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## The Secular Meaning Behind the Lemon Test: Lynch v. Donnelly

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## THE SECULAR MEANING BEHIND THE *LEMON* TEST: *LYNCH V. DONNELLY*

### INTRODUCTION

The writings of James Madison and Thomas Jefferson demonstrated their desire to avoid the old world practice of state sponsored religion and its attendant persecution.<sup>1</sup>

The adoption of the First Amendment to the Constitution formalized this idea of government non-involvement with religion.<sup>2</sup> The Clause prohibiting the establishment of religion embodied Jefferson's intent to erect a "wall of separation between church and state."<sup>3</sup>

This Comment will analyze the legal significance of the Supreme Court's recent decision in *Lynch v. Donnelly*.<sup>4</sup> Part I discusses the Court's prior analysis of Establishment Clause claims. Part II examines Supreme Court decisions following the creation of the *Lemon v. Kurtzman*<sup>5</sup> tripartite test. Finally, Part III considers the creation of a new Establishment Clause analysis and briefly highlights the factors involved.

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1. Madison was cognizant of the effects of state sponsored religion.

[A] true religion did not need the support of law; that no person either believer or non-believer should be forced to support a religious institution of any kind, that the best interest of a society required that the minds of men always be wholly free and that cruel persecutions were the inevitable result of government-established religion.

*Everson v. Board of Educ.*, 330 U.S. 1, 12 (1947) (quoting 2 J. MADISON, WRITINGS OF JAMES MADISON 183 (1785)). Jefferson also declared that a "clear and present danger" results from church-state involvement. *Id.* at 32 n.9 (quoting 1 RANDALL, THE LIFE OF THOMAS JEFFERSON 220 (1858)).

2. Many of the early settlers came to America hoping to escape religious persecution and avoid the dictates of church controlled European governments. Unfortunately, even the early colonies taxed their citizens to support government-sponsored church activities such as building churches and paying ministers' salaries. The Bill of Rights' provisions regarding religious liberty was the initial expression of the sentiment against these practices. *Everson v. Board of Educ.*, 330 U.S. at 8-13. See generally P. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION 19-27 (1983) (examining the desires of the state ratifying conventions to have included in the constitution a guarantee of government non-involvement in religion).

3. See *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (Jan. 1, 1802)).

4. 465 U.S. 668 (1984).

5. 403 U.S. 602 (1971).

## I. HISTORICAL BACKGROUND

Although the relationship between church and state was a great concern to the framers of the Constitution, it was not until 1947 that the Supreme Court decided a significant case involving the Establishment Clause.<sup>6</sup>

In *Everson v. Board of Education*,<sup>7</sup> the Supreme Court upheld a New Jersey statute that allowed parents to be reimbursed for the cost of transporting their children to parochial school.<sup>8</sup> The Court held that although the Establishment Clause bars a state from passing “laws which aid one religion, aid all religions, or prefer one religion over another,”<sup>9</sup> it does not prevent a state from extending the benefit of state laws to all citizens without regard to their religious affiliation.<sup>10</sup>

Using this reasoning in addition to an analysis of the significance of the United States’ religious history,<sup>11</sup> Justice Black concluded that the Establishment Clause did not prohibit spending tax-raised funds to pay bus fares of parochial school pupils as part of a general program.<sup>12</sup> The Court nevertheless, reemphasized the necessity for a clear delineation between Church and State.<sup>13</sup>

In the decisions following *Everson*, one can see a departure from a strict separation of church and state analysis.<sup>14</sup>

6. *Everson v. Board of Educ.*, 330 U.S. at 1.

7. *Id.*

8. *Id.* at 3.

9. *Id.* at 15.

10. *Id.* at 15-17. *Everson* has also been cited as being the first Supreme Court case to make the Establishment Clause applicable to the states by way of the Fourteenth Amendment. See *McCullum v. Board of Educ.*, 333 U.S. 203, 210 (1948).

11. 330 U.S. at 9. A discussion of history is appropriate to understand the purpose and limits of the Establishment Clause. The desire of the early settlers to escape religious persecution in Europe and the later adoption of the First Amendment stressed the importance of prohibiting the state sponsoring religion.

12. *Id.* at 16-17. A strict separation must be maintained between church and state. However, if the state of New Jersey desires to subsidize the transportation of *all* students enrolled in every public or private school within the state, it is within its prerogative. *Id.* at 17.

13. *Id.* at 18. “[The] wall must be kept high and impregnable. New Jersey has not breached it here.” *Id.*

14. Although the shift began in 1948 with *McCullum*, (see *infra* notes 15-18 and accompanying text), it gained momentum with the appointments of Justices Clark and Minton in 1949. Justices Clark and Minton favored an accommodation between church and state, and replaced two strict separationists, Justices Murphy and Rutledge. See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (wherein a Rhode Island statute which allowed salaries of private school-teachers to be subsidized by state funds was found to be an “excessive entanglement” of church and state and therefore unconstitutional. However, the Court noted that “[s]ome relationship between government and religious organizations is inevitable.”); *Walz v. Tax Comm’n*, 397 U.S. 664 (1969). The Court “will not tolerate either governmentally established

*McCollum v. Board of Education*<sup>15</sup> tested the constitutionality of an Illinois program which offered religious instruction to public school pupils. Parents of the students signed printed cards requesting that their children be permitted to attend these classes.<sup>16</sup> Although the program was struck down as being violative of the First Amendment, Justice Frankfurter's concurrence is significant for the manner in which he viewed the church-state relationship. The Justice noted that colonial schools were founded with a religious orientation.<sup>17</sup> The historical religious setting of colonial society therefore poses a dilemma for advocates of a strict First Amendment interpretation.<sup>18</sup>

The unconstitutionality of the Illinois statute in *McCollum* was distinguished from the finding of constitutionality in *Zorach v. Clauson*.<sup>19</sup> In *Zorach*, the Court addressed Section 3210 of the New York Education Law which permitted public schools to release students during school hours, on written request of their parents, to leave the school grounds and go to religious centers for religious instruction. Those students that did not go remained in the classrooms. The churches reported to the schools the names of the children re-

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religion or governmental interference with religion. [However], there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. See *infra* text accompanying notes 23-25. See also *Board of Educ. v. Allen*, 392 U.S. 236 (1968). A New York State law requiring public school authorities to lend textbooks to public and private school students was not violative of the First Amendment to the Constitution. Justice White, writing for the Court, relied on the analysis in *Everson* whereby the state may interact with religion as long as it "neither advances nor inhibits religion." *Id.* at 243; *Zorach v. Clauson*, 343 U.S. 306 (1952). "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." *Id.* at 312. See *infra* text accompanying notes 18-22.

