* note 77, at 362. *See also* Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1986) (criticizing "'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause"). For a concise description of the origins of the historical school of jurisprudence under the leadership of the German jurist Friedrich Karl von Savigny and its expression in nineteenth and twentieth century American legal thinking, see Berman, *Toward an Integrative Jurisprudence: Politics, Morality, and History*, 76 CALIF. L. REV. 779, 788-94 (1988). This school, Berman explains, originally reflected an integration of positivism, naturalism, and historicism. As a society matures, law becomes more complex; but

law must never become merely a body of ideal proportions or a mere system of rules promulgated by the state; it must always remain a particular expression of the social and historical consciousness of a people at a given time and place. The professional or technical element must never become divorced from the symbolic element or from the community ideas and ideals which underlie both the early and the later stages of legal development.

Id. at 789-90.

Although not clearly articulated by the majority opinion, the constitutional significance of the history relied upon in *Lynch* appears to be twofold. First, the Court suggested generally that governmental acknowledgment of religion is consistent with the "original intent" behind the establishment clause. Second, the Court argued that because this country has a long history of official recognition of religion, government promotion of religious symbolism is acceptable as a general matter and more particularly in the case of the crèche. Both points are open to criticism.

Professor Douglas Laycock recently presented an historical analysis that examines the historical arguments underlying *Lynch* and *Marsh* — that early practices of government support for religion indicate that the Framers believed such practices were consistent with the establishment clause. His analysis challenges the premises that because in the Framers' time instances of government involvement with or recognition of religion can be found, the establishment clause must be read today to preclude only preferential aid.⁸² He points out that many of the early practices — such as federal subsidies for missionary work among Indians and legislative chaplains — were preferential. It therefore seems doubtful that the Framers understood the establishment clause to embody the principle that nonpreferential aid was acceptable while preferential aid was not.⁸³ Although nonpreferentialism was not itself relied upon by the *Lynch* majority, Laycock's historical analysis provides a useful framework for examining the conclusions drawn from history by the *Lynch* majority.

Laycock forcefully argues that it is the disparate reaction at the state level to financial versus nonfinancial aid that helps us to distill a principle of establishment that is meaningful today. He lists numerous exam-

Berman criticizes the "romantic nationalism" and "blind historicism" of contemporary legal scholarship, and calls for "a recognition that law is an ongoing historical process, developing from the past into the future," with respect for past history as providing "sources for adaptation of the law to new circumstances." *Id.* at 795.

82. Professor Laycock demonstrates that the Framers "considered and rejected at least four drafts of the establishment clause that explicitly stated the 'no preference' view." Laycock, *supra* note 80, at 879. Proponents of nonpreferential aid to religion rely on a considerable body of historical scholarship. See, e.g., R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTION OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Smith, *Getting off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

He refers to the history of the debates in the states to shed light on what the Framers generally understood the concept of "establishment" to mean. The Virginia debates centered on a general tax assessment that was, at least for its time, relatively nonpreferential. It was against this proposal that Madison wrote his famous *Memorial and Remonstrance Against Religious Assessments*. See *supra* note 80. For an account of that history by the Supreme Court, see *Everson*, 330 U.S. at 8-14. The vote in Virginia against the assessment, like the vote against an even more clearly nonpreferential proposal in Maryland, evidences that the Framers' contemporaries concluded that "nonpreferential [financial] aid was a form of establishment and inconsistent with religious liberty." Laycock, *supra* note 80, at 899. Laycock further argues "[t]he debates in other states provide little evidence of a different understanding." *Id.* at 899.

83. Laycock, *supra* note 80, at 915.

ples of both coercive and preferential nonfinancial state aid to religion, relatively uncontroversial at the time but surely intolerable today.⁸⁴ Nonfinancial aid, however, merely supported what was an overwhelmingly Protestant community in early America. At the time, Laycock observes, nonfinancial support for Protestantism was not generally thought to be inconsistent with religious liberty "because almost no one could imagine a more broadly pluralist state. . . . In short, the appeal to the Framers' practice of nonfinancial aid to religion is an appeal to unreflective bigotry."⁸⁵ Financial aid, the controversial establishment issue of the day, was the focus of the Framers' attention, and when they thought about that they rejected even nonpreferential aid.

Today, our society is culturally and religiously pluralistic to an extent not imaginable in the Framers' time.⁸⁶ In such a context, some generalization of the Framers' rejection of nonpreferential financial aid also to preclude nonpreferential nonfinancial aid is necessary unless we are prepared to read the establishment clause to permit the preferential, coercive, and chauvinistic practices of early Protestant America. For Laycock, that generalization means a theory that requires government to refrain from encouraging or discouraging religious beliefs and practices. On occasion, the Court has spoken as though it similarly interpreted the establishment clause to require a firmly neutral stance toward religion.⁸⁷

What of the later examples cited by the Court in *Lynch*, such as the mottos "In God We Trust" and "One Nation Under God" and proclama-

84. Those practices included religious qualifications to hold office, denial of civil rights to Catholics, criminal penalties (including the death sentence) for blasphemy, and enforced observance of the Sabbath. The tax issue sparked controversy for a variety of reasons, including the splits it provoked among Protestant denominations. *Id.* at 916-17.

85. *Id.* at 918-19.

86. *Id.* at 919-20. See also *School District of Abington v. Schempp*, 374 U.S. at 214 (official U.S. census data lists 83 religious bodies of 50,000 or more members) and *id.* at 240-41 (Brennan, J., concurring) (collecting sources describing religious homogeneity of late eighteenth century America).

87. *Everson*, 330 U.S. at 15-16:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Reynolds v. United States* [98 U.S. 145, 164 (1878)].

See also *Schempp*, 374 U.S. at 217-23 (reviewing Court's adherence to "wholesome 'neutrality'"); *Valente*, 456 U.S. at 246 ("when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.")

tion of days of prayer?⁸⁸ Many are relatively nonpreferential, unlike the practice in *Lynch*. They therefore do not provide support to the Court's result in *Lynch* even under a distinction based on nonpreferentialism.⁸⁹ In any event, it is difficult to see their relevance. They tell us no more about understanding the original intent of the Framers of the Bill of Rights in relation to the propriety of the practice challenged in *Lynch* in the 1980's than the institutionalized system of apartheid that prevailed in this country for a century following Reconstruction tells us about the intent of the Framers of the Fourteenth Amendment and the acceptability under the equal protection clause of state-coerced racial discrimination in today's society.⁹⁰

The Court appears to reason that because it would be unthinkable to find the listed practices precluded by the establishment clause, we also must view crèches as similarly acceptable. In a sense, the Court retroactively has created its own phantom precedent to support its result.⁹¹ Not only does such an approach strain commonly accepted notions of judicial restraint, it is tautological and self-serving. The Court does not tell us why the practices it cites are consistent with the establishment clause. It could be argued, especially if one adopts Professor Laycock's test, that the examples cited by the Court merely evidence the attitude expressed almost a century ago by Justice Brewer that "this is a Christian nation."⁹² That may have been so as a practical matter in the Framers' day, but it cannot stand as consistent, in any meaningful sense in today's society, with the principle of religious liberty the Framers surely intended to effect.

88. The religious motto on our currency was decreed in 1865; the Pledge of Allegiance was modified to include the religious reference in 1954; and in 1952 Congress called on the President to proclaim annually a National Day of Prayer. See *Engel v. Vitale*, 370 U.S. at 449-50 & n.58 (Stewart, J., dissenting).

89. In other contexts, the Court has held that preferential activity warrants strict scrutiny into the extent to which the challenged activity advances a "compelling government interest" by a means "closely fitted" to the accomplishment of that end. *Larson v. Valente*, 456 U.S. at 246, 255.

90. See R. DWORKIN, *supra* note 81, at 379-89 (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education*, 347 U.S. 483 (1954)).

91. The Court on other occasions has, in dicta, listed a number of these practices, as well as others arguably less reflective of government endorsement of religion, as examples of the "hostile, suspicious, and even unfriendly" relation between church and state not required by a common-sense interpretation of the establishment clause. *Zorach*, 343 U.S. at 312-13. It was also in *Zorach* that the Court, speaking through Justice Douglas, said, "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. Justice Douglas, however, believed that "once government finances a religious exercise it inserts a divisive influence into our communities" that the establishment clause was intended to prevent. *Vitale*, 370 U.S. at 442-43 (Douglas, J., concurring).

92. *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). The Court's historical approach in *Lynch* appears even less satisfactory when one considers that it runs counter to the Court's general rejection of strict historicism in constitutional law. R. DWORKIN, *supra* note 81, at 366. For example, the Court has noted "use of prayers and Bible readings at the opening of the school day," even in the very few government-sponsored schools of 1789; and the practice flourished as public schools proliferated in the nineteenth century. See *Schempp*, 374 U.S. at 267-68. Yet the Court held that practice unconstitutional in *Schempp* and *Engel*.

B. Lynch and Lemon

While the Court's adventure in historical analysis is unprincipled, selective, and inconclusive, its application of the *Lemon v. Kurtzman* test to the Pawtucket crèche is disturbing for its very definiteness and lack of ambiguity. If the Court meant what it said in *Lynch*, the *Lemon* test allows wide latitude indeed within which to approve government participation in sectarian activities, at least when those activities involve recognition of and participation in religious themes that implicate traditions as deeply a part of American culture as is Christmas.

At the very outset, the Court opens up the game by demanding that the crèche must be evaluated in the context of the "Christmas season." At once, however, it is obvious that the Court has moved significantly beyond the examples of contextual analysis it cites — *Stone v. Graham*⁹³ and *School Dist. of Abington v. Schempp*.⁹⁴ In both examples, the challenged activity took place in a context that left little doubt about its religious orientation. The same activity, however, could have a different character in another context. Thus, Bible reading in public schools for a history course would be educational and therefore acceptable (that's what schools are for), while Bible reading for its own sake in public school would be religious and therefore not acceptable (that's what churches are for).⁹⁵ The crèche, however, has its *greatest* religious significance in the setting of Christmas — the very context the Court astonishingly suggests lessens that religious nature.⁹⁶ Indeed, in almost any other setting but Christmas the crèche would be more akin to the *Stone* and *Schempp* examples.

