LYNCH AND THE LUNACY OF SECULARIZED RELIGION

Frederick Mark Gedicks*

"Pyrrhus replied to one that gave him joy of his victory that one other such [victory] would utterly undo him."

—Plutarch (75 A.D.)**

Any "worst opinion ever" essay must start with criteria of badness. I propose three: (i) failure to explain why existing doctrine dictated the result, (ii) failure to articulate a rule that judges can consistently apply in subsequent cases, and (iii) failure to protect the interests of the prevailing party. Few opinions win this trifecta, but *Lynch v. Donnelly* is one of them.[1] Chief Justice Burger and the *Lynch* majority would have left the world of church and state immeasurably enriched—or at least immeasurably less screwed up—if they had not written an opinion at all.

This is, to be sure, a polemical characterization of *Lynch*, though hardly an unexpected one in a worst-case-ever essay. It takes a certain passion to argue that an opinion is not just wrong or bad, but as wrong and as bad as any opinion has ever been. Those who want a cold-blooded dissection of *Lynch* should look elsewhere.[2]

I. NO EXPLANATION

The facts of *Lynch* are not complicated. For many years the predominantly Catholic city of Pawtuckett, Rhode Island sponsored a Christmas holiday display on private property in its downtown commercial district, with the apparent goal of drawing shoppers to the district and increasing sales by businesses

* Guy Anderson Chair and Professor of Law, Brigham Young University Law School. I am grateful to Jeff Stempel and the *Nevada Law Journal* for their invitation to participate in this Symposium. Jacqueline Bosshardt proved excellent research assistance.

** Plutarch, *The Lives of the Noble Grecians and Romans* (John Dryden trans. 1683), *in* 14 GREAT BOOKS OF THE WESTERN WORLD 325 (Encyclopedia Britannica, Robert Maynard Hutchins ed. 1952) (75 A.D.); *see also* IX PLUTARCH'S LIVES 417 (G.P. Putnam's Sons, Bernadotte Perrin trans. 1920) (75 A.D.) ("[W]e are told that Pyrrhus said to one who was congratulating him on his victory, 'If we are victorious in one more battle with the Romans, we shall be utterly ruined.'").

[1] 465 U.S. 668 (1984) (Burger, C.J., majority opinion) (holding that government display of life-sized Christian nativity surrounded by secular symbols of the Christmas season did not violate Establishment Clause).

[2] I wrote a dispassionate analysis of *Lynch* once. *See* Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 704–09, 722–26. Polemics are more fun.

located there.[3] The display consisted mostly of large lighted candy canes, a wishing well, a large Christmas tree, five-pointed stars, a "Seasons Greetings" banner, cut-out figures of clowns and carnival animals, and a live Santa Claus together with representations of his house, sleigh, and reindeer.[4] The display also included a Christian nativity scene or "crèche," as the Court called it (showing off its French), which consisted of life-sized representations of the Holy Family—Joseph, Mary, and baby Jesus—along with other characters from the Biblical accounts of Jesus's birth, such as angels, kings bearing gifts, shepherds, barn animals, and a manger and stable.[5] All the components of the nativity were purchased and owned by the city, and were set up each year by city employees for the Christmas season.[6]

When the nativity was challenged in 1980, the lower courts held in accordance with existing doctrine that its presence in the city's Christmas display violated the Establishment Clause for lack of both a secular purpose and a primary secular effect.[7] One can argue that the crêche was installed for the secular purpose of drawing shoppers into the commercial district; assuming that it was effective in doing so, this would also seem to count as its primary and secular effect. However, the city's mayor had made it unmistakably clear that the city's purpose in including the nativity was at least religious, if not sectarian.[8] Justice Brennan had also previously suggested that the Establishment Clause prohibits government use of religious means to effect secular goals when comparable secular means are available,[9] and there was no showing in *Lynch* that Santa alone was not up to the task of generating downtown traffic and sales—that is, that without the nativity no one would have come downtown to shop.[10] Consequently, it's hard to fault lower court conclusions that the nativity was included in the display to identify city government with the religious sensibilities of the city's Catholic-Christian majority, and was so perceived by Christians and non-Christians alike.[11]

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[3] *Lynch,* 465 U.S. at 671; Donnelly v. Lynch, 525 F. Supp. 1150, 1154–55 n.5, 1159, (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982) (2–1 decision), *rev'd*, 465 U.S. 668 (1984).

