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Lynch v. Donnelly: The Disappearing Wall

Harriet Grant

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The establishment clause of the first amendment[1] has created controversy and vigorous debate among both commentators and the courts. In 1947 the United States Supreme Court stated that the establishment clause "has erected a wall between church and state. That wall must be kept high and impregnable."[2] In *Lynch v. Donnelly*,[3] however, the Court concluded that the concept of a "wall" of separation "is not a wholly accurate description."[4] The disagreement about the utility of this metaphor exemplifies the Court's ongoing struggle to find the appropriate relationship between religion and government.[5] Faced with that struggle, the *Lynch* Court applied the three-pronged[6] test enunciated in *Lemon v. Kurtzman*,[7] and ruled that a city's ownership and erection of a nativity scene as part of its annual Christmas display did not violate the establishment clause.[8]

This Note examines the *Lynch* Court's application of the *Lemon* test. It concludes that the Court, disregarding Justice Brennan's vigorous dissent, applied the *Lemon* test in a superficial manner. This relaxed application of the test resulted in a retreat from the only viable tool for determining whether the establishment clause has been violated.

To understand the *Lynch* decision, it is necessary to understand the objectives of both the establishment clause and the *Lemon* test itself. Discussing the

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1. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The establishment clause is applicable to the states through the fourteenth amendment. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

For a thorough discussion of the establishment clause—its origin, the Framers' intent, and an analysis of case law—see R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); L. PFEFFER, CHURCH, STATE AND FREEDOM (1953); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770 (analysis of the history of the establishment clause).

For various commentators' definitions of religion as an aid to interpreting the establishment clause, see Greenwalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984).

2. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

3. 104 S. Ct. 1355 (1984).

4. *Id.* at 1359.

5. "It has never been thought . . . possible . . . to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1972) (referring to establishment clause and free exercise clause). Illustrative of the Court's struggle with the establishment clause is its failure to reach unanimity in numerous decisions. *See infra* note 65.

Commentators also have disagreed. Robert L. Cord has stated that he and Leo Pfeffer "fundamentally disagree as to precisely what constitutional separation correctly entails." R. CORD, *supra* note 1, at 15. Cord disputes the strict separationist approach of Pfeffer. For Pfeffer's viewpoint, see L. PFEFFER, *supra* note 1.

6. See *Lynch*, 104 S. Ct. at 1362 (citing Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring)).

7. 403 U.S. 602 (1971).

8. *Lynch*, 104 S. Ct. at 1358.

objectives of the establishment clause, Chief Justice Burger, in *Walz v. Tax Commission*,[9] focused on what the Framers of the first amendment believed the " 'establishment' of a religion connoted[—namely,] sponsorship, financial support and active involvement of the sovereign in religious activity."[10] In later cases the Supreme Court has referred to these three elements as "the three main evils"[11] that the establishment clause sought to prevent.[12]

With these evils in mind,[13] the Court developed the three-pronged *Lemon* test for determining whether a governmental activity violates the establishment clause.[14] To be upheld, the activity (1) must have a secular purpose;[15] (2) must have a principal or primary effect that neither advances nor inhibits religion;[16]

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9. 397 U.S. 664 (1970).

10. *Id.* at 668.

11. *Lemon*, 403 U.S. at 612; *see* Meek v. Pittenger, 421 U.S. 349, 359 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971).

12. The Supreme Court also has articulated the meaning of the establishment clause as follows:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person . . . to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities . . . whatever they may be called, or whatever form they [take].

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). Even though this definition is a broad, uncompromising prohibition against the establishment of religion, the Court in *Everson* upheld the challenged government activity—reimbursement to parents for the cost of transporting children to parochial schools—because the state need not act as religion's adversary. The Court noted, "State power is no more to be used so as to handicap religions than it is to favor them." *Id.* at 18.

This definition of the establishment clause has been quoted in later decisions. *See Walz*, 397 U.S. at 670 (constitutional to grant tax exemptions to religious organizations for properties used solely for religious purposes); Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (unconstitutional to impose "anti-evolution" statute on teachers); Board of Educ. v. Allen, 392 U.S. 236, 250 (1968) (Black, J., dissenting) (constitutional to require public authorities to lend books, free of charge, to all students, including those in private sectarian schools).

13. *Lemon*, 403 U.S. at 612.

14. *Id.* at 612-13. The Court developed the *Lemon* test by examining prior decisions that addressed whether a government activity violated the establishment clause. As such the test was a compilation of previous analyses. The first two prongs initially were articulated in Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), and the third prong originated in *Walz*, 397 U.S. at 74.