Second, as Professor Van Alstyne points out in his critique of *Lynch*, the Court substantially broadens the purpose prong of *Lemon*.⁹⁷ Under *Lynch*, any secular purpose will do⁹⁸ — rendering the test toothless for all but the most explicit of religious motives. The "secular" purpose at stake in *Lynch*, as described by Professor Van Alstyne, was municipal government's decision to promote "the events, values, mysteries, customs, and monotheism of a particular religion — the religion, hardly coincidentally, that is most widely subscribed to nationally as well as locally."⁹⁹ The Court did not even attempt to buttress its purpose analysis by recog-

93. 449 U.S. 39 (1980) (per curiam).

94. 374 U.S. 203 (1963).

95. *Id.* at 225. See *supra* note 22 (discussing *Stone* and *Schempp*).

96. See *Lynch*, 525 F. Supp. at 1177 (Christmas display setting "supportive" of crèche's religious meaning); *Allen v. Morton*, 495 F.2d 65, 89 & n.55 (D.C. Cir. 1973) (per curiam) (Leventhal, J., concurring). But see *id.* at 70-72 (Tamm and Robb, J.J., concurring) (inclusion of privately owned crèche in government-sponsored Pageant of Peace does not violate "primary effect" prong).

97. Van Alstyne, *supra* note 77, at 783.

98. In a footnote, the Court expressly states that *Lemon* does not require an "exclusively secular" purpose. *Lynch*, 465 U.S. at 681 n.6. Of course, there is quite an expansive excluded middle between requiring an exclusively secular purpose and accepting any old purpose at all.

99. Van Alstyne, *supra* note 77, at 784. *Accord*, *Lynch*, 525 F. Supp. at 1164-65.

nizing some ultimately secular purpose like that attributed to the Sunday Closing Laws in *McGowan v. Maryland*.¹⁰⁰

Once we have climbed the foregoing pitches with the Court, the next one — although to me the most difficult and disturbing when viewed in isolation — seems relatively secure when considered in relation to what preceded it. After all, the “primary effect” of Pawtucket’s action was to do no more than to accomplish its “secular purpose” as described above.¹⁰¹ Furthermore, although it is difficult to find support for the Court’s result in cases such as *Walz v. Tax Comm’n*¹⁰² and *Zorach v. Clauson*,¹⁰³ which plainly involved nonpreferential benefits, the Court can find something of a bely in a case such as *McGowan v. Maryland*,¹⁰⁴ in which the Court sustained Sunday Closing Laws on the grounds of their wholly secular effect of promoting a uniform day of rest, notwithstanding their undeniable effect (and in fact original purpose¹⁰⁵) of encouraging observance of the predominant denomination’s Sabbath. But all three of those cases arguably could be characterized as an accommodation of religion, by government’s decision to remove or not to impose practical burdens on religious activity. Such practices are of course not strictly neutral toward religion. *Lynch*, however, takes matters to a new level by characterizing the benefit to religion occasioned by direct government sponsorship of an undeniably Christian symbol as indirect, remote, and incidental — no more an establishment than giving federal employees a Christmas holiday or exhibiting paintings depicting religious themes in a museum.¹⁰⁶

That is difficult to swallow. It seems to be one thing to give government workers the day off so that they can celebrate the birth of Jesus, and quite another to join in or — worse yet — to sponsor the services. And the crèche quite obviously was not displayed in a museum or some other neutral setting that might present it in a nonreligious fashion for pedagogic or other nonreligious purposes; it was part of an observance of a religious holiday. So the Court must be saying that the crèche is not *too much* more.¹⁰⁷

The majority does not controvert the assertion that “some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion.”¹⁰⁸ Instead, the majority concludes that the advancement of

100. 366 U.S. 420 (1961). See *Lynch*, 465 U.S. at 710-11 (Brennan, J., dissenting) (*McGowan*, unlike *Lynch*, serves wholly secular goals).

101. Van Alstyne, *supra* note 77, at 784.

102. 397 U.S. 664 (1970).

103. 343 U.S. 306 (1952).

104. 366 U.S. 420 (1961).

105. *Id.* at 431; *Schempp*, 374 U.S. at 263-64 (Brennan, J., concurring).

106. 465 U.S. at 683.

107. *Id.*

108. *Id.*

Professor Gary Simson has proposed a revision to the *Lemon* test that focuses on the “three main evils” the establishment clause was intended to protect against: sponsorship, financial support, and active involvement of the sovereign in religious activity. Simson, *supra* note 21, at 905. He would modify the primary-effects prong along the lines suggested by

religion occasioned by the crèche is within acceptable limits. The only reference in the opinion to where that line lies is the historical review and the citation to cases such as *McGowan*. If the challenged activity is not much more of an endorsement of religion than what has gone before, it is not an establishment.¹⁰⁹

The question thus becomes why the crèche falls within the undefined safety zone of permissible governmental involvement with religion. Justice O'Connor's opinion sheds more light on the question than does the majority's by concluding, as the majority implies, that the answer is because a reasonable person simply would not perceive the crèche to be a government endorsement of religion, considering the ubiquity of government acknowledgment of religion.¹¹⁰ Although, as suggested above, this last step does not seem to be a big one considering how much ground the *Lynch* opinion already had covered, for me it is the most troublesome and seems the most wrongheaded. It is difficult to respond effectively to an assertion like Justice O'Connor's, which purports to speak for some hypothetical representative of a perceiving public. I am amazed that Justice O'Connor and the four Justices in the majority can conclude that a government-sponsored symbol of one of the most important mysteries of the dominant religion, presented in the seasonal context with which its religious aspect is universally associated, would not be perceived as an endorsement of religion.¹¹¹

How one perceives and reacts to religious and political issues, both of which intersect in *Lynch*, is determined by a process not predominantly rational.¹¹² Moreover, the person whose perceptions are of concern is one whose views are not necessarily those of majoritarian (i.e., Christian) America. Neither consideration is reflected in the majority's or Justice O'Connor's opinions.

Justice O'Connor's concurrence in *Lynch* (i.e., by focusing on the message communicated to nonadherents); but Simson would modify the test by also asking whether the challenged activity expended public funds to benefit materially the operations of a religious institution or materially interfered with the authority of the religious group to decide religious doctrine. *Id.* at 924. Simson would characterize the legislation upheld in *McGowan* as having a permissible "insubstantial adverse effect." *Id.* at 929-30. *Marsh*, and by implication *Lynch*, impermissibly would communicate a material preference on the part of the state that citizens join in the sponsored religious activity. *Id.* at 928-29.

109. Professor Van Alstyne has characterized this as the Court's "any more than" test. Van Alstyne, *supra* note 77, at 783. See also Citizens Concerned for the Separation of Church & State v. City & County of Denver, 481 F. Supp. 522, 527 (D. Colo. 1979), *vacated on other grounds*, 628 F.2d 1289 (10th Cir. 1980) ("no governmental act can be approved on the ground that it is only a little bit unconstitutional").

110. *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring).

111. Apparently, at least one commentator agrees with the Court. Fairchild, *Lynch v. Donnelly: The Case For the Crèche*, 29 St. Louis U.L.J. 459 (1985) (Court's approach in *Lynch* is "common sense"). Compare *Engel v. Vitale*, 370 U.S. at 431, where the Court stated, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain," quoted by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring). See *Lynch*, 525 F. Supp. 1157 n.13, 1159-60, 1166.

112. See, e.g., Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); Greenawalt, *The Limits of Rationality and the Place of Religious Convictions: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1986).

Justice O'Connor describes the "purpose" prong as "subjective" and the "effect" prong as "objective." While she is correct that the intended message surely is a subjective matter, she is wrong to suggest that the message conveyed is a purely objective matter. This is apparent from her own statement that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion" and therefore convey a message to nonadherents that they are political outsiders.¹¹³ The question how nonadherents would feel is subjective as to them. And it is one not easily answered even hypothetically by a person as snugly inside the political fold as a life-tenured Supreme Court Justice.

Of course, the law abounds with so-called objective, reasonable-person tests that require the decisionmaker to imagine how most people would view a situation. Inevitably, that process injects a substantial dose of personal normative judgment; but perhaps that is acceptable when general majoritarian political and social standards are in issue and the decider is an assembly of members of the community that creates those standards or at least is a person with enough sensitivity to such standards to garner sufficient political support to become a federal judge. It is quite a different matter, however, when the concern is the sensibility of those whose faith and culture may render their reactions alien and inscrutable to the majority. In such a circumstance, great caution is in order. The Court, itself hardly a representative sampling of religious, cultural, or political pluralism, perhaps cannot be expected to know whether religious minorities would perceive Pawtucket's Christmas display as an endorsement of Christianity. And there is no indication in the majority or concurring opinions, apart from the objections of the plaintiffs, that anyone bothered to ask any non-Christian.¹¹⁴ Given the importance of the question and the uncertainty of the decisionmaking process the Court has prescribed for itself, it seems far more faithful to a genuine concern for the interests Justice O'Connor aptly describes to *assume* that non-Christians might have such a perception, than it is to conclude blithely that they do not based only on an historical record which itself evidences Christian domination of the political process.

To summarize, there is much to criticize in *Lynch v. Donnelly*. The Court's application of history is more advocacy than analysis. Without

113. *Lynch*, 465 U.S. at 692. In her concurring opinion in *Wallace v. Jaffree*, Justice O'Connor refined the test, in the context of a challenge to legislation, to be "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." 472 U.S. at 76 (O'Connor, J., concurring).