[4] *Lynch*, 465 U.S. at 671.

[5] *Id.* at 671; 525 F. Supp. at 1155–56.

[6] 465 U.S. at 671; 525 F. Supp. at 1154–56, 1176 n.34.

[7] 691 F.2d at 1034–35; 525 F. Supp. at 1172–73, 1177.

[8] *E.g.*, 525 F. Supp. at 1158–59 (describing the mayor's widely publicized vow "to fight vigorously the ACLU's attempt to take Christ out of Christmas").

[9] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring). The Court incorporated this principle into Establishment Clause doctrine a few years after *Lynch* in Cnty. of Allegheny v. ACLU, 492 U.S. 573, 611–12 (1989).

[10] To the contrary, testimony at trial showed that downtown merchants, at least, thought the nativity was inconsequential in this regard. *See* 525 F. Supp. at 1159.

[11] Unless you're Justice O'Connor. *See Lynch*, 465 U.S. at 691–693 (O'Connor, J., concurring) (concluding that the purpose and effect of the nativity in the display was not to endorse Christianity, because in that context a reasonable observer would not see it as anything other than the "celebration of a public holiday with traditional symbols").

O'Connor has been repeatedly criticized for implicitly investing her "reasonable observer" with the religious sensibilities of the Christian majority. *See, e.g.*, Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 859–60 (observing that in *Lynch* O'Connor and Burger both "ultimately looked only to the perception of the public at large"); *cf. Lynch*, 525 F. Supp. at 1170 ("[W]hen a belief or

Perhaps for this reason, the Supreme Court did not take attracting holiday shoppers and increasing holiday sales tax revenues as the city's purposes in setting up the crêche. Rather, the Court posited a secular purpose of celebrating the Christmas "Holiday" season through its traditional symbols, some of which are religious.[12] As for primary secular effect, the Court engaged in a curious evasion, concluding without explanation that the nativity was "no more religious" than certain other church-state interactions that it previously upheld, like state programs providing textbooks or bus transportation to parochial school students, federal building and block grants to religious colleges, and state exemption of churches from property taxes.[13] It also suggested an undeveloped analogy to religious art hanging in government-funded museums; just as medieval and Renaissance art with Christian and even Catholic themes does not run afoul of the Establishment Clause when hung in the same building as Picasso and Pollack,[14] apparently neither did the nativity when placed among candy canes, Santa Claus, and Rudolph.

This analysis also included one of the most culturally disingenuous statements ever to appear in the U.S. Reports. The Court concluded that the effect of the city's display of the nativity was not religious just because it "happens to coincide or harmonize with the tenets of some religions,"[15] as if the city had conducted a lottery of religious symbols and had randomly drawn the nativity out of a hat. Can you imagine Chief Justice Burger intoning that the nation of Israel's Saturday-closing restrictions do not have a religious effect because they merely "happen to coincide" with the Sabbath beliefs of the orthodox wing of "some religion" that dominates Israeli politics? (Me neither.) One can safely assume that a nativity would not have been included in the city's Christmas display—indeed, that the city would not have had a Christmas display at all—if 60 percent of its citizens had been Jewish or Muslim or Buddhist rather than Catholic. The inclusion of the nativity in the city's display did not just "happen to coincide" with the beliefs of its Catholic-Christian majority, but was chosen *precisely because of that coincidence*.

The Court's opaque explanation of its *Lynch* holding puts one in mind of Justice Brennan's realist "rule of five."[16] Having succeeded in getting four

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practice has been common to the majority for a long time, it becomes easy to regard the belief or practice as a matter of culture or tradition and thereby imply that they have somehow attained a neutral, objective status.").

