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Harry Simon

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Note

Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions

In 1984, the United States Supreme Court departed radically from traditional establishment clause analysis developed over the past forty years. In *Lynch v. Donnelly,* the Supreme Court upheld the maintenance of a creche, or Nativity scene, with public funds, on land owned by a nonprofit corporation as part of a Christmas display by the city of Pawtucket, Rhode Island. The Supreme Court rejected any single standard for determining the constitutionality of government aid to religion. Commentators have accused the Court in *Lynch* of paying mere "lip service" to traditional establishment clause analysis. Prominent constitutionalists reviewing the *Lynch* decision have been less kind. Professor Van Alstyne described *Lynch* as involving "a paradigmatic disregard of the establishment clause in virtually every dimension of its concerns."

In many other fields of constitutional law, the Supreme Court recently has shown a similar growing reluctance to limit government action threatening individual rights. This trend has caused a number of commentators to suggest a reexamination of state constitutions in order to

1. The first amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. Both the free exercise clause and the establishment clause of the first amendment have a single aim: the protection of religious liberty. See Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).
3. Id. at 1362.
7. As Justice Mosk of the California Supreme Court recently noted: "Few will gainsay the observation . . . that the current Supreme Court 'is no longer a bold, innovative institution and has abandoned, for the moment at least, the role of keeper of the nation's conscience. '" Mosk, Contemporary Federalism, 9 FAC. L.J. 711, 714 (1978) (quoting Wilkes, The New Feder-
provide protection for individual rights. A reexamination of state constitutional guarantees against government aid to religion is particularly appropriate in light of the *Lynch* decision.

Several state courts have noted that the establishment clause of the first amendment is vague and subject to varying interpretation. In contrast, similar provisions in state constitutions governing state aid to religion are more explicit. Some state constitutions prohibit financial aid to religious societies or to religion in general. Others prohibit the donation of property for religious uses or governmental preference of certain religions. Finally, some courts prohibit all of these activities.

During the years that immediately followed World War II, federal courts interpreted the federal establishment clause as providing new protections against state aid to religion. In many instances, federal pro-

8. See, e.g., Mosk, supra note 7. Justice Mosk briefly summarized California Supreme Court decisions affording broader protection for individual rights than their federal counterparts and urged the "highest courts of a state to evaluate state administrative action, or the conviction of a defendant in a state prosecution, pursuant to the provisions of the state constitution." *Id.* at 721 (emphasis in the original). See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan, observing that the combination of state and federal constitutional guarantees provides double protection of individual rights, encouraged independent state interpretation of state constitutional guarantees: "With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them." *Id.* at 503.

9. See infra note 271 & accompanying text.


11. See ARIZ. CONST. art. II, § 12; CAL. CONST. art. IX, § 7; IDAHO CONST. art. IX, § 5; MASS. CONST. amend. XVIII, § 2; MICH. CONST. art. I, § 4; S.D. CONST. art. IV, § 3; TEX. CONST. art. I, § 7; UTAH CONST. art. I, § 4; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11.


13. The constitutions of Colorado, Indiana, Minnesota, Mississippi, Missouri, Nevada, Texas, and West Virginia prohibit both government appropriations in aid of religion and the preference of one religion over another. See supra notes 10, 12.

tections were applied in the face of state court decisions that encouraged government participation in religious activities. As a result, state courts have largely ignored their own constitutions, relying on the broader federal protections instead. As federal protections narrow, however, the independent mandates of state constitutions can no longer be ignored. The state courts must not tolerate government aid to religion that violates these mandates.

California courts have recognized the independent vitality of the California Constitution and have interpreted it to provide unique protections against government action that threatens individual freedom of conscience. As one commentator observed, "[T]he California Supreme Court has established itself as the preeminent state forum in the bill of rights area . . . . If other state courts are in doubt as to precedent for going beyond the constitutional minima set by the fourteenth amendment, they need only look to California's example." During the past decade, California courts have relied on the California Constitution to develop comprehensive guarantees against government aid to religion.

This Note examines the growing divergence between federal and California law on government aid to religion, specifically focusing on the constitutionality of government-sponsored religious displays under the federal and California Constitutions. It first traces the development of establishment clause analysis. The Note then describes the United States Supreme Court's use of establishment clause analysis to validate state-sponsored religious displays, focusing on Lynch. It next examines the permissibility of religious displays under the California Constitution and demonstrates that California law provides substantial guarantees against state-sponsored religious displays absent under current interpretations of the federal establishment clause. Finally, this Note suggests that other state courts should use California law as a model to reexamine their state

15. As one commentator observed: "Instead of maintaining a 'wall of separation' [between church and state], many state courts have upheld enactments benefiting religion by narrow technical readings of their state constitutions." Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 VAND. L. REV. 620, 642 (1951). For an overview of state court decisions rendered prior to the development of federal establishment clause doctrine, see id. at 635-42.


17. See Brennan, supra note 8, at 502.


constitutions in order to provide greater protections against government aid to religion.

Federal Establishment Clause Doctrine

Background

The first amendment to the United States Constitution commands that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." While these two clauses have a single aim—the protection of religious liberty—they accomplish this purpose through different means. The free exercise clause prohibits direct governmental interference with private religious expression. In contrast, the establishment clause reflects the Framers' recognition that individual religious liberty also is threatened by government sponsorship of a particular religious viewpoint.

During the century and a half preceding World War II, regulation of state and municipal aid to religion was a matter of strictly local concern. State laws on aid to religion developed independently of federal guarantees. This changed, however, during the 1940's when the United States Supreme Court applied the religion clauses to the states. In Cantwell v. Connecticut, the Supreme Court ruled that the free exercise of religion was a fundamental right of citizenship protected from encroachment by the states through the due process clause of the fourteenth amendment. Seven years later, the Supreme Court ruled in Everson v. Board of Education that the establishment clause also was applicable to the states through the fourteenth amendment. The Everson Court held that the purpose of the establishment clause was to erect a wall of separation between church and state.

Since Everson, the Court has examined many forms of government aid to religion. In Lemon v. Kurtzman, decided in 1971, the Court developed a three-part test in an effort to define the permissible limits on

20. U.S. Const. amend. I.
22. See Engel v. Vitale, 370 U.S. 421, 430 (1961) (Government aid to religion short of compulsion does not violate the free exercise clause of the first amendment.).
25. 310 U.S. 296 (1940).
26. Id. at 303.
28. Id. at 15.
29. Id. at 18.
government aid to religion under the establishment clause. Under the *Lemon* test, government action is invalid if it lacks a clear secular purpose, has a primary effect that advances or inhibits religion, or involves excessive government entanglement with religion. Government aid to religion is permissible only if all three prongs of the *Lemon* test are satisfied.

The first prong of the *Lemon* analysis, requiring the government to show a valid secular purpose for the action in question, is a relatively easy standard to meet. A showing of any probable secular purpose is generally sufficient, even if the government action happens to coincide with the tenets of some religions. The mere allegation of some secular purpose, however, is not sufficient. The Supreme Court has overturned state enactments when it believed that the stated secular purpose was merely a self-serving justification for government action with truly religious aims.

The second prong of the *Lemon* test prohibits the government from enacting laws that have the primary effect of advancing or inhibiting religion. In *Hunt v. McNair*, the Supreme Court defined the term "primary effect" as either public aid flowing to an institution with a primarily religious mission or as government sponsorship of a specifically religious (placement of copies of the Ten Commandments in public schools); *McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws).


32. *Id.* at 612-13. In Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), the Court set forth the purpose and effect prongs of the *Lemon* test as a two-part test for establishment clause analysis. In *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970), the Court suggested that any government action that involved excessive entanglement with religion also violated the establishment clause. All three factors were integrated into a single test in *Lemon*, 403 U.S. 602.


36. *See id.*

37. *Id.; see also Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963) (noting the religious nature of the Bible).*

38. By excluding only those government activities that have the primary effect of advancing religion, the Court approved, by implication, those forms of aid that indirectly aid religion. In Committee for Pub. Educ. v. *Nyquist, 413 U.S. 756, 775 (1973)*, the Court found that government activities that provide only indirect, remote, or incidental benefits to religion meet the constitutional requirements of the primary effect prong of the *Lemon* test. The difference between government activity that indirectly aids religion and activity that has the primary effect of advancing religion is explained by the definition of primary effect provided in *Nyquist's companion case, Hunt v. McNair, 413 U.S. 734, 743 (1973).* *See infra* text accompanying notes 39-40.

activity in an otherwise substantially secular setting.\textsuperscript{40}

The third prong of the \textit{Lemon} test prohibits government action that excessively entangles the state with religion.\textsuperscript{41} The entanglement inquiry is divided into two components. First, the state must avoid administrative entanglement with religious authorities.\textsuperscript{42} The purpose of this prohibition is to avoid government entanglement in the administration of the church and to prevent church direction of government activities.\textsuperscript{43} Comprehensive and continuing state surveillance of religion is clearly repugnant to the principles that underlie the first amendment.\textsuperscript{44} Church administration of government policies creates a fusion of governmental and religious functions that comes perilously close to state establishment of religion.\textsuperscript{45}

Second, the Supreme Court has indicated that impermissible entanglement may occur when government activity creates the danger of political fragmentation and divisiveness along religious lines.\textsuperscript{46} This inquiry has never provided the sole basis for invalidating governmental action,\textsuperscript{47} and the strength of this objection always has been somewhat unclear. Moreover, recent court decisions threaten the viability of the political divisiveness inquiry as a barrier to government conduct outside of the very limited context of direct subsidies to religious institutions.\textsuperscript{48}

Until recently, the \textit{Lemon} test provided the only standard for establishment clause analysis. In 1982, however, the Court in \textit{Larson v. Valente}\textsuperscript{49} rejected the applicability of the \textit{Lemon} test in cases analyzing state statutes that discriminate among religions\textsuperscript{50} and applied a strict scrutiny analysis instead.\textsuperscript{51} The \textit{Larson} Court concluded that a state law granting a denominational preference to one religion over another "must be invalidated unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest."\textsuperscript{52} Under this analysis, the Court invalidated a Minnesota statute requiring religious organizations

