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Religious Symbols and the Establishment of a National 'Religion'

by Janet L. Dolgin*

I. INTRODUCTION

In its last few terms, the Supreme Court has decided over a half-dozen major religion clause¹ cases.² While the Court has not jettisoned accepted modes of first amendment analysis, the decisions have involved an important, if subtle, shift regarding the place and significance of religion and religious identity in American life. The religion cases that the Court has decided in the past several years suggest an alteration in the tone, if not the method, of first amendment analysis. This alteration reflects, and is reflected in, changes in the larger society. Correlatively, the religion cases frame many concerns that extend beyond the first amendment, per se, to

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1. The religion clauses of the first amendment, applicable to the states through the fourteenth amendment, provide: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" U.S. CONST. amend. I, cls. 1, 2.

2. See, e.g., *Thornton v. Calder*, 472 U.S. 703 (1985) (striking down Connecticut statute requiring employers to free employees from working on employee's chosen Sabbath); *McCreary v. Stone*, 471 U.S. 83 (1985) (nativity scene case; a four to four decision upholding a Second Circuit decision that a municipality could not deny private citizens' group the right to place a nativity scene in a public park); *Jensen v. Quaring*, 472 U.S. 478 (1985) (right not to have a photograph on one's drivers license); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down an Alabama statute authorizing public school teachers to announce a minute of silence in class for "meditation or prayer"); *Aguilar v. Felton*, 472 U.S. 402 (1985) (holding unconstitutional New York City's use of Title I funds to pay certain private, including parochial, school teachers); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (holding unconstitutional use of school district's funds to finance special classes in private, including parochial, schools).

embrace politics, ideology,³ and the meanings of 'person' and 'group' in American society.⁴ This Article focuses on two recent Supreme Court religion clause cases, each of which required the Court to decipher and judge religious symbols from the perspective of the first amendment, and each of which addressed the meanings of 'person' and 'group' in American society.⁵

II. RELIGION, SYMBOLS, AND IDENTITY

The Supreme Court's rare attempts to define religion have been seriously inadequate.⁶ Even more rarely has the Court expressly considered the way Americans create, use, and alter symbols that refer to religious or other identities. Yet, both these concerns are vital to a careful rendering of most, if not all, first amendment religion clause decisions.

A. Definitions of Religion

The rarity of the Supreme Court's attempts to define religion in first amendment cases is not surprising. Religion is illusive and often cannot be distinguished from other aspects of the social order, such as politics, or from other aspects of personal life. Although the Court has been slow to define religion, it has assumed that religion is a *thing*, amenable to defini-

3. As used here, the term 'ideology' does not refer to an explicit set of political or religious beliefs. Rather, following the French anthropologist Louis Dumont, 'ideology' refers to the pervasive assumptions that ground a particular culture's notion of reality. L. DUMONT, *HOMO HIERARCHIANS* 263 n.1a (1967). See Dolgin & Magdoff, *The Invisible Event*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 351, 353 (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977) [hereinafter *The Invisible Event*].

4. Fundamental to every ideology are particular notions of 'person' and 'group.' The Western notion of the person as an autonomous individual, able to exist apart from any other individual or set of individuals, and the correlative Western notion of the group as but a collection of individuals are only one society's conceptions of person and group. See *The Invisible Event*, *supra* note 3, at 352-54; C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962). For instance, in traditional caste India, the smallest unit that could exist alone was not conceived to be the person, but *two* castes, in a structured relation to each other. Barnett, *Identity Choice and Caste Ideology in Contemporary South India*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 270, 279-80 (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977).

5. See *supra* note 3.

6. Early on, the Court suggested that religion had to be theistic. *Davis v. Beason*, 133 U.S. 333, 341-42 (1890). Later, the definition was broadened, though left implicit. In *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), and *United States v. Seeger*, 380 U.S. 163, 165-66 (1965), the Court allowed nontheistic beliefs to be classified as religious. In *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), the Court in dicta suggested a negative definition of religion when it said that Thoreau's beliefs were secular, not religious. See Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 *Geo. L.J.* 1519 (1983).

tion.⁷ Yet, the Court has not been able to pinpoint the essence of the 'thing.' In demarcating one primary aspect of religion, the Court has said that if there is a God, there is probably a religion,⁸ or, comparably, that a belief "parallel to that filled by the orthodox belief in God" signals a religion.⁹ To hedge its bets, however, the Court has added that even if such beliefs exist, there still may be no religion if the basic claim is "so bizarre as to be clearly nonreligious in motivation."¹⁰

That the Court has attempted to define religion as it has is not surprising since its view is the common sense, native¹¹ American view. It is the way most Americans would explain this aspect of their social reality. It is also not surprising that the Court has failed in its attempts to define religion as a thing. Religion and religious identities are not things but sets of relationships.¹² Moreover, these relationships may be similar to other relationships, such as kinship, nationality, and politics.¹³ The way the Court has handled religion belies its own attempts at definition. Once one realizes that the Court, in fact, treats religion as a set of relationships, not as a thing, attention can shift from the problem of definition per se to an examination of the changing uses and meanings of the relationships that occur during activities people consider religious.

B. Symbols and Religious Identity

Like religion, religious symbols are not simply things. As with any other symbol, consideration of perspective is necessary to understand adequately the meaning of a religious symbol. No symbol, religious or otherwise, has one meaning for everyone.¹⁴ The definition a person selects from available meanings depends on the use of the symbol for that person at a particular time and place.¹⁵ No symbol (no event, thing, representation,

7. See *supra* note 6.

8. 133 U.S. at 333.

9. 380 U.S. at 166.

10. *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 719 (1981).

11. 'Native' is used here as anthropologists use the term, not to refer exclusively to people born in a society, but to refer to people encultured in the ways of a particular society.

12. Dolgin, Kemnitzer & Schneider, *Introduction: "As People Express Their Lives, So They Are . . ."*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 3, 34-36 (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977) [hereinafter *As People Express Their Lives*].

13. Schneider, *Kinship, Nationality, and Religion in American Culture*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977) [hereinafter *Kinship*]; see *infra* notes 118-36 and accompanying text.

14. See *The Invisible Event*, *supra* note 3, at 351, 353.

15. See *As People Express Their Lives*, *supra* note 12, at 27-30.

relationship, activity)¹⁶ has meaning apart from use. Correlatively, a religious symbol, like any symbol, may have one set of meanings at one time, in one place or for one group, and other sets of meanings elsewhere or for other people.¹⁷ Religious symbols may have other, nonreligious referents. Whether the primary meaning of a symbol is religious or not will depend on context and may shift over time. A symbol that has religious meanings in one context may have little or nothing to do with religion when used in another context; for example, the cross of the Red Cross. Similarly, a symbol with religious meanings may bear some of those meanings for some people, even if used in a nonreligious context; for example, Santa Claus in the local department store.

