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Lynch v. Donnelly: Has the Lemon Test Soured

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LYNCH v. DONNELLY: HAS THE *LEMON* TEST SOURED?

I. INTRODUCTION

The first amendment states, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] This language, known as the establishment and free exercise clauses, embodies the principles of separation of church and state and protection of individual religious liberty.[2] The Supreme Court's interpretation of the establishment clause has ranged from strict neutrality[3] to benevolent accommodation of governmental interference with religion.[4]

The Supreme Court has developed three tests to resolve disputes which arise under the establishment clause. The first test, enunciated in *Lemon v. Kurtzman*[5] (the "*Lemon* test"), applies when a government action or statute affords a uniform benefit or hardship to all religions, and

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1. U.S. CONST. amend. I. The first amendment religion clauses were made applicable to the states in Everson v. Board of Educ., 330 U.S. 1, 8 (1947) and Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. P. KAUPER, RELIGION AND THE CONSTITUTION 13 (1964). *See also* Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984) ("The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.") (quoting 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)); Engel v. Vitale, 370 U.S. 421, 431 (1962) (purpose of establishment clause was based on belief that a union of government and religion tends to destroy government and to degrade religion); Everson v. Board of Educ., 330 U.S. 1, 11 (1947) ("[I]ndividual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.").

3. For example, in Everson v. Board of Educ., 330 U.S. 1 (1947), the Court stated that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. *See also generally* School Dist. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); Engel v. Vitale, 370 U.S. 421, 425 (1962) (government may not take part in composing official prayers to be recited in public schools).

4. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the court stated that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 614. *See also generally* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (regulating conduct which may "harmonize" with certain religious tenets not prohibited by establishment clause); Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970) (fire and police protection received by religious organizations are incidental benefits which are accorded all persons or institutions); Board of Educ. v. Allen, 392 U.S. 236 (1968) (lending secular textbooks to children in nonsecular schools not a violation of establishment clause).

5. 403 U.S. 602 (1971). The "*Lemon* test" was derived from Lemon v. Kurtzman; however, the Court developed this test over several years, culminating in the *Lemon* three-part test. *See infra* notes 7-10.

not to laws which discriminate among religions.[6] Under this test, a court reviews whether (1) the statute or government action has a legitimate legislative or secular purpose,[7] (2) the principal or primary effect neither advances nor inhibits religion[8] and (3) the statute or government action fosters an excessive government entanglement with religion,[9] or produces political divisiveness along religious lines.[10]

The second test endorsed by the Supreme Court, the "strict scrutiny" test,[11] applies to government actions or statutes which grant denominational preferences or which discriminate among religions.[12] Under this test, any such action or statute will be invalidated unless it (1) is justified by a compelling governmental interest[13] and (2) is closely tailored to further that interest.[14]

The third test applies an historical analysis to determine the validity of the government action or statute. For example, in *Marsh v. Cham-*

6. Larson v. Valente, 456 U.S. 228, 252 (1982) (citing Board of Educ. v. Allen, 392 U.S. 236 (1968) and Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

7. The "secular legislative purpose" element developed from McGowan v. Maryland, 366 U.S. 420 (1961). In upholding Maryland Sunday closing laws, the *McGowan* Court stated that "[t]he present purpose and effect of most of [the laws] 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 sects, does not bar the State from achieving its secular goals." *Id.* at 445.

8. The "primary effect" element developed from School Dist. v. Schempp, 374 U.S. 203 (1963). The *Schempp* Court stated the requirement as follows: "what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 222.

9. The "excessive government entanglement" element of the *Lemon* test was developed in Walz v. Tax Comm'n, 397 U.S. 664 (1970). In *Walz*, the Court upheld tax exemptions for churches stating that the entanglement element is one of degree—the more entangled the government becomes with religion, the more likely the statute or governmental action is to be invalid. *Id.* at 674. The Court noted that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.*

10. The "political divisiveness" portion of the excessive entanglement element was added by *Lemon*, 403 U.S. at 622. The *Lemon* Court stated that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.*

11. Larson v. Valente, 456 U.S. 228, 246 (1982) (Minnesota statute exempting only religious organizations receiving more than 50% of their contributions from members from complying with certain registration and reporting requirements held violative of establishment clause).

12. *Id.*

13. *Id.* at 247 (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (university prohibited religious student group from using school grounds or buildings claiming compelling interest in maintaining strict separation of church and state)).

14. *Id.* (citing Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (taxing ordinance invalidated because "not narrowly drawn to prevent or control abuses or evils arising from [solicitation, including religious solicitations]")).

bers,[15] the Court compared the Nebraska legislature's practice of opening each session with a prayer by a chaplain paid with public funds to the same practice of the First Congress. The Court concluded that legislative prayer was not an establishment of religion; "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[16]

The Supreme Court recently applied the *Lemon* test in *Lynch v. Donnelly*,[17] where the City of Pawtucket, Rhode Island, had included a créche in its annual Christmas display. The Court held that the City's sponsorship of the display did not violate the establishment clause, notwithstanding the religious significance of the créche.[18]

This Note discusses the Court's interpretation and application of the *Lemon* test in *Lynch* as well as the applicability of the other establishment clause tests. This Note also discusses the problems facing courts in deciding which test to apply in a given situation, and in actually applying these tests.[19]

This Note attempts to resolve the confusion surrounding the various establishment clause tests by categorizing the establishment clause cases according to common issues and constitutional concerns.[20] Categoriza-

15. 463 U.S. 783 (1983).

16. *Id.* at 792. In addition to the *Lemon*, strict scrutiny and historical analysis tests, Justice Brennan set forth a test in School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963), as an appropriate means of determining whether rights guaranteed by the establishment clause had been infringed. He stated that governmental actions which "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice" must be struck down.

17. 104 S. Ct. 1355 (1984).

18. *Id.* at 1366.

19. The history of the *Lynch* case illustrates the ineffective and confusing use of the various establishment clause tests by different courts. The district court in *Lynch* used the *Lemon* test and found the City's inclusion of the créche to be a violation of the establishment clause. Donnelly v. Lynch, 525 F. Supp. 1150, 1180 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). Subsequent to the district court's opinion, the Supreme Court announced in Larson v. Valente, 456 U.S. 228 (1982) the strict scrutiny test for government action which grants a denominational preference. The First Circuit then affirmed the district court's decision in *Lynch* based on a strict scrutiny analysis. Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). The Supreme Court reversed *Lynch* based in part on the *Lemon* test and in part on an historical analysis. Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984). The Court did not apply strict scrutiny because it did not view the Christmas display as discriminatory. *Lynch*, 104 S. Ct. at 1366 n.13.

20. This categorization would allow the courts to focus on the specific concerns of each area in reaching their decisions. For example, the concerns in the public school cases involve the coercive effect of peer pressure caused by religious activities in the public schools. However, in nonpublic school cases, the courts are concerned with public funds being used in religious activities and governmental interference with religion. By categorizing the establishment

tion of cases according to the type of review they should receive is not a novel idea. The Supreme Court has long categorized various kinds of governmental discrimination in the equal protection area and used different tests depending upon the type of discrimination involved.[21] Categorizing cases based on distinct constitutional concerns, rather than the current practice of attempting to fit a particular case within all the establishment clause precedents, should result in more consistent decisions.

II. HISTORY OF THE ESTABLISHMENT CLAUSE

Although this Note does not attempt to provide a complete historical background of the establishment clause, it is important to review the intent of the Framers of the first amendment in order to understand and analyze the various establishment clause tests developed by the Supreme Court.

A. Intent of the First Congress

The debates of the First Congress[22] clearly indicate that Congress' overriding concern in drafting the religion clauses in the Bill of Rights was to prevent one national religion and to assure the free exercise of religion without government interference.[23] This national focus is supported by the fact that several of the state constitutions in effect at the time had established religions.[24]

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clause cases, and applying different tests in each area, the concerns of one category can be met without affecting the concerns and precedents in another category.

21. For example, if a statute discriminates on the basis of race, the Court will use a strict scrutiny analysis to determine constitutionality. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) and Brown v. Board of Educ., 347 U.S. 483 (1954). If discrimination is based on illegitimacy, the Court will use an intermediate scrutiny test. Lalli v. Lalli, 439 U.S. 259 (1978). If based on age, a rational basis analysis will be used. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). See also *infra* notes 279-84 and accompanying text discussing equal protection further.

22. The debates of the First Congress are found in the ANNALS OF CONGRESS. They are not verbatim transcripts, but are the shorthand notes of a reporter, Thomas Lloyd. In the past, there was reluctance in using these records for interpretations. However, the First Federal Congress project at The George Washington University sponsored by the National Archives, which is preparing a multivolume documentary history of the First Congress, has found that the ANNALS give a complete and accurate description of the debates on the religion clauses. The first of a projected seventeen volumes is entitled 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: SENATE LEGISLATIVE JOURNAL [hereinafter referred to as "DOCUMENTARY HISTORY"].

23. M. MALBIN, RELIGION AND POLITICS 10 (1978).

24. For example, the Georgia constitution of 1777, art. VI, required that "representation . . . shall be of the Protestant religion." In Maryland, art. XXXV of the declaration of rights of the constitution of 1776 required all state officers to declare "a belief in the Christian religion." Part I, art. III of the Massachusetts constitution provided in part that people have a right to

James Madison, who was known to have opposed any aid to religion, proposed several amendments to Congress.[25] His initial proposal stated, in part, "nor shall any national religion be established."[26] Another of his proposals was later amended to read "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[27] However, during the August 15, 1789 debate, there was concern that the amendment "might be thought to have a tendency to abolish religion altogether."[28] Several speakers urged that the word "national" be added before the word "religion."[29] However, others objected to the word "national" as it implied that the Constitution created one nation with a national government, instead of a union of states ruled by a federal government with limited powers.[30]

Madison felt that the first amendment was unnecessary. He thought that a modern republic "would breed such a multiplicity of sects as to make establishment unlikely even without an amendment."[31] He forcefully expedited debate on this issue, however, because he believed a Bill of Rights was necessary to strengthen support for the new constitution.[32]

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require the towns to provide sufficient funds for churches and for the support and maintenance of the public Protestant school teachers.

Evidence documenting the intent of the Framers of the first amendment suggests that they "desired to protect the 'equal, natural and unalienable right to free exercise of religion.'" Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 216 (1980).

25. 1 ANNALS OF CONG. 451, 757 (J. Gales ed. 1789). In addition to James Madison's proposals, several states suggested their own amendments. For example, Virginia and North Carolina proposed identical provisions:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

M. MALBIN, *supra* note 23, at 3-4 (citing THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed. 1836), vol. 3, p. 659 (Virginia) & vol. 4, p. 1244 (North Carolina) [hereinafter referred to as "THE DEBATES"]. New Hampshire suggested that "Congress shall make no law touching religion or to infringe the rights of conscience." *Id.* at 4 (citing THE DEBATES, *supra* at vol. 1, p. 362).

26. 1 ANNALS OF CONG. 451 (J. Gales ed. 1789). Madison's initial first amendment proposal stated in full: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*

27. *Id.* at 757.

28. *Id.* The concerns expressed were those of Peter Sylvester. In addition, Benjamin Huntington feared that the amendment would be "extremely hurtful to the cause of religion." *Id.* at 758.

29. M. MALBIN, *supra* note 23, at 9.

30. *Id.* at 10.

31. *Id.* at 16.

32. *Id.* at 5.

As interpreted by Thomas Lloyd, the reporter for the *Annals of Congress*, Madison "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent."[33]

However, "national" was dropped from the language which the House adopted: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[34]

The Senate offered several substitute amendments before sending its final version to the House stating, in part, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[35] A conference committee was convened and the final language, as we know it today, was accepted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[36]

It seems clear from the debates of the First Congress in 1789, and from the existence of publicly supported religious schools and state constitutions which required particular religious faiths for political offices, that the religion clauses were adopted to prevent the national government from imposing its religious convictions on the people of the states by establishing one national religion or by preventing the free exercise of religion. It appears that the Supreme Court has often lost sight of this goal in its interpretation of the religion clauses' intent and history.

B. Supreme Court's Interpretation of Intent

In many of its establishment clause cases, the Supreme Court has interpreted the Framers' intent in adopting the first amendment. This interpretation has varied widely, from a strict no aid view,[37] to the view that some aid is permissible within certain carefully delineated guidelines.[38]

The majority of establishment clause cases concern public and pri-

33. 1 ANNALS OF CONG. 758-59 (J. Gales ed. 1789).