15. *Lemon*, 403 U.S. at 612. For an example of the Court's use of the first prong of the *Lemon* test, see Stone v. Graham, 449 U.S. 39 (1980) (per curiam). In *Stone* the Court noted that the purpose behind posting the Ten Commandments in public classrooms was "plainly religious in nature. . . . [N]o legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41. Thus, due to the absence of a valid secular purpose, the Kentucky statute requiring the posting of the Ten Commandments was held unconstitutional.

16. *Lemon*, 403 U.S. at 612. The "effect" prong embodies the principle of government "neutrality"—a principle that the Court recognized prior to the *Schempp* decision. As early as 1947, Justice Rutledge stated that public funding for parochial schools can be constitutional only if the funding does not "aid, promote, encourage, or sustain religious teaching or observances." Everson v. Board of Educ., 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting). The majority in *Everson* insisted that the first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Id.* at 18. In Engel v. Vitale, 370 U.S. 421 (1968), the Court stated that " 'if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.' " *Id.* at 443 (Douglas, J., concurring) (quoting McGowan v. Maryland, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting)). The Court stated explicitly that the government cannot advance or inhibit religion, but instead must remain impartial. *See generally* Kirkland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1968) (discussing both the establishment clause and the free exercise clause to conclude that government cannot use religion to confer benefits or impose burdens); Weiss, *Privilege, Posture and Protection: "Religion" in*

and (3) must not foster an " 'excessive entanglement with religion.' "[17] If a government's activity "violates any of these three principles, it must be struck down."[18]

In *Lynch* a Pawtucket, Rhode Island taxpayer challenged the city's inclusion of a life-sized nativity scene in its annual Christmas display.[19] The city paid for the creche and hired workers to erect and dismantle it.[20] Although the city erected the display in a private park, its affiliation with the display was clear.[21] At trial Mayor Lynch stated that the city assembled the display to increase commercial activity,[22] to promote morale,[23] and to acknowledge the heritage of a national holiday,[24] rather than to endorse religion in general, or Christianity specifically.[25]

The United States District Court for the District of Rhode Island applied the *Lemon* test[26] and concluded that the city's inclusion of the creche violated the establishment clause.[27] The United States Court of Appeals for the First Circuit affirmed.[28] The court of appeals, however, applied the test articulated in *Larson v. Valente*[29] instead of the *Lemon* test.[30] The *Larson* test—used when the challenged activity discriminates among religions—requires a governmental

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the Law, 73 YALE L.J. 593 (1964) (discussing both the establishment clause and the free exercise clause to conclude that law cannot enter private domain of religion).

17. *Lemon*, 403 U.S. at 1613 (quoting *Walz*, 397 U.S. at 674).

18. Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam). In the recent case of Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1983), the Court stressed that each of the three prongs of the *Lemon* test must be satisfied independently for the government activity "to pass muster under the Establishment Clause." *Id.* at 123.

In other cases, however, the Court has referred to the test as a mere "guideline." *See* Meek v. Pittenger, 421 U.S. 349, 349 (1975); Tilton v. Richardson, 403 U.S. 672, 678 (1971). The *Lynch* Court followed the *Meek* approach. *See Lynch*, 104 S. Ct. at 1363. Justice Brennan, however, stressed the importance of the *Lemon* test, characterizing it as "the fundamental tool of Establishment Clause analysis." *Lynch*, 104 S. Ct. at 1371 n.2 (Brennan, J., dissenting).

19. Donnelly v. Lynch, 525 F. Supp. 1150, 1156 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). The display also included a talking wishing well, Santa's house, a group of carolers, houses and a church, five-pointed stars, Christmas trees, reindeer, and a banner reading "Seasons Greetings." *Id.* at 1155.

20. The purchase price of the creche was $1365. The city estimated that the cost of erecting, dismantling, and illuminating the creche was approximately $40 per year. This estimate included only the cost pertaining to the creche itself and not the whole display. *Id.* at 1156.

21. "[T]he opening ceremonies at the park [were] conducted by the Mayor, officiating in conjunction with Santa Claus, who arrive[d] on a City firetruck. When the main switch [was] thrown, the lights at City Hall [were] illuminated simultaneously with those in Hodgson Park." *Id.* at 1176.

22. The display was located in the heart of the shopping district. *Id.* at 1154.

23. *Id.* at 1158.

24. *Id.* at 1170.

25. *But see id.* at 1173 ("If the City indeed regarded the role of the nativity scene in the display as a neutral recognition of a cultural phenomenon devoid of any significant quantum of religious meaning or any endorsement of a religious message, it would not consider deletion of the creche a blow to religion.").

26. *Id.* at 1162.

27. *Id.* at 1181. The court based its holding on the fact that the inclusion of the creche violated the first two prongs of the *Lemon* test. *Id.* at 1170-77.

28. Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

29. 456 U.S. 228 (1982).