[12] 465 U.S. at 681 ("The display is sponsored by the city to celebrate the Holiday and to depict the origins of the Holiday."). I cannot help wondering if the Chief Justice would have capitalized the "H" if "Holiday" had referred to, say, Veterans or Presidents Day.

[13] *Id.* at 681–82 ("We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.").

[14] *Id.* at 683.

[15] *Id.* at 682 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961) (internal quotation marks and ellipsis omitted)).

[16] "What is the most important rule in constitutional jurisprudence?," Brennan is reported to have asked his clueless law clerks each year. The answer, it turns out, is that five Justices make a majority, so "with five votes you can do anything." Accounts of this anecdote are legion. *See, e.g.*, Mark Tushnet, *Rule of Law, Or Rule of Five?*, THE NATION, Nov. 1. 1993, at 497.

other Justices to sign onto his opinion, Chief Justice Burger apparently ceased to worry about what the opinion actually said.

II. No Rule

The take-away from *Lynch* was that "religion won," though no one was quite sure why. While it was better than nothing to know that the Court considered inclusion of the nativity "no more religious" than many other benefits allowed to religion under the Establishment Clause, its failure to explain how Jesus, Mary, and Joseph are like textbooks and bus passes and federal block grants left the lower courts and their litigants with nothing to go on.[17] All one could do was generalize the bare result: even theologically potent symbols of majoritarian religion may be appropriated and deployed by government so long as surrounded by some minimum of secular symbols—like, say, three plastic reindeer.[18] Thus was born one of the silliest and most incoherent lines of Supreme Court decisions ever, one in which the Court is still hopelessly entangled.

A few years after *Lynch*, the Court took up two more holiday displays in *County of Allegheny v. ACLU*, a nativity displayed by itself in the foyer of a city/county courthouse, and a giant Christmas tree set up outside a government building next to a smaller menorah in front of a plaque proclaiming the two symbols a salute to liberty.[19] A splintered Court failed to agree on a majority opinion, but when the dust cleared, the stand-alone nativity had been struck down as an endorsement of Christianity in violation of Establishment Clause neutrality,[20] while the combined Christmas tree and menorah were upheld as unobjectionable emblems of, in Justice Blackmun's words, the "winter-holiday

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[17] *See* Dorsen & Sims, *supra* note 11, at 845 ("If the instances of accommodation listed by the Chief Justice [in *Lynch*] are relevant to an emergent principle, the Court did not identify it."); *see also* Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 Maryland L. Rev. 352, 367–68 (1986) (observing that the *Lynch* majority justified its holding with rhetoric rather than analysis).

It is doubtful that the cases listed in the Court's "no-more-religious-than" string cite were really relevant to the situation before it in *Lynch*. *See, e.g.*, *Leading Cases of the 1983 Term: Establishment of Religion*, 98 Harv. L. Rev. 174, 176 n.20 (1984).

> The Court was apparently unconcerned that these examples involved situations in which the government had extended a clearly secular benefit to a wide range of similarly situated nonreligious and religious beneficiaries. The appropriate question in those cases was indeed whether the benefit to religion was sufficiently incidental. In contrast, the cases more appropriate for comparison to *Lynch* would have been those in which the government had used and was identified with a religious symbol.

Id.

[18] *See, e.g.*, George M. Janocsko, *Beyond the "Plastic Reindeer Rule": The Curious Case of* County of Allegheny v. American Civil Liberties Union, 28 Duq. L. Rev. 445, 485–86 (1990); *see also* James D. Gordon III, *An Unofficial Guide to the Bill of Rights*, 1992 BYU L. Rev. 371, 371 ("The establishment clause prohibits religious displays by the government, unless they are accompanied by Rudolph the Red-nosed Reindeer.").

[19] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 578–80, 582, 619 (1989).

[20] *Id.* at 601-02. This portion of Justice Blackmun's opinion was joined by a majority of the Court. *See id.* at 577 (syllabus).

season"[21]—a phrase apparently in general use only among employees of the U.S. Fire Administration,[22] psychologists who treat seasonal affective disorder,[23] and Supreme Court Justices who uphold nativities appearing in government Christmas displays.

