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NOTES

LYNCH V. DONNELLY: BREAKING DOWN THE BARRIERS TO RELIGIOUS DISPLAYS

INTRODUCTION

In *Lynch v. Donnelly*[1] the Supreme Court held that the City of Pawtucket, Rhode Island, did not violate the constitutional prohibition against "a law respecting an establishment of religion"[2] by including a crèche in its annual Christmas display. The Court, facing its first challenge to a governmental display of a religious symbol, used sweeping language that will also validate the displays of religious symbols in other settings.[3]

The Supreme Court has traditionally applied the tripartite *Lemon*[4] test to cases arising under the establishment clause. The *Lemon* test reflects a separationist[5] interpretation of the establishment clause because it forbids governmental aid to religion even if all religions benefit equally. The *Lynch* majority applied the *Lemon* test in this case, but it did so in a cursory and strained manner.[6] Contrary to the spirit of the *Lemon* test, the majority reached a decision favoring acknowledgement and accommodation of religion.

This Note traces the Supreme Court's methods of analyzing establishment clause cases and argues that *Lynch* manifests the desire of some members of the Court to adopt an accommodationist stance toward constitutional questions regarding religion.[7] Justice O'Connor's concurring opinion[8] particularly evinces an accommodationist view because her proposed modification of the *Lemon* test allows state action that effectively advances religion.[9] This Note concludes that the *Lynch* majority's arguments in favor of the

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

2 U.S. CONST. amend. 1, cl. 1. The first amendment's establishment clause declares that "Congress shall make no law respecting an establishment of religion." *Id.* The Supreme Court held in Everson v. Board of Educ., 330 U.S. 1, 8 (1947), that the fourteenth amendment applies the establishment clause to the states.

3 *See infra* notes 130-66 and accompanying text.

4 The *Lemon* test originated in Lemon v. Kurtzman, 403 U.S. 602 (1971). The test is discussed *infra* notes 42-45 and accompanying text.

5 *See infra* note 15 and accompanying text.

6 *See infra* notes 116-29 and accompanying text.

7 *See infra* notes 167-83 and accompanying text.

8 *Lynch*, 104 S. Ct. at 1366-70 (O'Connor, J., concurring).

9 *See infra* notes 173-77 and accompanying text.

crèche's constitutionality are unpersuasive[10] and that the decision justifies other governmental displays of religious symbols.[11]

I

THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE

A. A Search for Standards: Pre-*Lemon* Decisions

The Supreme Court gave its first exposition of the establishment clause in its 1947 *Everson v. Board of Education*[12] decision. Justice Black, writing for the *Everson* majority, concluded that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither 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."[13]

Since *Everson*, commentators have debated the accuracy of Black's interpretation of the establishment clause. Jurists have advanced several theories of establishment clause interpretation, two of which, the "strict separation" theory and the "accommodation" theory, have competed for Supreme Court approval.[14] Separation-

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10 *See infra* notes 111-29 and accompanying text.

11 *See infra* notes 130-66 and accompanying text.

12 330 U.S. 1 (1947). The *Everson* Court held that a school district did not violate the establishment clause by reimbursing parents for the costs of sending their children to private school by public transportation. *Id.* at 17. Although the resolution challenged in *Everson* effectively reimbursed parents only if their child attended a Catholic parochial school, *id.* at 20-21 (Jackson, J., dissenting), the Court ruled that the benefit flowed to the children rather than to the Church. *Id.* at 17-18. The plaintiff thus failed to convince the court that the state had indirectly subsidized religion. *Id.* at 18.

Although modern establishment clause theory began with *Everson*, see R. MORGAN, THE SUPREME COURT AND RELIGION 76 (1972) ("[T]he initial exposition of the establishment clause by the Supreme Court came in 1947. . . ."), the Supreme Court had decided one earlier case on establishment clause grounds. In Bradfield v. Roberts, 175 U.S. 291 (1899), the plaintiff sued to enjoin the City of Washington, D.C., from spending federal money to help support an allegedly sectarian hospital. *Id.* at 295. The Court found that the hospital was merely "a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church" and affirmed the lower court's dismissal for "fail[ure] to set forth a cause of action." *Id.* at 298-300. The short opinion did not attempt to define the establishment clause's prohibitions on goverumental actions.

13 330 U.S. at 15.

14 *See infra* notes 15-16 and accompanying text. A third theory, proposed by Professor Philip Kurland, advocates an approach similar to the suspect classification scheme the Supreme Court has taken in equal protection cases. Professor Kurland suggests that the free exercise clause and the establishment clause should together "mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations." P. KURLAND, RELIGION AND THE LAW 17-18 (1962). Thus far, the Supreme Court has not accepted Professor Kurland's theory.

Some commentators disagree with the *Everson* Court's conclusion that the fourteenth amendment applies the establishment clause to the states. *See* R. BERGER, GOVERNMENT BY JUDICIARY 134-56 (1977) (maintaining that drafters of fourteenth

ists argue that the establishment clause requires an impenetrable boundary between religion and government. According to the separationist theory, the establishment clause prohibits both governmental preference for religion over non-religion and governmental preference between religions.[15] Accommodationists, on the other hand, argue that the framers of the establishment clause meant only to prevent the government from favoring one sect over another and did not intend to forbid neutral government support for religion as a whole.[16]

Shortly after *Everson*, in *Illinois ex rel. McCollum v. Board of Education*,[17] the Supreme Court used the establishment clause for the first time to strike down a governmental practice. The mother of an Illinois schoolchild sued to enjoin the state's "shared time" program which allowed religious teaching in public schools.[18] The Court held that the state's use of the public school system for religious training constituted impermissible aid to religion and disagreed with the Board of Education's argument that the first amendment allows "an impartial governmental assistance [to] all religions."[19]

Despite the Supreme Court's adoption of the separationist theory in *Everson* and *McCollum*, subsequent Supreme Court opinions

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amendment did not intend that it embrace all other constitutional amendments and make them applicable to states); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949)(same). The Supreme Court has referred to this argument as "entirely untenable and of value only as an academic exercis[e]." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 217 (1963).

15 *See, e.g.*, Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 566 (1980) ("The barrier against laws setting up a church, preferring one religion over another, or aiding religion is generally considered to be an aspect of the antiestablishment provision . . . ."); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981) (advocating prohibiting any aid flowing from state to religious organizations either directly or indirectly except when such aid is contained in general welfare grant benefitting whole of society).

16 *See, e.g.*, R. CORD, SEPARATION OF CHURCH AND STATE 214 (1982) ("[F]ederal or state governmental actions most likely to violate an historically correct understanding of the Establishment of Religion Clause are only those public acts that in some way elevate a single religion, religious sect, or religious tradition into a legally preferred status. . . ."); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949) (asserting that legislative history of establishment clause demonstrates that its framers only intended to prohibit favoring one religion over another).

17 333 U.S. 203 (1948).

18 In a "shared time" program teachers excuse students early from their public school class to attend religious instrnction. The program originated in Gary, Indiana, in 1914 when school children were released early to attend religious classes at a church of their own faith. Other school systems modified the program and allowed religious groups to send teachers into public schools to hold religious instruction classes. L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 181-82 (1975). The Illinois program challenged in *McCollum* was of the latter type. *See McCollum*, 333 U.S. at 207-09 (detailing operation of Illinois program).

