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THE SUPREME COURT
AND THE RELIGION
CLAUSES: 1982 AND
1984 TERMS

DONALD H. J. HERMAN*

A. CASES DECIDED BY THE SUPREME COURT IN THE
1982 AND 1983 TERMS.

During the 1982-83 terms, the United States Supreme Court has
considered cases involving religion which have required it principally to con-
sider the Establishment Clause. I will briefly report on the cases that
have been decided and that are pending. Most of this discussion, how-
ever, will deal with two cases, Marsh v. Chambers,\(^1\) decided in 1983, in
which the Court upheld the practice of paid legislative chaplains, and
Lynch v. Donnelly,\(^2\) decided in 1984, in which the Court upheld the prac-
tice of publicly supported creche displays. The principal focus of my dis-
cussion will be on their implications for civil religion or what Justice
Brennan calls “ceremonial deism.”

In the 1982 term, the Court decided three cases which dealt with
church-state issues. In Larkin v. Grendel’s Den,\(^3\) the Court found as a
general matter that religious institutions must be excluded from govern-
mental decision making. Grendel’s Den, a restaurant, challenged the con-
stitutionality of a Massachusetts state law that gave churches and schools
the power to veto the liquor license of any business within a 500-foot
radius of their premises. The restaurant had been denied a liquor license
because of the opposition of a nearby church. In an 8-1 decision, Chief
Justice Burger, writing for the Court, found that the vesting of govern-

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\(^1\) 463 U.S. 783 (1983).
mental power in religious institutions violated the establishment clause's “core rationale” of “preventing a fusion of governmental and religious functions." Justice Rehnquist, in a dissenting opinion, criticized the majority for indicating the acceptability of a flat ban on all liquor licenses within a prescribed radius of churches, while striking down the state statute's less restrictive, discretionary ban. In Justice Rehnquist's view, if the more rigid prohibition would be constitutional, the more flexible one must also survive constitutional scrutiny.

In *Marsh v. Chambers*, a member of the Nebraska state legislature challenged the custom of opening the legislative day with a prayer by an official chaplain. In a 6-3 decision, the Supreme Court held this practice did not violate the establishment clause. An extensive analysis of this case will be presented in the principal part of my presentation.

In *Mueller v. Allen* a challenge was made to a Minnesota statute allowing taxpayers to deduct tuition, transportation, instructional material, and textbook expenses incurred in educating dependents attending primary and secondary schools. In a 5-4 decision, the Court found that the statute was neutral on its face and in its application and did not have a primary effect of either advancing or inhibiting religion. Justice Rehnquist, writing for the majority, focused on several features of the Minnesota statute that distinguished the tax law from similar measures previously found to be unconstitutional. First, unlike the arrangements that had been ruled unconstitutional, the statute at issue was only one among many deductions, and was made available to all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools, as well as sectarian private schools. Second, it was noted that all but one of the recent cases invalidating state aid to parochial schools had involved state assistance given directly to the schools themselves, while the Minnesota aid went to individual parents. Thus, instead of providing a tax benefit, a form of aid previously held unconstitutional, the Minnesota system involved a genuine tax deduction. In his dissent, Justice Marshall rejected the majority's attempt to distinguish cases that had held similar measures unconstitutional. The dissent stressed the actual effect of the tax deduction rather than the statute's apparent neutrality, focusing on evidence that shows that virtually all of the tax benefits authorized by the statute went to parents of parochial school children.

So far in the 1983 term, the court has decided one major case involving church and state. This is *Lynch v. Donnelly* which held that, notwithstanding the religious significance of a creche, a public supported display of a nativity scene as part of a holiday display did not violate the Estab-
lishment Clause. This case will also receive major attention in the principal part of my presentation.

B. CASES PENDING BEFORE THE COURT

Three cases involving church and state are presently pending before the Court. In *Grand Rapids School District v. Ball*, the District Court held that the city school district's shared time community education program, in which it supplies public school teachers to teach courses from its general curriculum in private school facilities leased from these schools, violates the Establishment Clause. The Sixth Circuit Court of Appeals affirmed. The Court is faced with the question of whether provision of secular, supplementary, non-substitutionary, instructional services to part-time public school students on premises leased from religiously oriented non-public schools under conditions of public school control constitutes a *per se* violation of the Establishment Clause. The case is complicated by the issue of state taxpayer standing.

In *Estate of Thornton v. Caldor, Inc.*, the Court is presented with the question of whether a Connecticut statute that protects persons who are involved in religious practices against being compelled to work on the day of the week which they observe as their Sabbath violates the First Amendment Establishment Clause.