30. The court of appeals applied the *Larson* test "because the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions." Donnelly v. Lynch, 691 F.2d 1029, 1034 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

activity to be invalidated unless it " 'is justified by a compelling governmental interest' " and " 'is closely fitted to further that interest.' "[31] The United States Supreme Court returned to the district court's application of the *Lemon* test, but upheld the display as constitutional. The Court stressed that the focus of its inquiry must be "on the creche in the context of the Christmas season. . . . Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[32]

Discussing the first prong of the test, the Court determined that Pawtucket had a valid secular purpose for including the creche in the display. Chief Justice Burger, writing for the majority, focused on the Christmas display as a whole. He concluded that Pawtucket's dual desire to celebrate Christmas and to depict the origins of the holiday were constitutionally permissible purposes supporting government activity.[33]

Justice O'Connor's concurring opinion based its analysis of the first prong on "whether the government *intend[ed]* to convey a message of endorsement or disapproval of religion."[34] She concluded that Pawtucket did not intend to endorse religion, but rather intended to celebrate a public holiday through a display of its traditional symbols.[35]

Justice Brennan, in dissent, countered both Chief Justice Burger's and Justice O'Connor's analyses. He focused on Pawtucket's purpose in including the creche in the display, rather than its purpose in erecting the display.[36] Because the creche is a distinctly religious symbol, Justice Brennan insisted that "a narrower sectarian purpose lay behind the decision to include" the creche.[37] The use of the creche implied "the City's support for the sectarian symbolism that the nativity scene evoke[d]";[38] thus, inclusion of the creche constituted an en-

31. *Id.* at 1034 (quoting *Larson*, 456 U.S. at 247). The court of appeals, affirming the district court's decision, agreed with the district court's analysis of the first two prongs of the *Lemon* test. Because the district court could not find any legitimate secular purpose behind the inclusion of the creche, the court of appeals concluded that "it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown" under the *Larson* test. *Id.* at 1035.

32. *Lynch*, 104 S. Ct. at 1362. The district court, however, did not focus on the display as a whole because it did not believe that the secular nature of the entire display neutralized the explicitly religious nature of the creche itself. "Santa Claus is not rendered religious by his proximity to the creche; the creche is not rendered secular by its proximity to Santa Claus." Donnelly v. Lynch, 525 F. Supp. 1150, 1177 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). "The Government cannot insulate its motives for using an object with religious significance from scrutiny merely by commingling it with a plethora of non-religious objects." *Id.* at 1169; *see supra* note 19.

33. *Lynch*, 104 S. Ct. at 1363. The district court, however, believed that "Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys." Donnelly v. Lynch, 525 F. Supp. 1150, 1172 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). Therefore, the court concluded that the activity lacked a valid secular purpose. *Id.* at 1174.

34. *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring) (emphasis added).

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

36. *Id.* at 1373 (Brennan, J., dissenting).

37. *Id.* (Brennan, J., dissenting). Justice Brennan claimed that "[t]he City . . . understood that the inclusion of the creche . . . would serve the wholly religious purpose of 'keep[ing] Christ in Christmas.' " *Id.*

38. *Id.* at 1376 (Brennan, J., dissenting). The Mayor's testimony at trial supports Justice Brennan's conclusion that the city's approval of the religious nature of the symbol was clear. The Mayor

dorsement of religion.[39]

The *Lynch* Court turned to prior decisons for guidance in applying the second prong of the test—the "effect" prong.[40] Chief Justice Burger did not "discern a greater aid to religion deriving from inclusion of the creche than from . . . benefits and endorsements previously held not violative of the Establishment Clause."[41] Therefore, he concluded that the inclusion of the creche produced a constitutionally permissible effect in that it neither advanced nor inhibited religion.[42]

Justice Brennan criticized the majority's analysis because he found the "clear religious effect of the creche" inescapable.[43] He noted that the city itself stressed the importance of the creche by placing it in a central location in the display[44] and that the city had not "disclaim[ed] government approval of the religious significance of the creche."[45] Even though the creche was surrounded by secular objects, it retained a specifically Christian meaning.[46] Therefore, the effect on religious minorities was pronounced and improper; it was a step "toward establishing the sectarian preference of the majority at the expense of the minority."[47]

Chief Justice Burger summarily dispensed with the third prong of the *Lemon* test[48] because neither the district court nor the court of appeals had found excessive entanglement resulting from inclusion of the creche.[49] He did note, however, that a litigant cannot initiate a lawsuit and then use that lawsuit as evidence of divisiveness and entanglement.[50]

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stated that "for him, as well as others in the City, the effort to eliminate the nativity scene . . . 'is a step towards establishing another religion, non-religion that it may be.' " *Id.* at 1373 (Brennan, J., dissenting).

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

40. *Id.* at 1363.