114. There was, however, a substantial expression of concern from both the Christian and non-Christian community. See *Lynch*, 525 F. Supp. at 1157 n.13, 1159-60, 1166. See also L. Pfeffer, *supra* note 2, at 118-26 (describing objections of Jewish and Christian groups to the practice of government-sponsored crèches). We must assume, however, that such evidence was not material to the Supreme Court's decision. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161, 166 n.20 (1930) ("in determining the principle of the case, we are bound by the judge's statement of the material facts on which he has based his judgment"); *id.* at 170.

In *Allen v. Morton*, plaintiffs conducted a poll of viewers of the crèche to show that it had a substantial religious impact on its viewers. 495 F.2d at 88 (Leventhal, J., concurring).

any articulated justification, the Court extends considerably the outer boundaries of *McGowan*, a case with which it may have little of principle in common. And the Court answers the crucial question almost peremptorily and certainly without basis for insight into the concerns that should matter most.

At bottom, *Lynch* appears to rest on a fundamental political choice made by the Court. A reading of the establishment clause as generalized and as demanding as that suggested by Professor Laycock would place the Court in a difficult position. As every establishment clause opinion of the Supreme Court recognizes, religion is and always has been an undeniably pervasive aspect of American culture. For the overwhelming majority of Americans, that religion is Christianity. And at least some of those Christians are very active politically. For example, the Reagan administration made school prayer a priority item on its agenda,¹¹⁵ and the Republican party carried that crusade into the 1988 presidential election.¹¹⁶ In extreme cases of government expression of evangelical Christian sentiment like school prayer, the Court more or less has resisted such pressures.¹¹⁷

Lynch, however, imposes greater pressure on the Court. I believe that pressure results not so much from the fact that Christmas is so secular, but more because it is so *American*. It is a commonplace to lament the "commercialization" of Christmas, and Christmas is a cultural phenomenon that undoubtedly includes unambiguously secular elements. But Christmas today in a sense is the quintessential expression of Christian American life. The orgy of retail sales, the Santa Clauses, reindeer, snowmen, the family gatherings, and themes of goodwill and charity do not necessarily make Christmas less Christian; but they do make it more American. Thus, when the Supreme Court speaks of a "stilted overreaction contrary to our history and our holdings" and of "our religious heritage," it seems to be saying Christmas is simply too close to home, too American, for government participation in the celebration to be illegal.¹¹⁸ Perhaps more than legislative prayer, the religious symbolism of Christmas "has become part of the fabric of our society."¹¹⁹ The Court surely would recoil from a result that would cast it in the role of the "Grinch who stole Christmas."

Of course, one might object that such a position carries its own rebuttal under the establishment clause, as I have tried to suggest above; but there is no mistaking which side wins in the Supreme Court when abstract ideals of religious neutrality collide with the familiar and powerful tradi-

115. L. Pfeffer, *supra* note 2, at 114.

116. Kaus, *On His Own: Bush's "New Ideas,"* Aug. 22, 1988 Newsweek at 22, col. 1.

117. *Wallace*, 472 U.S. 38.

118. As the Court observed in *Lynch*, "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." 465 U.S. at 673.

119. *Marsh*, 463 U.S. at 792.

tion of Christmas. One may as well be advocating "godless communism."¹²⁰ The lengths to which the Court was willing to go in reaching its result in *Lynch* merely emphasize that its commitment was to something it perceived as much more fundamental and important than coherent and principled establishment clause doctrine.

How then could the lower courts read *Lynch* as they did? That is the topic taken up below. I will examine the bases upon which the courts distinguished *Lynch* and consider, in the context of the principles commonly aggregated under the rubric "stare decisis," the extent to which inferior federal courts are obligated to follow the trail blazed by the Supreme Court when they believe that trail leads astray from the course charted by the Constitution.

IV. ANALYSIS AND CRITIQUE OF LOWER COURTS' TREATMENT OF *LYNCH*

The dilemma confronting the Third, Sixth, and Seventh Circuits was this: The defendant municipal government in each case had engaged in activity that appeared to violate the establishment clause by sponsoring in some fashion a nativity display. Writing on a clean slate, those three courts would have had little trouble deciding for the plaintiffs. But the Supreme Court precedent considering the constitutionality of such conduct, *Lynch*, seems to say that it is permissible. For the reasons set forth above, *Lynch* appears to be wrongly decided. As a general matter, almost universally thought to be beyond serious controversy, even "wrongly decided" Supreme Court precedent binds lower courts.¹²¹ The lower courts therefore have been placed in the position of reconciling the demands of intercourt stare decisis with their own sworn obligations to uphold and defend the Constitution and their own views of justice and liberty. How the courts resolve that conflict will say much about their respective views of their role as federal judges and their philosophy of law.

This inquiry divides into two broad areas. First, it seeks to describe the conception of law (in this instance precedent) manifested in the three opinions. That description requires an examination of how the lower courts dealt with *Lynch* in the light of the principles that make up stare decisis. The second step, after reaching an interpretation of those courts' version of stare decisis, is a critique of that picture.

Stripped to its bones, this inquiry yields the following: First, each of the three courts reached a decision that is semantically but not substantively defensible under *Lynch*. Consequently, I infer that each of the three lower courts concluded that, at least in cases raising important constitutional questions in an area of constitutional jurisprudence that is charac-

120. For an example of the Jewish response to President Reagan's characterization of the Soviet Union as "the focus of evil in the modern world" which "we are enjoined by Scripture and the Lord Jesus to oppose . . . with all our might," see Freeman, *Reagan's Speech to Broadcast Evangelists Replete With References to God and Jesus*, Feb. 1, 1984 Daily News Bulletin of the Jewish Telegraph Agency, reprinted in L. PFEFFER, *supra* note 2, at 115-16.

121. See *infra* text and accompanying notes 128, 149-61.

terized by its general incoherence, Supreme Court precedent may be read with as narrow an eye as semantics will permit and that a lower court is not bound by the salient interpretive political decisions made by the Supreme Court. Second, I argue that such a position is poor judicial policy, is inconsistent with important principles that I believe each of the courts in question would embrace, and is especially troublesome for the subterranean way the courts adopted it.

With these themes in mind, and with more particular points concerning *stare decisis* to follow in their proper place, it is time to turn to the specifics of the example at hand. The first question is how the Third, Sixth, and Seventh Circuits read *Lynch*.

A. Descriptive Discussion of Lower Court Opinions

1. The Two-Plastic-Reindeer and City-Hall Rules

As explained above, the Seventh, Sixth, and Third Circuits have confined *Lynch* to crèches (1) not located at sites closely associated with government and (2) not part of a larger Christmas display containing more or less secular symbols of Christmas. The Court's opinion in *Lynch* offers very little support for the notion that either the siting of the crèche or the presence of plastic reindeer were what neutralized the religious significance of the crèche.¹²²

The Court never said in *Lynch* that the siting of the Pawtucket crèche on privately owned property vitiated its association with city government. The crèche itself was city property, built and maintained by the city; and

122. The only commentaries on *Lynch* to find any substance in these distinctions are the dissents of Judge Campbell in the First Circuit *Lynch* opinion and of Justice Brennan. Justice Brennan's observation likely may have been more influenced by his desire to limit what he believed to be the damage done by the decision than by careful analysis of the establishment clause or of *stare decisis*.

In a series of cases predating *Lynch*, the United States District Court for the District of Colorado has reached conflicting results on this issue. Ultimately, the court considered the presence of secular symbols in the overall display as serving "to minimize the creche's importance as a religious symbol . . ." *Citizens Concerned for the Separation of Church & State v. City & County of Denver*, 526 F. Supp. 1310, 1313-14 (D. Colo. 1981). The court concluded that the Christmas display, erected on public property in front of Denver's City and County Building, had a secular purpose, *id.* at 1311; did not have the primary or direct effect of advancing or inhibiting religion, *id.* at 1315; and did not give rise to an excessive entanglement with religion, *id.* See also *Citizens Concerned for the Separation of Church & State v. City & County of Denver*, 508 F. Supp. 823 (D. Colo. 1981) (same conclusions on hearing for preliminary injunction).

The same display had been challenged in 1979. On a more poorly developed record for the defense, Judge Matsch ruled that "the City's placement of the Nativity Scene on the front steps of the City and County Building (the very building to which the Citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith." *Citizens Concerned for the Separation of Church & State*, 481 F. Supp. at 529. The court thus concluded that the crèche had the primary effect of advancing religion. *Id.* Judge Matsch believed that the "secular and religious aspects of the display cannot be separated, and indeed, the latter may be intentionally presented so as to promote the former." *Id.* at 530. Judge Matsch also found an excessive entanglement of government with religion. *Id.* at 530-31. Following remand from the Tenth Circuit's vacatur for lack of jurisdiction because plaintiff organization lacked standing, however, the district court in 1981 reached the conclusion described above.

the opinion appears to assume that everyone who viewed the display would know the city had sponsored it. By contrast, the displays in each of the lower-court cases were privately owned and carried signs expressly announcing that fact. Further, one quite easily could contend that the Pawtucket crèche more powerfully conveyed a message of government endorsement of Christianity. In Chicago, Birmingham, and Pittsburgh, government's role was largely passive: it merely had made space available to Christian groups that undertook to erect displays. Pawtucket, on the other hand, had actively gone out into the community with its arguably evangelical message. And, as Judge Easterbrook trenchantly noted in his dissent in *American Jewish Congress*, it is far from obvious that whatever appears in City Hall ipso facto reflects municipal endorsement.¹²³ The Supreme Court has observed in the establishment clause context that allowing religious and secular groups "equal access" to government property "does not confer any imprimatur of state approval" on the religious groups so long as a broad spectrum of groups is allowed access.¹²⁴ To be sure, there is no reason to assume that the governments of Birmingham and Allegheny County, at least, did not endorse a pro-Christian position.¹²⁵ But it is by no means clear that they did so more patently or vigorously than did Pawtucket.

