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The Establishment Clause and the Course of Religious Neutrality

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THE ESTABLISHMENT CLAUSE AND THE COURSE OF RELIGIOUS NEUTRALITY

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I. INTRODUCTION

Selection of appropriate limits on governmental support of religion has been a difficult task for the Supreme Court. Although Jefferson's metaphorical "wall"[1] between church and state may be a "useful figurative illustration to emphasize the concept of separateness,"[2] some limited entanglement between government and religion has proved inevitable.[3] The difficulty in drawing an appropriate line is well illustrated by two observations of Justice Jackson. He observed that "nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences. . . ."[4] Yet, in dissenting from the Court's decision to uphold release time for religious education,[5] Justice Jackson wrote of the need to avoid governmental intrusion into religious matters:

> It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar. The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power.[6]

The Court's struggle to find an appropriate dividing line between proper and improper governmental support of religion has produced decisions that may appear to be based on rather fine distinctions.[7] Nevertheless, until recently, one principle seemed to

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1. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

2. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).

3. *Id.*

4. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

5. Zorach v. Clauson, 343 U.S. 306 (1952).

6. *Id.* at 324-25 (Jackson, J., dissenting).

7. *Compare* Wolman v. Walter, 433 U.S. 229 (1977) *with* Meek v. Pittenger, 421 U.S. 349 (1975). In *Wolman* the Court approved provision of books, standardized testing,

emerge rather clearly—the need for "scrupulous neutrality"[8] by government. As the Court held in *Epperson v. Arkansas*,[9] the first amendment requires governmental neutrality between religion and nonreligion, as well as between various religions:

> Government in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.[10]

Although occasionally difficult to apply, the neutrality principle appeared well settled until the Court's recent decision in *Lynch v. Donnelly*.[11] Plaintiffs in that case challenged the inclusion of a creche in a government sponsored Christmas display in Pawtucket, Rhode Island. An amicus brief submitted jointly by the National Council of the Churches of Christ and the American Jewish Committee observed that it is "hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche."[12] As the brief pointed out, "[t]he creche is a depiction, in adorational terms, of the birth of a divinity in the form of the infant Jesus. . . . The doctrine of the birth of Jesus is not only central to Christianity but also serves, both historically and theologically, to separate Christianity from other religions."[13]

Notwithstanding the sacred religious symbolism of the creche, the Court held that the establishment clause did not prevent inclusion of the nativity scene in the city's Christmas display. The approach used by the plurality in *Lynch* is much more devastating to first amendment doctrine than its result. Indeed, it has been said that some Supreme Court decisions render "a far more subtle blow

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and diagnostic, therapeutic, and remedial services to children in nonpublic schools because they were of primary benefit to the children; and rejected provision of instructional equipment and field trips because they primarily benefitted the school. In *Meek*, the Court had used basically the same analysis to reject provision of counseling, therapeutic, and remedial services. What apparently made the difference in *Wolman* was that these services were provided off school premises.

8. Roemer v. Board of Pub. Works, 426 U.S. 736, 745 (1976).

9. 393 U.S. 97, 104 (1968).

10. *Id.* at 103-04.

11. 465 U.S. 668 (1984).

12. Brief of the National Jewish Committee and the National Council of the Churches of Christ in the U.S.A. as Amici Curiae in Support of Respondents at 3, Lynch v. Donnelly, 465 U.S. 668 (1984).

13. *Id.*

to liberty than the conduct [specifically under challenge]."[14] *Lynch* is precisely such a decision.

This Article examines, in light of *Lynch*, the continuing vitality of the neutrality principle as a basis for deciding establishment clause cases. Part II discusses the emergence and relatively consistent application of the principle prior to *Lynch*. Part III examines the abandonment of religious neutrality in *Lynch* and explores the plurality's redefinition of the purpose of the establishment clause—in particular, the Supreme Court's apparent acceptance of the view that we are not simply a religious people, but more specifically, a Christian people. Finally, Part IV reviews the past Term's establishment clause cases and attempts to assess their impact on the course of religious neutrality. In the wake of these recent decisions, some commentators have concluded that the wall between church and state is now as strong as ever. However, this Article urges a bit more caution and concludes that while the wall of separation is still standing, the foundation has been seriously weakened.

II. RELIGIOUS NEUTRALITY

A. Introduction

In deciding establishment clause cases, the Court has been forced to reconcile the "inescapable tension"[15] between two competing propositions. On the one hand, religion has been closely identified with many of our governmental institutions.[16] Indeed, numerous official references to religion or a deity can be found throughout our history. The Declaration of Independence, for example, refers to a "Creator."[17] President George Washington proclaimed November 26, 1789, a day of thanksgiving to offer prayers to the "Lord."[18] Other presidents have repeatedly issued proclamations that acknowledge religious holidays.[19] Sessions of Congress open with a prayer,[20] and both the national motto and the pledge of allegiance refer to "God."[21] These and other[22] illustrations confirm

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14. Korematsu v. United States, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

15. *Lynch*, 465 U.S. at 672.

16. Abington School Dist. v. Schempp, 374 U.S. 203, 212 (1963).

17. The Declaration of Independence para. 2 (U.S. 1776).

18. *Lynch*, 465 U.S. at 675 n.2.

19. *Id.*; *but see* R. MORGAN, THE SUPREME COURT AND RELIGION 28-30 (1972) (of the first four Presidents, two approved of ceremonial invocations of nondenominational religion, two did not).

20. Marsh v. Chambers, 463 U.S. 783 (1983).

21. *Lynch*, 465 U.S. at 676.

the frequently cited observation in *Zorach v. Clausen*[23] that "[w]e are a religious people whose institutions presuppose a Supreme Being."[24]

On the other hand, religious freedom is firmly embedded in our tradition,[25] and the presence of a barrier between secular and religious matters has allowed that freedom to flourish. As the Court previously observed, the "exalted"[26] place of religion has been "achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. . . . [I]t is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard."[27]

In its attempts to reconcile this tension, the Court has not insisted on absolute separation of church and state. Such an absolutist position may well be undesirable and, as a practical matter, impossible to sustain.[28] Thus, on various occasions the Court upheld governmental action that may have provided some benefit to religion. In each instance, however, the Court found that government had remained neutral on religious matters and had not promoted one religious theory over another or religion over nonreligion.[29] Equally important, the Court maintained its own neutrality by scrupulously avoiding any endorsement of religious theory, practice, or doctrine.

B. The Development of the Neutrality Principle

The decision in *Everson v. Board of Education*[30] illustrates the Court's pre-*Lynch* approach to establishment clause cases. In that case the Board of Education had authorized reimbursement of money spent by parents for their children's bus transportation to public as well as Catholic schools.[31] The Court found no violation

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22. *Id.*

23. 343 U.S. 306 (1952).

24. *Id.* at 313.

25. Abington School Dist. v. Schempp, 374 U.S. 203, 214.

26. *Id.* at 226; *see generally* Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83 (1984).

27. 374 U.S. at 226.

28. *See Lynch*, 465 U.S. 672-73; *see* P. KURLAND, RELIGION AND THE LAW (1961); *Katz, Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

29. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968).

30. 330 U.S. 1 (1947).

