

Nanette Green
November 21, 2005

THE RACE TO SECULARIZE:
“RENDER TO CAESAR THE THINGS THAT ARE CAESAR’S,
AND TO GOD THE THINGS THAT ARE GOD’S.”¹

When I was 8 years old, at school, I broke a statue of the Virgin Mary. Not intentionally, of course. I knocked it over as I put my book bag over my shoulder. I distinctly remember that I did not think it was a big deal because it was just a statue. Every classroom had one and it did not look particularly expensive. I was very surprised when I learned that my teacher, Sister Judith, had buried the statue outside the church.

I learned that a religious symbol, while apparently a mere object, possesses a nature sacred to believers. Thus, to Sister Judith, the trash can was not the appropriate repository for the statue.

Later that year, I learned the history of the candy cane in Sunday school. We were taught how the shape represented a shepherd’s hook or a “J” for Jesus and the colors symbolized Jesus’ blood and purity. Minding my previous lesson about religious symbols, I placed them on our church Christmas tree with much care. Days later I was very confused when I passed by my post office. They were giving out candy canes and many were discarded and crushed on the floor. I couldn’t understand how a symbol that could be so important to one group could be denigrated by another.

This tension between the idea of holiness, and the notion that nothing is sacred (or profane) has played itself out on the stage of the American “town square” from our country’s inception.

¹ Mark 12:17

Roger Williams, the Puritan religious leader and founder of Rhode Island, believed that government influence weakened religion. “To Williams, the church was a garden in the wilderness; but when government enters the realm of religion this garden becomes a wilderness.”² To Williams, combining religion and government was not only impermissible because it would be a governmental endorsement, but that combination also had the potential to corrupt the sacred.

In *Abington School District v. Schempp*³, the Supreme Court acknowledged that the Roger Williams theory was deeply rooted in the First Amendment when it wrote: “...the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.”⁴

In *Zelman v. Simmons-Harris*⁵ an Ohio voucher program prohibited participating schools from discriminating on the basis of race, ethnicity, or religion, or from teaching unlawful behavior or "hatred of any person or group" based on race, ethnicity, or religion.⁶ Although Justice Souter argued that the placing of such conditions on religious schools was in itself a reason to find the Ohio voucher program unconstitutional, the majority dismissed this concern, suggesting instead that taxpayers would not have standing to assert an excessive entanglement claim.

In *Everson v. Board of Education*⁷, the Supreme Court articulated several critical functions of the Establishment Clause. Among these, the preservation of the integrity of

² David M. Cobin, *Essay: Creches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams' Garden*, 1990 Wis. L. Rev. 1597 (1990)

³ *Abington School District v. Schempp*, 374 U.S. 203 (1963).

⁴ *Id* at 214.

⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁶ *Id* at 644.

⁷ *Everson v. Board of Education*, 330 U.S. 1 (1947).

religion was crucial. The Court stressed that “the structure of our government has...secured religious liberty from the invasion of civil authority.”⁸ In practice, however, the Roger Williams doctrine seems lost from the analysis of religious displays on public land.

If the Court can find some nonreligious or secular aspect to the holiday and finds that the display of religious symbols joined with secular ones produces a total effect that deprives the display of religious significance, then the government sponsorship does not violate the Establishment Clause. Yet, when the religious symbols are treated as sacred and with integrity, the government participates in the religious aspect of the holiday. These symbols violate the constitution.

Effectively, the court’s decisions have created a precedent that encourages local governments to drain the meaning from and denigrate religious symbols in order to legally display them.

This paper intends to show that the court’s religious display decisions have set a precedent that religious symbols are only permissible when their secular or neutral nature is emphasized, thereby encouraging the secularization and overall deprecation of religious symbols.

In Part I, the case law of religious displays will be examined with a particular emphasis on the Endorsement Test and focusing on how the Court’s approach ignores how it’s treatment will affect the displayed religion. Part II will consider how the Court’s approach has affected religion and its symbols. The race to secularize will be evaluated from a sociological standpoint. Finally, Part III will propose that the Endorsement Test should be modified to include a second prong. This new prong would be an evaluation

⁸ *Id* at 15.(quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871).

whether O'Connor's "reasonable observer," with knowledge of the symbol's history and sacredness the display religion holds it to, would find the symbol an endorsement of the displaying religion. We will test this theory by detailing the history of selected religious symbols and analyzing how a reasonable objective observer would view them with this new knowledge.