34. *Id.* at 796.

35. DOCUMENTARY HISTORY, *supra* note 22, at 166.

36. *Id.* at 186.

37. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (Court held unconstitutional statutes providing financial aid for attendance at nonpublic schools). *See also infra* text accompanying notes 41-42.

38. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (per curiam) (holding constitutional portions of Ohio statute providing nonpublic schools with books, standardized testing and

vate schools. The Court has strongly opposed any form of religious influence in the public schools.[39] It has, however, allowed certain forms of governmental aid to private schools.[40] While the public school cases appear to be fairly straightforward as to their strict requirements, the Court has struggled with governmental aid to nonpublic schools. For example, in 1947 the Court interpreted the establishment clause as requiring that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . [which] teach or practice religion."[41] Yet, in the same case, the Court went on to hold that fares paid for the public transportation of children attending religious schools could be reimbursed from public funds and did not violate the establishment clause.[42]

In 1974 in *Meek v. Pittenger*,[43] the Court invalidated a state statute which required public school teachers to provide auxiliary services, such as remedial reading, to religious schools.[44] The teachers were not employed by the religious schools nor directly subject to discipline by a religious authority. However, the Court found that there was a "potential" danger that these teachers might somehow intertwine religious doctrine with secular instruction.[45] This possibility was enough to find that the statute violated the establishment clause. This strict interpretation of the establishment clause does not appear to follow the original intent of the Framers since this action would not establish a national religion nor would it interfere with the free exercise of religion.

In interpreting the establishment clause, the Court has often stated that there is a conflict between the religion clauses. Chief Justice Burger stated in *Walz v. Tax Commission*[46] that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical ex-

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scoring, diagnostic services and remedial services, but unconstitutional portions relating to field trip services, instructional materials and equipment).

39. *See generally*, School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading and recitation of Lord's Prayer in public schools held unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (recitation of denominationally neutral morning prayer in public schools held unconstitutional).

40. *See generally*, Board of Educ. v. Allen, 392 U.S. 236 (1968) (lending secular textbooks to children in nonsecular schools held constitutional); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement of fees for public transportation of children to nonpublic schools held constitutional).

41. *Everson*, 330 U.S. at 16.

42. *Id.* at 17-18.

43. 421 U.S. 349 (1975).

44. *Id.* at 373.

45. *Id.* at 370-71.

46. 397 U.S. 664 (1970).

treme, would tend to clash with the other."[47]

The Court is especially aware of this apparent conflict in the nonpublic school area. According to the Court, the establishment clause prevents any aid to religious schools which could possibly be used to "advance" religion.[48] Such aid would tend to establish a religion. At the same time, aid given to the purely secular aspects of a religious school cannot involve the government to the point where government "inhibits" the free exercise of religion at those schools.[49]

This conflict between the clauses seems to have developed due to the Court's expansive interpretation of the establishment clause as preventing conduct which "establishes a religion or religious faith, or *tends to do so*."[50] However, in reviewing the intent of the Framers, there does not appear to be a conflict because they had only one goal in mind—preventing government interference with individual religious freedom.[51]

Because the Court has taken the position that the establishment and free exercise clauses have two separate conflicting goals, the Court's decisions often have been inconsistent.[52]

In *Thomas v. Review Board*,[53] a Jehovah's Witness quit his job when he was transferred to weapons production, a job which was contrary to his religious beliefs. The State of Indiana denied unemployment benefits

47. *Id.* at 668-69. In School District v. Schempp, Justice Goldberg articulated the relationship between the establishment and free exercise clauses: "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

48. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 372 (1975) (auxiliary teachers in religious schools cannot remain religiously neutral; therefore, aid is impermissible); and Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971) (teachers of secular subjects unable to completely distinguish between secular teaching and religious doctrine; therefore, aid is impermissible).

49. *See, e.g., Lemon*, 403 U.S. at 620 (cannot ignore the danger that governmental power will intrude on religion and conflict with free exercise clause).

50. Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984) (citing *Walz*, 397 U.S. at 669 (emphasis added)).

51. "The [free exercise and establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. KURLAND, RELIGION AND THE LAW 112 (1962).

52. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) (supplemental payments to teachers of secular subjects in nonpublic schools is unconstitutional) *with* Board of Educ. v. Allen, 392 U.S. 236 (1968) (lending secular textbooks to children in nonsecular schools is constitutional). *Compare also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (tuition reimbursement to poor parents of children in nonsecular schools violates establishment clause) *with* Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement to parents for fares paid for the public transportation of their children to nonsecular schools is not violative).

53. 450 U.S. 707 (1981).

because he did not leave his job for good cause.[54] The Court found that such denial violated the free exercise clause.[55] Justice Rehnquist, in dissent, argued that if Indiana's statute permitted unemployment benefits to persons who quit their jobs due to religious reasons, the statute would violate the establishment clause because it would have a religious purpose, advance religion and entangle the state in determining good faith religious beliefs.[56]

Justice Rehnquist suggested that there need not be this conflict between the two religion clauses. He stated that Justice Stewart discussed the correct approach in his dissent in *School District v. Schempp*.[57] The establishment clause should be limited to " 'government support of proselytizing activities of religious sects by throwing the weight of secular authorit[ies] behind the dissemination of religious tenets.' "[58] Justice Rehnquist also suggested that "[g]overnmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment."[59]

In attempting to explain the sometimes inconsistent positions of the Court, Chief Justice Burger stated in *Walz v. Tax Commission*:[60] "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[61]

In its effort to set guidelines for establishment clause cases, the Court has developed the three tests previously discussed—the *Lemon* test, strict scrutiny and historical analysis. However, application of these tests has not proven consistent. In fact, it seems to have added more confusion than clarity. This confusion is manifest in the recent case of *Lynch v. Donnelly*.[62]

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54. *Id.* at 712.
55. *Id.* at 720.
56. *Id.* at 726 (Rehnquist, J., dissenting).
57. *Id.* (Rehnquist, J., dissenting) (citing School Dist. v. Schempp, 374 U.S. 203 (1963)).
58. *Id.* (Rehnquist, J., dissenting) (quoting *Schempp*, 374 U.S. at 314 (Stewart, J., dissenting)).
59. *Id.* at 727 (Rehnquist, J., dissenting).
60. 397 U.S. 664 (1970).
61. *Id.* at 668.
62. 104 S. Ct. 1355 (1984).

III. STATEMENT OF THE CASE

A. The Facts

The City of Pawtucket, Rhode Island, annually erects a Christmas display as part of its observance of the winter holiday season. The display is situated in a privately owned park located in the heart of the City's shopping district. The display includes several Christmas objects such as Santa Claus and reindeer pulling Santa's sleigh.[63] For at least forty years a life-sized crèche has been a part of this display,[64] "positioned . . . in a central and highly visible location."[65] It costs the City approximately twenty dollars each year to erect and dismantle the crèche. In addition, expenses incurred by the City in lighting the crèche are nominal. The City has not spent any money on the maintenance of the crèche for the past ten years.[66]

Pawtucket residents, individual members of the Rhode Island affiliate of the American Civil Liberties Union and the affiliate itself brought an action in the United States District Court for Rhode Island challenging the constitutionality of the City's inclusion of the crèche in the annual display.[67] The District Court for Rhode Island held that the City's inclusion of the crèche in the display violated the establishment clause.[68] The Court of Appeals for the First Circuit affirmed.[69] In a five to four decision, the United States Supreme Court reversed.[70]

B. The District Court Opinion

The City of Pawtucket based its initial defense of the crèche on three main arguments. It claimed that "the emergence of a secular dimension to Christmas ha[d] rendered the holiday's meaning merely vestigial,"[71] the inclusion of the crèche in the display was not primarily religious because the crèche had become "secularized,"[72] and that even if Christmas

63. Lynch v. Donnelly, 104 S. Ct. 1355, 1358 (1984). The display also included "candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner [which read] 'SEASONS GREETINGS'." *Id.*

64. *Id.* The present crèche was purchased in 1973 at a cost to the City of $1365. The crèche is presently valued at approximately $200. *Id.*

65. *Id.* at 1376 (Brennan, J., dissenting).

66. *Id.* at 1358.

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

68. *Id.* at 1181.

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

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

71. *Lynch*, 525 F. Supp. at 1163.

72. *Id.* at 1165.

and the crèche are not secular, the crèche, when viewed in the totality of the display, did not violate the establishment clause.[73]

The district court disagreed with each of the City's contentions. As to Christmas becoming a secular holiday, the court stated that Christmas "has not lost its religious significance; rather, it has gained a secular significance."[74] The court found that the mere fact that the Christmas holiday had an important secular element did not justify government involvement in that holiday.[75]

The district court also disagreed with the City's claim that the crèche had lost its religious meaning and had become secularized. The court stated that because the crèche is the representation of the birth of Christ, it is immediately connected to the religious aspect of Christmas.[76] As a symbol, the crèche is the "embodiment of the Christian view of the birth and nature of Christ."[77] The court addressed the "totality of the display" argument when it reviewed the secular purpose of including the crèche in the display.[78]

The court then discussed whether the City violated the establishment clause by involving itself in the religious activity. The court noted that "[g]overnment may involve itself in activities with a religious content as long as it does so carefully, in ways that avoid the harm that the Establishment Clause was intended to forestall."[79] Using the *Lemon* test,[80] the district court undertook the following analysis.

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73. *Id.* at 1168-69. The City argued that, when applying the *Lemon* test, the court must not focus on the religious element itself but rather on the activity of which the City is a part. Thus, the City maintained that the court should focus on the commercial activity of erecting and maintaining the display, not on the crèche. The district court disagreed. It stated that "[w]henever the government employs a religious object . . . , the Establishment Clause demands that it account for its reasons in stepping beyond the secular sphere to accomplish its goals." *Id.* at 1169.

74. *Id.* at 1163.

75. *Id.* at 1164. The court noted, for example, that while the Bible is undisputedly an instrument of religion, "the Bible [also] possesses an independent literary and anthropological value that makes it a permissible object of study in the public schools in the course of a curriculum designed to emphasize those elements." *Id.*

76. *Id.* at 1167.

77. *Id.*

78. *Id.* at 1168-74.

79. *Id.* at 1168.

80. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). It is important to note that at the time the district court reached its decision (November 10, 1981), the Supreme Court had not yet decided Larson v. Valente, 456 U.S. 228 (1982) (decided April 21, 1982). In *Larson*, the Court held that strict scrutiny should be applied in cases where a statute or governmental action grants a denominational preference. *Larson*, 456 U.S. at 255. The action in *Lynch* probably would have fallen into this category since the City was giving Christianity a denominational preference. But see *supra* note 19 and accompanying text discussing the confusion over which test to apply. See also *infra* text accompanying notes 100-03 discussing the

1. Secular purpose

Under the purpose element of *Lemon*, "[t]he government action must 'reflect a clearly secular . . . purpose.' "[81] The district court stated that any secular purpose offered by a governmental entity must be closely scrutinized.[82] The City claimed that the crèche must be viewed in the totality of the display and that the purpose for inclusion of the crèche was similar to the purpose for the display as a whole: economic and cultural or traditional.[83] The court disagreed and found that, while the purpose of the Christmas display was to bring shoppers into the downtown area and the display was characteristic of the way Americans celebrate Christmas, the crèche only represented the way "*Christians* celebrate Christmas."[84] The court thus concluded that the crèche was included in the display "in order to express the City's approval and endorsement of the religious message that the symbol conveys."[85]

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use of strict scrutiny by the court of appeals in *Lynch*, and see *infra* notes 188-93 and accompanying text discussing the Supreme Court's analysis of strict scrutiny in *Lynch*.

81. *Lynch*, 525 F. Supp. at 1168 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973)).

82. *Id.* (citing McGowan v. Maryland, 366 U.S. 420, 449 (1961)).

83. *Id.* at 1170.