19 333 U.S. at 211.

contain language indicating some support for the accommodationist view.[20] In *Zorach v. Clauson,*[21] for example, the Court upheld New York City's "shared time" program, even though it differed only marginally from the Illinois program that *McCollum* invalidated.[22] Justice Douglas, writing for the *Zorach* majority, emphasized that in some situations the government could accommodate religion and stated only that "[t]he government must be neutral when it comes to competition *between* sects."[23] In a sentence often cited by accommodationist parties and courts,[24] Douglas wrote that "[w]e are a religious people whose institutions presuppose a Supreme Being."[25] Thus, in contrast with *Everson* and *McCollum, Zorach* presented an accommodationist interpretation of the establishment clause.

The *Zorach* decision did not end debate about how the Court should properly interpret the establishment clause. The Supreme Court continued its philosophical see-sawing when the separationist view reemerged in the early 1960s. In the "school prayer cases," *Engel v. Vitale* [26] and *School District of Abington Township v. Schempp,*[27] the court invalidated the longstanding[28] and widespread[29] practice

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20 *See e.g.*, cases cited *infra* note 168. One commentator complained that "[t]he establishment clause opinions handed down by the Court in the last twenty-five years have been replete with contradictory assertions [and] confusing signals." Note, *supra* note 15, at 1473.

21 343 U.S. 306 (1952).

22 *Id.* at 315. New York City's program allowed participating students to leave school early to attend religious instruction at their place of worship. *Id.* at 308. The city required that participating religious institutions give a weekly list of attendance to the child's public school principal or teacher. *Id.* & n.1. Three Justices, including Justice Black (author of *McCollum* decision), dissented. The dissenting Justices believed that New York City's program differed only marginally from Illinois's and considered the *Zorach* and *McCollum* holdings inconsistent. *Id.* at 316 (Black, J., dissenting), 322-23 (Frankfurter, J., dissenting), 325 (Jackson, J., dissenting).

23 *Id.* at 314 (emphasis added).

24 *See, e.g.,* Hall v. Bradshaw, 630 F.2d 1018, 1022-23 (4th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981) (although holding that inclusion of "motorist's prayer" on map published by state agency violated establishment clause, court noted that references to deity in ceremonies and on coinage reflected history of nation identified with religion); Allen v. Hickel, 424 F.2d 944, 948 (D.C. Cir. 1970) (in challenge to government display of crèche, court, citing *Zorach's* langnage, stated that first amendment does not require government to ignore existence of certain widely-held customs and beliefs).

25 343 U.S. at 313. Professor Kurland called this statement "famed, troublemaking, and essentially meaningless." Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ,"* in CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT 16 (P. Kurland ed. 1975).

26 370 U.S. 421 (1962) (invalidating New York's practice of having public school children voluntarily recite nondenominational state-composed prayer).

27 374 U.S. 203 (1963) (invalidating Pennsylvania law requiring that verses from Bible be read aloud at beginning of each public school day).

28 "The use of prayers and Bible readings at the opening of the school day long antedates the founding of our Republic." *Id.* at 267 (Brennan, J., concurring).

29 Twenty-two states entered the *Engel* case as amici curiae on behalf of New York.

of beginning the public school day with a religious ceremony. In *Schempp* Justice Clark provided a new test for establishment clause cases: "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[30] Despite the government's contention that the challenged school exercises implemented the secular purpose of promoting moral values[31] and recognizing the nation's spiritual heritage,[32] the Court found an impermissible state goal of inculcating children with religion and a consequent effect of advancing religion.[33]

The Supreme Court relied on yet another method of establishment clause analysis to uphold the religious property tax exemptions challenged in *Walz v. Tax Commission*.[34] In *Walz* the Court declared that the establishment clause forbids actions creating "an excessive government entanglement with religion."[35] The *Walz* Court saw excessive entanglement as a threat to the twin aims of the establishment clause: prohibiting secular government from controlling religion and preventing religious groups from attempting to use government for their own benefit.[36] The Court admitted that entanglement "is inescapably [a test] of degree" but ruled that anything more than minimal contacts between religion and government would contravene the establishment clause.[37] The *Walz* Court also saw the lack of a union of religion and government throughout the long history of tax exemption for religious property as evidence that the government's program would not lead to the "established church or religion" that the first amendment prohibits.[38]

Justice Harlan, concurring in *Walz*, indicated that governmental entanglement with religion could also cause political divisiveness.[39] Harlan feared that the administration and planning likely to accompany programs involving both government and religion would politicize religion as different sects competed for limited federal and

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Engel, 370 U.S. at 421-22. Nineteen states favoring school prayer filed amicus curiae briefs in *Schempp*. *Schempp*, 374 U.S. at 204.

30 374 U.S. at 222.

31 *See id.* at 223 (arguing that exercises combated "materialistic trends" of age, perpetuated secular institutions, and presented valuable literary work).

32 *Engel*, 370 U.S. at 425; *Schempp*, 374 U.S. at 223.

33 *Engel*, 370 U.S. at 425; *Schempp*, 374 U.S. at 224.

34 397 U.S. 664 (1970) (upholding governmental grants of tax exemption for property used for religious purposes).

35 *Id.* at 674.

36 *See id.* at 675 (holding, however, that grant of tax exemption does not constitute excessive entanglement because tax exemption does not subsidize church, but simply refrains from demanding that church support state).

37 *Id.* at 674.

38 *Id.* at 678.

39 *Id.* at 695-96 (Harlan, J., concurring).

state resources.[40] Justice Harlan suggested that courts consider the threat of political discord when deciding establishment clause cases.[41]

B. The *Lemon* Test

One year after *Walz*, in *Lemon v. Kurtzman*,[42] the Supreme Court synthesized its previous opinions and formulated a tripartite test for deciding whether the establishment clause prohibited a challenged governmental act. The Court ruled that to pass constitutional muster:

> [f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[43]

The *Lemon* majority, in dictum, also wrote favorably of Justice Harlan's "political divisiveness" theory.[44] The Court did not incorporate a "political divisiveness" prong into its test but wrote that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[45]

C. Post-*Lemon* Establishment Clause Theory

Since the *Lemon* decision, the Supreme Court has applied the *Lemon* test in all but two establishment clause cases. Both of these cases presented new lines of reasoning for interpreting the establishment clause. In the first case, *Larson v. Valente*,[46] the plaintiffs alleged that Minnesota's statute regulating charitable solicitations discriminated among religious sects.[47] The *Larson* majority explic-

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40 *Id.*

41 Although the Supreme Court has never adopted the political divisiveness theory as a test of constitutionality, cases decided after *Walz* have dealt with the concept. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) ("The challenged statute thus enmeshes churches in the processes of government and creates the danger of '[p]olitical fragmentation and divisiveness on religious lines.' " (citing Lemon v. Kurtzman, 403 U.S. 602, 623 (1971))); Meek v. Pittenger, 421 U.S. 349, 372 (1979) (plurality) ("The Act thus provides successive opportunities for political fragmentation and division along religious lines.").

42 403 U.S. 602 (1971) (declaring unconstitutional Pennsylvania statute that provided funds to help private schools defray cost of teaching secular subjects).

43 403 U.S. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1980)).

44 *Id.* at 622-25. The Court indicated that the statutory programs at issue could potentially cause political divisiveness by requiring annual appropriations and consuming state fiscal resources. *Id.* at 623.

45 *Id.* at 622.

46 456 U.S. 228 (1982).