31. The Board excluded payment for transportation of any pupil attending a "private school run for profit." This exclusion was not challenged. *Id.* at 4 n.2.

of the first amendment even though such financial reimbursement plainly helped these children attend church schools, and thus, indirectly benefited religious institutions.[32] In reaching this conclusion, the Court stressed that the Board had acted in a neutral fashion because transportation, like other public services provided to churches (police and fire protection, for example), is separate and "indisputably marked off from the religious function."[33]

One might certainly challenge the majority's notion that the state acted neutrally. Justice Jackson argued in a forceful dissent that reimbursement for transportation to Catholic schools differs significantly from provision of other public services. He pointed out that "[n]either the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' "[34]

While reasonable people might differ over application of the neutrality principle in *Everson*, all Members of the Court clearly relied on that principle as a method for resolving the tension generated by the dispute. The majority expressly stated that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers. . . ."[35] Moreover, the Court maintained its own neutrality on religious matters; it upheld the law because it viewed the legislation as simply providing "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[36]

In *Zorach v. Clauson*,[37] the Court rejected a first amendment challenge to a New York law that allowed public school students to leave school buildings and attend religious institutions for instruction or devotional exercises. As in *Everson*, the Court attempted to avoid crossing the fine line between permissible accommodation and impermissible endorsement of religion. The majority held that the New York release time program was constitutional because it involved neither religious instruction in the public schools nor expenditure of any public funds.[38] The Court relied on the absence of

32. *Id.* at 17.
33. *Id.* at 18.
34. *Id.* at 25 (Jackson, J., dissenting).
35. *Id.* at 18.
36. *Id.*
37. 343 U.S. 306.
38. *Id.* at 308-09. In this regard, the New York program was distinguishable from that in *McCollum*, in which religious instruction took place on public school property during school hours. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

any evidence that public school officials coerced students to participate in the release time program.[39] In fact, the Court found that school authorities were completely neutral in this regard.[40] Accordingly, to uphold New York's release time program, the Court did not have to support any particular religious doctrine or religion over nonreligion. The Court, like the school personnel, assumed an attitude that "show[ed] no partiality to any one group and that [let] each flourish according to the zeal of its adherents and the appeal of its dogma."[41]

The Court's impartiality was equally evident in *Board of Education v. Allen*,[42] in which the Court again upheld governmental conduct that arguably benefited religion.[43] The challenged statute authorized the loan of textbooks to school children, including those attending parochial schools. The textbooks were those designated for use in public schools or approved by a board of education.[44] In rejecting a first amendment challenge, the Court underscored the state's secular purpose to further educational opportunities for all children.[45] It emphasized that parochial schools perform a secular function as well as their obvious sectarian one.[46] Because the trial court decided the case on cross-motions for summary judgment,[47] nothing in the record indicated that any of the textbooks were used by the parochial schools to promote their religious function,[48] and the Court refused to assume that all textbooks—whether they dealt with mathematics, literature, or science—were used to further a religious purpose. Therefore, the Court upheld the textbook loan provision because it perceived that the service provided was so separate from any religious function that it reflected a neutral position toward religion. Manifestly, the Court again reached its result without endorsing any religious practice, theory, or doctrine. Indeed, five years later the Court explained that the result in *Allen* was premised

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39. 343 U.S. at 311. The Court suggested that if the authorities had used their position to force students to take religious instruction, a wholly different case would have been presented. *Id.*

40. *Id.*

41. *Id.* at 313.

42. 392 U.S. 236 (1968).

43. The Court observed that no funds or books were furnished directly to parochial schools. Nevertheless, free books may have made it more likely that some children would choose to attend parochial schools. *Id.* at 243-44.

44. *Id.* at 239.

45. *Id.* at 243.

46. *Id.* at 247-48.

47. *Id.* at 248.

48. *Id.*

on its perception that the textbook loan provision reflected a neutral attitude toward religion.[49]

The Court also maintained a position of scrupulous neutrality when it considered the constitutionality of governmental financial assistance to institutions of higher learning, including sectarian ones.[50] The decision in *Hunt v. McNair*[51] is typical of the Court's approach. Plaintiffs in *Hunt* attacked a South Carolina law establishing an authority that could issue revenue bonds to assist colleges in construction projects. Plaintiffs argued that the law violated the establishment clause because it authorized such assistance to the Baptist College at Charleston. Despite the affiliation of the college, the Court found no constitutional violation. The Court stressed that the aid was not limited to sectarian institutions, but rather was available to all institutions regardless of whether they had religious affiliations.[52] Moreover, the statute explicitly excluded financing of any projects that included facilities to be used for religious instruction, religious worship, or departments of divinity.[53] Finally, the Court underscored the absence of any showing that the college placed special emphasis on religious, rather than secular, education.[54] Although the Court held that the aid was constitutionally permissible, its opinion plainly did not embrace religion in general or any specific religious sect. To the contrary, the Court found that the aid in *Hunt*, like that in other cases,[55] was constitutionally permissible because it took the form of a "secular, neutral or nonideological"[56] service that was available to all regardless of religious affiliation.

For similar reasons, the Court concluded in *Walz v. Tax Commission*[57] that New York's property tax exemption for religious organizations was constitutional. Certainly, the challenged exemption conferred an indirect benefit on religion, but the opinion upholding

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49. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 782 (1973).

50. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion).

51. 413 U.S. 734 (1973).

52. *Id.* at 741.

53. *Id.* at 736-37.

54. *Id.* at 743-44. In *Tilton* and *Roemer* the Court also emphasized the absence of any evidence in the record that religion permeated the institution. Roemer v. Board of Pub. Works, 426 U.S. 736, 755-59 (1976); Tilton v. Richardson, 403 U.S. 672, 680-82 (1971) (plurality opinion). In *Tilton*, the Court struck down part of the Act that would allow federally aided facilities to be used for sectarian purposes after twenty years. 403 U.S. at 683-84, 689.

55. *See, e.g.*, *Everson*, 330 U.S. 1 (1947); *Allen*, 392 U.S. 236 (1968); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).

56. Tilton v. Richardson, 403 U.S. 672, 687 (1971) (plurality opinion).

57. 397 U.S. 664 (1970).

this practice carefully avoided any endorsement of religion. Instead the Court focused on the breadth of the exemption, which covered all property devoted to religious, educational, or charitable purposes.[58] Moreover, and perhaps more importantly, the Court emphasized that the exemption reinforced the desired separation of church and state:[59] "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[60] The holding in *Walz* thus tended to confine, rather than enlarge, the area of constitutionally permissible state involvement with religion.[61] As observed in *Walz*, the course of neutrality toward religion may not be an absolutely straight line;[62] nevertheless, the Court maintained a neutral course in that case.

Even in upholding the constitutionality of Sunday Closing Laws, the Court wrote opinions that carefully avoided endorsement of religion or religious practices.[63] The Court acknowledged, in *McGowan v. Maryland*,[64] that these laws have a strongly religious origin. The majority pointed out that the Maryland statutes under review explicitly referred to the "Lord's day" and the "Sabbath day."[65] Although the Court held that the statutes in question were not laws respecting an establishment of a religion, its conclusion was premised on the finding that those statutes were no longer rooted in their religious foundations.[66] The Court traced in detail the emergence of secular justifications for Sunday Closing Laws and observed:

> Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of

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58. *Id.* at 666, 672-73.

59. *Id.* at 676. Additionally, the Court pointed to the historical acceptance of tax exemptions for religious institutions. Tilton v. Richardson, 403 U.S. 672, 676-77 (1971) (plurality opinion).

60. *Id.* at 674.

61. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). *See also* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 793 (1973).

62. 397 U.S. at 669.

63. *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

64. 366 U.S. 420, 433 (1961).

65. *See id.* at 445.

66. *Id.* at 447-49. The Court reached the same conclusion regarding the laws under review in the other cases before the court. Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 624-30 (1961); Braunfeld v. Brown, 366 U.S. 599, 602 (1961); Two Guys v. McGinley, 366 U.S. 582, 598 (1961).

> women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sect, does not bar the State from achieving its secular goals.[67]

The Court made clear that its determination applied only to those Sunday Closing Laws that indeed had a secular purpose and effect. To underscore this limitation, the Court offered a disclaimer suggesting that such a law might be unconstitutional if it were shown that its "purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."[68] Thus, although *McGowan* gave a stamp of approval to laws that provide a uniform day of rest, it did *not* sanction religion or religious practices. The secular reasons behind the Sunday Closing Laws may have coincided with the tenets of certain religions;[69] however, in upholding the laws, the Court was not required to adopt those tenets or to depart from a neutral position toward religion.

These decisions reveal that the Court has upheld laws that have benefited religion in some way. In each such instance, however, the Court found that the challenged provision reflected a neutral attitude toward religion. The neutrality principle, of course, may be more easily stated than applied.[70] Nevertheless, in the past, the Court made a good faith effort to apply the principle, insisted on neutrality by government officials, and avoided conferring its own imprimatur on religion or on any specific religious practice or doctrine.