84. *Id.* at 1171 (emphasis in original). The court noted that it was aware of at least two courts which had accepted an intent to "show how the American people celebrate the holiday season surrounding Christmas" as a valid secular purpose for the inclusion of the crèche in a public Christmas display. *Id.* at 1170 (citing Allen v. Hickel, 424 F.2d 944, 949 (D.C. Cir. 1970); Citizens Concerned for Separation of Church & State v. City & County of Denver, 508 F. Supp. 823, 827 (D. Colo. 1981), *opinion incorporated in* 526 F. Supp. 1310 (D. Colo. 1981)). The court found the rationale in those cases "extremely troubling." *Id.*

85. *Id.* at 1174. The court stated that there was a fine line between "acknowledgment" and "promotion" of religious practices by government. *Id.* at 1171. While the Supreme Court has made it clear that the establishment clause does not require "government to ignore the existence of religion in American life, it is equally clear that there are limits on the ability of government affirmatively to employ religious practices and objects to acknowledge religion's role." *Id.*

The court stated that the statements and actions of the City and the Mayor supported a reasonable inference of City approval of Christianity. *Id.* at 1172. First, the City had never attempted to disclaim any endorsement of the religious message that the crèche conveyed. *Id.*

Second, the court found that the only religious heritage and traditions that have been a part of the City's displays and official ceremonies have been those of the Christian majority of its citizenry. *Id.*

Finally, the court interpreted the City's argument—that removing the religious elements from Christmas would achieve the very hostility toward religion that the establishment clause was created to prevent—to mean that the City's reason for including the crèche was for religious purposes only. *Id.* at 1172-73.

In contrast to Pawtucket's failure to disclaim any endorsement of the crèche's religious significance, in Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), the government disavowed any affiliation with the religious content of a crèche located at the Pageant of Peace in Washington, D.C. Three plaques were located within the federal parkland and contained a history of the Pageant. The plaques stated, in part:

2. Primary effect

In order for governmental action to pass the primary effect element of the *Lemon* test, the district court stated that the action must not have a " 'direct and immediate effect of advancing religion,' " even though it may effectively promote legitimate secular ends.[86] The court found that the City's inclusion of the crèche gave an "aura of governmental approval" which was "a subsidy as real and as valuable as financial assistance."[87]

3. Entanglement

The district court next analyzed the two parts of the entanglement test: (1) administrative entanglement, which is implicated when the action brings government officials into close, ongoing contact with the affairs of religious institutions,[88] and (2) potential for political divisiveness, which assesses the probability that the government involvement "will encourage division of the polity along religious lines."[89]

The court did not find administrative entanglement because there was no interaction between the City and any of the community's religious organizations.[90] However, the court did find that the crèche failed the political divisiveness portion of the entanglement test.[91] The City argued that the crèche had been a part of its display for forty years and the practice had not evoked any apparent dissension.[92] The court found,

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> The National Park Service sponsors the Pageant on the basis that this National Celebration Event is wholly secular in character, purpose, and main effect. The illuminated crèche display is intended to be reverential to the religious heritage aspect of Christmas; but that display is not meant, and should not be taken, either to promote religious worship, or profane the symbols of any religion[.]

Id. at 73-74. The *Allen* court found that the plaques lessened the impact of governmental involvement in the crèche display. *Id.* at 73.

86. *Lynch*, 525 F. Supp. at 1174 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-85 n.39 (1973)). As the district court noted, the Supreme Court has stated that the establishment clause reaches "not only the actual establishment of religion, but also the '*sponsorship*, financial support, and active involvement of the sovereign in religious activity.' " *Id.* (quoting *Nyquist*, 413 U.S. at 772 (emphasis in original)).

87. *Id.* at 1178. The City claimed that a violative effect had not occurred. *Id.* at 1175-76. The court disagreed, finding that people knew the display was sponsored in part by the City, that the life-sized crèche was not insignificant, and that the religious message of the crèche was not muted by the overall display. *Id.* at 1176-78.

88. *Id.* at 1178-79 (citing Lemon v. Kurtzman, 403 U.S. 602, 615-20 (1971); Meek v. Pittenger, 421 U.S. 349, 369-72 (1975)).

89. *Id.* at 1179 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796 (1973)).

90. *Id.* Evidence showed that the City purchased the components and designed the layout of the display without any assistance or input from the City's religious organizations. *Id.*

91. *Id.* at 1180.

92. *Id.* at 1179.

however, that while there was once an appearance of harmony among the townspeople, once the City's practice was challenged by the lawsuit, "the atmosphere has been a horrifying one of anger, hostility, name calling and political maneuvering."[93]

The district court found that, based on the *Lemon* test, the City's inclusion of the créche in its annual Christmas display was a violation of the establishment clause.[94] It therefore ordered that the City be permanently enjoined from continuing the practice.[95]

C. *The Court of Appeals Opinion*

The issues raised on appeal included whether the district court erred in finding that the plaintiffs had standing[96] and whether the inclusion of the créche in the Christmas display constituted a violation of the establishment clause.[97]

Finding that the plaintiffs had standing as municipal taxpayers to challenge the City's ownership and display of the créche,[98] the court next addressed the district court's finding of an establishment clause violation. The court of appeals reviewed the district court's analysis under the *Lemon* test;[99] however, it concluded that the *Lemon* test was not the appropriate test to be applied in *Lynch* because inclusion of the créche demonstrated the City's preference for Christianity over other religions.[100] The court noted that the Supreme Court had recently decided,

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93. *Id.* at 1180.

94. *Id.* at 1181.

95. *Id.*

96. Donnelly v. Lynch, 691 F.2d 1029, 1030 (1st Cir. 1982). The City argued that the Supreme Court's subsequent decision in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), severely limited federal and state taxpayer standing, leaving no room for municipal taxpayer status. *Lynch*, 691 F.2d at 1030.

In *Valley Forge*, the Department of Health, Education and Welfare transferred surplus real property to a church-related college pursuant to a federal statute. The Supreme Court found that the plaintiffs did not have standing to sue, even though their action was based on the establishment clause. *Valley Forge*, 454 U.S. at 489. In prior decisions which held taxpayers had standing, the plaintiffs were challenging the exercise of congressional power under the taxing and spending clause. *See* Flast v. Cohen, 392 U.S. 83 (1968). Unlike *Flast*, the statute at issue in *Valley Forge* was enacted by Congress under the property clause of the Constitution. *Valley Forge*, 454 U.S. at 480.

The court of appeals in *Lynch* disagreed with Pawtucket's assertion and concluded that *Valley Forge* did not alter the long-established rule of municipal taxpayer standing. *Lynch*, 691 F.2d at 1032.

97. *Lynch*, 691 F.2d at 1032.

98. *Id.*

99. *Id.* at 1032-34.

100. *Id.* at 1034.

in *Larson v. Valente*,[101] that a strict scrutiny test is appropriate when government action grants a denominational preference.[102] The strict scrutiny test requires invalidation of government action unless the action "is justified by a compelling governmental interest" and "is closely fitted to further that interest."[103]

The First Circuit found that the City presented no compelling governmental interest in owning and displaying the crèche.[104] Because the City was unable to advance any legitimate secular purpose at trial for inclusion of the crèche, the City could not state a compelling purpose.[105] The court of appeals concluded that since the first element of the strict scrutiny test was not met, it was unnecessary to address the second element.[106] The court then affirmed the district court's decision.[107]

IV. THE SUPREME COURT OPINIONS

A. The Majority

The majority[108] began their analysis with an historical review of the purpose and intent of the establishment and free exercise clauses of the first amendment. The Court stated that while it has recognized that the first amendment was designed " 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other,' "[109] it has also recognized that " 'total separation is not possi-

101. 456 U.S. 228 (1982) (challenge to state statute which denied exemption from certain registration and reporting requirements to religious organizations receiving more than half of their total contributions from nonmembers).

102. *Lynch*, 691 F.2d at 1034. See *supra* text accompanying notes 11-14 discussing the strict scrutiny test.

103. *Id.*

104. *Id.* at 1035.

105. By displaying the crèche, the City "tried to endorse and promulgate religious beliefs." *Id.* at 1034-35 (citing Donnelly v. Lynch, 525 F. Supp. 1150, 1173 (D.R.I. 1981)).

106. *Id.* at 1035.

107. *Id.* Judge Bownes concurred in the opinion but wrote separately to rebut the dissent's assertion that Christmas originated as a religious holiday. He reviewed the historical evidence of Christmas and concluded that Christmas has roots which "extend to folk customs and pagan rites that predate the birth of Christ." He noted, however, that the crèche was tied firmly to the Christian religion and this is the distinction between the crèche and Christmas as a holiday. *Id.* at 1037 (Bownes, J., concurring).

Judge Campbell dissented, finding the City's display to be "nothing more nor less than a potpourri of well-recognized Christmas symbols." He argued that to retain the holiday but outlaw ancient symbols "seems to me an empty and even rather boorish gesture." *Id.* at 1037-38 (Campbell, J., dissenting).

108. The Court was split five to four. The opinion of the majority was delivered by Chief Justice Burger, joined by Justices Rehnquist, White, Powell and O'Connor.

109. Lynch v. Donnelly, 104 S. Ct. 1355, 1358 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

ble.' "[110] The Court explained that "[n]o significant segment of our society . . . can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."[111] Due to the seemingly conflicting objectives of the establishment and free exercise clauses, the majority felt that the Constitution does not require complete separation but mandates accommodation.[112]

The Court noted that accommodation of religion could be found in the first session of the First Congress in 1789. The Court concluded that since the First Congress considered appointments and compensation for chaplains serving during legislative sessions the same week that the establishment and free exercise clauses were approved, the Framers did not perceive any conflicts between the religion clauses.[113] In addition, the Court noted that the decisions of the First Congress should be given great deference when interpreting the Constitution.[114]

The Court then discussed the "unbroken history of official acknowledgment by . . . government of the role of religion in American life from at least 1789."[115] For example, Thanksgiving[116] and Christmas[117] were proclaimed national holidays and federal employees enjoy the holidays off, paid from public revenues.[118] In addition, the national motto is "In God we trust."[119]

The Court said that it has refused to use an "absolutist" approach to establishment clause questions, invalidating any government action that confers benefits to religion.[120] Instead, the Court stated that its role was

110. *Id.*

111. *Id.* at 1359.

112. *Id.*

113. *Id.*

114. *Id.* (citing Myers v. United States, 272 U.S. 52, 174-75 (1926)).

115. *Id.* at 1360.

116. The Court noted that "[t]he day after the first amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" *Id.* at 1360 n.2 (citing A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 87 (rev. 1st ed. 1964)).

117. 5 U.S.C. § 6103 (1982).

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

119. 36 U.S.C. § 186 (1982). In addition, United States coins have the inscription "In God We Trust." 31 U.S.C. § 112(d)(1) (1982). The Court noted other examples of acknowledgment, including: the language "under God" added to our Pledge of Allegiance in 1954; religious paintings displayed in public art galleries, the Capitol and the Supreme Court; and the presence of chapels in the Capitol. Also, Presidential proclamations to commemorate the National Day of Prayer, 36 U.S.C. § 169h (1982), Jewish Heritage Week, and the Jewish High Holy Days have been issued. *Lynch*, 104 S. Ct. at 1360-61.

120. *Lynch*, 104 S. Ct. at 1361. An absolutist approach would require "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to

to scrutinize official action to determine whether it establishes a religion or tends to do so.[121] The Court stated that each case requires "line drawing" and that a fixed per se rule could not be framed.[122]

In analyzing establishment clause cases, the Court emphasized its unwillingness to use only one test or criterion.[123] However, the Court did acknowledge that it is often useful to apply the *Lemon* test, inquiring whether there is a secular purpose, whether the primary effect is to advance or inhibit religion, and whether there is an excessive entanglement of government with religion.[124]

1. Secular purpose

In applying the *Lemon* test to *Lynch*, the Court initially noted that the focus of the inquiry must be on the crèche in the context of the Christmas season.[125] The Court found that the district court had erred by focusing almost exclusively on the crèche independent from the display, and by inferring from the religious nature of the crèche that the City had no secular purpose for the display.[126]

The Court found that in the context of the Christmas season, the inclusion of the crèche was not "a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[127] The City's inclusion of the crèche in the display was to celebrate the holiday and to illustrate the origins of the holiday.[128] The Court deemed these to be "legitimate secular purposes."[129]

2. Primary effect

The Court's inquiry as to whether the primary effect of including the crèche conferred a substantial and impermissible benefit on religion focused on comparisons with prior cases where the beneficial effect did

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religion in general or to one faith." *Id.* The Court dismissed this approach as being "simplistic." *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1362. *Cf. id.* at 1371 n.2 (Brennan, J., dissenting).