Part I

The first recent case that has reviewed a governmental display of religious symbols was *Lynch v. Donnelly*.⁹ Ironically, the facts of *Lynch* took place in Pawtucket, of Roger Williams's Rhode Island. In this case, the city along with the downtown retail merchants' association sponsored a crèche depicting the birth of Jesus. The crèche display held true as a representation of the manger scene, as described in the Gospels of Luke¹⁰ and Matthew.¹¹ The crèche was positioned in the heart of the Pawtucket shopping district and was surrounded by a larger display including: Santa Claus's house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers and cut-out figures representing such characters as a clown, an elephant and a teddy bear. In addition, there was a large banner that read "Season's Greetings" and hundreds of colored lights.¹²

The Supreme Court held that this city-sponsored crèche did not violate the Establishment Clause and explained that the impression gained from viewing the whole display was a celebration of the secular aspects of Christmas.¹³ The majority's overall opinion reflects a policy concern about whether the display endangered other religions or non-religions by serving or endorsing a religion. Absent from the analysis was a concern

⁹ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹⁰ Luke 2:1-20 (New International Version).

¹¹ Matthew 1:18 – 2:23 (New International Version).

¹² *Lynch*, 465 U.S. 668, 608 (1984).

¹³ *Id* at 672.

for whether the governmental conduct threatened the displayed religion itself. Justice O'Connor's concurrence had an even more narrow analysis as she introduced her "Endorsement Test". According to O'Connor, the central issue was whether Pawtucket "endorsed Christianity by its display of the crèche."¹⁴ When she found that it did not, her analysis ended and she therefore never addressed the question of whether the display corrupted Christianity.

The majority opinion addressed this policy concern when, after discussing the different ways that government actions accommodated religion, the Chief Justice wrote:

The District Court plainly erred by focusing almost exclusively on the crèche. When viewed 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 crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.¹⁵

The post-*Lynch* question was whether a government-sponsored crèche displayed without any secular symbols violated the Establishment Clause. This question was answered in *Allegheny v. ACLU*.¹⁶ There, a crèche was placed on the grand staircase of Allegheny County Courthouse in downtown Pittsburgh. Like the crèche in *Lynch*, it was a representation of the Biblical manger scene in Bethlehem. It included figures of baby Jesus, Mary, Joseph, farm animals, shepherds and wise men in a manger scene with an angel bearing a banner that read "*Gloria in Excelsis Deo!*"¹⁷

The display had a fence around three sides decorated with flowers and contained a sign stating: "**This Display Donated by the Holy Name Society.**"¹⁸

¹⁴ *Id.* (O'Connor, J., concurring).

¹⁵ *Id.* at 680.

¹⁶ *Allegheny*, 109 S. Ct. 3086 (1989).

¹⁷ Translated from the Latin to mean "Glory to God in the Highest!"

¹⁸ *Allegheny*, 109 S. Ct. 3086, 3094 (1989).

The court found that this violated the Establishment Clause and this time the majority adopted O'Connor's "endorsement" test. The majority found that the critical distinction between *Lynch* and *Allegheny* was the absence of secular figures in the *Allegheny* crèche to detract from the Christian significance of Christmas. Justice Blackman wrote:

Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell.¹⁹

Thus, the display in *Lynch* symbolized the court's construct of a "secular Christmas" and the display in *Allegheny* symbolized the court's opinion of a "religious Christmas". The *Lynch* opinion shows that the government can celebrate Christmas, as long as it does not endorse any religious doctrine. *Allegheny* tested this principle by celebrating Christmas absent any secular "distracters" and consequently violated the Establishment Clause.

In *City of Pittsburgh v. ACLU*²⁰, the court voted to approve another downtown Pittsburgh religious display. Outside an entrance to the public City-County Building, the city sponsored a display that includes a forty-five foot Christmas tree decorated with lights and ornaments and, next to it, an eighteen-foot Chanukah menorah. Beneath the tree, the city placed a sign that read, "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom."²¹

¹⁹ *Id* at 3105.

²⁰ *Id* at 3115-3116.

²¹ *Id* at 3095.

The court found that Chanukah, like Christmas, has both religious and secular dimensions, and that the menorah could be viewed as a secular object.²² The proximity of the Christmas tree strengthened this view and created a total effect of the display which did not endorse Christianity or Judaism, rather it reflected the city's recognition of an overall winter holiday season.