C. The Court's Retreat From Neutrality

The first sign that the Court might retreat from its position of scrupulous neutrality appeared in *Mueller v. Allen*.[71] In that case, the

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67. *McGowan*, 366 U.S. at 444-45.

68. *Id.* at 453.

69. *Id.* at 442.

70. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

71. 463 U.S. 388 (1983).

Court rejected an establishment clause challenge to a state statute allowing taxpayers a deduction for expenses incurred in providing tuition, textbooks, and transportation for children attending elementary and secondary schools. The overwhelming majority of taxpayers eligible for such deductions were parents whose children attended parochial schools.[72] Despite the indirect benefit to those schools, the majority upheld the constitutionality of the provisions by relying on two features of the legislative scheme: First, the deduction was one of many (such as those for medical expenses and charitable contributions) available under state tax laws.[73] Second, and most important, the deduction was available for educational expenses incurred by all parents, including those whose children attended public schools or nonsectarian private institutions.[74] The Court concluded that the challenged statute was neutral on its face and thus bore enough resemblance to the assistance programs upheld in prior cases to survive constitutional scrutiny.[75]

The dissenters criticized the majority for ignoring the actual impact of the tax provisions. In practice, the deductions were not available to all parents, but only to those whose children attended schools that charged for tuition or instructional material. This group of taxpayers was comprised almost entirely of parents who sent their children to religious schools.[76] Moreover, the benefit that flowed to the sectarian schools from the tuition tax deduction was not limited to the secular functions performed by those schools.[77] Similarly, the deduction for instructional material applied even to material that could be used for religious purposes.[78] Because the statute provided substantial aid to religious schools and assisted the sectarian, as well as the secular, functions of those institutions, the dissenters maintained that the law was unconstitutional.

Perhaps the difference between the majority and the dissent centered not on the neutrality principle's appropriateness, but on its application. The majority certainly stressed the facially neutral characteristics of the statute and stated that it was not embracing religion.[79] In this respect the majority also attempted to maintain its own neutrality. By refusing to consider the actual impact of the

72. *Id.* at 401.
73. *Id.* at 396.
74. *Id.* at 397.
75. *Id.* at 396.
76. *Id.* at 413 (Marshall, J., dissenting).
77. *Id.*
78. *Id.* at 414 (Marshall, J., dissenting).
79. *Id.* at 397.

law,[80] however, the majority ignored an important aspect of the neutrality principle.[81] This refusal signaled a retreat from the neutrality principle—or, at the very least, a willingness to abide by a weakened version of the principle.

The neutrality principle was further weakened by the Court's determination in *Marsh v. Chambers*[82] that the practice of opening legislative sessions with a prayer did not violate the establishment clause. As Justice Brennan stated in his dissent, a legislative prayer clearly violates the principle that government should remain neutral in matters of religion:

> It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" . . . with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.[83]

The majority made no attempt whatsoever to suggest that a legislative prayer could be justified under the neutrality principle. Instead, it relied on the fact that the practice enjoyed an "unambiguous and unbroken history of more than 200 years."[84] The Continental Congress opened its sessions with a prayer, and the First Congress—which approved the language of the first amendment—adopted a similar practice that has since continued

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80. *Id.* at 401.

81. In previous cases the Court was careful to consider the real impact of the challenged aid on sectarian education. When the aid provided no direct benefit to religious education, it was upheld. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 392 U.S. 236 (1968). The Court disapproved direct aid to sectarian schools in Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977).

82. 463 U.S. 783 (1983).

83. *Id.* at 808 (Brennan, J., dissenting) (footnotes omitted).

84. *Id.* at 792.

without interruption.[85] The Court recognized that past practices alone do not justify contemporary violations of constitutional rights. Under the facts in *Marsh*, however, the Court held that the historical evidence revealed not only what the drafters intended the establishment clause to mean, but also how they thought the clause applied to the very practice under attack. In short, the Court found that the Framers' "actions reveal[ed] their intent."[86] Accordingly, the Court concluded that the drafters of the first amendment did not view paid legislative chaplains or legislative prayers as violations of the establishment clause.[87]

The decision in *Marsh*, standing alone, might not pose a serious threat to the neutrality principle. The Court's reliance on the "unique history"[88] of the legislative prayer suggests that the Court may have been creating an exception to the establishment clause, rather than reshaping first amendment doctrine.[89] That exception plainly allowed governmental officials to abandon a neutral position toward religion, but only in the context of the legislative prayer. Moreover, in carving out the exception, the Court itself did not embrace a religious practice, but deferred to the intent of the drafters in reaching its decision. In this manner the Court preserved its own neutrality on religion. When considered in isolation, *Marsh* does not significantly undermine the general principle that governmental officials—including Members of the Court—should remain neutral toward religion and religious practice.

Marsh, however, does not stand in isolation, and when viewed together with the Court's previous decision in *Mueller*, provides further evidence of a retreat from the neutrality principle. Finally, any notion that *Marsh* might be read narrowly and confined to the special case of legislative prayer was laid to rest by the decision in *Lynch v. Donnelly*.[90]

III. THE CRECHE CASE: NEUTRALITY ABANDONED

A. Facts

In 1980, the city of Pawtucket erected a Christmas display in a privately owned park. The display contained (1) a talking wishing well; (2) Santa's House, inhabited by a live Santa who distributed

85. *Id.* at 787-89.
86. *Id.* at 790.
87. *Id.*
88. *Id.* at 791.
89. *Id.* at 796 (Brennan, J., dissenting).
90. 465 U.S. 688 (1984).

candy; (3) a group of caroler/musician figures; (4) a small village composed of four houses and a church; (5) four large, five-pointed stars; (6) three wooden Christmas tree cutouts; (7) a live, forty-foot Christmas tree strung with lights; (8) a spray of reindeer pulling Santa's sleigh; (9) a garland hung from candy-striped poles; (10) cutout letters spelling "Season's Greetings"; and (11) twenty-one cutout figures representing such characters as a clown, a bear, and a robot.[91]

In addition, as it had done for the past forty years, the city included a creche in its Christmas display. The nativity scene occupied 140 square feet[92] of the entire Christmas display. It contained life-sized figures of "kings bearing gifts, shepherds, animals, and angels," as well as "Mary and Joseph kneeling near the manger in which the baby [Christ] lies with arms spread in apparent benediction."[93] The creche had been purchased by the city seven years earlier for $1,365.[94] Since then, no money had been spent on its maintenance, although it was estimated that the city's annual cost of assembling, removing, and storing the creche was $20.00 and that an additional $20.00 was spent on lighting.[95]

One week before Christmas, a lawsuit was filed challenging the city's ownership and erection of the creche. Plaintiffs did not contest the entire Christmas display; rather they alleged that the city's sponsorship of the *creche* violated the first amendment establishment clause.[96] As might have been expected, the lawsuit generated deep public concern and outright resentment.[97] The most recurrent comments were that "the birth of Christ is the essence of Christmas, and that the presence of the creche, as a symbol of the spiritual core, is necessary to preserve the true meaning of the holiday."[98] The authors of these comments viewed the lawsuit as an attack on the very presence of religion as part of the community's life.[99]

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91. Donnelly v. Lynch, 525 F. Supp. 1150, 1155 (D.R.I. 1981).
92. *Id.* at 1156 n.9.
93. *Id.* at 1156.
94. *Id.*
95. *Id.*
96. *Id.* at 1154, 1156. *See* notes 30-70 and accompanying text for discussion of the view espoused by the plaintiffs.
97. 525 F. Supp. at 1161-62.
98. *Id.* at 1161.
99. *Id.* at 1162.

