

The Burger Court Opinion Writing Database

Lynch v. Donnelly

465 U.S. 668 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 15, 1983

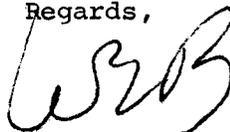
RE: 82-1256 - Lynch v. Donnally

MEMORANDUM TO THE CONFERENCE:

Enclosed is a proposed opinion in the above. I sent a typescript to Bill Brennan Saturday to facilitate his dissent.

Maybe he will be persuaded!

Regards,

A handwritten signature in black ink, appearing to be the initials 'WSB' with a stylized flourish.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **NOV 15 1983**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[November —, 1983]

THE CHIEF JUSTICE delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. In recent years, the display has been located in Hodgson Park, a private park owned by a nonprofit organization in the heart of the City's shopping district. The display is essentially like those to be found in any number of towns or cities across the Nation—often on public grounds—during the Christmas season. The display is comprised of many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus' house, reindeer pulling Santa's sleigh, candy-striped poles, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

The creche, which has been included in the display for the 40 or more years that the City has erected the display, occu-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens ✓
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: NOV 18 1983

STYLISTIC CHANGES

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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The creche, which has been included in the display for 40 or more years, occupies about 140 square feet of the 40,000

Handwritten:
CJ
I am not in agreement
discrepancy
7/11

CHANGES THROUGHOUT 5, 7, 14, 16
STYLISTIC CHANGES THROUGHOUT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

NOV 22 1983

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

**DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

[November —, 1983]

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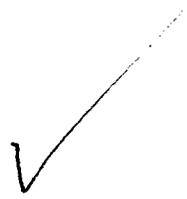
The creche, which has been included in the display for 40 or more years, occupies about 140 square feet of the 40,000 square feet of the park. The figures in the creche, which

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 23, 1983

PERSONAL



Re: 82-1256 Lynch v. Donnelly

Dear Lewis:

I reached for the telephone to respond to your November 23 memo and then recalled you are en route to Richmond.

The sentence you refer to was a response to a request from Bill Rehnquist and the only difference I can see between what I have said and what you suggest is the word "direct" which I omitted deliberately.

My reasoning is that textbook and bus transportation is as much a "subsidy" as anything could be and almost as direct as cash to a college for a building. My footnote was an effort to deal with this; older cases virtually concede books and buses have saved parochial schools.

However, I see no problem in adding "or religious institutions" after "colleges" and inserting "direct" adjectively ahead of "subsidy." In another case I would consider myself free to say that there really is no difference except degree in the "aid" to a religion whether we provide books or buildings to a school or pews in a church. Since we do not need to decide it in this case, I can comply as above.

The past cases contain a good bit of stilted nonsense on what will "establish" a religion. I want to move away from that paranoid approach.

Regards,

Justice Powell

CHANGES AS MARKED:
STYLISTIC CHANGES

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: DEC 1 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

**DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

[December —, 1983]

THE CHIEF JUSTICE delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, R. I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display is comprised of many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus' house, reindeer pulling Santa's sleigh, candy-striped poles, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

The creche, which has been included in the display for 40 or more years, occupies about 140 square feet of the 40,000 square feet of the whole area. The figures in the creche,

Supreme Court of the United States
Washington, D. C. 20543

Fly
✓

CHAMBERS OF
THE CHIEF JUSTICE

February 2, 1984

MEMORANDUM TO: Justice White
Justice Powell
Justice Rehnquist
Justice O'Connor

Re: 82-1256 - Lynch v. Donnelly

I have concluded that the dissent needs no direct response. Earlier I had done some "honing" on the draft last seen by you. I deferred until I saw what Bill had to say.

Let me know if this draft gives any problems before I circulate it.

Regards,
WRB

I told Jan that the opinion is OK with me but I have no objection if the Chief wishes to answer dissent more explicitly the

I do not understand why the Chief is being so cautious, as the marked changes seem innocuous to me. I suppose you want your thoughts on whether there should be a dissent. In my view, the dissents do not cry out for one.