15. 333 U.S. 203 (1948).

16. *Id.* These classes were held in the public school building during school hours and were taught by privately employed religious instructors.

17. *Id.* at 213-14.

18. *Id.* at 213.

Accommodation of legislative freedom and Constitutional limitation upon that freedom cannot be achieved by a phrase. We cannot illuminatingly apply the "wall of separation" metaphor until we have considered the relevant history of religious education in America, the place of the "release time" movement in that history, and its precise manifestation in the case before us.

*Id.* It can be inferred from Justice Frankfurter's opinion that when the line between church and state is defined, other factors, such as history, must be considered. In determining whether there can be accommodation between government and religion, the court must examine the specific area of government involvement. See generally *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemptions to religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (time release program in public schools); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (use of public land for religious celebrations). Thus, *McCollum* may be viewed as the initial application of an implied accommodation theory.

19. 343 U.S. 306 (1951).

leased from public school who failed to report for religious instruction.<sup>20</sup> In sustaining the “released time program” Justice Douglas stated that there need not be separation of church and state in every and all respects.<sup>21</sup> Justice Douglas focused on the religious historical background of the American settlers. He noted that religion is so entrenched in the fabric of American society that it is difficult to ignore.<sup>22</sup> Recognizing an accommodation of religion concept, Justice Douglas, outlined various circumstances in modern society where religion and state are compatible:

Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies. . . .<sup>23</sup>

Chief Justice Burger’s opinion in *Walz v. Tax Commission*<sup>24</sup> addressed the religious history immediately preceding the adoption of the First Amendment. “[F]or the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in the religious activity.”<sup>25</sup> Therefore, governmental activity which falls short of such proscribed conduct will be permitted.<sup>26</sup> This is the essence of the accommodation theory. Absent a balance between the two conflicting extremes the intent of the Framers could not be followed. “The legislative purpose (of the property

20. *Id.* In *Zorach*, the Court determined that no public tax funds or public school classrooms were used to conduct or administer the religious program. This distinguished the holding from *McCullum* where religious instructions were held in public school classrooms and public funds were used to administer the program. *Id.* at 308-09.

21. *Id.* at 308-09.

22. *Id.* at 313-14. “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our spiritual needs.” *Id.*

23. *Id.* at 312-13.

24. 397 U.S. 664 (1969).

Exemption from taxes for properties owned by religious organizations was held not to be an excessive involvement of government with religion. Chief Justice Burger noted that churches have been exempt from paying such taxes for over 75 years. This exemption does not favor one religious organization over another. Thus, the state remains neutral towards religion as prescribed by the First Amendment to the Constitution. Chief Justice Burger concluded that the tax exemption was neutral. He added that the government must not only be neutral but that there may even be a friendly coexistence with religion. The government should “exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.” *Id.* at 676-77. This “benevolent neutrality” marked the initial application of a formal accommodation theory.

25. *Id.* at 668.

26. *Id.* at 669.

tax exemption) is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.”<sup>27</sup>

The conflict between an act deemed violative of the Establishment Clause and one deemed permissible governmental activity reached its climax in *Lemon v. Kurtzman*.<sup>28</sup> The *Lemon* Court addressed the constitutionality of two state statutes which authorized state officials to supplement the salaries of teachers of secular subjects in non-public elementary schools.<sup>29</sup> Chief Justice Burger, writing for the majority, again acknowledged the significance of the historical religious attitude surrounding American colonization.<sup>30</sup> More importantly, the Chief Justice added to the list of permissible and necessary examples of involvement with religion.<sup>31</sup>

The *Lemon* Court believed that a “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”<sup>32</sup> This ideology is difficult to reconcile with Thomas Jefferson’s view towards church and state.<sup>33</sup> In fact, through case law,<sup>34</sup> one can see the slow destruction of what was once considered an “impregnable wall.”<sup>35</sup> The “wall’s” condition remains uncertain. “Judicial caveats against entanglement must recognize that the line of separation, far from being a wall, is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”<sup>36</sup>

Concluding that the Establishment Clause does not act as a total bar to state involvement with religion, Chief Justice Burger created a three-pronged test for Establishment Clause inquiry. To be permissible, “the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor

27. *Id.* at 672.

28. 403 U.S. 602 (1971).

29. *Id.* at 607.

30. *Id.* at 612.

31. *Id.* at 614. “Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.” *Id.* This expanded the list previously set forth in *Zorach*, 343 U.S. at 313. See *supra* note 22 and accompanying text.

32. 403 U.S. at 614.

33. See *supra* notes 1-3 and accompanying text.

34. See *supra* note 13 and accompanying text.

35. *Everson v. Board of Educ.*, 330 U.S. at 18 (1947).

36. *Lemon v. Kurtzman*, 403 U.S. at 602, 614 (1971). This is the most explicit statement by the Court indicating their departure from a strict separatist philosophy.

inhibits religion . . . and the statute must not foster an excessive government entanglement with religion.”<sup>37</sup>

This is the seminal analysis for religion cases. Yet, upon closer examination, the three-pronged *Lemon* test does not provide a sufficient degree of certainty. The set of criteria developed by the Court is evasive, subject to judicial manipulation. Unless a governmental act fits squarely within one of the specifically enumerated prohibitions, the judiciary need not declare the act impermissible. Hence, the *Lemon* test accomplishes two equally significant goals: it presents a guideline for judicial determination and yet, it provides flexibility to the judge who may be inclined to permit the state-religion involvement.<sup>38</sup>

## II. POST-LEMON DECISIONS

The flexibility of the *Lemon* test yielded decisions that not only interpreted the tripartite test, but expanded upon it as well. Justice Rehnquist characterized it best when he wrote that the test was “a rather elusive inquiry.”<sup>39</sup> The extension of the once well defined parameters of the *Lemon* test reached its boundaries in *Marsh v. Chambers*.<sup>40</sup>

*Marsh* dealt with the legitimacy of an entrenched Nebraska practice which called for a chaplain, paid for by the state, to open legis-

37. *Id.* at 612-13 (citations omitted). The three prongs were developed independently in prior cases but were specifically set forth in an absolute test for the first time in *Lemon*. For a discussion of the individual development of the prongs, see Comment, *Lynch v. Donnelly: Has the Lemon Test Soured?*, 19 LOY. L.A.L. REV. 133, 134 nn.7-9 (1985).

38. See Devins, *Religious Symbols and Establishment*, 27 JOURNAL OF CHURCH AND STATE 19 (1985). The author suggests that there may exist two entirely separate ways to utilize the tripartite test.