41. *Id.* at 1364; *see infra* notes 62-64, 66-68 and accompanying text; *see also Lynch*, 104 S. Ct. at 1363 nn.8-11 (citing specific language from prior cases in which the Court admitted that the challenged activity benefited religion and nevertheless upheld the activity).

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

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

44. *Id.* (Brennan J., dissenting). Justice Brennan added:

> [D]espite the small amount of ground covered by the creche, viewers would not regard the creche as an insignificant part of the display. It is an almost life sized tableau marked off by a white picket fence. Furthermore, its location lends the creche significance. . . . Although the Court recognizes that one cannot see the creche from all possible vantage points, . . . people standing at the two bus shelters [outside the park] and looking down at the display will see the creche centrally and prominently positioned.

Id. (Brennan, J., dissenting) (citing Donnelly v. Lynch, 525 F. Supp. 1150, 1176-77 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S.Ct. 1355 (1984)).

45. *Id.* (Brennan, J., dissenting). Justice Brennan referred to Allen v. Morton, 495 F.2d 65, 67-68 (D.C. Cir. 1973) (per curiam), in which the United States Court of Appeals for the District of Columbia had allowed the "Pageant of Peace" on federal parkland to include a creche, but only on the condition that the federal government display "explanatory plaques" refuting any government support of the religious beliefs associated with the creche. *Lynch*, 104 S. Ct. at 1376 (Brennan, J., dissenting).

46. *Lynch*, 104 S. Ct. at 1377 (Brennan, J., dissenting); *see supra* notes 19 & 32.

47. *Lynch*, 104 S. Ct. at 1386 (Brennan, J., dissenting).

48. *See id.* at 1364-65.

49. *See id.*

50. *Id.*

The Court in *Lynch* departed from the *Lemon* test by applying it in a superficial manner.[51] This is evident from the Court's failure to counter or even address previously established analyses pertaining to each prong of the test that, had they been applied, would have produced a different result.

In *Abington School District v. Schempp*,[52] Justice Brennan articulated a limitation to the first prong of the *Lemon* test: "[G]overnment may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."[53] Thus, if a secular purpose motivates a government's activity, secular means must be used to effectuate this purpose if they exist.

The Supreme Court relied on this limitation in striking down the government's activity in the recent case of *Larkin v. Grendel's Den, Inc.*[54] The controversy in *Larkin* involved a Massachusetts statute that vested in churches the power to prevent the issuance of liquor licenses to premises located near them. The Court stated that the valid secular purpose—restricting alcohol consumption near places of worship—could "be readily accomplished by other means";[55] thus, the religious means employed by the government were invalid. The *Lynch* Court, however, merely relegated its analysis of this "limitation" to a footnote

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51. The Court's apparent retreat from the *Lemon* test may reflect a growing trend. In Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court upheld the practice of opening legislative sessions with prayer without ever applying the *Lemon* test. *See infra* note 73 and accompanying text. Furthermore, in Americans United for Separation of Church & State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 1412 (No. 83-6369) (1984), the court of appeals held that the challenged cooperative educational arrangement violated the establishment clause. The arrangement allowed students in sectarian schools to take substantive courses from the public school curriculum at public expense during regular school hours, in sectarian school facilities. Many of the teachers were or had been employed by the sectarian school. *Id.* at 1392. The court applied the *Lemon* test and found a violation of the first two prongs. *Id.* at 1410-16. The Supreme Court, however, has decided to hear this case even though *Lemon* and Meek v. Pittenger, 421 U.S. 349 (1975) would seem to govern. The Court's willingness to hear a case so similar to others previously decided suggests that Court might abandon or modify the *Lemon* test.

The *Lynch* Court justified its departure from the *Lemon* test by referring to *Meek* and Tilton v. Richardson, 403 U.S. 672 (1971)—cases in which the Court referred to the test as a mere "guideline." *See supra* note 18. The Court's reliance on these cases, however, is questionable. Although *Meek* and *Tilton* referred to the test as a "guideline," their analysis betrayed their words. *Meek* upheld the challenged textbook loan program by relying on Board of Educ. v. Allen, 392 U.S. 236 (1968). *Meek*, 421 U.S. at 359. In *Allen* the Court relied on Abington School Dist. v. Schempp, 374 U.S. 203 (1963). *Allen*, 392 U.S. at 243. In *Schempp* the Court formulated the first two prongs of what became the *Lemon* test. *See supra* note 14. Therefore, the *Meek* Court, in its analysis of textbook loans, fully employed the *Lemon* test. The *Meek* Court also held that the provision of the challenged auxiliary services (testing and related services for exceptional or remedial students) and instructional materials was unconstitutional because it violated the third prong of the *Lemon* test—excessive entanglement. *Meek*, 421 U.S. at 372. Therefore, the Court did apply the *Lemon* test, but because the program clearly violated the third prong of the test, the Court had no need to delve deeply into an analysis of the other two prongs. In *Tilton* the Court justified its holding by carefully distinguishing the case from *Lemon*; in so doing the Court emphasized the *Lemon* test itself. *Tilton*, 403 U.S. at 684-89. Thus, although a trend towards departing from the *Lemon* test seems apparent, the Court's reliance on *Meek* and *Tilton* to justify this departure is unfounded.