The argument that the presence or absence of plastic reindeer or Santa Claus in the display is of constitutional significance is no more persuasive. The Court plainly never said so in *Lynch*. Indeed, after describing the display, the only other time the majority referred to the secular symbols was to state "[e]ven the traditional, purely secular displays extant

123. Do they all believe in Santa Claus, too? In 1979 the City invited John Sefick to display some of his art in the lobby of the Daley center. One of the pieces Sefick put on display was a life-sized tableau of former Mayor Michael Bilandic and his wife accompanied by a tape recording satirizing Bilandic's response to the previous winter's record snowfall. The City tried to get rid of the art, or at least turn off the tape and was met by an injunction. *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979). Once the City had opened the lobby to art, the court concluded, it could not dispose of one piece because it disliked the message.

827 F.2d at 132 (Easterbrook, J., dissenting).

124. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). The Second Circuit applied this principle in *McCreary*, 739 F.2d at 727. Justice Brennan, however, distinguished *Widmar* in his *Lynch* dissent on the basis that Pawtucket had "singled out Christianity for special treatment." *Lynch*, 465 U.S. at 702 (Brennan, J., dissenting). The relevance of Justice Brennan's observation is difficult to understand, in view of the fact that *Lynch* did not involve access to government realty. The public forum doctrine under the free speech clause of the First Amendment refutes the notion that government endorses, or is understood to endorse, the content of every message communicated from its property. For a discussion of the public forum doctrine, see D. BOGEN, *BULWARK OF LIBERTY*, 79-88 (1984).

125. There is some indication, however, that some members of Chicago government were opposed to the crèche. *American Jewish Congress*, 827 F.2d at 122-23 (describing controversy and prior litigation involving the Chicago crèche). And the Christians of Scarsdale had to enlist the court's assistance in gaining access to municipal property for their display. Of course, the relevance of these facts to the perceptions of nonadherents itself raises factual questions. It seems reasonable to assume that such matters would find their way into local news coverage. In any event, whether religious groups can command access under the free exercise clause to government property, as the plaintiffs did in *McCreary*, is doubtful after *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1391 (1988).

at Christmas, with or without a crèche, would inevitably recall the religious nature of the Holiday."¹²⁶ The distinction proposed by the lower courts seems to be at odds with their position with respect to the disclaimer signs. It is difficult to take seriously the proposition that plastic reindeer and giant candy canes speak more loudly than plain words.

Finally, and by far most significantly, whatever inferences might be whispered by the Court's mention of the location or elements of the Pawtucket display are overwhelmingly contradicted by the very loud voice of the Court's legal analysis. As I have attempted to demonstrate above, *Lynch* may have been wrong, but it was not obscure. At bottom, the lower courts' distinctions concern whether government notoriously recognized the religious origins of Christmas. That is exactly what the Court in *Lynch* said government legitimately could do. To read *Lynch* otherwise is to render unintelligible the Court's entire discussion of history, precedent, and their bearing on the application of the *Lemon* test. Interpreting *Lynch* to govern each of the lower court cases does not require stretching any principle the Supreme Court's opinion considered important.¹²⁷ Instead, to so read *Lynch* merely would acknowledge the decision about government sponsorship of religious symbols the Supreme Court expressly had made.

2. Stare Decisis

What does this reveal about the conception of stare decisis held by the lower courts in interpreting *Lynch*? The rule that Supreme Court precedent binds lower federal courts has a two-hundred year pedigree that puts it almost beyond controversy,¹²⁸ although the evident (albeit veiled) defiance of *Lynch* by the lower courts invites a closer look at the rule. This point will be taken up below.¹²⁹ The further question arises: what is it that binds the lower courts? The process by which lower courts determine exactly what it is they are supposed to follow is so much a part of what judges and lawyers do every day that discussing it is like discussing breathing: We all do it to stay in business, but if we examine it too closely we start to feel slightly anxious and tight in the chest. It is common to

126. 465 U.S. at 685. True, the Court did describe the so-called secular objects before describing the crèche; but it hardly reflects a principled reading of precedent to ascribe legal significance to the order in which the Court described the facts.

127. Application of *Lynch* to the facts before the lower courts did not require the kind of extension raised, for example, by the question whether *Brown v. Board of Education* should apply to public transportation, which involved the impact of segregation on adults and not just children and would have required the express overruling of precedent. See Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 78 (1967) (lower court cases decided immediately after *Brown* properly exhibited restraint and deference to Supreme Court prerogative to overrule *Plessy*).

128. Kelman, *supra* note 127, at 4 ("there is an absolute duty to apply the law as last pronounced by superior judicial authority"); R. DWORKIN, *supra* note 81, at 25 ("most American lawyers think that the lower federal courts are absolutely bound to follow past decisions of the Supreme Court, but that view is challenged by some"). The exception Dworkin cites is *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1982), *rev'd in part and aff'd in part sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985). *Id.* at 418 n.21.

129. See *infra*, text accompanying notes 139-64.

speak in terms that do not explain much, such as the shibboleth that lower courts are bound by the "holding" of Supreme Court precedent but not "dictum," and that "material" differences in facts render precedent non-binding. As any lawyer or judge knows, precedent can be manipulated because the previous case "does not constrain the selection of which factors matter."¹³⁰ Felix Cohen pointed out half a century ago that the attachment of legal significance to differences between the case at bar and the relevant precedent, and there are always differences between any two cases, involves ethical questions.¹³¹ And Karl Llewellyn has described the Janus-like nature of the doctrine of precedent: the "orthodox view," under which subsequent courts can confine precedent "to its facts" for purposes of distinguishing troublesome precedent, and the "loose view," which ascribes precedential significance to any words in the prior opinion for purposes of enlisting the aid of welcome precedent.¹³²

My thinking about these problems has been clarified considerably by the ideas Professor Ronald Dworkin expresses in *Law's Empire*. Dworkin describes law as a process of constructive interpretation, in which the judge interprets the precedent, statute, constitution, or what-have-you, to make of it the best that it can be, as part of a coherent body of principles that reflects the political morality of the community.¹³³ He organizes the descriptive visions of law prevailing in the literature of legal philosophy into three categories — law as convention (under which law is only those political decisions expressly made by institutions authorized to make such decisions, such as a legislature); law as pragmatism (under which law has no historical force whatsoever, judges are free to decide each case based on their own personal political views, and any suggestion to the contrary in judicial decisions is just a noble lie strategically told for the sake of appearances¹³⁴); and law as integrity (which fits the constructive interpretation process mentioned above).

Comparing each vision of law against his standards of (1) fit with our contemporary Anglo-American legal practice and (2) suitability to serve as a justification for the application of the state's coercive power against

130. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425 (1988).

131. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 201, 217 (1931). Professor Arthur Goodhart has suggested a set of "rules" for determining the ratio decidendi of cases in the English system, but he glides over the key problem of the lower court's determination of which facts are material by relying on judges' good faith. Goodhart, *supra* note 114, at 181.

132. K. LLEWELLYN, *THE BRAMBLE BUSH* 65-76 (1960).

133. R. DWORKIN, *supra* note 82, *passim*. For a thoughtful evaluation of *LAW'S EMPIRE* as a descriptive study of adjudication in hard cases, which focuses on the question of prospective overruling, see Note, *Surveying the Realm: Description and Adjudication in LAW'S EMPIRE*, 73 IOWA L. REV. 131 (1987). For an exploration of the relationship between the ideas expressed in *LAW'S EMPIRE* and the positivists' claims, see Kress, *The Interpretive Turn*, 97 ETHICS 834 (1987).

134. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 58 (1984) ("[j]udges rationalize their decisions as the results of reasoned elaboration of principles inherent in the legal system. Instead of choosing among available descriptions, theories, vocabularies, and courses of action, the official who feels 'bound' reasons from nonexistent 'grounds' and hides from herself the fact that she is exercising power").

an individual, Dworkin argues that law as integrity provides the best model. Within that model, to be sure, seriously controversial questions of how to reconcile sometimes competing legal principles as well as the broader political ideals of justice, fairness, and procedural due process (which Dworkin views as including the principles of *stare decisis*) will arise. Law as integrity requires the judge to engage his or her own political and moral convictions in the constructive interpretation process; and law as integrity recognizes controversies over particular principles, but views society as a community united in part by its commitment to the integrity of the concept of principle.

In my view, lower federal court interpretation of Supreme Court precedent that is as clear in its import as is *Lynch* can be viewed as approaching either end of a continuum of deference.¹³⁵ At one end of that continuum, the lower court would attempt to identify the interests and principles at stake in the precedential case, the doctrinal and historical context of the precedent, and the underlying choices made by the precedent-setting court. The facts that implicate those choices would be material, and the lower court — if it viewed itself as bound by precedent that is on point — would attempt to reach a decision consistent with the principles reflected in those choices interpreted in the light of current times. This approach views precedent as substantive. At the other extreme, the lower court would evaluate the merits of the choices made by the precedential courts and aggressively look for factual consonance or dissonance with the case at hand, depending on the lower court's view of the merits. Both approaches require a penetrating examination of the precedent, but the second looks for the least deferential reading possible that is consistent with generally accepted semantic norms of legal discourse: Regardless of what princi-

135. Professor James Hardisty has described the "bindingness" of precedent as lying on a continuum. The most binding kind of precedent is "rule *stare decisis*," in which the court clearly articulates a rule to be followed in subsequent cases, which promotes predictability and uniformity in later cases. Hardisty, *supra* note 7, at 53-56, 61-62. "Result *stare decisis*" follows from the ratio decidendi of the decision, and provides greater leeway in subsequent decisions by allowing distinctions based on facts. *Id.* at 56-59. He further suggests that *stare decisis* may be understood as having varying referents, which he depicts graphically on a continuum of restrictiveness. *Id.* at 62.