Taken together, *Larkin*, and *Mueller* suggest that the Supreme Court has available to it two tripartite tests—one is a deferential test used to uphold government programs and the other is a strict scrutiny test used to invalidate such programs. Recent Supreme Court decisions suggest that the Court will make increasing use of the deferential test. *Id.* at 25.

39. *Mueller v. Allen*, 463 U.S. 403 n.1 (1983). In *Mueller*, a challenge was made to a Minnesota plan which allowed taxpayers to take deductions in computing their state income tax for a portion of actual expenses in tuition, textbooks, and transportation. Although the statute appeared on its face to apply neutrally to all parents, the deductible expenses are normally incurred only in connection with private schools, 90% of which, in Minnesota, are parochial. Nevertheless, the Supreme Court held that the plan did not violate any of the elements of *Lemon* and therefore was constitutional. In *Mueller*, the Court made its first serious attempt to revise the application of *Lemon v. Kurtzman*. The Court said that since the program was available to all parents, any benefits to religious institutions would be only incidental. *Id.* at 397-98.

40. 463 U.S. 783 (1983).

lative sessions with prayer. The Court, relying upon historical import, found the practice constitutional. This represented the farthest the Court has been willing to extend the governmental interaction doctrine. The Court relied heavily upon historical significance, essentially rejecting the *Lemon* test's application.<sup>41</sup> And yet, the *Marsh* decision offered little aid in expanding upon the tripartite test. The Supreme Court had now reached an impasse in its Establishment Clause analysis. While the *Lemon* test proved too restrictive, the *Marsh* approach appeared too liberal. The result of this incompatibility is the approach taken in *Lynch v. Donnelly*.<sup>42</sup>

In *Lynch*, the Supreme Court, in a 5-4 decision, upheld as constitutional, a yuletide display of a nativity scene in Pawtucket, Rhode Island. The city-owned display was situated in a park in the heart of

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41. *Id.* at 786-92. Citing the continued use for over two hundred years of prayer in congressional sessions and other public bodies, the Court noted that the practice "has become part of the fabric of our society." *Id.* at 792. As such, it is not an establishment of religion, but rather an "acknowledgement of beliefs widely held among the people of this country." *Id.*

*Marsh* was the first Establishment Clause decision to make explicit use of historical precedent. Other Court decisions have made use of history to support their conclusions. *See, e.g.,* *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1969) (upholding the state of New York's practice of granting property tax exemptions to religious and other social welfare organizations. The Court emphasized both the historical roots and apparent beneficial effects of the practice. "A page of history is worth a volume of logic."). The notion that religious practices deeply embedded in this history are beyond the purview of judicial review would appear to apply to several other situations. One example is the motto "In God We Trust" printed on the country's coins and currency.

Chief Justice Burger opened his discussion by observing that "historical patterns alone" are insufficient justification for abrogation of constitutional guarantees. 463 U.S. at 790. He then reviewed the history surrounding both Nebraska's practice and the enactment of the First Amendment and concluded that legislative prayer had become an inextricable part of American society. *Id.* at 792. The Chief Justice dismissed the respondent's arguments that history was often ambiguous and that evidence indicated that both John Jay and John Rutledge opposed the motion to begin the first session with prayer. This just meant that the matter had been carefully considered. *Id.* at 791. No prayers were offered at the Constitutional Convention, but the Chief Justice postulated that this was a mere oversight. *Id.* at 787 n.6.

*Marsh v. Chambers* was not the first time Chief Justice Burger relied upon the history of a religious practice in determining whether it was permissible. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish children's public education could end after the eighth grade based on the long existence of the sect).

Justice Brennan, in dissent, noted that in the first place the Court was clearly not relying upon the obscure legislative history of the First Amendment, and that that history in any event should not be regarded in the absence of the states' intent, as the First Amendment is law only because of the states' ratification. The Justice argued finally that the Constitution is not a static document unaffected by life's exigencies. 463 U.S. at 814-17 (Brennan, J., dissenting).

42. 465 U.S. 668 (1984).



the shopping district. The display was comprised of many of the traditional Christmas figures and decorations.<sup>43</sup>

Pawtucket residents, individual members of the Rhode Island affiliate of the American Civil Liberties Union and the Affiliate itself challenged the city's inclusion of the creche in the annual display. The district court held that the creche violated the First Amendment's Establishment Clause.<sup>44</sup> The court reasoned that including the creche in the Christmas display amounted to a clear endorsement of religious beliefs. The court found that the effect of such an endorsement was to affiliate the city with the Christian belief which the creche represents.<sup>45</sup> The Court of Appeals for the First Circuit affirmed.<sup>46</sup>

In addressing the constitutionality of the publicly owned creche, the Supreme Court, in an opinion by Chief Justice Burger, stated that although the *Lemon* test was the appropriate test to apply, it was not necessarily the only test; nor must the Court's application of the *Lemon* test be strict.<sup>47</sup> Chief Justice Burger added that there was insufficient evidence to establish that inclusion of the creche is a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."<sup>48</sup>

The Court concluded that the primary effect of including the creche was not to advance religion.<sup>49</sup> Moreover, the Court noted the religious traditions of American society and held that any benefit to one religion, through the erection of a creche, would be indirect, remote, and incidental.<sup>50</sup>

43. *Id.* The city placed a creche in the foreground of the display, consisting of life-sized representations of the figures present in the traditional story of Christ's birth. The display also included several secular items commonly associated with celebrations of the Christmas holiday season such as Santa Claus and reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a large banner which read 'Season's Greetings', purchased in 1973 for \$1,375. The city had expended no funds for its upkeep and maintenance, and the cost of lighting the display was nominal. *Id.*

44. *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

45. *Id.* at 1181.

46. 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

47. 465 U.S. at 672-73, 679.

48. *Id.* at 680.

49. *Id.* at 685.

50. *Id.* at 683. "It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries . . . would so 'taint' the City's exhibit as to render it violative of the Establishment Clause." *Id.* at 686.

Justice Brennan, writing on behalf of the four dissenters, concluded that the creche was unconstitutional. The dissent analyzed the creche under both the strict *Lemon* test and the deferential *Lemon* test<sup>51</sup> and found the nativity scene violative of the Establishment Clause under either approach.