B. The District Court's Decision

The city first argued that Christmas is a national, secular holiday.[100] The emergence of a secular dimension to Christmas rendered the religious meaning "merely vestigial", and thus, the city's support of Christmas was secular.[101] The district court agreed that Christmas has a secular element: "This is the Christmas whose central figure is Santa Claus and whose themes are the nontheological ones of goodwill, generosity, peace, and less exaltedly, commercialism."[102]

The district court found, nevertheless, that Christmas retains an important religious dimension. "Janus-like, it is one holiday with two distinct and very different faces."[103] The central figure of the *religious* Christmas is Christ, and the themes are the theological ones of "salvation and spiritual peace, renewal, and fulfillment."[104] Governmental participation in the celebration of the secular aspects of Christmas does not justify governmental support of its religious components, such as the creche.[105] "It is too late in Establishment Clause jurisprudence," the district court wrote, "to suggest that the Government may endorse the Christian view of Christmas as a celebration of the birthday of the Son of God."[106]

In its second argument, the city contended that, assuming Christmas has retained a religious element, the creche itself has become secularized.[107] Like Santa Claus, Christmas trees, bells, stars, and reindeer, the creche, it was suggested, had lost any religious significance.[108] The district court rejected that suggestion and, in so doing, expressed its inability to understand what meaning the creche could have besides the religious one.[109]

For its third and final defense, the city of Pawtucket relied on the three-prong test set forth in *Lemon v. Kurtzman*.[110] Assuming the religious character of the creche, the city contended that its support

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100. *Id.* at 1163.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1164-65.
106. *Id.* at 1164.
107. *Id.* at 1165.
108. *Id.* at 1166.
109. *Id.* at 1167.
110. 403 U.S. 602, 612-13 (1971). A careful reading of *Lemon* indicates that all three prongs must be satisfied for the government action to survive the consitutional analysis. *See* Stone v. Graham, 449 U.S. 39, 41 (1981) ("If a statute violates any of these three principles, it must be struck down").

of the creche was constitutional because the support had a secular purpose, had a secular effect, and involved no excessive governmental entanglement with religion.

To satisfy the first prong of the test, the city argued that its *purpose* in displaying the creche was not to promote religion, but simply to acknowledge the religious significance of Christmas.[111] The court conceded that it is difficult to draw a precise line between permissible acknowledgement and impermissible promotion of religion.[112] It concluded, however, that no such line needed to be drawn in this case because the record failed to support the city's position. To the contrary, the district court found that the city used the creche for the very purposes of promoting the theological message and keeping Christ in Christmas.[113]

The city argued, under the second prong of the *Lemon* test, that the *effect* of displaying the creche was purely secular. The city offered three reasons why the presence of the creche in the Christmas display did not create the appearance of governmental endorsement of religion: first, the public was unaware of the city's connection with the display; second, the creche was only an insignificant part of the display; and third, the city had made no effort to highlight the religious message.[114] The court rejected all three contentions. The court stated that the first contention "border[ed] on the frivolous"[115] because the public was well aware of the city's connection with the display. According to the court, the viewing public would not regard the creche as an insignificant part of the overall display, given the size and location of the nativity scene. In addition, the district court found that the religious significance of the creche was not diminished simply because it was part of a larger, secular Christmas display. The district court also rejected the third contention by observing that the city appeared to support both aspects of the holiday by commingling secular and religious symbols.[116] This dual message would be portrayed to the viewing public, many of whom supported the nativity scene precisely because it perpetuated the religious element of Christmas.[117]

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111. 525 F. Supp. at 1170. The city also argued an economic purpose, but downtown businessmen testified that the creche added nothing to the Christmas display as a commercial draw. *Id.*

112. *Id.*

113. *Id.* at 1172-73.

114. *Id.* at 1175-76.

115. *Id.* at 1176.

116. *Id.* at 1177.

117. *Id.* at 1161.

The city also argued that it had satisfied the third prong of the *Lemon* test: It had avoided excessive entanglement with religion by displaying the creche without the participation of religious organizations. The district court agreed, stating that the absence of participation by religious organizations indicated that the city had not become improperly entangled with religion when it displayed the creche.[118] The court concluded, however, that the political divisiveness resulting from the display impermissibly entangled the city with religion. The court observed that "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."[119]

Accordingly, the district court held that Pawtucket's inclusion of a nativity scene in its Christmas display violated the establishment clause. In so doing, the court stressed that the case

> is not about an infringement of the right of Christians freely to express their belief that Christmas is the day on which the Son of God was born. This decision has nothing to do with the ability of private citizens to display the creche in their homes, yards, businesses, or churches. However, the right to express one's own religious beliefs does not include the right to have one's government express those beliefs simply because the believers constitute a majority.[120]

C. The Supreme Court Opinion

Chief Judge Pettine's careful examination of the issues in the district court opinion stands in marked contrast to the plurality opinion of the Supreme Court.[121] Relying more heavily on rhetorical statements[122] than on analysis, the plurality concluded that public sponsorship of a nativity scene does not violate the establishment

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118. *Id.* at 1179.

119. *Id.* at 1180.

120. *Id.* The judgment was upheld by a divided panel of the court of appeals. 691 F.2d 1029 (1st Cir. 1982).

121. *Lynch*, 465 U.S. 668. Chief Justice Burger wrote the opinion and was joined by Justices White, Powell, and Rehnquist. Justice O'Connor filed a concurring opinion. *Id.* at 687. Justice Brennan filed a dissenting opinion in which Justices Marshall, Blackmun and Stevens joined. *Id.* at 694. Justice Blackmun also filed a dissenting opinion in which Justice Stevens joined. *Id.* at 726.

122. *Id.* at 678-85. In the first part of the opinion, the Chief Justice merely catalogued examples of public acknowledgement of religion and stressed the importance of religion in our history. *Id.* at 674-78. He explained that prior cases had not adopted an absolutist view of the establishment clause and had upheld government conduct despite the

clause. The plurality opinion strayed from the record by misconstruing the district court's holding and overlooking its findings of fact. In addition, the plurality departed significantly from prior caselaw by ignoring the neutrality principle underlying prior establishment clause cases and by narrowing the scope of the establishment clause.

The plurality held that the city had a secular purpose in displaying the creche,[123] based, in part, on a finding that Christmas is a national holiday. The plurality did not discuss its reasons for this finding, nor did it acknowledge the district court's findings to the contrary. Chief Justice Burger, writing for the plurality, observed that the creche must be examined in the context of the entire Christmas season and stated that the "creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday."[124]

The plurality imputed its finding—that the display depicted the historical origins of a national holiday—to the city's purpose in displaying the creche. The Chief Justice recognized the religious significance of the creche and explicitly rejected the suggestion that it was holding that the creche is a secular symbol like Santa Claus or the talking wishing well.[125] Instead, the plurality advanced the notion that inclusion of the creche in the larger display simply depicted the historical origins of Christmas[126] and that the creche merely happened to coincide with the tenets of certain religions.[127]

The assertion that the creche simply depicted the historical origins of the holiday is rather remarkable in light of the district court's finding that the city included the creche not for historical reasons, but for the purpose of advancing a religious message.[128] Moreover, the assertion disregards the finding that Christmas has two distinct

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benefit of such conduct conferred on religion. *Id.* at 678. For a discussion of these prior cases, see *supra* notes 30-70 and accompanying text.

123. *Id.* at 680. The Chief Justice stated that the *Lemon* test, see *supra* notes 110-19 and accompanying text, which was first articulated in an opinion that he himself authored, is not necessarily dispositive of First Amendment challenges. He stated that the Court is unwilling "to be confined to any single test or criterion in this sensitive area." *Id.* at 679. The plurality's opinion, however, then goes on to analyze the case under two of the prongs—the purpose of the action and the extent of the entanglement. The prong not analyzed—the effect of the action—probably would have been the most problematic in upholding the constitutionality of the city's display.

124. *Id.*

125. 465 U.S. at 685 n.12.

126. *Id.* at 680.

127. *Id.* at 682.