Religious symbols, as such, tend almost by definition to be particularistic and sectarian. They signal identification with a group, whatever their concrete and specific message. The establishment clause would seem, among other things, to protect against the state's appropriating a religious symbol and endowing it with national significance. Correlatively, the free exercise clause would seem, among other things, to protect the right of the individual or the group to create and use partisan religious symbolism that suggests particularistic identifications. However, identification as a member of a religious group and identification as a national may become mutual substitutes because the apparently separate domains of religion and nationality in American culture are in certain important respects similar, or even identical.¹⁸

Recently, in dealing with religious symbolism from the perspective of the religion clauses, the Supreme Court has, in fact, treated religion as a set of relationships, while insisting at least implicitly that religion is a thing. The Court has avoided seriously considering the significance of perspective and context and, as a result, has failed to preserve the protections both the establishment and free exercise clauses afford. The Court's recent decisions in *Lynch v. Donnelly*,¹⁹ an establishment clause case, and in *Goldman v. Weinberger*,²⁰ a free exercise clause case, provide a useful and pointed contrast.

16. Throughout this paper, the word 'symbol' refers not to things per se, but to, for example, events, representations, relationships, and activities.

17. See *As People Express Their Lives*, *supra* note 12, at 27-30 (discussing primacy of meaning).

18. See *infra* notes 118-36 and accompanying text.

19. 465 U.S. 668 (1984).

20. 106 S. Ct. 1310 (1986).

III. RELIGIOUS SYMBOLS IN *Lynch v. Donnelly* AND *Goldman v. Weinberger*

In *Lynch v. Donnelly*, the Court allowed a city government to sponsor a Christmas display, including a nativity scene, the establishment clause notwithstanding. In *Goldman v. Weinberger*, the Court allowed the Air Force to prohibit an Orthodox Jewish officer from wearing a yarmulke while in uniform, the free exercise clause notwithstanding.

A. *Lynch v. Donnelly*

From a constitutional point of view, *Lynch* reaffirms the use of a three-prong test the Court set forth in *Lemon v. Kurtzman*²¹ for establishment clause cases. From a sociological point of view, the case sanctions governmental recognition of Christianity under the guise that Christian symbols are only part of an encompassing civil religion.²² From an anthropological point of view, the *Lynch* decision provides an evocative text, giving evidence of the creation of an American civil religion, replete with myth and ritual.²³

The Facts and the Lower Court Decisions. Each November, the city of Pawtucket, Rhode Island, set up a Christmas display.²⁴ In the front of the display sat a nativity scene that the city purchased in 1973,²⁵ which included lifesized figures of "kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling, near the manger in which the baby [lay], with arms spread in apparent benediction."²⁶

21. 403 U.S. 602 (1971). Under the *Lemon* test, a court will sustain an establishment clause challenge if the challenged statute has a secular purpose, has a primary effect *other than* to benefit or harm religion, and does not entail an excessive entanglement of church and state. *Id.* at 612-13.

22. See Note, *Lynch v. Donnelly: Our Christmas Will be Merry Still*, 36 MERCER L. REV. 409, 419 (1984). For discussions of 'civil religion,' see Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986); Bellah, *Civil Religion in America*, DAEDALUS, Winter 1967, at 21.

23. See *The Invisible Event*, *supra* note 3, at 355-58 (discussing the comparable use and development of myth and ritual in the celebration of the Fourth of July).

24. In 1980-81, the display contained a wishing well; Santa's house; carolers; a miniature 'village' with four houses and a church; five-pointed stars; wooden Christmas tree cutouts; a forty foot Christmas tree; reindeer pulling Santa's sleigh; a garland; the message "Season's Greetings;" cutout figures of clowns, a dancing elephant, a robot and a teddy bear; and the nativity scene at issue in the case. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1155 (D.R.I. 1981).

25. *Id.* at 1156. The crèche cost \$1365 in 1973. City workers assembled, removed, and stored the crèche each year. Also, a city electrician hooked up two spotlights that illuminated the crèche. The Parks Department estimated that these employees' services cost about \$20 per year out of the total \$4500 the Department spent on the entire display each year. *Id.*

26. *Id.* at 1155.

Plaintiffs were members of the American Civil Liberties Union²⁷ who, having repeatedly asked that the city remove the nativity scene from its display,²⁸ brought suit in 1980, alleging that the inclusion of the crèche constituted governmental support for Christianity, in violation of the establishment clause of the first amendment.²⁹

The trial court, finding that Christmas has religious significance and that the crèche is a religious symbol, applied the three-prong *Lemon* test³⁰ to ascertain whether the nativity scene violated the establishment clause.³¹ Judge Pettine, of the United States District Court for the District of Rhode Island, found that the city had not demonstrated that it had a secular purpose in erecting the crèche.³² Further, the court held that the crèche signaled an "official sponsorship" of Christian beliefs.³³ Finally, while finding that the *Lemon* test did not prohibit the administrative entanglement, the court did find that the nativity scene caused "political divisiveness."³⁴ The court concluded that by including the crèche in its Christmas display, the city of Pawtucket had violated the establishment clause.³⁵

The United States Court of Appeals for the First Circuit affirmed,³⁶ but set aside the *Lemon* test in favor of the strict scrutiny standard³⁷ that the Supreme Court had applied in *Larson v. Valente*.³⁸ The circuit court used this stricter test³⁹ because the case concerned an act that discriminated among religions rather than an act that treated all religions uniformly. Accepting the district court's finding that defendants had no legitimate secular purpose for including the nativity scene, the circuit court con-

27. *Id.* at 1153.

28. *Id.* at 1158 n.14.

29. *Id.* at 1156-57.

30. *See supra* note 21.

31. 525 F. Supp. at 1168.

32. *Id.* at 1173. The Court found the city to have effected "the view of its predominantly Christian citizens that it is a 'good thing' to have a crèche in a Christmas display, because it is a good thing to 'Keep Christ in Christmas.'" *Id.* (quoting the Pawtucket mayor's testimony).

33. *Id.* at 1178. The crèche was thereby found to have violated the "primary effect" prong of the *Lemon* test. *Id.* at 1174-78.

34. *Id.* at 1180.

35. *Id.*

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

37. *Id.* at 1034.