Justice Brennan found that the first prong of the *Lemon* test was violated. Specifically, the dissent was unable to find any secular purpose for the creche.<sup>52</sup> Additionally, the dissent found the primary effect of including the creche was to advance religion.<sup>53</sup> Lastly, although the dissent found no reason to disturb the district court's finding that the third prong of the *Lemon* test was not breached, they felt that the creche "pose[d] a significant threat of fostering 'excessive entanglement.'"<sup>54</sup>

The dissent also analyzed Pawtucket's use of the creche under a deferential view. While Justice Brennan conceded the applicability of history when appropriate,<sup>55</sup> the dissent, nevertheless, felt the majority lacked sufficient evidence to support their finding.<sup>56</sup> Justice Brennan scrutinized the American people's celebration of Christmas and found "no support for the Court's conclusion."<sup>57</sup> "The Court's insistence upon pursuing this vague historical analysis is especially baffling since even the petitioners and their supporting amici concede[ ] that no historical evidence . . . supports publicly sponsored Christmas displays."<sup>58</sup>

51. See *supra* note 38 and accompanying text.

52. 465 U.S. at 698 (Brennan, J., dissenting). Justice Brennan observed that Pawtucket failed to explicitly state the purpose behind the creche. Justice Brennan goes on to note, "Pawtucket's valid secular objectives can be readily accomplished by other means." *Id.* Justice Brennan observed that ordinarily either a clear purpose of advancing religion or a clear secular purpose is apparent in cases involving the establishment clause. The Justice added that ordinarily the Court is slow to impute unconstitutional intent to a government body. *Id.* (citing *Muel-ler v. Allen*, 463 U.S. 388 (1983)).

53. 465 U.S. at 701 (Brennan, J., dissenting). "The 'primary effect' of including nativity scene in the City's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." *Id.*

54. *Id.* at 702.

55. *Id.* at 696 n.2.

56. *Id.* at 724. Justice Brennan suggests that prior decisions which the Court claims support its historical analysis relied upon specific, concrete evidence wanting in *Lynch*.

57. *Id.* at 718. The Court's analysis, Justice Brennan said, is a mere restatement of the obvious; that is, religion played a large part in this country's formative years. That being the case, an absolutist approach is inappropriate. But that does not resolve the question that was presented in *Lynch*. *Id.*

58. *Id.* at 720 n.25 (citations omitted).

Upon analyzing the trend of the Court regarding Establishment Clause claims, one finds that the *Lemon* test has been supplanted.<sup>59</sup> Nowhere is this more evident than the Court's decision in *Lynch*. And yet, perhaps the most interesting aspect of the *Lynch* case is the dissent's approach.

The majority viewed *Lynch* as a case whose facts fell within the permissible parameters of a loosely defined *Lemon* test. While the dissent opposed this premise, their analysis placed them in a precarious position. One of the dissent's arguments concentrated upon the violation of a strict *Lemon* approach. The other argument acknowledged the use of history, albeit, in the proper context.

It was their acquiescence to the use of history within a *Lemon* test analysis which led to the ultimate and final liberalization of Establishment Clause inquiry.

Viewed at its base level, the dissent's reasoning placed them in a position of being the indefinite minority. The fact that the minority addressed the use of history is most significant. The dissent rejected the conclusions drawn from the majority's use of history, yet, the dissent left unanswered the role of persuasive and proper historical data within Establishment Clause analysis. Rather than simply dissenting in *Lynch*, the onus was upon the dissenters to develop a new standard for Establishment Clause cases which would encompass factors the dissent deemed relevant (including history), yet, when applied to *Lynch*, would lead to a conclusion of unconstitutionality. Anything less than the development of a new standard would result in an intellectual debate among the Supreme Court justice ending with the final vote being cast in favor of the majority—those favoring a liberal stance toward the traditional tripartite test.

There have been district court cases which have found governmental acts, similar to those involved in *Lynch*, violative of the First Amendment.<sup>60</sup> Those cases can be differentiated from *Lynch* on various levels. Most significant is the reluctance of the district courts to

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59. See generally Note, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175 (1984). The author noted that the Court never set forth the *Lemon* test as the only test, and suggests the Court may have become impatient with that analysis. *Id.* at 1198.

60. See *Bivella v. Nashua*, 599 F. Supp. 792 (D.C.N.H. 1984) (court held the display of creche on city hall plaza unconstitutional); *ACLU v. City of Birmingham*, 588 F. Supp. 1337 (E.D. Mich. 1984), *aff'd*, 791 F.2d 1561 (6th Cir. 1986) (nativity scene on the lawn of city hall held unconstitutional); *Fox v. City of Los Angeles*, 22 Cal. App. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867, (1978) (court invalidated illumination of cross to honor Christmas and Easter); *ACLU v. City of St. Charles*, 622 F. Supp. 1542 (N.D. Ill. 1985) (cross illuminated on public fire house declared unconstitutional).

depart from the traditional *Lemon* test.<sup>61</sup> Simply put, the district courts are not prepared to change their line of inquiry until the Supreme Court has placed their imprimatur upon a new test. One may argue that this new test was created in *Lynch v. Donnelly* and will be applied to its progeny.

### III. FACTORS CREATING A SECULAR MEANING

The new *Lynch* test only vaguely resembles the structured tripartite *Lemon* test. The *Lynch* court has created a "secular meaning" approach to Establishment Clause claims. This "secular meaning" inquiry will extend the range of permissible activities formerly deemed violative of the Establishment Clause. While the *Lemon* test questions the existence of a secular purpose,<sup>62</sup> the *Lynch* analysis inquires into the existence of a secular meaning.<sup>63</sup> The distinction between a secular purpose and a secular meaning is that a secular purpose will either be explicitly stated or implicitly found by the court. The court will find a secular purpose lacking only when there is no question that the statute or activity was motivated wholly by religious considerations.<sup>64</sup> A secular meaning exists, however, only in the presence of additional factors.<sup>65</sup>

A secular purpose may be one of several purposes for a particular governmental act. The declaration of an act's secular purpose is merely the means to a potential finding of constitutionality. Yet, the act must still avoid the last two pitfalls of the *Lemon* test. On the other hand, the determination that an act has achieved a secular meaning is the conclusion of the inquiry. An act which has achieved a secular meaning has assumed a secular persona. The non-sectarian characteristics have become so prevalent that the religious meaning or context of the practice involved has been diluted.<sup>66</sup> In sum,

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61. *Wallace v. Jaffrey*, 105 S. Ct. 2479 (1985). The Supreme Court, in a per curiam decision, recently stated: 'Needless to say, only this Court may overrule one of its precedents.' *Id.* at 2485 n.26 (quoting *Jaffrey v. Wallace*, 705 F.2d at 1532).

62. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

63. *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984) (Brennan, J., dissenting). "The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning," *Id.*

64. See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). Indeed, even when the benefit is substantial the act was permitted. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

65. See *infra* notes 70-119 and accompanying text.

66. Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 147 (1983-84). See also *supra* note 63. But cf. *Lynch v. Donnelly*, 465 U.S. 668.

whereas the purpose of an act is an integral part of its formation, the existence of a secular meaning is the act's ultimate composition.

The majority in *Lynch* concluded that the creche in its commemoration of Christmas had attained a secular meaning. Chief Justice Burger acknowledged the secular meaning of the creche when he wrote, "[i]f the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution."<sup>67</sup> The Chief Justice warned, "[t]o forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season . . . would be a stilted over-reaction contrary to our history and to our holdings."<sup>68</sup> In her concurring opinion, Justice O'Connor recognized the secular meaning of the creche as well. "The holiday itself has very strong secular components and traditions. . . . The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols."<sup>69</sup>

The new secular meaning approach, however, is hollow absent an analysis of the various factors that comprise the court's determination.

#### A. *Historical Significance*

The first significant consideration, as is apparent from the case law, is the role of history. In addressing the constitutionality of a county's official seal which contained a cross, the district court in *Johnson v. Board of County Commissions of Bernalillo County*<sup>70</sup> relied on the county's religious history to conclude that no constitutional violation existed. The court noted that the cross represents the Spanish and Catholic traditions of early New Mexico and that "Catholicism cannot be separated from New Mexico history."<sup>71</sup> In holding that use of expressions of trust in God by the United States Government on its coinage, currency, official documents, and publications was permissible,<sup>72</sup> the Ninth Circuit stated that it was

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67. 465 U.S. at 686.

68. *Id.* See generally *id.* at 686-87.

69. *Id.* at 692.

70. 528 F. Supp. 919 (D.N.M. 1981).

71. *Id.* at 924. The importance history plays in Establishment Clause analysis was summed up best when the court stated, "In the panorama of First Amendment decisions, one caveat remains outstanding: that the history of man is inseparable from history of religion." *Id.* at 921 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)).

72. *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

unable to discern any religious significance attendant the use of money or study of government publications. The secular meaning of such acts had become so strong that its usage was excluded from First Amendment significance because the motto had no theological or ritualistic impact.<sup>73</sup> Though the Supreme Court in *Engel v. Vitale*<sup>74</sup> struck down a New York Regent's Prayer prescribed by state statute as part of a daily ceremony for opening school, the propositions stated in *Engel* remain strong; certain activities that are patriotic or ceremonial may lose their religious significance in favor of psychological and inspirational qualities.<sup>75</sup>

#### B. Proximity

The presence of secular objects in close proximity to the act in question has also been considered by the courts. A religious object standing alone may indeed have religious significance. Yet, that same object amidst various secular objects may, when viewed as one unit, achieve a secular meaning. This factor was addressed by the Court in *Lynch*.<sup>76</sup> Other courts have also addressed the presence of secular objects alongside sectarian objects. In *Allen v. Morton*,<sup>77</sup> the Court of Appeals for the District of Columbia addressed the maintenance of a creche in connection with an annual Christmas Pageant of Peace celebrated on federal park land. In allowing the creche as part of the Pageant, the court noted that the Pageant and the Christ-

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73. *Id.* at 243. The *Aronow* court in citing *Engel v. Vitale*, noted that schoolchildren are encouraged to recite historical documents such as the Declaration of Independence which refer to the Deity. *Id.*

74. 370 U.S. 421 (1962).

75. 432 F.2d at 243-44. For a differing analysis of the role of history and its "secularizing" effect, see, e.g., *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792 (1973) (quoting *Walz*, 397 U.S. at 678) (wherein the Court, in referring to the country's apparent approval of tax exemptions for church property, remarked: "But historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use.'"); *ACLU v. Rabun County*, 698 F.2d 1098, 1111 (11th Cir. 1983) (In finding County Chamber's approval of a plan to re-erect on state park land a cross which stood every other year for a period of 22 years, the court stated, "[H]istorical acceptance without more' does not provide a rational basis for ignoring the command of the Establishment Clause. . . ."); *ACLU v. City of St. Charles*, 622 F. Supp. 1542, 1545 (N.D. Ill. 1985) ("Unlike [A] creche, a cross on a building, even during the Christmas season, does not ordinarily conjure up in a viewer's mind the historical antecedents of the Christmas holiday.").

76. 465 U.S. at 681. Chief Justice Burger noted the secular meaning attained by the creche when viewed among the other secular objects. "The display engenders a friendly community spirit of good will in keeping with the season." *Id.* at 685. The secular objects consisted of a talking Wishing Well, Santa Claus and reindeer.

77. 495 F.2d 65 (D.C. Cir. 1973).

mas holiday itself had achieved a “secularized nature.”<sup>78</sup> The court goes on to find that the creche’s association with these secularized objects results in a secular meaning, overshadowing whatever sectarian aspects may exist. The court noted that the utilization of the creche, only to manifest the religious heritage aspect of the Christmas celebration, was one of many “traditional aspects of our national history associated with Christmas.”<sup>79</sup> The court ignored whatever religious significance the creche, within the entire Pageant context, may have had.<sup>80</sup> Rather, the court found that inclusion of the creche was intended to be “reverential to the religious heritage aspect of Christmas.”<sup>81</sup>

Another case which concentrated on a religious symbol’s proximity to secular objects was *Anderson v. Salt Lake City Corp.*<sup>82</sup> The object involved in *Anderson* was a granite monolith on which the Ten Commandments were inscribed together with other symbols, representing the All Seeing Eye of God, the Star of David, The Order of Eagles, letters of the Hebraic Alphabet, and Christ or peace. The court noted that the Order of the Eagles is not a religious organization but a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based. Yet, the court noted that an ecclesiastical background does not negate the presence of “substantial secular attributes.”<sup>83</sup> The court cited that “the Ten Commandments is an affirmation of at least a precedent legal code.”<sup>84</sup> Though the court apparently concentrated solely on the Decalogue among other secular objects to conclude that secularity dominated whatever religious effects existed, the fact that the acts were located in front of a courthouse must not be overlooked. The Ten Commandments comprise a legal code. When placed in front of a courthouse, their legal significance is heightened. Hence, the religious overtones are substantially subordinated to the Decalogue’s secular meaning.<sup>85</sup>

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78. *Id.* at 73.

79. *Id.*

80. *Id.* at 74. The court stated that the creche “was not meant and should not be taken, either to promote religious worship, or profane the symbols of any religion.” *Id.*

81. *Id.*

82. 475 F.2d 29 (10th Cir. 1973).