In the consolidated cases of *Wallace v. Jaffree* and *Smith v. Jaffree*, the Court has agreed to consider two questions:

1. Whether a state statute which permits, but does not require, teachers in public schools to observe up to a minute of non-activity for meditation or silent prayer has the predominant effect of advancing the student's liberty of mind rather than any effect of establishing religion; and

2. Does a moment of silence for individual silent prayer and meditation at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

I now turn to the principal part of my presentation, which will deal with the opinions of the Court handed down in the last two terms which relate to the recognition of civil religion.

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8 469 U.S. 1102 (1985).
C. A Religious People and A Christian Nation: Construing the Free Exercise Clause

Just before the turn of the century, the United States Supreme Court could in a unanimous opinion declare without qualification that: "[T]his is a Christian nation." This assertion was made in the case of the Church of the Holy Trinity v. United States decided in 1892. This case involved an action brought against a New York church which had contracted for the services of a minister residing in England; the action charged violation of an anti-immigration statute prohibiting any person or organization from assisting or encouraging migration of any foreigner to perform labor or service in any part of the United States. The Supreme Court reversed lower court findings that this particular contract violated the statute. In reaching its conclusion, the Court found that it was not the intention of Congress to forbid such contracts for services of ministers or ecclesiastical employees who were residents of a foreign nation. In determining the purpose of Congress, the Court assumed that there was an affirmative historical relation of the American state to religion and in particular to Christian churches.

The Court found that it was unlikely the Congress meant in any way to impede the activity of Christian churches "because this is a religious people." The Court considered a variety of historical experiences as establishing this fact, including the royal commission of Christopher Columbus, the first colonial grant to Sir Walter Raleigh by Queen Elizabeth, the first charter of Virginia granted by King James I, the Maryland Compact, the fundamental orders of Connecticut, and the charter granted to William Penn. All of these were found by the Court to have been granted to further the Christian faith.

The Court then turned to a consideration of the attitude of the American federal and state governments to the policy of furtherance of religion from the time of independence. The Court observed that "the Declaration of Independence recognizes the presence of the Divine in human affairs, by the very explicit terms of the document itself." Further, the Court noted: "If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community." The Court went on to find that the Constitution with the First Amendment free exercise clause constitutes a declaration of support for religion which continues the tradition embodied in the state constitutions. The Court concluded: "There is no

* 143 U.S. 457 (1892).
dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people.”

Satisfied that it established that by tradition “this is a religious nation,” the Court turned to the consideration of the specific religious character of the nation. The Court began by quoting from various state court opinions to establish its assertion that “this is a Christian nation.” First the Court cited a Pennsylvania opinion which states: “Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church . . . and spiritual courts; but Christianity with liberty of conscience to all men.”

The Court then turned to an opinion of Chancellor Kent written when he served as Chief Justice of the Supreme Court of New York where he wrote: “The people of this [s]tate, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; . . . the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity. . . .”

Turning from case law to general practice, the Court found evidence to support its assertion; the Court cited the form of oaths which include an appeal to the Almighty, the custom of opening sessions of deliberative bodies with prayer, laws respecting observance of the Sabbath. The Court concluded that: “These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.”

D. FORBIDDING SCHOOL PRAYER AND BIBLE READING: CONSTRUING THE ESTABLISHMENT CLAUSE

The decision in Church of the Holy Trinity can properly read to provide that the statute at issue could not be applied to prohibit the hiring of a foreign cleric without violating the free exercise clause. The Court found as a general proposition that we are a religious people, and as a matter of a more specific proposition that we are a Christian nation; and that to prevent activity which was germane to the functioning of a Christian Church would involve an unconstitutional interference. With the decisions of the Supreme Court in Engel v. Vitale finding that the required recitation of an official state prayer in schools violated the First

10 Id. at 470 (quoting Updegraph v. Com., 11 Serg. & Rawle 394, 400).
11 Id. at 470-71 (quoting People v. Ruzzles, 8 Johns 290, 294-295).
Amendment, and the decision in *Abington School District v. Schempp* finding that a requirement of reading of passages from the Bible or the Lord’s Prayer in public schools violates the First Amendment, the Court construed the effect of the establishment clause on officially required non-denominational religious activity and specifically, non-sectarian Christian activity. Without denying that we are a religious people, the Court in *Engel v. Vitale* found that: “[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause . . . .” In *Abington School District v. Schempp*, the Court again found that the “religious character of the exercise” of reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord’s Prayer by students in unison to be in violation of the Establishment Clause. In a concurring opinion, Justice Brennan identified as a particular basis for constitutional prohibition the Christian character of the exercises which made these exercises objectionable at the present time in a way which they might not have been to the framers of the Constitution. Justice Brennan reasoned: “[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.”