38. 456 U.S. 228 (1982) (striking down a state statute establishing special registration and reporting requirements for religious organizations receiving more than half their total contributions from nonmembers).

39. Under the *Larson* test, the questioned act or statute is unconstitutional unless it "is justified by a compelling governmental interest" and "is closely fitted to further that interest." 456 U.S. at 247.

cluded that ipso facto the city had not shown a compelling governmental interest in owning or using the crèche.⁴⁰ It was thus unnecessary to apply the second prong of the *Larson* test and to ask whether the act was closely fitted to a compelling interest.⁴¹

The Supreme Court Decision. In a five to four decision, the Supreme Court reversed.⁴² The Court's opinion, authored by Chief Justice Burger, relied on accepted forms of establishment clause analysis but suggested a new view⁴³ of the proper relation between church and state. Rejecting the notion that the Constitution requires a complete separation of church and state, Justice Burger asserted that "it affirmatively mandates accommodations, not merely tolerance, of all religions, and forbids hostility to any."⁴⁴ The opinion fails to recognize that this accommodationist position easily leads to a state-sponsored civil religion, built around and dependent upon the beliefs and practices of the majority Christian religion. The almost inevitable end is accommodation to the Christian religion and discrimination against all others.

In its analysis the majority rejected the First Circuit's use of the *Larson*⁴⁵ strict scrutiny standard and applied the *Lemon* test.⁴⁶ The Court's discussion of this choice, limited to a footnote, merely asserted that neither the display nor the crèche were "explicitly discriminatory in the sense contemplated in *Larson*."⁴⁷ That summary dismissal of the *Larson* standard suggests, as much as anything in the opinion, the Court's failure to consider perspective. The First Circuit was correct in concluding that the city's display of the crèche discriminated against non-Christians. That discrimination is not the mere consequence of the erection of a reli-

40. 691 F.2d at 1034.

41. *Id.*

42. 465 U.S. at 670.

43. Hints as to the accommodationist view the Court expressed in *Lynch* had begun to appear earlier in the history of the Burger Court. See *Walz v. Tax Commission*, 397 U.S. 664 (1970); Kurland, *The Religion Clauses of the Burger Court*, 34 CATH. U.L. REV. 1, 15-17 (1984).

44. 465 U.S. at 673.

45. 456 U.S. at 247.

46. Under the *Lemon* test, the Court found first that the city's use of the crèche "to celebrate the Holiday and to depict the origins of the Holiday" provided the requisite secular purpose, 465 U.S. at 681; second, that the crèche did not have a primary effect of advancing religion if compared with activities already declared constitutional, *Id.* at 682, such as Sunday Closing Laws, *McGowan v. Maryland*, 366 U.S. 420 (1961), and the use of public money to supply textbooks to students in church-sponsored schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); and third that, despite the district court's finding that the nativity scene created political divisiveness, the nativity scene did not involve an "excessive entanglement of religion and government," 465 U.S. at 685.

47. 465 U.S. at 687 n.13. In this footnote the Court limited *Larson* to "a statute or practice patently discriminatory on its face." *Id.*

gious object that happened to be central to one faith, but is equally a consequence of the centrality of Christianity, itself, to the American nation.⁴⁸ The implications of that fact were invisible to the Court, which apparently *presumed* that its insider's view encompassed the totality of Americans' experiences. One can readily compare the blinders the Court wore to those an earlier Supreme Court donned in *Plessy v. Ferguson*,⁴⁹ which created the doctrine of 'separate but equal.'

The Court was *not* asked whether it would be unconstitutional for a government to include an array of religious objects, representing different faiths, in a public display. This issue, however, seems closer to the question the Court actually considered than the real question before it. The real question before the Court was whether it was unconstitutional to include a key symbol of Christianity, the mainstream American religion, in a public display. The Court may have transformed the question before it because, as Justice Brennan suggested, Christmas seems "so familiar and agreeable."⁵⁰ The majority opinion, however, plays on the familiarity until it practically mandates the inclusion of Christianity in the definition of 'American.'

The Crèche, Civil Religion, and the Dangers of Lynch. Every nation-state develops a set of myths about the meaning of the nation, its history, and its people, and a corresponding set of rituals.⁵¹ Although such myths and rituals may be recited and acted out at important, historic, or commemorative moments,⁵² they are not saved exclusively for these significant events. People appropriate and transform these myths and rituals into an integral part of everyday life that informs people about what it means to be an 'American' (or a member of any other national group) and about who is marginal to that definition of self.

The majority opinion in *Lynch* invokes a set of American myths,⁵³ re-

48. Soon after the plaintiff filed suit in *Lynch*, Mayor Lynch held a press conference at the site of the crèche during which he almost explicitly linked American patriotism with Christianity. Mayor Lynch spoke of "patriotism, freedom and the Pawtucket tradition of a nativity scene," 525 F. Supp. at 1159, and pledged to fight the plaintiffs' efforts "to take Christ out of Christmas." *Id.*; Stewart, *Taking Christ Out of Christmas?*, 69 A.B.A. J. 1832, 1834 (1983). After the district court's ruling in *Donnelly v. Lynch*, Mayor Lynch formed the Citizens' Committee to Continue Christmas to ensure the continued display of the crèche in the Pawtucket park where the city erected its display. *Id.* at 1837.

49. 163 U.S. 537 (1896). See Tribe, *Equal Justice or Economic Efficiency?*, HARV. L. REV. 592, 610 (1985) (comparing the *Lynch* Court's balancing of the friendly Christmas spirit that the crèche created against the 'incidental' endorsement of one religion to the Court that 'found nothing evil' in the Jim Crow policy).

50. 465 U.S. at 696 (Brennan, J., dissenting).

51. See *The Invisible Event*, *supra* note 3.

52. *Id.* at 355-58.

53. As used here, the term 'myth' does not speak to the truth or falsity of the tales.

ifies them, and then uses them to construct a civil religion that becomes isomorphic with the celebration of Christianity. The text begins gently, recalling the continuing role of religion in American life since the eighteenth century.⁵⁴ Then, slowly, an equation develops that identifies the crèche with a host of events and objects that Americans value. First, the opinion equates Thanksgiving with Christmas, suggesting it would be silly to quibble and differentiate Thanksgiving, with "its theme of expressing thanks for divine aid," from Christmas, which bears a similar "religious significance."⁵⁵ The text then lists 'other examples' of America's "religious heritage" including the use of "In God We Trust" and "One nation under God," as well as public support for art galleries that include religious paintings, and the annual Presidential proclamation of a National Day of Prayer.⁵⁶ The *Lynch* opinion, which seems to use an expansive definition of religion, intimates that each instance noted is hardly distinguishable from the others, and that together, these instances of religion are equally neutral and equally 'American.' In short, the Court begins to define civil religion⁵⁷ to include particular sectarian symbols.