83. *Id.* at 33.

84. *Id.*

85. *Anderson* must be distinguished from *Stone v. Graham*, 449 U.S. 39 (1980), which struck down the use of the Ten Commandments in public schools. The reason for inapposite results is the closer scrutiny given to religious activities in the school setting. *See also* *Ring v. Grand Fork Public Dist.*, 483 F. Supp. 272 (D.N.D. 1980). For a more detailed discussion of religion in the school environment, see *supra* notes 107-19 and accompanying text.

In another case addressing religious symbols in close proximity to a courthouse, the court in *Paul v. Dade County*<sup>86</sup> held that a temporary string of lights in the form of a cross on the outside of a county courthouse during the Christmas season did not amount to religious activity. The court listed some of the secular purposes involved<sup>87</sup> and went on to state that "many symbols, though religious in origin, have ceased to have religious meanings or have also acquired secular meanings."<sup>88</sup>

The presence of secular objects accompanying a religious object lends support to the finding that the act has a secular meaning and therefore is not violative of the Establishment Clause. Yet, the proximity factor does not upset traditional Establishment Clause analysis when secular objects are absent.<sup>89</sup> Finally, the proximity factor is one factor that helps determine the constitutional status of a given

86. 202 So.2d 833 (Fla. Dist. Ct. App. 1967).

87. *Id.* The court cites some of the secular purposes including helping decorate the streets of Miami and attracting holiday shoppers to the area. *Id.* at 835.

88. *Id.* "For example, the dove, the star, the fish, and three intertwined rings have all had, or presently may have, some religious symbolism attached thereto. On the other hand, some have also acquired certain secular meanings." *Id.* See also *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 558 P.2d 338 (en banc), cert. denied, 434 U.S. 876 (1976), wherein the court stated, "the acceptance of an essentially religious symbol as a memorial to war veterans somehow transforms the religious symbol to a secular status and meaning." *Id.* at 341.

89. See *Burrelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984). The court found that the display of a creche on city-owned park land was violative of the Establishment Clause. The creche was displayed without any accompaniment of secular symbols or disclaimers of any type which would place the public on notice of the city's impartial view towards any particular religion. Based upon these circumstances, the court found that the creche represented excessive entanglement by the municipal government with a particular religious doctrine. The fact that the creche was erected at no expense to the city was deemed irrelevant.

See also *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983). The Rabun County Chamber of Commerce approved a plan for the erection of a cross on state park grounds which would have dimensions of approximately 26 feet by 35 feet and had the capability of being illuminated by thirty-one 175 watt Mercury vapor lights. This would enable the cross to be visible for several miles and from the adjacent major highway. As in *Burrelle*, there were no other attendant secular objects. This, coupled with the Rabun County Chamber of Commerce's desire to dedicate the cross in a religious service on Easter Sunday, gave rise to the court's finding of a violation of the Establishment Clause. For a more detailed discussion on the significance of a religious symbol with respect to a national as compared to a non-national holiday (such as Easter), see *infra* notes 90-98 and accompanying text. See also *ACLU v. City of St. Charles*, 622 F. Supp. 1542 (N.D. Ill. 1985). In *Saint Charles*, the court distinguished the violative display of a cross from that of the creche. An illuminated 35 foot by 18 foot Latin cross was placed on top of the town's fire station as part of the city's annual Christmas display. The court noted that unlike the creche, a cross on a building even during the Christmas season does not conjure up the same historical aspects of the Christmas holiday as does the creche. The creche, coupled with other secular displays, has been accepted as part of our nation's holiday display. The cross, however, has a great deal of religious meaning and is often used on the outside of churches to indicate that the building is a church. Further, unlike the creche, which is mostly displayed at Christmas time, the cross is displayed



act. One may see through the case law that proximity may create a secular meaning, but it should not be regarded as the sole inquiry.

### C. *Federal v. Non-Federal Holidays*

Establishment Clause inquiry has also concentrated on the use of religious symbols in commemorating federal holidays, as opposed to symbols used to commemorate non-federal occasions. Courts have permitted the use of sectarian symbols in the former and have denied the same symbol in the latter situation.<sup>90</sup> Clearly, the courts distinguish between federal and non-federal holidays.

Congress has enumerated specific legal public holidays<sup>91</sup> and has provided for pay and leave of public employees with respect to these holidays. Yet, the case law in this area has centered around sectarian symbols and their use, with regard to both enumerated, as well as, unenumerated holidays. In *Eugene Sand & Gravel Inc. v. City of Eugene*,<sup>92</sup> the Supreme Court of Oregon permitted erection of a large cross in a municipal park as a veterans' war memorial. In upholding the act, the court noted that the secular purpose was as a memorial to all war veterans of all wars.<sup>93</sup> Yet, what ultimately made the act permissible was a proposed charter amendment stating that as a war memorial "the cross was to be lighted 'on appropriate days or seasons which fittingly represent the patriotic . . . sacrifice of war veterans,' including the national holidays of Memorial Day, Independence Day, Veteran's Day, Thanksgiving Day and the Christmas season."<sup>94</sup> Finally, the court goes on to note that "the requirements of the charter amendment, as adopted by the vote of the people of Eugene, are that it be lighted only on secular national holidays, but not including Easter (a religious day, not a national holiday). . . ."<sup>95</sup>

While there are in fact no "national" holidays, those specifically enumerated as federal holidays have achieved a secular meaning. That is, though some may not celebrate a particular federal holiday

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year-round and serves the purpose of conveying a relationship with the Christian religion. The primary effect of the cross was found to be one of favoring certain religious beliefs.

90. See, e.g., *Fox v. City of Los Angeles*, 22 Cal. App. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 558 P.2d 338 (1976); *ACLU v. City of Eugene*, 589 F. Supp. 222 (S.D. Tex. 1984).

91. 5 U.S.C. § 6103 (1985).

92. 276 Or. 1007, 558 P.2d 338 (1976).

93. *Id.* at 344.

94. *Id.*

95. *Id.* at 347. It should be noted that a great deal of litigation involves the commemoration of Easter, which is not a federal holiday. See 5 U.S.C. § 6103.

(e.g. Christmas), Congress has, notwithstanding, mandated that these occasions merit a day off from federal employment. Indeed, the classification itself signifies a certain secularity: "federal" holidays.