47 *Id.* at 230. Minnesota's statute "provide[d] for a system of registration and disclosure respecting charitable organizations, and [was] designed to protect the contribut-

itly refused to decide the case using the *Lemon* test, reasoning that "the [*Lemon*] 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."[48] Justice Brennan, writing for the majority, asserted that the Court's precedent demanded that they treat "a state law granting a denominational preference" with "strict scrutiny."[49] Before *Larson*, however, the Court had neither invalidated a statute on the ground that it discriminated among religions nor applied a "strict scrutiny" analysis in establishment clause cases.[50] The discrimination in favor of popularly accepted religions evident in Minnesota's statute, however, apparently convinced the Court that they should use an equal protection standard. The Court thus required that Minnesota demonstrate that the law served a compelling state interest and closely fitted this interest.[51] The Court accepted arguendo Minnesota's claim that the state had a compelling interest in protecting the public from fraudulent practices, but ruled that the statute's means were not sufficiently tailored to serve this goal.[52] The majority did not expressly limit future applications of the strict scrutiny test to facially discriminatory action, but stressed its finding that Minnesota's law discriminated on its face.[53] Thus far, *Larson* is

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ing public and charitable beneficiaries against fraudulent practices." *Id.* at 230-31. Prior to 1978, the legislature had exempted all religious groups from the statute's requirements. *Id.* at 231. In 1978 Minnesota's legislature amended the statute to require that groups receiving less than half of their total contributions from members of related organizations meet the extensive registration and reporting procedures the law required, thus disfavoring groups that solicited from the general public. MINN. STAT. § 309.515(b) (Supp. 1982). *Larson*, 456 U.S. at 231-32. Members of the Unification Church sued to prevent the state from enforcing the new law. *Id.* at 232-34.

48 456 U.S. at 252 (emphasis in original) (footnote omitted). In dictum, the *Larson* Court maintained that Minnesota's statute would also fail the *Lemon* test because it involved "an excessive governmental entanglement with religion." The majority asserted that the statute's legislative history revealed an intent to discriminate among sects, thus encouraging political divisiveness. *Id.* at 251-55. For a discussion of the Court's possible motives for not applying the *Lemon* test in *Larson*, see Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, Larson v. Valente, 62 NEB. L. REV. 359 (1983).

49 456 U.S. at 246.

50 *See* Note, *supra* note 48, at 361 (*Larson* stands as Court's first use of strict scrutiny analysis in establishment clause cases). The *Larson* Court cited Epperson v. Arkansas, 393 U.S. 97 (1968), School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Zorach v. Clauson, 343 U.S. 306 (1952), and Everson v. Board of Educ., 330 U.S. 1 (1947), for the premise that the establishment clause required "denominational neutrality," 456 U.S. at 246, but in none of these cases did the Court apply a strict scrutiny analysis.

51 456 U.S. at 246-47.

52 *Id.* at 248-51.

53 The *Larson* Court distinguished the statute in that case from laws with an incidental disparate impact among religions on the ground that the statute involved in *Larson* was not facially neutral. *Id.* at 246-47 n.23.

the only case in which the Court has invalidated a statute on the ground that it discriminated among religions.

The second case, *Marsh v. Chambers*,[54] digressed more significantly from the *Lemon* test. The *Marsh* Court upheld Nebraska's practice of hiring a chaplain to recite a prayer at the opening of each legislative session.[55] The Court pointed to the long history of legislative chaplains and explained that even the drafters of the first amendment approved hiring a chaplain for the House and Senate.[56] The majority neither applied the *Lemon* test nor explained why the three-pronged analysis was inapposite. The dissent interpreted the majority's disregard for *Lemon* to mean that *Marsh* was a narrow opinion approving legislative chaplains rather than a change in traditional doctrine.[57]

Despite these two recent cases, the *Lemon* test, with its separationist tenor, has served as the cornerstone of establishment clause analysis. Even in the *Larson* and *Marsh* decisions, where the Supreme Court applied a different analysis, the majority did not reject the *Lemon* test.[58] The Court returned to the *Lemon* test in *Lynch v. Donnelly* [59] but applied it there in a cursory manner that avoided *Lemon*'s separationist effect.[60]

III

LYNCH V. DONNELLY

Every November the City of Pawtucket, Rhode Island, erected a Christmas display in a private park in the downtown commercial area.[61] The city placed a crèche in the foreground of the display, consisting of life-sized representations of the figures present in the traditional story of Christ's birth.[62] The display also included several secular items commonly associated with celebrations of the Christmas holiday season.[63] The plaintiffs, members of the Ameri-

54 463 U.S. 783 (1983).

55 *Id.* at 786

56 *Id.* at 786-92.

57 *Id.* at 796 (Brennan, J., dissenting).

58 *See supra* notes 46-57 and accompanying text.

59 104 S. Ct. 1355 (1984); *see infra* notes 89-95 and accompanying text.

60 *See infra* notes 116-29 and accompanying text.

61 Donnelly v. Lynch, 525 F. Supp. 1150, 1154 (D.R.I. 1981).

62 *Id.* at 1156. Pawtucket had included a crèche in its Christmas display for at least 40 years. *Id.* at 1158. The city purchased their present crèche in 1973 for $1,365 and spent only a minimal amount of money for its upkeep. *Id.* at 1156. The trial court found that the figures' "poses, coupled with their facial expressions, connote[d] an atmosphere of devotion, worship, and awe." *Id.*

63 These items included "a 'talking' wishing well," a "Santa's House, inhabited by a live Santa who distributed candy," "four large, five-pointed stars covered with small white electric lights," "a spray of reindeer pulling Santa's sleigh," "cutout letters, colored in fluorescent paint, that spell[ed] 'SEASON'S GREETINGS,' " and various

can Civil Liberties Union, sued to enjoin the city from including the crèche in the display after the city refused to remove the crèche voluntarily.[64] The plaintiffs alleged that the créche's presence in the display demonstrated official support for Christianity and thus violated the establishment clause.[65]

A. The Lower Federal Courts Bar the Crèche

The district court found that the crèche constituted an inherently religious symbol and that the surrounding secular elements failed to neutralize its religious nature.[66] The court then applied the tripartite *Lemon* test to the challenged activity. Despite the city's contention that the court should apply the secular purpose prong to the display as a whole, the court scrutinized the crèche alone.[67] The court concluded that the city's claim "that the presence of the creche in the display merely acknowledges the religious heritage of the holiday" indicated a sectarian goal. Pawtucket therefore failed to meet the *Lemon* test's secular purpose requirement.[68] The court also held that the crèche impermissibly advanced religion because the city had "singled out [Christian] religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable."[69] Although the court concluded that the crèche did not create the daily administrative entanglement between religion and government that the establishment clause prohibits,[70] the court did find the crèche politically divisive. The trial judge concluded that this political divisiveness constituted yet another ground for invalidating the crèche under the establishment clause.[71] The district court thus declared Pawtucket's display of the crèche uncon-

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other figures including carolers, "a clown, a dancing elephant, a robot, and a teddy bear." *Id.* at 1155.

64 *Id.* at 1153, 1158 n.14.

65 *Id.* at 1156-57.

66 *Id.* at 1165-68. The court compared the crèche to some of the other elements of the display and found that the major, and possibly only, significance of the crèche was the story that it symbolically told: "In sum, the Court does not understand what meaning the creche, as a symbol, can have other than a religious meaning." *Id.* at 1167.