The remainder of the Court's opinion concerns a demonstration that the crèche at issue in the case is, like Thanksgiving or the National Gallery, a nonsectarian piece of Americana. The Court responded to Justice Brennan's accurate description of the crèche as the "re-creation of an event that lies at the heart of the Christian faith"⁵⁸ by characterizing the crèche as "passive," "like a painting."⁵⁹ "The display," continued the majority opinion, "engenders a friendly community spirit of good will in keeping with the season."⁶⁰ This is a serious misconstruction of the meaning of the crèche for religious Christians and non-Christians alike. In the Court's view, the crèche is essentially like Santa's reindeer or a Christmas tree. Although the Court *assumes* that this view is representative, in actuality it only represents the view of social insiders⁶¹ and those who do not find the crèche (or, by extension, Christian theology) to be ultimately meaningful. As Justice Brennan asserts in dissent, the public use and display of religious symbols *may* pass constitutional muster only when the symbols have been relegated to a "form of 'ceremonial deism' . . . because they have lost through rote and repetition any significant religious

Myth refers to stories and parts of stories that widely disseminated within a society, reflect a society's underlying ideology. See *supra* note 4; R. BARTHES, *MYTHOLOGIES* (1972).

54. 465 U.S. at 674.

55. *Id.* at 675.

56. *Id.* at 676-77.

57. See *supra* note 22.

58. 465 U.S. at 711 (Brennan, J., dissenting).

59. 465 U.S. at 685.

60. *Id.*

61. See *Tribe, supra* note 49, at 611.

content."⁶²

It may be that for a group of Americans,⁶³ Christian by identification and not religious in practice, the crèche has lost all its original meaning and has simply become another object heralding a winter 'holiday season.' Certainly, the majority opinion contends that Christmas is part of an innocuous and generalized civil religion.⁶⁴ Beyond this, however, the majority opinion carries a dangerous undercurrent. If the celebration of Christmas becomes an essential aspect of the celebration of American identity, then those who reject the celebration (or even those who reject the celebration in its public guise) can be excluded from the social fabric of 'America.'⁶⁵ Indeed, in *Lynch*, the Court at one point suggests that the crèche is not a religious object at all, but the representation of an historical event.⁶⁶ By extension, Christianity becomes not one religion among many but a 'national' religion with a unique historical veracity.

In short, the *Lynch* decision depends on placing the crèche outside the domain of significant religious symbols. This is done by demeaning the symbol (for example, equating the crèche with reindeer) or by entirely removing the symbol from the domain of religion and placing it in some other domain (for example, calling the crèche an historical representation or a harbinger of 'community spirit'). The Court thereby defines the crèche as an object that government can legitimately display.

Lynch officially takes the crèche outside the domain of religion, and places it within the domain of *civil* religion, a supposedly harmless and nonsectarian celebration of the American nation.⁶⁷ Yet, outside the fanciful world of the *Lynch* decision, the crèche remains a central embodiment of Christian theology for religious Christians and for many non-Christians.

Lynch suggests that those who reject the public display of a nativity scene are not simply rejecting a particular religion and a particular theology, but are in fact rejecting an American event, an American celebration, and are thereby defining themselves as potentially unpatriotic and dis-

62. 465 U.S. at 716 (Brennan, J., dissenting). Justice Brennan expressed some uncertainty even about the view that government can constitutionally recognize "'ceremonial deism.'" *Id.*

63. Members of this group could include, in addition to Christians, non-Christians who identify strongly with the social mainstream and do not feel marginal within the society.

64. 465 U.S. at 680.

65. See 465 U.S. at 717 (Brennan, J., dissenting) (asserting that the majority opinion's insistence that the crèche is merely an "unobjectionable part of our 'religious heritage'" brings us back to days when Justice Brewer "could arrogantly declare for the Court that 'this is a Christian nation.'").

66. 465 U.S. at 680 (characterizing the crèche as depicting "the historical origins" of this traditional event long recognized as a national holiday).

67. Mirsky, *supra* note 22; Bellah, *supra* note 22.

loyal outsiders, marginal to the national whole. The real danger of *Lynch* stems from the Court's basing its decision on a portrait of reality, more fictional than true. By characterizing the nativity scene in *Lynch* as secular, the Court removes the public display of the crèche from the scrutiny of the establishment clause. Yet, the crèche is, in fact, no less sectarian than it was before *Lynch*. Still evoking centuries of Christian symbolism, the crèche is now officially an 'American' symbol, declared to be a mere conveyor of seasonal good tidings. Those who refuse to applaud or appropriate the crèche in its public display risk being marked as pariahs or as refusing the American way of life. The real, almost unspeakable, danger of *Lynch* is that "being Christian,"—whether through birth or through the proper "code for conduct,"⁶⁸ including publicly accepting the crèche—can become synonymous with, or an essential aspect of, being American.

With some subtlety, *Lynch* suggests that although one need not be born a Christian to be an American, and that non-Christians need not actively convert to Christianity, the American civil religion, which portrays and celebrates American identity, includes public acceptance of the crèche, as of the flag or of the national anthem. If the crèche were the passive, nonsectarian object the Court describes, the danger would be nil.⁶⁹ It is not. For many Americans, if not for the five in the *Lynch* majority, the crèche represents Christian theology and Christian faith; after *Lynch*, Americans who refuse to participate in a civil religion that includes the crèche risk being accused of un-American behavior.

Lynch helps establish a putative civil religion, in fact based in sectarian symbolism. The decision supports the state's *establishment* of religion in a powerful and dangerous form. By insisting that the establishment clause is irrelevant because the crèche is not 'religious,' the Court supports the construction of a putatively civil religion founded in Christian symbolism and backed by the state. The establishment of religion the Court sanctioned in *Lynch* is opaque rather than transparent,⁷⁰ and is

68. *Kinship*, *supra* note 13, at 63 (describing American identity, national, religious, and familial, as built on a combination of "natural" ties, such as ties of "blood," and "code for conduct"). See *infra* notes 118-36 and accompanying text.

69. That possibility, that the Court's characterization of the crèche is prophetic, poses another potential danger. This is a danger to those religious Christians for whom the crèche is more than a substitute for Santa's sleigh and for whom the crèche represents a unique religious truth, providing the basis for a whole way of life.