\textsuperscript{40} Id. at 743.
\textsuperscript{41} \textit{Lemon}, 403 U.S. at 612-13.
\textsuperscript{42} Id. at 614-15.
\textsuperscript{44} Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).
\textsuperscript{46} \textit{Lemon}, 403 U.S. at 622-24.
\textsuperscript{47} Lynch v. Donnelly, 104 S. Ct. 1355, 1364 (1984) (plurality opinion).
\textsuperscript{48} Id. at 1364-65.
\textsuperscript{49} 456 U.S. 228 (1982).
\textsuperscript{50} Id. at 252. Nevertheless, the majority implied that the discriminatory statute at issue in \textit{Larson} violated the entanglement prong of the \textit{Lemon} test. See id. at 251-53.
\textsuperscript{51} Id. at 252.
\textsuperscript{52} Id. at 247.
that solicited more than fifty percent of their funds from nonmembers to comply with detailed registration and reporting requirements.\textsuperscript{53} Because the statute imposed selective burdens only on certain denominations,\textsuperscript{54} the Court stated that the statute could only be justified if it furthered a compelling governmental interest and was narrowly tailored to serve that interest.\textsuperscript{55} While the Court determined that Minnesota's statute furthered the compelling governmental interest of preventing fraud among charitable institutions, the Court found that the statute was not narrowly tailored to prevent fraud.\textsuperscript{56} On this basis, the Court concluded that the statute was unconstitutional.\textsuperscript{57}

Establishment Clause Analysis and Religious Displays

During the thirty-five years that followed \textit{Everson},\textsuperscript{58} the Supreme Court never squarely addressed the problem of publicly-funded displays of religious symbols. Lower federal and state courts reached different conclusions regarding the propriety of such displays under the federal Constitution.\textsuperscript{59}

While the permissibility of such displays remained in doubt, the Supreme Court had prohibited the government from conveying religious messages in certain contexts. In \textit{Abington School District v. Schempp},\textsuperscript{60} bible reading in public schools was held to have an impermissible purpose

\textsuperscript{53} Id. at 255.
\textsuperscript{54} Id. at 253-54.
\textsuperscript{55} Id. at 246-47.
\textsuperscript{56} Id. at 251.
\textsuperscript{57} Id. at 255.
\textsuperscript{58} Everson v. Board of Educ., 330 U.S. 1 (1944); \textit{see supra} text accompanying notes 27-29.


\textsuperscript{60} 374 U.S. 203 (1963).
and, therefore, to violate the establishment clause. In Schempp, Justice Clark observed that the government’s purpose in requiring bible reading was undeniably religious because “the place of the Bible as an instrument of religion cannot be gainsaid.”

In Engel v. Vitale, the Court explained that government-sponsored religious messages should be prohibited because of their coercive effect on minority religions. This case involved a constitutional challenge to an official, nondenominational prayer mandated by the New York Regents for use in the public schools. The Engel Court was deeply concerned that public sponsorship of religion would place indirect pressure on members of minority religions to conform. In the words of Justice Black, writing for the majority, “one of the greatest dangers to the freedom of the individual to worship in his own way lay in the government placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.” The Engel Court majority also emphasized that the establishment clause stands for the proposition that “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’” by the civil magistrate. As a result, the Court held the prayer unconstitutional and suggested that “each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves . . . .”

In 1980, the Court analyzed the first amendment limits on government sponsorship of tangible, physical displays of religious symbols for the first time. In Stone v. Graham, the Supreme Court struck down a Kentucky statute that authorized the posting of copies of the Ten Commandments in public school rooms throughout the state. The plaques on which the Commandments were printed bore a message noting the secular application of the Ten Commandments as the fundamental legal code of Western civilization.

Nevertheless, the Court dismissed the legislature’s proclaimed secular purpose as self-serving. The Court believed that the real purpose of

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61. Id. at 224.
63. See id. at 435-36.
64. The Regents had recommended that all children recite the following prayer each day in the presence of their teacher: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” Id. at 422.
65. Id. at 431.
66. Id. at 429.
67. Id. at 432 (quoting J. Madison, Memorial and Remonstrance Against Religious Assessments, in 2 The Writings of James Madison 187 (G. Hunt ed. 1901)).
68. Engel, 370 U.S. at 435.
70. Id. at 41.
71. Id.
the legislature could be assumed because "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."72 Thus, the Court found that the law authorizing the plaques lacked any clear secular purpose.73 Having decided that the statute failed to meet the first prong of the Lemon test, the Court felt no need to examine the statute under the other prongs of the Lemon test and held the statute unconstitutional.74

The Court's decisions in each of these cases strongly condemn government-sponsored religious messages. In each case, the Court focused on the character of the government's activity. The magnitude of the government aid involved was unimportant. The Court thereby consistently rejected any de minimis principle in establishment clause analysis.75

Three years after Stone, the Court in Marsh v. Chambers76 stepped back from its strong position against government-sponsored religious messages. In Marsh, the Court upheld the Nebraska legislature's employment with public funds of a chaplain to deliver an invocation at the opening of each legislative session.77 The Court ignored the Lemon test without comment.78 Chief Justice Burger, writing for the majority, never addressed whether the primary effect of the practice aided religion or whether the state's purpose was to aid religion.79 According to the majority, employment of legislative chaplains was an accepted practice of the First Congress, which ratified the Bill of Rights.80 Consequently, the

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72. Id.
73. Id.
74. Id. at 40-43. The Chief Justice and Justices Blackmun, Stewart, and Rehnquist refused to join in the Stone opinion. Id. at 43.
75. See id. at 42. As Justice Clark noted in Schempp, "It is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ." Schempp, 374 U.S. at 225; see also Engel, 370 U.S. at 436 (quoting J. MADISON, supra note 67, at 185-86).
77. Id. at 786.
78. See id. at 796 (Brennan, J., dissenting).
79. Instead, Chief Justice Burger concluded that Nebraska's employment of legislative chaplains "presents no more potential for establishment [of religion]" than school transportation of parochial students (approved in Everson, 330 U.S. 1), construction grants for religious universities (approved in Tilton v. Richardson, 403 U.S. 672 (1971)), or property tax exemptions for churches (approved in Walz v. Tax Comm'n, 397 U.S. 664 (1970)). Marsh, 463 U.S. at 791. By comparing government aid to religion in the principal case to that in Everson, Tilton, and Walz, the Chief Justice overlooked the justifications for government aid in each of those previous cases. Chief Justice Burger's use of comparisons in establishment clause analysis is discussed infra notes 98-104 & accompanying text.
80. Marsh, 463 U.S. at 787-88. Justice Brennan points out in his dissent, however, that this practice was not universally accepted. James Madison, in his later writings, expressed doubts about the propriety of legislative chaplains. Id. at 807-08 (Brennan, J., dissenting).
practice could not be held to violate the establishment clause.\textsuperscript{81}

The majority distinguished the legislative prayers at issue in \textit{Marsh} from the school prayer at issue in \textit{Schempp}\textsuperscript{82} and \textit{Engel}.\textsuperscript{83} The majority noted that adult audiences at legislative meetings are less susceptible to religious indoctrination and peer pressure than children and, therefore, require less protection against state-sponsored religious exercises.\textsuperscript{84} The majority also stated that the employment of legislative chaplains was a part of the fabric of our society and as such was nothing more than "a tolerable acknowledgment of beliefs widely held among the people of this country."\textsuperscript{85}

As Justice Brennan noted in his dissent in \textit{Marsh}, the majority's opinion was too narrow to pose a significant threat to the establishment clause.\textsuperscript{86} Few government practices aiding religion could be justified under establishment clause analysis based on official acknowledgement of their propriety by the First Congress.

Despite the narrow scope of the holding in \textit{Marsh}, the decision represented a major change in the Court's outlook. The Court no longer insisted that the government stay out of the business of prayers. Instead, the Chief Justice seemed to indicate that, in certain situations, majority religionists are entitled to special acknowledgments of their beliefs through official state action. The majority in \textit{Marsh} approved a government action that the Court in \textit{Engel} felt tended dangerously toward an establishment of religion.\textsuperscript{87}

The magnitude of the Court's retreat from its position in \textit{Stone} against government-sponsored religious messages became more apparent

\textsuperscript{81} The Chief Justice observed that "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." Id. at 790 (majority opinion).

\textsuperscript{82} See supra notes 60-61 & accompanying text.

\textsuperscript{83} See supra notes 62-64 & accompanying text.

\textsuperscript{84} \textit{Marsh}, 463 U.S. at 792.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 795 (Brennan, J., dissenting).

\textsuperscript{87} The \textit{Marsh} Court accepted the invocation of divine guidance by the state legislature as a "part of the fabric of our society." Id. at 792 (majority opinion). The Court saw nothing wrong with "tolerable acknowledgment" of Christian beliefs, \textit{id.}, and admonished the respondents for their lack of "ability and willingness to distinguish between real threat and mere shadow." Id. at 795 (quoting \textit{Schempp}, 374 U.S. at 213 (Goldberg, J., concurring)).

In \textit{Engel}, 370 U.S. 421, the majority strongly disapproved of government sponsorship of one particular kind of prayer or one particular form of religious services. See \textit{id.} at 429-30. The Court suggested that such sponsorship violated the establishment clause because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Id. at 431.
in *Lynch v. Donnelly*. In *Lynch*, the Court reexamined the limits on government sponsorship of sacred religious symbols. The Court upheld the inclusion of a Nativity scene depicting the birth of Christ as part of a Christmas display built and maintained by the city of Pawtucket, Rhode Island. The display also included a Christmas tree, striped poles, a Santa Claus house, an elephant, a clown, a teddy bear, a wishing well, colored lights, reindeer, and a sleigh.

Chief Justice Burger, writing for a plurality, initially refused to commit the Court to the *Lemon* test. The Chief Justice insisted that "[w]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion." The Court had departed from the *Lemon* test before, and the Court indicated its willingness to depart from it in the future. In fact, Chief Justice Burger's application of the three-prong *Lemon* test in *Lynch* was a radical departure from traditional establishment clause doctrine.

First, Chief Justice Burger found that the creche served the legitimate secular purpose of depicting the historical origins of Christmas. He did not attempt to explain, however, how a government-sponsored display of a peculiarly Christian version of history advanced secular knowledge. The Court, in fact, departed from the rationale of *Stone*, which indicated that the lack of a valid secular purpose sometimes can be assumed from the religious nature of a display. The place of the creche as an instrument of religion, like that of the Bible and the Ten Commandments, cannot be gainsaid. As Justice Brennan observed in his dissent in *Lynch*, the creche 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..."