67 *Id.* at 1168-70. Although the court acknowledged the importance of context, it feared that allowing the inclusion of a secular item to protect a religious item from individual scrutiny would permit easy avoidance of establishment clause prohibitions. *Id.* at 1169.

68 *Id.* at 1170. The court expressed concern that the city's explanation could turn any belief or action common to the majority into "a matter of culture or tradition and thereby imply that they have somehow attained a neutral, objective status." *Id.*

69 *Id.* at 1178.

70 *Id.* at 1179.

71 *Id.* at 1178-80. The court noted that since the suit began, "the atmosphere has been a horrifying one of anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol." *Id.* at 1180.

stitutional and enjoined the city from including a nativity scene in future exhibits.

The Court of Appeals for the First Circuit affirmed the district court's holding[72] but applied the *Larson*[73] strict scrutiny standard.[74] The court found the strict scrutiny analysis applicable because "the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions."[75] The court ruled that Pawtucket lacked the compelling interest *Larson* required,[76] reasoning that the city's failure to convince the trial court that it had a secular purpose for including the crèche precluded any possibility that the city had a compelling objective.[77] Because Pawtucket's action failed to satisfy the strict scrutiny test's first requirement, the court did not inquire into whether the governmental action was "closely fitted to further the interest that it assertedly serves."[78]

B. The Supreme Court Reverses

1. *Majority*

The Supreme Court reversed the court of appeals in a five to four decision, holding that the crèche did not violate the establishment clause.[79] The majority's opinion adopted an accommodationist tone as five Justices distanced themselves from earlier decisions interpreting the establishment clause as requiring "a 'wall' between church and state."[80] The Court instead wrote that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[81]

In a brief footnote the Court rejected the First Circuit's applica-

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72 Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982).

73 Larson v. Valente, 456 U.S. 228 (1982); *see supra* notes 46-53 and accompanying text.

74 The *Larson* decision came down after the district court decided Donnelly v. Lynch. *Donnelly,* 691 F.2d at 1034.

75 *Id.*

76 *Id.* at 1035.

77 *Id.* The court explained that "[i]f one is unable to demonstrate *any* legitimate purpose or interest, it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown." *Id.* (emphasis in original). The court questioned the district court's implication that political divisiveness alone could be a ground for holding the crèche display unconstitutional. *Id.*

78 *Larson,* 456 U.S. at 248.

79 Lynch v. Donnelly, 104 S. Ct. 1355 (1984). The federal government filed an amicus curiae brief supporting Pawtucket's appeal. *Id.* at 1357.

80 *Id.* at 1359.

81 *Id.*

tion of the *Larson*[82] strict scrutiny standard: "we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*."[83] The majority thus limited the *Larson* holding to facially discriminatory statutes or actions.[84] The Court also distinguished the historical approach of *Marsh v. Chambers*[85] because Pawtucket could not demonstrate that either public celebrations of Christmas or official displays of nativity scenes existed at the time of the First Congress.[86] The *Lemon* test therefore remained the only existing method of establishment clause analysis available to the majority, and they applied it to Pawtucket's action.

Unlike the two lower courts, the Supreme Court viewed the crèche in light of the entire Christmas season,[87] rather than focusing on the nativity scene alone. The Court did not explain its choice of context except to caution that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[88] Characterizing the city's action as "principally tak[ing] note of a significant historical religious event long celebrated in the Western World,"[89] the majority held that the city's desire to acknowledge the origins of Christmas satisfied the *Lemon* test's secular purpose requirement.[90] Furthermore, the Court ruled that Pawtucket's inclusion of the crèche in the display neither advanced nor inhibited religion, reasoning that any benefit to religion was "indirect, remote, and incidental."[91] Finally, the Court concluded that the crèche did not cause any administrative entanglement.[92] The majority questioned the district court's

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82 Larson v. Valente, 456 U.S. 228 (1982). *See supra* notes 46-53 and accompanying text.

83 104 S. Ct. at 1366 n.13.

84 *Larson,* 456 U.S. at 246 n.23. *See supra* note 53 and accompanying text.

85 463 U.S. 783 (1983). *See supra* notes 54-57 and accompanying text.

86 104 S. Ct. at 1383-86 (Brennan, J., dissenting). The Court's interest in the history of official celebrations of Christmas is evident from questions the Court asked during oral argument. *Id.* at 1383 n.25.

87 *Id.* at 1362.

88 *Id.*

89 *Id.* at 1363.

90 *Id.*

91 *Id.* at 1364. The Court explained that the crèche benefited religion no more than did other activities held not violative of the first amendment. *Id.* at 1363-64. The Court cited Marsh v. Chambers, 463 U.S. 783 (1983) (legislative prayer by chaplains paid with public funds); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (plurality) (general grants to church sponsored schools); Tilton v. Richardson, 403 U.S. 672 (1971) (plurality) (public expenditures for building church sponsored schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions); Board of Educ. v. Allen, 392 U.S. 236 (1968); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws); Zorach v. Clauson, 343 U.S. 306 (1952) (release time program for religious training); and Everson v. Board of Educ., 330 U.S. 1 (1947) (public expenditures for transporting children to religious schools).

92 104 S. Ct. at 1364.

conclusion that the crèche generated political divisiveness[93] and noted that the Court has not held "that political divisiveness alone can serve to invalidate otherwise permissible conduct."[94] The Court also stated that courts should not even inquire into political divisiveness unless the case involves governmental financial payments to religious schools or groups.[95]

2. *O'Connor's Concurrence*: *Modifying* Lemon

Justice O'Connor joined the majority opinion but also filed a separate concurrence in which she proposed modifying the *Lemon* test. According to O'Connor, the Court should not strike down an activity unless a plaintiff can prove governmental "endorsement or disapproval of religion" or "excessive entanglement with religious institutions."[96] Under O'Connor's theory, the *Lemon* test's secular purpose and primary effect prong should probe the subjective and objective meanings of the challenged government actions.[97] O'Connor would permit an action when the government neither intends nor appears to endorse or disapprove religion.[98] Like the majority, O'Connor examined Pawtucket's crèche in light of the Christmas season. She found that the context "negate[d] any message of endorsement" of religion, even though its context did not neutralize the nativity scene's religious significance.[99]

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93 *Id.* at 1365.

94 *Id.* at 1364.

95 *Id.* at 1364-65. This pronouncement reaffirmed previous dicta in Mueller v. Allen, 463 U.S. 388 (1983). The *Mueller* Court limited political divisiveness inquiries "to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Id.* at 404 n.11. The *Lynch* Court used slightly more expansive language to include cases "involv[ing] a direct subsidy to church-sponsored schools or colleges, or other religious institutions." *Lynch*, 104 S. Ct. at 1364-65. For a discussion and criticism of the political divisiveness theory, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980) (political divisiveness test rests on inaccurate historical base and threatens civil liberties).

96 104 S. Ct. at 1366 (O'Connor, J., concurring). O'Connor elaborated that "the effect of communicating a message of government endorsement or disapproval of religion," not the advancement or inhibition of religions, is crucial. *Id.* at 1368. Despite the facial similarity between O'Connor's standard and the *Lemon* test, O'Connor's analysis would have an accommodationist effect on establishment clause decisions. *See infra* notes 173-77 and accompanying text. O'Connor subsequently came to question the validity of inquiring into institutional entanglement. *See* Aguilar v. Felton, 105 S. Ct. 3232, 3247 (1985) (O'Connor, J., dissenting) ("My reservations about the entanglement test . . . have come to encompass its institutional aspects as well.").