70. See Lefebvre, *Ideology and the Sociology of Knowledge*, in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 255-56 (J. Dolgin, D. Kemnitzer & D. Schneider eds. 1977). Lefebvre uses the terms 'transparency' and 'opacity' to describe the relation in any social order between social consciousness and praxis. In a transparent situation, praxis is present and intelligible to social consciousness. In an opaque situation, 'mystical veils' disguise praxis from social consciousness. See K. MARX, *CAPITAL I: A CRITICAL*

thereby rendered more dangerous still.

B. Goldman v. Weinberger

Like *Lynch*, *Goldman* is concerned with a religious symbol. Unlike *Lynch*, the object at issue—the skull-cap or yarmulke worn by Orthodox Jewish males—does not represent the mainstream, Christian religion. Rather, the yarmulke is a symbol of difference and particularity.

The Facts and the Lower Court Decisions. In compliance with the requirements of Orthodox Judaism, Simcha Goldman wore a yarmulke before he entered the Air Force in 1977 and continued to wear a yarmulke after he joined the service.⁷¹ Goldman, a psychologist, entered the Air Force as a commissioned officer.⁷² He was stationed at March Air Force Base in Riverside, California, where he worked as a clinical psychologist at the Mental Health Clinic.⁷³

Goldman's yarmulke did not become an issue while he served in the Air Force until 1981 even though he wore it openly while in the health clinic and wore it, covered by his service cap, when outside.⁷⁴ In May 1981, the Hospital Commander, Colonel Gregory, informed Goldman that wearing the yarmulke violated Air Force Regulation (AFR) 35-10,⁷⁵ which prohibited anyone but "armed security police in the performance of their duties" from wearing headgear indoors.⁷⁶ Goldman explained his religious situation to Colonel Gregory and then asked that he be allowed to wear civilian clothing in order to avoid conflict with AFR 35-10. Colonel Gregory refused, and in June 1981 Goldman was given a letter of reprimand and threatened with court martial.⁷⁷ In July 1981, Goldman filed suit, challenging AFR 35-10 as violating, in his case, the free exercise clause of the first amendment.

The trial court granted the temporary restraining order and prelimi-

ANALYSIS OF CAPITALIST PRODUCTION 88-92 (S. Moore & E. Aveling, trans. 1867-1906).

71. *Goldman v. Secretary of Defense*, 530 F. Supp. 12, 13 (D.D.C. 1981).

72. In 1973, Goldman had been accepted into the Armed Forces Health Professions Scholarship Program. As a result, Goldman was placed on inactive reserve status while he completed his Ph.D. in psychology. During that time, he received a monthly stipend and an allowance for books, tuition, and other fees. In 1977, he entered active service, obliged to complete a year of active duty for each year of subsidized education. *Goldman*, 106 S. Ct. at 1311.

73. *Id.* at 1312.

74. *Id.*

75. 530 F. Supp. at 13.

76. 106 S. Ct. at 1312 (quoting AFR 35-10, ¶ 1-6.(h)(2)(f) (1980)).

77. 530 F. Supp. at 13. Before May 1981, Goldman had received high evaluations from superior officers in each of the categories, including the category of "Professional Qualities (attitude, dress, cooperation, bearing)." 734 F.2d at 1533.

nary injunction that Goldman requested,⁷⁸ and then, after a full hearing, granted a permanent injunction against the Air Force's insistence that Goldman remove his yarmulke while in uniform. The court rejected each party's request for application of a particular constitutional test⁷⁹ and concluded that the Air Force simply had the authority,⁸⁰ given the military interest in uniformity,⁸¹ to infringe Goldman's first amendment right to practice his religion.

Like the trial court, the court of appeals followed the Supreme Court's refusal in *Rostker v. Goldberg*⁸² to apply a specific test for judging the case. In determining "whether the restrictions on Goldman's right to exercise his religion were authorized and justified by the power of the military to regulate itself,"⁸³ however, the circuit court reversed and held for the government.⁸⁴ The circuit court decided that despite the guarantees of the free exercise clause, Goldman's "freedom to act"⁸⁵ could be constitutionally curtailed in light of the Air Force's interest in enforcement of the dress regulation. The court asserted explicitly that the Air Force's interest in uniformity was "in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement."⁸⁶ Admitting that the Air Force dress regulations were entirely arbitrary,⁸⁷ the circuit court declared that any exception to them would undercut the

78. 530 F. Supp. at 16.

79. Goldman asked the district court to apply the "compelling state interest test" that courts often use in free exercise clause cases. *Id.* at 15. The United States asked that the court apply the "rational relation" test. *Id.* at 15. The Supreme Court, however, had rejected the rational relation test in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a case concerning claims of gender discrimination under the Military Selective Service Act. 530 F. Supp. at 15.

80. 530 F. Supp. at 16 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). In *Rostker*, the Court stressed that the deference due congressional decisions about raising, supporting, and governing armies differs with regard to the force of the military authority being asserted. *Id.* In *Rostker*, a statute Congress enacted was at issue, while in *Goldman*, the Air Force had promulgated the regulation in question. *Id.* at 64; 106 S. Ct. at 1312.

81. The Air Force asserted, through an affidavit of Major General Emanuel, that AFR 35-10 supported a military interest in uniformity that was, in turn, needed to preserve the fighting ability of the service. 530 F. Supp. at 14, 16.

82. 453 U.S. at 57.

83. 734 F.2d at 1536.

84. *Id.* at 1532.

85. The Court revived an old distinction between the freedom to believe and the freedom to act under the free exercise clause, holding the first absolute and the second conditional. 734 F.2d at 1540-41. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (noting the difference between the protection of free religious belief and the protection of free religious action). *But see* *Sherbert v. Verner*, 374 U.S. 398 (1962) (mitigating the force of the belief/action distinction in first amendment religion cases by holding that only a compelling state interest could justify burdening the free exercise of religion).

86. 734 F.2d at 1540.

87. *Id.*

military purpose of strict enforcement, per se.⁸⁸

The Supreme Court Decision. The Supreme Court affirmed the circuit court in a five to four decision.⁸⁹ The majority opinion, authored by Justice Rehnquist and joined by Justices White, Powell, Stevens, and Chief Justice Burger, is an astonishing document that applies a "subrational-basis standard"⁹⁰ to the facts of the case. The opinion relies on deference courts owe to military decisions.⁹¹ The *Goldman* opinion asserts that judicial deference courts owe the military does not "render entirely nugatory in the military context the guarantees of the first amendment,"⁹² but that assertion has no apparent impact on the Court's reasoning in *Goldman*. The Court did not balance the significance of Goldman's claim; it is not even considered. The Court concludes starkly that if "appropriate military officials" decide upon a certain set of dress regulations, "they are under no constitutional mandate to abandon their considered professional judgment."⁹³

Goldman's right to practice his religion, a right AFR 35-10 undeniably and seriously curtailed,⁹⁴ was ignored by the Court's majority⁹⁵ who simply accepted the Air Force's unsubstantiated assertion that development of "the subordination of personal preferences and identities" is essential

88. The court of appeals denied a petition for a rehearing en banc; three judges dissented. 739 F.2d 657 (1st Cir. 1984) (en banc).