Professor Hardisty explains that "[t]he vagueness of *stare decisis* is functional; it allows judges flexibility to adapt the law to new conditions." *Id.* at 64. The appearance that judges are restricted by precedent more than they really are creates an illusion of greater predictability, certainty, and fairness than actually exists. *Id.* at 65-67. This illusion results from the adversarial nature of opinion writing as well as lawyering: "[T]he multiplicity of referents of *decisis* serves the persuasive purposes of judges and practicing lawyers and would seem to be endemic to an adversary system based on justification in terms of similarity to and differences from prior decisions." *Id.* at 67.

I do not understand Hardisty to be describing (or criticizing, for that matter) the "noble lie" Dworkin ascribes to the pragmatists. Instead, Hardisty is exposing one aspect of judicial behavior that is familiar to most lawyers: Judges do not always say precisely what they mean; and, like most legal writers, they employ rhetoric to achieve a variety of aims within the law. It is a much further step, however, to describe law, as do some pragmatists, as wholly nondeterminative and judicial opinions as mere artifice. It also is quite a different matter to accuse judges, as I do in this article, of covertly defying what ought to be a determinative rule and concealing that subversion behind the facade of factual distinction. For a skeptical view of *stare decisis* and legal distinctions, see Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

ples the lower court understood the Supreme Court to have had in mind, the lower court would feel free to go its own way so long as it could do so without saying two plus two equals five. This approach views precedent as semantic.

The two polar positions on this continuum do not necessarily relate to breadth versus narrowness of precedent. The issue is faithfulness to the choices made by the precedential court. It may well be that the precedent itself is quite narrow.¹³⁶ *Lynch* is a good example. Although the Court adopted an application of *Lemon* forgiving almost to the point of transparency, *Lynch* itself was confined to the relatively narrow field of government observance of the symbolism of religious holidays — more specifically that of Christmas. Later cases have demonstrated that *Lynch* did not herald the demise of *Lemon* or signal the start of a wholesale disintegration of whatever guiding principles might exist under the establishment clause.¹³⁷

The two foregoing categories — precedent as substantive and precedent as semantic — bear some correspondence to Dworkin's categories of law as integrity and law as pragmatism. Under law as integrity, the lower court would read precedent to be the best it can be as a matter of substance. If, so interpreted, precedent demands a result that is inconsistent with the lower court's best interpretation of the community's applicable principles of fairness or justice, the lower court probably would conclude that the procedural due process considerations of stare decisis generally yield the best moral and political justification for the use of coercive force that implicitly underlies all legal rules and regretfully would follow the precedent. (I say "probably" because there might be circumstances in which the principles of stare decisis themselves indicate a contrary result or justice and morality cry out for sacrifice of stare decisis — important questions to which I shall return shortly.) Under law as pragmatism, the judge would view the precedent *solely* as a challenge to his or her skill at overcoming semantic obstacles to the result guided by his or her vision of what the good life requires.¹³⁸

136. It might be that the precedent is such a bold step that its outer boundaries await definition in later cases. See *supra* note 127 (comparing *Brown* and *Lynch*).

137. See *supra* note 21 (later application of *Lemon*).

138. R. DWORKIN, *supra* note 81, at 160. A possible third approach to precedent would be that a lower court is bound only by the literal terms of the past political decision made by an authorized entity, here the Supreme Court (assuming *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) is law), and that any decision reached by the lower court beyond those confines is based not on "law" but on some other source. This of course is law as conventionalism. I premit it in text because it is of little help in this exercise.

Dworkin persuasively argues that law as conventionalism, taken seriously, has very little relation to what courts usually do because it describes law as vigorous only in easy cases, which rarely find their way to court. In borderline cases, Dworkin explains, law as conventionalism usually leaves a judge to his or her own extralegal decisions. The question here is not where lie the outer boundaries of *Lynch*. As I have attempted to show, the facts of each lower court case fall comfortably within *Lynch*'s borders. The problem is how a court reconciles the competing commands of different sources convention would regard as authoritative. The assertion that convention requires adherence to Supreme Court precedent over the lower courts' reading of the Constitution assumes the outcome of an interpretive question which itself is not answered by conventionalism.

Professor Harold Berman has urged an "integrative jurisprudence," which brings

a. Anticipatory overruling

Is there a trump card in the lower court's hand? In certain circumstances, lower federal courts have expressly declined to follow a Supreme Court decision admittedly on point on the grounds that the lower court believes the Supreme Court no longer would follow the precedent.¹³⁹ Factors relied upon by lower courts to apply the so-called doctrine of anticipatory overruling include a perceived erosion of precedent by later Supreme Court decisions in other areas of law, a perceived emergence of new doctrinal trends, and an indication by the Supreme Court that it will overrule the precedent when presented with the appropriate opportunity.¹⁴⁰ Because each of those reasons is tied to a perception of the Supreme Court's contemporary position premised on the Court's own expressions, they have been considered appropriate bases for lower court departure from otherwise controlling precedent.¹⁴¹ Bases considered improper for anticipatory overruling, because they lack an articulable tie to views expressed by the Court, include the desire to prompt reconsideration of precedent, a belief that the Supreme Court erred in the previous case, and the perception of difficulties in practical application of the precedent.¹⁴² In deciding whether to depart from Supreme Court precedent, lower courts have been admonished to balance conflicting duties: the duty to apply the latest, most "correct" legal rule; the duty to obey the Supreme Court; the duty to be honest and straightforward in decisionmaking; and the duties to do justice in the case at hand and to respect the need for certainty and reliance.¹⁴³

together the political, moral, and historical aspects of the giving of a legal order to social relations. The alternative he advocates "must combine historical insights into law with the political insights of legal positivism and the moral insights of natural-law theory." Berman, *supra* note 81, at 797. To Berman, "all that needs to be subtracted from each of the three major schools of jurisprudence, in order to integrate them, is its assertion of its own supremacy. All that needs to be added is a recognition of their mutual interdependence." *Id.* at 801.

139. See, e.g., *United States v. City of Philadelphia*, 644 F.2d 187, 191-92 (3d Cir. 1981) (*Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) no longer accurate statement of the law concerning implied causes of action); *Hobbs v. Thompson*, 448 F.2d 456, 472-74 (5th Cir. 1971) (the deference to legislative judgment in First Amendment cases established by *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), eroded by later freedom of expression cases applying stricter scrutiny and abandoning the "privilege theory" of public employment); *Andrews v. Louisville & Nashville R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1971) (Supreme Court has unambiguously signalled intent to overrule *Moore v. Ill. Cent. R.R.*, 312 U.S. 630 (1941), and *Transcontinental & W. Air v. Koppal*, 345 U.S. 653 (1953), (concerning exhaustion of administrative remedies when presented with proper case; *Andrews* is proper case); *United States v. White*, 405 F.2d 838, 847-48 (7th Cir. 1969) (en banc), *rev'd on other grounds*, 401 U.S. 745 (1971) (*On Lee v. United States*, 343 U.S. 747 (1952), on point on the electronic eavesdropping issue, but "completely eroded" by *Katz v. United States*, 389 U.S. 347 (1967), and other cases). See generally, Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53 (1982); Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 *WASH. L. REV.* 87 (1984); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 *HARV. L. REV.* 1281 (1952); Comment, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 *COLUM. L. REV.* 504 (1959); Note, *The Attitude of Lower Courts to Changing Precedent*, 50 *YALE L.J.* 1440 (1941).

140. Kniffin, *supra* note 139, at 53.

141. *Id.* at 61-69.

142. *Id.* at 71-72.

143. *Id.* at 74-85.

Although it appears that the lower courts have taken an exceedingly narrow view of *Lynch*, none of their opinions suggests that the lower courts have concluded that the Supreme Court would abandon *Lynch*. These cases therefore do not rely on the doctrine of anticipatory overruling; instead, the lower court's opinions must be read as to assume that *Lynch*, whatever one concludes its reach to be, remains the law today. That assumption surely is valid. There was no basis to conclude that subsequent precedent has eroded *Lynch*, a new doctrinal trend has emerged, or the Court is awaiting a good opportunity to overrule *Lynch*.¹⁴⁴

b. Other possible bases for defiance of precedent

1. *Generalities* — Is there any other basis on which lower courts can expressly defy Supreme Court precedent? The notion that Supreme Court precedent may be ignored has its proponents. The Reagan administration, through then-Attorney General Edwin Meese, has argued that the Supreme Court's constitutional precedent binds only the parties to the case and "does not establish a supreme law of the land that is binding on all persons and parts of government, henceforth and forevermore."¹⁴⁵ William Brevard Hand, Chief Judge of the Southern District of Alabama, undertook his own historical analysis to conclude that the Supreme Court had erred in (1) applying the establishment clause to the states, and (2) ruling that the Constitution forbade school prayer.¹⁴⁶ Invoking the rule of law and the considerations often applied to intracourt stare decisis, Chief Judge Hand therefore expressly declined to follow Supreme Court precedent he conceded was on point.¹⁴⁷ Other courts on occasion have declined to follow applicable precedent of higher courts.¹⁴⁸

144. The granting of *certiorari* in *Allegheny County* occurred after all four lower court cases were decided.

145. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987). In the face of a torrent of criticism, Meese subsequently backpedaled, asserting that he had meant only that the Executive was free to criticize, not to disobey, the Supreme Court. See Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987).

146. *Jaffree v. Bd. of School Comm'rs of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd in part and aff'd in part sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

147. *Jaffree*, 554 F. Supp. at 1112-30.

148. Professor Joseph Singer, in his article explaining how the Critical Legal Studies movement advocates responsibility and community, not nihilism, has urged legal scholars to "perform an edifying role by broadening the perceived scope of legitimate institutional alternatives." Singer, *supra* note 135, at 58. Professor Singer cites the example of Judge Paul Garrity of the Superior Court of Massachusetts, who refused to comply with the decision of the appellate court reversing his six-month deadline to remedy what he had found were conditions constituting cruel and unusual punishment at the county jail. Unlike Chief Judge Hand, however, Garrity reconciled the conflict between his personal view of the Constitution and the institutional demands of his role as an inferior court by quitting the case. *Id.* at 58 n.167.