The majority explains, "In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season."²³

O'Connor disagreed and found that Chanukah was a religious holiday and that the menorah was a central religious symbol.²⁴ Still, she agreed that the city could display the menorah without violating the Establishment Clause. She concluded that the total display, rather than endorsing Judaism, endorsed a message of pluralism and freedom to choose one's own beliefs. In her view, such an endorsement was permissible under the Establishment Clause.²⁵

Justices Brennan, Marshall, and Stevens concluded that it was impermissible for both the crèche and the menorah to be displayed by the local governments. Significantly, Brennan found that combining the symbols of multiple religions does not minimize the harm.

²² "But the menorah's message is not exclusively religious. The menorah is the primary symbol for a holiday that, like Christmas, has both religious and secular dimensions." *Id* at 3112.

²³ *Id* at 3114.

²⁴ *Id* at 3112.

²⁵ "The message of pluralism conveyed by the city's combined holiday is not a message that endorses religion over nonreligion... In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of 'making religion relevant, in reality or public perception, to status in the political community.'" *Id* at 3123-24 (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

Here the dissenters finally find constitutional significance in the danger posed to the displayed religions. Brennan wrote:

[I do not] discern the theory under which the government is permitted to appropriate particular holidays and religious objects to its own use in celebrating “pluralism”... To lump the ritual objects of religions together without regard to their attitudes toward such inclusiveness, or to decide which religion should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.²⁶

Furthermore, Brennan found that the state’s display of the menorah, but not other holiday symbols, distorts the Jewish religious calendar and that of other minority religions:

Contrary to the impression the city and Justices Blackmun and O’Connor seem to create, with their emphasis on the ‘winter holiday season,’ December is not the holiday season for Judaism....The holiday calendar they appear willing to accept revolves exclusively around a Christian holiday. And those religions that have no holiday at all during the period between Thanksgiving and New Year’s Day will not benefit even in a second-class manner, from the city’s once-a-year tribute to ‘liberty’ and ‘freedom of belief’. This is not ‘pluralism’ as I understand it.²⁷

Here, Brennan expresses how the court’s acceptance of a holiday comprised of multiple religious practices detracts from each. Thereby diluting the entire display of religious meaning and satisfying the Establishment Clause.

*Capitol Square Review & Advisory Bd. v. Pinette*²⁸ affirmed the lower courts’ grant of a mandatory injunction requiring that the Ku Klux Klan be issued a permit for erection of Latin cross in the plaza next to the state capitol. The Board had also permitted a variety of unattended displays on Capitol Square including, a state-sponsored lighted tree during the Christmas season, a privately sponsored menorah during Chanukah, a

²⁶ *Id* at 3128.

²⁷ *Id* at 3128-3129.

²⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival.²⁹ The Board received an application from the Ohio Ku Klux Klan, to place a cross on the square from December 8, 1993, to December 24, 1993, which was denied by the Board on the ground that the permit would violate the Establishment Clause. The court held that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on grounds of state capitol.

Justice O'Connor concurred and fleshed out her Endorsement Test. She explained that her "...Endorsement Test creates a more collective standard to gauge 'the objective meaning of the [government's] statement in the community.'"³⁰ Furthermore, O'Connor's Endorsement Test looks through the eyes of the reasonable person of tort law to determine whether the display constitutes a governmental endorsement of religion. However, O'Connor explained that

...the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion...Today's proponents of the Endorsement Test all agree that we should attribute the observer knowledge that *the cross is a religious symbol*, that Capitol Square is owned by the State, and that the large building nearby is the seat of state government.³¹

Here, O'Connor gives her reasonable observer knowledge that the display has religious elements but only for the purpose of evaluating whether the display reaches the level of governmental endorsement. Once she determines that "the reasonable observer would view the Klan's cross display fully aware that Capitol Square is a public space in which a

²⁹ *Id* at 758.

³⁰ *Id* at 779.

³¹ *Id* at 780-781 italics added.

multiplicity of groups, both secular and religious, engage in expressive conduct”³² the inquiry ends. When she determines that the Klan’s statement is not strong enough to be considered an objective endorsement of religion--it becomes approved. Thereby creating an incentive to devalue and drain sacred symbols of their meaning in order to qualify for display on public grounds.

