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Notes and Comments

Lynch v. Donnelly: One Giant Step Over the Wall?

I. Introduction

In *Lynch v. Donnelly*,[1] the Supreme Court upheld the inclusion of a nativity scene in a Christmas holiday display funded by the City of Pawtucket, Rhode Island. In reversing the district and circuit court decisions, the Court's inquiry focused on the crèche in the context of the celebration of a national holiday, Christmas, rather than on the scene's religious significance.[2] The Court concluded that inclusion of the crèche did not advance religion more than other prior official acknowledgements of religion by all branches of government.[3] In addition, the Court stated that the display had a secular purpose, and that Pawtucket had neither impermissibly advanced religion nor fostered excessive entanglement between religion and government as a consequence of including a crèche in its holiday display.[4]

In a five to four decision,[5] the Court appears to have continued a recent trend toward accommodation between church and state.[6] Indeed, the Court interprets the Constitution as "affirmatively [mandating] accommodation."[7] The Court explicitly rejected an interpretation requiring complete separation of church

1. 104 S. Ct. 1355 (1984).
2. *Id.* at 1362.
3. *Id.* at 1360-61.
4. *Id.* at 1365.
5. The plurality opinion was written by Chief Justice Burger and joined by Justices White, Powell, and Rehnquist. Justice O'Connor joined in the holding but filed her own concurrence. The dissenting opinion was written by Justice Brennan, and joined by Justices Marshall, Blackmun and Stevens.
6. *See infra* notes 35-46 and accompanying text.
7. Lynch v. Donnelly, 104 S. Ct. at 1359.

and state,[8] thus repudiating the "wall between church and state" approach articulated in previous decisions.[9]

Part II of this Note examines earlier establishment clause cases and the recurrent themes that have emerged from these decisions. Part III discusses the current standards and the *Lemon v. Kurtzman* test,[10] which has been used by the Court as the standard to be applied in cases challenging state action as violative of the establishment clause. Part IV sets out the facts and lower court decision in *Lynch v. Donnelly*. Part V sets forth the Supreme Court's decision. Part VI analyzes the plurality's use of precedent and its national holiday rationale. Finally, this Note concludes that the *Lynch* decision may have far reaching consequences. First, the decision sanctions certain government involvement with religious displays and religious institutions. The scope of this sanction, however, is unclear. Second, the authoritativeness of the *Lemon* test is substantially weakened by the Court's reasoning. Third, given the weakened establishment clause standard and the Court's reemphasis of its unwillingness to be confined to any single test, it appears that future establishment clause cases will be decided on a case by case basis.

II. Background

The Constitution guarantees that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[11] The search for the historic purpose of this language has yielded inconclusive results.[12] The United

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8. *Id.*

9. *See* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). *See also infra* notes 21-31 and accompanying text.

10. 403 U.S. 602 (1971). *See infra* notes 47-72 and accompanying text for a discussion of the *Lemon* test.

11. U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

12. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 816 (1978). *See also* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 1029 (2d ed. 1983). The authors all conclude that a study of history reveals no clear meaning of the establishment clause.

Although it is true that many colonists fled religious persecution, their experiences differed widely in the colonies. In Virginia, Thomas Jefferson and James Madison led a continuing fight against continued aid to religion. In other states, however, close ties existed between church and state. Indeed, a number of states had established churches

States Supreme Court, however, has attached great significance to the views of James Madison and Thomas Jefferson in defining the historical purpose of the religious clauses and in fixing the meaning of the establishment limitation.[13] Madison's view was that both religion and government function best when each remains independent of the other.[14] Echoing this approach, Jefferson wrote that the effect of the amendment was to establish "a wall of separation between church and state."[15]

Three broad themes emerge from earlier Supreme Court cases interpreting the establishment clause.[16] One theme advocates strict separation of church and state.[17] The second theme urges that government remain neutral in religious matters.[18] Finally, more recent decisions imply a need for government accom-

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until after the revolution. *See* J. NOWAK, *supra*, at 1030.

Some commentators have interpreted the establishment clause as a limitation on the federal government's sovereignty over religious matters, thus leaving these matters to the individual states. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1553 n.1 (10th ed. 1980); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833); Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U.L. REV. 151, 183 (1981).

13. *See* P. KAUPER, RELIGION AND THE CONSTITUTION 47 (1964). *See also* Everson v. Board of Educ., 330 U.S. 1, 11-14 (1947); Reynolds v. United States, 98 U.S. 145, 163-64 (1878).

14. L. TRIBE, *supra* note 9, at 819. James Madison stated that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." THE COMPLETE MADISON, HIS BASIC WRITINGS 306 (S. Padover ed. 1973).

15. Letter from Thomas Jefferson to Nehemiah Dodge and others, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* T. JEFFERSON, THE PORTABLE THOMAS JEFFERSON 303, 303 (M. Peterson ed. 1975). Jefferson asserted:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for this faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Id.

16. *See* P. KAUPER, *supra* note 13, at 59; *cf.* Comment, *Publicly-Funded Display of Religious Symbols: The Nativity Scene Controversy*, 51 U. CIN. L. REV. 353, 354 (1982) (citing only two themes, combining the strict separation and neutrality approaches).

17. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 212 (1947); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1946). *See also infra* notes 21-31 and accompanying text.

18. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963). *See also infra* notes 32-34 and accompanying text.

modation of religion.[19] The failure to adopt a consistent approach is evident in cases that purport to apply the strict separation approach.[20]

A. *Strict Separation of Church and State*

The stern approach to the establishment clause requires strict separation of church and state and therefore forbids government action in support of religion.[21] This fundamental concept of strict separation of church and state found its first notable expression in *Everson v. Board of Education.*[22] *Everson* sustained the constitutionality of a New Jersey law providing free bus transportation to school children, including pupils of parochial schools.[23] The Court concluded that this statute was a valid general-public welfare measure designed to safeguard school children traveling between their homes and schools.[24]

Justice Black, writing for the majority, interpreted the establishment clause to mean at least that

> [n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[25]

Justice Black concluded that the first amendment erected a high and impregnable wall which cannot be breached.[26] This wall was not breached in *Everson* because the purpose of the legislation — safety of school children on their way to and from

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19. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668-72 (1970); Zorach v. Clausen, 343 U.S. 306, 312-13 (1952). *See also infra* notes 35-46 and accompanying text.

20. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding constitutionality of a New Jersey statute that provided free bus transportation for parochial school students).

21. P. KAUPER, *supra* note 13, at 59. According to Professor Kauper, the key to this approach, which emerged from Everson v. Board of Educ., 330 U.S. 1 (1947), is that "government cannot by its programs, policies, or laws do anything to aid or support religion or religious activities." P. KAUPER, *supra* note 13, at 61.

22. 330 U.S. 1 (1947).

23. *Id.* at 18.

24. *Id.* at 16-18. The Court upheld the statute even though parochial schools indirectly benefited from it.

25. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

26. Everson v. Board of Educ., 330 U.S. at 18.

school — was sufficiently secular.[27] The religious institution derived no direct benefit.