97 104 S. Ct. at 1367. The subjective meaning is the government's intended purpose while the objective meaning is the community's perception of the government's intent. *Id.* at 1367-68.

98 *Id.* at 1368.

99 *Id.* at 1369. O'Connor compared the crèche to the legislative prayer upheld in Marsh v. Chambers, 463 U.S. 783 (1983), *see supra* notes 54-57 and accompanying text, and found it to be no greater a religious endorsement. *Id.*

3. *Dissent*

Four Justices dissented in an opinion written by Justice Brennan.[100] The majority's broad language approving governmental accommodation and acknowledgment of religion, and the majority's ambivalence toward the *Lemon* test, disturbed the dissenters.[101] The dissent expressed particular concern that "the Court's less than rigorous application of the *Lemon* test"[102] manifested the majority's desire to weaken *Lemon*'s separationist effect.[103] Unlike the majority, the dissenters believed that "the clear religious effect of the crèche"[104] offended the establishment clause notwithstanding the surrounding secular items.[105]

The dissenters, like the majority, applied the *Lemon* test to Pawtucket's inclusion of the nativity scene in its Christmas display.[106] They found that the crèche's "distinctively religious"[107] nature, as well as Pawtucket's ability to achieve its stated secular goals without using the crèche, demonstrated a sectarian purpose.[108] The dissenters also thought the crèche unconstitutional because it had the "primary effect" of "plac[ing] the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche."[109] The dissenters agreed with the majority that evidence of political divisiveness was an insufficient reason for declaring an activity unconstitutional and that no administrative entanglement existed in

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100 104 S. Ct. at 1370 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined Brennan's dissent.

101 *Id.* at 1370-71, 1380-82. Brennan wrote of three types of permissible government acknowledgment of religion: (1) accommodating individuals' right to practice their religion, (2) the continuance of a practice that has lost its religious significance over time, and (3) minor recognitions of religion such as "the reference to God contained in the Pledge of Allegiance" that "have lost through rote repetition any significant religious content." The crèche, according to Brennan, fit none of these categories. *Id.* at 1380-82. Justice Powell, who joined the *Lynch* majority, later had second thoughts about that opinion's ambivalence toward the *Lemon* test. In Wallace v. Jaffree, 105 S. Ct. 2479 (1985), Powell wrote "separately to . . . respond to criticism of the three-pronged *Lemon* test." *Id.* at 2493 (Powell, J., concurring) (footnote omitted). Powell noted that the tripartite test had aided the Court in deciding establishment clause cases and feared that "continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis." *Id.* at 2494 (footnote omitted). Powell also stated in *Wallace* that *Lynch* was decided "primarily on the long historical practice of including religious symbols in the celebration of Christmas." *Id.* at n.5. The *Lynch* opinion itself, however, belies this assertion. *See supra* note 86 and accompanying text.

102 104 S. Ct. at 1370.

103 *See id.* at 1370-71.

104 *Id.* at 1376.

105 *Id.* at 1375-77.

106 *Id.*

107 *Id.* at 1373.

108 *Id.* at 1372-73.

109 *Id.* at 1373.

this case.[110]

III
ANALYSIS

The *Lynch* opinion is a flawed but important decision in establishment clause analysis. The *Lynch* majority wrongly concluded that Pawtucket's crèche did not violate the establishment clause. The Court did not refute the trial judge's findings of fact and incorrectly compared the crèche to religiously neutral items. The opinion uses reasoning that approves less secularized displays of nativity scenes and other religious symbols during the Christmas season. The *Lynch* decision and language also reflect an accommodationist trend within the Supreme Court and indicate the misgivings several justices have about the *Lemon* test's separationist effect.

A. The Majority's Flawed Factual Analysis

The *Lynch* Court's treatment of the facts does not withstand close analysis. First, the Court imprudently reversed the trial court's conclusions of fact without inquiring whether they were "clearly erroneous."[111] Although the trial judge focused his attention on Pawtucket's crèche by itself,[112] he also found that the crèche advanced religion even when viewed within the context of the city's entire Christmas display.[113] The Supreme Court did not dispute the district court's finding[114] but instead cited other government actions the Court had previously upheld, stating that "[w]e are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements."[115] The majority's constitutional analysis is thus suspect because it rests on unsupported factual assumptions.

The Court's conclusions about the character of the crèche also

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110 *Id.* at 1374-75. Justice Blackmun, joined by Justice Stevens, also filed a dissenting opinion. Justice Blackmun criticized the majority's failure to follow precedent and its destruction of the crèche's religious meaning. *Id.* at 1386-87 (Blackmun, J., dissenting).

111 Justice Brennan criticized the majority for "mak[ing] only a half-hearted attempt to grapple with the fact that [the trial judge's] detailed findings may not be overturned unless they are shown to be 'clearly erroneous.'" *Lynch,* 104 S. Ct. at 1375 n.11 (Brennan, J., dissenting) (citations omitted).

112 *See supra* note 67 and accompanying text.

113 *Donnelly,* 525 F. Supp. at 1177.

114 *Lynch,* 104 S. Ct. at 1363.

115 *Id.* at 1364. The majority cited eight previous cases in which the government had prevailed against a claim that its action violated the establishment clause. *See supra* note 91 and accompanying text. The Court did not compare the crèche display with the issues those cases presented; it simply stated that the crèche presented no greater threat of religious establishment than did those earlier cases. *See id.* at 1363-64.

misinterpreted the display's effects. The *Lynch* majority viewed the crèche as merely a passive display "like a painting"[116] and concluded that disallowing the crèche would be tantamount to prohibiting public art galleries from displaying religious paintings.[117] The Court's analogy is incorrect, however, because the mèlange of themes present in a gallery's display reduces the likelihood that a viewer will perceive that the government supports any one particular ideology. Furthermore, the atmosphere of a museum lends itself to a dispassionate study of a painting's merits. In contrast, Pawtucket did not claim that the crèche deserved public display because it evinced any particular artistic value. The Court's argument would have been more persuasive had the city placed notices disclaiming official support for the crèche's underlying religious basis around the nativity scene. Although disclaimers cannot legitimize an improper state motive, Pawtucket could have used them to negate an observer's interpretation "that a particular faith had been singled out for public favor and recoguition"[118] and have prevented thereby the crèche's presence from siguificantly advancing a religion.[119]

The majority's comparision of the crèche to an objective study of the Bible or religion in public schools,[120] a practice that *School District of Abington Township v. Schempp*[121] implicitly accepted, is unpersuasive because it overlooks the effect of Pawtucket's action. The *Schempp* Court suggested that studying the Bible does not unconstitutionally advance religion if the state uses the book in a context that precludes any perception that the government promotes its religious values.[122] The *Schempp* Court's finding that beginning the class day with a reading from the Bible advanced religion even within the secular public school system,[123] however, indicated that placing a religious item within a secular context does not necessarily prevent the sectarian aspect from unconstitutionally advancing religion. As with the Bible reading prohibited in *Schempp*, Pawtucket's crèche retains its individual effect of advancing piety even when

116 *Id.* at 1365.

117 *Id.* at 1361.

118 *Id.* at 1380 (Brennan, J., dissenting).