128. *See* Donnelly v. Lynch, 525 F. Supp. at 1173.

and very different faces—a secular one and a religious one.[129] The central figure of the religious element is Christ, and the creche is a depiction of the religious doctrine relating to his birth. As the district court explained:

> The creche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ. . . . It depicts the birth of Christ in a way that is not merely historical. It has not been so altered over the years as to relegate its religious connection to a matter of historical curiosity. *It is the embodiment of the Christian view of the birth and nature of Christ.*[130]

In addition to ignoring certain findings, the plurality misconstrued the district court's holding. Chief Justice Burger concluded that the "District Court's inference, drawn from the religious nature of the creche, that the City has no secular purpose was, on this record, clearly erroneous."[131] The district court did make this inference, stating that the use of a "patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys."[132] The court, however, had also relied on other evidence in the record to support this inference. For example, the court found that the city never attempted to disclaim the endorsement of the religious message when it constructed the Christmas display.[133] The district court also noted that any neutral purpose was cast in doubt by the fact that the only religious traditions that have been part of Pawtucket's official displays are those of the Christian majority.[134] Finally, the court believed that the absence of a secular purpose was confirmed by the city's own argument that removal of the creche would be hostile to religion.[135] As the district court observed, if the city's purpose was the neutral recognition of a cultural or historical phenomenon, it would not have considered elimination of the creche a blow to religion.[136] Based on these findings, the city's arguments, statements by the mayor, and other evidence in the record, the district court found that the nativity scene was made part of the larger Christmas display

129. *Id.* at 1163.
130. *Id.* at 1167 (emphasis added).
131. *Id.* (footnote omitted).
132. *Id.* at 1172.
133. *Id.*
134. *Id.*
135. *Id.* at 1172-73.
136. *Id.* at 1173.

precisely in order to keep Christ in Christmas.[137] As a factual matter, therefore, and not merely as an inference from the religious nature of the creche, the district court determined that the city's purpose was the approval and endorsement of a religious message.[138] Yet the plurality ignored this detailed analysis by the lower court.

The plurality also refused to acknowledge that the Supreme Court itself had previously inferred the absence of a secular purpose solely from the religious nature of challenged conduct. In *Stone v. Graham*,[139] the Court addressed the constitutionality of a statute requiring the posting of the Ten Commandments in public school classrooms. The statute also required that each display contain the following notation: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[140] The trial court found that the statute served a secular purpose and upheld the law.[141] Despite the statute's stated legislative purpose and the findings of the trial court, the Supreme Court reversed without the benefit of briefs or oral argument. Relying solely on the religious nature of the Ten Commandments, the Court concluded that the purpose of their posting on schoolroom walls was plainly religious.[142] As the Court stated, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[143]

Not surprisingly, the district court in *Lynch* relied on *Stone* in finding an impermissible religious purpose behind the display of the creche.[144] The creche—certainly no less so than the Ten Commandments—is a sacred, religious symbol representing a central tenet of Christianity.[145] Nevertheless, the *Lynch* plurality attempted to distinguish *Stone* on the ground that, in the latter case, the statute was motivated "*wholly* by religious considerations."[146] The plurality's attempt to recast the *Stone* opinion obscured, if not totally

137. *Id.* at 1173-74.
138. *Id.* at 1174.
139. 449 U.S. 39 (1980).
140. *Id.* at 40 n.1.
141. *Id.* at 40.
142. *Id.* at 41, 43.
143. *Id.* at 41 (footnote omitted).
144. 525 F. Supp. at 1171-72.
145. *See supra* notes 12-13 and accompanying text.
146. 465 U.S. at 680 (emphasis added).

ignored, the fact that, in *Stone*, the state legislature articulated and the trial court found a secular purpose for posting the Ten Commandments. The Supreme Court's contrary conclusion in *Stone* was derived solely from the religious nature of that symbol.

Lynch presented an even stronger case for finding an impermissible purpose. First, the Court could have inferred, as it did in *Stone*, a religious purpose solely from the distinctively religious nature of the challenged symbol. In addition, the Court could have accepted the district court's finding, based on testimony and other evidence, that the city's actual purpose was advancement of the religious message embodied in the creche.

A more disturbing aspect of the *Lynch* plurality opinion than either its casual treatment of the record or its improper characterization of *Stone* is the plurality's abandonment of the neutrality principle[147] as a calculus for resolving establishment clause cases. The departure from the neutrality principle fundamentally threatens first amendment values. The Chief Justice did not even pay lip service to the need for governmental neutrality in matters of religion. Equally startling was the plurality's willingness to depart from its own scrupulous neutrality and to align itself with the doctrine of a particular religion.

The plurality, despite conceding that the creche has religious significance,[148] stated that it was "unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause."[149] In making this assertion, the plurality simply disregarded the premise underlying those other cases. In each of those cases the aid was upheld because it was "so separate and so undisputably marked off from the religious function"[150] that it reflected a neutral posture toward religion. In each instance, the aid took the form of a "secular, neutral, or nonideological"[151] service. Moreover, in upholding such aid the Court itself expressly avoided conferring its own blessings on any religious practice or theory.

Lynch is plainly distinguishable from these prior cases. Government support for a symbol as deeply involved with religious significance as the creche cannot be characterized as a secular, neutral, or

147. *See supra* notes 8-10 and accompanying text.
148. 468 U.S. at 687.
149. *Id.* at 682.
150. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
151. Tilton v. Richardson, 403 U.S. 672, 687 (1971). *See* Hunt v. McNair, 413 U.S. 734 (1973). *But see* Marsh v. Chambers, 463 U.S. 783 (1983).

nonideological service. The plurality made no real attempt to characterize the aid as such, perhaps recognizing the futility of such an effort. In addition, because the creche is associated only with Christianity, the aid here supports one religion.

The plurality's suggestion that *McGowan v. Maryland*[152] somehow supports the result in *Lynch* distorts the actual holding in the former case. In *McGowan*, the Court upheld the Maryland Sunday Closing Laws only after finding that their present purpose was to protect the public health, safety, and welfare, and that they had become disassociated from their religious origins.[153] Indeed, the Court indicated that Sunday Closing Laws may well violate the establishment clause if it were shown that their purpose or effect was to use the state's coercive power to aid religion.[154] Thus, it was disingenuous for the *Lynch* plurality to suggest that the creche is no more identified with religion than the Sunday Closing Laws. The underlying rationale of *McGowan* was that the laws in question had been separated from their religious foundations. By contrast, it cannot seriously be maintained that the creche similarly has been divorced from its religious origins. In short, *McGowan* provides no support for the result in *Lynch*, but instead serves to highlight how far the *Lynch* plurality departed from the neutrality principle.

Likewise, contrary to the plurality's suggestion,[155] the nativity scene in the Christmas display is not analogous to religious paintings in a public gallery. As one commentator stated, "At a museum . . ., observers expect to be exposed to a variety of works of art and literature, including those influenced by religion; thus, inclusion of such works carries no message about the display organizers' view or endorsement of religion."[156] It would be possible to uphold the practice of including religious paintings in public galleries without doing any disservice to the neutrality principle, for by including religious paintings among the many works of art in public galleries, the government shows no partiality to religion in general, or to any specific religious sect.[157] In this regard, the public display of religious art work is comparable to the practice of providing bus transportation to all pupils, including those attending religious

152. 366 U.S. 420 (1961).

153. *Id.* at 447-49. *See supra* note 67 and accompanying text.

154. 366 U.S. at 453.

155. *Lynch*, 465 U.S. at 683.

156. Note, *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 181 (1984); *see also* Donnelly v. Lynch, 525 F. Supp. at 1177.

157. Note, *supra* note 157, at 181.

schools,[158] or the practice of granting certain tax exemptions to all charities, including religious ones.[159] Were it to uphold such a practice in the face of a constitutional challenge, the Court would merely be giving its stamp of approval to public funding of art displays; it would not be giving its approval to any religious message contained in the paintings themselves.

The nativity scene challenged in *Lynch* stands on very different footing. It is not merely a work of art included among other art objects in a museum. The creche was placed in the Christmas display precisely to promote the religious message of Christmas.[160] When the Court sustained the constitutionality of that practice, it threw its weight behind the religious message.