In *McCollum v. Board of Education*,[28] the Court applied the strict separation standard of *Everson* and held that a released-time program, which utilized public school classrooms for religious instruction, was unconstitutional.[29] The Court concluded that the state provided an impermissible aid to sectarian groups by providing pupils for religious classes through the use of the state's compulsory attendance laws.[30] The "First Amendment has erected a wall between church and state which must be kept high and impregnable."[31]

B. *Neutrality*

The neutrality theme of the establishment clause requires that government conduct have a secular purpose and a primary effect that neither advances nor inhibits religion.[32] The Court affirmed this principle in *Abington School District v. Schempp*,[33] which involved a first amendment challenge to a Pennsylvania statute that required a reading from the Bible and a recitation of the Lord's Prayer at the opening of the school day. Justice Clark, writing for the Court, concluded that these religious exercises required by the state were in violation of the first amendment's command that government maintain strict neutrality, neither aiding nor opposing religion.[34]

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27. *Id.* at 16-18. The four dissenting Justices in *Everson* agreed with the majority's reasoning regarding strict separation, but they concluded that the New Jersey statute breached this standard. The state was promoting religion by providing public money to defray the costs of parochial education. *Id* at 45-46.

28. 333 U.S. 203 (1948).

29. *Id.* at 212.

30. *Id.*

31. *Id.*

32. P. KAUPER, *supra* note 13, at 64-67. The critical difference between the strict separation approach and the neutrality approach is that the strict separation approach is directed only at inquiring whether government is acting in aid of religion. In contrast, the neutrality approach is additionally concerned with whether government laws or programs hinder religion. *Id.* at 66-67. *See generally* McGowan v. Maryland, 366 U.S. 420, 445 (1961) (upholding Sunday closing laws).

33. 374 U.S. 203 (1963).

34. *Id.* at 226. If the purpose or primary effect of the government action is either the advancement or the inhibition of religion, then the enactment exceeds legislative power. *Id.* at 222.

C. *Accommodation*

Before *Lynch v. Donnelly*[35] the Supreme Court did not explicitly endorse the accommodation approach.[36] Recent decisions, however, reflect the emerging view that government conduct acknowledging or benefiting religion is not a per se violation of the establishment clause.[37]

The approach of the Court in *Zorach v. Clauson*[38] evidences a recognition of the interrelationship between church and state and permits government to accommodate the religious interests of the people.[39] In *Zorach*, the Court upheld the constitutionality of a released-time program in which students left the school buildings and grounds for religious instruction at religious centers.[40] The Court found that by adjusting the schedule of public events to sectarian needs, the state respects the "religious nature of our people . . . [and] . . . accommodates the public service to their religious needs."[41]

Even though Sunday remains a day of religious significance for many, in *McGowan v. Maryland*[42] the Court upheld the constitutionality of Sunday closing laws.[43] Reasoning that the statutes had a secular purpose, namely providing for a uniform day of rest, the Court acknowledged that the concerns of religion and government may overlap.[44] Indeed, in upholding property tax exemptions for properties used solely for religious purposes,

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35. 104 S. Ct. 1355 (1984).

36. Prior decisions recognized the interrelationship between church and state. *See infra* notes 38-41 and accompanying text. However, the *Lynch* decision represents the first time the Court has interpreted the Constitution as mandating accommodation between church and state. *See* Lynch v. Donnelly, 104 S. Ct. at 1359.

37. *See* Hunt v. McNair, 413 U.S. 734 (1973) (upholding constitutionality of a plan by which church-related colleges were permitted to borrow money, at favorable rates of interest, for the purpose of constructing buildings for secular use); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding a federal statute that made federal grants for construction of buildings available to sectarian colleges); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for buildings used for religious worship).

38. 343 U.S. 306 (1952).

39. *Id.* at 312-14.

40. *Id.* at 315.

41. *Id.* at 313-14.

42. 366 U.S. 420 (1961).

43. *Id.* at 452.

44. *Id.* at 461-62.

the Court, in *Walz v. Tax Commission*,[45] stated that "[n]o perfect or absolute separation is really possible."[46]

III. Current Standards

A. *The* Lemon v. Kurtzman *Test*

The analyses in *McGowan v. Maryland*,[47] *Abington School District v. Schempp*,[48] and *Walz v. Tax Commission*[49] were combined in *Lemon v. Kurtzman*[50] to form the current establishment clause test.[51] The three-prong test provides that state action will survive an establishment clause challenge if (1) it has a secular purpose; (2) it has a primary effect that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion.[52] Applying this test, the Court in *Lemon* held unconstitutional Rhode Island and Pennsylvania statutes that provided salary supplements to teachers in private schools.[53] The Court determined that the statutes did have a secular purpose, namely to enhance the qual-

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45. 397 U.S. 664 (1970) (upholding constitutionality of a New York statute granting property tax exemptions to property used solely for religious worship).

46. *Id.* at 670.

47. 366 U.S. 420 (1961).

48. 374 U.S. 203 (1963).

49. 397 U.S. 664 (1970).

50. 403 U.S. 602 (1971).

51. McGowan v. Maryland, 366 U.S. 420 (1961), which upheld Sunday closing laws, was the Supreme Court's earliest articulation of what was later incorporated as the first prong of the modern establishment clause test. The state's secular purpose in providing a uniform day of rest overrode any indirect benefit derived by particular religious sects. *Id.* at 444-45.

In Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court required that, in addition to a secular purpose, the state action must have a primary effect that neither advances nor inhibits religion. *Id.* at 222. This was later incorporated as the second prong of the modern establishment clause test.

In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Court upheld a New York statute granting property tax exemptions to property used solely for religious worship. The Court reasoned that exempting this property would afford a lesser degree of governmental entanglement with religion than would taxing the organizations that owned the property. *Id.* at 674. This prohibition of excessive governmental entanglement with religious organizations became the final prong of the modern establishment clause test.

52. Lemon v. Kurtzman, 403 U.S. at 612-13.

53. *Id.* at 625. In addition to supplementing teachers' salaries, the Pennsylvania statute reimbursed the schools for the cost of textbooks and instructional materials in specified secular subjects. *Id.* at 626.

ity of secular education in all schools covered by the compulsory attendance law.[54] The Court declined to decide whether the primary effect of the statutes was to advance religion.[55] Nevertheless, it struck the statutes down because their cumulative effect was to foster an excessive entanglement between government and religion.[56]

In applying the first prong of the *Lemon* test, namely the requirement of secular purpose, courts are usually willing to defer to the stated purpose of the government conduct.[57] There are, however, some notable exceptions to this policy of deference.[58] These cases generally involve the use of patently religious

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54. *Id.* at 613.

55. *Id.* at 613-14.

56. *Id.* at 614. The Court concluded that the statute required continuing government control and surveillance by state authorities in order to ensure that state aid supported only secular education. This continuing involvement constituted excessive entanglement between government and religion. *Id.* at 619.

57. In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court considered a constitutional challenge to a New York State statute with the stated purpose of preserving a healthy and safe environment for all school children. *Id.* at 773. The statute provided for maintenance and repair grants to nonpublic schools and tuition reimbursements or tax relief to parents whose children attended nonpublic schools. *Id.* at 762-67. However, although acknowledging the secular legitimacy of the state purpose, the Court nevertheless found the statute violative of the effect prong of the *Lemon* test. *Id.* at 780-89.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court noted that the stated purpose of Pennsylvania and Rhode Island statutes providing salary supplements to teachers in nonpublic schools was to enhance the quality of secular education in all schools covered by compulsory attendance laws. *Id.* at 613. However, the statutes were held unconstitutional based on the entanglement prong. *See supra* note 56 and accompanying text.

In Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), the school district's stated purpose for the singing of Christmas carols at holiday assembly programs was the advancement of the students' knowledge of the role of religion in the cultural development of civilization. *Id.* at 1314. The court held this was not a violation of either the establishment clause or the free exercise clause. *Id.* at 1318-19.

In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973), the court held that the inclusion of a nativity scene in a holiday display on a public parkland had a secular purpose, namely to bolster tourism and to commemorate the traditional and historic aspects of the national holiday of Christmas. *Id.* at 69. Despite this secular purpose, the action violated the entanglement prong of the test. *Id.* at 67.