89. 106 S. Ct. at 1314. Both *Lynch* and *Goldman* were five to four decisions. The division of the Court in the two cases, although similar, was not identical. Justice Stevens held with the majority in *Goldman* but dissented in *Lynch*. Justice O'Connor dissented in *Goldman* but held with the majority in *Lynch*. In both cases Chief Justice Burger and Justices Rehnquist, White, and Powell were in the majority, while Justices Brennan, Marshall, and Blackmun dissented.

90. 106 S. Ct. at 1317 (Brennan, J., dissenting).

91. The Court in *Goldman* quoted the Court's assertion in *Rostker*, 453 U.S. at 70, that "[j]udicial deference is . . . at its apogee when legislative actions under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." The majority opinion in *Goldman* does not mitigate the force of the statement in application to *Goldman*, even though a statute Congress enacted was at issue in *Rostker*, while the Air Force promulgated the regulation at issue in *Goldman*. See *supra* note 80.

92. 106 S. Ct. at 1313.

93. *Id.* at 1314.

94. Agreeing with the district court on this point, though ultimately holding for the government, the appeals court stated, "[i]t is indisputable that covering his head is a protected part of Goldman's exercise of his religion." 734 F.2d at 1537.

95. Justice Stevens, concurring, attempted to rectify the Court's failure to consider Goldman's first amendment rights. Justice Stevens began his concurring opinion by noting that Captain Goldman's case was 'attractive,' that his devotion to Orthodox Judaism was "readily apparent," that the yarmulke has "religious significance for the wearer," and is not only "familiar and accepted," but also is a "symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism." 106 S. Ct. at 1314-15 (Stevens, J., concurring).

during peacetime and war to provide effective defense.⁹⁶ The Court concluded that:

to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, . . . military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.⁹⁷

The Yarmulke, Civil Religion, and the Dangers of *Goldman*.

Civil religion is not as clearly at issue in *Goldman* as in *Lynch*. *Goldman* is, however, the free exercise clause counterpart to the *Lynch* decision. *Lynch* stands for the establishment and protection of a civil religion based on Christian beliefs and symbols. *Goldman* implicitly protects that religion further by limiting, at least in one context, the freedom to don religious symbols that suggest marginality from the mainstream civil religion.

In fact, the *Goldman* case should never have reached the courts because the Air Force regulation at issue in the case explicitly denies that service dress must be absolutely uniform. AFR 35-10 reads in part:

Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad.⁹⁸

The yarmulke *Goldman* wore was not even arguably extreme, unusual, or faddish.⁹⁹

In addition, AFR 35-10 permits service personnel to wear religious items and clothing, including temple garments, crosses, and scapulars, if they are hidden, and also permits personnel to wear visible rings or bracelets that bear religious symbols.¹⁰⁰ The exception for rings and other such items of jewelry, but not for a yarmulke, as well as the visible/invisible

96. *Id.* at 1318-19. *See id.* at 1326 (O'Connor, J., dissenting) (arguing that "the Government can present no sufficiently convincing proof in this case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and *esprit de corps*").

97. *Id.* at 1314. *See id.* at 1317 (Brennan, J., dissenting) (claiming regulation does more than render military life 'objectionable' for petitioner; it erects "an almost absolute bar to the fulfillment of a religious duty").

98. AFR 35-10, ¶ 1-12a.(1) & (2) (1978) (quoted in 106 S. Ct. at 1318-19 (Brennan, J., dissenting)).

99. *See id.* at 1319 (Brennan, J., dissenting).

100. *Id.*

standard, is patently discriminatory. The inevitable effect of that standard, as Justice Brennan recognized in his dissenting opinion, is to allow "only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties."¹⁰¹

In its brief, the Government explicitly voiced a fear that upholding Goldman's claim would end in a wild array of religious items, representing marginal faiths, on the heads and shoulders of military personnel. The Government warned of a "rag-tag band of soldiers"¹⁰² and argued that permitting Goldman to wear a yarmulke would lead to a slippery slope of Sikh turbans, Yogi robes, and Rastafarian dreadlocks.¹⁰³ As Justice Brennan correctly recognized, however, none of these items were before the Court in the *Goldman* case.¹⁰⁴ The Government could not have legitimately feared that allowing yarmulkes would inevitably lead to anything else since the Court would have to judge each religious item at issue against the reasons behind the military's decision to prohibit that item.¹⁰⁵ Moreover, the Government's invoking turbans, robes, and dreadlocks and suggesting that these, along with yarmulkes, would produce a "rag-tag band of soldiers"¹⁰⁶ graphically illustrates the fear of marginality that lies behind the Court's decision in *Goldman*. This fear provides the answer to a question that puzzled Justice Brennan in his dissenting opinion. Why should it be the case, queried Justice Brennan, "that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs, is more troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other."¹⁰⁷ As Justice Brennan declared, "[b]oth standards are constitutionally suspect."¹⁰⁸ If the first standard seems more troublesome than the second, that can only be because of the assumption of a basic division between mainstream Christians and all others. Once this assumption is made, the concern be-

101. *Id.* at 1320 (emphasis in original).

102. *Id.* at 1319.

103. *Id.* (quoting Brief for Respondents, at 20).

104. *Id.*

105. *See id.* (noting reasonable bases for controlling dress in the military to include "functional utility, health and safety considerations, and the goal of a polished, professional appearance"). *Id.*

106. *Id.*

107. *Id.* at 1320 (emphasis in original). Justice Brennan's query arose in response to a concern expressed in Justice Stevens's concurrence, and more implicitly in the Court's majority opinion, that various minorities be treated fairly as compared with each other, and that, in particular, Orthodox Jews not be allowed to wear yarmulkes if Sikhs cannot wear turbans or Rastafarians cannot wear dreadlocks. *Id.*

108. *Id.*

comes equal protection of minority groups vis-a-vis *each other*, not vis-a-vis the majority. The protection of the first amendment, however, must extend equally to all groups, not equally to all minority groups at a common level lower than that extended the majority.