52. 374 U.S. 225 (1963).

53. *Id.* at 265 (Brennan, J., concurring). This alternative means approach originated in McGowan v. Maryland, 366 U.S. 420, 467 (1967).

54. 459 U.S. 116 (1983).

55. *Id.* at 124. A legislative zoning ordinance or proper directions to the licensing authority—secular means—could effectuate this purpose.

and concluded that even if "the City's objectives could have been achieved without including the creche in the display . . . [t]hat is irrelevant."[56]

This hasty dismissal of the "alternative means" approach exemplifies the Court's inadequate application of the *Lemon* test. The test was formed through a compilation of previous analyses;[57] it is not self-defining. Prior approaches to the establishment clause—such as the alternative means limitation—must be incorporated into the analysis of each applicable prong for the test to have meaning. Furthermore, although the Court quickly dispensed with the alternative means limitation, it had employed this very limitation only one term before *Lynch*,[58] in *Larkin*.[59] Finally, if the Court had applied the limitation, it would have reached a different result because Pawtucket's secular objectives could have been accomplished without including the creche in the display.[60] Because of these considerations, Justice Brennan accused the majority of "alter[ing] its analysis from term to term in order to suit its preferred results."[61]

The *Lynch* Court analyzed the second prong of the *Lemon* test in an equally cursory fashion. Chief Justice Burger relied on *Everson v. Board of Education*,[62] *Board of Education v. Allen*,[63] and *Tilton v. Richardson*[64]—three cases in which the challenged governmental activity aided religion but the court nevertheless upheld the activity. *Everson* upheld government reimbursement to parents for transportation costs of children attending sectarian schools. *Allen* upheld the lending of textbooks, by public school authorities, free of charge, to all students, including those in parochial schools. Finally, *Tilton* upheld federal grants to college facilities, including church-related institutions of higher education. These cases have a common significant element; in each case the Court stressed that the quality of and access to education in America were crucial factors in its determination that the challenged activities did not violate the establishment clause.[65]

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56. *Lynch*, 104 S. Ct. at 1363 n.7; *see* Van Alstyne, *supra* note 1, at 785 n.77 (noting this inconsistency).

57. *See supra* note 14.

58. *Lynch*, 104 S. Ct. at 1372 n.4 (Brennan, J., dissenting); *see supra* note 52 and accompanying text (discussion of *Schempp* alternative means limitation).

59. *See supra* notes 54-55 and accompanying text.

60. *Lynch*, 104 S. Ct. at 1342 n.4 (Brennan, J., dissenting). Justice Brennan noted that "several representatives of Pawtucket's business community testified that although the overall . . . display played an important role in promoting downtown holiday trade, the display would serve this purpose equally well even if the creche were removed." *Id.* at 1373 n.5 (Brennan, J., dissenting).

61. *Id.* at 1372 n.4 (Brennan, J., dissenting).

62. 330 U.S. 1 (1947).

63. 392 U.S. 236 (1968).

64. 403 U.S. 672 (1970).

65. The Court in *Everson* recognized the state's interest in protecting "school children's welfare." *Everson*, 330 U.S. at 17. The reimbursement plan was no more than "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from *accredited* schools." *Id.* at 18 (emphasis added). Even with the emphasis on the importance of education in America, four Justices dissented (Justices Jackson, Rutledge, Burton, and Frankfurter). *See id.* at 18, 28. The *Allen* Court noted that "private education has played and is playing a significant and valuable role in raising national levels of knowledge . . . ." *Allen*, 392 U.S. at 247. Even though the Court stressed the value of education, three Justices dissented (Justices Black, Douglas, and Fortas). *See id.* at 250, 254, 269. Finally, although the *Tilton* decision upheld financial aid to

Although the *Lynch* Court relied on the *Everson* line of cases, it failed to note that in those prior decsions the Court had emphasized that the sectarian effect—the aid to religion—was coupled with a strong secular effect—the betterment of education. The Court in the *Everson* line of cases appeared to be more tolerant of a closer nexus between religion and government if the toleration resulted in aiding the American educational system. The inclusion of the creche in *Lynch*, however, did not improve the quality of education or even relate to education.