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89. *Id.* at 1358.
90. *Id.*
91. In addition to the Chief Justice, the plurality consisted of Justices White, Powell, and Rehnquist.
92. *Id.* at 1361-62.
93. *Id.* at 1362. Justice O'Connor, writing a lone concurring opinion, suggested a "clarification" of the *Lemon* test. *Id.* at 1366 (O'Connor, J., concurring). Justice O'Connor's test focused on government entanglement with religion, on the government's purpose in the questioned activity, and on the message the questioned activity conveys to the general public. *Id.* at 1366-67. Concentrating on the celebratory nature of the creche, Justice O'Connor concluded that the display did not violate the establishment clause because it did not have the effect of communicating an endorsement of Christianity. *Id.* at 1369.
94. *Id.* at 1363 (plurality opinion). The Chief Justice also rejected as irrelevant Justice Brennan's suggestion that the goals of the city might have been accomplished solely through secular means. *Id.* at 1363 n.7. This conclusion is particularly ironic, since the Chief Justice found the existence of alternative means highly relevant in *Larkin v. Grendel's Den*, Inc., 459 U.S. 116, 123-24 (1982), decided just two years prior to *Lynch*.
and redemption."96 Under the rationale of Stone, no assertion of a supposed secular purpose could have blinded the Court to that fact.97

The Court's examination of the primary effect of the display also was unprecedented. The Court did not examine the primary effect of the creche itself, and did not allege that the primary effect of the creche was to serve some legitimate secular purpose. Instead, the Court attempted to measure the magnitude of the benefit conferred upon religion by the inclusion of the creche in the Christmas display.98 Thus, the Court recognized a de minimis factor in establishment clause analysis that prior case law consistently had rejected.99

In an apparent disregard of precedent, the Chief Justice refused to view the creche as having a primary effect that advanced religion, unless the creche was more beneficial to religion than other types of aid held permissible in the past.100 The Court concluded that the intangible aid of erecting a single, highly visible display of a sacred religious symbol conferred no greater benefit upon religion than textbook loans to parochial schools and was no more an endorsement of religion than Sunday closing laws.101 Because the creche benefited religion in an insignificant way, Chief Justice Burger found that the second prong of the Lemon test was satisfied.102

Comparison of past establishment clause cases103 to ascertain an acceptable magnitude of benefits bestowed upon religion threatens the rationale of those cases cited as precedent by the Lynch Court. The Lynch plurality failed to realize that the only thing similar in the primary effect

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97. See *Stone*, 449 U.S. at 41 ("an 'avowed' secular purpose not sufficient to avoid conflict with the First Amendment").
98. *Lynch*, 104 S. Ct. at 1363-64.
99. The Court categorized the aid to religion provided by the creche as indirect and incidental. *Id.* at 1364. The Chief Justice observed that "[i]t is not a case where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." (*Id.*)
100. See *Fausto v. Diamond*, 589 F. Supp. 451, 466 (D.R.I. 1984) ("Lynch appears to recognize a de minimus factor which the prior caselaw decried." (citations omitted)). In contrast, see *Stone*, 449 U.S. at 42 ("This is not a case . . . where religion was substantially aided . . . No comparable benefit to religion is discernible here." *Id.*
102. *Id.*
analysis utilized in all of these cases was the required examination of the unique religious and secular aspects of the specific government activity that was presently under review.104

In its application of the entanglement prong of the Lemon test, the Lynch Court further constricted the scope of establishment clause analysis. The Court concluded that inclusion of the creche caused no administrative entanglement because there was no evidence of contact between government and religious authorities.105 In addition, Chief Justice Burger implied that political entanglement is an irrelevant consideration, except in cases involving direct subsidies to religious institutions.106 This contention, however, defies recent case law and contradicts the Court's reasoning in Larkin v. Grendel's Den, Inc.107

In Grendel's Den, decided in 1982, the Court invalidated a Massachusetts ordinance that gave churches the power to veto the issuance of liquor licenses to commercial enterprises located within 500 feet of church premises. Even though the case did not involve direct subsidies, Chief Justice Burger, writing for the majority, expressed his concern that "[t]he challenged statute... enmeshes churches in the processes of government and creates the danger of '[p]olitical fragmentation and divisiveness on religious lines.'"108

Finally, the Lynch plurality decided that erection of the creche did

104. The plurality opinion in Lynch compared the benefit to religion conferred by Pawtucket's display with the benefit conferred on religion by other establishment clause decisions. 104 S. Ct. at 1363. The Court cited, inter alia, Board of Educ. v. Allen, 392 U.S. 236 (1968), which allowed public school districts to loan secular textbooks to parochial schools. The Allen Court emphasized that parochial schools have two goals, religious instruction and secular instruction. Id. at 247. The majority was able to uphold the enactment because "the processes of secular and religious training are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." Id. at 248.

The Lynch decision also cited McGowan v. Maryland, 366 U.S. 420 (1961). Lynch, 104 S. Ct. at 1363. McGowan upheld Maryland's Sunday closing law against an establishment clause challenge. The Court in McGowan emphasized how the nature of Sunday closing laws had changed. While these laws initially had religious objectives, McGowan, 366 U.S. at 431-33, present-day Sunday closing laws were enacted to set apart one day as a uniform day of rest, a day that all members of the family and community could spend together. Id. at 450. The McGowan Court noted that Sunday closing laws "have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations." Id. at 445.

In examining the magnitude of the aid to religion in these cases, the Lynch Court ignored the nature of the aid involved. Chief Justice Burger never claimed that Pawtucket's display served some great governmental concern, as in McGowan, or was separable from religious objectives, as in Allen. As mere exemplars of the permissible magnitude of government aid to religion, the opinions in McGowan and Allen have lost all of their ingenuity, subtlety, and reasoning.

105. Lynch, 104 S. Ct. at 1364.
106. Id. at 1364-65.
108. Id. at 127 (quoting Lemon, 403 U.S. at 623).
not violate the rule established in *Larson v. Valente*,109 which prohibited discrimination among religions in the absence of a compelling state interest.110 The plurality concluded that erection of the creche was not "explicitly discriminatory in the sense contemplated by *Larson.""111 This conclusion appears to indicate that the *Lynch* Court has limited the applicability of *Larson* to a statute that patently discriminates among religions on its face.112

Thus, the *Lynch* Court held that the display at issue was constitutional under the tests established in both *Lemon* and *Larson*. It is not certain, however, that *Lynch* constitutes a blanket endorsement of all government-sponsored religious displays. The *Lynch* Court's holding was predicated in part on the fact that Chief Justice Burger evaluated the Nativity scene in the context of the larger Christmas display.113 When viewed as a part of a larger display, the creche passed constitutional muster. Thus, it remains unclear whether a government-sponsored Nativity scene or a cross standing alone would violate the establishment clause.114

Most significantly, the tone of the Supreme Court's decision in *Lynch* was very different from that in prior Supreme Court cases analyzing government aid to religion. Past decisions emphasized concern regarding whether official support of religion might affect freedom of worship by placing indirect pressure on minority religionists to conform.115 In contrast, the plurality opinion in *Lynch* emphasizes the need to accommodate America's religious heritage.

The *Lynch* Court catalogued long-standing government recognition of religion.116 The Court praised this official recognition of religion as an accommodation of religious beliefs that follows "'the best of our traditions'" by respecting "'the religious nature of our people.'"117

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110. See supra note 52 & accompanying text.
112. *Id.*
113. *Id.* at 1362.
115. See supra notes 65-66 accompanying text.
117. *Id.* at 1361 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The Court also noted that "'the Constitution... affirmatively mandates accommodation, not merely tolerance, of all religions.'" *Lynch*, 104 S. Ct. at 1359. The Court has allowed, and sometimes even required, the government to accommodate religious belief by exempting religionists from certain publicly-imposed burdens, including military service, *Gillette v. United States*, 401 U.S. 437, 453 (1971), and public school attendance, *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). The creche at issue in *Lynch*, however, cannot be viewed as a mere accommodation of religious belief. "'While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant
Court's generalized approval of official religiousness in Lynch suggests, even more strongly than in Marsh, that the Court is willing to allow government sponsorship of religion that it considers no more than "a tolerable acknowledgement of beliefs widely held among the people of this country." The current position of the Supreme Court regarding establishment clause analysis of religious displays seems most uncertain. Lynch has questioned the general applicability of a constitutional test once thought mandatory without offering any clear alternatives. Furthermore, Lynch has analyzed both the purposes and effects of government enactments in contradiction to settled establishment clause doctrine. Finally, Lynch examined the magnitude of challenged aid to religion in spite of the Supreme Court's earlier insistence that government aid in support of religion, however minor, violated the establishment clause.

Although Lynch represents the Supreme Court's last word on the permissibility of government-sponsored religious displays, the Court, in its 1984 term, provided some new guidance in analyzing government action under the establishment clause. In Wallace v. Jaffree, the Court used the purpose prong of the Lemon test to invalidate an Alabama statute that provided for a moment of silence "for meditation and voluntary prayer" in all public schools. The sponsor of the statute had testified that a majority could use the machinery of the State to practice its [religious] beliefs. Schempp, 374 U.S. at 226 (emphasis in original), quoted in Wallace v. Jaffree, 105 S. Ct. 2479, 2491 n.45 (1985).

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


121. See supra notes 94-104 & accompanying text.
122. In addition to the decision in Jaffree v. Wallace, 105 S. Ct. 2479 (1985), discussed infra notes 123-28 & accompanying text, the Supreme Court rendered three other decisions holding government activities unconstitutional under the three-part Lemon test. In Aguilar v. Felton, 105 S. Ct. 3232 (1985), and Grand Rapids v. Ball, 105 S. Ct. 3216 (1985), the Court invalidated two statutes that provided public teachers and public monies for the remedial teaching of secular subjects at religious schools. In Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985), the Court invalidated a Connecticut statute that required employers to allow their employees not to work on the employee's chosen Sabbath.
124. Id. at 2482.
fled that the sole purpose of the statute was to return prayer to the schools. At the time this statute was enacted, Alabama law already provided for a moment of silence in all public schools "for meditation."