Professors Mortimer Kadish and Sanford Kadish have explored the circumstances in which the institutionalization of a liberty provides justification for departure from legal rules. M. KADISH & S. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973). The Professors Kadish describe the concept of "legitimated interposition," which "denotes instances where deviational discretion — power to act according to the agent's best judgment in ways that are unauthorized or even prohibited by rules of [the agent's official] competence — has become embedded in legal arrangements." *Id.* at 66. In describing the relationship between legitimated interposition and the role of judges, the Profes-

The positions of Mr. Meese and Chief Judge Hand are difficult to defend on the basis either of fit with current legal practice or political legitimacy. The Supreme Court takes the supremacy of its decisions almost for granted, although on occasion it has expressly stated that inferior federal courts are bound to adhere to applicable Supreme Court precedent.¹⁴⁹ Obviously, the legal force of such statements assumes precisely that which is in question. Some support for the conclusion can be found in the structure of Article III itself, which vests the whole of the judicial power in one "supreme Court" and authorizes the creation of "such inferior courts as the Congress may from time to time ordain and establish."¹⁵⁰ From the function of judicial review recognized in *Marbury v. Madison*, which at least Chief Judge Hand implicitly applied in entertaining the merits of a challenge to the constitutionality of Alabama's school-prayer law, and the structural relationship between the Supreme Court and the inferior federal courts, can be derived support for the bindingness of Supreme Court precedent.

Mr. Meese's opinion reflects his disagreement with *Cooper v. Aaron*,¹⁵¹ which relied on *Marbury* and the supremacy clause¹⁵² to hold that Supreme Court interpretation of the fourteenth amendment "is the supreme Law of the Land."¹⁵³ The Court in *Cooper* reasoned that the oath of legislative, executive, and judicial officers to support the Constitution therefore embraces adherence to Supreme Court interpretation of the Constitution.¹⁵⁴

Professor Burt Neuborne has offered three persuasive sets of reasons why Mr. Meese's position does not accurately describe our legal system.¹⁵⁵ First, "the idea of a cacophonous constitution," without a single authoritative voice, would render the Constitution ineffective as a check on the

sors Kadish suggest that, although judges are constrained by rules of law, the requirements of justice sometimes are disserved by those rules and therefore extend the judge "a liberty to make this judgment and to depart from the rules to achieve results consistent with the ends for which his role is set up." *Id.* at 90. This point appears to be directed to courts of last resort, *id.* at 86, and does not seem to include departure by lower federal courts from applicable Supreme Court precedent. Such action would be beyond the lower courts' constitutive competence, and would not derive from "a domesticated and integrally functioning instrument for achieving the ends of the legal system;" it therefore would constitute usurpation, not legitimated interposition. *See id.* at 67-68 (discussing nature of legitimated interposition generally).

149. Justice Powell, sitting as circuit justice, so stated in *Jaffree*, 459 U.S. 1314, 1315-16 (1983). *Accord* *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam). In *Hutto*, the Supreme Court concluded that the Fourth Circuit had ruled contrary to the rule concerning proportionality review under the eighth amendment announced in *Rummell v. Estelle*, 445 U.S. 263 (1980). *Id.* at 375.

150. U.S. CONST., art III, § 1 (emphasis added). Section 2 of Article III, and Section 13 of the Judiciary Act of September 24, 1789, 1 Stat. 73 (1789) provide for the "appellate" jurisdiction of the Supreme Court.

151. 358 U.S. 1 (1958).

152. U.S. CONST., art. VI.

153. *Cooper*, 358 U.S. at 18.

154. *Id.* at 18-19.

155. Although Professor Neuborne's argument focuses on the relationship between the Executive and Judicial branches, as did Mr. Meese's, much of the underlying considerations apply to the relationship of the inferior federal courts to the Supreme Courts.

“primary behavior” of government.¹⁵⁶ Second, the content and enforceability of constitutional rights would become a function of a party’s ability to continue seeking judicial rulings until an acceptable one appeared; and majority tyranny would become more imminent.¹⁵⁷ Third, Professor Neuborne pointed out the overwhelming historical evidence in favor of the authoritative force of settled judicial precedent.¹⁵⁸

2. *A possible exception* — One might envision an almost irresistible case for deliberate, lower-court defiance of undeniably applicable Supreme Court precedent. My colleague Richard Barkley has suggested the following hypothetical: Suppose some clear rule of procedural default, grounded in the Supreme Court’s interpretation of the Constitution, is announced by the Court in the context of habeas corpus petitions from state capital sentences. Thereafter (assume that issues of retroactivity do not arise), a habeas petition comes before a federal district judge who learns two things at the hearing: (1) the procedural default certainly has occurred and the Supreme Court precedent inescapably bars granting the writ; and (2) the result is the exclusion of overwhelmingly exculpatory evidence, which otherwise certainly would have resulted in an acquittal upon retrial. The district judge is confronted with the awful dilemma of having to choose between the compelling moral demand that he or she exercise power to prevent the state from killing an apparently innocent person and the institutional integrity of the judicial and constitutional process. Justice and procedural due process (in the form of stare decisis) are in a head-on collision. It would be difficult to defend the morality of passing the buck to the court of appeals or the Supreme Court or risking the prisoner’s execution by denying the petition, even in the age of public defenders and the occasional pro bono counsel.

There may be some results the law demands that are simply too unjust for community morality, expressed through the courts’ interpretation of law, to countenance.¹⁵⁹ Such acute situations, like Barkley’s life-or-death scenario, are probably compelling and rare enough for the tradition of inter-court stare decisis to tolerate as exceptions. Legal principles need not be relentlessly or cruelly consistent to retain their coherence. As Dworkin observes, political ideals of justice, fairness, and procedural due process can conflict as well as compete. Law as integrity sometimes will require very difficult moral choices from among them, as Barkley’s hypothetical illustrates. The application of judgment certainly will be called for, but that judgment will be informed by the community’s principles of law and ideals of political morality — restraints no less real because internalized by the judge.¹⁶⁰

156. Neuborne, *supra* note 146, at 994-95.

157. *Id.* at 996.

158. *Id.* at 1000.

159. See R. Dworkin, *supra* note 82, at 101-04 (wicked law is still “law,” but such practices “yield to no interpretation that can have, in any acceptable political morality, any justifying power at all”).

160. *Id.* at 257. See also LLEWELLYN, *supra* note 133, at 156-60 (reality of restraints judges perceive on their use of the leeways of legal doctrine).

Such cases should be rare indeed, however, for they do threaten erosion of law's coherence. One immediate problem raised by Barkley's hypothetical is the imagined reaction of the state authorities. A constitutional confrontation between state and federal government could be precipitated if the state, with some justification, refused to accept the district court decision as law.¹⁶¹ Recourse to the federal district court's contempt powers hardly would seem appropriate, in the light of that court's own admitted defiance of the Supreme Court precedent. Of course, the state can appeal the granting of a writ of habeas corpus;¹⁶² and the most likely outcome would be correction by the court of appeals. Nevertheless, the potential implications for the integrity of the rule of law are severe; and the slope is very slippery.

Even if one acknowledges the legitimacy of defiance of precedent in individual cases of extreme injustice, such wrenchingly grave concerns are not presented by *Lynch*. To be sure, individual religious freedom is a matter of great importance; and religious conflict has long been, and remains today, a source of almost unbelievable fear, violence, hatred, and bloodshed. But the circumstances of the case must be kept in perspective: Neither municipally sponsored crèches nor a rule prohibiting them, as offensive as either might be to some, is going to kill anyone.

3. *The case at hand* — It is exceedingly doubtful that the Third, Sixth, or Seventh Circuits would join either Chief Judge Hand or Mr. Meese in their views on the bindingness of Supreme Court precedent. Such a position surely would be regarded as too radical to merit serious consideration by those courts. And very few judges, especially federal appellate judges, would risk the anarchy¹⁶³ and nihilism most believe would ensue from that position. Nor does it appear that the courts in question regarded municipal crèches as a moral outrage that no just society ought to tolerate, of the kind that might justify an exception to intercourt stare decisis.

This puts readers of the lower courts' opinions in the position of concluding one of two things: Either (1) the lower courts really believed that the city-hall and two-plastic-reindeer rules sensibly interpret *Lynch* consistently with the principles applied by the Supreme Court; or (2) the lower courts disagreed with those principles, saw no basis upon which to negate

161. For example, consider the political firestorm sparked by the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), in which the Court found Georgia's assertion of jurisdiction over the Cherokee reservation contrary to the Constitution, laws, and treaties of the United States. *Id.* at 561-62. Georgia refused to appear before the Supreme Court and state officials repudiated the Court's decision. President Jackson, who took no steps to enforce the decree, is alleged to have said of *Worcester*, "John Marshall has made his law; now let him enforce it." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 83 (1982 ed., Strickland, et al., eds.). Whether Jackson actually made that remark has been questioned, and the Court did not actually issue an order directed to the Executive Branch. *Id.* at 83 & nn. 173-74. The confrontation was resolved in 1833, when Georgia's Governor Lumpkin pardoned the individuals convicted under Georgia's assertion of jurisdiction over the reservation. *Id.*

162. 28 U.S.C. § 2253 (1982).

163. "But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto*, 454 U.S. at 375.