**Legislative Prayer and Civil Religion**

The recent decisions of the Supreme Court in *Marsh* and *Lynch* raise the question of whether religious practices can occur within a governmental context without offending the deeply devout who may view such practices as constituting the establishment of a secular religion or the nonbeliever who may see such practices as an endorsement of religious, or, more specifically, Christian belief. In *Marsh v. Chambers*, the Court found that the practice of the Nebraska legislature of opening its legislative day with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. The majority observed that for

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14 *370* U.S. at 430.
15 *374* U.S. at 240-241 (Brennan, J., concurring).
sixteen years the chaplain had been elected from one Christian denomination, the Presbyterian Church, that he was paid at public expense, and that the prayers offered were in the Judeo-Christian tradition.

The majority found the practice of opening sessions of a legislature and other deliberative public bodies with prayer was deeply embedded in the history and tradition of the country. It was noted that court proceedings, including those in the United States Supreme Court, begin with an announcement including the invocation: “God save the United States and this Honorable Court.” The majority traced the practice of opening legislative meetings with prayer by a paid chaplain to the Continental Congress, and observed that this practice was carried on by the First Congress in 1789 by statute. The Bill of Rights, including the First Amendment with its Establishment Clause, which was argued as the basis for constitutional attack on the practices at issue in *Marsh*, was agreed to only three days after Congress authorized the appointment of paid chaplains. Thus, the majority concluded: “Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”

The *Marsh* majority, while conceding that “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees” nevertheless maintained that there was “far more here than simply historical patterns” which justified the practice of legislative prayer. For the majority it was not simply a matter of historical pattern; rather the majority focused on the historical fact that in the same week members of the First Congress voted to appoint and to pay a chaplain for each House. They also voted to approve the draft of the First Amendment for submission to the states. From this fact two inferences were drawn: first, that the drafters could not reasonably be viewed as intending the Establishment Clause to forbid that which they had immediately before found acceptable; and second, that it would be incongruous to interpret the Clause as imposing more stringent constitutional limitations on the states than the draftsmen imposed on the federal government.

The majority went on to reject the argument that opening the legislature with prayer should be viewed as proselytizing activity or as symbolically placing the government’s official seal of approval on a particular religious view. Rather, the majority viewed these invocations in the legislature as simply harmonizing with the tenets of some or all religions, while avoiding the objection of school prayer since the individuals affected by the practice of legislative prayer are adults and presumably not

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17 *Id.* at 788.
susceptible to religious indoctrination nor subject to peer pressure. The majority found no concern with the content of the prayer since there was no indication that the prayer was used as an opportunity to proselytize or advance any particular religion or belief. Instead the majority endorsed the observation that “[w]e are a religious people whose institutions presuppose a Supreme Being,” and held that “[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”

It is clear that the majority based its finding of constitutionality of legislative prayer upon acceptance of the proposition that these widely held religious beliefs establish that we are a Judeo-Christian nation since the court specifically found that the practice at issue in the Nebraska legislature involved prayers that were in the “Judeo-Christian tradition.” In a footnote quoting the deposition of the chaplain involved in the case, it was noted that the prayers could be characterized as “non-sectarian,” “Judeo-Christian” with “elements of the American civil religion.”

In a lengthy dissent by Justice Brennan who was joined by Justice Marshall, it was argued that the practice of invocational prayer violated the Establishment Clause and was not saved by historical pattern or fact. According to Justice Brennan, for a statute providing for some religious practice to survive constitutional challenge, it must have a secular purpose; its principal or primary effect can be neither to advance nor to inhibit religion; and it cannot foster an intensive government entanglement with religion. Justice Brennan applied these tests to legislative prayer and found it to fail each. The purpose of legislative prayer was viewed to be self evident; it was found to be primarily religious rather than secular. According to the dissent: “To invoke Divine guidance on a public body entrusted with making the laws, is nothing but a religious act.” Whatever secular functions legislative prayer might perform, the dissent cited the formality of opening a session, getting the membership to quiet down, imbuing legislators with a sense of high purpose and seriousness, were said to be obtainable without a religious practice. Justice Brennan went on to observe “that to claim a secular purpose for prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.”

18 Id. at 792 (footnote omitted).
19 Id. at 793 n.14.
Not only the purpose but also the primary effect, according to the dissent, of legislative prayer is religious. The dissent saw no significant difference between school prayer and legislative prayer since they both place indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion. Justice Brennan underscored his observation: “[I]nvocation in Nebraska’s legislative halls explicitly link religious belief and observance to the power and prestige of the State. [T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion. . . .” Equally objectionable to the dissent was the fact that the practice of legislative prayer leads to excessive entanglement of the state and religion. Specifically, the dissent noted that: “In the case of legislative prayer, the process of choosing a suitable chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to suitable prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.” This entanglement was further viewed as threatening political division along religious lines producing rancor and conflict which the First Amendment was aimed at avoiding. For instance, the dissent observed such divisiveness reflected in “objections raised by some Senators to Christological references in certain prayers” made by the chaplain and guest members of the clergy.²⁰