Applying the first prong of the *Lemon* test, the majority found that the statute "was not motivated by any clearly secular purpose—indeed the statute had no secular purpose." Thus, the Court held that the statute violated the establishment clause.

The narrowness of the decision in *Jaffree*, however, limits its impact as precedent. Few government activities can be invalidated based on frank admissions by state authorities that they intend to further religious belief. At best, the *Jaffree* decision provides only minimal protection against government aid to religion.

In light of the lingering uncertainties of federal establishment clause analysis, it is not surprising that the California Supreme Court has criticized the United States Supreme Court for treating the establishment clause in "various factual situations with perplexing diversity of views." Those challenging government aid to religion, however, need not rely solely on the uncertainties of federal establishment clause doctrine. California's constitution, for example, provides broader protections against official sponsorship of religious activities. Other states have similar broad constitutional provisions limiting public aid to religion. This Note next examines the California courts' interpretation of its religion clauses in order to provide a model for other states to follow in the interpretation of parallel state guarantees.

125. *Id.* at 2483.

126. *Id.* at 2481. Although plaintiff contended at trial that this statute also violated the establishment clause, plaintiff did not contest the validity of this statute before the Supreme Court. *Id.* at 2482.

127. *Id.* at 2490 (emphasis in original). Because the statute failed to meet the threshold requirement of a clear secular purpose, the majority never analyzed the statute under either the effect or entanglement prongs of the *Lemon* test.

128. A majority of the justices on the Court indicated that a statute authorizing only a moment of silence would be constitutional. *Id.* at 2493 (Powell, J., concurring); *id.* at 2496 (O'Connor, J., concurring); *id.* at 2503 (Burger, C.J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* at 2520 (Rehnquist, J., dissenting). Two justices would uphold a moment of silence statute if a clear secular purpose could be discerned justifying the statute. *Id.* at 2493 (Powell, J., concurring); *id.* at 2497-501 (O'Connor, J., concurring). Three justices of the Court approved of the statute at issue in *Jaffree*. *Id.* at 2505-08 (Burger, C.J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* at 2508-20 (Rehnquist, J., dissenting). Even the majority opinion observed that "legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." *Id.* at 2491 (majority opinion).

California Law on Religious Displays

In contrast to the United States Constitution, the California Constitution contains three separate provisions limiting government aid to religion. Article I, section 4 embodies two provisions that parallel both religion clauses in the first amendment. Similar to the federal establishment clause, section 4 provides: "The Legislature shall make no law respecting an establishment of religion."\(^{130}\) Similar to the federal free exercise clause, section 4 also provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed."\(^{131}\) In addition, article XVI, section 5 prohibits the state government from granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose."\(^{132}\) Finally, article IX, section 8 prohibits the use of public money for sectarian schools.\(^{133}\)

The scope of each of these provisions, however, is not determined by the scope of parallel federal guarantees. Under California law, the courts of California have been free to interpret the guarantees of the California Constitution independently of federal interpretations of parallel federal guarantees.\(^{134}\) In 1974, the voters of California passed a constitutional initiative reaffirming the independent nature of California's constitutional guarantees. Article I, section 24 of the California Constitution was amended to provide: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."\(^{135}\)

California's Establishment Clause

The Legal Basis for Independent State Interpretation

On November 5, 1974, the voters of California approved article I, section 4 of the California Constitution.

\(^{130}\) CAL. CONST. art I, § 4. Article I, § 4 provides in full:
Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. A person is not incompetent to be a witness or juror because of his or her opinion on religious beliefs.

\(^{131}\) Id.

\(^{132}\) Id. art. XVI, § 5. For the full text of § 5, see infra note 237.

\(^{133}\) Article IX, § 8 provides:
No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

\(^{134}\) CAL. CONST. art. IX, § 8.

\(^{135}\) See People v. Brisendine, 13 Cal. 3d 528, 548, 331 P.2d 1099, 1112, 119 Cal. Rptr. 315, 328 (1975) ("This court has always assumed the independent vitality of our state Constitution.").
section 24 of the California Constitution,\textsuperscript{136} which reaffirmed the independent nature of California's constitutional guarantees.\textsuperscript{137} During the same election, a prohibition against laws "respecting an establishment of religion" was added by initiative to article I, section 4 of the California Constitution.\textsuperscript{138} Although this language is identical to the establishment clause of the federal Constitution,\textsuperscript{139} the interpretation of the two clauses has not been entirely parallel.

The United States Supreme Court has not opposed such differences in interpretation. The Supreme Court has long recognized the right of the states to interpret textually similar passages of state constitutions in a broader manner than parallel federal guarantees.\textsuperscript{140} Federal courts have no authority to review California courts' interpretations of its state constitution, even if these decisions also analyze federal law. A state court decision is shielded from federal review as long as the state relied upon adequate and independent state grounds in reaching its conclusion.\textsuperscript{141}

At one time, the California Supreme Court deferred to federal interpretations of the federal Constitution as binding authority on California's courts in interpreting textually similar passages of California's constitution, absent a showing of cogent reasons supporting a varying interpretation.\textsuperscript{142} Recent decisions of the California Supreme Court, however, interpret California's establishment clause more broadly than parallel federal standards.\textsuperscript{143} For more than a decade, the California Supreme Court has shown less deference to federal analysis in interpreting the scope of

\textsuperscript{136} See id.

\textsuperscript{137} See People v. Brisendine, 13 Cal. 3d 528, 551, 531 P.2d 1099, 1114, 119 Cal. Rptr. 315, 330 (1975) (The voters' "declaration of constitutional independence ... was a mere reaffirmation of existing law.").

\textsuperscript{138} CAL. CONST. art. I, § 4; see text accompanying note 130; see also Mandel v. Hodges, 54 Cal. App. 3d 596, 616, 127 Cal. Rptr. 244, 257 (1976). Article I, § 4 already included language guaranteeing the free exercise and enjoyment of religion without discrimination or preference.

\textsuperscript{139} See supra note 1 for the text of the first amendment.

\textsuperscript{140} See, e.g., Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-92 (1965).

\textsuperscript{141} As the Court observed in Fox Film Corp. v. Muller, 296 U.S. 207 (1935): "Where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Id. at 210. State court decisions are shielded from federal review only if the judgment clearly relies upon independent state grounds. The United States Supreme Court recently announced that it will assume that state court decisions resting on both state and federal law are reviewable by the federal courts "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion ...". Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

\textsuperscript{142} This approach was taken in Gabrielli v. Knickerbocker, 12 Cal. 2d 85, 89, 82 P.2d 391, 392-93 (1938); Johnson v. Huntington Beach Union High School, 68 Cal. App 3d 1, 15, 137 Cal. Rptr. 43, 51 (1982), cert. denied, 434 U.S. 877 (1977); and Mandel v. Hodges, 54 Cal. App. 3d 595, 616, 127 Cal. Rptr. 244, 257 (1976).

\textsuperscript{143} See infra notes 176-85 & accompanying text.
many individual rights under the California Constitution. The California Supreme Court has recognized that state courts are the ultimate arbiters of all state law. Thus, California courts independently may construe provisions of the California Constitution that parallel federal law, as long as they do not restrict liberties granted under the federal Constitution.

**Recent Developments**

Until 1984, the independent potential of California's establishment clause was largely ignored. In *Feminist Women's Health Center v. Philibosian*, however, decided just three months after *Lynch*, the California Court of Appeal interpreted the California establishment clause independently of the federal Constitution for the first time. In *Philibosian*, the Los Angeles District Attorney's office had come into possession of 16,500 aborted fetuses. Police had seized the fetuses from the home of a private physician, and the District Attorney held the fetuses as potential evidence of criminal conduct. The District Attorney had attempted to release the fetuses to a right-to-life group that planned to hold a memorial service, but a trial court enjoined the impending release. The District Attorney's office then announced its intention to inter the fetuses at Valhalla Cemetery, which had volunteered to store the fetuses free of charge. When this plan was announced, the Catholic League of


145. *See supra* note 134 & accompanying text.


150. *Id.* at 1082, 203 Cal. Rptr. at 920-21. The disposition of the fetuses quickly became a cause celebre for conservative politicians. Right-to-life groups, state senators, the Los Angeles County Board of Supervisors, and President Reagan urged the District Attorney's office to provide a memorial service for the remains. *Id.* at 1082, 203 Cal. Rptr. at 920.
Southern California contracted with Valhalla Cemetery to hold a memorial service for the fetuses and place a plaque on the site. The trial court refused to enjoin the District Attorney from authorizing the release.

The California Court of Appeal in Philibosian unanimously reversed the trial court, holding the District Attorney's action unconstitutional under the establishment and free exercise clauses of article I, section 4, and under article XVI, section 5 of the California Constitution. In analyzing the propriety of the proposed release under California's establishment clause, the court first noted that "California courts alone determine the rights guaranteed by the California Constitution so long as those rights extend equal or greater protection to those guaranteed under the federal Constitution under totally similar provisions of the Bill of Rights." Thus, the court's analysis of California's establishment clause was premised upon only certain United States Supreme Court cases that the California appellate court found persuasive. The court referred to Lynch only once, agreeing with Chief Justice Burger's assertion that no single test is definitive in establishment clause analysis. Significantly, the court did not otherwise refer to Lynch in its application of establishment clause analysis.

The Philibosian court then applied the three-part Lemon test. With respect to the first prong of the Lemon test, the court announced that it would determine the purpose behind the District Attorney's proposed action from an objective viewpoint. The court noted that preservation of the fetuses was no longer required for evidentiary purposes and found no other secular purpose justifying the proposed interment of the fetuses. Thus, in the court's view, the District Attorney's release of the fetuses lacked a clear secular purpose. Furthermore, the publicity surrounding the District Attorney's repeated attempts to release the fetuses to pro-life groups convinced the court that the proposed interment gave the appearance that the government harbored a religious viewpoint.