58. In Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court rejected the argument that Bible readings could be justified as an effort to promote the secular purpose of teaching moral values. *Id.* at 223-24.

In Gilfellan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1981), *cert. denied*, 451 U.S. 987 (1981), the city financed the construction of a platform for the celebration of a

symbols.[59] Thus, for example, the Supreme Court in *Stone v. Graham*[60] reversed a state court judgment that upheld a law requiring that plaques displaying the Ten Commandments be posted in every public schoolroom. The avowed secular purpose was to illustrate the significance of the Ten Commandments in the development of Western legal codes and law.[61] The Court stated that the Ten Commandments is "undeniably a sacred text," and that "no legislative recitation of supposed secular purposes can blind us to the fact."[62] Therefore, the Court concluded that the preeminent purpose was plainly religious in nature.[63]

Government action must have a primary effect that neither advances nor inhibits religion in order to satisfy the second prong of the *Lemon* test.[64] The Supreme Court has upheld state action when the primary effect does not advance religion although some benefit may be derived by a religious organization.[65] In *Committee for Public Education & Religious Liberty*

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papal mass. Rejecting the city's contention that the platform was erected as a safety measure, the court held that this was only an incidental secular purpose, and therefore, the action violated the establishment clause. *Id.* at 934.

In Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the court held that North Carolina's use of a nondenominational prayer on the reverse side of the official state map violated the establishment clause. The stated purpose was to promote highway safety. The court concluded that the prayer was undeniably religious in nature and the state, under the establishment clause, was prohibited from employing religious means when secular means were sufficient. *Id.* at 1020.

In Lowe v. City of Eugene, 254 Or. 539, 463 P.2d 360 (1969), *appeal dismissed sub. nom.*, Eugene Sand and Gravel v. Lowe, 397 U.S. 591 (1970), *cert. denied*, 397 U.S. 1042 (1970), the court held the placing of a lighted cross in a city park violated the establishment clause. Although the avowed purpose was to promote business in the downtown area during the Christmas season, the court held this insufficient, reasoning that the primary purpose was to give preferential treatment to the religious symbol of the majority. *Id.*, 463 P.2d at 362.

59. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (state required prayers at the opening of the school day); Lowe v. City of Eugene, 254 Or. 539, 463 P.2d 360 (1969), *appeal dismissed sub. nom.* Eugene Sand and Gravel v. Lowe, 397 U.S. 591 (1970), *cert. denied*, 397 U.S. 1042 (1970) (city erected a lighted cross in a city park during the Christmas season).

60. 449 U.S. 39 (1980).

61. *Id.* at 41.

62. *Id.*

63. *Id.* at 41-43.

64. Lemon v. Kurtzman, 403 U.S. at 612. *See supra* text accompanying notes 55-56.

65. *See generally* Hunt v. McNair, 413 U.S. 734 (1973) (upholding constitutionality of a plan by which church-related colleges were permitted to borrow money, at favorable

v. Nyquist,[66] the Court explained that state action violates the effects test if it has the direct and immediate effect of advancing religion;[67] there is no violation when the effect is remotely and incidentally advantageous to religious institutions.[68]

After passing the secular purpose and the primary effect prongs of the *Lemon* test, the state action must, additionally, not foster an excessive entanglement with religion. This "excessive entanglement" prong measures the degree of involvement between church and state, and it prohibits state action that calls "for official and continuing surveillance leading to an impermissible entanglement."[69] In *Lemon v. Kurtzman*,[70] the Court also included a second part to the entanglement inquiry, namely whether the government action may result in intensified political fragmentation along religious lines.[71] In *Nyquist*, however, the Court concluded that although the prospect for political divisiveness along religious lines alone may not invalidate state action, it is "certainly a 'warning signal' not to be ignored."[72]

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rates of interest, for the purpose of constructing buildings for secular use); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding a federal statute that made federal grants for construction of buildings available to sectarian colleges); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for buildings used for religious worship).

66. 413 U.S. 756 (1973).

67. *Id.* at 774.

68. *Id.* at 774-89. When the government attempted to reimburse the parents of parochial school students for the tuition they paid, the religious schools became more attractive as an alternative to public education. This was held to be a direct benefit to the religious institution.

69. Walz v. Tax Comm'n, 397 U.S 664, 675 (1970). *See also* Lemon v. Kurtzman, 403 U.S. 602, 619-20 (1971).

70. 403 U.S. 602 (1971).

71. *Id.* at 623. Because the statutes permitting the salary supplements for private school teachers required annual appropriations, the Court feared that candidates and voters would be divided along religious lines. *Id.*

72. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973). Like the statutes in *Lemon*, the statutes involved in *Nyquist* also required annual appropriations to reimburse parents of private school children for tuition payments and to provide direct money grants to private schools for maintenance and equipment. Most of the schools involved were parochial schools. Once again the Court feared political divisiveness along religious lines as pressure increased for a larger amount of funds.

B. *Alternatives to* Lemon: *Strict Scrutiny and Historical Analysis*

In two recent establishment clause cases — *Larson v. Valente*[73] and *Marsh v. Chambers*[74] — the Supreme Court did not apply the three-part *Lemon* test.[75] *Larson* involved an establishment clause challenge to a Minnesota charitable solicitations act which provided that religious organizations receiving more than fifty percent of their total contributions from members or affiliated organizations were exempt from the registration and reporting requirements of the act.[76] The Court reasoned that the *Lemon* test was intended to apply only to laws affording uniform benefits to all religions and not to state action that discriminates among religions.[77] Instead, it held that *any* statute granting a denominational preference must be subject to strict scrutiny by the courts.[78] Applying strict scrutiny, the Court held the statute

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73. 456 U.S. 228 (1982).

74. 103 S. Ct. 3330 (1983).

75. In two other recent establishment clause decisions, however, the Court did apply the *Lemon* test. In Mueller v. Allen, 103 S. Ct. 3062 (1983), the Court upheld a Minnesota statute that allows state taxpayers, when computing their state income tax, to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending elementary or secondary school. *Id.* at 3065. The statute satisfied the purpose prong of the test because the tax deduction had a secular purpose, namely to ensure that the state's citizenry was well educated. Moreover, the deduction did not have the primary effect of advancing religion, because it was available to all parents whether their children attended private or public schools, and any benefit received by sectarian schools was incidental. *Id.* at 3066-68. Finally, the fact that, under the statute, state officials must determine whether particular textbooks qualify for tax deductions was held an insufficient basis for finding excessive entanglement. *Id.* at 3071.

In Larkin v. Grendel's Den, 459 U.S. 116 (1982), the Court held unconstitutional a Massachusetts statute that vested in the governing bodies of churches and schools the power to veto applications for licenses to sell liquor when the premises were within a 500 foot radius of the church or school. *Id.* at 117. The purpose prong of the *Lemon* test was violated because, in the Court's opinion, the avowed purpose, namely to protect the spiritual and educational centers from the danger associated with liquor serving establishments, could be accomplished by other means. *Id.* at 123-24. Because the veto power of the churches was standardless, the Court reasoned that this power could be exercised for explicitly religious goals. *Id.* at 125. Thus, the statute could have the primary and principal effect of advancing religion. *Id.* at 126. The statute also failed the entanglement prong. Zoning, the Court said, is traditionally a governmental function. By allowing churches to prevent the issuance of liquor licenses, the church became enmeshed in the process of government. *Id.* at 126-27.

76. Larson v. Valente, 456 U.S. at 230.

77. *Id.* at 252.