119 In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973), the District of Columbia Circuit ruled that a crèche could be included in a Christmas display on federal property if the government disassociated itself from the religious committees overseeing the display. *Id.* at 74-76. The court also ruled that "appropriate plaques" would neutralize the unconstitutional advancement of religion the crèche otherwise provided. *Id.* at 67.

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

121 374 U.S. 203, 225 (1963); *see supra* notes 27-33 and accompanying text.

122 "Nothing we have said here indicates that such [literary and historical] study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Schempp,* 374 U.S. at 225.

123 *See id.*

placed within a secular milieu. The crèche display does not invite the debate or discussion of the nativity scene's historical accuracy and meaning that one would expect in an objective setting, nor did Pawtucket desire such objectivity.[124]

The majority's belief that the crèche's presence confers no greater benefit on religion than does "Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass' "[125] is also fallacious. The Court's argument ignores the difference between recognition of a historical fact and governmental countenance of the religious origins of that fact. Although Christmas originated as a religious holiday, it has since become associated with many nonreligious symbols and traditions. Christmas is thus analagous to the Sunday closing laws the Court approved in *McGowan v. Maryland*.[126] The *McGowan* Court upheld mandatory Sunday closing laws against a claim that enforced rest on the Christian Sabbath violated the establishment clause, finding that although the laws originally had a religious motive, states continued to enforce them with the secular goal of providing a respite from work and an opportunity for family gatherings.[127]

Whatever reason Congress had for declaring Christmas a federal holiday,[128] the *McGowan* reasoning allows official Christmas celebrations if these celebrations remain confined to the holiday's secular aspects. The crèche's presence, however, oversteps this narrow line because with it the government affirmatively encourages the religious side of Christmas's dual nature. By erecting a religious symbol reminding viewers of Christmas's sectarian origin, the city may inspire a least some observers to turn from the holiday's lay atmosphere and contemplate its theological underpinning.[129] The establishment clause's prohibition of governmental advancement of religion forbids the city from thus aiding religion over secularism or advancing a particular religion.

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124 The district court discerned from the mayor's testimony that "the city has accepted and implemented the view . . . that it is a 'good thing' to have a creche in a Christmas display because it is a good thing to 'keep Christ in Christmas.' " *Donnelly*, 525 F. Supp. at 1173 (citations omitted).

125 *Lynch*, 104 S. Ct. at 1364. Congress declared Christmas a paid holiday for federal workers in 1885 without debate. Contrary to the *Lynch* majority's assertion, Congress neither referred to Christmas as "Christ's Mass" nor specified its reason for declaring Christmas a federal holiday. *See* 15 CONG. REC. 166, 843, 2240 (1884); 16 CONG. REC. 411, 428, 430, 513 (1885); *see also Donnelly*, 691 F.2d at 1037 (Bownes, J., concurring) (discussing congressional recognition of Christmas).

126 366 U.S. 420 (1961).

127 *Id.* at 431-42.

128 *See supra* note 125.

129 *See Lynch*, 104 S. Ct. at 1377 (Brennan, J., dissenting) ("The nativity scene is clearly distinct in its purpose and effect from the rest of the . . . display for the simple reason that it is the only one rooted in a biblical account of Christ's birth.").

B. *Lynch*'s Implicit Approval of Other Nativity Displays

Pawtucket's crèche was part of a Christmas display that included many secular items.[130] The Supreme Court viewed the crèche in the context of this display and the Christmas season[131] and did not explicitly state that a governmentally sponsored crèche lacking surrounding secular elements would pass constitutional muster. In *ACLU v. City of Birmingham,*[132] the District Court for the Eastern District of Michigan distinguished *Lynch* on this basis. In *City of Birmingham* the district court applied the *Lemon* test to a nativity scene, standing alone, that the municipal government erected in front of City Hall during the Christmas season.[133] The court found that the city violated the *Lemon* test by displaying the crèche and declared the erection of the nativity scene unconstitutional.[134] The trial judge distinguished *Lynch,* arguing that "it does not, either on its face or in any implicit proclamation, hold that a nativity scene standing alone . . . complies with the requirements of the separation of church and state required by our Constitution."[135]

The *Lynch* dissent, writing that "[t]he Court's decision implicitly leaves open questions concerning the constitutionality of the public display . . . of a crèche standing alone,"[136] suggested the narrow reading of *Lynch* that the *City of Birmingham* court adopted. Plaintiffs seeking to enjoin nativity scenes surrounded by a few or no secular items are likely to advocate this narrow reading in future cases. Nevertheless, the language of the *Lynch* opinion does not indicate that the majority intended to so limit its holding. The *Lynch* Court's approval of Pawtucket's desire to celebrate "a particular historic religious event . . . acknowledged in the Western World for 20 centuries,"[137] implies that a crèche displayed alone and a crèche surrounded by secular items are equally acceptable. The *Lynch* opinion refers to the secular items Pawtucket exhibited with the nativity

130 *See supra* note 63 and accompanying text.

131 *Lynch,* 104 S. Ct. at 1362-65; *see supra* notes 87-88 and accompanying text.

132 588 F. Supp. 1337 (E.D. Mich. 1984).

133 *Id.* at 1338-39. The city displayed the crèche "[a]nnually . . . from approximately late November through early January of the following year." *Id.* at 1338.

134 *Id.* The trial judge found that the city did not have a secular purpose for sponsoring the crèche and that the crèche impermissibly "advance[d], affirme[d], approve[d], and otherwise validate[d] the Christian religion." *Id.* at 1339. The trial judge failed to heed the *Lynch* Court's admonition against inquiring into political divisiveness unless the case involves financial subsidies, *see supra* note 95 and accompanying text, and declared that "the solely religious character of the display in question is such that it might cause political divisiveness." 588 F. Supp. at 1339.

135 588 F. Supp. at 1339. *See also* Burrelle v. City of Nashua, 599 F. Supp. 792 (D.N.H. 1984) (ordering removal of crèche from grounds of municipal offices and distinguishing *Lynch* because of lack of surrounding secular items).

136 104 S. Ct. at 1370 (Brennan, J., dissenting).

137 104 S. Ct. at 1365.

scene, but the Court did not rely on the presence of these items when it held that the crèche met the establishment clause's requirements. The majority's broad language approving Pawtucket's crèche as mere recoguition of Christmas's religious origins applies to a nativity scene that is not a part of a larger display. A crèche standing alone remains part of the same "Christmas season" backdrop within which the Supreme Court viewed Pawtucket's crèche[138] and will thus have the same purpose, effect, and lack of entanglement that the Court found in *Lynch*.

The district court's opinion in *City of Birmingham* is therefore inconsistent with *Lynch* because it ignores the substance of the majority's reasoning. The *Lynch* opinion did not create a "reindeer rule"[139] exception to establishment clause doctrine whereby the government can place secular Christmas decorations around a crèche and thereby make the display constitutional. The *Lynch* analysis extends beyond the particular facts in that case and permits the government to display a crèche during Christmas regardless of the display's physical surroundings.

In contrast, the Second Circuit's decision in *McCreary v. Stone*,[140] affirmed by a tied vote of the Supreme Court, correctly applied the *Lynch* majority's reasoning. In *McCreary*, plaintiffs claimed that the Village of Scarsdale, New York, violated their right of free expression by refusing them permission to erect a crèche in a public park.[141] Issuing its decision prior to *Lynch*, the district court agreed with the plaintiffs that the village's refusal was a content-based restriction on expression[142] but found that allowing the plaintiffs to display a crèche on public property would violate the establishment clause by advancing religion.[143] The court concluded that the village had a compelling interest for denying the plaintiffs' request and held that the village's means were sufficiently narrow to conform to first amendment doctrine.[144]

On appeal, the Second Circuit relied on *Lynch* to reverse the

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138 *See supra* notes 87-88 and accompanying text.