151. Id. at 1083, 203 Cal. Rptr. at 921.
152. Id. at 1084, 203 Cal. Rptr. at 921.
153. See infra notes 230-35 & accompanying text.
155. Id. at 1092-93, 203 Cal. Rptr. at 927; see CAL. CONST. art. I, § 4; id. art. XVI, § 5.
157. Id. at 1086, 203 Cal. Rptr. at 923.
158. Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (plurality opinion); see supra notes 88-121 & accompanying text.
160. The court noted that "[w]e perceive the purpose test to be objective in nature." Id. at 1090, 203 Cal. Rptr. at 925.
161. Id. at 1089, 203 Cal. Rptr. at 924.
162. Id. at 1089-90, 203 Cal. Rptr. at 925.
163. Id. at 1090-91, 203 Cal. Rptr. at 925-26.
court observed that the symbolic identification of government with religion threatened the fundamental precept that religious concerns must remain matters of "'individual and community conscience.'"\textsuperscript{164} Thus, the court concluded that "'[t]he state must not only maintain the reality of separation with the church, it must also maintain the appearance of such separation.'"\textsuperscript{165}

Applying the second prong of the \textit{Lemon} test, the court found that release of the fetuses to Valhalla would have the impermissible primary effect of advancing religion by giving symbolic governmental support to the religious views of the Catholic League.\textsuperscript{166} While the court recognized that the Catholic League had a constitutionally protected right to proclaim that aborted fetuses are human beings and to mourn them, the court emphasized that the League had no right to expect state participation in its religious expression.\textsuperscript{167}

With respect to the third prong of the \textit{Lemon} test, the court determined that the state's action caused improper and excessive political entanglement with the Catholic League.\textsuperscript{168} The court concluded that "'[t]he act of indirectly turning the fetuses over to Valhalla would vitiate the studied neutrality which is the state's constitutional course.'"\textsuperscript{169} Although the court noted that political entanglements alone cannot support a finding of unconstitutionality under the federal Constitution, it emphasized that potential political divisiveness is an "important factor" in determining whether there has been an establishment clause violation under the California Constitution.\textsuperscript{170} On this basis, the court concluded that the District Attorney's actions violated all three prongs of the \textit{Lemon} test.\textsuperscript{171}

The court also held that the District Attorney's actions violated the rule set forth in \textit{Larson v. Valente},\textsuperscript{172} which prohibits discrimination among religions in the absence of a compelling state interest. The court noted that release of the fetuses would give symbolic support to the Catholic League's belief that aborted fetuses are murdered human beings.\textsuperscript{173} Consequently, the court concluded that "any state action showing a preference for this belief . . . must be invalidated unless it is justified by a

\textsuperscript{164} Id. at 1090, 203 Cal. Rptr. at 925 (quoting L. Tribe, \textit{American Constitutional Law} 868 (1978)).
\textsuperscript{165} Philibosian, 157 Cal. App. 3d at 1090, 203 Cal. Rptr. at 925 (citing Fox v. City of Los Angeles, 22 Cal. 3d 792, 804, 587 P.2d 663, 670, 150 Cal. Rptr. 867, 874 (1978) (Bird, C.J., concurring)).
\textsuperscript{166} Philibosian, 157 Cal. App. 3d at 1091, 203 Cal. Rptr. at 926.
\textsuperscript{167} Id. at 1090, 203 Cal. Rptr. at 925.
\textsuperscript{168} Id. at 1091, 203 Cal. Rptr. at 926.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 1089, 203 Cal. Rptr. at 925.
\textsuperscript{172} Id. at 1088, 203 Cal. Rptr. at 924. For a discussion of \textit{Larson v. Valente}, 456 U.S. 228 (1982), see \textit{supra} text accompanying notes 49-57.
\textsuperscript{173} Philibosian, 157 Cal. App. 3d at 1091, 203 Cal. Rptr. at 926.
compelling governmental interest with which 'it is closely fitted to further [that] interest.'” 174 Because the law allowed the District Attorney to dispose of fetuses through incineration, the court concluded that interment at Valhalla would not serve any compelling state interest. 175

The Philibosian court’s analysis of California’s establishment clause provides substantial protections against government aid to religion that are absent under current federal interpretations of the federal establishment clause. The United States Supreme Court has implied that official acknowledgments of religious belief may serve the legitimate secular goal of accommodating religion. 176 In contrast, the Philibosian decision emphasized that the state must avoid the appearance, as well as the reality, of religious partiality. 177

In addition, the United States Supreme Court has recently appeared to abandon any attempt to determine the validity of government actions based on their potential for causing political divisions along religious lines. 178 Philibosian, on the other hand, indicates that political divisiveness continues to be an important factor in establishment clause analysis under the California Constitution. 179

Finally, the United States Supreme Court has severely limited application of the strict scrutiny standard stated in Larson. 180 Under the Lynch decision, it appears that only those statutes that facially discriminate among religions are subject to strict scrutiny. 181 In contrast, the Philibosian decision requires a compelling state interest to justify any government activity that prefers one religion over another. 182

Although the Philibosian decision invalidated government participation in a religious ceremony, the Court’s rationale seems equally applicable to static religious displays. Government sponsorship of a creche or a cross, no less than government participation in a memorial service, may create the appearance of government support for a particular religious viewpoint. 183 Government involvement with a religious display may lack a secular purpose, have a primary effect advancing religion, or create political divisiveness. 184 Furthermore, the involvement may prefer one

176. See infra notes 117-19 & accompanying text.
177. See supra note 165 & accompanying text.
178. The plurality expressly limited the political divisiveness inquiry to cases involving direct government subsidies to religious institutions. Lynch, 104 S. Ct. at 1364-65.
179. See supra text accompanying notes 168-70.
180. 456 U.S. at 247; see supra text accompanying note 52.
181. Lynch, 104 S. Ct. at 1366 n.13; see supra text accompanying note 112.
182. See supra text accompanying notes 172-75.
183. See, e.g., Fox v. City of Los Angeles, 22 Cal. 3d 792, 797, 587 P.2d 663, 665, 150 Cal. Rptr. 867, 869 (1978) (Illumination of a cross on Los Angeles City Hall “does seem preferential when comparable recognition of other religious symbols is impracticable.” (emphasis added)).
184. See, e.g., McCreary v. Stone, 739 F.2d 716, 721 (2d Cir. 1984) (“[I]n light of the
religion over others without any compelling state interest. To the extent that government involvement with religious displays causes these results, such involvement is inconsistent with the rationale of the Philibosian decision.

Thus, the Philibosian court's interpretation of California's establishment clause represents a major departure from current federal establishment clause doctrine. Philibosian, however, is less than two years old and represents the view of a single appellate court.

More settled protections against state aid to religion are contained in California's free exercise clause. For more than 130 years, California's free exercise clause has guaranteed the free exercise of religion, without discrimination or preference.

California's Free Exercise Clause

California's establishment clause is only ten years old. In contrast, California's free exercise clause was proposed prior to California's admission to the union. Article I, section 4 of the California Constitution, as originally adopted by the California Constitutional Convention of 1849, proclaimed: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state." Accounts of the proceedings of the 1849 Convention are very sketchy. The members talked briefly about banning Mormon polygamy from the protections of the free exercise clause. In order to further equal treatment of all religions, clergy of the Catholic and Protestant division" caused by the placement of a creche in a public park, the Board of Trustees of the Village of Scarsdale urged that the local creche committee "erect the creche at a location other than the village owned property.") aff'd by an equally divided court sub nom. Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985).


186. See supra note 131, infra note 188 & accompanying text.


188. CAL. CONST. of 1849, art. I, § 4. The full text of article I, § 4 provided: The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state.

Id.

faiths alternated in delivering the invocation.\textsuperscript{190}

California's courts exhibited similar concerns regarding evenhandedness in the years immediately following the 1849 Convention. In 1858, the California Supreme Court invalidated the state’s Sunday closing law because of concerns that the law established, as a religious institution, the observance of a day held sacred by the followers of one faith.\textsuperscript{191} Shortly thereafter, the California Supreme Court reversed its opinion because it became convinced that the aim of the law was to protect workers.\textsuperscript{192} The court found it significant that the law in question “enjoins nothing which is not secular, and it commands nothing that is religious.”\textsuperscript{193}

The delegates to the California Constitutional Convention of 1879 were very concerned about religious freedom and the separation of church and state.\textsuperscript{194} Consequently, one of the delegates at the convention proposed an amendment to article I, section 4 providing that free exercise shall be guaranteed, not simply allowed, in California.\textsuperscript{195} The sponsor of the amendment felt that no language could express the convention’s commitment to religious freedom too clearly. In his opinion, “the word ‘allowed’ conveys the idea that the right to disallow or deny exists. . . . I deny that any Government or any power on earth has a right to grant or deny freedom of religious belief.”\textsuperscript{196} The majority of the convention agreed with him. As a result, article I, section 4 now reads: “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.”\textsuperscript{197} This provision of the California Constitution has been described as “more than a guarantee of religious toleration, it is a guarantee of religious equality.”\textsuperscript{198} In this respect, California law significantly differs from its federal counterpart. While the federal free exercise clause prohibits government interference with religious exercise,\textsuperscript{199} California's
free exercise clause additionally prohibits government preferences in favor of, or discriminations against, one religion over another.²⁰⁰

Although the sweep of California’s free exercise clause is very broad, not all laws aiding religion have been held to violate its ban on governmental religious preferences. Government actions that aid religion do not violate the mandate of California’s free exercise clause as long as such actions are religiously neutral. For example, in California Educational Facilities Authority v. Priest,²⁰¹ the California Supreme Court upheld a statute authorizing the issuance of tax free bonds by all private universities against challenges that it violated California’s free exercise clause.²⁰² The statute applied equally to sectarian and nonsectarian institutions. The majority reasoned that the statute was not proscribed by California’s free exercise clause because “[t]he Act is religiously neutral; it neither favors, fosters, nor establishes any religion . . . .”²⁰³

Mandel v. Hodges²⁰⁴ also illustrates the importance of government neutrality toward religious matters under California’s free exercise clause. In Mandel, the California Court of Appeal sustained an injunction against the Governor that prevented him from designating Good Friday as a paid state holiday.²⁰⁵ The court recognized that the express terms of California’s free exercise clause prohibit discrimination against, or preference in favor of, one religion as opposed to any other.²⁰⁶ The court reasoned that the appointment of an exclusively Christian holy day as a paid holiday amounted to discrimination against all non-Christians and preference in favor of Christians.²⁰⁷

Religious Displays Under California’s Free Exercise Clause

In 1979, the California Supreme Court addressed the constitutionality of a religious display under California’s free exercise clause for the first time. In Fox v. City of Los Angeles,²⁰⁸ the California Supreme Court sustained an injunction against the city of Los Angeles prohibiting the display of a single-barred latin cross on City Hall.²⁰⁹ The city had used

²⁰². Id. at 606, 526 P.2d at 521, 116 Cal. Rptr. at 369.
²⁰³. Id. at 603, 526 P.2d at 520, 116 Cal. Rptr. at 368. The court also upheld the statute against the proscriptions of article XVI, § 5 of the California Constitution. See infra notes 250-57 & accompanying text.
²⁰⁴. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).
²⁰⁵. Id. at 601-02, 127 Cal. Rptr. at 247.
²⁰⁶. Id. at 617, 127 Cal. Rptr. at 258.
²⁰⁷. Id.
²⁰⁸. 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).
²⁰⁹. The cross in question was a single-barred latin cross commonly used in Protestant and Catholic faiths, not the double-barred cross used by Greek and Eastern Orthodox churches. See id. at 794, 587 P.2d at 664, 150 Cal. Rptr. at 868.
public funds to display the cross at Christmas for the previous thirty years and on Latin Easter Sunday for the previous decade. In response to demands by members of the Eastern Orthodox Church, the city also kept the cross lighted on Orthodox Easter.