The *Lynch* Court also noted *McGowan v. Maryland*,[66] *Walz v. Tax Commission*,[67] and *Marsh v. Chambers*[68] as additional examples of cases in which valid governmental activities had the effect of aiding religion. In these cases, however, the Court had emphasized a compelling historical justification for the activity; this historical justification overrode the activity's religious effect.[69] Each case focused on the specific challenged act and its acceptance throughout American history.[70] Thus, the Court in *Walz* noted "the undeviating acceptance given religious tax exemptions from our earliest days as a Nation."[71] The Court in *McGowan* noted that Sunday closing laws existed at the time Madison fought for the first amendment; nonetheless, he had not objected to these laws.[72] In *Marsh* the Court noted that throughout American history, "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[73]

Chief Justice Burger's *Lynch* opinion presented examples of the government's "official acknowledgement . . . of the role of religion in American life,"[74] rather than focusing on the specific challenged activity—the inclusion of

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church-related higher institutions of education, three Justices dissented (Justices Black, Douglas, and Marshall). *See Tilton*, 403 U.S. at 689.

These split decisions illustrate that even when the strong secular purpose of promoting education is present, the Court is divided as to whether the government may aid indirectly a religious institution.

66. 366 U.S. 420 (1961).

67. 397 U.S. 664 (1970).

68. 103 S. Ct. 3330 (1983).

69. Justice Brennan, dissenting in *Marsh*, noted that a historical analysis has its risk "in light of certain . . . skeletons in the congressional closet." *Id.* at 3347 n.30 (Brennan, J., dissenting). He mentioned a statute enacted by the first Congress that required persons convicted of certain crimes to be "publicly whipped, not exceeding thirty-nine stripes" and a statute, enacted one week after Congress proposed the fourteenth amendment to the States, that approved racial segregation of public schools in the District of Columbia. *Id.* These references indicate that Justice Brennan did not find historical analysis as persuasive as did the majority.

70. "[P]rior cases have all recognized that the 'illumination' provided by history must always be focused on the particular practice at issue in a given case." *Lynch*, 104 S. Ct. at 1386 (Brennan, J., dissenting).

71. *Walz*, 397 U.S. at 681 (upholding tax exemptions for church property).

72. *McGowan*, 366 U.S. at 438-40.

73. *Marsh*, 103 S. Ct. at 3333. The Court found the historical justification for opening legislative sessions with prayer so compelling that it did not apply any part of the *Lemon* test. *See supra* note 51.

74. *Lynch*, 104 S. Ct. at 1360. Chief Justice Burger pointed to the following examples of this "official acknowledgment": Thanksgiving as a religious and national holiday, "In God We Trust" printed on currency, "One Nation Under God" in the Pledge of Allegiance, publicly funded art galleries containing masterpieces of religious events, and chapels in the Capitol. *Id.* at 1360-61.

a creche in a publicly funded Christmas display. Unlike Sunday closing laws in *McGowan*, tax exemptions in *Walz*, and legislative prayers in *Marsh*, the inclusion of a creche in governmental Christmas celebrations does not have "an unbroken history of widespread acceptance."[75] No analogous historical justification existed for the *Lynch* Court to rely on the *McGowan* line of cases. Because of this faulty use of historical analysis, Justice Brennan accused the majority of "select[ing] random elements of America's varied history . . . to suit the views of five Members of th[e] Court."[76]

The misapplication of the *Everson* and *McGowan* lines of cases supports Justice Brennan's characterization of the decision as "careless."[77] The majority nevertheless relied on those cases as its sole basis for concluding that the inclusion of the creche did not violate the *Lemon* test's effect prong.

Lynch's focus on the *Everson* and *McGowan* lines of cases also obscures other valid establishment clause concerns. The Court in *Schempp* had noted another approach to the "effect" prong—the effect of the government's activity on religious minorities.[78] *Schempp* held that no state law or school board rule may require passages from the Bible or the Lord's prayer to be read or recited in public schools.[79] The Court noted that the King James version of the Bible differed from, for example, the Jewish Holy Scriptures; therefore, the effect on religious minorities would be impermissible because these recitations and readings would result in government approval and advancement of one religion—Christianity.[80] One year before the *Schempp* decision, the Court in *Engel v. Vitale*[81]—another school prayer case—had forcefully articulated this concern: "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."[82]

Chief Justice Burger did not address the effect that inclusion of a creche in the display would have on religious minorities. This omission was inappropriate. Unlike the nondenominational prayer in *Engel*,[83] a creche embodies the

75. *Id.* at 1385 (Brennan, J., dissenting). Justice Brennan, referring to the public financing of displays that included nativity scenes, stated: "It is . . . impossible to tell . . . whether the practice ever gained widespread acceptance, much less official endorsement, until the twentieth century." *Id.* at 1386 (Brennan, J., dissenting).

76. *Id.* at 1386 (Brennan, J., dissenting).