The plurality's willingness to endorse a particular religious denomination further underscores the plurality's departure from the neutrality principle. *Lynch* did not involve government support for a broad range of private organizations, among them various religious groups;[161] rather, Pawtucket provided governmental sponsorship for a single religious message—that of the Christian majority. None of the cases relied on by the plurality sanctioned such governmental preference for a single denomination. Indeed, in *Larson v. Valente*[162] the Court held, "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[163] In a cavalier and unconvincing fashion, the *Lynch* plurality dispensed with *Larson* by stating that it was unable to see the creche display "as explicitly discriminatory in the sense contemplated in *Larson*."[164]

The entire tenor of the Chief Justice's opinion plainly suggests that the plurality was unable to perceive any real danger to religious freedom resulting from public expenditure of small sums on the display of a nativity scene. For the plurality, Christmas—and thus the

158. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

159. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

160. Donnelly v. Lynch, 525 F. Supp. at 1161-62.

161. *Compare* McCreary v. Stone, 575 F. Supp. 1112 (S.D.N.Y. 1983), *rev'd* 739 F.2d 716 (2nd Cir. 1984), *aff'd* by an equally divided court *sub nom.* Board of Trustees of the Village of Scarsdale v. McCreary, 105 S. Ct. 1859 (1985).

162. 456 U.S. 228 (1982).

163. *Id.* at 246.

164. *Lynch*, 465 U.S. at 687 n.13.

religious symbolism of the creche—is an acceptable part of our heritage.[165] Yet as Justice Brennan aptly observed, by adopting this position, the plurality took "a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that 'this is a Christian nation.' "[166]

D. The Scope of the Establishment Clause

The neutrality principle emerged as the vehicle to resolve the difficulties courts have encountered in determining when laws impermissibly "aided religion."[167] It may not have served as a perfect litmus, but through its use, the Court had been able to maintain the delicate balance between the objective of preventing state intrusion into religious matters and the reality that total separation of religion and state is impossible.

The momentum that began with *Mueller*, increased with *Marsh*, and received a decided thrust with *Lynch* was more than a shift away from the neutrality principle. The proposition that government—including the Supreme Court—should remain neutral in religious matters is not an end in itself, but rather a means to safeguard the principle of religious liberty that lies at the core of the first amendment.[168] In abandoning the neutrality principle, the plurality departed from the very purposes of the establishment clause as described in *Everson*. In short, the step taken by *Lynch* was towards a redefinition—and narrowing—of the establishment clause.

The precise conduct proscribed by the establishment clause is not easily determined by reference to the language or even the history of the first amendment.[169] Much is known about the Framers'

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165. *Id.* at 674-78, 685-86.

166. *Id.* at 717-18 (Brennan, J., dissenting) (quoting Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

167. Even before Everson v. Board of Educ., the Court used the neutrality principle to resolve some of its first amendment cases. *See generally* R. MORGAN, *supra* note 19, at 32-36.

168. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940):

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

169. *See generally* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF.

views on religious freedom, particularly those of Madison and Jefferson.[170] The historical evidence, however, does not provide many specific answers, and in these cases a literal quest for the Framers' intent may be both futile and misdirected.[171] As the Court stated in its first full examination of the establishment clause:

> The "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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. 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."[172]

The *Lynch* plurality clearly indicated its direction when it stated that the purpose of the establishment clause is the very limited one of preventing the actual establishment of a state church or religion.[173] At one point, the plurality observed that the Court's role in establishment clause cases is "to determine whether, in reality, [the challenged conduct] establishes a religion or religious faith, or tends to do so."[174] In keeping with this theme, the plurality later

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L. REV. 260, 264 (1968); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770 (1984).

170. *See* Everson v. Board of Educ., 330 U.S. 1, 33-41 (Rutledge, J., dissenting).

171. Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). Justice Brennan wrote:

> While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Id. at 237-38.

172. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (citation omitted).

173. 465 U.S. at 678.

174. *Id.*

observed that any notion that the creche poses "a real danger of establishment of a state church is far-fetched indeed."[175]

The plurality's reliance on the views of Justice Story is especially revealing.[176] Although it quoted from one part of Story's *Commentaries on the Constitution*, the plurality failed to mention that Story firmly believed that we are not simply a *religious* people, but a *Christian* people. Story wrote that it is "the especial duty of government to foster and encourage [the truth of Christianity] among all the citizens and subjects."[177] Richard Morgan has carefully examined Story's views on the first amendment and concluded that Story had a "truncated notion of the separation of church and state"[178] and believed in full accommodation between government and the Christian churches.[179] What is interesting about Story's position, Morgan wrote, is its "aberrational quality" in the sense that Story's approach is "high and dry, out of the mainstream of American constitutional law."[180] Morgan's conclusion must now be qualified: "at least until *Lynch v. Donnelly*."

Notwithstanding the *Lynch* plurality's reconstructionist efforts, the well settled interpretation of the establishment clause had been that it forbids more than the establishment of a state church or religion. The Court had previously found that the establishment clause prohibited a state[181] from engaging in a much wider range of activity, including allowing religious groups to enter public schools during regular hours for religious instruction;[182] composing a nondenominational, voluntary prayer for students;[183] requiring Bible readings at the start of the school day;[184] prohibiting the teaching of evolution;[185] paying a salary supplement to teachers teaching nonreligious courses in sectarian schools;[186] providing money grants for maintenance of facilities operated by sectarian schools;[187]

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175. *Id.* at 686.

176. *See id.* at 678.

177. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1865 at 723 (1833).

178. R. MORGAN, *supra* note 19, at 38-39.

179. *Id.* at 39.

180. *Id.* at 40.

181. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (holding that "[t]he fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment").

182. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

183. Engel v. Vitale, 370 U.S. 421 (1962).

184. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

185. Epperson v. Arkansas, 393 U.S. 97 (1968).

186. Lemon v. Kurtzman, 403 U.S. 602 (1971).

187. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

providing tuition reimbursements to parents of children attending religious schools;[188] reimbursing religious schools for the cost of testing and record-keeping mandated by state;[189] loaning instructional material and equipment to religious schools[190] or directly to students attending such schools;[191] funding field trips by students in religious schools;[192] requiring posting of the Ten Commandments on walls of public classrooms;[193] and imposing registration and reporting requirements on religious organizations that solicit more than fifty percent of their funds from nonmembers.[194]

On prior occasions the Court had expressly rejected the suggestion that the establishment clause had the narrow purpose of prohibiting only conduct that actually establishes, or tends to establish, a state religion or church. In *Everson*,[195] for example, the Court adopted a much broader interpretation of the first amendment provision.[196] The establishment of a state church and the compulsion of particular religious beliefs are only two of the prohibited activities described by the Court in that case.[197]

This broad interpretation of the first amendment withstood a direct challenge in *Illinois ex rel McCollum v. Board of Education*.[198] The defendants argued that the Court should renounce the expansive view of the establishment clause expressed in *Everson* and hold that the first amendment was intended only to forbid governmental preference of one religion to the exclusion of others.[199] The Court gave "full consideration"[200] to the argument and then explicitly rejected the invitation to repudiate *Everson* in favor of a narrower view of the establishment clause.

In *Engel v. Vitale*,[201] the Court once again refused to endorse the notion that the establishment clause has the limited purpose of prohibiting establishment of one particular religion. Justice Black stated for the Court:

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188. *Id.*; *see also* Sloan v. Lemon, 413 U.S. 825 (1973).
189. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
190. Meek v. Pittenger, 421 U.S. 349 (1975).
191. Wolman v. Walter, 433 U.S. 229 (1977).
192. *Id.*
193. Stone v. Graham, 449 U.S. 39 (1980).
194. Larson v. Valente, 456 U.S. 228 (1982).
195. 330 U.S. 1 (1947).
196. *Id.* at 15.
197. *Id.* at 15-16.
198. 333 U.S. 203 (1948).
199. *Id.* at 211.
200. *Id.*
201. 370 U.S. 421 (1962).

> It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[202]

In *Abington School District v. Schempp*,[203] the Court "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[204] In so doing, the Court reaffirmed its conclusion that the purpose of the first amendment was not merely to forbid the establishment of a single sect, creed or religion.[205] " '[T]he object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' "[206]

IV. A REAFFIRMATION OF RELIGIOUS NEUTRALITY

Both the abandonment of the neutrality principle and the suggestion that the establishment clause has the limited purpose of prohibiting the establishment of a state church or religion represented substantial departures from well-settled first amendment

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202. *Id.* at 436 (footnote omitted).
203. 374 U.S. 203 (1963).
204. *Id.* at 216.
205. *Id.* at 217.
206. *Id.* (quoting *Everson*, 330 U.S. at 31-32 (1947) (Rutledge, J., dissenting)).

principles. Not surprisingly, commentators forecasted significant changes in establishment clause jurisprudence.[207] In view of the approach taken by the *Lynch* plurality, such predictions were well founded. As the Court itself had previously noted, "[I]n constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."[208] *Lynch* certainly appeared to provide the platform for further inroads on the scope of the establishment clause and on the neutrality principle.