Justice Brennan then explored the nature of the relationship between the state and religion which he maintained was required by the Constitution. The terms “separation” and “neutrality” were viewed as producing “a wall of separation between church and state.” Not a metaphor, but an actual barrier. The result, according to the dissent, is a continuing need to reaffirm the proposition that: “The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion must be a private matter for the individual, the family, and the institutions of private choice.”²¹ Individual liberty was said to be central to the First Amendment in the sense of forbidding coercion to religious belief or practice or compelling support for the practices of any faith to which one does not adhere. Beyond this, Justice Brennan identified three concerns which must be addressed by anyone who would authorize and make official religious practice whether it be in terms of recognizing a “Judeo-Christian practice” or of instituting some form of civil religious practice. These concerns, according to the dissent, are born out of a respect for religion and a desire to maintain its character and to prevent its debasement. A primary purpose of separation and neutrality, according to

²⁰ Id. at 800 n. 9.
²¹ Id. at 802.
the dissent, is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religion. This concern seems to be an extenuated practice of a traditional religion or institutes some civil religious practice which draws on a traditional religion.

Justice Brennan then addressed the historical account given by the majority. The dissent noted that even before adoption of the First Amendment, the framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not involve the name of God in the Constitution. The dissent also rejected the argument that the framers of the Establishment Clause would not have authorized chaplains for Congress if they thought it violated the Clause since according to the dissent, the action in these early Congresses is equally explained by the passions and exigencies of the time, as well as the pressure of constituents and colleagues. More importantly, the dissent objects to the majority's analysis, which was said to treat the First Amendment as an Act of Congress whose meaning was determined primarily by reference to the intent of Congress; rather, according to the dissent, the significance of the Bill of Rights is to be determined by the reference to the purpose of the states which compelled their enactment as a condition for ratification of the Constitution.

More importantly, Justice Brennan maintained that the fact of the historical character of a practice does not determine its constitutionality. According to Justice Brennan: “We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.” The significance of this fact in the context of church and state was underscored by Justice Brennan by his reference to one of his earlier opinions where he observed: “[O]ur religious composition makes us a vastly more diverse people than were our forefathers . . . [i]n the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and nonbelievers alike.”

Justice Brennan admits that in the past this may have been a Christian nation; notwithstanding historical support for such a view, he maintains that this country no longer be viewed as such. Justice Brennan pointed out that in fact President John Adams issued a number of official

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**Id.** at 803.

**Id.** at 816.

**Id.**

**Id.** at 817 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 240-241 (1963)).
prayer proclamations. Moreover, Justice Story, in each treatise on the
Constitution, maintained that the “real object” of the First Amendment
“was, not to countenance, much less to advance Mohammedanism, or Ju-
daising, or infidelity, by prostrating Christianity, but to exclude all rivalry
among Christian sects. ...

A possible exemption for certain practices and statements under gov-
ernment auspices was characterized by the dissent as based on a finding
that such “practices” have lost any true religious significance. Among
such practices the dissent would place the familiar recitation of “God
save the United States and this Honorable Court,” “In God We Trust,”
“One Nation Under God” and the like.

Legislative prayer was viewed as
not falling within this class. According to Justice Brennan:

Prayer is serious business — serious theological business — and it is not a
mere “acknowledgment of beliefs widely held among people of this country”
for the State to immerse itself in that business. Some religious individuals
or groups find it theologicaically problematic to engage in joint religious exer-
cises predominantly influenced by faiths not their own. Some might object
even to the attempt to fashion a “non-sectarian” prayer. Some would find it
impossible to participate in any “prayer opportunity” marked by Trinita-
rian references. Some would find a prayer not invoking the name of Christ
to represent a flawed view of the relationship between human beings and
God. Some might find any petitionary prayer to be improper. Some might
find any prayer that lacked a petitionary element to be deficient. Some
might be troubled by what they consider shallow public prayer, or non-
spontaneous prayer, or prayer without adequate spiritual preparation or
concentration. Some might, of course, have theological objections to any
prayer sponsored by an organ of government. Some might object on theologi-
cal grounds to the level of political neutrality generally expected of govern-
ment-sponsored invocational prayer. And some might object on theological
grounds to the Court’s requirement that prayer, even though religious, not
be proselytizing.

The point Justice Brennan seems to be making is that even conced-
ing that we are a “religious nation,” this fact does not lead to a ground for
authorizing any particular religious practice because of the profound the-
ological differences that underlie the many sects which constitute our plu-
ralistic religious society. Accordingly, he concludes: “[W]e are faced with
potential religious objections to an activity at the very center of religious
life, and it is simply beyond the competence of government, and inconsis-
tent with our conceptions of liberty, for the [s]tate to take upon itself the

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** Id. at 817 (quoting 1 J. Story, Commentators on the Constitution § 1871 (1st ed. 1833)).