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

78. *Schempp*, 374 U.S. at 219-10. Justice Black, dissenting in *Allen*, also focused on the protection of minority religious groups. *Allen*, 392 U.S. at 254 (Black, J., dissenting).

79. *Schempp*, 374 U.S. at 223. The fact that individual students could be excused from such readings by written request of their parents did not alter the Court's decision. The Schempps did not have their children excused from class because they believed "that the children's relationship with their teachers and classmates would be adversely affected." *Id.* at 208.

80. The Court recognized that "from the standpoint of Jewish faith, the concept of Jesus as the Son of God was 'practically blasphemous' " and the King James version of the Bible depicts Jesus as such. *Id.* at 209.

81. 370 U.S. 421 (1962).

82. *Id.* at 431. The school prayer was held unconstitutional even though it was nondenominational and voluntary. *Id.* at 430.

83. *See supra* notes 81-82 and accompanying text.

tenets of one religion—Christianity.[84] Justice Brennan illustrated the significance this analysis would have had if it had been applied in *Lynch*. He argued that the creche affected both religious minorities and nonbelievers; it "convey[ed] the message that their views are not similarly worthy of public recognition nor entitled to public support."[85] The "religious chauvinism"[86] that results from such a government action contravenes the notion that the government cannot advance or inhibit religion.[87] Thus, if a government action has a detrimental effect on religious minorities, the effect prong of the *Lemon* test is violated—government is advancing the majority religion while inhibiting minority religions.

Another analysis omitted from the *Lynch* decision pertains to both of the first two prongs of the *Lemon* test, and was used by the Court in cases dealing with government aid to parochial schools.[88] The Court noted in *Allen* that parochial schools have a dual function; "parochial schools . . . , in addition to their sectarian function, perform the task of secular education."[89] If a government's action has a secular purpose—to support the quality of the American educational system—and if the government aids parochial schools only in the performance of their secular function, then no violation of the establishment clause has occurred.[90] The purpose prong and the effect prong both would be

84. Justice Brennan noted the creche's embodiment of only Christian beliefs. "The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah." *Lynch*, 104 S. Ct. at 1378-79 (Brennan, J., dissenting); *see also* Donnelly v. Lynch, 525 F. Supp. 1150, 1165-68 (D.R.I. 1981) (creche discussed as a purely religious symbol), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

85. *Lynch*, 104 S. Ct. at 1373 (Brennan, J., dissenting). Although *Schempp* and *Engel* both dealt with impressionable children of lower grade school age, these cases apply to *Lynch* because the display appeared particularly suited for young children. *See supra* note 19.

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

87. *See supra* note 16. Even when the Court has stressed its belief in the strong role of religion in American life, it has continued to accept the need for government neutrality. For example, in Zorach v. Clauson, 343 U.S. 306 (1952), the Court noted: "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. The Court, however, went on to note that "government must be neutral when it comes to competition between sects." *Id.* at 314.

88. *See supra* notes 62-65 and accompanying text.

89. *Allen*, 392 U.S. at 248. The Court noted that the secular and sectarian aspects of parochial schools were capable of being separated. The two aspects are not so "intertwined that the secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Id.* This view, however, was not met with unanimous support. Justice Douglas found that textbooks might contain religious dogma and one cannot separate books neatly into secular and religious categories. He noted that textbooks were different from school transportation—the controversy in *Everson*—because "[w]hatever may be said of *Everson*, there is nothing ideological about a bus." *Id.* at 257 (Douglas, J., dissenting).

90. *See Lemon*, 403 U.S. at 663 (White, J., concurring in part and dissenting in part) (citing *Allen*, 392 U.S. at 248). In *Lemon*, however, the Court realized that the challenged salary support to teachers in parochial schools was government assistance that could not aid the secular function of parochial schools without also aiding the sectarian function. *Id.* at 619. Justice Douglas insisted that any government aid to parochial schools violated the establishment clause. *Id.* at 640 (Douglas, J., dissenting). Although he conceded that parochial schools perform a dual function, he refuted the notion that these functions could be separated. *Id.* at 641 (Douglas, J., dissenting). Justice Rutledge recognized this problem in 1947 when he acknowledged the "admixture of religious with secular teaching in all such institutions." *Everson*, 330 U.S. at 47 (Rutledge, J., dissenting). He went on to state that "commingling the religious with the secular teaching does not divest the whole of its religious permeation. . . . Indeed, on any other view, the constitutional prohibition always could be

satisfied because the only aid given by the government would be to the secular aspects embedded within sectarian schools.