Recognizing the inherent ambiguities of the federal establishment clause, the California Supreme Court chose to analyze the display under California's free exercise clause. The court noted that California's free exercise clause forbids the government from discriminating against, or exhibiting preferences toward, one religion over another. The court was uncertain whether federal interpretations of the United States Constitution were that comprehensive.

The court adopted a sympathetic attitude towards the plight of religious minorities. The city of Los Angeles argued that, since it had lighted the cross without objection for thirty years, the lighting of the cross conferred no measurable benefit upon Christians. The court refused to accept this argument, reasoning that "[t]here may be complex and troubling reasons why residents who are non-Christians have chosen not to seek equal recognition and aid."

Additionally, the court rejected the city of Los Angeles's argument that the cross was merely "symbolic of the spirit of peace and good fellowship toward all mankind" and recognized the religious nature of the display.

The city also argued that, by keeping the cross lighted on Orthodox Easter, the city was accommodating other religions rather than preferring one religion over another. The court stated that this accommodation could not undo the preference because "[t]he city hall is not an immense bulletin board where symbols of all faiths could be displayed."

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210. Id. at 794, 587 P.2d at 663-64, 150 Cal. Rptr. at 867-68. Latin and Orthodox Easter Sundays commonly occur on different dates in the same year. See id. at 796, 587 P.2d at 665, 150 Cal. Rptr. at 869.

211. Id. at 796, 587 P.2d at 665, 150 Cal. Rptr. at 869.


213. See Fox, 22 Cal. 3d at 795, 587 P.2d at 664-65, 150 Cal. Rptr. at 868-69.

214. Id. at 796, 587 P.2d at 665, 150 Cal. Rptr. at 869.

215. Id. at 797, 587 P.2d at 665, 150 Cal. Rptr. at 869.

216. Id. In addition, the court perceived that the federal establishment clause imposed a separate duty of religious neutrality. In the court's view, "[t]o be neutral surely means to honor the beliefs of the silent as well as the vocal minorities." Id. at 799, 587 P.2d at 666, 150 Cal. Rptr. at 870.

217. Id. at 798, 587 P.2d at 666, 150 Cal. Rptr. at 870.

218. Id. at 796-97, 587 P.2d at 665, 150 Cal. Rptr. at 869.

219. Id. at 797, 587 P.2d at 665, 150 Cal. Rptr. at 869. On this basis, the majority distinguished the facts of Fox from those of Evans v. Selma Union High School Dist., 193 Cal. 54, 222 P. 801 (1924). In Evans, the California Supreme Court upheld a school district's purchase of a Bible for a public school library against a challenge based on California Political Code
court's view, illumination of a single religious symbol "does seem preferential when comparable recognition of other religious symbols is impracticable."220 Thus, the court concluded that the city's illumination of the cross violated the prohibition in California's free exercise clause against government preference of one religion over another.221

The California Supreme Court's interpretation of California's free exercise clause in Fox substantially differs from federal interpretations of the federal establishment clause in three respects. First, the Fox decision requires the government to refrain from special recognition of one religion when comparable recognition is not available for all religions.222 In contrast, the Lynch decision allows the government to sponsor the use of sacred symbols of one religion, without regard to any actual or perceived favoritism that may result from such sponsorship.223

Second, the California Supreme Court has recognized that there is a significant difference between government sponsorship of secular symbols and government sponsorship of spiritual symbols to commemorate national holidays.224 In contrast, the United States Supreme Court has permitted the government to use religious symbols to serve the secular purpose of commemorating holidays.225

Finally, the California Supreme Court has exhibited a sympathetic attitude towards religious minorities. That court has recognized that minority silence in the face of government acknowledgements of majority religious belief may stem from reasons other than disinterest.226 In contrast, the United States Supreme Court recently has emphasized the importance of America's "religious heritage"227 and signaled its approval of "tolerable acknowledgements"228 of Christian religious beliefs.

Nevertheless, the Fox decision has limitations. It forbids government sponsorship of religious symbols only when comparable recognition of other religions is not possible. A narrow reading of Fox might allow

§ 1607, prohibiting the inclusion of sectarian books in public schools, and § 1672, prohibiting the distribution or use of sectarian publications in public schools. CAL. POL. CODE §§ 1607, 1672 (repealed 1943); see Evans, 193 Cal. at 55-61, 222 P. at 801-08. Justice Newman, commenting on the Evans decision in Fox, noted that while a librarian can always add new books to the library and give comparable recognition to all who demand it, comparable recognition for other religions on city hall, by comparison, is impracticable. 22 Cal. 3d at 797, 587 P.2d. at 655-66, 150 Cal. Rptr. at 869-70.

220. Fox, 22 Cal. 3d at 797, 587 P.2d at 665, 150 Cal. Rptr. at 869.
221. See supra notes 212-14 & accompanying text.
222. See Fox, 22 Cal. 3d at 797, 587 P.2d at 665, 150 Cal. Rptr. at 869.
224. See supra note 217 & accompanying text.
225. See supra notes 94-97 & accompanying text.
226. See supra notes 215-16 & accompanying text.
227. Lynch, 104 S. Ct. at 1360; see supra notes 116-19 & accompanying text.
the government to employ religious symbols in forums where minority religionists conceivably could receive comparable recognition.\textsuperscript{229} Thus, government erection of a Latin cross in a public park might be permissible under the theory that other religionists could demand government erection of their chosen religious symbols in the same park.

The most recent leading case, however, takes a more restrictive view of California's free exercise clause. In \textit{Feminist Women's Health Center v. Philibosian},\textsuperscript{230} the California Court of Appeal analyzed the constitutionality of government participation in a memorial service for aborted fetuses under the free exercise clause.\textsuperscript{231} The court made no mention of the availability of comparable recognition for other religious points of view.\textsuperscript{232} Instead, the court recognized that "the religious freedom of every person is threatened whenever government associates its power with one particular religious tradition."\textsuperscript{233} On this basis, the court concluded that the government's proposed participation would prefer one religion over another in violation of California's free exercise clause.\textsuperscript{234}

\textsuperscript{229} One commentator criticized the Fox court's narrow reasoning:

The majority's implication that the cross could be displayed if recognition of other religious symbols was practicable does not preserve the separation of church and state guaranteed by the California Constitution. It would not be difficult to imagine a situation in which the government could display the symbols of all religions.

Note, Fox v. City of Los Angeles: Preference of Religion and the Use of Independent State Constitutional Grounds, 68 CALIF. L. REV. 666, 671 (1980) (footnotes omitted). Justice Clark, in his dissent in Fox, similarly complained that the line "between permissible and impermissible display remains as obscure as the city's now darkened cross." 22 Cal. 3d at 824, 587 P.2d at 683, 150 Cal. Rptr. at 887 (Clark, J., dissenting).


\textit{Philibosian} also involved a challenge under California's establishment clause. For further discussion of the court's resolution under that constitutional provision, see supra text accompanying notes 147-85.

\textsuperscript{231} 157 Cal. App. 3d at 1092, 203 Cal. Rptr. at 926-27.

\textsuperscript{232} The opinion acknowledges the District Attorney's argument that any other denomination was free to act with respect to the proposed burial. The court, however, does not specifically respond to this argument. \textit{Id.} at 1087, 203 Cal. Rptr. at 923.

\textsuperscript{233} \textit{Id.} at 1092, 203 Cal. Rptr. at 927 (quoting Fox, 22 Cal. 3d at 805, 587 P.2d at 671, 150 Cal. Rptr. at 875 (Bird, C.J., concurring)). Even this reasoning, however, might permit some government involvement with religious displays. This point is best illustrated in \textit{Baer v. Kolmorgen}, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (N.Y. Sup. Ct. 1958), decided under article I, § 3 of the New York Constitution. Article I, § 4 of the California Constitution was copied verbatim from this provision at California's First Constitutional Convention. \textit{See J. Browne, supra} note 189, at 39. The court in \textit{Baer} upheld the placement of a creche by a private group upon the grounds of a public school. 14 Misc. 2d at 1022, 181 N.Y.S.2d at 239. The school had allowed other groups to erect displays upon request. No such request had ever been denied. \textit{Id.} at 1019, 181 N.Y.S.2d at 236. On this basis, the court could find no preference toward, or discrimination against, any one religion over others. \textit{See id.} at 1022, 181 N.Y.S.2d at 239. In the court's view, the school board had acceded to the creche committee's request in the same spirit of cooperation with which it had acceded to the demands of other groups within the community. \textit{Id.}

\textsuperscript{234} \textit{Philibosian}, 157 Cal. App. 3d at 1092, 203 Cal. Rptr at 926-27.
The analysis of California’s free exercise clause in Philibosian places California law directly at odds with the rationale articulated by the United States Supreme Court in Lynch. The United States Supreme Court has praised government sponsorship of religious symbolism as accommodation of religious belief that follows “‘the best of our traditions’” by respecting “‘the religious nature of our people.’”235 In contrast, the Philibosian court expressed its conviction that government association with a particular religious tradition threatens religious freedom.