** Id. at 817.

** Id. at 819-21 (footnotes omitted).
role of ecclesiastical arbiter."  

F. CIVIL RELIGION AND THE CHRISTIAN TRADITION: "THE CRECHE CASE"

This term the Supreme Court again considered the propriety of governmental sponsorship of religious practice, this time an official commemoration of Christ's birth. In *Lynch v. Donnelly*, the Court addressed the question of whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display. The Christmas display at issue was erected by the City of Pawtucket in cooperation with local merchants in a downtown park owned by a nonprofit organization. The display consisted of many symbols associated with Christmas, including along with the nativity scene a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, hundreds of colored lights, and a large banner which carried the slogan "Season's Greetings." The creche, which had been exhibited for forty years, consisted of traditional figures associated with the story of Christ's birth, including the infant Jesus, Mary, Joseph, angels, shepherds, wise men and animals.

The District Court found that the exhibition of the creche by the city represented an endorsement and promulgation of religious beliefs, and that its erection had the effect of affiliating the city with Christian beliefs. The appearance of official sponsorship was found to confer a direct benefit on Christianity. The First Circuit affirmed.

In a 5-4 opinion, the Supreme Court reversed. The Court's opinion delivered by Chief Justice Burger began with the observation that the Religion Clauses do not contemplate a total separation of church and state. The Chief Justice observed that the "concept of a 'wall' of separation used to describe the relationship of church and state is merely a useful figure of speech;" that the "wall of separation" is a metaphor; and that this "metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." According to Justice Burger, the Constitution, instead, "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

The Court's opinion in *Lynch v. Donnelly* began by adopting the analysis developed in *Marsh* and endorsed that opinion. Justice Burger

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29 Id. at 821.
32 691 F. 2d. 1029 (1st Cir. 1982).
33 465 U.S. at 673.
underscored the premise that the Establishment Clause is to be interpreted in a manner consistent with the contemporaneous understanding of its significance. Furthermore, according to the Chief Justice: “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” This observation led to reaffirmation of the proposition that “we are a religious people whose institutions presuppose a Supreme Being.” This proposition was said to be reflected in official prayer invocations, proclamation of holidays such as Thanksgiving and Christmas as national holidays with religious overtones, adoption of the statutorily prescribed national motto “In God We Trust,” and the language “One Nation Under God” as part of the Pledge of Allegiance to the Flag. The Court’s opinion went on to note that art galleries supported by public revenues display religious paintings which were inspired by the Christian faith. For example, the National Gallery in Washington, maintained by federal funds, exhibits paintings of the Last Supper, the Nativity, the Crucifixion and the Resurrection. Moreover, the majority observed that the very chambers of the Supreme Court are decorated with a symbol of religion, namely Moses with the Ten Commandments.

In *Lynch v. Donnelly* the majority makes explicit what was implicit in its opinion in *Marsh*, that is, rejection of the proposition that the test established in *Lemon v. Kurtzman* provides a binding standard for the application of the Establishment Clause. The Court concedes that it is often useful to inquire whether a challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement with religion. Nevertheless, the majority observes that: “[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area,” and specifically notes that: “We did not, for example, consider that analysis relevant in *Marsh*.

The majority emphasizes that the focus of inquiry in the case before it was “on the creche in the context of Christmas season.” Accordingly, the Court concluded that: “When reviewed in the proper context of the Christmas holiday season, it is apparent that on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.” Rather, the Court maintains that the City of Pawtucket “has principally taken note of a significant historical religious event long celebrated in the Western World,” and that the “creche in the display depicts the historical origin

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34 *Id.* at 674.
35 *Id.* at 679.
of this traditional event long recognized as a National Holiday."\(^{38}\)

According to the majority: "The narrow question is whether there is a secular purpose for Pawtucket’s display of the creche."\(^{37}\) Two purposes are found: first, to celebrate the holiday, and second, to depict the origins of the holiday. The majority finds: "These are legitimate secular purposes." The Court compares the benefit to a particular religion by display of the creche as no more significant than other practices which the court has upheld despite their benefit to religion; the court cites for comparison the provision of textbooks for students attending church-sponsored schools, provision of transportation for such students, grants for building for church-sponsored colleges, tax exemptions for church properties, and release time for religious training. The majority concluded: "We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause."\(^{38}\) The majority concludes that whatever benefit the creche gives to one faith or religion or all religions, it is indirect, remote, and incidental; according to the court display of the creche is not more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as “Christ’s Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The Court goes on to suggest that the display of the creche is a permissible practice of civil religion with identifiable social benefits. The majority concedes that the creche "is a reminder of the origins of Christmas." According to the Court: "The display engenders a friendly community spirit of good will in keeping with the season;" further, "the display brings people into the central city, and serves commercial interests and benefits merchants and their employees."\(^{39}\) At the same time, the Court admits that the "creche may well have special meaning to those whose faith includes the celebration of religious masses." The majority maintained that this in no way violates the Establishment Clause; it reasoned: "Of course the creche is identified with one religious faith, but . . . it would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so ‘taint’ the city’s exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol - the creche - at the very time people are taking note of the season with Christ-

\(^{38}\) Id. at 680-81.
\(^{37}\) Id. at 681.
\(^{36}\) Id. at 682.
\(^{39}\) Id. at 685.
mas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be stilted over-reaction to our history, and to our holdings.” The Court stated that: “If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.”