In declaring the illumination on the city hall of a huge cross for the commemoration of Easter unconstitutional, the Supreme Court of California, in *Fox v. City of Los Angeles*,<sup>96</sup> stated,

whatever may be said for the secular nature of the Christmas holiday, the same cannot be argued for Easter. Easter Sunday is no more a legal holiday in this state than any other Sunday. To the extent that non-Christians observe the day, they do not typically share in the display of the Latin cross. Indeed, the *Spiritual* content of the cross is central to the *spiritual* significance of Easter as a matter of common knowledge.<sup>97</sup>

The federal/non-federal factor is merely an additional aspect for the court to consider. It is apparent that courts will not allow the use of religious symbols to commemorate purely religious holidays.<sup>98</sup> Yet, there are those situations where religious symbols will be allowed as part of a federal holiday commemoration. The key inquiry, again, becomes the creation of a secular meaning. When the act commemorates a federal holiday and rises to a level of attaining a secular meaning, the act will be permitted.

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96. 22 Cal. App. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

97. *Id.* at 809, 587 P.2d at 673, 150 Cal. Rptr. at 877 (Bird, C.J., concurring) (emphasis in original). But this line of cases must be compared with other cases that have addressed the use of religious symbols in commemorating a federal building. See *ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), which held the erection of three Latin-style crosses and a Star of David as part of a war memorial in a public park violative of the Establishment Clause of the First Amendment. The *Eckels* court addressed the *Eugene Sand & Gravel, Inc.* decision, stating that the Oregon Supreme Court's reasoning was both "non-binding and erroneous." *Eckels*, 589 F. Supp. at 239. Yet, *Eckels* may be distinguished from *Eugene* in that the four symbols in question in *Eckels* were located over 230 feet from the planned war memorial, whereas in *Eugene*, the religious symbols were located on the war memorial. Thus, one can see the federal/non-federal factor at work in addition to the proximity factor being considered by the court. For a more detailed discussion of the proximity factor in obtaining a secular meaning, see *supra* notes 74-87 and accompanying text. See also *ACLU v. Rabun County Chamber of Commerce*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 698 F.2d 1098 (11th Cir. 1983). In *Rabun*, the court found as unconstitutional a cross placed in a state park which was to be illuminated on particular holidays. The cross, however, was for a year-round display whose only purpose was found to be religious. Yet, the decision must also be distinguished from *Eugene* in that the *Rabun* court based its holding in part on the relationship between the cross and its planned unveiling on Easter. 510 F. Supp. at 891, 888-89.

98. For example, Easter, which is not a federal holiday. For a further discussion of the impact of Easter, see *supra* notes 95-96 and accompanying text.

D. *Duration*

Another factor courts have considered to be important in determining the constitutionality of religious symbols in society has been the length of time the object is exposed to the public. Though no specific time period has been mandated, it appears as though the "secularity" of an object is weakened over time. One thing becomes clear: when the act is designed to stand permanently, it will be declared unconstitutional. Hence, in *Meyer v. Oklahoma*,<sup>99</sup> a religious symbol in the form of a fifty foot high Latin Cross, designed to stand forever, was found to be unconstitutional.<sup>100</sup> On the other extreme, courts have acknowledged the permissible use of religious symbols for one day. In *Burrelle v. City of Nashua*,<sup>101</sup> the court addressed the granting of a license to display a creche on the city hall plaza designed to last from the period between November 1 and January 31. The court enjoined the structure noting that the granting of licenses to various religious groups for use of the plaza area had previously been for periods of less than twenty-four hours and were never of a permanent nature.<sup>102</sup>

Other courts have also addressed permissible lengths of time. *Paul v. Dade County*,<sup>103</sup> considered a Latin Cross made by a string of lights, lighted only at night during the Christmas season. The court allowed the act finding that the cross had a secular connotation as a yule season decoration and that the Christmas season was not an overly extended period of time.<sup>104</sup> Lastly, in a case decided after *Lynch*, the Court of Appeals for the Second Circuit held in *McCreary v. Stone*,<sup>105</sup> that a creche placed in a village owned park for a

99. 496 P.2d 789 (Okla. 1972), *cert. denied*, 409 U.S. 980 (1972).

100. *Contra Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 558 P.2d 338 (1976). In *Eugene*, the court allowed the religious symbol even though it was erected to last forever. The key distinction was that the role of the cross was part of a war memorial and was "somehow transform[ed] . . . to a secular status and meaning." *Id.* at 341. For a more detailed discussion on the secular meaning of religious symbols in the national holiday context, see *supra* notes 90-98 and accompanying text.

101. 599 F. Supp. 792 (D.N.H. 1984).

102. *Id.* at 794.

103. 202 So.2d 833 (Fla. Dist. Ct. App. 1967), *cert. denied*, 390 U.S. 1041 (1968).

104. *Id.* at 835. Compare *ACLU v. City of Birmingham*, 588 F. Supp. 1337 (E.D. Mich. 1984). The court held that the placement of a nativity scene on the lawn of city hall during the Christmas season was unconstitutional. The court stated that "unlike those in *Lynch* and *McCreary*, (the creche) was entirely city-sponsored and was to remain in full public view much longer than two weeks." *Id.* at 1340.

105. 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court*, 105 S. Ct. 1859 (1985).

period of two weeks during the Christmas holiday season was permissible.<sup>106</sup>

The duration of the religious symbol may be viewed as another factor creating an overall secular meaning. Objects that are placed in public view for short designated periods of time are less likely to become sectarian or create the appearance of state support.

#### E. Religion/School

The preceding factors have one common bond; they are all factors used by the courts to find an act's secular meaning. One significant factor, however, which can negate whatever secularity a given act has obtained, is whether the act takes place upon school property and will adversely affect any school children. Hence, the religion/school children factor will have negative implications resulting in a finding of unconstitutionality, despite the fact that the very same act, when done off school premises, may be deemed permissible.

Since its inception, the accommodation theory, in the area of schools, has met with a more rigid interpretation. For the courts, the extent of the religious intrusion within the public walls, and its possible effect on impressionable young children, becomes the crucial issue.<sup>107</sup> Public schools are reluctant to use an accommodation theory where the moral and academic well-being of children is concerned.<sup>108</sup>

In *Johnson v. Huntington Beach Union High School District*,<sup>109</sup> the California Court of Appeals found that a public high school was not a proper forum for a voluntary Bible study club and was therefore not permitted to meet or conduct activities on the school campus, during school hours.<sup>110</sup> The court used the *Lemon* test and found that while a secular purpose existed, the use of school facilities as a forum for religious preaching violated the primary effect

106. *Id.* at 717.

107. See generally Note, *The Constitutional Dimensions of Student Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499 (1982-83). The author distinguishes between the elementary school, the high school and the university, noting that while the fear of religious indoctrination is well-founded in the elementary school setting, the high school and university student may be able to understand the difference between "neutral accommodation" and "indoctrination". *Id.* at 509.