After *Allegheny County* the Court took a long and welcome vacation from religious symbol cases. Unfortunately, its return to them in 2005 suggested that rest had not cleared its mind. In *McCreary County v. ACLU*, the Court struck down the inclusion of the Ten Commandments in a contemporary display of secular and religious documents that have historical significance for the development of American law,[24] while in *Van Orden v. Perry* it upheld a monument of the very same Commandments installed 38 years earlier on the grounds of a state capitol among seventeen historical or cultural monuments.[25] The contemporary display failed for lack of a secular purpose; the Court expressly found that the purpose of including the Commandments was to endorse religion and belief, if not Christianity itself.[26] The older monument was upheld because it appeared among secular monuments that suggested a predominant secular historical meaning,[27] had caused no public outcry,[28] and was kind of old.[29]

A fair summary of the *McCreary-Van Orden* two-step is that old religious monuments are okay, while new ones are not—a rule Justice Scalia happily (or

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[21] *Id.* at 620 (Blackmun, J.) ("[T]he city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."); *accord id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment) (concluding "that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season"). Four other Justices agreed with the result reached by Blackmun and O'Connor, but for the very different reason that the display involved no coercion or religious belief or practice. *Id.* at 655–73 (Kennedy, J., joined by Rehnquist, C.J., and White Scalia and Kennedy, JJ., concurring in the judgment in part and dissenting in part).

[22] *See Christmas and Holiday Season*, WIKIPEDIA, http://en.wikipedia.org/wiki/Christmas_and_holiday_season (last visited Jan. 29, 2012) ("The U.S. Fire Administration defines the 'Winter Holiday Season' as the period from December 1 to January 7.").

[23] *See, e.g.*, Mary Ellen Copeland, *Enjoying the Winter Holiday Season* (2006), *available at* http://psychcentral.com/lib/2006/enjoying-the-winter-holiday-season/ (last visited Jan. 29, 2012).

> No matter what your faith or cultural background, as the holiday season approaches, you may notice, as many people do, that instead of feeling a sense of warm anticipation, you feel a sense of dread. . . . In recent years, the phenomenon of Seasonal Affective Disorder (SAD), which is related to lack of light through the eyes, has become widely accepted as a cause of this malaise.

Id. (emphasis added). Without discounting the seriousness SAD, I personally remember a number of other things that brought on a "sense of dread" during the Christmas holidays, such as how to find a "Tickle Me Elmo" or a place to park at the mall.

[24] McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 850, 881 (2005).

[25] Van Orden v. Perry, 545 U.S. 677, 681 (2005).

[26] *McCreary County*, 545 U.S. at 850, 880–81.

[27] *Van Orden*, 545 U.S. at 691–92 (plurality opinion).

[28] *See id*. at 702 (Breyer, J., concurring in the judgment) (observing that "40 years passed in which the presence of this monument, legally speaking, went unchallenged"); *cf. id.* at 682, 691 (plurality opinion) (observing that the monument is "passive" and that petitioner had walked by it for years before challenging it).

[29] *See id*. at 686–88 (plurality opinion) (documenting that display of the monument is consistent with a centuries-old American tradition of acknowledging the "role of God in our Nation's heritage").

maybe sarcastically—or maybe both) endorsed a few years later.[30] A more sophisticated synthesis suggests that government use of a religious symbol in the face of evidence showing a subjective motivation to favor the "Judeo-Christian" majority violates the Establishment Clause even when the symbol appears among a sea of wholly secular symbols, but government use of the same symbol in the same kind of sea without that evidence is unobjectionable.[31]

Bottom line, then (otherwise known as the "three-reindeer" rule): The government may appropriate a religious symbol for its own purposes—which may also be religious—so long as it places it in the vicinity of a few secular symbols and keeps its mouth shut.