Both 'neutral standards' that Justice Brennan described, the first resulting in unequal treatment between Orthodox Jews and other minorities and the second in unequal treatment between Christians and all minority groups, are products of a concern with forms of dress, and by implication, of belief or behavior, considered outside the mainstream. The majority opinion must recognize that when such a concern leads to disparate treatment in a context that the free exercise clause protects, such treatment cannot be tolerated. In *Goldman*, the Court's response is that the military deserves judicial deference. That response, however, is clearly disingenuous when, as in *Goldman*, judicial deference really means a blind judiciary. The Court in *Goldman* did not apply an easier test to the military's 'neutral standard' than it would apply in a nonmilitary setting. The Court applied no standard at all. The Court noted the military's perceived need for uniformity¹⁰⁹ and thereby decided the case.¹¹⁰

In the first amendment context, there cannot be absolute judicial discretion in cases that concern the military.¹¹¹ The Court's decision in *Goldman*, however, is not the simple result of judicial deference. As the Government notes in its brief, wearing a yarmulke is an assertion of individuality and religious particularity.¹¹² More concretely, the wearer of a yarmulke differentiates himself from the Christian majority. To allow that kind of expression *in the military* is a forceful assertion that America tolerates difference.¹¹³ In a universe in which *Lynch* is the order of the day, however, this assertion of individuality and particularity is threatening. Such an assertion poses a danger to the civil religion con-

109. The government presented no convincing proof that allowing Goldman to wear his yarmulke would harm military discipline or spirit. *Id.* at 1326 (O'Connor, J., dissenting).

110. See *id.* at 1325 (arguing for a standard to determine first amendment claims in a military context by which the government must show that "unusually important interest is at stake" and that granting the exemption requested will do "substantial harm" to the military interest asserted).

111. Even the *Goldman* majority says that the first amendment is not nugatory in the military context. *Id.* at 1313. The opinion belies this assertion.

112. *Id.* at 1318 (Brennan, J., dissenting).

113. The legislative branch of the federal government has shown its disapproval of *Goldman* by adding amendments to both the House and Senate versions of legislation establishing military programs. The amendments would allow members of the armed services to wear religious apparel, including yarmulkes and turbans. The Senate amendment was recently passed by a fifty-five to forty-two vote after having been rejected last year. The Reagan administration, including the Department of Defense, opposes the amendment. In any case, Mr. Reagan has already said he will veto the legislation for other reasons. N.Y. Times, Sept. 26, 1987, at A7, col. 6.

structed and applauded in *Lynch*, a civil religion that demands uniformity and obedience.

IV. NATIONALITY AND RELIGION: IMPLICATIONS OF *Lynch* AND *Goldman*

A. *Identification with the National Order*

The civil religion that the Court portrayed in *Lynch* and reaffirmed in *Goldman* requires acceptance of 'Christianity' by all Americans.¹¹⁴ Correlatively, it precludes the assertion of religious, or ethnic, particularity.

The implications of *Lynch* and *Goldman* are serious. These cases suggest a shift in the level at which people must identify themselves and be identified by others in American society.¹¹⁵ Together, *Lynch* and *Goldman* suggest a move toward a unified national identity and away from the assertion of individuality or particularity at the level of the person or the group. A unified national identity replaces individual and group identities, and, as *Goldman* suggests, marginality from the unified whole becomes intolerable. Moreover, collective interests become identical with the interests of the state.¹¹⁶

The parameters of the new collective interests are discernable. *Lynch*, explicitly, and *Goldman*, implicitly, develop a myth of the state that identifies its interests with Christianity. According to *Lynch*, however, this form of Christianity is not religious, at least insofar as religion has anything to do with theology or with the realm of the sacred. Rather, the Court defines Christianity as a fact in the world, an historic truth,¹¹⁷ and its public representation is both neutral and passive.¹¹⁸

In *Lynch*, the Court explains that the problems that led to the inclusion of the religion clauses in the Constitution no longer exist: "We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgement of the [American] religious heritage."¹¹⁹ The Court is correct. What it fails to note, however, is that the danger of tangible interference from outsiders is being replaced by a threat from within: the threat of a national order, itself encompassing Christianity, with which everyone must identify.

114. "Christian" or "Christianity" (as apparently intended in *Lynch*) and as used in quotation marks here does not refer to a particular set of theological positions so much as to the mainstream, per se, which, of course, is predominantly white and Christian.

115. See *infra* notes 118-36 and accompanying text.

116. Exclusive identification of value with the state (rather than with the individual or with subgroups) is the ideal form according to the theory of fascism.

117. 465 U.S. at 680.

118. *Id.* at 685.

119. *Id.* at 686.

Lynch recharacterizes the crèche as a national, rather than a partisan, religious symbol and proclaims that the symbol encompasses all Americans. The Court's analysis shifts the crèche and its attendant symbolic values from the domain of religion to that of the nation. The Court can thereby refer to the crèche as a neutral symbol. That reference, sustained by the assumption that all truly national symbols are inclusive, is illusory. In short, the Court in *Lynch* moves freely between the domain of religion and that of nationality, identifying America with Christianity and at the same time calling for a primary identification at the level of the *nation rather than the group*.

The Court's recharacterizations are possible because there is an underlying similarity between religion and nationality in American culture. This similarity allows nationality and religion (as well as certain other apparently separate domains of the social order, such as kinship) to become substitutes for each other.

B. *The Similarity of Nationality and Religion in American Culture*

At the conscious level, Americans believe that nationality, religion, and kinship are separate domains of social life. Each concerns various forms of relationship, but none appears inevitably to entail the others. For instance, one's relationship as a cousin or a sibling appears separate from one's relationship as a Christian or a Jew or a Muslim, and these appear separate from one's relationship as an American. In fact, however, as the anthropologist David Schneider has shown, the ostensibly separate domains of kinship, religion and nationality are structured similarly in American culture.¹²⁰ Schneider's analysis reveals that the underlying cultural forms that define kinship, religion, and nationality in America are virtually identical. It is useful to present Schneider's analysis to understand the ease with which the Supreme Court in *Lynch* based a national 'religion' in sectarian symbols and then, in *Goldman*, called for the exclusivity of that 'religion.'

Americans¹²¹ conceive of themselves as autonomous individuals, related to various other autonomous individuals.¹²² In outlining the cultural forms underlying American conceptions of relationship, Schneider begins with kinship relationships.¹²³ "The distinctive features of the domain of kinship in American culture," writes Schneider, "can be abstracted from a consideration of the classification of the different kinds of relatives.