Predictions of a "downhill thrust," however, may have been premature. While the *Lynch* decision approached the "verge" of establishment clause jurisprudence, the Court more recently has declined to take further steps down that slope. During the last Term, the Supreme Court decided four cases in which it did not follow the direction taken by *Lynch* and, in three of the cases, reaffirmed the need for scrupulous neutrality by government in religious matters.[209]

In *Estate of Thorton v. Caldor, Inc.*,[210] the Court invalidated a Connecticut statute that gave employees the right not to work on their chosen sabbath. The Court held that the statute violated the establishment clause, but its decision did not rest squarely on the neutrality principle. The Chief Justice, who authored the brief opinion, stated that the law contravened a "fundamental principle of the Religion Clauses."[211] He then quoted, not from one of the Court's own discussions of religious neutrality, but instead from the Second Circuit's decision in *Otten v. Baltimore & Ohio Railroad*,[212] in which Judge Learned Hand stated that "[t]he First Amendment . . . gives no one the right to insist that in the pursuit of [his] own interests others must conform their conduct to his own religious necessities."[213] Thus, although not re-establishing the neutrality principle, the Court in Thorton resisted an opportunity to continue the trend of the *Lynch* cases.

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207. *See, e.g.*, Van Alstyne, *supra* note 170.

208. Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).

209. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Estate of Thorton v. Caldor, Inc., 105 S. Ct. 2914 (1985); Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

210. 105 S. Ct. 2914 (1985).

211. *Id.* at 2918.

212. 205 F.2d 58 (2d Cir. 1953).

213. *Id.* at 61.

Unlike *Estate of Thorton*, the three other decisions clearly endorsed the principle that government officials must pursue a neutral course in religious matters. In *Grand Rapids School District v. Ball*,[214] the Court concluded that the school district violated the establishment clause by operating its Community Education and Shared Time Programs in sectarian schools. Both programs involved classes for nonpublic school students, including those attending religious schools, that were taught by teachers hired by the public school system and conducted in nonpublic school classrooms. The Court held that the programs impermissibly advanced religion in three respects: First, they entailed the risk that the participating teachers may become involved in intentionally or inadvertently inculcating a religious message.[215] Second, the programs provided a symbolic union of church and state that was likely to influence young children.[216] Finally, the two programs directly promoted religion by providing a direct subsidy to religious schools for instructional services and materials in parochial school buildings.[217]

In *Aguilar v. Felton*,[218] the companion case to *Ball*, the Court invalidated New York City's Title I program.[219] Through this program, the city used federal funds to pay the salaries of teachers who provided remedial instructional services to parochial students in parochial school buildings. The defendants in *Aguilar* attempted to distinguish their program from those challenged in *Ball* on the ground that New York City had adopted a system for monitoring the religious content of the Title I classes. The Court ruled that New York's program violated the establishment clause precisely *because* of this monitoring system. It held that the system resulted in excessive—and constitutionally impermissible—entanglement between church and state. Under the pervasive monitoring system, agents of the State of New York inspected the religious schools regularly for the presence of religious matter in Title I classes. Church and state thus became entangled in two ways: First, religious institutions were forced to endure the presence of state personnel and to submit to the state's determination of what is a religious symbol.[220] Second, administrative personnel of public and parochial schools

214. 105 S. Ct. 3216, 3230-31 (1985).
215. *Id.* at 3223.
216. *Id.* at 3223-24.
217. *Id.* at 3224.
218. 105 S. Ct. 3232 (1985).
219. 105 S. Ct. at 3237, 3239. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701–2854 (1982).
220. 105 S. Ct. at 3238-39.

worked closely together in resolving problems related to scheduling the program.[221] Accordingly, the Court concluded:

> Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the *constitutional principles* that they implicate—that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.[222]

Perhaps the strongest reaffirmation of the neutrality principle occurred in *Wallace v. Jaffree*,[223] in which the Court struck down an Alabama statute authorizing a period of silence in public schools for meditation or silent prayer.[224] The Court reaffirmed the principle that government must remain neutral in matters of religious theory, doctrine, and practice. It observed that by amending the statute to allow a moment of silence for "voluntary prayer," the Alabama legislature "intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a *course of complete neutrality* toward religion."[225]

All four cases are also significant because they repudiate the *Lynch* plurality's notion that the establishment clause forbids only the creation of a state church or religion. The programs and laws challenged in these cases created little, if any, danger of the establishment of a state religion.[226] Yet, as the Court expressly stated: "The First Amendment's guarantee that 'Congress shall make no law respecting an establishment of religion' . . . is more than a

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221. *Id.* at 3239.

222. *Id.* (emphasis added).

223. 105 S. Ct. 2479 (1985).

224. The Court also rejected the remarkable suggestion that it should overrule Cantwell v. Connecticut, 310 U.S. 296 (1940), which held that the first amendment religion clauses were incorporated through the fourteenth amendment as limitations on the states. Writing for the Court, Justice Stevens stated in unequivocal terms: "[W]hen the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that [Fourteenth] Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power." *Wallace*, 105 S. Ct. at 2486. The Court's refusal to retreat from *Cantwell* may have broader implications and signal a willingness to rebuff any attempts to make inroads on the incorporation doctrine generally.

225. 105 S. Ct. at 2492 (emphasis added).

226. *Aguilar*, 105 S. Ct. 3240 (Powell, J., concurring).

pledge that no single religion will be designated as a state religion. . . . The Establishment Clause instead primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[227]

From among the speculation on the reasons for the Court's abrupt turnabout from *Lynch*, one point clearly emerges: The change in direction coincided with a switch in vote by Justice Powell. Although he joined the plurality's more restrictive view of the establishment clause in *Lynch*, in the more recent cases he aligned himself with the expansive view of the majorities. Justice Powell's concurring opinion in *Aguilar* suggests that his change in vote might have been due to his concern that public aid to religion would produce a serious risk of ongoing political divisiveness:

> [T]here remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from non-recipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Although the Court's opinion does not discuss it at length, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.[228]

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227. *Ball*, 105 S. Ct. 3221-22 (quoting Committee for Public Educ. v. Nyquist, 413 U.S. 756, 772 (1973)).

228. *Aguilar*, 105 S. Ct. at 3240 (Powell, J., concurring) (citing Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (opinion of Harlan J.)) (citations omitted).

Justice Powell's emphasis on the potential for political strife is particularly significant in light of the discussion of that issue in *Lynch*. The *Lynch* plurality noted that political divisiveness alone cannot serve to invalidate otherwise permissible conduct and found that any political strife was caused, not by the creche, but by the lawsuit.[229]

Regardless of the reasons, the recent decisions do represent a change in direction from *Lynch*. The "downhill thrust" provided by that case has been retarded, at least for now. The recent cases seem to expose *Lynch* for what it is—an aberration that will be limited to its facts and then perhaps fade away. The question remains, however, whether the repudiation of the *Lynch* approach is complete. Lower courts have adopted a more expansive view of *Lynch*.[230] In addition, as suggested above, the change from Lynch may reflect nothing more than the switch in vote by Justice Powell.[231] Furthermore, there are sound bases for caution in predicting the complete demise of *Lynch* and that the wall between state and church is as strong as ever.

The first reason that the complete repudiation of *Lynch* should not be freely predicted is that the three cases which most clearly pronounced the reaffirmation of the neutrality principle involved schoolchildren. The desire to maintain a course of neutrality toward religion is arguably strongest when impressionable children are affected. As the Court observed in *Ball*, particular care must be taken when the recipients of a governmental message are children in their formative years: "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."[232] Thus, efforts might be made to limit the reach of the recent cases to school-aid challenges involving young children.

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229. *Lynch*, 465 U.S. at 684-85.