Most recently, the court decided two cases on the display of the Ten Commandments on public governmental space. In *Van Orden v. Perry*,³³ the 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity."³⁴ The monolith at issue stood 6-feet high and 3-feet wide. It was located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content was the text of the Ten Commandments, which held true to the Jewish and Christian³⁵ accounts of the Ten Commandments as Moses had received them from God on Mount Sinai.

Above the Ten Commandments was carved an eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appeared to be an ancient script are carved above the text of the Ten Commandments. Below the text were two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRESENTED TO THE PEOPLE

³² *Id* at 782 .

³³ *Van Orden v. Perry*, 125 S.Ct. 2854 (U.S. 2005).

³⁴ Tex. H. Con. Res. 38, 77th Leg. (2001).

³⁵ Deuteronomy 5-6:1 (New International Version).

AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS
1961." ³⁶

The Court held that this display did not violate the establishment clause. Its analysis was driven both by the nature of the monument and by history. The Court held that the placement of the Ten Commandments monument on the State Capitol grounds was a passive use of the text. Indeed, the complaining citizen had apparently walked by the monument for a number of years before bringing this lawsuit. Texas had treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group had a dual significance, partaking of both religion and government.

Interestingly, Justice Breyer's concurrence starts by identifying the Ten Commandments' text as having "an undeniably ... religious message, invoking, indeed emphasizing, the Deity." ³⁷ He then goes on to explain that "the display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)." He added that in certain contexts, "... a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) -- a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States."³⁸ He focuses on the fact that circumstances surrounding this display's physical setting suggest that the State was attempting to emphasize the Ten Commandment's secular side.

³⁶ *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (U.S. 2005)

³⁷ *Id* at 2869 (U.S. 2005).

³⁸ *Id* at 2869-2870 (U.S. 2005).

“The monument sat in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. The setting does not readily lend itself to meditation or any other religious activity.”³⁹

Breyer goes on to explain that these factors lead him to the conclusion the display is permissible because “the Commandments’ text on this monument conveys a predominantly secular message...”⁴⁰. He further contends that this point is proven by the fact that this monument stood for 40 years unchallenged; thus the reasonable observer must have not found this to be an endorsement of religion. Here again the court finds that when a clearly religious symbol⁴¹ is surrounded by secular symbols it takes on a new nature and meaning; it conveys a new message that makes it permissible. As long as the general public can look at it and find it void of religious context, it is permissible for governmental display.

In *McCreary County v. ACLU*,⁴² the court considered a similar Ten Commandments display case. There two Kentucky Counties, each posted large, readily visible copies of the Ten Commandments in their courthouse, which the ACLU sought to have enjoined. The Counties then adopted nearly identical resolutions calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The resolutions noted several grounds for taking that position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics." The displays around the Commandments were modified to include eight smaller, historical documents containing

³⁹ *Id* at 2870 (U.S. 2005).

⁴⁰ *Id.*

⁴¹ *Stone v. Graham*, 449 U.S. 39 (U.S. 1980).

⁴² *McCreary County v. ACLU*, ⁴² 125 S. Ct. 2722 (U.S. 2005).

religious references as their sole common element, e.g., the Declaration of Independence's "endowed by their Creator" passage.

After the District Court found that the display had a definite religious meaning and was narrowly tailored to Christianity, the Counties revised the exhibits again.

The new posting, entitled "The Foundations of American Law and Government Display," consisted of nine framed documents of equal size. One set out the Commandments explicitly identified as the "King James Version," quotes them at greater length, and explained that they have profoundly influenced the formation of Western legal thought and this Nation. With the Commandments were framed copies of, the Star Spangled Banner's lyrics and the Declaration of Independence, accompanied by statements about their historical and legal significance.

The District Court and the Sixth Circuit on appeal found that this display also had too much religious content to be permissible for display. The court explained the Commandments' foundational value is religious, rather than secular,⁴³ and found that the Counties' asserted educational goals crumbled upon an examination of this litigation's history

The Court affirmed the judgment, agreeing that all of the displays violated the Establishment Clause because they did not have a secular legislative purpose. It held that it was necessary to take purpose seriously under the Establishment Clause and to understand purpose in light of context. Therefore, the lower courts properly considered the progression leading up to the counties' third displays in determining that a religious objective permeated the counties' actions.

⁴³ *Stone v. Graham*, 449 U.S. 39 (U.S. 1980).