78. *Id.* at 246.

unconstitutional because the state failed to show that the statute's fifty percent rule was closely tailored to the avowed state purpose of preventing fraudulent solicitations.[79]

In *Marsh*,[80] the Court applied neither the *Lemon* test nor the strict scrutiny approach of *Larson*. Rather, relying on an historical analysis, the Court approved the continuing use of a chaplain at legislative sessions in Nebraska.[81] Citing the continued use for over two hundred years of prayer in congressional sessions and other public bodies,[82] the Court noted that the practice "has become part of the fabric of our society."[83] As such, it is not an establishment of religion, but rather an "acknowledgement of beliefs widely held among the people of this country."[84]

IV. *Lynch v. Donnelly*

A. *Facts*

For over forty years the City of Pawtucket, Rhode Island set up and maintained traditional displays and decorations throughout the city during the Christmas season.[85] One such display was maintained by the city in Hodgson Park, which is privately owned property situated in the heart of Pawtucket's downtown commercial district.[86] Each year the city, with the owner's permission, entered Hodgson Park in November and erected a lighted Christmas display. The city owned the lights, figures, and buildings that made up the display.[87] The display included a nativity scene as well as a Santa's house, carolers, a lighted Christmas tree, and other traditional holiday symbols. The figures in the display, including those in the nativity scene, were life-sized.[88] When the crèche was first purchased, it cost $1365.00; erecting and dismantling the crèche cost the city ap-

79. *Id.* at 248-51.
80. 103 S. Ct. 3330 (1983).
81. *Id.* at 3335-37.
82. *Id.* at 3332-34.
83. *Id.* at 3336.
84. *Id.*
85. Lynch v. Donnelly, 104 S. Ct. 1355, 1358 (1984).
86. *Id.*
87. *Id.*
88. *Id.*

proximately twenty dollars per year. In addition, there was a minimal charge for the electricity that lit the scene.[89] City workers or city-paid contractors performed the set-up and dismantling work.[90]

One week before Christmas in 1980, the plaintiff taxpayers brought suit in federal district court against the city to enjoin the erection of the nativity scene as a violation of the establishment clause.[91]

B. *The Lower Court Decisions*

The district court found that including a nativity scene in a publicly funded Christmas display violated the establishment clause.[92] It began a consideration of the merits by rejecting the defendant's characterization of the nativity scene as a largely secular symbol which did not violate the establishment clause.[93] The court reasoned that because the scene is a direct representation of the Biblical account of the birth of Christ, it is more immediately connected to the religious meaning of Christmas than, for example, Santa Claus.[94] The court also rejected the city's argument that because Christmas has a secular dimension, the city is permitted to celebrate its sectarian as well as its secular aspects.[95]

The district court then continued to apply the *Lemon v. Kurtzman* test.[96] The court was not persuaded by the city's argument that the display had a primary purpose that was secu-

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89. *Id.*

90. Donnelly v. Lynch, 525 F. Supp. 1150, 1154-55 (D.R.I. 1981), *aff'd*, 691 F.2d 1059 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

91. *Id.* at 1154.

92. *Id.* at 1181.

93. *Id.* at 1165-68.

94. *Id.* at 1166.

95. *Id.* at 1164. The court stated that Christmas has a secular dimension exemplified by Santa Claus and such nontheological themes as good will, peace on earth, and commercialism. *Id.* at 1167. Despite this secular dimension, the court concluded that the holiday has not lost its religious significance. *Id.* at 1163. The court further indicated that "[a]s long as there are also strong secular elements, the government may involve itself with the activity *if* it limits itself to promoting only those elements." *Id.* at 1164 (emphasis in original).

96. *Id.* at 1168-80. *See supra* notes 47-52 and accompanying text for an explanation of the *Lemon* test.

lar — whether economic, traditional, or cultural.[97] Rather, the court concluded that by including a religious symbol in its display,[98] the city's purpose was to support and approve the majority's religious beliefs.[99] The court also found that the requirements of the primary effect prong of *Lemon* were not met.[100] The court determined that the appearance of official sponsorship of Christian beliefs that the crèche conveys, confers more than a remote and incidental benefit on Christianity.[101] Finally, the court found that there was no excessive entanglement between government and religious organizations.[102] However, the city's ownership and display of the nativity scene engendered division along religious lines.[103] This divisiveness alone would not have resulted in a finding of an establishment clause violation.[104] But this divisiveness, together with the court's earlier findings of an impermissible purpose and effect, led the court to conclude that the establishment clause had been violated.[105]

The First Circuit affirmed the lower court's decision.[106] Although it approved of the district court's application of the *Lemon* test,[107] the court of appeals relied on *Larson v. Valente*,[108] which was decided after the district court decision in *Lynch v. Donnelly*.[109] The court reasoned that *Larson* required a

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97. Donnelly v. Lynch, 525 F. Supp. at 1173-74.

98. *Id.* at 1165-68. The court found that the nativity scene had retained its religious significance and meaning unlike other traditional holiday symbols such as Santa Claus. *Id.* at 1166-67.

99. *Id.* at 1173.

100. *See supra* notes 65-68 and accompanying text for an explanation of the "primary effect" prong of the *Lemon* test.

101. Donnelly v. Lynch, 525 F. Supp. at 1174-78. In the court's view, the crèche remained undeniably a religious symbol. Its inclusion in the city sponsored display had the effect of a government endorsement of the religious beliefs it represented.

102. *See supra* notes 69-72 and accompanying text for an explanation of this third prong of the *Lemon* test.

103. Donnelly v. Lynch, 525 F. Supp. at 1179-80.

104. *See supra* notes 70-72 and accompanying text.

105. Donnelly v. Lynch, 525 F. Supp. at 1179-80.

106. Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982), *aff'g* 525 F. Supp. 1150 (D.R.I. 1981), *rev'd*, 104 S. Ct. 1355 (1984).

107. *Id.* at 1033-34.

108. 456 U.S. 228 (1982). *See supra* notes 74-79 and accompanying text.

109. The district court decided the case in November, 1981. Larson v. Valente, 456 U.S. 228 (1982), was argued on December 9, 1981, and decided April 21, 1982. Donnelly v. Lynch was argued before the First Circuit Court of Appeals on April 7, 1981, and decided November 3, 1982.

strict scrutiny analysis in the Pawtucket case because "the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions . . . ."[110] Because the court concluded that no legitimate secular purpose was advanced by the city sponsorship of the nativity scene, the action did not survive strict scrutiny.[111]

In dissent, Judge Campbell viewed the crèche in its context and found it to be no more symbolically religious than Santa Claus.[112] Indeed, he argued that it was totally inconsistent to maintain Christmas as a national holiday and at the same time forbid displays of this nature.[113] Judge Campbell concluded that when these religious symbols are "seasonally deployed without accompanying religious ceremonies or message," they do not establish religion.[114]

V. The Supreme Court Decision

A. *Plurality Opinion*

Notwithstanding the religious significance of the crèche, the Supreme Court's plurality opinion,[115] written by Chief Justice Burger, concluded that the City of Pawtucket had not violated the establishment clause by including the crèche in its annual Christmas display.[116]

At the outset the Court explicitly rejected the "wall of separation approach,"[117] reasoning that the Constitution affirmatively mandates "accommodation of all religion, . . . and forbids hostility towards any [religion] . . . ."[118] The Chief Justice

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110. Donnelly v. Lynch, 691 F.2d at 1034.

111. *Id.* at 1035.

112. *Id.* at 1038-39.

113. *Id.*

114. *Id.* at 1039.

115. Chief Justice Burger delivered the plurality opinion in which Justices White, Powell, and Rehnquist joined. Justice O'Connor joined in the holding but filed her own concurrence.

116. Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984).

117. *See supra* notes 21-31 and accompanying text for a discussion of the "wall of separation" approach. Although acknowledging that the metaphor serves as a useful reminder that the establishment clause forbids an established church, the Court stated that it was not entirely an accurate description of the practical aspects of the relationship that, in fact, exist between church and state. *Lynch*, 104 S. Ct. at 1359.

118. *Lynch*, 104 S. Ct. at 1359. *See also supra* notes 35-46 and accompanying text

maintained that this interpretation was compatible with what history revealed was the contemporaneous understanding of the establishment clause.[119] The Court viewed the First Congress' employment of a congressional chaplain to offer daily prayers as evidence of the "accommodations of religious belief intended by the Framers."[120] Pursuing this historical analysis, the Court identified other examples of official government acknowledgement of religion in American life since 1789,[121] including the declaration of Thanksgiving as a "national" holiday.[122] The Court stated that in view of this history of pervasive governmental acknowledgement of religion, it has consistently declined to take an absolutist view in establishment clause challenges.[123] Rather, the Court viewed its prior decisions as focusing on whether the challenged conduct "in reality . . . establishes a religion or religious faith, or tends to do so."[124]

Nevertheless, the Court applied the three-part *Lemon v. Kurtzman* test, which it maintained provided useful guidelines

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for a discussion of the accommodation theory.

119. *Lynch*, 104 S. Ct. at 1359-60.

120. *Id. See also* Marsh v. Chambers, 103 S. Ct. 3330 (1983) (holding constitutional the use of publicly compensated legislative chaplains).

121. *Lynch*, 104 S. Ct. at 1360-61. Examples referred to by the Court include "In God We Trust" on coins, the words, "One nation under God" in the Pledge of Allegiance, the use of public revenues to provide compensation for chaplains in Congress and the Armed Services, the display of religious paintings in museums that receive government subsidies, and Presidential Proclamations that commemorate the Jewish High Holy Days. *Id.*

122. *Lynch*, 104 S. Ct. at 1360. In his dissent, Justice Brennan outlined the history of the emergence of Christmas as a public holiday. This did not occur until the middle of the nineteenth century. Indeed the colonists brought to this country differing views concerning the celebration of the holiday. For example, the Massachusetts Colony made the observance of Christmas Day by feasting or any other way an offense punishable by fine. As increasing numbers of members of the Anglican, Dutch Reformed, and Roman Catholic churches arrived, the practice of celebrating Christmas publicly grew. *Id.* at 1383-85.

In 1870, Congress, following the lead of 29 states made Christmas a holiday in the District of Columbia. *See* Act of June 28, 1870, ch. 167, 16 Stat. 168 (1870). In 1885, Congress provided for payment of federal employees on Christmas Day. *See* J. Res. 5, 48th Cong., 2d Sess., 23 Stat. 516 (1885).

There are in fact no "national" holidays. Congress has simply accomodated "to some extent the opportunities of individuals to practice their religion." *Lynch*, 104 S. Ct. at 1381 (Brennan, J., dissenting). If Congress made Christmas a national holiday, that would raise a separate establishment clause question.

123. *Id.* at 1361.

124. *Id.* The Court cites Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970), as standing for this proposition.

in a case by case line drawing process.[125] First, the Court concluded that the city had a secular purpose.[126] The display was sponsored to celebrate a national holiday and to depict the origins of that holiday.[127] Furthermore, the Court concluded that *Lemon v. Kurtzman* merely required *a* secular purpose, not *exclusively* secular objectives.[128]

Next, the Court discussed the primary effect prong of the *Lemon* test.[129] The Court concluded that whatever benefit was conferred on religion in general or the Christian faith in particular was indirect, remote, and incidental.[130] It was no more an advancement or endorsement of religion than the expenditure of public funds for transportation of students to church-sponsored schools upheld in *Everson v. Board of Education*,[131] or the Sunday closing laws upheld in *McGowan v. Maryland*,[132] or the released-time program upheld in *Zorach v. Clauson*,[133] or the exhibition of religious paintings in government supported museums.[134]

The Court affirmed the district court's finding that there was no excessive administrative entanglement due to the city's sponsorship of the crèche.[135] The cost of maintaining the display was minimal and no ongoing interaction between church and

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125. *Lynch*, 104 S. Ct. at 1362.

126. *Id.* at 1363.

127. *Id.* The Court rejected the district court's inference that, because of the religious nature of the crèche, the city had no secular purpose for the display. The focus was on the crèche in the context of the Christmas season and the national holiday it celebrates. *Id.*

128. *Id.* at 1363, n.6.

129. *Id.* at 1363-64.

130. *Id.* at 1364.

131. 330 U.S. 1 (1947).

132. 366 U.S. 420 (1961).

133. 343 U.S. 306 (1952).

134. *Lynch*, 104 S. Ct. at 1361. The Court also cites Larkin v. Grendel's Den, 459 U.S. 116 (1982), and McCollum v. Board of Educ., 333 U.S. 203 (1948), as examples of state action that substantially aided religion and thus violated the establishment clause. In *Grendel's Den*, churches were given the power to veto licenses to business establishments serving alcoholic beverages, if the business sought to locate within 500 feet of the religious institution. Larkin v. Grendel's Den, 459 U.S. at 117. In *McCollum*, government had impermissibly aided sectarian groups by providing pupils for their religious classes through use of the state's compulsory public school machinery. McCollum v. Board of Educ., 333 U.S. at 212.

135. *Lynch*, 104 S. Ct. at 1364.

state was necessary.[136] The Court, however, rejected the district court's finding that the political divisiveness engendered by the lawsuit was evidence of excessive entanglement.[137] Reaffirming that *divisiveness alone* cannot serve to invalidate otherwise permissible conduct, the Court emphasized that "[a] litigant cannot, by the very act of commencing a lawsuit, . . . create the appearance of divisiveness and then exploit it as evidence of entanglement."[138]

Justice Burger concluded by stating that if the presence of the crèche in this display violated the establishment clause, a host of other official recognitions of our religious heritage were equally offensive to the Constitution.[139] Such a holding would be contrary to our history and to prior holdings.[140]

B. *Concurring Opinion*

Although concurring in the plurality holding, Justice O'Connor filed a separate opinion to "suggest a clarification of the [Court's] establishment clause doctrine."[141] According to Justice O'Connor, the establishment clause prohibits the government from making adherence to a religion relevant to a person's standing in the political community.[142] Government action runs afoul of this prohibition if it fosters excessive entanglement with religious institutions or endorses religion.[143] Justice O'Connor concluded that there was no excessive entanglement in this case and concurred with the plurality's conclusion that divisiveness alone is not an independent test of constitutionality.[144] There-

136. *Id.*

137. *Id.* at 1365.

138. *Id.*

139. *Id.* The Court notes such official acknowledgments of Christmas as the declaration of Christmas as a national holiday, and the singing of carols and hymns in public schools and other public places. *Id.*

140. *Id.* at 1366.

141. *Id.* (O'Connor, J., concurring).

142. *Id.* Justice O'Connor notes that excessive entanglement may interfere with the independence of the religious institution or give the institution access to the government that is not shared by nonadherents of the religion. Endorsement tends to divide the community by making adherents of the endorsed religion insiders, and nonadherents, outsiders in the political community. *Id.*

143. *Id.* at 1367-68.