Lynch as law, and sought to reconcile the conflict they perceived between *Lynch* and their independent understanding of the establishment clause's strictures by fastening onto factual distinctions that obviously have little or no bearing on the decision reached by the Court in *Lynch*. Based on the foregoing discussion of the merits of those distinctions, it is difficult to avoid concluding that the second description is correct.¹⁶⁴

B. Critique of Lower Court Opinions

Can we find a justification for the view I have imputed to the Third, Sixth, and Seventh Circuits? One way to approach the problem is to ask whether the issues raised by intracourt stare decisis have anything to teach us about the degree of deference a lower federal court should accord Supreme Court precedent.¹⁶⁵

Discussion of intracourt stare decisis most commonly focuses on the considerations involved in the overruling of the precedent of the court of last resort. Stare decisis is seen as a kind of presumption that must be overcome by strong countervailing interests.¹⁶⁶ Traditional interest analysis focuses on the impact of overruling precedent on reliance, predictability, certainty, neutrality, judicial efficiency, and fairness.¹⁶⁷ The issue usually is characterized as resolving the tensions between the need for a better rule or standard of law,¹⁶⁸ the fairness of providing the party to benefit the "most correct" judicial thinking on the subject, and the appearance of justice, on the one hand, and upsetting the reasonable expectations of the party who justifiably relied on the old rule, a sense of stability and predictability for all those who must order their affairs according to the courts' dictates, and the appearance that legal rules and standards are determined by objective, neutral, and enduring principles not subject to shifts in judicial personnel or temperament on the other hand.¹⁶⁹

164. Dworkin, in refuting a dogmatically positivist theory of law, has criticized analyses that portray judges as either "well-meaning liars" or "simpletons." R. DWORKIN, *supra* note 81, at 40-42. His criticism is not entirely at odds with the views I express in this article. First, I do not read Professor Dworkin to contend that no judge ever could be fairly consigned to either category. Second, the argument in this article does not attempt anything like a comprehensive theory of law, or a sweeping characterization of how judges decide cases. My focus is on a narrow example, which I believe does approach something like the distinction Professor Dworkin abjures. I would not put the matter in the same terms as he does, as that would be overstating the point. Nevertheless, as discussed below, the issue of judicial truthfulness cannot be avoided here. To the contrary, to me it emerges as the key consideration.

165. As mentioned, Chief Judge Hand sought to apply such considerations in deciding to ignore Supreme Court precedent. The Eleventh Circuit's conclusion that such application was erroneous does not necessarily mean that the principles embodied in intracourt stare decisis have no relevance whatsoever to intercourt stare decisis. It simply means that those principles do not provide any basis for a lower court to exceed its competence.

166. Hardisty, *supra* note 8, at 49-50.

167. *Id.*; see, e.g., Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 472-84; H. HART, JR. & A. SACKS, *THE LEGAL PROCESS* 565-92 (tentative ed. 1958); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 10-11 (1941).

168. This could be indicated by, for example, changed circumstances, evolving social values, or more enlightened thinking about the legal problem at hand. See generally W. REYNOLDS, *JUDICIAL PROCESS* 176 (1980).

169. See, e.g., *Monell v. Dept. of Social Services*, 436 U.S. 658, 695-701 (1978), *overruling* *Monroe v. Pape*, 365 U.S. 167 (1960).

It often has been suggested that in constitutional cases, the interest in correctness of result and the practical unavailability of correction by legislation should lower the threshold.¹⁷⁰ Some commentators have suggested a second look at this position. Professor Maltz has identified two problems of uncertainty that can result from overruling constitutional doctrine. Retrospective uncertainty arises when actions are taken by persons or institutions in reliance on the previous rule, which later are found improper under the new rule.¹⁷¹ Maltz also identifies the problem of prospective uncertainty, resulting largely from observance of the requirement of Article III and its related forms of prudential self-restraint, in which the contours of a doctrinal change remain undefined until numerous later cases have been decided.¹⁷² Finally, Maltz distinguishes between cases in which the Court overturned precedent because it later perceived that the previous decision misapplied the premises under which it had been decided,¹⁷³ and the more significant instances in which the premises of the earlier decisions were reexamined and found wanting.¹⁷⁴ Maltz cautions that the practice of reexamining underlying premises in constitutional law, especially when such instances occur frequently, enervates the restraining force of neutral principles on constitutional decisionmaking and raises the suspicion "that each succeeding majority is simply using the Constitution as an excuse to enforce its own perceptions of good social policy."¹⁷⁵ Dworkin's description of law as integrity avoids the overkill implicit in the concept of "neutral" principles by recognizing the importance of the judge's own judgment of social and political morality, constrained by the obligation to interpret law as a coherent body of principles that both fits legal practice and justifies the use of coercive force.¹⁷⁶

Other commentators also have questioned the conventional wisdom that constitutional decisions should be less difficult to overrule. For example, in addition to invoking the interest of predictability, Judge Easterbrook has argued that such an approach subverts the constitutional amendment process both by circumventing the supermajority requirement (and its goal of promoting stability in government institutions) and by

170. *Monell*, 436 U.S. at 695; Maltz, *supra* note 168, at 467. The most familiar articulation of this principle is by Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-11 (1932) (Brandeis, J., dissenting).

171. Maltz, *supra* note 168, at 472-73. The example cited by Maltz is the overruling of *Betts v. Brady*, 316 U.S. 455 (1942), in which the Court had held that due process did not require states to provide free legal counsel for indigent criminal defendants, by *Gideon v. Wainwright*, 372 U.S. 335 (1962). The impact of the change was dramatic, as *Gideon* was accorded full retroactive effect. Maltz, *supra* note 168, at 473 n.28, citing *Desist v. United States*, 394 U.S. 244, 250 (1969).

172. Maltz, *supra* note 168, at 473-78. Maltz cites as an example the Supreme Court's fragmentary approach to defining the limitations on the imposition of the death penalty.

173. *Id.* at 478-82, comparing *Morey v. Doud*, 354 U.S. 457 (1957), with *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (*per curiam*).

174. Maltz, *supra* note 168, at 481-84, comparing *Goesaert v. Cleary*, 335 U.S. 464 (1948), with *Reed v. Reed*, 405 U.S. 71 (1971), and *Craig v. Boren*, 429 U.S. 190 (1976).

175. Maltz, *supra* note 168, at 483-84, citing *Weschler, Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

176. See *supra* note 134 and accompanying text.

sapping the motivation of those who otherwise might seek to change the text.¹⁷⁷ Judge Easterbrook instead would apply the same standards for adherence to precedent, whether constitutional, statutory, or common law. For example, stare decisis must yield when the accretion of precedent creates such internal inconsistencies as to provide no meaningful guidance to judicial decisionmaking, when the order in which cases have come to the court has backed the court into an unacceptable corner, or more generally when moral and prudential judgments strongly announce that time for change has arrived.¹⁷⁸

It could be argued that a lower federal court, while not exactly at liberty to ignore Supreme Court precedent, does properly enjoy the discretion to cut it exceedingly fine. One could invoke arguments in support of an aggressively nondeferential approach that would resemble those frequently deployed in defense of intracourt overruling of precedent. As Judge Easterbrook has pointed out, "manipulation" of precedent can serve the beneficial function of demonstrating the need for the Supreme Court to revisit ill-considered decisions, by evidencing either the unworkability of precedent or the need for refinement.¹⁷⁹ And perhaps a more adversarial lower court would prompt the Supreme Court to be more careful in the first instance, at least to say clearly what it means. A less deferential reading of precedent also would allow greater flexibility and would bring to bear the considered judgment of a greater number of judges. In this sense, the less deferential approach would dilute the power of the Supreme Court and thus, by sheer diversification, could reduce the potential for tyranny of "a bevy of Platonic Guardians."¹⁸⁰ Lower courts also would be more free to seek justice, and to apply the "correct" rule, in individual cases. And one might argue that the availability of corrective review by the Supreme Court could serve as a check on excessive exercise of this approach.

General principles of intracourt stare decisis also supply countervailing arguments. Predictability would be less under a less deferential review. Both prospective and retrospective uncertainty for the party benefitted by the precedent would increase. A party could be less certain that its past conduct, while seemingly sanctioned by the Supreme Court, would be safe in courts of appeals; and the foundation for future planning would be unstable. Conscientious district courts would be placed in the awkward position of having to choose between defying two apparently contradictory views from their superiors. Uniformity also would suffer. This is an especially important consideration in constitutional law. The Constitution itself contradicts the proposition that one's constitutional rights properly may depend on whether one lives in Michigan or Rhode Island.¹⁸¹ Further, there is no guarantee that lower courts would always seek to maximize individual liberty, or to promote other choices one might regard as desirable. We should be skeptical that Supreme Court review can or should

177. Easterbrook, *supra* note 131, at 430-31.

178. *Id.* at 425-26, 432.

179. *Id.* at 424-25.

180. L. HAND, *THE BILL OF RIGHTS* 73 (1958).

181. U.S. CONST. art. IV, §§ 1 & 2; U.S. CONST. amend. XIV, § 1.

be expected to provide much protection. As a practical matter, the Supreme Court's case load makes it very difficult for the Court to exercise much supervision over the lower courts once it has spoken on an issue.¹⁸²

There also is a downside to the ameliorative function served by less deferential reading of precedent. Judge Easterbrook's observation concerning the effect of greater willingness to overrule constitutional decisions on the forces for change in the text also could be generalized to apply to the problem of lower court deference to Supreme Court precedent. By partially shielding the public, and the Supreme Court, from the consequences of the Court's precedent, lower courts can suppress criticism and deflate the pressure for change. Part of what is so troublesome about *Lynch* is the Court's flaccid commitment to individual religious liberty — the majority opinion's silence on that subject is awesome — in the face of the pressure of majoritarian culture, tradition, and preference. The voice of minority outrage that might otherwise appropriately be raised in response loses both its vigor and its persuasive force when the lower courts quietly tell everyone that what the Supreme Court did really was a little thing, no big deal. As any allergist knows, we often can build up a tolerance for what otherwise would be toxic by consuming it in small doses.

It should be apparent by now that there are no killer arguments on either side of this debate, just as there are none on the underlying substantive issue. The very fact that the Third, Sixth, and Seventh Circuits could write the opinions they did without having to rewrite the dictionary demonstrates both points. But all reasons are not created equal, and few choices are wholly determined by rational processes.