Here the Counties *raced* to secularize; they took active measures to erase the religious meaning from a clearly religious symbol so that it could be permissibly displayed. They down played the religious and enhanced the secular. The Court still found this display to be in violation because of the religious nature of the Counties' prior displays. By finding that the Counties' display was impermissible because its prior religious content, the Court is encouraging future displays to start at the bottom of the secularization scale. Essentially, the court is encouraging future displayers to be sure that their future display is void of all religious content before it ever reaches the public's eyes.

Part II

In 1999, the Third Court of Appeals held that a holiday display erected and maintained by Jersey City, New Jersey did not violate the Establishment Clause. This particular display contained a crèche, a menorah, plastic statues of Santa Clause and Frosty the Snowman, a Christmas tree, and a sign stating that the display was part of an ongoing effort to celebrate the ethnic and cultural diversity of the community.⁴⁴

Following the precedent set in *Lynch* and *Allegheny*, the court found "that the inclusion of traditional secular symbols alongside established religious symbols was sufficient to establish a secular purpose for the erection and maintenance of the holiday display." Essentially, the crèche and menorah were deemed no longer sacred religious items because Frosty's secular nature overpowered their religion.

The problem with this result is not a mere matter of taste. Although, Justice Kennedy did write in *Allegheny*, "It is ...true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more

⁴⁴ *ACLU of NJ v. Schundler*, 168 F.3d 92 (3d Cir. 1999).

so.”⁴⁵ Rather, the problem is that placing each of these sacred symbols next to a purely mythical or playful item cheapens it. It projects the message that the crèche or menorah is on the same level as Frosty the “magical” snowman. David M. Corbin expands on this concept in *Creches, Christmas Trees and Menorahs: Weeds Growing In Roger Williams’ Garden*:

Religion in today’s society runs the risk of amalgamation and dilution. Judaism risks becoming a branch of Christianity. Christianity risks becoming little more than the opportunity for a social occasion and a seasonal economic boon. The involvement of the state in this spiritual descent accelerates the process.⁴⁶

The government not only promotes secularized displays such as the one in *Jersey City*, it requires it. For displays to pass the test they must have enough secular nature to not be deemed religious—the crèche cannot be *too sacred* or else it has to be next to a mythical Frosty. The issue then becomes: when does the reasonable objective observer start to believe that the crèche is mythical and magical too. When does “Silent Night” become as real as “Frosty the Snowman”?

The court has also found that placing a menorah next to a crèche weakens the value of both and the reasonable objective observer would view the display as a cultural celebration. They are right—“The association of Chanukah with Christmas distorts the essential nature of both.”⁴⁷

What was once a holy celebration of beliefs has become a merged commercial celebration remnant with scattered symbols of faith. Christmas celebrates what

⁴⁵ *Allegheny* 109 S. Ct 3086, 3146 (1989).

⁴⁶ David M. Cobin, *Essay: Creches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams’ Garden*, 1990 Wis. L. Rev. 1597, 1608 – 1609 (1990).

⁴⁷ *Id* at 1609.

Christians believe to be the birth of their savior. It is a liturgical celebration that falls in importance behind Holy Week and Easter.

Chanukah is a very different celebration. Chanukah is probably one of the best-known Jewish holidays, *not* because of any great religious significance, but because of its proximity to Christmas.

“As many non-Jews (and even many assimilated Jews!) think of this holiday as the Jewish Christmas, adopting many of the Christmas customs, such as elaborate gift-giving and decoration. It is bitterly ironic that this holiday, which has its roots in a revolution against assimilation and the suppression of Jewish religion, has become the most assimilated, secular holiday on the Jewish calendar.”⁴⁸

Lumping the holidays together strips them of their significance. “The fact that Chanukah and Christmas both occur in the winter makes them no more alike in nature or significance than Yom Kipper is like Halloween, even though they both occur in the autumn.”⁴⁹ When a viewer sees a crèche next to a menorah in the middle of the public square, he sees exactly what the court has worked so hard to promote: a celebration of the holiday season, instead of the birth of the redeemer of sins and a symbol to commemorate the rededication of the Holy Temple in Jerusalem after its desecration by the Syrians.