As federal guarantees have narrowed, recent interpretations of California’s free exercise and establishment clauses have provided substantial protections against state aid to religion. The strongest mandate against state aid to religion, however, is contained in article XVI, section 5 of the California Constitution.

Article XVI, Section 5

For more than a century, article XVI, section 5236 has prohibited state and municipal governments from granting “anything to or in aid of any religious sect, church, creed, or sectarian purpose.”237 No passage in the California Constitution more clearly represents California’s commitment to the separation of church and state than article XVI, section 5. California Supreme Court Justice Stanley Mosk describes this section as “the definitive statement of the principle of government impartiality in the field of religion.”238

235. Lynch, 104 S. Ct. at 1361 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
236. This provision of the California Constitution was originally numbered article IV, § 30, see 3 E. Willis & P. Stockton, supra note 195, at 1272, was renumbered on November 8, 1966, as article XIII, § 24, see State of California, California Voters Pamphlet, General Election, Proposition 1-A, app. at 8 (1966), and became article XVI, § 5 on November 5, 1974. See State of California, supra note 187, at 79, 84.
237. Cal. Const. art. XVI, § 5. This section states in full:
Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, or hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.
Id. Article XVI, § 3 provides: “No money shall ever be appropriated . . . for the purpose or benefit of any corporation, association, asylum . . . not under the exclusive management and control of the State as a state institution . . . .” Id. art. XVI, § 3. Notwithstanding this provision, article XVI, § 3 provides for government aid to orphans, and to certain needy persons who are blind, aged, or physically handicapped, through private institutions not controlled by the state. Id.
The debates of the California Constitutional Convention of 1879 shed light on the framers' intent regarding article XVI, section 5. When state neutrality in religious matters was slightly threatened by an amendment to provide public aid to private orphanages, acrimonious debate resulted. The convention delegates were concerned that the orphanage amendment violated the strict mandate of religious neutrality contained in article XVI, section 5. Convention delegates expressed deep concerns that the government not "infringe upon the principles of the American Government, and that . . . the State not . . . support any church or religious creed." The testimony of one of the proponents of the orphanage exception gives an indication of the intensity of feeling within the Convention:

[The amendment] does not extend any further than [the orphanage exception]. That is the extent of the amendment. I am just as much opposed as any gentleman upon this floor to any union of church and State. But I do not look upon this as State aid to a church. It is for the orphans.

Eventually, concern for the plight of the orphans prevailed over concerns about religious neutrality. Article XVI, section 5 was amended to allow state aid for private orphanages. Nevertheless, the fact that a

239. See 3 E. WILLIS & P. STOCKTON, supra note 195, at 783-88, 818-20, 1263-66, 1272-74. The orphanage exception was passed as an amendment to article XVI, § 3 (formerly CAL. CONST. art. IV, § 22), which prohibits the appropriation of public funds for private uses. The opponents of the orphanage exception pointed out that both article XVI, § 3 and article XVI, § 5 (formerly CAL. CONST. art. IV, § 30) were designed, at least in part, to prevent "opportunity for special legislation and for special grabbing into the treasury," 3 E. WILLIS & P. STOCKTON, supra note 195, at 785 (remarks of Mr. Caples), and to prevent subsidies "in any form or shape, to any private corporation, church or otherwise." id. at 1273 (remarks of Mr. Andrews).

240. See 3 E. WILLIS & P. STOCKTON, supra note 195, at 819 (remarks of Mr. Howard). Opponents of the orphanage measure stated their objections clearly. One delegate plainly noted, "I shall oppose every proposition which proposes to mix up, in any way, the officers of this State with religious institutions." Id. at 1265 (remarks of Mr. Filcher). The fiercest charge of the opponents of the measure was that "[t]his means State support of sectarian institutions and sectarian schools, and the gentlemen here know it very well." Id. at 1266 (remarks of Mr. Reynolds); see also id. at 1265 (remarks of Mr. Vaquezr) (charging that education in sectarian orphanages will make the orphans "know everything else but their duties as citizens"). Some delegates were stung by the antisectarian fervor of the opponents. See, e.g., id. at 1263-64 (remarks of Mr. Reddy). More typically, proponents of the exception tried to blunt charges of sectarianism. See, e.g., id. at 1263 (remarks of Mr. Murphy) ("I scorn the idea of raising the cry of sectarian schools upon the floor of this House"); id. at 788 (remarks of Mr. Barbour) ("I, sir, have no sectarian feelings.").

The framers also demonstrated their commitment to the separation of church and state by adopting article IX, § 8, which places a ban on state aid to parochial schools. CAL. CONST. art. IX, § 8; see supra note 133.

241. 3 E. WILLIS & P. STOCKTON, supra note 195, at 1273 (remarks of Mr. Wilson).

242. Article XVI, § 5 states: "[N]othing in this section shall prevent the legislature granting aid pursuant to Section 3 of Article XVI." CAL CONST. art. XVI, § 5. Article XVI, § 3 permits the legislature to appropriate funds for private orphanages. Id. art. XVI, § 3.
constitutional amendment was required before the legislature could provide funding for private orphanages demonstrates the framers' intention that the ban on state aid to religion be absolute.

Although article XVI, section 5 forbids the government from granting anything in aid of any sectarian purpose, California courts initially split on whether state aid could be justified on the basis that it provided only incidental benefits to religion. In Frohlicher v. Richardson, 243 decided in 1921, a California appellate court invalidated a statute providing for the restoration of historical missions owned by the Catholic church. The state treasurer argued that the fact of ownership by the Catholic church was incidental to the historical benefit the state would receive. Although the court recognized the tremendous architectural and historical importance of these missions, 244 it could not overlook the plain language of article XVI, section 5 prohibiting government aid to any sectarian purpose. The court believed that "[t]he incident is in itself sufficient to raise the bar of [article XVI, section 5] of the constitution." 245

Subsequent cases, however, have permitted government aid to sectarian purposes if the benefit to religion was only incidental. In 1946, a California appellate court, in Bowker v. Baker, 246 upheld a statute authorizing the transportation to school of parochial school children on public school buses. The court reasoned that article IX, section 1 of the California Constitution requires the legislature to "encourage by all suitable means the promotion of intellectual . . . improvement." 247 In light of this overriding constitutional objective, any benefit the statute conferred upon religion was "incidental or immaterial." 248 In Gordon v. Board of Education, 249 decided one year later, voluntary release programs for public school children seeking religious instruction also were held only to benefit religion incidentally.

Recent Developments

In 1976, the California Supreme Court first addressed the issue of whether article XVI, section 5 permits government aid that provides only incidental benefits to religion. In California Educational Facilities Au-

244. Id. at 215-17, 218 P. at 499-500.
245. Id. at 217, 218 P. at 500. The court found that the statute also violated article IV, § 22 (currently CAL. CONST. art. XVI, § 3) by appropriating public money to an institution not under the exclusive control of the state. Frohlicher, 63 Cal. App. at 214, 218 P. at 499.
247. Id. at 658-59, 167 P.2d at 258. Article XI, § 1 provides, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." CAL. CONST. art. IX, §1.
thority v. Priest, a unanimous court upheld a statute authorizing the issuance of tax-free bonds by private universities against a challenge that this statute violated the proscriptions in article XVI, section 5 against public aid to religion. The net result of the statute was to deprive the state of revenue for the benefit of religious universities.

Although the court recognized that the framers intended "to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support" of sectarian purposes, it interpreted section 5 as a prohibition against only official involvement that had the direct, immediate, and substantial effect of advancing religion. Thus, the court concluded that government activities that only indirectly, remotely, and incidentally aid religion do not violate article XVI, section 5. The court reasoned that the bond authorization at issue in Priest primarily encouraged intellectual achievement, and that any benefits the bond issues might bestow upon religion were incidental to this primary purpose. As a result, the court held that the benefits were not violative of article XVI, section 5.

The analysis in Priest, however, seems at odds with both the absolutist language of article XVI, section 5 and with the framers' intent in


251. Id. at 604-06, 526 P.2d at 520-22, 116 Cal. Rptr. at 368-70. At the time of the decision, article XVI, § 5 was titled article XII, § 24. See supra note 236.


253. Priest, 12 Cal. 3d at 605, 526 P.2d at 521, 116 Cal. Rptr. at 367. The court borrowed language from the United States Supreme Court, which had created the incidental benefit doctrine one year before in Committee for Pub. Educ. v. Nyquist, 413 U.S. 734 (1973), discussed supra note 38. Priest, 12 Cal. 3d at 605 n.12, 526 P.2d at 521 n.12, 116 Cal. Rptr. at 369 n.12.

254. Priest, 12 Cal. 3d at 605-06, 526 P.2d at 521-22, 116 Cal. Rptr. at 369-70.

255. See id.

256. "In sum, although in certain subtle respects the Act appears to approach state involvement with religion . . . we cannot say that in the abstract it crosses the forbidden line." Id. at 606, 526 P.2d at 522, 116 Cal. Rptr. at 370 (citation omitted). The court's reasoning in Priest seems to parallel contemporaneous developments in federal case law. The facts of Priest closely resemble those of Hunt v. McNair, 413 U.S. 734 (1973) (state bond authorization for the construction of secular projects on private campuses), as did the outcome.

enacting that section. While the court’s justification for the bond issues mirrored those arguments advanced by the proponents of the orphanage exception to article XVI, section 5,\textsuperscript{257} the framers indicated that such aid to religion required a specific constitutional exemption.