~~_____~~

Joe

CHANGES AS MARKED: 10, 12

STYLISTIC CHANGES THROUGHOUT

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: **FEB 2 1984**

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

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Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus' house, reindeer pulling Santa's sleigh, candy-striped poles, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 7, 1984

Re: 82-1256 - Lynch v. Donnelly

MEMORANDUM TO: Justice White
Justice Powell
Justice Rehnquist
Justice O'Connor

The most recent draft of my opinion was sent to you before I received the second dissent and did not take it into account.

I now enclose a new draft taking into account additional items in Bill Brennan's dissent, as well as some in Harry's dissent.

Before I circulate this to the full Court, I would be glad to have any reactions. I would hope to circulate to the full Court before the end of the week.

Regards,



P.S. Terrible weather down here - 74°!

Dear Chief -

Your latest draft of Feb 7th
is fine with me.

Sincerely
Warren E. Burger

CC

U
ANGES AS MARKED: 7, 9-16

LISTIC CHANGES THROUGHOUT.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: FEB 15 1984

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

THE CHIEF JUSTICE delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

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The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and

C

STYLISTIC CHANGES THROUGHOUT

MARKED: 8, 9-11, 13, 14, 16

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: FEB 27 1984

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

**DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

[February —, 1984]

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We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the

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ES AS MARKED: 15, 16

STYLISTIC CHANGES

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____

Recirculated: MAR 1 1984

RECEIVED
SUPREME COURT U.S.
JUSTICE

'84 MAR -2 A11:29

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

THE CHIEF JUSTICE delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a crèche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the City.

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Supreme Court of the United States
Washington, D. C. 20543

March 2, 1984

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

Re: 82-1256 Lynch v. Donnelly

Looks as if this case can come down Monday. The final draft, which will circulate this evening, will include the following changes.

Footnote 6 will be modified to read as follows:

The City contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that Lemon requires. Were the test that the government must have "exclusively secular" objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.

The last sentence of Footnote 12 is omitted. The footnote will read in its entirety as follows:

JUSTICE BRENNAN states that "by focusing on the 'context' in which the creche appear[s]," the Court seeks to "explain away the clear religious import of the creche," post, at 12, and that it has equated the creche with a Santa's house or a talking wishing well, post, at 18. Of course this is not true. Our focus is not on the location of the creche amidst secular objects, but on the presence of the creche during the Christmas Holiday.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1984

MEMORANDUM TO THE CONFERENCE

RE: 82-1256 - Lynch v. Donnelly

Supplementing the memo I circulated earlier this evening, I have decided to omit another sentence from Footnote 12. The footnote in its entirety appears in the enclosed draft at the bottom of page 16.

Regards,

A handwritten signature in black ink, consisting of the letters 'WRB' in a stylized, cursive script. The 'W' and 'R' are connected, and the 'B' has a long, sweeping tail that extends downwards and to the right.

AS MARKED: 11,16

IC CHANGES

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: MAR 2 1984

RECEIVED
SUPREME COURT, U.S.
JUN 1984

'84 MAR -5 10:22

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

THE CHIEF JUSTICE delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 7, 1984

MEMORANDUM TO THE CONFERENCE:

Re: 82-1256 - Lynch v. Donnelly

An expert on canonical law alerted me to the fact that the common usage "Vicar of Rome" is not accurate. The precise description is "Vicar of Christ" or "Bishop of Rome."

Absent dissent, I will correct my error in due course.

Regards,



MA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 17, 1983

No. 82-1256

Lynch v. Donnelly

Dear Thurgood, Harry and John,

We four are in dissent in the above. I shall attempt a dissent, although I can well understand that each of you may also want to write separately.

Sincerely,

Bill

Justice Marshall

Justice Blackmun

Justice Stevens

To: The Chief Justice
Justice White
 Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 1/22/84

Recirculated: _____

RECEIVED
SUPREME COURT, U.S.

84 JAN 22 10 50 AM

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[January —, 1984

JUSTICE BRENNAN, dissenting.