This creation of a “commercial” Jewish-Christmas has affected the practice of Judaism. One author explains,

“Since the Christians have their great days in the American calendar, the Jews are entitled to theirs---provided they do not ask for too many...In sum, Jews are expected to absent themselves from work on Rosh Hashanah and Yom Kippur, but are less and less likely to be found in the synagogue. The other

⁴⁸ <http://www.jewfaq.org/holiday7.htm> (November 19, 2005)

⁴⁹ David M. Cobin, *Essay: Creches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams' Garden*, 1990 Wis. L. Rev. 1597, 1609 (1990).

festivals have reordered in priority...Sukkot and Shavuot are practically forgotten by the majority of American Jews...”⁵⁰

The result of the merging holidays is the dilution of Chanukah into a “Jewish Christmas” and Christmas into a mythical, magical, commercial celebration.

Many religious commentators have expressed their regret at the secularization of Chanukah: “Having found or created a sufficiently secular Christmas so that municipalities can do what they please, ... they apply the same procedure to Chanukah...But I dissent from the depths of my soul...I want to keep my holidays full of holiness...”⁵¹

In addition, the *Allegheny* display has been described by one rabbi as “an outrage.... [Hanukkah] is a religious holiday and by putting a menorah on public property we secularize Hanukkah.”⁵² Similarly one pastor said, “[t]his is a tradition that we do not want to abandon...but to conform with federal law and with our town's tradition, we are forced to create something that appears to be a mishmash. It is a mishmash that offers nothing of substance to any one faith, and instead trivializes highly meaningful religious displays.”⁵³

Christians too have expressed their regret of the evolution of the Christmas secularization.

“Merry Christmas” became “Happy Holidays” and now, in a television commercial, has become “Happy Honda-days.” The

⁵⁰ *Id* at 1610.

⁵¹ Alexandra D. Furth, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. Pa. L. Rev. 579, 602 (1998) (quoting Jill Laurie Goodman, Crèches, Menorahs, and the Courts, *Tikkun*, Jan.- Feb. 1995, at 30).

⁵² Alexandra D. Furth, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. Pa. L. Rev. 579, 602 (1998) (quoting Rabbi Lester Frazin in Bill Lindelof, Capitol Menorah Stirs Pride, Protest, *Sacramento Bee*, Nov. 27 1994, at B1).

⁵³ Tom Mashberg, *Somerset Faithful Want Icons Removed From Secular Displays*, *The Boston Herald*, December 5, 1999 at 16.

Feast of St. Nicholas, for example, once honored the memory of an Orthodox Christian bishop known for his care of the poor and their children. From that, we tolerated the invention of Santa Claus, turning a good clergyman into a comic caricature. Santa's red suit mocks a bishop's vestments, and the floppy hat makes fun of a bishop's mitre. Then the image of a celibate Orthodox bishop is further undermined by the creation of "Mrs. Claus." A Christian holy man is turned into a jolly old elf.⁵⁴

Clearly, the display of religious symbols evokes strong responses from the religious community. When the Court comments on the authenticity of these symbols and practices, the Court interferes with the autonomy of religion, which results in cheapening the sanctity and offending the faithful.

Part III

In order to address the Supreme Court's steps into Roger William's garden, this Part will suggest a test that should be adopted in conjunction with the current test. The goal is not to improve the endorsement analysis, but rather to stop the contamination of religion through the secularization of its most sacred symbols.

A second prong of analysis should be added, in addition to the current Endorsement Test, that would ask if a reasonable objective observer with knowledge of the symbol's theological history and its associated rituals, would find the use of the symbol to be an endorsement of religion. This is a much stricter test than the O'Connor version. It stays true to her original analysis but asks the court to confront the symbol on its own terms and it considers those who place a special belief in its meaning.

If after considering these two factors, a reasonable objective observer can say that displaying a symbol does not constitute an endorsement of religion, then the symbol must have possessed a low level of significance and sacredness. Essentially, the symbol's

⁵⁴ Ed Byrne, *Keeping Christ in Christmas*, Wrightstown Post Gazette, December 16, 2005 at B2.

level of significance to its adherents should be inversely proportional to its likelihood of passing the test and being displayed. This prong of the analysis would depart from the O'Connor Endorsement Test because it would require that each displayed symbol receive an independent evaluation. For example, a crèche would no longer pass the test because it was placed next to Frosty or a menorah.

The desired effect of this test would be that it would cease “the race to the bottom” of secularization of religious symbols. No longer could the court rationalize a crèche in a governmental display because it was situated next to Rudolph, losing its religious significance and merely possessing a “magical” “cultural” quality. This would also not permit the display of a menorah and crèche together with the rationale that they “neutralize” each other, resulting in a “cultural celebration”.