The majority concludes that the acceptance of certain religious practices which have a secular purpose, in a sense constituting a civil religion, in no way violates the Establishment Clause. The Court maintains, “that the fears and political problems that gave rise to the Religion Clauses in the 18th century are of far less concern today.” The majority observes: “We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government.” It is this “public acknowledgment of the religious heritage long officially recognized” which is coming to constitute the practice of a civil religion. Nevertheless, the Court maintains that this is not equivalent to establishing a state church. The Court maintains: “Any notion that these symbols pose a real danger of establishment of a state church is far fetched.”

Justice Brennan, as in Marsh, delivered a strong dissent in Lynch, in which he challenged the finding that the display of the creche does not constitute an endorsement of a religion and goes on to attack the acceptance of religious practices derived from traditional faiths as constitutionally impermissible. According to Justice Brennan: “Pawtucket’s maintenance and display at public expense of a symbol as distinctively sectarian as a creche simply cannot be squared with our prior cases. And it is plainly contrary to the purpose and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket’s Nativity scene dilutes in some fashion the creche’s singular religiosity, or that the City’s annual display reflects nothing more than an ‘acknowledgment’ of our shared national heritage.”

Justice Brennan notes that the record shows that the mayor and other civic leaders of Pawtucket understood that the display of the creche “would serve the wholly religious purpose of ‘keep[ing] Christ in Christ-

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40 Id. at 686.
41 Id.
42 Id.
43 Id.
45 Id. at 691 (Brennan, J., dissenting).
He concludes that: "The 'primary effect' of including a Nativity scene in the city's display is . . . to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche . . . the City's decision to include the creche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the creche, thereby providing 'a significant symbolic benefit to religion . . . .'"

Justice Brennan faults the Court's analysis, which focused on the holiday context in which the Nativity scene appeared, which, according to him, attempted to minimize the religious significance of the display. According to Justice Brennan: "The effect of the creche, of course, must be gauged not only by its inherent religious significance but also by the overall setting in which it appears," but according to him: "[I]t blinks reality to claim, as the Court does, that including such a distinctively religious object as the creche in its Christmas display, Pawtucket has done no more than make use of a 'traditional' symbol of the holiday, and has thereby purged the creche of its religious content and conferred only an 'incidental and indirect' benefit on religion." According to Justice Brennan, the creche retains a specifically religious meaning; he states: "I refuse to accept the notion implicit in today's decision that non-Christians would find that the religious content of the creche is eliminated by the fact that it appears as part of the City's otherwise secular celebration of the Christmas holiday. The Nativity scene is clearly distinct in its purpose and effect . . . . It is the chief symbol of the characteristically Christian belief that a divine Saviour was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption."

Justice Brennan also criticizes the Court for what he identifies as a faulty syllogistic argument which he characterizes as follows: "The Court begins by noting that government may recognize Christmas day as a public holiday; the Court then asserts that the creche is nothing more than a traditional element of Christmas celebration; and it concludes that the inclusion of a creche is part of a government's annual Christmas celebration is constitutionally permissible."

Justice Brennan asserts that this argument fails to take into account the fact that the Christmas holiday in our national culture contains both secular and sectarian elements. According to Justice Brennan: [T]he Court's logic is fundamentally flawed both because it obscures the reason

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46 Id. at 700-01 (Brennan, J., dissenting).
47 Id. at 701 (Brennan, J., dissenting).
48 Id. at 705-06 (Brennan, J., dissenting).
49 Id. at 708 (Brennan, J., dissenting).
50 Id. at 709 (Brennan, J., dissenting).
why public designation of Christmas day as a holiday is constitutionally acceptable, and blurs the distinction between the secular aspects of Christmas and its distinctly religious character, as exemplified by the creche.\textsuperscript{55} The secular aspect of recognition of Christmas as a public holiday is said to be in the accommodation of the calendar to a day when Americans expect to spend time visiting with their families, attending religious services, and resting. However, according to the dissent, official participation in or endorsement of the distinctly religious elements of an otherwise secular event encroaches upon the First Amendment.