The \textit{Priest} court also failed to define which types of government aid only incidentally benefit religion. The use of similarly vague terms has caused great uncertainties in federal establishment clause analysis. As with California’s free exercise clause doctrine, federal establishment clause doctrine permits only indirect government aid to religion.\textsuperscript{258} The types of aid that are deemed indirect, however, have varied from case to case. For example, the United States Supreme Court has upheld loans of textbooks to parochial schools,\textsuperscript{259} while invalidating loans of maps to parochial school;\textsuperscript{260} it has upheld state tax deductions for the parents of parochial schoolchildren,\textsuperscript{261} while invalidating tax credits for the parents of parochial schoolchildren.\textsuperscript{262} In addition, the Supreme Court’s loose definition of indirect aid allowed the religious display at issue in \textit{Lynch}.\textsuperscript{263}

Attempting to resolve these ambiguities in \textit{Priest}, the California Supreme Court recently limited the scope of permissible aid under article XVI, section 5 of the California Constitution.\textsuperscript{264} In \textit{California Teachers Association v. Riles},\textsuperscript{265} decided in 1981, the California Supreme Court overturned a statute authorizing public school districts to loan secular textbooks to parochial school students. The court held that the plan violated article XVI, section 5 by providing public aid to a religious institution.\textsuperscript{266} The court refused to follow the United States Supreme Court’s decision in \textit{Board of Education v. Allen},\textsuperscript{267} which upheld a statute authorizing similar textbook loans.\textsuperscript{268} The Supreme Court in \textit{Allen} reasoned that the government could constitutionally aid parochial schools in per-

\begin{itemize}
\item \textsuperscript{257} See supra text accompanying note 241.
\item \textsuperscript{258} See Meek v. Pittenger, 421 U.S. 349, 364-65 (1975).
\item \textsuperscript{259} See Board of Educ. v. Allen, 392 U.S. 236, 248 (1968) (secular textbooks lent directly to the parochial students).
\item \textsuperscript{260} See Meek v. Pittenger, 421 U.S. 349, 366 (1975) (instructional materials lent directly to parochial schools).
\item \textsuperscript{261} Mueller v. Allen, 463 U.S. 388, 396-402 (1983) (deduction for tuition, textbooks, and transportation available to all parents for expenses of public or private school incurred by choice of parents, not of state).
\item \textsuperscript{262} Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 789-94 (1973) (state’s resulting loss of revenue constitutes an effective charge upon the state for the purpose of religious education).
\item \textsuperscript{263} Lynch v. Donnelly, 104 S. Ct. 1355, 1364 (1984) (plurality opinion); see supra notes 98-104 & accompanying text.
\item \textsuperscript{265} 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).
\item \textsuperscript{266} Id. at 813, 632 P.2d at 964, 176 Cal. Rptr. at 311.
\item \textsuperscript{267} 392 U.S. 236 (1968).
\item \textsuperscript{268} Riles, 29 Cal. 3d at 812, 632 P.2d at 963, 176 Cal. Rptr at 310.
\end{itemize}
forming the mission of secular education.\textsuperscript{269}

Writing for the majority in \textit{Riles}, Justice Mosk reviewed many federal decisions on public aid to parochial schools, but was unable to harmonize their holdings.\textsuperscript{270} In his view, the United States Supreme Court had erred by focusing primarily on the secular benefit that the challenged government activity provided to the children.\textsuperscript{271} Justice Mosk stated that the nature of the aid to religion was an equally important factor.\textsuperscript{272} As a result, the \textit{Riles} decision established a two-part test for analyzing the validity of government aid under article XVI, section 5. A California court must first examine whether the aid to religion is direct or indirect, and second, consider the nature of the aid.\textsuperscript{273} Regardless of whether the aid is direct or indirect, government aid that possesses doctrinal content or advances an essential objective of a sectarian institution confers an impermissible benefit upon religion in violation of article XVI, section 5.\textsuperscript{274} To illustrate this point, the court distinguished textbook loans, which impermissibly advance parochial school education, from police and fire protection, “‘which are indisputably marked off from the religious function.’”\textsuperscript{275} While the court also found that the textbook loan directly aided sectarian schools, the court downplayed the importance of this inquiry and primarily focused on the nature of the aid in finding the textbook loan impermissible.\textsuperscript{276}

Although \textit{Riles} was decided in a parochial school context, the ration-

\textsuperscript{269} See Allen, 392 U.S. at 245.
\textsuperscript{270} \textit{Riles}, 29 Cal. 3d at 807-08, 632 P.2d at 960-61, 176 Cal. Rptr. at 307-08.
\textsuperscript{271} \textit{Id.} at 807-09, 632 P.2d at 960-62, 176 Cal. Rptr. at 307-09. Other state courts have similarly used independent state grounds to invalidate state aid to parochial schools when they perceived that federal protections against government aid to religion were too weak. \textit{See}, e.g., Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971) (prohibiting transportation of parochial students aboard public school buses), \textit{cert. denied}, 406 U.S. 957 (1972). The majority in \textit{Epeldi} observed that “it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution.” \textit{Id.} at 395, 488 P.2d at 865; \textit{see also} \textit{Gaffney v. State Dep’t of Educ.}, 192 Neb. 358, 220 N.W.2d 550 (1974) (prohibiting textbook loans to parochial school students). The \textit{Gaffney} court noted, “There is no ambiguity in our constitutional provision [prohibiting aid to sectarian schools]. The impact of the language and its purpose can be understood by any literate person. The standards are not secular purpose, primary aid, or political divisiveness and state-church entanglement.” \textit{Id.} at 362, 220 N.W.2d at 555 (citation omitted).
\textsuperscript{272} \textit{Riles}, 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} The court emphasized that “not all expenditures directly for the benefit of sectarian schools are prohibited . . . and not all expenditures for the immediate benefit of children are valid.” \textit{Id.} at 811, 632 P.2d at 963, 176 Cal. Rptr. at 310.
\textsuperscript{275} \textit{See id.} at 811-12, 632 P.2d at 963, 176 Cal. Rptr at 310 (quoting \textit{Everson v. Board of Educ.}, 330 U.S. 1, 18 (1947)). As one writer observed, “The key is to determine whether a particular form of aid has doctrinal content.” \textit{Note}, California Teachers Association v. \textit{Riles: Textbook Loans to Sectarian Schools}, 70 CALIF. L. REV. 959, 974 (1982).
\textsuperscript{276} \textit{Riles}, 29 Cal. 3d at 812, 632 P.2d at 963, 176 Cal. Rptr. at 310 (quoting \textit{Everson v. Board of Educ.}, 330 U.S. 1, 18 (1947)).
ale of *Riles* seems equally applicable to public sponsorship of religious displays. Litigants have argued, with varying degrees of success, that the erection of religious displays serves secular purposes and only incidentally benefits religion. All religious displays however, possess doctrinal content. The religious nature of a creche, a cross, or the Ten Commandments cannot be gainsaid. It is the doctrinal importance of these displays that make them religious. As the California Supreme Court has noted: “Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus.”

Because religious displays possess a doctrinal character, government participation in their erection or maintenance is inconsistent with the rationale of *Riles* and thereby violates article XVI, section 5 of the California Constitution. By recognizing the importance of the character of government aid to religion, the *Riles* decision provides a substantial, additional barrier to government sponsorship of religious displays.

Conclusion

Chief Justice Burger’s opinion in *Lynch v. Donnelly* represents a radical departure from traditional establishment clause analysis. The decision in that case has drawn severe criticism from prominent constitutionalists. Professor Tribe has compared the *Lynch* decision to *Plessy v. Ferguson*. The Court has been accused of paying only “lip service” to traditional establishment clause analysis.

At one time, the United States Supreme Court was concerned with government sponsorship of religion and its tendency to constrain freedom of worship. Now the Supreme Court focuses on America’s religious heritage and discounts the symbolic benefit government sponsorship of


278. Fox v. City of Los Angeles, 22 Cal. 3d 792, 798, 587 P.2d 663, 668, 150 Cal. Rptr. 867, 870 (1978).

279. 104 S. Ct. 1355 (1984) (plurality opinion); see supra notes 94-107 & accompanying text.

280. See supra notes 5-6 & accompanying text.

281. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 162 (1984) (citing Plessy v. Ferguson, 163 U.S. 537, 543-52 (1896) (affirming the constitutional validity of the “separate but equal” doctrine)). In Professor Tribe’s opinion, the *Lynch* decision expressed the Court’s feeling that special government recognition of Christianity does not create an inferior status for nonadherents. Rather, if nonadherents feel their treatment is unequal, it is only because of the construction they place on the government’s acts. Tribe, supra, at 161-62.


283. See supra notes 66-68, 87 & accompanying text.
sacred religious symbols bestows on Christians.\textsuperscript{284}

In contrast to modern federal establishment clause doctrine, the California Supreme Court requires a stricter separation of church and state and protects freedom of worship for both majority and minority religionists. California courts repeatedly have relied upon the California Constitution to provide guarantees against state aid to religion in the face of federal ambiguity. Interpreting California's establishment clause, California's courts have required the state to avoid the appearance of religious partiality, have applied strict scrutiny to government activities that prefer one religion over others, and have affirmed the importance of political divisiveness as a factor in judging the validity of government actions.\textsuperscript{285}

Interpreting the California free exercise clause, the California Supreme Court has prohibited special government recognition of one religion when comparable recognition of all religions is not possible.\textsuperscript{286} Interpreting the general prohibition on state aid to religion contained in article XVI, section 5,\textsuperscript{287} the California Supreme Court has prohibited the government from granting to religion aid that possesses doctrinal content.\textsuperscript{288}

California law provides an array of protections absent under current federal interpretations of the federal Constitution. If other state courts interpret their constitutional provisions relating to freedom of religion as broadly as the California Supreme Court has interpreted its constitutional provisions, state constitutions will provide necessary protections at a time when the federal limits on government aid to religion are increasingly uncertain.\textsuperscript{289}

\textit{Harry Simon*}

\textsuperscript{284} See supra notes 116-19 & accompanying text.
\textsuperscript{285} See supra notes 165, 170 & accompanying text.
\textsuperscript{286} See supra notes 219-21 & accompanying text. In contrast, the Lynch decision allows special government recognition of one religion without regard to the interests of other religions.\textit{Lynch,} 104 S. Ct. at 1373-74 (Brennan, J., dissenting).
\textsuperscript{287} \textit{CAL. CONST.} art. XVI, § 5.
\textsuperscript{288} See supra notes 264-76 & accompanying text. In contrast, the Lynch decision allowed Pawtucket to erect and maintain a display illustrating a central tenet of the Christian religion.\textit{Lynch,} 104 S. Ct. at 1377 (Brennan, J., dissenting); see supra text accompanying note 96.
\textsuperscript{289} For a discussion of relevant state constitutional provisions that parallel California's constitutional provisions, see supra notes 10-13 & accompanying text.

* Member, Third Year Class.