III. No Religion

The most curious aspect of *Lynch* and its progeny is their enthusiastic endorsement by conservative believers. It is something of a victory, I suppose, to have the symbols of one's faith used by the government; it counts as a kind of social validation, rather like having someone of one's race or ethnicity or religion elected President. It counts also as a refutation of "secularism"—much on the conservative Christian mind these days, though it's often not entirely clear what that mind thinks secularism is. In case of religious symbols, however, the price of social validation and victory over secularism is that such symbols be emptied of their religious significance, however implausible that may seem. Thus has the Court defended government use of religious symbols by secularizing, or minimizing, or flat-out ignoring the undeniably religious purposes and effects of such use. As Professor Tushnet observed, extrapolating from *Lynch*, "where the Justices feel pressure to validate a religious activity, they are likely to respond by treating it as essentially nonreligious."[32] In order to defend the close alignment of church and state suggested by government appropriation of a religious symbol, the obviously religious symbol must be recharacterized as secular; the validating government use of the symbol that

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[30] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139–40 (2009) (Scalia, J., concurring) (arguing that the Ten Commandments monument installed in city park among a few secular monuments would not violate the Establishment Clause because it was as old as the monument upheld in *Van Orden*).

[31] A number of Justices appear to believe that the secular sea has become optional. *See* Salazar v. Buono, 130 S. Ct. 1803 (2010) (plurality opinion) (holding that large Latin cross at federal World War I memorial signified honor for fallen veterans rather than endorsement of Christianity). At oral argument, Justice Scalia insisted that the Latin cross is a secular memorial symbol that honors Jews, Muslims, and other non-Christians as well as Christians, expressing shock that any reasonable person would think otherwise. Transcript of Oral Argument at 38–39, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472). He had no comeback, however, to counsel's observation that Jewish cemeteries universally lack crosses. *Id.*

[32] Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 Sup. Ct. Rev. 373, 399; *cf.* William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495, 508, 509 (1986) (The Court has "distinguished, distorted, or failed to apply establishment doctrine" in order to reconcile anti-establishment principles with a 'de facto establishment' reality.).

engenders such pride of religious place is really a misuse of the religious meaning, if not its complete erasure.[33]

Lynch, *Allegheny*, and *Van Orden* all illustrate this phenomenon. The tip-off is that the most plausible and authentic descriptions of the religious symbols at issue are found in the dissenting opinions that argue against their appropriation by the government. When the Court upholds government use of religious symbols, it is inevitably the dissenting opinions that take the symbols seriously as *religious* symbols, and the majority opinions that secularize or trivialize their spiritual content.

Dissenting in *Lynch*, for example, Justice Brennan described the nativity "as a mystical re-creation of an event that lies at the heart of Christian faith," whose symbolic content prompts "a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah."[34] The majority refers to it as the mere commemoration of "a significant historical religious event" that by now is a "traditional event long recognized as a National Holiday" which creates "a friendly community spirit of goodwill in keeping with the season."[35] The contrast could not be more stark. Who knew that the first shot in the "War against Christmas" was fired by culturally conservative Supreme Court Justices?

In *Allegheny*, Justice Blackmun concedes that the menorah is a symbol of the miracle commemorated by Chanukah, but then asserts that the menorah's meaning is not "exclusively religious" and that Chanukah is an American "cul-

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[33] This and much of what follows is drawn from FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE ch. 4 (Duke, 1995).

[34] Lynch v. Donnelly, 465 U.S. 668, 711 (1984) (Brennan, J., dissenting); *see also id*. at 708 ("The nativity scene . . . is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious, and holy." (footnote omitted)); *accord* Braveman, *supra* note 17, at 353 ("[I]t is hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche.") (quoting Brief of Nat'l Jewish Comm. & Nat'l Council of the Churches of Christ as Amici Curiae Supporting Respondents, Lynch v. Donnelly, 465 U.S. 668 (1984), at 3) (internal quotation marks omitted); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE WESTERN RES. L. REV. 1211, 1212, 1213 (2011) ("The [nativity] figures are worshiping the baby because, according to Christian belief, the baby is the Son of God—actually himself also God—incarnated in human form. . . . If you think about it even a little bit seriously, the nativity scene can only represent the Christian belief in the Incarnation.").