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, *ante*, at 9, proven extremely difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. *Ante*, at 9. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular context in which the City of Pawtucket has chosen to display its nativity scene. The narrowness of the Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross.¹

¹For instance, nothing in the Court's opinion suggests that the Court of Appeals for the Third Circuit erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. *Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (CA3 1980). Nor does the Court provide any basis for disputing the holding of Court of Appeals for the Eleventh Circuit that the erection and maintenance of an illuminated Latin cross on state park property violates the Establishment Clause. *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F. 2d 1098 (CA11 1983).

p.1 + stylistic changes

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 2/10/84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984

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

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, *ante*, at 9, proven difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. *Ante*, at 9. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular context in which the City of Pawtucket has chosen to display its nativity scene. The narrowness of the Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross.¹ Despite the

¹ For instance, nothing in the Court's opinion suggests that the Court of Appeals for the Third Circuit erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. *Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (CA3 1980). Nor does the Court provide any basis for disputing the holding of the Court of Appeals for the Eleventh Circuit that the erection and maintenance of an illuminated Latin cross on state park property violates the

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 2/23/84

changes +
pp. 2-3, 6, 10, 11-12, 15-16, 25 + 31

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984

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

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, *ante*, at 8-9, proven difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. *Ante*, at 9. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular context in which the City of Pawtucket has chosen to display its nativity scene. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a creche standing alone, or the public display of other distinctively religious symbols such as a cross.¹ Despite the narrow con-

¹ For instance, nothing in the Court's opinion suggests that the Court of Appeals for the Third Circuit erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. *Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (CA3 1980). Nor does the Court provide any basis for disputing the holding of the Court of Appeals for the Eleventh Circuit that the erection and maintenance of an illuminated Latin cross on state park property violates the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1984

Re: Lynch v. Donnelly, No. 82-1256

Dear Harry:

The following is my effort to accommodate your concerns about the reference to Marsh in note 2. It modifies this footnote by replacing the last two sentences with the following sentence:

I can only conclude that with today's unsupported assertion, the Court hopes to provide a belated explanation for the failure in Marsh v. Chambers, _____ U.S. _____ (1983), to address the analysis of the Lemon test.

What do you think?

Sincerely,


W.J.B., Jr.

cc: Justice Marshall
Justice Stevens

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 3/2/84

RECEIVED
SUPREME COURT OF THE U.S.

'84 FEB -2

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984

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

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, *ante*, at 8-9, proven difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. *Ante*, at 9. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular context in which the City of Pawtucket has chosen to display its nativity scene. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone, or the public display of other distinctively religious symbols such as a cross.¹ Despite the narrow con-

¹ For instance, nothing in the Court's opinion suggests that the Court of Appeals for the Third Circuit erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. *Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (CA3 1980). Nor does the Court provide any basis for disputing the holding of the Court of Appeals for the Eleventh Circuit that the erection and maintenance of an illuminated Latin cross on state park property violates the

M
P 3, 5, 7, 17

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 21, 1983

Re: 82-1256 - Lynch v. Donnelly

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 18, 1983

Re: No. 82-1256-Lynch v. Donnelly

Dear Chief:

I await the dissent or dissents.

Sincerely,

T.M.
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1984

Re: No. 82-1256-Lynch v. Donnelly

Dear Bill:

Please join me in your dissent.

Sincerely,

Jm.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1984

RECEIVED
SUPREME COURT U.S.
JUSTICE HARRY A. BLACKMUN

'84 JAN 31 A9:56

Re: No. 82-1256 - Lynch v. Donnelly

Dear Bill:

Please join me in your dissent. I may write a paragraph or two of my own.

Sincerely,



Justice Brennan

cc: The Conference

No. 82-1256 - Lynch v. Donnelly

JUSTICE BLACKMUN, dissenting.

I join JUSTICE BRENNAN's dissenting opinion.

As JUSTICE BRENNAN points out, the logic of the Court's decision in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1970) (which THE CHIEF JUSTICE would say has been applied by this Court "at times," ante, at 9, but which JUSTICE O'CONNOR acknowledges with the words, "Our prior cases have used the three-part test articulated in Lemon," ante, at 2), compels an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's creche on public property at public expense must be held unconstitutional.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While the Mayor of Pawtucket began a crusade to "keep Christ in Christmas," App. 161, his victory, in my view, tends to demean the figure that inspired the quest. For, in order to subvert the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: FEB 3 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

JUSTICE BLACKMUN, dissenting.