Still, this test is not so conservative that it would shield against the use of all symbols that have any religious history. The reasonable objective observer would consider the symbol based on its history and the level of significance it holds in the religion today. This would be a fact specific analysis that would result in a range of symbols: those that are considered to be extremely sacred (such as a crèche or menorah) to those that have a religious origin but hold no particular significance in the present faith (candy canes and ivy).

For example, consider a governmental display contained: mistletoe, a crèche, a Christmas tree, ivy, and a menorah. The analysis would begin with O'Connor's Endorsement Test. The observer would first consider the display in its entirety, informed about the community's general practice with regard to religious displays and about the history of the forum at issue. This observer would, O'Connor described, consider “the

‘history and ubiquity’ of a practice [as] relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.’⁵⁵ This is where the second prong of analysis comes into play.

Here the reasonable observer would know:

1. the history of the symbol and
2. the level of sacredness that the symbol possesses in the displayed religion. In this prong, each symbol would receive its own independent evaluation considering each of these factors.

In this evaluation, the reasonable objective observer would know that Druid priests used mistletoe, 200 years before the birth of Jesus, in their winter celebrations. They revered the plant since it had no roots yet remained green during the cold months of winter. Then, the ancient Celts believed mistletoe to have magical healing powers and used it as an antidote for poison, infertility, and to ward off evil spirits. The plant was also seen as a symbol of peace, and it is said that among Romans, enemies who met under mistletoe would lay down their weapons and embrace.

Scandinavians associated the plant with Frigga, their goddess of love, and it may be from this that we derive the custom of kissing under the mistletoe. Those who kissed under the mistletoe had the promise of happiness and good luck in the following year.⁵⁶ In addition, to this information, the reasonable objective observer would know if the Druids, Celts, or Scandinavians currently hold the same beliefs, consider it sacred, or regularly use it in rituals.

⁵⁵*Pinette*, 515 U.S. 753, 673 (1995). Also, see *Allegheny*, 492 U.S. at 630

⁵⁶See <http://www.historychannel.com> (November 19, 2005)

Based on this information, the reasonable observer would evaluate whether this symbol could truly be considered “secular” today or if it still holds a “religious” value to those who believe. In theory, the level of sanctity should be inversely proportional to the likelihood that a symbol will be considered “secular”.

Holly would receive a separate evaluation. The reasonable observer would know that legend has it that holly sprang from the footsteps of Christ as he walked the earth. The pointed leaves were said to represent the crown of thorns Christ wore while on the cross and the red berries symbolized the blood he shed.⁵⁷ However, he would also know that few modern day Christians hold the same belief and, inside the Christian churches, holly symbolizes the winter season more than the legend that began its use.

This analysis would require the observer to balance the symbol’s history with its modern day use. The likely result would be that holly would fall in the middle of the scale but closer to the secular side because of its modern day treatment.

In contrast, the reasonable observer would know that the crèche is a representation of what Christian’s belief to be the Son of God, who redeemed all men from their sins. The display represents the birth story as detailed in the Bible. In addition, the observer would know that modern Christians consider the nativity scene to be a sacred depiction and situate their entire Christmas celebration around it’s symbolism. Since both factors in this prong’s analysis yielded a high level of sacredness, the reasonable observer would likely find that this is a religious symbol with no secular meaning and to display such a symbol would be an endorsement of Christianity.

In conclusion, the purpose of separating church and state was not only to protect the state from corruption, but also to protect religion from cheapening through state

⁵⁷ See <http://www.historychannel.com> (November 19, 2005)

involvement. From the public perspective, nothing personifies the sacred nature of religion more than symbols. In Christianity, symbols are an inherent part of the practice; everything from the bread and wine at Holy Communion to the candy cane has a sanctified significance.

For the Jewish, symbols too function to remind the faithful of the past; symbols such as the yarmulke and the Star of David have revered value that Jews hold close to their heart. This paper has shown that the Supreme Court has repeatedly decided cases that have not only evaluated religious symbols as “secular”, but have had the effect of encouraging the religious to degrade and drain their symbols of meaning so that they can be displayed.

This is directly in contradiction to Roger William’s theory that one of the goals was to keep the government’s “weeds” out of the church’s “garden”. The garden can still grow in liberal democracies—but great care must be taken to nurture the soil while we “move forward” towards skepticism and dissent.

Now I understand why Sister Judith buried my broken Virgin Mary. Only when the sense of the holy is lost will the folly of a headlong rush to the secular be fully revealed.