230. *See, e.g.*, Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985). (Although the Tenth Circuit Court of Appeals eventually reversed on rehearing en banc, a panel of the Tenth Circuit Court of Appeals originally relied on *Lynch* in holding that Bernalillo County, New Mexico, did not violate the establishment clause by including another Christian symbol—the cross—on its county seal.)

231. *See supra* notes 228-29 and accompanying text.

232. *Ball*, 105 S. Ct. at 3225; *see generally*, Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II*, 81 HARV. L. REV. 513, 561-90 (1968) (permissable degree of state involvement with religion in the schools differs with the various levels of education).

A second reason for caution is that the narrow view of the establishment clause has stronger support on the present Court than at any previous time. Initially, Justice Reed was the lone subscriber to the view that the establishment clause forbids only a state church or religion.[233] Later, Justice Stewart appeared to adopt this position.[234] Now, the Chief Justice[235] and Justice Rehnquist[236] embrace that reading of the establishment clause. Indeed, Justice Rehnquist offered a lengthy review of the historical evidence in support of the conclusion that the establishment clause forbade only establishment of a national religion and preference among religious sects.[237] Although Justice White had never endorsed the notion that the first amendment prohibits only a state church or religion,[238] in *Wallace v. Jaffree*, he revealed his support for a basic reconsideration of the Court's establishment clause precedents, citing Justice Rehnquist's historical explication as grounds for that reassessment.[239] Justice O'Connor's views on the establishment clause are still evolving and it is difficult to predict how she might vote in the future. She has stated that the relevant issue in establishment clause cases is whether an "objective observer" would perceive the challenged

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233. *McCollum*, 333 U.S. at 238-56 (Reed, J., dissenting).

234. *Engel*, 370 U.S. at 444-50 (Stewart, J., dissenting).

235. *See, e.g.*, *Wallace*, 105 S. Ct. at 2507 (Burger, C.J., dissenting). The Chief Justice stated: "The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous."

236. *See id.* at 2509 (Rehnquist, J., dissenting).

237. *Id.* at 2509-19. The historical evidence, of course, is not as conclusive as suggested by Justice Rehnquist nor is it dispositive in deciding specific cases. *See supra* notes 171-173 and accompanying text. Indeed, in Committee for Pub. Educ. v. Nyquist he joined Justice White's dissenting opinion that conceded the futility of relying too heavily on the history of the first amendment: "[O]ne cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations." 413 U.S. 756, 820 (1973) (White, J., dissenting). On the use of history in constitutional interpretation Professor Alexander Bickel has written:

> Like the text, we may thus conclude, history cannot displace judgment. And like the text, it should not, if it could. For, as Brandeis said on more than one occasion, and as the Framers themselves well knew, 'the only abiding thing is change'. . . . We require to know, as accurately as may be, whence we come, in order to be aware that it is our own reasoned and revocable will, not some idealized ancestral compulsion, that moves us forward.

A. BICKEL, THE LEAST DANGEROUS BRANCH, 108, 110 (1962).

238. Justice White has been out of step with many of the Court's establishment clause cases. *See, e.g.*, *Nyquist*, 413 U.S. at 813; *Lemon*, 403 U.S. at 661 (White, J., dissenting).

239. *Wallace*, 105 S. Ct. at 2508 (White, J., dissenting).

conduct as an endorsement of religion.[240] Although the endorsement test looks very similar to the neutrality principle,[241] Justice O'Connor opposed the proposition that the first amendment requires complete neutrality.[242] Moreover, her views emerge more clearly from the application than the enunciation of her test. On the basis of the record in *Lynch*,[243] an objective observer might easily have perceived—indeed, the district court found—that the city of Pawtucket was endorsing a religious message by including the creche. Yet, Justice O'Connor concurred in the judgment upholding the city's conduct.[244] Thus, in the present Court, four Justices arguably support a narrow construction of the establishment clause.

The Justice Department's position suggests a final reason to doubt that the neutrality principle is again firmly embedded in first amendment jurisprudence. In three of the recent cases,[245] the Department appeared either on behalf of a party or as an amicus curiae and argued in support of the constitutionality of the challenged conduct.[246] Additionally, at the Annual Meeting of the American Bar Association, Attorney General Meese harshly criticized the recent religion decisions and continued to assert that the establisment clause does not require neutrality, but only prohibits establishment of a national church.[247] Apparently, the present administration is not yet ready to concede defeat on this issue.

Although these arguments caution against predicting the complete demise of *Lynch*, the recent cases do demonstrate that *Lynch* will not be readily extended. While *Lynch* weakened the foundation, the wall continues to stand. For now, the downhill momentum of *Lynch* has been retarded. During the last Term, the Court reaffirmed the fundamental proposition that government must remain neutral in matters of religious theory, doctrine, and practice in order for religious liberty to flourish. Equally important, the Court reasserted its own neutrality on religious matters. In *Lynch* a plurality of the Court willingly embraced a sacred religious symbol of a

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240. *Id.* at 2501 (O'Connor, J., dissenting).

241. Indeed, in the *Ball* case, the majority cited the endorsement test with approval. 105 S. Ct. at 3226.

242. *Wallace*, 105 S. Ct. at 2504 (O'Connor, Jr., dissenting).

243. *See supra* notes 113-117 and accompanying text.

244. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

245. *Aguilar*, 105 S. Ct. 3232; *Ball*, 105 S. Ct. 3216; *Wallace*, 105 S. Ct. 2479.

246. *See* Brief for the Secretary of Education, Aguilar v. Felton, 105 S. Ct. 3232; Brief for the United States as Amicus Curiae Supporting Petitioners, Grand Rapids School District v. Ball, 105 S. Ct. 3216; Brief for the United States as Amicus Curiae, Wallace v. Jaffree, 105 S. Ct. 2479.

247. 54 U.S.L.W. 2037-38 (July 16, 1985).

specific denomination. In its more recent decisions, however, the Court carefully avoided even a symbolic link between itself and religion or religious practices. It should be stressed that such scrupulous avoidance of a union between the Court and religion does not represent any hostility toward religion or a lack of appreciation for the central role that religion has played in our culture. Quite to the contrary, it is a recognition that such a link would both degrade religion and threaten the very legitimacy of the Court.[248] *Lynch* plainly illustrates these dangers. Norman Redlich, Dean of the New York University School of Law, has pointed out that the Court, by embracing a Christian symbol, does "exactly what the Constitution was designed to prevent: It denigrates religion by trying to convert a religious symbol into a secular observance, and it shuts the door on those of us who cannot accept a religious symbol because it conflicts with our deepest religious beliefs."[249]

For the time being, the Court has returned to a course of religious neutrality.[250] Such a course may well require the Court to engage in "interpretation of a delicate sort."[251] Nevertheless, in order to maintain the exalted place of religion and the prominent position of the Court, it is a course that should—indeed, must—be pursued.

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248. 370 U.S. 421, 431 (1962) (The "first and most immediate purpose [of the establishment clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.")

249. Redlich, *Nativity Ruling Insults Jews*, N.Y. Times, Mar. 26, 1984, at A19, col.2.

250. For the most recent application of the neutrality principle, see Witters v. Washington Dept. of Serv. for the Blind, 54 U.S.L.W. 4135 (1986).

251. *Abington*, 374 U.S. at 226. The religious neutrality principle does not require the Court to adopt an absolutist position on separation of church and state. On various occasions, application of the principle has allowed the Court to uphold neutral, nonideological practices that nevertheless benefit religion. *See supra* notes 30-70 and accompanying text.

While this Article has focused on the role of the neutrality principle in establishment clause cases, it should be mentioned that the principle also plays a role in free exercise cases. At times, there may be a tension between the two religion clauses. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980). The neutrality principle aids in reducing the tension. For example, a state violates the free exercise clause by denying unemployment benefits to a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments. *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981). On the other hand, it might be argued that the state aids in the establishment of a religion by providing such benefits. Such an argument might be persuasive if the establishment clause mandated absolute separation. However, as this Article has argued, that clause does not mandate the extreme position but instead requires a course of neutrality. Such a course would be followed if the state provided benefits for all employees who terminated their work for good cause, including good cause related to religious beliefs. *Id.* at 719-20.