Justice Brennan went on to criticize the characterizations and comparisons the Court made as part of the rhetoric of its decision. The Court's suggestion that the creche is a mere representation of a particular historic religious event is rejected. And it is maintained that the creche is "best understood as a mystical re-creation of an event that lies at the heart of Christian faith."\textsuperscript{56} According to Justice Brennan, the attempted minimizing of the significance of the creche is insulting both to believers and to those who believe that the Christian story is no part of our history or national heritage. Justice Brennan also rejected the majority's analogy between the display of the creche by a city and the inclusion of the Bible or Milton's \textit{Paradise Lost} in a course on English literature by a state college. According to the dissent, in literature courses "the religiously-inspired materials are being considered solely as literature. The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression."

Similarly, the dissent rejected the comparison of the city display of a creche with a museum display of religious art; it is suggested by the dissent that: "It would be another matter if the creche were displayed in a museum setting, in the company of other religiously-inspired artifacts, as an example, among many, of the symbolic representation of religious myths. In that setting, we would have objective guarantees that the creche could not suggest that a particular faith had been singled out for public favor and recognition."\textsuperscript{57}

Finally, Justice Brennan turns to what seems to be the central significance of the Court's opinion in \textit{Marsh} and \textit{Lynch}, that is, the acceptance of religious practices in a civil religion or what the Court denominates "official acknowledgment of religion." According to Justice Brennan, the Court's opinions in these cases sounds "a broader and more troubling theme." Justice Brennan acknowledges that there are certain practices of

\textsuperscript{55} Id. at 710 (Brennan, J., dissenting).
\textsuperscript{56} Id. at 711 (Brennan, J., dissenting).
\textsuperscript{57} Id. (Brennan, J., dissenting).
\textsuperscript{57} Id. at 713 (Brennan, J., dissenting).
civil religion long accepted. These include: "Invoking the celebration of Thanksgiving as a public holiday, the legend ‘In God We Trust’ on our coins, and the proclamation ‘God Save the United States and this Honorable Court’ at the opening of the judicial sessions." He objects, however, to the Court's assertion, without explanation, "that Pawtucket's inclusion of the creche in its annual christmas display poses no more of a threat to the Establishment Clause values than these other official ‘acknowledgments’ of religion." Justice Brennan does not so much object to official acknowledgment of religion or practices of civil religion as he does to the incorporation of particular practices that seem to refer to a particular set of religious beliefs. He observes that: "Intuition tells us that some official ‘acknowledgment’ is inevitable", but that government "must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs." The standard which the dissent maintains can be derived from the case law which must be met by the government in recognizing civil religious practice is set out by Justice Brennan as follows: "Should government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over non-religion." Application of this standard has resulted in forbidding the posting of the Ten Commandments in schoolrooms, voiding a prohibition on teaching principles of Darwinian evolution, forbidding mandatory Bible reading at the beginning of the school day, prohibiting mandatory reading of a state-composed prayer, and forbidding use of public school facilities for religious instructions.

Justice Brennan observed that despite a growing body of case law, "the Court has never comprehensively addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations." Nevertheless, he suggests that certain principles can be identified which set the parameters for the acknowledgment of religious practices and for the development of civil religion. He notes that although the government may not be compelled to do so by the Free Exercise Clause, the state may, consistent with the Establishment Clause, accommodate opportunities for

58 Id. at 714 (Brennan, J., dissenting).
59 Id. (Brennan, J., dissenting).
60 Id. (Brennan, J., dissenting).
66 465 U. at 714 (Brennan, J., dissenting).
individual religious practice. An example would be the proclamation of Christmas as a holiday by which the government simply chooses to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." Similarly, a practice which is of both religious and secular significance may be accepted for its particular secular significance. According to Justice Brennan, Thanksgiving Day, in his view, "fits easily within this principle, for despite its religious antecedents, the current practice of celebrating Thanksgiving is unquestionably secular and patriotic. We all gather with our families on that day to give thanks both for personal and national good fortune, but we are free, given the secular character of the holiday, to address that gratitude either to divine beneficence or to such mundane sources as good luck or the country’s abundant natural wealth."

Perhaps the most significant aspect of the dissent is the principle set out by Justice Brennan for the testing of the propriety of practices of civil religion; he observes: "[W]e have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture." The examples cited by the dissent are: the designation of "In God We Trust" as our national motto, and the reference to God contained in the Pledge of Allegiance. For these practices Justice Brennan endorses the term "ceremonial deism," which he maintains is protected from Establishment Clause scrutiny because it involves practices that have lost through rote repetition any significant religious content. Particularly significant for Justice Brennan is the secular function that these practices perform; according to him "these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." This secular significance is drawn from both the historical practice which the Court had stressed in its opinion, and their identifiably secular function which the dissent stresses. According to Justice Brennan: "The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning."