Notwithstanding my objections to *Lynch*, I think those three courts made a poor choice. The main reason I think so, heretical by some standards and not entirely the result of rational weighing of commensurable considerations, lies in my belief that in law the means can sometimes be more important than immediate ends because they in turn can implicate less immediate but sometimes more compelling ends.

As I have attempted to show, the three courts faced three options, each with its unappealing aspects: (1) follow *Lynch*, warts and all; (2) condemn *Lynch* explicitly and refuse to follow precedent admittedly on point; or (3) find some way to wiggle out of following *Lynch* without explicitly

182. The Supreme Court received a total of 5,268 petitions for certiorari and direct appeals in 1987-88. It was able to grant review in only 167 cases. Telephone interview with Clerk of the Supreme Court (October 31, 1988). For discussion of the relative demise of the Supreme Court's error-correcting role after the Judiciary Act of 1925, Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, codified at 28 U.S.C. §§ 1251-1294 (1982), and of the effects of the Court's increasing caseload on its institutional function, see Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 795-803, 848-73 (1983). It appears, however, that the Supreme Court has found the time to review *Allegheny County*. Nevertheless, the Court's political role in today's society is one of broad strokes. Big questions, not flyspecking distinctions, are the business of the Supreme Court; and it hardly has time to repeat itself. The availability of en banc review at the court of appeals level, however, does provide a more ready check at least on panel decisions.

renouncing the principles of stare decisis. The problem with the first choice is that it leads to a result the lower courts apparently believe is inconsistent with the establishment clause, thereby producing one immediate end that is undesirable but by means that are admirable for their straightforwardness, fit with legal practice, and faithfulness to the principles of stare decisis. The second choice achieves one desirable immediate end (preventing government sponsorship of Christianity) by means also praiseworthy for their candor, but yields the undesirable less immediate result of compromising the system of judicial hierarchy contemplated by Article III and very much a part of our legal heritage and current practice. The third choice achieves the desirable end of protecting the principle embodied in the establishment clause, but it does so by a means I find most disturbing and leads to two undesirable less immediate ends: it renders stare decisis practically meaningless while misrepresenting what is going on.

With a downside to each choice, why should the lower courts pick (1)? In addition to the reasons canvassed above in support of deference to precedent, (2) is simply too much at odds with how most people believe our judicial system works. For the reasons discussed above, hardly anyone, especially judges, would maintain that each inferior federal court is entirely free to march to the music of its own drummer, even in hard cases.

The principal problem with option (3), the one the three courts actually chose, is that it forced the courts in effect to dissemble thrice about what they were doing. First, the courts gave the impression that they understood *Lynch* to establish the two-plastic-reindeer and the city-hall rules. I have tried to show that *Lynch* will not bear that interpretation. Second, they created the false impression that they were operating within the confines of stare decisis. But that cannot be the case in the face of the previous point. Third, and to me most disturbing, they purported to mean what they said. Each opinion reads as though the courts were treating law as substantive, yet a hard look in the light of *Lynch* reveals the contrary.

Dworkin's description of law as integrity is a perceptive metaphor that captures not just "wholeness" but "trustworthiness" as well. To provide the moral justification for the application of coercive force, law must be more than something that hangs together. It must be something we can trust and believe in. Faith may be one of the most important forces in our society. Faith in each other and in our institutions and ideals is the glue of community, keeps the economy going, and allows us to live together without paranoia. And the strength of our legal system does not derive solely from its recourse to force to enforce its demands — the Constitution's origins are proof that the state does not enjoy a monopoly on violence. The strength of our legal system is our faith in its integrity.

It is difficult to maintain confidence in a legal system when judges behave the way we expect skillful tax counsel to act in serving their clients'

interests.¹⁸³ Loopholes and technicalities — law as semantics in action — are fine things to the person whose purpose it is to evade the goals of the law. The fact that the adversarial system demands such conduct by lawyers, however, reveals that we expect more from judges. This doesn't mean that judges should pretend the law is a "brooding omnipresence."¹⁸⁴ Quite the contrary, it means that judges should not pretend at all. When judges purport to base their decision on silly distinctions like the "two-plastic-reindeer rule,"¹⁸⁵ it appears that they are not telling the truth about what they are doing. Lawyers are taught from the very first that "truth" can be a conveniently elastic concept indeed; but when all is said and done, we want to know who won and why. Although some may regard it as a mark of intellectual sophistication to be able to say one thing while meaning another, and a sign of resourcefulness to think of such a distinction, that does not mean it is a good thing for judges, whose work product is the reasoned opinion that explains and justifies the result reached, to do.¹⁸⁶

To face the bad news is a mark of courage and integrity, qualities most people would agree judges should display. The Supreme Court has looked foolish and has lost credibility as it has foundered around, confecting spurious distinctions between its own precedents and trying to avoid the difficulties that would ensue from an establishment clause theory that meant business, like the one suggested by Professor Laycock.¹⁸⁷ The bad news there might be that the Court would be constrained to conclude government has no business promoting religion, especially Christianity, the way it sometimes does. Perhaps we would have to print new coins, members of Congress would have to see their own chaplains in their own

183. For a discussion of the tension inherent in the choice between rules (over- and under-inclusiveness, arbitrariness) and standards (brinksmanship), see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987).

184. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

185. Comment, *supra* note 22, at 495 & n.113.

186. For an overview of the goals underlying the time-honored requirement that courts set forth the grounds for decision in a reasoned opinion — including avoidance of the appearance and reality of arbitrary decisionmaking, the explication of what the law is, the disciplining effect of exposing in writing one's analysis, and the benefit of collective thinking on an appellate court — see W. REYNOLDS, *supra* note 169, at 57-67.

For a clever study, in the form of a novel, of the relationship between sincerity and maturity, see D. ROBERTSON, *THE SUM AND TOTAL OF NOW* (1968).

187. Examples are *Zorach*, 343 U.S. 306 and *McCullum*, 333 U.S. 203. *Zorach* upheld a New York public school program whereby students were excused from otherwise compulsory attendance for a period of time during the day so they could participate in religious education or devotional exercises at religious centers. 343 U.S. at 308. *McCullum* struck down an Illinois program of the same kind, the only difference being that the schools required the students to remain within the school building for religious instruction or services, conducted in space made available for such purposes. 333 U.S. at 205. It is difficult to see how the program in *Zorach* is less a use of the state's compulsory public school machinery to provide pupils for religious education than the Illinois program. To be sure, the provision of tax-supported school facilities by Illinois was an aggravating factor; but the manipulation of compelled classroom attendance "to channel the children into sectarian classes" appeared to have been a sufficient basis to hold the Illinois program unconstitutional. *Zorach*, 343 U.S. at 316-17 (Black, J. dissenting); see also *Zorach* at 320-23 (Frankfurter, J., dissenting) (state coercion, the "pith" of the constitutional defect in release-time programs, equally present in *Zorach* and *McCullum*; distinction between the two cases "is trivial, almost to the point of cynicism").

churches, and Christian groups would have to seek sponsorship elsewhere for the symbols of their beliefs. It may be understandable that the lower courts in dealing with *Lynch* have imitated the example of evasiveness and dissimulation set by the Supreme Court, but it is no more commendable.

Law is complex and difficult. It can serve as a means to perpetuate injustice, exploitation, and oppression or as a guardian of liberty and fairness. Law's complexities and difficulties are the tools of the lawyer's trade, employed in the service of the client's interests. In the course of legal argument, lawyers play a game and speak a language they and the courts understand. But judges are *public* servants, and I believe their work ultimately belongs to the people.¹⁸⁸ When courts speak, therefore, at least they should say what they mean. In the *crèche* cases, this would mean the lower courts either should have said that the rule in *Lynch* stinks, but whatever value inheres in a stable, hierarchical system of judicial policymaking is more important than the value of preserving the increment of individual religious liberty lost to *Lynch*, or they should have said they believe *Lynch* requires an unconscionable result and the values at stake are momentous enough to warrant refusal to follow it. The outcry provoked by the Reagan administration's contention that Supreme Court decisions bind only the litigants, or at least not the Executive Branch,¹⁸⁹ was tremendous;¹⁹⁰ but at least those offended knew what they were up against. As suggested above, outrage can be a politically healthy thing. It should not be suppressed by clever, nervous lawyers in black robes.

Finally, there is more at stake here than public perception. Patterns of thinking, like patterns of overt behavior, can become habitual. As anyone engaged in an intellectually demanding profession is aware, the mind like the body must be exercised to remain fit. The same might be said of character. The practice of dissimulation and pretext, by those charged with a public trust that demands the highest level of integrity, is a dangerous thing. For anyone with a conscience and integrity, judging must be an enormously difficult task; and the temptation to hide in the shadows of legal sophistry must at times be powerful. There is a serious risk that the more often a judge takes the easy way out, the more ingrained becomes his or her habit of doing so and the flabbier becomes his or her capacity for intellectual honesty.

CONCLUSION

Lynch is bad law, but the stratagem employed by the lower courts in evading it made worse law. I do not believe the establishment clause, interpreted in the light of today's society, permits government to spon-

188. Cf. Mikva, *For Whom Judges Write*, 61 SO. CAL. L. REV. 1357, 1365-66 (1988) (discussing increasing public consumption of judicial opinions).

189. See *supra* note 146 and accompanying text.

190. One has to wonder whether the administration would have taken the same position if there weren't several Supreme Court decisions that frustrate portions of the administration's agenda.

sor the symbolism of one of the chief mysteries of the Christian religion. As disturbing as *Lynch* is, however, I find even more troubling its interpretation by the lower courts. That interpretation cynically portrays law as nothing more than semantics, and betrays the integrity that gives law its life. Because so much depends on judicial integrity, we should be wary of courts that attempt to talk out of both sides of their mouths — in this case by (implicitly) swearing allegiance to follow the decisions of the Supreme Court while dispatching such decisions to oblivion with a wink and lawyerly sleight-of-hand.