124. *Id.* at 1362. See *supra* notes 7-10 and accompanying text discussing the *Lemon* test.

125. *Id.*

126. *Id.* at 1362-63.

127. *Id.* at 1363.

128. *Id.* (citing Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970); Citizens Concerned for Separation of Church & State v. City & County of Denver, 526 F. Supp. 1310 (D. Colo. 1981), *opinion incorporating* 508 F. Supp. 823 (D. Colo. 1981)).

129. *Id.* (footnote omitted). The Court concluded that the crèche had a secular purpose, "which is all that *Lemon* requires." The test did not require that the government's objective be "exclusively secular." *Id.* at 1363 n.6.

not violate the establishment clause. The Court noted that such comparisons were difficult to make; nonetheless, it made several comparisons. For example, the Court compared the beneficial effect of the crèche on religion with the beneficial effect that tax exemptions for church properties had on religion.[130] The Court found no greater aid to religion deriving from inclusion of the crèche than from "benefits and endorsements previously held not violative of the Establishment Clause."[131]

The Court observed that even if the inclusion of the crèche somewhat advanced religion, some legitimate advancement of religion may result from government action. " 'Not every law that confers an "indirect," "remote" or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' "[132] The Court concluded that any benefit accruing to religion from the Pawtucket crèche was indirect, remote and incidental and not a violation of the establishment clause.[133]

3. Entanglement

The Court agreed with the district court's finding that administrative entanglement did not exist because there was no evidence of contact between the City and church authorities concerning the content or design of the crèche.[134]

As to the political divisiveness portion of the entanglement test, however, the Court found that inquiry was not required. It stated that the political divisiveness inquiry was called for only in cases which involve a direct subsidy to church sponsored schools or other religious institutions.[135] The Court stated that the district court had erred in finding that political divisiveness based on dissension in the town caused by the filing of the lawsuit signaled entanglement.[136] The Court commented that a litigant could not "create the appearance of divisiveness [by com-

130. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)). In addition, the Court compared the beneficial effect of including the crèche in the display with the beneficial effect of expenditures for transportation of students attending church sponsored schools (Everson v. Board of Educ., 330 U.S. 1 (1947)), Sunday closing laws (McGowan v. Maryland, 366 U.S. 420 (1961)) and legislative prayers (Marsh v. Chambers, 463 U.S. 783 (1983)).

131. *Lynch*, 104 S. Ct. at 1364. The Court distinguished Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). In *Larkin*, a state statute substantially aided religion by giving religious institutions veto power in regard to liquor licenses. The Supreme Court held that the statute violated the establishment clause. In *Lynch*, however, there was "no comparable benefit to religion." *Lynch*, 104 S. Ct. at 1364.

132. *Lynch*, 104 S. Ct. at 1364 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (bracketed portion provided by *Lynch* Court)).

133. *Id.*

134. *Id.*

135. *Id.* at 1364-65 (citing Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983)).

136. *Id.* at 1365.

mencing a lawsuit] and then exploit it as evidence of entanglement."[137]

The Court concluded that the City had a secular purpose for including the crèche, that it had not impermissibly advanced religion, and that it did not create excessive entanglement between government and religion.[138]

Having satisfied the *Lemon* test, the Court further discussed the crèche's role in history and in the celebration of Christmas. It stated that the crèche, "like a painting, is passive; admittedly it is a reminder of the origins of Christmas."[139] However, "[t]o forbid the use of this one passive symbol . . . at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, . . . would be a stilted over-reaction contrary to our history and to our holdings."[140]

B. Concurring Opinion

Justice O'Connor wrote a separate opinion in order to suggest a clarification of the meaning of the establishment clause. She contended that the establishment clause prohibits excessive entanglement with religious institutions and, more importantly, government endorsement or disapproval of religion.[141] In addition, since the Court had never relied on political divisiveness as an independent ground for holding a government practice unconstitutional, the political divisiveness issue should not be an independent test of constitutionality.[142]

Under Justice O'Connor's analysis, the purpose element of the *Lemon* test asks whether the government's actual purpose is to endorse or disapprove of religion.[143] She stated that the proper inquiry was whether the government *intended* to convey a message of endorsement or disapproval of religion by its action. Justice O'Connor found that the City did not intend to endorse nor disapprove of any religions. She felt that the City's purpose for including the crèche in the display was to celebrate the public holiday through its traditional symbols and, thus, this purpose was not violative of the establishment clause.[144]

The "effect" element of the *Lemon* test, according to Justice O'Connor, asks whether, irrespective of the actual purpose, the practice

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring).
142. *Id.* at 1367 (O'Connor, J., concurring).
143. *Id.* at 1368 (O'Connor, J., concurring).
144. *Id.* (O'Connor, J., concurring).

conveys a message of endorsement or disapproval. Even if a practice had in fact caused advancement or inhibition of religion, such a practice would not be invalidated unless it conveyed a message of endorsement or disapproval.[145] Justice O'Connor found that Pawtucket's display of the crèche did not communicate a message that the government endorsed the Christian religions represented by the crèche. She believed that the crèche was a traditional symbol of the holiday and recognition of that holiday was not understood to be an endorsement of religion.[146] Therefore, Justice O'Connor agreed with the majority's opinion that the City's inclusion of the crèche in its Christmas display was not a violation of the establishment clause.[147]

C. *The Dissenting Opinions*

1. Justice Brennan's dissent

Justice Brennan stated that the majority reached "an essentially narrow result which turn[ed] largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared."[148] He found that this result implicitly left open several questions. These were, for example, whether the public display on public property of a crèche standing alone would be constitutional,[149] whether the public display or other religious symbols such as a cross would also be permissible[150] or whether the Pawtucket crèche without the display of Santa Claus and the other secular objects would have been valid.[151]

In addition, Justice Brennan disagreed with the majority that the *Lemon* test is "simply one path that may be followed or not at the Court's option."[152] In his view, the *Lemon* test is mandatory[153] and the Court has consistently held that the government action in question must accord with the three elements of the *Lemon* test in order to pass muster

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

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

147. *Id.* at 1370 (O'Connor, J., concurring).

148. Lynch v. Donnelly, 104 S. Ct. 1355, 1370 (1984) (Brennan, J., dissenting). Justice Brennan was joined by Justices Marshall, Blackmun and Stevens.

149. *Id.* at 1370 n.1 (Brennan, J., dissenting). *See also* McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd mem. per curiam*, 105 S. Ct. 1859 (1985) (Village of Scarsdale cannot prohibit erection of a privately owned crèche in public park based on establishment clause).

150. *Lynch*, 104 S. Ct. at 1370 n.1 (Brennan, J., dissenting). See *infra* note 159 discussing City of Los Angeles' erection of illuminated cross in front of City Hall.

151. *Lynch*, 104 S. Ct. at 1370 n.1 (Brennan, J., dissenting).

152. *Id.* at 1371 n.2 (Brennan, J., dissenting).

153. *Id.* "Indeed, ever since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of Establishment Clause analysis." *Id.* (Brennan, J., dissenting).

under the establishment clause.[154]

Applying the *Lemon* test to the City's inclusion of the crèche in its Christmas display, Justice Brennan found a clear violation.[155] He argued that, because there was no explicit statement of purpose[156] and because Pawtucket's objectives could be readily accomplished by other means,[157] inclusion of the crèche could be inferred to have a sectarian, rather than secular purpose.[158]

Regarding the second element of the test, Justice Brennan concluded that using the crèche in the display had the effect of benefiting one religion. In addition, he stated that inclusion of the crèche conveyed a message to minority religious groups, as well as to nonreligious groups, that their views were not "similarly worthy of public recognition nor entitled to public support."[159]

Justice Brennan also disagreed with the majority's conclusion that no administrative entanglement existed.[160] He noted that after the *Lynch* decision, the City could expect Jews or other non-Christian groups to

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154. *Id.* (Brennan, J., dissenting). Justice Brennan noted that even though the Court initially used a strict scrutiny test in Larson v. Valente, 456 U.S. 228 (1982), it used the *Lemon* test as well. Brennan emphatically noted that only in Marsh v. Chambers, 463 U.S. 783 (1983) (legislative prayer upheld), did the Court use neither strict scrutiny nor the *Lemon* analysis. *Lynch*, 104 S. Ct. at 1371 n.2 (Brennan, J., dissenting).

155. *Lynch*, 104 S. Ct. at 1375 (Brennan, J., dissenting).

156. The City claimed that its purpose in erecting the display was to celebrate the holiday and promote both retail sales and goodwill. *Id.* at 1372-73 (Brennan, J., dissenting).

157. *Id.* at 1372 & n.4 (Brennan, J., dissenting). The City claimed its purpose for including the crèche was exclusively secular. *Lynch*, 525 F. Supp. at 1170. See *supra* text accompanying note 83 discussing the City's purpose for inclusion of the crèche in the display. Therefore, it may be inferred that the purpose of including the crèche was to celebrate the holiday and promote sales and goodwill. However, Justice Brennan argued these purposes could have been accomplished just as easily by using the rest of the display without the crèche. *Lynch*, 104 S. Ct. at 1372-73 (Brennan, J., dissenting).

For example, in Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982), the Court struck down a Massachusetts statute which gave church governing bodies the power to veto applications for liquor licenses because the government could accomplish its secular objectives by other means.

158. *Lynch*, 104 S. Ct. at 1372-73 (Brennan, J., dissenting).

159. *Id.* at 1373 (Brennan, J., dissenting) (footnote omitted). Justice Brennan noted that the California Supreme Court had expressed the following view when it considered a similar issue in regard to the erection of an illuminated cross in front of the Los Angeles City Hall:

> When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status.

Id. at 1373 n.7 (Brennan, J., dissenting) (citing Fox v. City of Los Angeles, 22 Cal. 3d 792, 803, 587 P.2d 663, 670, 150 Cal. Rptr. 867, 874 (1978) (Bird, C.J., concurring)).

160. *Lynch*, 104 S. Ct. at 1374 (Brennan, J., dissenting).

press for inclusion of their symbols.[161] In addition, even though there was no apparent political divisiveness in the community prior to the lawsuit, the City divided along religious lines after the suit was filed. Justice Brennan maintained that the district court observed correctly that the "quiescence [before the suit] of those opposed to the crèche may have reflected nothing more than their sense of futility in opposing the majority."[162] Justice Brennan easily concluded that Pawtucket's inclusion of the crèche was unconstitutional.[163]

Justice Brennan then attacked the majority's two main arguments for constitutionality under the *Lemon* test. First, Justice Brennan argued that the majority improperly focused on the crèche in the holiday context.[164] He maintained that the crèche has inherent religious significance and that the majority was incorrect in labeling it as no more than a "traditional" symbol of the holiday.[165] Justice Brennan stated that the crèche was the "chief symbol of the characteristically Christian belief" and, when publicly sponsored by the government, it is a dramatic reminder to those who do not share those same beliefs, of their differences with the Christian faith.[166]

Second, Justice Brennan argued that the majority failed to see both the secular and sectarian aspects of Christmas. He found a serious flaw in the conclusion that once the designation of Christmas as a public holiday was held constitutionally acceptable, "virtually every form of gov-

161. Justice Brennan based this assertion on the fact that the Mayor of Pawtucket, in his testimony, remarked that he would include a Menorah in future displays. *Id.* at 1374 (Brennan, J., dissenting) (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 796 (1973)) ("competing efforts [by religious groups] to gain or maintain the support of government" has "occasioned considerable civil strife").

162. *Lynch*, 104 S. Ct. at 1374 (Brennan, J., dissenting) (citing Donnelly v. Lynch, 525 F. Supp. 1150, 1179 (D.R.I. 1981)).

163. *Id.* at 1375 (Brennan, J., dissenting).

164. *Id.* at 1375-76 (Brennan, J., dissenting). Justice Brennan argued that in Hunt v. McNair, 413 U.S. 734, 743 (1973), the Court noted that "[a]id normally may be thought to have a primary effect of advancing religion when it . . . [supports] a specifically religious activity in an otherwise substantially secular setting." In addition, the secular setting of a public school does not make the practice of school prayer constitutional. *See* Engel v. Vitale, 370 U.S. 421 (1962) and School Dist. v. Schempp, 374 U.S. 203 (1963).