If Chief Justice Burger had analyzed the dual aspects of Christmas he would have reached a different result in *Lynch*.[91]

> [T]he Christmas holiday in our national culture contains both secular and sectarian elements. To say that the government may recognize the holiday's traditional, secular elements of gift-giving, public festivities and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday.[92]

The creche symbolizes solely the sectarian aspect of Christmas.[93] Therefore, the display, had it not included the creche, would not have violated either of the first two prongs of the *Lemon* test; the secular purpose of promoting goodwill and increasing commercial activity would have been achieved without the prohibited effect of advancing religion.[94] Because Chief Justice Burger failed to separate Christmas into its secular and sectarian features, his reasoning was erroneous and simplistic. Rather than addressing the issue, Chief Justice Burger begged the question by noting that, "[i]f the presence of the creche . . . violates the Establishment Clause, a host of other forms of taking official note of Christmas . . . are equally offensive to the Constitution."[95]

Chief Justice Burger's analysis of the third prong also exemplifies the Court's superficial application of the *Lemon* test. Although the mere potential for divisiveness or entanglement never has been a sufficient basis for invalidating a challenged governmental activity,[96] previous decisions have acknowledged that this potential represents a "warning signal" that the evils[97] which the establishment clause sought to prevent may be surfacing.[98] The district court deter-

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brought to naught by adding a modicum of the secular." *Id.* (Rutledge, J., dissenting). The Court in *Tilton*, however, insisted that federal subsidies to church-related institutions could be separated because the "federal subsidized facilities would be devoted to the secular and not the religious function of the recipient institution." *Tilton*, 403 U.S. at 679.

91. The district court in *Lynch* noted the dual aspects of Christmas in concluding that the inclusion of the nativity scene in a government display was unconstitutional. Donnelly v. Lynch, 525 F. Supp. 1150, 1165-68, *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

92. *Lynch*, 104 S. Ct. at 1378 (Brennan, J., dissenting).

93. The district court in *Lynch* acknowledged the solely religious nature of the creche. "The court does not understand what meaning the creche, as a symbol, can have other than a religious meaning." Donnelly v. Lynch, 525 F. Supp. 1150, 1167, *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984). Furthermore, Justice Brennan described the creche as a "mystical re-creation of an event that lies at the heart of Christian faith." *Lynch*, 104 S. Ct. at 1379 (Brennan, J., dissenting); *see supra* note 80.

94. This idea is implicit in Justice Brennan's dissent. *See Lynch*, 104 S. Ct. at 1377-80 (Brennan, J., dissenting).

95. *Id.* at 1365.

96. Donnelly v. Lynch, 525 F. Supp. 1150, 1180, *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

97. *See supra* notes 10-12 and accompanying text.

98. *Meek*, 421 U.S. at 372; *Nyquist*, 413 U.S. at 798; *Lemon*, 403 U.S. at 625 (Douglas, J., concurring). The Court in *Nyquist* emphasized the significance of this "warning signal." "While the prospect of such divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored." *Nyquist*, 413 U.S. at 797-98 (quoting *Lemon*, 403 U.S. at 625 (Douglas, J., concurring)).

Justice Brennan in his *Lynch* dissent noted that after the *Lynch* decision other religious sects

mined that the inclusion of the creche might result in future divisiveness.[99] Chief Justice Burger, however, failed to recognize this warning signal. This omission not only illustrates the Court's unwillingness to adhere to the *Lemon* test but also suggests the Court's lack of commitment to the notion of a "high and impregnable wall between church and state."[100] When confronted by a warning signal that the establishment clause might be jeopardized, Chief Justice Burger not only failed to mention the "flare" but vigorously upheld the activity—the inclusion of the creche—that prompted the warning.

The Court in *Lynch*, by applying the *Lemon* test in this superficial manner, renders the test ineffectual. The *Lynch* decision indicates that the Court may abandon the *Lemon* test altogether, or at least continue to apply it only in a skeletal form to achieve a preordained result. This development would leave the Court without a meaningful tool for determining whether a violation of the establishment clause has occurred. The final result would be a new and troubling vision of the wall of separation between church and state—a disappearing wall that the court could erect or dismantle at will.

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may press for inclusion of their religious symbols within publicly funded displays. The Mayor had remarked that he would include a Menorah in future displays. This statement may increase the likelihood that various religious groups will seek to have their religions represented by the government. *Lynch*, 104 S. Ct. at 1374 (Brennan, J., dissenting).

The likelihood that religious groups will continue to seek recognition of their religious symbols in government displays or on public land already has become a reality. The Supreme Court has heard a case brought against the Village of Scarsdale following the village's denial of an application to display a creche in a public park during the Christmas season. McCreary v. Stone, 739 F.2d 716 (2d Cir.), *cert. granted sub nom.* Board of Trustees v. McCreary, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 84-277).

99. Donnelly v. Lynch, 525 F. Supp. 1150, 1180, *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

100. *See supra* note 2 and accompanying text.