144. *Id.* at 1367.

fore, the central issue was whether Pawtucket endorsed Christianity by including the crèche in the city sponsored Christmas display.[145]

In order to determine the existence of an "endorsement," Justice O'Connor used the purpose and effect prongs of the *Lemon* test.[146] The purpose prong inquiry involves whether the government's actual purpose is to endorse or disapprove of religion.[147] The effect prong inquiry involves whether, irrespective of the government's actual purpose, the practice in fact conveys a message of endorsement or disapproval of religion.[148]

Justice O'Connor applied the *Lemon* test and concluded that the city had not endorsed a religion. This analysis turned on recognizing that the crèche was displayed in a context that included other secular symbols, all intended to celebrate a national holiday.[149]

The purpose prong was satisfied because Pawtucket did not intend to convey any message endorsing Christianity, but rather intended to celebrate a public holiday through the use of traditional symbols.[150] Furthermore, the inclusion of the crèche also satisfied the effect test.[151] Viewing the crèche in the context of the entire display, Justice O'Connor concluded that displaying and maintaining the crèche was no more an endorsement of religion than other government actions previously upheld by the Court.[152]

C. *Dissenting Opinion*

Justice Brennan, writing for the dissent,[153] initially observed that the majority had reached an essentially narrow decision which only approved the inclusion of the crèche in the "particu-

145. *Id.*

146. *Id.*

147. *Id.* at 1368. *See supra* text accompanying notes 57-63.

148. *Id. See supra* text accompanying notes 64-68. This inquiry is similar to Chief Justice Burger's inquiry concerning whether the government action "in reality" establishes religion. *See Lynch*, 104 S. Ct. at 1361.

149. *Id.* at 1369 (O'Connor, J., concurring).

150. *Id.*

151. *Id.* at 1368.

152. *Id.* at 1369.

153. Justice Brennan is joined by Justices Marshall, Blackmun, and Stevens.

lar holiday context in which the City of Pawtucket's nativity scene appeared."[154] Nevertheless, the dissent concluded that the inclusion of other secular symbols did not negate the specific Christian meaning of the crèche, and, therefore, this action was an impermissible endorsement of a particular faith.[155]

Unlike the majority, the dissent characterized the *Lemon* test as the settled fundamental tool in establishment clause cases, designed to ensure that religion and government remain strictly apart.[156] Applying the *Lemon* test, Justice Brennan concluded that the inclusion of a nativity scene did not reflect a clearly secular purpose.[157] Furthermore, the city's purpose can be accomplished by other means.[158] In order to comply with the purpose test, Pawtucket's seasonal celebration must "at least be non-denominational and not serve to promote religion."[159]

Next, Justice Brennan maintained that the "sectarian nature of the nativity scene has the effect of placing the government's imprimatur on the particular religious beliefs exemplified by the crèche."[160] This imprimatur, he concluded, violates the effect test because it conferred a significant benefit to a particular religion, which was precisely the sort of chauvinism that the establishment clause was intended to prohibit.[161]

Agreeing with the majority that there was no administrative entanglement present, the dissent took note of the divisiveness

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154. *Id.* at 1370 (Brennan, J., dissenting).

155. *Id.*

156. *Id.* at 1371 n.2. Justice Brennan did recognize certain circumstances when accommodation between church and state is permissible. First, government may act to accommodate the opportunities of individuals to practice their religion. *Id.* at 1381. This principle would justify the declaration of December 25th as a public holiday. *Id.* Second, while a particular practice may have derived from religious motivations, it is permissible for government to pursue the practice when it is continued today solely for secular reasons. *Id.* Finally, those practices by which government has long acknowledged religion, such as the designation of "In God We Trust" as our national motto, now serve a secular purpose. This, together with their long history, gives them a secular meaning, making them constitutionally permissible. *Id.* at 1381-82.

157. *Id.* at 1372-73. Justice Brennan noted that several representatives of Pawtucket's business community testified that the display would attract shoppers to the downtown area even without the crèche. *Id.* at 1373 n.5.

158. *Id.* at 1372.

159. *Id.* at 1373.

160. *Id.*

161. *Id.* at 1374.

created by the initiation of this suit.[162] This was a warning signal that "values embodied in the Establishment Clause are at risk."[163]

Turning to an analysis of the majority opinions, Justice Brennan stated that, in focusing on the nativity scene in the context of the holiday celebration, the majority ignored the clearly religious meaning of the crèche.[164] Thus, although Christmas is a public holiday, it does not follow that government was free to participate in its sectarian as well as its secular aspects.[165] Justice Brennan, however, concluded that some official acknowledgement of religion was inevitable, but cautioned against "overly broad acknowledgements . . . that may imply governmental favoritism toward one set of religious beliefs."[166] Justice Brennan identified three guidelines for government to follow to satisfy the establishment clause.[167] First, government may accommodate, to some extent, the opportunity for individuals to practice their religion.[168] Second, even if a particular practice may have previously had a religious connotation, the government may continue the practice today for purely secular reasons.[169] Third, the government may recognize aspects of national history and culture.[170] Justice Brennan concluded that the crèche did not satisfy any of these guidelines.[171] There was no historical evidence that either the founding fathers or the public in general supported such a municipally funded display.[172] Finally, the dissent concluded that the city's action was a "coer-

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162. *Id.* at 1374-75.

163. *Id.* at 1374.

164. *Id.* at 1376.

165. *Id.* at 1377-78.

166. *Id.* at 1380.

167. *Id.* at 1381.

168. *Id.* (citing Zorach v. Clauson, 343 U.S. 306 (1952)). Justice Brennan noted, as an additional example, that the government had declared Christmas a public holiday. *Lynch*, 104 S. Ct. at 1381 (Brennan, J., dissenting).

169. *Lynch*, 104 S. Ct. at 1381 (Brennan, J., dissenting). Justice Brennan cited as examples McGowan v. Maryland, 366 U.S. 420 (1961), and the declaration of Thanksgiving as a public holiday. *Lynch*, 104 S. Ct. at 1381 (Brennan, J., dissenting).

170. *Lynch*, 104 S. Ct. at 1381-82 (Brennan, J., dissenting) (citing as examples Marsh v. Chambers, 103 S. Ct. 3330 (1983), and the use of "In God We Trust" on United States currency).

171. *Id.* at 1382.

172. *Id.* at 1385-86.

cive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority."[173]

VI. Analysis

In *Lynch v. Donnelly*,[174] the Supreme Court signals the expansion of a significant trend in the Court's changing attitude toward church and state relations. Approving the inclusion of a nativity scene in a government sponsored Christmas display, the Court indicates that the symbolic wall of separation can be breached.[175] Indeed, according to Chief Justice Burger, the wall is merely a "useful figure of speech."[176] The Constitution mandates accommodation,[177] not merely tolerance of all religions. Although earlier decisions foreshadowed this view, there is no doubt that the *Lynch* decision is the Court's first explicit expression of the accommodation approach.[178]

A. *The Plurality's Use of History and Precedent*

Previous decisions, although not expressly approving the accommodation approach, recognized the impossibility of a total separation of church and state.[179] As Chief Justice Burger indicates in *Lynch*, the Court has in the past refused to take a rigid approach in establishment clause analyses.[180] Beginning with *Everson v. Board of Education*,[181] the Court has consistently upheld governmental action when it indirectly benefited religious institutions. Thus, activities such as released-time programs for

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173. *Id.* at 1386.

174. 104 S. Ct. 1355 (1984).

175. *Id.* at 1359.

176. *Id.*

177. *Id. See supra* notes 35-46 and accompanying text.

178. *Lynch*, 104 S. Ct. at 1359. *See also* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970); McGowan v. Maryland, 366 U.S. 420, 451-52 (1961); Zorach v. Clauson, 343 U.S. 306, 312-14 (1952). These decisions, although not stating that the Constitution mandates accommodation, nevertheless recognized that absolute separation of church and state is not possible and that some interrelationship is inevitable.