165. *Lynch*, 104 S. Ct. at 1376 (Brennan, J., dissenting).

166. *Id.* at 1377 (Brennan, J., dissenting). Justice Brennan also noted that the City did nothing to disclaim government approval of the religious significance of the crèche. *Id.* at 1376 (Brennan, J., dissenting). Justice Brennan suggested that such a disclaimer may be a factor in deciding whether a religious display is objectionable. *Id.* (Brennan, J., dissenting). *See, e.g.*, Allen v. Morton, 495 F.2d 65, 67-68 (D.C. Cir. 1973) (per curiam) (inclusion of crèche in Pageant of Peace on federal parkland adjacent to White House conditioned on erection of explanatory plaques disclaiming any government sponsorship of religious beliefs associated with the crèche).

ernmental association with the celebration of the holiday" would also be acceptable.[167] He argued that the establishment clause allows government to participate in the *secular* celebration of Christmas but not in the religious or sectarian aspects of Christmas.[168]

Justice Brennan also took issue with the majority's list of "official acknowledgments" of the role of religion in this country. He noted that while some acknowledgments such as Thanksgiving derived from religious motivations, they have now become secular celebrations or acknowledgments.[169] Additionally, he remarked that certain practices, such as the reference to God in the Pledge of Allegiance, are a form of "ceremonial deism," and are not violative of the establishment clause "because they have lost through rote repetition any significant religious content."[170] In addition, he stated that such practices were "probably necessary to serve certain secular functions"; however, the crèche is not necessary to accommodate the secular celebration of Christmas.[171]

The majority's historical analysis also concerned Justice Brennan because it failed to focus on the central issue of "whether the challenged practices 'threaten those consequences which the Framers deeply feared.' "[172] In the past, the Court had consistently focused historical inquiry on the particular practice under review. For example, in *McGowan v. Maryland*,[173] the Court focused its historical inquiry of Sunday closing laws from the Colonial period through the present.[174] In contrast, the *Lynch* majority did not discuss the history of public celebration of Christmas or the use of publicly displayed nativity scenes. Justice Brennan concluded the reason for this was because history does not show such similar approval of the public celebration of Christmas.[175]

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167. *Lynch*, 104 S. Ct. at 1378 (Brennan, J., dissenting). See *supra* note 85 for the district court's discussion of this point.

168. *Id.* at 1377-78 (Brennan, J., dissenting).

169. *Id.* at 1381 (Brennan, J., dissenting). Another example of a governmental practice which derived from religious motivation is found in the Sunday closing laws which were upheld in McGowan v. Maryland, 366 U.S. 420 (1961) (fact that a government practice coincides to some extent with certain religious beliefs does not render it unconstitutional).

170. *Lynch*, 104 S. Ct. at 1381 (Brennan, J., dissenting). Justice Brennan stated that these practices serve the wholly secular purpose of "inspiring commitment to meet some national challenge" or to solemnize public occasions. *Id.* (Brennan, J., dissenting).

171. *Id.* at 1382 (Brennan, J., dissenting).

172. *Id.* at 1383 (Brennan, J., dissenting) (quoting School Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring)).

173. 366 U.S. 420 (1961).

174. *Id.* at 431-40.

175. *Lynch*, 104 S. Ct. at 1383-85 (Brennan, J., dissenting). Justice Brennan reviewed the history of Christmas in the United States and found that the development of Christmas as a public holiday is a comparatively recent phenomenon. He stated that "[t]he historical record,

In conclusion, Justice Brennan stated:

> [T]he City's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the crèche conveys.[176]

2. Justice Blackmun's dissent

Justice Blackmun argued that not only did the majority's decision make light of the Court's precedents, but the majority "ironically . . . does an injustice to the crèche and the message it manifests."[177] He stated that the majority has removed the sacred message of the crèche and relegated it to a neutral symbol of the Christmas holiday season.[178]

V. ANALYSIS OF SUPREME COURT'S REASONING IN *LYNCH*

Lynch v. Donnelly[179] epitomizes the confusion surrounding the proper test for establishment clause analysis. The district court found a violation of the establishment clause based on the *Lemon* test,[180] the court of appeals affirmed based on the strict scrutiny test,[181] and the Supreme Court reversed based in part on the *Lemon* test and in part on an historical analysis theory.[182]

The Supreme Court discussed the *Lemon* test as being "useful" but not required in establishment clause cases.[183] However, as Justice Bren-

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contrary to the Court's uninformed assumption, suggests that at the very least conflicting views toward the celebration of Christmas were an important element of [religious] competition at the time of the adoption of the Constitution." *Id.* at 1385 (Brennan, J., dissenting). In addition, Justice Brennan stated that "there is no evidence whatsoever that the Framers would have expressly approved a Federal celebration of the Christmas holiday including public displays of a nativity scene." *Id.* at 1386 (Brennan, J., dissenting).

176. *Id.* (Brennan, J., dissenting).

177. Lynch v. Donnelly, 104 S. Ct. 1355, 1387 (1984) (Blackmun, J., dissenting). Justice Blackmun was joined by Justice Stevens.

178. *Id.* (Blackmun, J., dissenting).

179. 104 S. Ct. 1355 (1984).

180. Donnelly v. Lynch, 525 F. Supp. 1150, 1181 (D.R.I. 1981). See *supra* notes 71-95 and accompanying text for discussion of the district court opinion.

181. Donnelly v. Lynch, 691 F.2d 1029, 1034-35 (1st Cir. 1982). See *supra* notes 96-107 and accompanying text for discussion of the court of appeals opinion.

182. *Lynch*, 104 S. Ct. at 1360-65. *Compare also Lynch*, 525 F. Supp. at 1181 (crèche sponsored by city violative) *with* Citizens Concerned for Separation of Church & State v. City & County of Denver, 526 F. Supp. 1310, 1315 (D. Colo. 1981), *opinion incorporating* 508 F. Supp. 823 (D. Colo. 1981) (crèche sponsored by city not violative).

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

nan pointed out, the *Lemon* test, until very recently, had been considered mandatory.[184] The *Lynch* Court stated that the *Lemon* test was not "relevant" in *Marsh v. Chambers*;[185] however, it did not discuss why the test was irrelevant. *Marsh* was the first establishment clause case in which the Court did not even attempt to discuss the *Lemon* test. In *Marsh*, it was alleged that the Nebraska legislature violated the establishment clause by beginning their sessions with a prayer conducted by a paid chaplain; however, the Court found no violation.[186] As Justice Brennan stated in his *Lynch* dissent, perhaps *Marsh* is "only a single, aberrant departure from our settled method of analyzing Establishment Clause cases" and it may be limited strictly to its facts.[187]

The Court also noted that the *Lemon* test was not useful in *Larson v. Valente*.[188] In *Larson*, the Court held that a Minnesota reporting statute violated the establishment clause by requiring reporting by certain religious organizations, thereby discriminating among religions.[189] However, the *Larson* Court used a new approach—the strict scrutiny test.[190]

The Court in *Larson* announced that the *Lemon* test is "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."[191] Denominational preference requires application of the strict scrutiny test. If this is the rule, the City of Pawtucket's inclusion of the crèche in its display would not be a government action which affords a uniform benefit to all religions, since the City selected only one group, Christians, to support. Such a denomi-

184. *Id.* at 1371 n.2 (Brennan, J., dissenting) (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973)).

185. 463 U.S. 783 (1983). See *supra* text accompanying notes 15-16 for a further discussion of *Marsh*.

186. *Id.* at 795. It seems clear that had the *Marsh* Court applied the *Lemon* test, the legislature's practice of opening sessions with a prayer would have been found violative because prayers generally do not have a secular purpose. In addition, paying chaplains with public funds would probably constitute an "excessive" entanglement between government and religion.

Justice Brennan, dissenting in *Marsh*, stated "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800-01 (Brennan, J., dissenting).

187. *Lynch*, 104 S. Ct. at 1370 (Brennan, J., dissenting). *But see*, Fausto v. Diamond, 589 F. Supp. 451, 464 n.14 (D.R.I. 1984) ("That *Lynch* must be viewed as a landmark, not as an aberration, is evident in light of Marsh v. Chambers . . . , which completely disregarded the *Lemon* model.").

188. 456 U.S. 228 (1982).

189. *Id.* at 255.

190. *Id.* at 246. See *supra* notes 11-14 and accompanying text discussing the strict scrutiny test.

191. *Larson*, 456 U.S. at 252 (footnote omitted) (emphasis in original).

national preference, it seems, should have required application of the strict scrutiny test in *Lynch*. The majority dismissed this argument in a footnote, concluding that the government's action was not discriminatory.[192] Since the First Circuit based its affirmance of the district court on a strict scrutiny theory,[193] the Court should have at least explained its position more clearly for future actions. After *Lynch*, it is not certain when strict scrutiny analysis is appropriate.

The Court held that the crèche must be viewed as part of the overall display in the context of the Christmas season.[194] Justice Brennan in dissent argued that the majority was incorrect in focusing on the holiday context.[195] In his view, as well as the district court's view, the crèche has inherent religious significance and, therefore, including it in a display did not lessen the religious effect.[196] This statement may be correct; however, it misses the point. If Christmas and the crèche did not have any religious significance, establishment clause analysis would not be necessary. It is the fact that the crèche *has* religious significance which requires the Court to review the government's action. Once religious significance is established, the Court must, as the Supreme Court majority stated, focus on the crèche in the context of the display and the Christmas season which it celebrates.[197]

The surrounding display does not lessen the religious significance of the crèche; it merely changes the focus. For example, the religious significance of the Bible is not lessened in the context of a public school setting. The question is whether there is a secular purpose for the use of the Bible in public schools. Under the *Lynch* Court's analysis, if the Bible is read as part of a literature course, its use probably would not violate the establishment clause. However, if the Bible is read as part of a religious activity, it would be violative. The public school setting does not "lessen the religious effect" of the Bible; it merely changes the focus of the inquiry to the use of the Bible in the school.[198] Similarly, a religious symbol such as the crèche must be viewed in the context of the entire Christmas display of which it was a part.

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192. *Lynch*, 104 S. Ct. at 1366 n.13. The Court stated "[i]t is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." *Id.* *But see id.* at 1375 n.11 (Brennan, J., dissenting) (agreeing with court of appeals that Pawtucket crèche failed strict scrutiny test).

193. *Lynch*, 691 F.2d at 1035.

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

195. *Id.* at 1375-76 (Brennan, J., dissenting).

196. *Id.* at 1376 (Brennan, J., dissenting); *Lynch*, 525 F. Supp. at 1168-70.

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

198. See *supra* note 75 discussing the Bible in public school settings.

A. Secular Purpose

The Court stated that only when a governmental activity was "motivated wholly by religious considerations" has the Court invalidated such action based on lack of secular purpose.[199] The Court found that there were several nonreligious motivations for including the crèche in the display and, therefore, the crèche passed the secular purpose element of the *Lemon* test.[200]

The Court reasoned that since Christmas is a constitutionally accepted national holiday, official association with the sectarian aspects of the holiday was also acceptable.[201] Justice Brennan argued, however, that the majority failed to appreciate the distinction between the secular and religious aspects of Christmas, and that the Court in effect held that all official association by government with the Christmas holiday is acceptable.[202]

In an effort to evaluate the City's actual purpose for including the crèche, the Court overlooked the district court's record. The trial record revealed that the Mayor testified that he was strongly committed to maintaining the crèche.[203] He claimed that the purpose of the entire Christmas display was to promote goodwill and attract business in the shopping district.[204] While this may be true, it does not explain the purpose for including the crèche in the display. As Justice Brennan noted in dissent, the secular purpose of the entire display could have been achieved without the crèche.[205] However, the majority brushed this aside as being irrelevant.[206] The Court found that there was a secular purpose for including the crèche because the crèche depicted the historical origins of a "traditional event long recognized as a National Holiday."[207]

It seems clear that the City could not propose, and the Court could not find, a legitimate secular purpose for including the crèche in the display without ignoring its inherent religious significance and relegating it

199. *Lynch*, 104 S. Ct. at 1362 (citing Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968); School Dist. v. Schempp, 374 U.S. 203, 223-24 (1963); Engel v. Vitale, 370 U.S. 421, 424-25 (1962)).

200. *Id.* at 1363.

201. *Id.* at 1365.

202. *Id.* at 1378 (Brennan, J., dissenting).