[35] *Id*. at 680, 685 (Burger, C.J.); *accord id.* at 691 (O'Connor, J., concurring) (describing the purpose of the crèche as "celebration of the public holiday through its traditional symbols," which have "cultural" as well as religious significance.); *accord id.* at 693 (arguing that long-standing and common public acknowledgments of religion by government serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in [our] society."); *accord* David C. Fairchild, Lynch v. Donnelly*: The Case for the Crèche*, 29 ST. LOUIS U. L.J. 459, 472 (1985) (arguing that the "American celebration of the Christmas holiday is a national folk festival rooted in the biblical account of the nativity.").

Of course, as Professor Laycock has pointed out, the nativity can only be understood as "historical" if one also accepts the Incarnation of God that it signifies. Laycock, *supra* note 34, at 1214 ("The reason it seems odd for the Court to describe the event as historical is that it is historical only if you believe in the miracle.").

tural tradition" just like Christmas.[36] Indeed, as I've indicated, he describes Christmas and Chanukah as secular parts of the same "winter-holiday season."[37] Justice O'Connor helpfully points out that the menorah's placement next to the enormous Christmas tree "obscures the religious nature of the menorah and the holiday of Chanukah,"[38] thus vaporizing its significance to Jews along with its endorsement of Judaism. Again, it is left to the dissenters to emphasize the menorah's religious significance. Justice Brennan carefully describes the menorah's ritual use in "a celebration that has deep religious significance,"[39] and Justice Stevens likewise characterizes it as "unquestionably a religious symbol" and quotes rabbinical testimony that the menorah is as sacred a symbol to Jews as the nativity is to Christians.[40]

Van Orden takes a slightly different path to the same place as *Lynch* and *Allegheny*. Chief Justice Rehnquist sagely avoids the silliness of secularizing the Commandments, forthrightly acknowledging their undeniable religiosity.[41] But this confession is buried in an avalanche of examples purporting to show the secular significance of the Commandments and comparable religious texts and symbols. One must read the dissenting opinions to find an actual quotation of the text of the monument, which of course leads off with the powerful declaration of God himself, "I AM the LORD thy God", followed by the hardly less compromising prohibition, "Thou shalt have no other gods before me." The theological force of this text is, shall we say, somewhat stronger than one might suspect from the majority's laconic adjective, "religious." It is left to Justice Stevens in dissent to explain that "the Commandments represent the literal word of God as spoken to Moses and repeated to his followers after descending from Mount Sinai,"[42] and to observe the "profoundly sacred message" embedded in the text of the Commandments:

> It commands present worship of Him and no other deity. It directs us to be guided by His teaching in the current and future conduct of all of our affairs. It instructs us to follow a code of divine law, some of which has informed and been integrated into our secular legal code ('Thou shalt not kill'), but much of which has not ('Thou shalt not make to thyself any graven images. . . . Thou shalt not covet').[43]

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[36] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 613, 615 (1989) (opinion of Blackmun, J.). *See also id.* at 618 (describing the display as a "secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.").

[37] *Id*. at 616–17 (Blackmun, J.). Justice Blackmun did not reveal whether the U.S. Fire Administration and the American Psychological Association agree. *See supra* note 23 and accompanying text.

[38] *Id*. at 633–35 (O'Connor, J., concurring in part and concurring in the judgment).

[39] *Id.* at 643 (Brennan, J., concurring in part and dissenting in part).

[40] *Id.* at 654 & n.15 (Stevens, J., concurring in part and dissenting in part).

[41] Van Orden v. Perry, 545 U.S. 677, 690 (2005) ("Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain.").

[42] *Id.* at 716 (Steven, J., dissenting).