As JUSTICE BRENNAN points out, the logic of the Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1970) (which THE CHIEF JUSTICE would say has been applied by this Court "at times," *ante*, at 9, but which JUSTICE O'CONNOR acknowledges with the words, "Our prior cases have used the three-part test articulated in *Lemon*," *ante*, at 2), *compels* an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's creche on public property at public expense must be held to be a violation of the First Amendment.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," App. 161, their victory, in my view, tends to demean the figure that inspired the quest. For, in order to subvert the constitutionally mandated result, the Court has deprived the creche of its symbolic essence—the divine nature of the birth of Christ. The Court has endorsed the city's declaration that the creche is nothing more than a display that invites people "to participate in the Christmas spirit, brotherhood, peace, and let loose with their money." App. to Pet. for Cert. A-36. Today's opinion relegates the creche to the

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 8, 1984

Re: No. 82-1256 - Lynch v. Donnelly

Dear John:

Thank you for your letter. I shall be glad to add your name to the little dissent I have written in this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Stevens

cc: Justice Brennan
Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 24, 1984

Re: No. 82-1256 - Lynch v. Donnelly

Dear Bill:

I have one difficulty with the revisions made in your third draft. You will recall that I was with the majority in Marsh v. Chambers. I wonder, therefore, whether you can do something about the last two sentences of the new footnote 2. Could they be eliminated or at least toned down? I feel that I cannot join those sentences in their present form.

Sincerely,



Justice Brennan

cc: Justice Marshall
Justice Stevens

21
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 27, 1984

2-7256
Re: No. 81-1257 - Lynch v. Donnelly

Dear Bill:

Your proposed revision of the last two sentences in n. 2 serve generally to alleviate my concern. Please go along with it.

Sincerely,



Justice Brennan

cc: Justice Marshall
Justice Stevens

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Changes throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: FEB 28 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins,
dissenting.

As JUSTICE BRENNAN points out, the logic of the Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1970) (which THE CHIEF JUSTICE would say has been applied by this Court "often," *ante*, at 9, but which JUSTICE O'CONNOR acknowledges with the words, "Our prior cases have used the three-part test articulated in *Lemon*," *ante*, at 2), *compels* an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's creche in a municipally sponsored display must be held to be a violation of the First Amendment.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," App. 161, their victory, in my view, tends to demean the figure that inspired the quest. For, in order to subvert the constitutionally mandated result, the Court has depreciated the creche's symbolic essence—the divine nature of the birth of Christ. The Court devalues the creche by claiming that, within the context of Pawtucket's Christmas celebration, the creche makes no more of an endorsement of any religious statement than do the depictions of Santa Claus, elves,

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pp. 1-2

M

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: MAR 2 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins,
dissenting.

As JUSTICE BRENNAN points out, the logic of the Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1970) (which THE CHIEF JUSTICE would say has been applied by this Court "often," *ante*, at 9, but which JUSTICE O'CONNOR acknowledges with the words, "Our prior cases have used the three-part test articulated in *Lemon*," *ante*, at 2), *compels* an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's crèche in a municipally sponsored display must be held to be a violation of the First Amendment.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the crèche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," App. 161, the Court today has declared that presence virtually irrelevant. The majority urges that the display, "with or without a crèche," "recall[s] the religious nature of the Holiday," and "engenders a friendly community spirit of good will in keeping with the season." *Ante*, at 15. Before the District Court, an expert witness for the city made a similar, though perhaps more candid, point, stating that Pawtucket's display invites people "to participate in the Christ-

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

November 17, 1983

'83 NOV 18 A9:49

82-1256 Lynch v. Donnelly

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

Copies to the Conference

LFP/vde

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

November 23, 1983

82-1256 Lynch v. Donnelly

Dear Chief:

Your third draft adds a sentence on page 14 that in view of Lemon v. Kurtzman you may wish to clarify:

"Be that as it may, this case does not involve a subsidy to church-sponsored schools or colleges; the inquiry into potential divisiveness is not called for, Mueller v. Allen, U.S. _____, 103 S. Ct. 3062, 3071 n. 11."