203. *Lynch*, 525 F. Supp. at 1154 n.3. The Mayor also indicated his intention to " 'figure some other way to have a nativity scene as part of the historical tradition and part of the full Christmas display.' " *Id.*

204. *Id.* at 1158.

205. *Lynch*, 104 S. Ct. at 1372 (Brennan, J., dissenting).

206. *Id.* at 1363 n.7.

207. *Id.* at 1363.

to one of the traditional symbols of the holiday. In effect, the Court begged the question by eliminating any religious content in the crèche. Had it not done so, the Court would have been compelled to find that the City's action did not pass the secular purpose element of the *Lemon* test.

B. Primary Effect

The Court's analysis of the primary effect question was equally nonpersuasive. It compared the beneficial effects of government action on religion that previously were held nonviolative with the beneficial effects of including the crèche in the City's Christmas display. The Court noted that this type of analysis was difficult to make.[208] It was difficult because such a comparison does not elicit consistent results. The Court apparently "weighed" the beneficial effects found in its prior cases against the "weight" of the beneficial effect in the *Lynch* case. The Court stated that

> to conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools.[209]

Such a subjective "analysis" cannot possibly result in consistent application of the primary effect test because courts will invariably decide on differing "weights" depending on their subjective viewpoints.

The better approach would be to review the actual effect of the crèche in the City of Pawtucket. The district court reviewed this effect; however, the Supreme Court did not give deference to the district court's findings.

The testimony at the trial disclosed several views as to the effect of the crèche. A professor of philosophy stated that inclusion of the crèche was "essential" in the display. Otherwise, "it would be like having a birthday party without knowing whose birthday it was."[210] The Mayor testified that the representative of at least one segment of the Jewish community in Pawtucket had called him to express support and to state that they regarded the crèche as "a thing of joy and not a religious service or

208. *Id.*

209. *Id.* The Court made a similar comparison in Marsh v. Chambers, 463 U.S. 783 (1983). "We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, . . . beneficial grants for higher education, . . . or tax exemptions for religious organizations . . . ." *Marsh*, 463 U.S. at 791 (citations omitted).

210. *Lynch*, 525 F. Supp. at 1160-61. David Freeman, a professor of philosophy at the Univ. of Rhode Island, was an expert witness for the City.

observance of any kind."[211] A spokesman for the ACLU noted that many callers felt that the ACLU was " 'making a mountain out of a molehill' and that some regarded the display as secular in nature."[212]

However, in contrast, there was testimony by one of the plaintiffs that his reaction to the crèche was one of fear.[213] Steve Brown, Executive Director of the ACLU, stated that he viewed the crèche as representing "official sponsorship of a particular religious viewpoint."[214]

In view of the evidence obtained at trial, the Court should have concluded that inclusion of the crèche had at least some effect of impermissibly benefiting religion. Whether it was sufficient to confer a "substantial and impermissible" benefit on religion is another subjective question. However, absent a finding of clear error, the Court should have upheld the district court's findings.[215]

C. Entanglement

1. Administrative entanglement

The Court agreed with the district court's findings that administrative entanglement did not exist.[216] The cost to the City was minimal and there was no evidence of contact with church authorities in the community concerning the content or design of the crèche.[217] Justice Brennan argued that inclusion of the crèche *could* result in administrative entanglement due to other religious groups wishing that their views be expressed or supported by the City.[218] While this is a possibility, it does not rise to the level of "excessive" government entanglement with religion which the *Lemon* test prohibits.

2. Political divisiveness

The Court stated that the political divisiveness question need not be addressed unless a case involves a direct subsidy to church-sponsored

211. *Id.* at 1159. The Mayor also stated that it was his impression that people were shocked and outraged over the lawsuit because it questioned what had been an accepted community tradition for 40 years. *Id.* at 1158.

212. *Id.* at 1157. The trial court found that the phone calls and Letters to the Editor were admissible under FED. R. EVID. 803(3) as an exception to the hearsay rule. The court then found these statements and beliefs to be evidence of the "effect" which the crèche had on the people of Pawtucket. *Id.* at 1157 n.13.

213. *Id.* at 1156.

214. *Id.* at 1157.

215. FED. R. CIV. P. 52(a). See *infra* note 231 stating the relevant part of Rule 52(a).

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

217. *Lynch*, 525 F. Supp. at 1179.

218. *Lynch*, 104 S. Ct. at 1374 (Brennan, J., dissenting). See *supra* note 161 discussing the Mayor's statement concerning future displays.

schools or colleges, or other religious institutions.[219] Justice Brennan argued that such a suggestion derives from "a distorted reading" of Supreme Court precedent.[220] Indeed, in *Larson v. Valente*,[221] a case involving the exemption of certain religious organizations from reporting requirements, the Court applied the political divisiveness portion of the test and found a violation based in part on the statute "engender[ing] a risk of politicizing religion."[222]

The district court approached this question by reviewing the "calm history" of the Pawtucket crèche, marked by no apparent dissension.[223] However, it then turned to the community's reaction to the lawsuit and determined that the calm history was "the product of a pragmatic calculation that enduring one religious symbol celebrating one Christian holiday was a small price to pay for harmony among the townspeople."[224]

The Supreme Court stated that a litigant could not exploit the appearance of divisiveness caused by the filing of its lawsuit.[225] However, the Court did not support this statement with any legal argument. In contrast, Justice Brennan agreed with the district court that *any* appearance of political divisiveness could be used as evidence of entanglement.[226]

Whether the political divisiveness element really adds anything to the *Lemon* test is questionable. The Court noted that it has never held that political divisiveness alone could serve to invalidate an otherwise permissible government action.[227] Justice O'Connor stated in her concurring opinion that political divisiveness should not be an independent test of constitutionality.[228] Furthermore, many noted scholars have criticized this analysis. "[T]he inconsistent and incoherent use and nonuse of the political divisiveness test by the Supreme Court suggests that the utility of this test as a tool of constitutional adjudication is dubious."[229]

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219. *Id.* at 1364-65 (citing Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983)).

220. *Id.* at 1374 n.9 (Brennan, J., dissenting).

221. 456 U.S. 228 (1982).

222. *Id.* at 253.

223. *Lynch*, 525 F. Supp. at 1179.

224. *Id.*

225. *Lynch*, 104 S. Ct. at 1365.

226. *Id.* at 1374 (Brennan, J., dissenting).

227. *Id.* at 1364.

228. *Id.* at 1367 (O'Connor, J., concurring). *See also* Justice Brennan's statement to same effect, *id.* at 1374 n.9.

229. Gaffney, *supra* note 24, at 230. In addition, Professor Gaffney stated that the Court should "abandon the political divisiveness test because the test is dysfunctional, illiberal, theologically unsound, constitutionally impermissible, and historically erroneous." *Id.* at 236. *See also* Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866-67 (1978);

D. Summary

The Supreme Court reversed the court of appeals' ruling and found that a violation of the establishment clause had not occurred.[230] Generally, the Court does not overturn a lower court's decision unless it finds that decision to be clearly erroneous.[231] Here, the Court stated that the district court had "plainly erred" in its inference that, based on the religious significance of the crèche, the City did not have a secular purpose for the display.[232] However, as Justice Brennan pointed out, detailed findings of the district court may not be overturned unless clearly erroneous and the Court made "only a half-hearted attempt . . . to grapple with [this] fact."[233]

In sum, the Court was faced with a dilemma. It appears that a majority of the Justices felt that inclusion of the crèche in the Christmas display was not so offensive as to violate the Constitution.[234] However, the district court had thoroughly reviewed the issue and, based on the *Lemon* test, concluded that the City had violated the establishment clause.[235] The Supreme Court was left with three options: (1) to let the decision stand, although not agreeing with the result, (2) to reverse the lower courts and change the application of the *Lemon* test, or (3) to find the district court had clearly erred. Since the Court recently had been criticized for disrupting the longstanding establishment clause analysis in *Marsh v. Chambers*[236] and *Larson v. Valente*,[237] the Court used a "less than vigorous application of the *Lemon* test"[238] to find that the district court had erred.

Perhaps Justice Brennan recognized the problem in *Lynch* when he stated: "I am convinced that this case appears hard not because the prin-

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Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

230. *Lynch*, 104 S. Ct. at 1366.

231. FED. R. CIV. P. 52(a). Rule 52(a) states in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

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

233. *Id.* at 1375 n.11 (Brennan, J., dissenting) (citations to majority opinion omitted).

234. Justice Brennan stated that "[a]lthough the Court's relaxed application of the *Lemon* test to Pawtucket's crèche is regrettable, it is at least understandable and properly limited to the particular facts of this case." *Id.* at 1380 (Brennan, J., dissenting).

235. *Lynch*, 525 F. Supp. at 1181.

236. 463 U.S. 783 (1983) (application of an "historical analysis" type of approach). See *supra* text accompanying notes 15-16 discussing historical analysis.

237. 456 U.S. 228 (1982) (strict scrutiny test applicable to actions which discriminate among religions). See *supra* notes 11-14 and accompanying text discussing strict scrutiny analysis.

238. *Lynch*, 104 S. Ct. at 1370 (Brennan, J., dissenting).

ciples of decision are obscure, but because the Christmas holiday seems so familiar and agreeable."[239]

VI. PROPOSED CATEGORIES

Until recently, the *Lemon* test was the only test for establishment clause analysis.[240] However, application of the test has often resulted in inconsistent decisions. A review of the application of the test in *Lynch v. Donnelly*[241] proves this point. The Supreme Court reversed the district court, not based on a misapplication of the law, but because it interpreted the facts and applied them to the *Lemon* test differently than the district court. The Court found that the district court had "plainly erred" in applying a relatively subjective test.[242] It held that the court of appeals did not apply the "correct" test—it used the strict scrutiny test.[243]

Obviously there is confusion in the courts as to when to use the *Lemon* or strict scrutiny tests and when to disregard both tests and apply an historical analysis.[244] The reasons for such confusion are several.

A. Reasons for Inconsistent Results

The most obvious reason why application of the *Lemon* test has resulted in inconsistent decisions is the difficulty inherent in the subject matter. As stated by Justice Powell, the establishment clause concerns "some of the most perplexing questions to come before this Court."[245] It is difficult for government to avoid aiding religion in some manner unless it actually opposes religion; however, this is forbidden by the free exercise clause.[246] The Court has tried to find a neutral course between the establishment and free exercise clauses; unfortunately, the *Lemon* test has failed to provide such a course.

There are several problems with the *Lemon* test. One problem is that if read literally, it is inflexible. In an effort to avoid the inflexibility

239. *Id.* at 1371 (Brennan, J., dissenting).

240. See *supra* notes 152-54 and accompanying text discussing the use of the *Lemon* test.

241. 104 S. Ct. 1355 (1984).

242. See *supra* text accompanying notes 232-33 discussing the clearly erroneous standard.

243. Donnelly v. Lynch, 691 F.2d 1029, 1034-35 (1st Cir. 1982).

244. See *supra* text accompanying notes 5-16 & 179-82 and accompanying text concerning the confusion over the correct test.

245. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973). Similarly, in discussing the difficulty in resolving establishment clause cases, Circuit Judge Tamm stated that "[t]his case, we unhappily anthropomorphize, is similarly disposed to perplex, confuse, and even frustrate, so sensitive and complex are the issues it presents." Allen v. Morton, 495 F.2d 65, 68 (D.C. Cir. 1973) (per curiam).

246. See *supra* text accompanying notes 47-59 discussing the conflict between the religion clauses.

and the strict obstacle that the *Lemon* test has become, the Supreme Court has formulated additional tests.[247] Chief Justice Burger disagrees with the application of the *Lemon* test as a strict obstacle. As stated in *Tilton v. Richardson*:[248]

> There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.[249]

In addition to the inflexibility of the *Lemon* test, its application has generally been limited to religion and education cases.[250] This has caused difficulty when the lower courts have attempted to apply the test to noneducational questions. For example, in *Bogen v. Doty*,[251] where the issue was whether a county board violated the establishment clause by opening each board meeting with a prayer, Chief Judge Gibson for the Eighth Circuit stated: "[T]he District Court reviewed several of the decisions of the Supreme Court touching on the establishment clause. However, it found no specific guidance in those cases or the Constitution."[252] Similarly, in *Allen v. Morton*,[253] the question concerned a crèche on federal parkland in the government's annual Christmas Pageant of Peace in Washington, D.C. The court stated that "the involvement we consider here today is novel in terms of Supreme Court precedent and thus does not fit well in the pigeonholes of past decisions."[254]

The Supreme Court has also found application of the *Lemon* test somewhat difficult in noneducational cases. Thus, in *Marsh v. Chambers*,[255] the Court used a new historical analysis approach without even mentioning the *Lemon* test[256] and, in *Larson v. Valente*,[257] it developed

247. See *supra* notes 11-16 and accompanying text discussing the various tests.

248. 403 U.S. 672 (1971).