179. *See*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973). *See also supra* notes 35-46 and accompanying text.

180. *Lynch*, 104 S. Ct. at 1361.

181. 330 U.S. 1 (1947) (upholding a New Jersey statute giving aid to parochial schools for transporting children to school).

religious instruction held outside the public schools [182] and Sunday closing laws[183] have been upheld against establishment clause challenges. Furthermore, statutes that confer a more direct benefit on religious institutions, such as the exemption of church owned property from the payment of property taxes, have also been upheld.[184]

Moreover, the *Lynch* decision is not the first time the Court has upheld governmental conduct that utilizes public funds for patently religious activities. As Chief Justice Burger observes in *Lynch*, government has long recognized, and in effect, subsidized holidays with religious significance by releasing government employees from duties on holidays, such as Christmas, while still paying their salaries with public revenue.[185] These same public funds are used to pay for congressional chaplains who offer prayers at the beginning of legislative sessions.[186]

However, the holding in *Lynch* goes further than previous decisions. By approving the expenditure of public funds for the inclusion in Pawtucket's holiday display of a scene so closely associated with a particular religious belief, the Court implicitly indicates that government action may constitutionally benefit one religion to the exclusion of others. Furthermore, Pawtucket's avowed objectives for erecting the entire display could be realized without the crèche.[187] Thus, there was no need in this case for the municipality to support religion, either directly or indirectly. Government objectives in prior decisions, on the other hand, could not have been accomplished without some indirect benefit to religious institutions in general.[188]

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182. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

183. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

184. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970). The rationale is that because religious institutions are exempt from the financial burden of property taxes, they have more funds available for religious pursuits.

185. *Lynch*, 104 S. Ct. at 1360.

186. The use of public funds for legislative chaplains was upheld in Marsh v. Chambers, 103 S. Ct. 3330 (1983).

187. *Lynch*, 104 S. Ct. at 1373 n.5.

188. For example, the objective of providing a uniform day of rest could not have been achieved without some indirect benefit to religion once Sunday was chosen as that day. McGowan v. Maryland, 366 U.S. 420 (1961).

Similarly, the public's legitimate interest in safe transportation for all school children could not have been accomplished without providing some program which benefited parochial as well as public school students.

Despite the Court's conclusion that its holding is in harmony with prior decisions, its historical analysis is unprecedented. A municipally sponsored crèche is not a part of our "shared national heritage" to the same extent as legislative chaplains and Sunday closing laws.[189] In both *Marsh v. Chambers*[190] and *McGowan v. Maryland*,[191] the historical analyses focused on concrete and specific evidence of the history and public acceptance of the particular practices being challenged.[192] In *Lynch*, no specific evidence was presented concerning the history of publicly funded Christmas displays or the history of the public celebration of Christmas.[193]

One of the principal problems in holding the inclusion of the crèche in Pawtucket's display constitutional is the Court's reliance on Christmas as a "national" holiday.[194] Congress established Christmas as a legal public holiday for federal employees and residents of the District of Columbia.[195] This falls far short of designating Christmas as a nationwide holiday.[196] The designation of a day of such religious significance as a national holiday may, in itself, raise an establishment clause problem. However, even if this problem is overcome, it does not necessarily follow that using public funds to display *any* symbol of the holiday is likewise constitutional.[197] This rationale could lead to

189. *See Lynch*, 104 S. Ct. at 1383 (Brennan, J., dissenting) (Justice Brennan criticizes the adequacy of the majority's historical analysis).

190. 103 S. Ct. 3330 (1983).

191. 366 U.S. 420 (1961).

192. *See* Marsh v. Chambers, 103 S. Ct. at 3332-36 (outlining the history of the use of legislative chaplains); McGowan v. Maryland, 366 U.S. at 444-45 (tracing the development of Sunday closing laws as an outgrowth of other public health and safety measures).

193. *Lynch*, 104 S. Ct. at 1383 n.25 (Brennan, J., dissenting). Justice Brennan pointed out that neither the petitioners nor their supporting amici could provide any information regarding the history of the publicly funded display of nativity scenes. *Id.* Moreover, the recognition of Christmas as a public holiday is a recent phenomenon, begun in the middle of the 19th century, unlike the use of legislative chaplains which dates from the first Congress. *Id.* at 1383.

194. *Lynch*, 104 S. Ct. at 1362, 1365, 1369. *See supra* note 122.

195. 5 U.S.C. § 6103 (1982); 5 U.S.C.A. § 6103 (West Supp. 1984).

196. *See supra* note 122.

197. In his dissent, Justice Brennan reasons "that government may recognize the holiday's traditional, secular elements of giftgiving, public festivities, and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday." *Id.* at 1378 (Brennan, J., dissenting).

greater government entanglement with religion than was intended whenever an action is couched in the guise of celebrating a public holiday.

The Court's comparison of the Pawtucket crèche to a display of artistic masterpieces with religious themes in publicly subsidized museums or the study of the Bible in literature classes[198] is unsound. The paintings are being exhibited not for their religious symbolism, but because of their artistic value. Similarly, in a literature class the Bible is considered solely for its literary value rather than for the particular religious beliefs it espouses. Finally, the display of paintings in a museum and the study of the Bible are not confined to a single holiday season with religious significance. The Pawtucket crèche plays no comparable secular role because it is not displayed for its aesthetic qualities.

B. *The Uncertainty Following* Lynch v. Donnelly[199]

Although it is clear that the Court has, in dictum, expressly approved the accommodation approach,[200] the scope of the holding in *Lynch* is uncertain. Thus, the question of whether a publicly funded crèche standing by itself or a private crèche displayed by itself on public property would be constitutional was left undecided.

This uncertainty is evident in two lower court decisions decided after *Lynch* — *McCreary v. Stone*[201] and *ACLU v. City of Birmingham*.[202] Both decisions involved the display of a crèche by itself. In *McCreary*, the Second Circuit reversed a district court decision, holding that the Village of Scarsdale could not prohibit private citizens from displaying a crèche on a public parkland during the Christmas season.[203] Applying the *Lemon v. Kurtzman* "guidelines," the Second Circuit reasoned that if the *Lynch* crèche, which was purchased, erected, displayed, and

198. *Lynch*, 104 S. Ct. at 1361, 1362, 1364.

199. 104 S. Ct. 1355 (1984).

200. *Id.* at 1359-61.

201. No. 83-9052 (2d Cir. June 21, 1984), *cert. granted sub nom*, Board of Trustees, Village of Scarsdale v. McCreary, 53 U.S.L.W. 1060 (U.S. Oct. 16, 1984)(No. 84-277).

202. 53 U.S.L.W. 2111 (E.D. Mich. Aug. 28, 1984).

203. McCreary v. Stone, No. 83-9052, slip op. at 4661 (2d Cir. June 21, 1984), *rev'g* 575 F. Supp. 1112 (S.D.N.Y. 1983).

sponsored by Pawtucket, was not construed by the Supreme Court to have the effect of impermissibly advancing religion, then the Scarsdale crèche, which was purchased, erected, displayed and sponsored by private citizens, could not be viewed as violative of the establishment clause either.[204]

A district court in *ACLU v. City of Birmingham*, however, took a much more restrictive view of the holding in *Lynch*, reasoning that Birmingham's display of the solitary crèche was unconstitutional because it was not part of a larger holiday display which included other secular decorations.[205]

In *Stone v. Graham*[206] and *Abington School District v. Schempp*,[207] the Supreme Court noted that the context in which a religious practice occurs may determine whether government sponsorship of that practice violates the establishment clause.[208] In both decisions, the Court indicated that the study of the Ten Commandments or the Bible in public schools was permissible under the establishment clause if the study was integrated into the school curriculum. Both Chief Justice Burger's opinion and Justice O'Connor's concurrence in *Lynch* focus on the crèche in the context of the public holiday it celebrates, rather than on its inclusion in a display with other secular symbols.[209] It is possible to conclude that the display of a religious symbol, such as the crèche, is only constitutional in the context of a national holiday. Thus, the setting, either by itself or surrounded by other secular symbols, may be immaterial. Following this interpretation, the display of other religious symbols not similarly identified with public holidays, would be unconstitutional. Thus, for example, the publicly funded display of a cross during the Easter holidays would violate the establishment clause, because

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204. *Id.* at 4681-82.