No doubt you added this to reject the argument that the city's sponsorship of the creche may create political divisiveness. As this case does not involve church-sponsored schools or colleges, it is unnecessary to refer to them in this context. I think the sentence well could be read as saying that "political divisiveness" is a concern only in cases involving subsidies to schools and colleges as contrasted with other religious institutions.

Your landmark decision in Lemon v. Kurtzman does not limit the political-divisiveness inquiry as your new sentence might be read to suggest. Nor does Mueller v. Allen limit the inquiry.

The purpose of the change, as I understand it, could be attained simply by replacing the language "does not involve a subsidy to church-sponsored schools or colleges" on p. 14 with the following:

"Does not involve a direct financial subsidy to religious institutions or church-sponsored groups" - or some similar words.

Sincerely,

The Chief Justice

lfp/ss

February 8, 1984

82-1256 Lynch v. Donnelly

Dear Chief:

Your latest draft of February 7 is fine with me.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice White
Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'83 NOV 18 P1:18

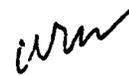
November 18, 1983

Re: No. 82-1256 Lynch v. Donnelly

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'83 NOV 16 AM 11:51 November 16, 1983

Re: 82-1256 - Lynch v. Donnally

Dear Chief:

Although I will await Bill Brennan's dissent, I may want to add a few words of my own because I am quite troubled about the almost total disregard of the District Court's findings of fact which were sustained by the Court of Appeals.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

'84 JAN 24 A9:42

January 23, 1984

Re: 82-1256 - Lynch v. Donnelly

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 8, 1984

Re: 82-1256 - Lynch v. Donnelly

Dear Harry:

Your additional dissent is, I believe, most constructive. It is the sort of opinion which you may prefer to issue simply in your own name. If, however, you would like company, I would be very happy to have you add my name to it.

Respectfully,



Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 1, 1983

No. 82-1256 Lynch v. Donnelly

Dear Chief,

Please join me. I will be circulating a
separate concurrence.

Sincerely,



The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: DEC 1

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[December —, 1983]

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. *E. g.*, *Larkin v. Grendel's Den*, — U. S. — (1983). 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

PP-1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: DEC 15 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[January —, 1984]

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. *E. g.*, *Larkin v. Grendel's Den*, 459 U. S. 116 (1983). 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

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 6, 1984

Re: No. 82-1256 Lynch v. Donnelly

Dear Chief,

Your Draft No. 5 raises no problems as far as
I am concerned.

Sincerely,

Sandra

The Chief Justice

cc: Justice White
Justice Powell
Justice Rehnquist

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: FEB 8 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[February —, 1984]

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

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 15, 1984

No. 82-1256 Lynch v. Donnelly

Dear Chief,

I agree with all the changes in the 5th Draft
and am "still with you."

Sincerely,

Sandra

The Chief Justice

cc: Justice White
Justice Powell
Justice Rehnquist

Pp. 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: 2/28/84

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS *v.*
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

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. *E. g.*, *Larkin v. Grendel's Den*, 459 U. S. 116 (1983). 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

W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 2, 1984

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SUPREME COURT U.S.
JUSTICE SANDRA DAY O'CONNOR

No. 82-1256 Lynch v. Donnelly

'84 MAR -5 A10:22

Dear Chief,

I will let you know by the end of the day tomorrow if I can be ready for a Monday announcement of Lynch. As you know, there have been many changes going back and forth. Some have required additional adjustments in my opinion.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

2, 4, 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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JUSTICE

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'84 MAR -5 A10:22

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1256

DENNIS LYNCH, ETC., ET AL., PETITIONERS v.
DANIEL DONNELLY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[March —, 1984]

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. *E. g.*, *Larkin v. Grendel's Den*, 459 U. S. 116 (1983). 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

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 5, 1984

RECEIVED
SUPREME COURT U.S.
JUSTICE SANDRA DAY O'CONNOR

'84 MAR -5 A10:22

Re: No. 82-1256 Lynch v. Donnelly

Dear Chief,

I have made the final changes in my concurring opinion. I have no objection to releasing the decision today.

Sincerely,

Sandra Day O'Connor

The Chief Justice

Copies to the Conference