120. *Kinship*, *supra* note 13, at 63.

121. To some extent the underlying forms through which Americans understand relations of kinship, nationality, and religion are found in the West generally.

122. See *The Invisible Event*, *supra* note 3, at 353.

123. D. SCHNEIDER, *AMERICAN KINSHIP* (1968); *Kinship*, *supra* note 13.

There are two kinds of relatives in American culture: those related 'by blood,' and those related 'by marriage.'"¹²⁴

Relationships defined through blood, conceived to be a *natural* substance,¹²⁵ are a 'special instance' of the larger class of "the natural order of things" as defined in American culture.¹²⁶ A pattern of behavior or code for conduct distinguishes relationships through marriage or law. This is a 'special instance' of the larger class of 'the order of law' that, in American culture, is opposed to the order of nature.¹²⁷

The key symbol of American kinship is sexual intercourse. As Schneider writes, "love in the sense of sexual intercourse is a natural act with natural consequences, according to its cultural definition."¹²⁸ That is, relationships through blood stem from sexual intercourse. Moreover, love as sexual intercourse "stands for unity."¹²⁹ Spouses, related by marriage instead of blood, consummate their relationship through sexual intercourse. Other symbols of American kinship include love as contrasted with money, and home as contrasted with work. All the symbols of American kinship suggest unity, either of natural substance or of code for conduct.¹³⁰ All these symbols, to use Schneider's phrase, "provide for relationships of diffuse, enduring solidarity."¹³¹

Americans conceive of religious and national identifications similarly to the way they conceive of identifications based on kinship. The domains of religion and nationality are also arenas of diffuse, enduring solidarity.¹³² Moreover, both religions and national identifications concern relationships through natural substance and relationships through law. One can

124. *Kinship*, *supra* note 13, at 64. People related through marriage in American culture are indicatively called 'in-laws.'

125. As a cultural anthropologist, Schneider is not concerned with the scientific validity; that is, the truth, of the native theories he is examining. If the natives, here Americans, believe that relationships are created through blood, then, for the anthropologist, they are. Similarly, if ghosts exist for another group of natives, then for the cultural anthropologist studying that group of people, ghosts exist. SCHNEIDER, *supra* note 121, at 2-3.

126. *Kinship*, *supra* note 13, at 65.

127. Schneider charts the development of all kinship relationships in American culture from either relationship as natural substance or relationship as code for conduct as follows:

Relatives	Nature	Law
1. In Nature: the natural child, the illegitimate child, the natural mother, etc.	+	-
2. In-Law: Husband, wife, step-, in-law, etc.	-	+
3. By Blood: father, mother, brother, sister, uncle, aunt, etc.	+	-

Kinship, *supra* note 13, at 66.

128. *Id.*

129. *Id.*

130. *Id.* at 67.

131. *Id.*

132. *Id.* at 67-71.

be an American through natural substance by being born to American parents ('blood') or by being born on American soil ('mud'), or one can be an American through law, a process indicatively called 'naturalization.' As with kinship, relationships to the nation; for example, loyalty to and love for one's country, express diffuse, enduring solidarity.

The case for religion is slightly more complicated.¹³³ Schneider uses the examples of Christianity and Judaism to show that American religions concern relationships of diffuse, enduring solidarity which are defined through natural substance or through a code for conduct.¹³⁴ Perhaps an even better example is the Church of Jesus Christ for Latter-Day Saints (the Mormons) since this religion is native to America. The way Mormons conceive of themselves as Mormons exhibits an even closer parallel to American conceptions of kinship and nationality than appears in either Judaism or Christianity. Mormons are Mormons because they behave like Mormons and because they have Mormon blood.¹³⁵ Mormon blood can be obtained at birth or by going through the Mormon conversion process.

A non-Mormon who converts to Mormonism is said to undergo a trans-fusion, effected by the Holy Ghost, replacing non-Mormon with Mormon blood.¹³⁶ Moreover, Mormons conceive of themselves as members of one family with Jesus Christ, the "literal Son of God"¹³⁷ being the elder brother. Certainly, diffuse, enduring solidarity characterizes the Mormon community.

Because the apparently separate domains of nationality and religion have similar structures in American culture, it is possible to use symbols that pertain in one domain to represent relationships in the other. A symbol like the crèche, which, among other things, represents relationships of diffuse, enduring solidarity among Christians, can be shifted to another arena; for example, nationality, in which the same sentiments pertain. In that shift, however, the crèche does not necessarily lose its partisan representation. Rather, the diffuse, enduring solidarity asked of all Americans

133. In part, the case for religion is more complicated because most religions with which Americans identify long predated the colonization of America and developed in other countries and different cultures. The case of Mormonism, however, is especially significant because Mormonism is native to the United States, and, in Mormonism, the basic forms through which religious identity is understood are identical to those underlying relations of kinship in American culture. Dolgin, *Latter-day Sense and Substance* in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 519, 530-35 (I.I. Zaretsky & M.P. Leone eds. 1974) [hereinafter *Latter-day Sense and Substance*]. For Mormons, blood is a natural substance dividing all people into three groups. A person is a Mormon ("a descendant of the House of Israel"), a 'Gentile,' or a 'Negro.'

134. *Kinship*, *supra* note 13, at 69-70.

135. See *Latter-day Sense and Substance*, *supra* note 132, at 530-31.

136. B.R. McCONKIE, MORMON DOCTRINE 390 (1966).

137. *Id.* at 129.

may become exclusive and particularistic. While previous identification with the crèche signalled identification as a Christian, *Lynch* suggests that identification as an American requires identification with this symbol. The Court's justification for the transfer is largely bogus. To non-Christians¹³⁸ the crèche is neither neutral nor passive.¹³⁹ It specifically represents Christianity and Christian theology and the marginality of non-Christians to the mainstream American religion. By delineating and demanding a collective 'Christian' identity at the level of the nation, *Lynch* suggests that Christianity and the American nation become one, that similarity replace particularity, and that the nation replace the individual as the ultimate locus of value.

Lynch establishes a national 'Christian' religion that combines the power of the state with the power of the insider. *Goldman* suggests the consequences for those who continue to display particularity. In the end, the civil religion supported in *Lynch* and reaffirmed in *Goldman* is neither civil nor a religion. Rather, it is a state ideology grounded in Christian forms but not in Christian theology. These cases combine the myths of the nation with Christian symbolic forms, unite the collective interests of the 'insider' with those of the state, and preclude all who disagree.

138. The crèche remains an important religious symbol for religious Christians as well.

139. See *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984).