139 Fin. Times, Dec. 24, 1985, at 4, col. 1 ("In a 5-4 decision, now often known as the 'two plastic reindeer rule,' the court upheld the constitutionality of a city-sponsored nativity scene on a private parkland as part of a larger secular Christmas display.").

140 739 F.2d 716 (2d Cir. 1984), *aff'd mem. by an equally divided Court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985).

141 McCreary v. Stone, 575 F. Supp. 1112, 1115 (S.D.N.Y. 1983). The district court ruled against the plaintiffs' additional claim that the village violated their right to free exercise of religion by not allowing them to use the park. *Id.* at 1121. The appellate court reversed the trial court without reaching this issue. 739 F.2d at 722-30.

142 575 F. Supp. at 1125-26.

143 *Id.* at 1130-33.

144 *Id.* at 1133. The trial court did not explain its conclusion that Scarsdale's action was narrowly tailored to the interest it served.

trial court's finding that the crèche would advance religion merely by its presence on public property.[145] The court of appeals interpreted *Lynch* as holding that a nativity scene, regardless of "the physical context within which the display of the creche [is] situated," does not impermissibly advance religion if displayed during the Christmas season.[146] As a result, Scarsdale would not violate the establishment clause by permitting the crèche display.[147] Because the crèche display would not implicate the establishment clause, Scarsdale no longer had a compelling interest for its prohibition. The court of appeals therefore enjoined the village from relying on the establishment clause to support its decision.[148]

C. *Lynch*'s Mixed Effect on Displays of Other Religious Symbols

The Supreme Court has yet to consider the constitutionality of governmental displays of religious symbols other than nativity scenes. Lower courts have decided both for and against government defendants, but future cases will have to consider the effect of the *Lynch* decision.

The display litigated in *ACLU v. Rabun County*[149] fairly represents cases involving the constitutionality of displays of religious symbols other than nativity scenes. In *Rabun County* the county's Chamber of Commerce erected a large Latin cross on a mountain in a state park and illuminated the cross for a few hours every night.[150] The Georgia chapter of the American Civil Liberties Union sued to have the cross dismantled, alleging that the presence of the religious symbol on public property violated the establishment clause.[151] The district court, applying the *Lemon* test,[152] found that the state's action had the purpose and effect of advancing Christianity and also found excessive entanglement due to the cross's potential for creating political divisiveness.[153] Accordingly, the trial court ruled this

145 *McCreary*, 739 F.2d at 724-29.

146 *Id.* at 729.

147 *Id.* at 730.

148 *Id.* The court of appeals emphasized that its decision affected only the village's content-based restriction of the plaintiffs' right to expression and left open "the ability of the village to establish reasonable time, place and manner restrictions regarding the use of its public properties." *Id.*

149 698 F.2d 1098 (11th Cir. 1983) (per curiam).

150 The cross was 27 feet by 35 feet and was "illuminated approximately from sunset until 10:15 or 10:30 p.m. each night." ACLU v. Rabun County, 510 F. Supp. 886, 888 (N.D. Ga. 1981).

151 *Id.*

152 *Id.* at 889.

153 *Id.* at 890-92. The trial court found that Chamber of Commerce statements indicated "that the cross was placed on the mountain for religious reasons." *Id.* at 889. The trial court also found that the "cross can have no other primary effect but to further the

display unconstitutional.[154]

The Eleventh Circuit affirmed the district court and ordered the county to remove the cross.[155] The court of appeals applied the *Lemon* test and concluded that "the Chamber ha[d] failed to establish a secular purpose" for displaying the cross.[156] The court based its conclusion on Chamber of Commerce statements expressing the important relationship between the cross and Easter[157] and on the cross's significance as a symbol of Christianity.[158] Because the Chamber's action failed to meet the *Lemon* secular purpose requirement, the court declared the cross display unconstitutional without considering the remaining prongs of the *Lemon* test.[159]

Despite some factual similarity, *Rabun County* is distinguishable from *Lynch*. Unlike the defendant city in *Lynch*, the Rabun County Chamber of Commerce planned a year-round display of the religious symbol unconnected with the celebration of a national holiday. In *Lynch* the Court tried to minimize the religious significance of the crèche by stating that it merely depicted the origin of an official national holiday, but this mitigating factor cannot defend the constitutionality of a religious symbol displayed at other times of the year. Even if the Chamber of Commerce erected the cross to celebrate the Easter holiday, *Lynch* offers little support because Easter is not an official holiday.[160] Thus, although defendants are likely to cite *Lynch* as reflecting a broad approval of religious displays, the decision only aids Christmas activities.

The *Lynch* reasoning can, however, validate some cross displays. In *Paul v. Dade County*,[161] for example, a Florida appellate court faced a claim that a cross displayed on a public building during Christmas violated the federal Constitution. The plaintiff sued to

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cause of the religion it symbolizes," *id.* at 891, and that this "apparent state sanction for one religion over all others can cause tension and a concomitant risk of political divergence on theological grounds." *Id.* at 892.

154 *Id.*

155 698 F.2d at 1111. The state did not participate in the appeal so the Chamber of Commerce defended the cross's presence on state property. *Id.* at 1102 n.4. The Eleventh Circuit found that the cross's location on state property constituted state action. *Id.* at 1109 n.19.

156 *Id.* at 1111.

157 *Id.* The court cited "the selection of an Easter deadline for completion of the cross, the decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in . . . press releases" as evidence of a religious motive. *Id.*

158 *Id.* at 1110-11.

159 *Id.* at 1109-11. The remaining prongs of the *Lemon* test require that a challenged activity neither advance nor inhibit religion nor excessively entangle religion and government. *See supra* notes 42-45 and accompanying text.

160 *See* 5 U.S.C. § 6103 (1982) (list of federal holidays does not include Easter).

161 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).

enjoin the Dade County Commission from erecting a "cross, made by a string of lights . . . [on] the courthouse during the Christmas season,"[162] claiming that this display violated the establishment clause. The court disagreed, finding that the commission intended the cross and other "lights and decorations" to "attract holiday shoppers to the downtown area."[163] The court thus found that the display had a secular purpose and also concluded that the cross did not advance or inhibit religion.[164]

The primary difference between *Paul* and *Lynch* lies in the two symbols at issue: a cross, made of lights, and a crèche. The *Lynch* Court did not deny the religious nature of the crèche,[165] however, and any attempt to distinguish the symbols on the basis of their respective sectarian significance runs counter to the Court's policy of avoiding ecclesiastical inquiries.[166] Indeed, both symbols could ostensibly serve the secular purpose of taking note of Christmas's religious origins. The *Lynch* opinion, taken to its logical conclusion, thus extends beyond permitting nativity displays and validates the public display of crosses at Christmas.

D. *Lynch*'s Effect on the *Lemon* Test and the Separationist Theory

The *Lynch* decision did not presage an immediate abandonment by the Court of either the *Lemon* test or the constitutional barriers separating church and state.[167] Nevertheless, the opinion reflects the Supreme Court's growing shift to an accommodationist theory

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162 *Id.* at 834.