108. *Id.*

109. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, cert. denied, 434 U.S. 877 (1977).

110. The school district had set forth regulations under which student clubs could operate on high school campuses. Under these rules, clubs could not have free use of the classrooms and facilities without receiving recognition and approval as a student club. The district, however, specifically prohibited student religious clubs from meeting during the school day. *Id.*

prong.<sup>111</sup> The court furthered its argument and stated that Establishment Clause principles were more compelling than those of free exercise since the students were free to profess their beliefs anywhere outside of the public schools.<sup>112</sup>

*Brandon v. Guilderland Central School*,<sup>113</sup> reinforces the *Johnson* analysis. *Brandon* also involved a student-initiated religious group. The group sought to conduct its meetings before school hours within school facilities. Again, the court found the Establishment Clause principles to be more compelling than the students' free exercise rights. If such activity was granted by the school, the court held it "would create an improper appearance of official support and would improperly advance religion."<sup>114</sup>

Even where religious activity is considered to be less intrusive, Establishment Clause concerns still prevail in the school setting. Thus, in the situations involving voluntary prayer at the beginning of the school day,<sup>115</sup> or merely a moment of silence,<sup>116</sup> the courts' concern focuses on the possible effect of religious indoctrination<sup>117</sup> of young children. Hence, where elementary school is involved, the *Lemon* test has been applied strictly and, though a secular purpose will generally

111. 68 Cal. App. 3d at 12, 137 Cal. Rptr. at 49.

112. *Id.* at 17, 137 Cal. Rptr. at 52.

113. 635 F. 2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1982).

114. 635 F.2d at 979. The Court in *Brandon* was concerned with the setting of a captive audience and the symbolic inference to be drawn by impressionable students that the school endorsed such behavior.

115. *See, e.g., Bell v. Little Axe Independent School Dist.*, 766 F.2d 1391 (10th Cir. 1985). A religious meeting was held at the beginning of the school day in order to "influence children in a positive way to seek God and good in their own lives and in others." *Id.* at 1397.

116. *See, e.g., Wallace v. Jaffrey*, 105 S. Ct. 2479 (1985). Justice O'Connor struck down an Alabama "meditation and voluntary prayer" statute. However, that not all moment of silence statutes were declared unconstitutional since they do not favor one religion over another. *Id.* at 2491-92. Also, the statute in *Wallace* was struck down purely on the basis of legislative history and never reached the *Lemon* test analysis. Justice Powell, however, in his concurrence, analyzed the statute under the *Lemon* test and found the practice to be one that endorsed and sponsored religion in the public schools.

117. There is a distinction drawn between elementary schools, high schools and universities. It has been established in *Widmar v. Vincent*, 454 U.S. 263 (1981), that universities have traditionally been open forums for the dissemination of ideas. *See generally* Comment, *Widmar v. Vincent and the Public Forum Doctrine: Time to Reconsider School Prayer*, 1984 Wisc. L. REV. 147 (1984). The concern in elementary schools and high schools stems from the question of whether the child could distinguish between indoctrination and mere statements of opinion. While the disparity between the elementary school student and the university student is self-evident, there is still some question whether the high school student has reached the level of maturity that the university student possesses. For example, the court of appeals in *Brandon* supports its decision using *Widmar's* "university analysis." *But see Bell*, 766 F.2d at 1391, where a *Widmar* analysis was used to distinguish the elementary school atmosphere from the university setting.

exist, the primary effect and entanglement prongs will cause the act to fail.<sup>118</sup>

In addition to a strict application of the *Lemon* test, there is a compelling public policy interest against indoctrinating young children with unsolicited religious activity. Thus, courts are not anxious to lower the "impregnable wall" in the area of religion and public schools.<sup>119</sup>

The religion/school children factor appears to be the last remnant of a strict *Lemon* test analysis. Though *Lynch* inquires into the existence of a secular meaning, one thing remains constant: activities that have religious significance will rarely be permitted when imposed upon school children in the school environment. It thus becomes possible for an act to attain a secular meaning when it does not take place on school premises and yet, lose any secularity when placed within the school environment.

#### CONCLUSION

In addressing *Lynch v. Donnelly*, this Note has examined the current position of the *Lemon* test. This article has attempted to trace the *Lemon* test's path towards liberalization. The examination then discussed the possible creation of a new test by the Supreme Court, a secular meaning approach, and offered the pertinent factors which are considered. The broadening of the *Lemon* test, specifically with regard to a creche on public property, could have been strengthened in the Supreme Court's decision in *Board of Trustees of the Village of Scarsdale v. McCreary*.<sup>120</sup> Unfortunately, however, the *McCreary* decision has limited precedential value.<sup>121</sup> What remains is the need

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118. It is interesting to note that even when there is mere symbolism within the public school walls, the primary effect and entanglement prongs of the *Lemon* test are still not satisfied. See *Stone v. Graham*, 449 U.S. 39 (1980); *Ring v. Grand Fork Public Dist.*, 483 F. Supp. 272 (D.N.D. 1980).

119. A child who is at the age of development is still forming his own intellectual beliefs and is vulnerable to the influence of school authority. In *Widmar v. Vincent*, the Court specifically stated that the school's interest was in fulfilling its obligations pursuant to the Establishment Clause and may be characterized as compelling. 454 U.S. at 271. While the underlying theory is the prevention of government endorsement of religious activity in a public institution where secular education is the primary motive, the effect on children attending public schools distinguishes this situation from others.

120. 105 S. Ct. 1859 (1985) (per curiam).

121. R.L. STERN, E. GROSSMAN & S.M. SHAPIRO, *SUPREME COURT PRACTICE* 287 (6th ed. 1986).

An affirmance in these situations (per curiam), of course, has precedential value. But it carries with it the same elements of unfairness to the parties, particularly to the petitioner, as when a judgment is summarily reversed. . . . The possibility of a summary

for a clearly delineated test. While the Supreme Court is not bound by any one test,<sup>122</sup> it is time to restructure this rather evasive line of inquiry. The secular meaning approach advocated in this article is an attempt to define the Supreme Court's current position on establishment clause cases. Yet, clarification, if it is to arrive at all, will only be possible through subsequent establishment clause cases and a specific intent on the part of the Supreme Court to create a new and distinct test.

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affirmance, while a rarity, serves as a warning against completely ignoring the merits of the case in preparing the petition.

*Id.*

122. *Lynch v. Donnelly*, 465 U.S. at 679.