205. 53 U.S.L.W. 2111 (E.D. Mich. Aug. 28, 1984).

206. 449 U.S. 39 (1980).

207. 374 U.S. 203 (1963).

208. The Court in *Stone* struck down a Tennessee statute requiring the posting of the Ten Commandments on classroom walls. The court found this impermissible in that this religious text was not integrated into the school curriculum, but rather was used for its religious message. Stone v. Graham, 449 U.S. at 42. In *Schempp*, the Court held unconstitutional mandatory Bible reading at the opening of each school day. Nevertheless, the court stated that this did not bar the study of the Bible as literature in a literature class. Abington School Dist. v. Schempp, 374 U.S. at 223-25.

209. *Lynch*, 104 S. Ct. at 1362, 1368.

Easter is not a national holiday.

Perhaps the most significant impact of the *Lynch* decision involves the extent to which the tripartite test articulated in *Lemon v. Kurtzman*[210] remains the standard applicable to future establishment clause cases. As Justice Brennan observes in his dissenting opinion, the Court's reference to the *Lemon* test as a useful guideline suggests a less than vigorous commitment to *Lemon's* standards.[211] This weak commitment is inconsistent with previous decisions. Ever since its initial formulation, the *Lemon* test has been regarded as *the* fundamental tool of establishment clause analysis. Other opinions have described the test in mandatory terms.[212] *Marsh v. Chambers*[213] was the only case in which the Court did not apply the *Lemon* analysis since the test's inception.[214] In *Larson v. Valente*,[215] the Court used both a strict scrutiny analysis[216] and the *Lemon* test.[217]

Although the *Lynch* decision does not reject the *Lemon* test outright, it does suggest that future establishment clause cases will be dealt with differently. Rather than invalidating all government conduct that may advance all religions or one religion in particular, the Court will scrutinize the challenged conduct to determine if "in reality, it establishes a religion or religious faith, or tends to do so."[218] Thus, *Lynch* does not frame any fixed per se rule. Clearly some relationship between religion, or religious institutions and government, is permissible. It appears that each challenge will require a case by case determination, depending upon the circumstances of the particular relationship between church and state.

By expressly refusing to be confined to one particular

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210. 403 U.S. 602 (1971). See *supra* notes 51-52 and accompanying text for an explanation of the *Lemon* test.

211. *Lynch*, 104 S. Ct. at 1370-71 (Brennan, J., dissenting).

212. *Id.* at n.2 (citing Larkin v. Grendel's Den, 459 U.S. 116 (1982) and Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)).

213. 103 S. Ct. 3330 (1983).

214. In Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court traced the history of the use of legislative chaplains dating back to colonial times in holding constitutional a Nebraska statute that used public funds for salaries of legislative chaplains.

215. 456 U.S. 228 (1982).

216. *Id.* at 246-51.

217. *Id.* at 251-55.

218. *Lynch*, 104 S. Ct. at 1361.

test,[219] the Court, in *Lynch*, abandoned the comparative certainty of the *Lemon* analysis for the undefined territory of case by case decision making. It is difficult to determine what the permissible level of government advancement of religion will be. Rather than clarifying an already sensitive area, the Court appears to have adopted an even more imprecise approach.[220] Despite the Court's refusal to be bound by a single test, the Court nevertheless utilizes the *Lemon* analysis in holding Pawtucket's crèche constitutional.[221] In doing so, the Court clarifies the *Lemon* standards, while diminishing their impact.

First, the secular purpose prong of the *Lemon* analysis is satisfied when the challenged legislation or conduct has *a* secular purpose. This is because the purpose inquiry, according to Chief Justice Burger, focuses on whether the statute or activity was motivated *wholly* by religious considerations.[222] Justice O'Connor focuses on whether the government's *actual purpose* is to endorse religion.[223] In either case, it appears that a *primary* secular purpose is no longer required.[224] One secular purpose will suffice despite the fact that there may be some religious purposes as well. Furthermore, whether the objectives could have been accomplished by other means is immaterial to the analysis.[225]

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219. *Id.*

220. *See, e.g.*, Binford v. Eckels, No. H-82-0035 (S.D. Tex. May 22, 1984) (available Aug. 9, 1984, on LEXIS, Genfed library, Dist. File), which aptly illustrates the uncertainty concerning the appropriate criteria to be used after *Lynch* in establishment clause cases. The district court utilized the *Lemon* guidelines as well as an historical and a strict scrutiny analysis to hold unconstitutional the placement of two crosses and a Star of David in a meditation area located in a public park.

221. Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

222. *Id.* at 1362.

223. *Id.* at 1368 (O'Connor, J., concurring).

224. *Compare Lynch*, 104 S. Ct. at 1363 n.6 (stating that "*a* secular purpose . . . is all that *Lemon* requires") (emphasis added) *with* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 773 (stating that "a *clearly* secular purpose is required") (emphasis added).

225. *See* Larkin v. Grendel's Den, 456 U.S. 116 (1982). In *Larkin*, the court held unconstitutional a Massachusetts statute that vested in the governing bodies of schools and churches the power to prevent the issuance of liquor licenses for premises within 500 feet of a school or church by objecting to the license applications. The statute failed the purpose prong of the *Lemon* analysis because the valid secular legislative purposes could have been accomplished by other means. *Id.* at 123-24. The court in *Lynch* rejects this approach. *See Lynch*, 104 S. Ct. at 1363 n.7.

Second, it is clear that when the government action has the effect of substantially aiding religion, the action will fail the primary effect prong of the *Lemon* analysis. However, the Court correctly recognized that on occasion some advancement of religion will result from governmental action and that previous decisions have upheld the constitutionality of legislation that conferred more than an indirect benefit on religious institutions.[226] Nevertheless, the degree of advancement permissible under *Lynch* is unclear.

Finally, the Court reaffirms its position that divisiveness alone cannot serve to invalidate otherwise permissible conduct under the entanglement test.[227] The Court goes even further by stating that the divisiveness engendered by a lawsuit cannot be used as evidence of excessive entanglement.[228] Yet divisiveness may already exist but not be publicly articulated until a lawsuit is initiated.

VII. Conclusion

In *Lynch v. Donnelly*,[229] the Supreme Court held that a municipality did not violate the establishment clause when it set up and maintained a crèche. The decision will have a significant impact on future establishment clause challenges. By expressly endorsing the accommodation approach, the Court sanctioned government action that benefits religion. But, by failing to define a more precise test and by further weakening the requirements of the *Lemon v. Kurtzman* analysis, the Court failed to alleviate the difficulties in establishment clause analyses. Determining the constitutionality of state action in this sensitive area on a case by case basis increases the likelihood of misapplication of vague standards. A more precise test is desirable.

Naomi Katz

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226. *Lynch*, 104 S. Ct. at 1369.
227. *Id.* at 1364-65.
228. *Id.* at 1365.
229. 104 S. Ct. 1355 (1984).