

***Lynch v. Donnelly (1984)***

465 U.S. 668

*During the Christmas season each year, the city of Pawtucket, Rhode Island, erected a holiday display in a park owned by a nonprofit organization and located in the shopping district. The display included both secular figures and decorations associated with Christmas, such as reindeer pulling a sleigh and a Christmas tree, and a creche with figures of Jesus, Mary, Joseph, shepherds, angels, etc. The creche, originally purchased in 1973, cost the city \$1365, and the city annually incurred nominal costs in erecting, lighting, and dismantling the creche. The respondents in the case challenged inclusion of the creche in the display as a violation of the Establishment Clause, arguing that it created both the appearance and reality of governmental endorsement of Christianity. They prevailed in both district court and the court of appeals, and the city appealed the case to the Supreme Court.*

Opinion of the Court: Burger, White, Powell, Rehnquist, O'Connor.

Concurring opinion: O'Connor.

Dissenting opinions: Brennan, Marshall, Blackmun, Stevens.

**The CHIEF JUSTICE delivered the opinion of the Court**

In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible....

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.

In this case, the focus of our inquiry must be on the creche in the context of the Christmas season....

The District Court inferred from the religious nature of the creche that the City has no secular purpose for the display. In so doing, it rejected the City's claim that its reasons for including the creche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society variety of motives and purposes are implicated. The City, like the Congresses and Presidents, however has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as National Holiday....

The District Court found that the primary effect of including the creche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular....

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh [v. Chambers]* and implied about the Sunday Closing Laws in *McGowan* is true of the City's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some... religions." ...

The dissent asserts some observers may perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The District Court found that there had been no administrative entanglement between religion and state resulting from the City's ownership and use of the creche. But it went on to hold that some political divisiveness was engendered by this litigation. Coupled with its finding of an impermissible sectarian purpose and effect, this persuaded the court that there

was "excessive entanglement." The Court of Appeals expressly declined to accept the District Court's finding that inclusion of the creche has caused political divisiveness along religious lines, and noted that this Court has never held that political divisiveness alone was sufficient to invalidate government conduct....

The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for. In any event, apart from this litigation there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration. The District Court stated that the inclusion of the creche for the 40 years has been "marked by no apparent dissension" and that the display has had a "calm history." Curiously, it went on to hold that the political divisiveness engendered by this lawsuit was evidence of excessive entanglement. A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement....

We hold that, notwithstanding the religious significance of the creche, the City of Pawtucket has not violated the Establishment Clause of the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed.

**JUSTICE O'CONNOR, concurring.**

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis.

I

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the

political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message....

Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman* (1971) as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device....

## II

... In my view, political divisiveness along religious lines should not be an independent test of constitutionality.

Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon*, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional. Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation, as this case illustrates, itself may affect the political response to the government practice. Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.

## III

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely

instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

#### A

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.... The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose....

#### B

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.... What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh v. Chambers* (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose – celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the crèche does not have the effect of communicating endorsement of Christianity....

**JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.**

... After reviewing the Court's opinion, I am Convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so

familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a creche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the City's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result....

The Court advances two principal arguments to support its conclusion that the Pawtucket creche satisfies the *Lemon* test. Neither is persuasive.

First, The Court, by focusing on the holiday "context" in which the nativity scene appeared, seeks to explain away the clear religious import of the creche and the findings of the District Court that most observers understood the creche as both a symbol of Christian beliefs and a symbol of the City's support for those beliefs. Thus, although the Court concedes that the City's inclusion of the nativity scene plainly serves "to depict the origins" of Christmas as a "significant historical religious event," and that the creche "is identified with one religious faith," we are nevertheless expected to believe that Pawtucket's use of the creche does not signal the City's support for the sectarian symbolism that the nativity scene evokes. The effect of the creche, of course, must be gauged not only by its inherent religious significance but also by the overall setting in which it appears. But it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the creche in its Christmas display, Pawtucket has done no more than make use of a "traditional" symbol of the holiday, and has thereby purged the creche of its religious content and conferred only an "incidental and indirect" benefit on religion....

*Second.* The Court also attempts to justify the creche by entertaining a beguilingly simple, yet faulty syllogism. The Court begins by noting that government may recognize Christmas day as a public holiday; the Court then asserts that the creche is nothing more than a traditional element of Christmas celebrations; and it concludes that the inclusion of a creche as part of a government's annual Christmas celebration is constitutionally permissible. The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of

this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements. To say that government may recognize the holiday's traditional, secular elements of giftgiving, public festivities and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday....

When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step. Because it is clear that the celebration of Christmas has both secular and sectarian elements, it may well be that by taking note of the holiday, the government is simply seeking serve the same kinds of wholly secular goals—for instance, promoting goodwill and a common day rest—that were found to justify Sunday Closing laws in *McGowan*. If public officials go further and participate in the secular celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause. But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday and places the prestige, power and financial support of a civil authority in the service of a particular faith....

... The Court's approach suggests a fundamental misapprehension of the proper uses of history in constitutional interpretation. Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment Clause. But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, "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." Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit our central inquiry in these cases—whether the challenged practices “threaten those consequences which the Framers deeply feared.”

... 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; accordingly, the Court's repeated invocation of the decision *Marsh* is not only baffling, it is utterly irrelevant. Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case.