163 *Id.* at 835.

164 *Id.* The court's brief opinion implied that the cross had become a secular symbol and therefore did not advance religion.

165 *Lynch,* 104 S. Ct. at 1365 n.12.

166 *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871) ("[I]t is easy to see that if the civil courts are to inquire into all these [ecclesiastical] matters, the whole subject of the doctrinal theology, the usages and customs . . . of every religious denomination may, and must, be examined into with minuteness and care. . . .").

167 The Court handed down four opinions during the 1984 term involving establishment clause questions. In each of these cases the Court invalidated the allegedly unconstitutional activity. These decisions reflect the turmoil the present Court faces when deciding religion cases, however, rather than a rejection of the accomodationism present in *Lynch. See* Aguilar v. Felton, 105 S. Ct. 3232 (1985) (invalidating New York City's practice of funding public school teachers who entered parochial schools to provide remedial instruction); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985) (disallowing school district's practice of providing supplementary courses and after school courses in private schools); Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985) (striking down Connecticut statute that required employers to excuse employee from work if employee wished to observe his Sabbath); Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (striking down Alabama statute that provided students with moment of silence to pray or meditate on ground that only religious concerns motivated legislature to pass law).

of establishment clause interpretation.[168] The majority's refusal to be bound by the *Lemon* test,[169] for example, implicitly criticizes the strict separation doctrine. The *Lemon* test's prohibition against advancing religion[170] represents a separationist interpretation of the establishment clause because it forbids governmental aid to religion even if provided in a nondiscriminatory manner. The weakness of the *Lynch* majority's arguments that Pawtucket's crèche did not advance religion[171] reveals the Court's difficulty when it relies on the *Lemon* test to reach an accommodationist result. Similarly, the Court's statement that "[i]n each [establishment clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed"[172] demonstrates the court's desire to avoid the rigid separation of church and state present in the *Lemon* test.

Justice O'Connor's concurrence[173] openly adopted an accommodationist posture. O'Connor suggested that a governmental practice advancing religion will not violate the first amendment unless the government intends or is perceived to endorse religion, or the practice creates administrative entanglement.[174] O'Connor's reliance on intent, however, would effectively permit governmental entities to engage in religious activities that the *Lemon* test would prohibit. The Court's frequent difficulty in determining the motive of state actors[175] and its deference to avowed secular objectives[176] place a heavy burden on a plaintiff who must prove the govern-

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168 The Court decisions in *Lynch* and Marsh v. Chambers, 463 U.S. 783 (1983), discussed *supra* notes 54-57 and accompanying text, reflect the Court's willingness to retreat from a separationist interpretation of the first amendment when faced with fact patterns dissimilar from those in earlier cases.

169 104 S. Ct. at 1362. *Lynch* was not the first time the Court expressed its refusal to be tied to the *Lemon* test. *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975) (plurality) ("[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. . . ."). Since the development of the *Lemon* test, however, the Court has applied it in all but two cases. *See supra* notes 46-57 and accompanying text. *See also Lynch,* 104 S. Ct. at 1371 n.2 (Brennan, J., dissenting).

170 *See supra* notes 42-43 and accompanying text.

171 *See supra* notes 111-29 and accompanying text.

172 *Lynch,* 104 S. Ct. at 1361 (emphasis in original).

173 *Id.* at 1366-70 (O'Connor, J., concurring). *See supra* notes 96-99 and accompanying text.

174 *See supra* note 96 and accompanying text.

175 *See, e.g., Lynch,* 104 S. Ct. at 1372 (Brennan, J., dissenting) (noting lack of "explicit statement of purpose by Pawtucket's municipal government accompanying its decision to purchase, display and maintain the crèche.").

176 In Mueller v. Allen, 463 U.S. 388, 394-95 (1983), the Court observed that a challenged governmental activity usually passes the *Lemon* test's secular purpose requirement, and explained that "[t]his reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Id.*

ment's improper motive. Furthermore, *Lynch*'s requirement that the government "accommodate" religion[177] expands the number of governmental motives that can withstand constitutional attack. Thus, O'Connor's emphasis on intent as a test of constitutionality would allow government officials to defend establishment clause suits with much greater success than would the *Lemon* formula.

Moreover, the majority's decision to scrutinize Pawtucket's crèche within the larger context of the Christmas season[178] also weakens the *Lemon* test's prohibition against advancement of religion. In *Lynch* the majority expanded the focus of its inquiry from the crèche alone to include Pawtucket's entire display and the history of official recognition of Christmas as a public holiday.[179] By expanding the context in which the Court views a challenged activity, the majority has made it easier to find that the surroundings minimize the importance of any particular religious component. This reasoning enables courts to find that a state act advancing religion could generate an overall effect too insignificant to merit constitutional concern. The danger of this approach is that accommodationist courts could approve even the most blatantly sectarian practice by viewing it as merely an insignificant portion of a large, secular whole and thereby erode the Constitution's prohibition against governmental establishment of any or all religions.

The majority's approval of Pawtucket's claim that acknowledging the religious origins of Christmas constituted a valid governmental objective[180] also indicates their desire to accommodate religious displays. Court precedent would have allowed the majority to find a secular purpose for the challenged display without reaching this issue. Although the city argued at trial that its crèche and entire Christmas display purported to draw shoppers to the downtown area,[181] the district court found that the evidence failed to support this claim. The *Lynch* majority could have relied on the Court's policy of deference to government motives[182] to find that in this specific instance the claimed economic objective was a "plausible secular purpose."[183] Instead, however, the Court went one step further by providing an exposition on the general acceptability of governmental acknowledgment of a religious event. The Court's adoption of this line of reasoning demonstrates its unsettled views toward the relationship between government and religion. These

177 *Lynch*, 104 S. Ct. at 1359.
178 *See supra* notes 87-88 and accompanying text.
179 *See supra* notes 87-88 and accompanying text.
180 *See supra* notes 89-90 and accompanying text.
181 *Donnelly*, 525 F. Supp. at 1170.
182 *See supra* note 176 and accompanying text.
183 *Mueller*, 463 U.S. at 394.

unsettled views, and the *Lynch* precedent, could provide support for a future complete reevalution of the *Lemon* test.

Conclusion

Lynch v. Donnelly demonstrates the Supreme Court's questioning of the separationist theory implicit in the *Lemon* test and earlier Court decisions. The Court's arguments that Pawtucket's crèche meets the *Lemon* test's requirements fail because the *Lynch* majority could not show that the crèche does not advance religion. The majority's willingness to approve the crèche even though it violated the spirit of the *Lemon* test demonstrates that, at least in some situations, the Court will tolerate government support of religion. Justice O'Connor's concurrence shows a greater accommodationist reading of the establishment clause because her proposed modification of the *Lemon* test allows governmental advancement of religion and places a heavy burden of proof on plaintiffs seeking to halt governmental support for religious activities.

The *Lynch* opinion has the immediate effect of permitting governmental sponsorship of Christmas displays that include nativity scenes. The Court's arguments, however, extend further than *Lynch*'s facts and allow governmental entities to erect a crèche or other religious symbol during the Christmas season. Although local governments must still tread gingerly when deciding what symbols to erect, lest they run afoul of the establishment clause's command against discriminating amongst sects, the *Lynch* decision gives constitutional backing to governmental support for the religious aspects of public holidays.

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