[43] *Id.* at 717 (Stevens, J., dissenting); *accord id.* at 738 (Souter, J., dissenting) ("[A pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones."); *see also* Laycock, *supra* note 34, at 1220 ("To say that the Commandments are 'historical' is to repeat the fallacy of *Lynch v. Donnelly*. A miracle—God's appearance

Intellectual historian Hans Frei described how in the eighteenth and nineteenth centuries the scholarly approach to the Bible was transformed from interpreting it as the literal history of the world to taking it as a mere manifestation of the mythic consciousness of its human authors.[44] The latter approach to Biblical interpretation, which Frei called "mythophilic," saw "the subject matter of biblical narratives neither in the events to which they referred nor in the ideas supposedly stated in them in narrative form, but in the consciousness they represented."[45] In other words, the Bible eventually ceased to be understood as the historical record of the events it describes, or even as one reliable account of them, and instead became a kind of anthropological evidence of the social, cultural, proto-scientific, and aspects of the ancient mind that wrote it. This "demythologization" of the Biblical text rendered it susceptible of meaning in an era in which scholars had become deeply skeptical of miracles and the supernatural. Mythophilic interpretation permitted an understanding of Jesus's resurrection as a new manifestation of divine consciousness rather than a literal historical event.[46]

A "symbolic demythologization" is at work in *Lynch*, *Allegheny*, and *Van Orden*. The majorities in these cases transform religious symbols of deep spiritual significance into cultural artifacts. As Justice Blackmun succinctly stated in *Allegheny*, "The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."[47] Rather than allowing the nativity, the menorah, or the Commandments to be understood authentically, as representations of central and miraculous events in the Christian or Jewish faith, the opinions reduce each of them to a thinned-out sign of secular folklore, "devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part."[48]

The Court's desacralization of the nativity in *Lynch*, the menorah in *Allegheny*, and the Commandments in *Van Orden* is betrayed by *Lynch*'s analogy to religious art.[49] The reason the presence of such art in government galleries is uncontroversial is that it is generally framed as evidence of the beliefs and practices of societies safely located in the past.[50] The implicit message is that religious art has little spiritual or normative force in contemporary society. The Court's analogy of the nativity, the menorah, and the Commandments to

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on a mountaintop to carve laws in stone—is 'historical' only if it really happened. Whether it really happened is a matter of faith.").

[44] HANS W. FREI, THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH AND NINETEENTH CENTURY HERMENEUTICS (1974).

[45] *Id*. at 265.

[46] *Id*. at 313–15.

[47] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 601 (1989).

[48] *Lynch*, 465 U.S. at 727 (Blackmun, J., dissenting). Justice Blackmun was not so troubled by the comparable secularization of the menorah in *Allegheny*. *See* 492 U.S. at 587 n.34, 613–21.

[49] *See Lynch*, 465 U.S. at 683.

[50] *Cf.* Laycock, *supra* note 34, at 1250 ("[T]he museum context makes clear that the painting is there because of its value as art, not because of its religious message. [E]ven in a museum devoted to a period when substantially all art was religious, the reasonable observer could see that selections were based on artistic value.").

museum art implies that they, too, have little contemporary spiritual significance and thus may be safely appropriated by government. The unmistakable emphasis of even the *Van Orden* plurality on the cultural and historical (but hardly the religious) significance of the Commandments merely confirms the Court's embarrassment at the theological content of governmentally sponsored religious symbols.

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As Professor Van Alstyne has pointed out, the nativity in *Lynch* was "partly secularized," having been "assimilated into and made a part of the state temporal, and not simply left to the church spiritual."[51] Thus is a depiction of the birth of the Christian savior reduced to the good cheer of Santa, the symbol of the Jewish "Miracle of the Lights" to an inoffensive alternative to secular Christmas cheer, and the word of God to a Hebrew prophet to archeological evidence of oxymoronic "Judeo-Christian" belief. Any more such victories for religion, and it will be truly undone.

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[51] William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 785–86; *see also id.* at 787 ("Distinctly religious practices, insofar as they serve the state, thus by definition have virtually succeeded in satisfying a secular purpose and promoting a secular interest.").