249. *Id.* at 678.

250. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (most establishment clause cases involve religion and education).

251. 598 F.2d 1110, 1112 (8th Cir. 1979).

252. *Id.* The district court "concluded, on the basis of 'history and custom,' that [prayer at county board meetings] did not pose a threat to the first amendment provisions, nor was it violative thereof." *Id.*

253. 495 F.2d 65 (D.C. Cir. 1973) (per curiam).

254. *Id.* at 75.

255. 463 U.S. 783 (1983).

256. *Id.* at 786-95.

257. 456 U.S. 228 (1982).

the strict scrutiny test for certain religion clause cases.[258]

Another problem with the *Lemon* test is that in its short twenty year history, it has been expanded, rephrased and reemphasized by the Court. This again has been due to the difficulty in the application of the test. For example, the "primary effect" language has been construed to mean "a" primary effect as well as "the" primary effect. Chief Justice Burger stated in *Tilton v. Richardson*,[259] that "[t]he crucial question is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether *its principal* or primary effect advances religion."[260] Conversely, in *Committee for Public Education and Religious Liberty v. Nyquist*,[261] the Court stated "this section has *a* primary effect that advances religion."[262] While this may appear to be a mere technicality, it can change the outcome of a case since a governmental action can have several effects; however, the principal effect of such action need not advance religion.

For example, in *Mueller v. Allen*,[263] a Minnesota statute allowed tax deductions for certain expenses incurred in educating children. Of the five hundred privately supported schools located in Minnesota, approximately ninety-five percent were sectarian. Even though expenses incurred in sending children to public school are minimal, and the tax deduction clearly benefits parents sending their children to sectarian schools, the Supreme Court upheld the statute.[264] The Court found that while *a* primary effect of the statute was a tax benefit for those children attending sectarian schools, *the* primary effect was a facially neutral statute which provided tax benefits to all persons educating children in Minnesota.[265] If the Court had looked at only one of the primary effects—tax benefits for children in sectarian schools—the Court would have invalidated the statute.

In addition to the primary effect element, the excessive entanglement element has also been rephrased and reemphasized. Prior to *Lemon*, excessive entanglement actually was a part of the primary effect element. In *Walz v. Tax Commission*,[266] the Court announced the effect test: "[w]e must also be sure that the end result—the effect—is not an

258. *Id.* at 246.
259. 403 U.S. 672 (1971).
260. *Id.* at 679 (emphasis added).
261. 413 U.S. 756 (1973).
262. *Id.* at 774 (emphasis added).
263. 463 U.S. 388 (1983).
264. *Id.* at 396.
265. *Id.* at 397.
266. 397 U.S. 664 (1970).

excessive government entanglement with religion."[267] However, excessive entanglement became a separate test after *Walz* and has been criticized as being a subjective[268] and inefficient[269] test. In addition, it is seen as a Catch-22. The Court insists that recipient sectarian schools continually report to the government in order to insure neutrality. Yet, this continual reporting and "surveillance" invalidates the program because it creates "excessive entanglement." Such reasoning is clearly circular.[270]

The political divisiveness portion of the entanglement element has drawn additional criticism.[271] The Court stated in a footnote in *Mueller v. Allen*[272] that the element should be used only in "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[273] Yet, political divisiveness was used to strike down a Massachusetts statute governing the issuance of liquor licenses within five hundred feet of a church or school in *Larkin v. Grendel's Den, Inc.*[274] A noted constitutional law scholar has stated that the political divisiveness test has merely shifted the focus in aid to parochial school cases.[275] By prohibiting neutral aid to religious schools, religious groups will be forced to oppose aid to public schools in an effort to indirectly benefit the parochial schools. Such action will cause new forms of political divisiveness along religious lines.[276]

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267. *Id.* at 674.

268. Ripple, *supra* note 229, at 1218.

> In short, *by requiring the Justices to predict the probability of unconstitutional effect,* the entanglement test has introduced an abnormally high degree of judicial subjectivity into the Court's assessment of the nature of religious institutions and of the relationships which those institutions develop with governmental entities. The degree of entanglement deemed "excessive" often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question. The Justices have often based their conclusions on factual assumptions upon which the record is either silent or to the contrary.

Id. (emphasis in original).

269. *Id.* at 1216. "Even if the Court is willing to accept the policy directions to which [the entanglement test] leads, a test not susceptible to fair and moderately efficient judicial management is a poor candidate for retention and a substitute must be sought." *Id.*

270. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1047 (2d ed. 1983).

271. See *supra* notes 227-29 and accompanying text discussing criticism of the political divisiveness element of the *Lemon* test.

272. 463 U.S. 388 (1983).

273. *Id.* at 403-04 n.11.

274. 459 U.S. 116 (1982). "The challenged statute thus enmeshes churches in the processes of government and creates the danger of '[p]olitical fragmentation and divisiveness along religious lines.'" *Id.* at 127 (citing Lemon v. Kurtzman, 403 U.S. 602, 623 (1971)).

275. Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education,* 70 NW. U.L. REV. 883 (1976).

276. *Id.* at 907. This shift will continue further if the government tries to aid nonreligious private schools in an attempt to promote an alternative to the public school system. Religious

Another reason for inconsistent results arises from the fact that all establishment clause cases are grouped together, whether they concern subsidies to parochial schools, prayer in public schools or tax exemptions for religious organizations.

The uniform treatment of all establishment clause cases has caused the courts to lose sight of these different concerns. For example, in the public school area, the primary concern is to prevent the imposition of any type of religious activity upon young schoolchildren. However, in the nonpublic school area, the main concern is with tax expenditures or governmental involvement in religion. In these cases, the courts must be careful not to infringe on freedom of religion, while at the same time not "establish" a religion.

Recently, the courts have been faced with cases such as *Marsh v. Chambers*,[277] which appear to be outside the realm of precedent. Instead of struggling to apply the *Lemon* test, which did not appear to address the concerns in *Marsh*, the Court developed the new historical analysis test. As stated by the Solicitor General in his brief in *Marsh*, "[i]n these circumstances, analysis of the legislative chaplaincy practice under the *Lemon* test seems pointless."[278]

B. Possible Solution

One way to achieve more consistent results would be to categorize the establishment clause cases and apply tests which meet the concerns of each category. This categorization would be somewhat analogous to the categorization used in the equal protection area.

In equal protection analysis, the Court has developed three basic tests. Strict scrutiny review is used when a law impinges on a fundamental right or is based on a suspect classification, such as race,[279] national origin[280] or alienage.[281] Intermediate scrutiny is used when a law is

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groups will then be forced to oppose aid to both nonsectarian private schools and public schools. *Id.* at 907-08.

277. 463 U.S. 783 (1983).

278. Brief for the United States as Amicus Curiae in Support of Petitioners at 22, Marsh v. Chambers, 463 U.S. 783 (1983).

279. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (statute prohibiting marriage between whites and nonwhites held unconstitutional); Brown v. Board of Educ., 347 U.S. 483 (1954) (separate but equal doctrine rejected as to public education).

280. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (discrimination against Mexican-Americans with regard to jury service held unconstitutional).

281. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (federal law discriminating against aliens held constitutional); *but see* Graham v. Richardson, 403 U.S. 365 (1971) (state law discriminating against aliens held unconstitutional).

based on a quasi-suspect classification, such as illegitimacy[282] or gender.[283] The third test is the rational basis analysis which is used when a law is discriminatory but need not meet the higher standards of the suspect or quasi-suspect classification, such as most social and economic regulations.[284] By categorizing the types of governmental discrimination, the Court is able to apply various tests appropriate to the specific areas of concern.

The establishment clause cases appear to fall within four categories: public schools, nonpublic schools, status quo and governmental regulation of religious organizations.

1. Public schools

The primary factual issues in this area involve statutes or government practices which cause the government to become actively involved in religion. The Court's primary concerns focus on the potential indirect coercive effect of these statutes and government practices upon children to conform to the government's approved religion.[285] Coercion is particularly important in regard to young schoolchildren, as opposed to college students.[286] While the Court has stated that coercion is really only a factor in free exercise clause cases, and is not a factor in establishment clause cases,[287] in the public school area coercion seems to be the underlying concern. For example, although a statute may make school prayer voluntary, the Court is inclined to believe that it has the indirect coercive effect of compelling small children to conform.[288] Justice Frankfurter

282. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (state statute concerning inheritance by illegitimate children upheld).

283. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (state statute forbidding the sale of 3.2% beer to males aged 18 to 20 held unconstitutional).

284. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (classification of railroad employees based on length of employment held rationally related to statutory purpose of insuring solvency of railroad retirement system); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland welfare program which set the maximum payment of $250 regardless of family size or need, upheld because rationally related to state's interest in encouraging employment).

285. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

286. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (University students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

287. *See* School Dist. v. Schempp, 374 U.S. 203, 223 (1963) ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

288. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam). In *Stone*, the Court

stated in his concurring opinion in *Illinois ex rel McCollum v. Board of Education*:[289] "The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to [conform]."[290]

The test which should be used in public school cases can be confined to the first two elements of the *Lemon* test: secular purpose and primary effect. The Court should give deference to the stated legislative purpose[291] because not all religious references in public schools are unconstitutional. For example, religious art and literature may be studied if their purpose is purely academic. However, while the purpose of a program may be a neutral or secular one, if the effect of the practice is to give governmental support to the advancement of religious beliefs, the practice would constitute a violation.

In analyzing the principal effect of a governmental action, the Court should focus on the concerns particular to public school cases. The Court should review whether *the* primary effect, not a remote or incidental effect, advances or inhibits religion.[292] The effect should not be to indirectly coerce schoolchildren into following a particular religious practice. However, the focus should not be so narrow as to foreclose all

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struck down a Kentucky statute requiring that the Ten Commandments be posted in public schools. The Court stated that the posted copies would have the effect of "induc[ing] the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.*

289. 333 U.S. 203 (1948) (release of children from public school to attend religious program given *on* school premises found unconstitutional).

290. *Id.* at 227 (Frankfurter, J., concurring). *See also* Zorach v. Clausen, 343 U.S. 306 (1952). In *Zorach*, the Court upheld a program where students were released from public schools so that they could receive religious instruction off the school's premises. *Id.* at 315. If such a program had indirectly coerced students into attending the religious classes, the governmental action would have been a direct violation of both the establishment and free exercise clauses. *Id.* at 314.

291. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). *But see* Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

In *Stone*, the legislature clearly stated a secular purpose for the posting of the Ten Commandments in the public schools. The statute provided in part:

> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "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."

Stone, 449 U.S. at 39-40 n.1.

Although the legislature stated a secular purpose, the Court found that "[t]he pre-eminent purpose . . . is plainly religious in nature." *Id.* at 41. The Court could have based the violation on the primary effect test, thereby giving deference to the legislative purpose.

292. *See* McGowan v. Maryland, 366 U.S. 420, 449-50 (1961) (Sunday closing laws found to have only a remote and incidental effect advantageous to religion and therefore not violative).

religious references. As stated by Justice Rehnquist in his dissenting opinion in *Stone v. Graham*, " 'I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religions have played in the tragic story of mankind.' "[293]

2. Nonpublic schools

The focus in the nonpublic school area is very different from the public school area. In nonpublic school cases, the Court tries to avoid the appearance of advancing religion where the nonpublic schools receive public financial support. In addition, the free exercise clause takes on a more substantial role in this area by preventing the government from inhibiting religious freedom in the nonpublic schools. In analyzing legislation in this area, the Court has considered several factors.