Notwithstanding his acknowledgment of the propriety of "ceremonial

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84 Id. 715 (Brennan, J., dissenting).
85 Id. at 715-16 (Brennan, J., dissenting).
86 Id. at 716 (Brennan, J., dissenting).
87 Id. at 717 (Brennan, J., dissenting).
88 Id. (Brennan, J., dissenting).
deism” or civil religion, Justice Brennan finds that the display of the creche fails to meet the tests he identifies for proper civil religious practice. He concludes that the public display of the creche is not necessary to accommodate individual religious expression, its display is not necessary to serve wholly secular goals, and that the creche, because of its unique association with Christianity, is more sectarian than those references to God that are acceptable in ceremonial phrases and other practices of civil religion. It is important to see the line that Justice Brennan believes must be drawn between religious practice which he views as constituting the prohibited establishment of religion and those which he views as appropriate practices of civil religion. He writes: “The religious works on display at the National Gallery, Presidential references to God during an Inaugural Address or the national motto represent no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the creche begins and ends with reverence for a particular image of the divine.”

Justice Brennan’s view of the Court’s decision is that it permits incorporation into constitutionally permissible civil religion certain practices which are distinctly Christian. This he finds unconstitutional as a result of the evolution of the Court’s interpretation of the Establishment Clause. Critically citing Church of Holy Trinity v. United States, Justice Brennan observes that: “By insisting that such a distinctively sectarian message [as made by the creche] is merely an unobjectionable part of our religious heritage, the Court takes a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation.’” Justice Brennan suggests that the Court has either failed to follow its own precedent in Engel v. Vitale, the school prayer case, or is eroding its precedential value, since in Engel the Court rejected the argument advanced by the State of New York that its Regent’s Prayer was simply an acceptable part of our “spiritual heritage.”

Justice Brennan concludes his opinion by criticizing the account of American historical experience of public celebration of Christmas which is used by the Court as the basis for finding the public display of a creche constitutionally permissible. While maintaining that an historical practice standing alone is never sufficient to justify a challenged governmental action, he concludes that in fact the historical evidence does not show a tradition of public display of the creche in the United States until the nineteenth century. Justice Brennan concludes that: “[T]here is no evi-

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**Id. (Brennan, J., dissenting).**

**Id. at 717-18 (Brennan, J., dissenting) (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892)).**

**Id. at 718 (Brennan, J., dissenting) (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)).**
dence whatsoever that the Framers would have expressly approved a federal celebration of the Christmas holiday including public displays of a nativity scene . . . [n]or is there any suggestion that publicly-financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history.”

G. CIVIL RELIGION: STATE RELIGION OR EMPTY PRACTICES

The Court’s opinions in *Marsh* and *Lynch* establish the proposition that there is no constitutional prohibition against civil religious practices. These opinions, however, do not establish any general standard by which one can judge with certainty a practice as appropriate to civil religion. Two principles seem to emerge from the Court’s opinions in these cases: practices which serve a secular purpose, such as instilling patriotism or solemnizing proceedings, can be included within civil religion, and secondly, practices which have been part of the historical and cultural experience of this nation, even though they have sectarian origins, are permissible to civil religion if they are made to serve secular purposes.

The division of the Court centers on this latter proposition. Chief Justice Burger, writing for the majority in *Marsh* and *Lynch*, maintains that legislative prayer, which in the specific case had been derived from Judaeo-Christian tradition, and the display of the creche, which is necessarily associated with the Christian religion, are constitutionally permissible within the practice of civil religion, because they can be shown to serve secular ends as a result of the context in which the practices occur. By this reference to the historical experience of this nation for determination of the propriety of public acknowledgment of religious practices, the court necessarily must refer to the Christian religious tradition since that in fact has been the tradition of this country. Chief Justice Burger has merely provided a formulation one step removed from that of Justice Brewer in *Church of the Holy Trinity*. Justice Brewer said “this is a Christian nation.” Chief Justice Burger says that we have an historical religious tradition to which the Court can refer in making a determination of the propriety of public religious practices; however, it turns out that as a matter of historical fact, this tradition is Christian. One must ask if this mode of analysis does not lead to the very establishment of the Christian religion which the Constitution was meant to prevent.

On the other hand, the analysis given by Justice Brennan in *Marsh* and *Lynch* leads to the conclusion that for religious practice to be constitutionally permissible as a practice of civil religion, it must be religiously neutral and wholly secular in purpose. One must ask whether such civil

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"Id." at 724-25 (Brennan, J., dissenting).
religious practices are not equally offensive to those persons who are religious and those who are not. This instrumental view of religion would seem necessarily repugnant to any who worship. To the extent that the neutrality which would be required to meet Justice Brennan's standards is possible, it would seem to lead to contentless and meaningless incantations and exercises. This again would seem to be objectionable to those who are religious, as well as to persons who would find such expression hypocritical. While Justice Brennan may be correct in his analysis of what will pass muster as a constitutionally permissible public religious practice, as a matter of public policy, the practices and expressions which would meet his test should perhaps be rejected on the grounds that they would necessarily be empty and vacuous, and that rather than leading to patriotism and dedication, they are likely to produce resentment and cynicism.