Initially, the particular form of aid given to a nonpublic school is important. Aid given directly to the students or parents—rather than the religious institution itself—often is upheld. The Court distinguished the state aid in *Lemon v. Kurtzman* with that upheld in *Everson v. Board of Education*[294] and *Board of Education v. Allen*[295] by stating that, in those prior cases, "state aid was provided to the student and his parents—not to the church-related school."[296]

Another important concern is whether the aid is given to a broad class of beneficiaries. In *Mueller v. Allen*,[297] the Court distinguished the aid struck down in *Committee for Public Education and Religious Liberty v. Nyquist* [298] by stating that in comparison, the Minnesota tax deduction "permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses."[299] It found that a program "that neutrally provides state assistance to a broad spectrum

293. *Stone*, 449 U.S. at 46 (Rehnquist, J., dissenting) (quoting Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring)).

294. 330 U.S. 1 (1947).

295. 392 U.S. 236 (1968).

296. Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). *See also* Mueller v. Allen, 463 U.S. 388, 399 (1983) ("the means by which state assistance flows to private schools is of some importance"); Wolman v. Walter, 433 U.S. 229, 253 (1977) (per curiam) (field trip transportation aids the school rather than the children and "this fact alone may be sufficient to invalidate the program as impermissible direct aid"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973) ("fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered").

297. 463 U.S. 388 (1983).

298. 413 U.S. 756 (1973).

299. *Mueller*, 463 U.S. at 398 (emphasis in original). In *Nyquist*, the Court distinguished *Allen* and *Everson*. "In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." *Nyquist*, 413 U.S. at 782 n.38 (emphasis in original).

of citizens is not readily subject to challenge under the Establishment Clause."[300]

The Court is also concerned with whether the aid can be limited to only the secular aspects of the nonpublic school. If the religious institution is "pervasively sectarian," the secular program must be capable of being separated out of the sectarian program.[301] In this regard, the Court looks at the type of institution aided. Although secondary schools are considered to be "pervasively sectarian," colleges are not. This is because elementary and secondary schools are generally under more religious control than the nonpublic colleges.[302] Whether the institution is pervasively sectarian or not, the concern is whether the aid directly benefits the secular, not sectarian, aspects of the institution.

Another concern follows directly from the issue of whether the aid will benefit only the secular aspects of an institution. The Court is also wary of the amount of "surveillance" needed to keep secular and sectarian programs apart. As stated in *Walz v. Tax Commission*,[303] there are "programs, whose very nature is apt to entangle the State in details of administration."[304] Some surveillance of, or entanglement in, nonpublic schools is constitutional. For example, regulating nonpublic schools so that minimum educational standards are met, such as "competent teachers, accreditation of the school for diplomas, the number of hours of work and credits allowed," would be constitutional.[305] However, the Court has found other programs to be "fraught with the sort of entanglement that the Constitution forbids."[306]

In *Lemon*, the Court found the Rhode Island program of supplementing the salaries of teachers of secular subjects in nonpublic schools to be unconstitutional because such a program would require extensive

300. *Mueller*, 463 U.S. at 398-99.

301. Hunt v. McNair, 413 U.S. 734 (1973) (state aid for construction of secular building at Baptist college held unconstitutional).

302. In Roemer v. Board of Pub. Works, 426 U.S. 736 (1976), the Court noted that the "character-of-institution" distinctions in *Lemon* were important:

> The elementary and secondary schooling in *Lemon I* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; each school had a local Catholic parish that assumed "ultimate financial responsibility" for it; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specifically instructed by the "Handbook of School Regulations" that " '[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.' "

Id. at 764-65 (citing *Lemon*, 403 U.S. at 617-18).

303. 397 U.S. at 664 (1970).

304. *Id.* at 695.

305. *Lemon*, 403 U.S. at 631 (Douglas, J., concurring).

306. *Id.* at 620.

reporting and auditing. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[307]

Other factors deemed relevant by the Court are whether the program is mandated and controlled by the state[308] and whether the aid is a one-time, single-purpose grant or continuing aid.[309] In *Committee for Public Education and Religious Liberty v. Regan*,[310] tests were mandated and controlled by the state. The Court stated that "[t]he nonpublic school thus has no control whatsoever over the content of the tests."[311] In contrast, in *Levitt v. Committee for Public Education and Religious Liberty*[312] where state-mandated tests were prepared by nonpublic school teachers, the Court stated that there were no means available "to assure that internally prepared tests [were] free of religious instruction."[313]

In *Tilton v. Richardson*,[314] the Court found that government entanglement was reduced when the aid was a "one-time, single-purpose construction grant," as opposed to "direct and continuing payments" which require "regulation and surveillance."[315]

The test which should be used in the nonpublic school area can also be confined to the first two elements of the *Lemon* test. This would include reviewing excessive entanglement as a possible effect under the primary effect element. As in the public school area, the courts should give deference to the stated legislative purpose.[316] Legislatures are thought to be in a better position than the courts to understand the school systems in their states and to determine when aid is needed.

The primary effect issue is important in this area. Legislation which only has "a remote and incidental effect" that benefits religious organizations should not be struck down. The establishment clause is concerned with legislation which has *the* principal effect of advancing religion.[317] Moreover, the courts must not inhibit religion, which would include dis-

307. *Id.* at 619.

308. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

309. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971).

310. 444 U.S. 646 (1980).

311. *Id.* at 654. In addition, there was "no substantial risk that the examinations could be used for religious educational purposes." *Id.* at 656.

312. 413 U.S. 472 (1973).

313. *Id.* at 480.

314. 403 U.S. 672 (1971).

315. *Id.* at 688.

316. See *supra* note 291 and accompanying text discussing the role of legislative purposes.

317. See *supra* text accompanying notes 260-65 discussing the difference between "a" primary effect and "the" primary effect.

advantaging nonpublic schools to the benefit of public schools. For example, state-mandated tests for all schoolchildren, nonpublic and public, should be paid for by the state. If not, the nonpublic schools will be at a distinct disadvantage to public schools. In addition, entanglement should be considered as one effect of the legislation. If the primary effect is *excessive* government entanglement, the program should be struck down. Requiring reporting to assure neutrality should not be viewed as "excessive" entanglement. If entanglement is merely one effect, but not the primary effect, such legislation should be upheld.

As stated previously, the courts should review the legislation with the concerns of the nonpublic schools in mind. Additionally, the actual, factual results or effects of legislation—not potential harm—should be reviewed by the courts. Further, the courts should not assume problems not in the factual record. As stated by Justice Marshall in *Wolman v. Walter*,[318] the harm which the Court is concerned with does not include "imaginable but totally implausible evils."[319]

3. Status quo

The focus in this area is on particular practices which have been a part of the history of a community or the United States for many years, and whether such practices should be retained or eliminated. These cases have shown that the Court's concern is whether the practice advances religion, rather than concern over whether a practice inhibits religion. For example, in *Marsh v. Chambers*,[320] the governmental action at issue was the prayer that opened each session of the Nebraska legislature. This had been an ongoing practice for more than a century.[321] The Supreme Court found that this practice resulted in no advancement of religion and, thus, no violation of the establishment clause.[322] The Court based its decision on a purely historical analysis.[323]

The *Lemon* test is not helpful in this area because it was developed based on the concerns in the public and private school areas and does not address concerns which are purely historical. The government actions in both *Marsh* and *Lynch v. Donnelly* should have been found to violate the establishment clause based on the *Lemon* test. However, the Court appeared to be of the opinion that the governmental practices in those cases

318. 433 U.S. 229 (1977) (per curiam).
319. *Id.* at 260 n.6 (1977) (per curiam) (Marshall, J., concurring in part and dissenting in part).
320. 463 U.S. 783 (1983).
321. *Id.* at 795.
322. *Id.*
323. *Id.* at 786-95.

had been a part of our society for decades and the "status quo" should be preserved.

An historical analysis test should be applied in this area. As stated by Justice Holmes, "a page of history is worth a volume of logic."[324] However, as the Court has also noted, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[325]

In order to meet the historical analysis test, the Court "must consider both the actual impact of the practice in modern society as well as the historical basis for the activity."[326] Incidental benefit to religious institutions in today's society should be upheld. For example, in *McGowan v. Maryland*,[327] Sunday closing laws were upheld even though some incidental benefits were recognized by some religious groups.[328] Only practices which directly and substantially benefit religion should be struck down.

In addition to reviewing the actual impact of the governmental activity in today's society, the record must be supported by evidence of historical acceptance. In *Walz v. Tax Commission*,[329] the Court upheld tax exempt status for religious institutions. The historical record showed "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction."[330] As was noted previously, the historical review should be of the particular practice at issue. Because the history of public endorsement of Christmas as a religious holiday is sketchy at best, the City of Pawtucket's inclusion of the crèche in its Christmas display may have been disallowed under the historical analysis as well.[331]

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324. *See* Walz v. Tax Comm'n, 397 U.S. 664, 675-76 (1970) (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

325. *Id.* at 678.

326. Bogen v. Doty, 598 F.2d 1110, 1113 (1979) (opening invocation at county board meetings not violative of establishment clause). In looking at the actual impact of the governmental action in *Walz*, the Court stated that "[i]f tax exemption can be seen as this first step toward 'establishment' of religion, as Mr. Justice Douglas fears, the second step has been long in coming." *Walz*, 397 U.S. at 678.

327. 366 U.S. 420 (1961).

328. *Id.* at 445.

329. 397 U.S. 664 (1970).

330. *Id.* at 678. Additionally, the Court noted that "[n]early 50 years ago Mr. Justice Holmes stated: 'If a thing has been practised [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Id.* (citing Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

331. See *supra* notes 107 & 175 discussing the various views on the history of Christmas in the United States.

4. Government regulation of religious organizations

The final category of establishment clause cases concerns government regulation of religious organizations. While this category only includes a few Supreme Court cases at present, the potential for further government regulation in this area is highly probable. The existing concerns are denominational preference and discretionary powers given to religious organizations.

In *Larson v. Valente*,[332] the Court struck down a statute which granted a denominational preference and, in effect, discriminated between religious organizations.[333] The statute originally exempted all religious organizations from certain reporting and registration requirements. It was then amended to exempt only religious organizations which received more than half of their contributions from members. The effect of the amendment was to require only certain religious organizations to register. Using strict scrutiny, the Court found that the statute did not further any compelling governmental interest and, therefore, the denominational preference was held invalid under the establishment clause.[334]

In *Larkin v. Grendel's Den, Inc.*,[335] the Court struck down a statute which gave churches or schools discretionary veto power over restaurant applications for liquor licenses.[336] The Court noted that ordinarily this type of power is vested in agencies of government.[337] The Court found that while the statute had a secular purpose, it also had a primary effect of advancing religion.[338] Additionally, it found that the statute "enmeshes churches in the processes of government," entanglement which is offensive to the Constitution.[339]

This kind of government regulation of religious institutions should be analyzed using strict scrutiny. There must be a compelling governmental interest justifying the statute and the statute must be closely fitted to further that interest.[340] The reason for the strict scrutiny analysis in *Larson* was due to the discriminatory effect of the statute. In *Larkin*, while there is no discriminatory effect, the statute gives the religious organizations power normally vested in the government. Such delegation

332. 456 U.S. 228 (1982).
333. *Id.* at 255.
334. *Id.*
335. 459 U.S. 116 (1982).
336. *Id.* at 127.
337. *Id.* at 122 (citing California v. LaRue, 409 U.S. 109, 116 (1972)).
338. *Id.* at 125-26.
339. *Id.* at 127.
340. See *supra* notes 11-14 discussing strict scrutiny analysis.

of power should be supported by a compelling reason. If the same effect can be accomplished without such discrimination or delegation of power, the statute should be invalidated.

VI. CONCLUSION

It is virtually undisputed that the establishment clause prohibits the establishment of one national religion. Moreover, government must be careful not to interfere with the free exercise of religion. Thus, it cannot endorse nor can it disapprove any particular religion. Beyond that, however, the reality is such that religious organizations and religious schools are important in today's society and cannot exist without some interaction with government. How much or how little interaction is permissible is difficult to answer. The Supreme Court has attempted to draw the line by comparison with prior cases or by reflecting back at how society existed during the First Congress when the religion clauses were enacted. While these methods may shed some light on the answer, the results have been far from conclusive or consistent.

Categorizing establishment clause cases could lead to more consistent decisions by providing more structure and guidelines. By looking at the concerns in one area, instead of the concerns of all establishment clause cases, the courts will be able to focus more clearly on the issues in a particular case. Perhaps the confusion surrounding the proper test to be applied in *Lynch v. Donnelly* could have been avoided by using such a categorization.

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