

A CHRISTMAS CAROL IN THE PARK FROM THE SUPREMES

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In the recent case of *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), the Supreme Court of the United States considered “whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche or Nativity scene in an annual Christmas display.” The fact surrounding the case were as follows:

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 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, 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 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 animals all ranging in height from 5” to 5’. In 1973, when the present creche was acquired, it cost the city \$1365; it is now valued at \$200. The erection and dismantling of the creche costs the City about \$20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.

Residents of Pawtucket and members of the local affiliate of the American Civil Liberties Union brought suit in federal district court challenging the City’s inclusion of the creche in the annual display. The federal district court found that the creche violated the Establishment Clause, binding on the states through the Fourteenth Amendment to the United States Constitution.

According to the federal district court, “by including the creche in the Christmas display, the City has tried to endorse and promulgate religious beliefs and that erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents.” In the

opinion of the federal district court, this “appearance of official sponsorship” conferred “more than a remote and incidental benefit on Christianity.” The federal district court, therefore, permanently enjoined the City from including the creche in its display.

The U.S. Court of Appeals for the First Circuit affirmed the lower court’s judgment. On a writ of certiorari, the United States Supreme Court granted review of this decision. Chief Justice Warren Burger delivered the opinion of the Court.

According to Burger, “the purpose of the Establishment and Free Exercise Clauses of the First Amendment is to prevent, as far as possible, the intrusion of either the church or the state into the precincts of the others.” On the other hand, “the Court has recognized that total separation is not possible in an absolute sense.” Consequently, Burger found “some relationship between government and religious organizations is inevitable.” Therefore, as described by Burger, each Establishment Clause case must “reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other and the reality that total separation of the two is not possible.”

Despite the Establishment Clause prohibition against “an established church or anything approaching it,” Burger acknowledged “an unbroken history of official acknowledgement by all three branches of government for the role of religion in American life from at least 1789.” At that time, the drafters of the United States Constitution provided for the employment of congressional chaplains to offer daily prayers in Congress without noting any Establishment Clause problem. This practice continues to the present day.

Burger pointed to the celebration of Thanksgiving as further proof of the government officially recognizing holidays with religious significance. According to Burger, Thanksgiving “has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.” Other examples “of reference to our religious heritage” referenced by Burger included: “the statutorily prescribed national motto ‘In God We Trust’ which Congress and the President mandated for our currency” and “the language ‘One Nation under God’ as part of the Pledge of Allegiance to the American Flag.” In addition, Burger cited public art galleries and the Capitol itself among “countless other illustrations of the Government’s acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber [of the Supreme Court] in

which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

In determining whether challenged governmental conduct “establishes a religion or religious faith, or tends to do so,” the Court has “often found it useful to inquire whether the challenged law or conduct has secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.” This three part test (secular purpose, primary effect to advance or inhibit religion, and excessive entanglement) was enunciated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Despite the three part *Lemon* test, Burger emphasized the Court’s “unwillingness to be confined to any single test or criterion in this sensitive area.” Consequently, Burger stated: “In this case, the focus on our inquiry must be on the creche in the context of the Christmas season.”

As described by Burger the federal district court in this particular instance “inferred from the religious nature of the creche that the City has no secular purpose for the display.” According to Burger, the lower court “plainly erred by focusing exclusively on the creche.”

When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are indicated. The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

As a result, Burger concluded that the district court’s “inference, drawn from the religious nature of the creche, that the City has no secular purpose was, on this record clearly erroneous.”

In this case, the City had contended that the purposes of the display were “exclusively secular.” As noted by Burger, it was not necessary that the City prove that the purpose of the creche was 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.”

Burger also found that this particular Christmas display did “not create excessive entanglement between religion and government.”

Entanglement is a question of kind and degree . . . There is [in this case] no evidence of

contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the City owns the creche, now valued at \$200, the tangible material it contributes is *de minimus*. In many respects the display requires far less ongoing, day-to-day interaction between the church and state than religious paintings in public galleries.

Based upon the above analysis, Burger and a majority of the Justices on the Supreme Court held that "notwithstanding the religious significance of the creche, the City of Pawtucket has not violated the Establishment Clause of the First Amendment."

#### JUSTICE O'CONNOR CONCURS

In a separate concurring opinion, Justice O'Connor found "the central issue is whether Pawtucket has endorsed Christianity by its display of the creche." To answer this issue, O'Connor would "examine both what Pawtucket intended to communicate in displaying the creche and what message the City's display actually conveyed."

According to O'Connor, the secular purpose prong of the Lemon test would depend on "whether the government intends to convey a message of endorsement or disapproval of religion." Applying this principle to the facts of the case, O'Connor found that "Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions."

The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

O'Connor, therefore, found that this display was not "intended to endorse or has the effect of endorsing Christianity."

#### JUSTICE BRENNAN DISSENTS

In a dissenting opinion, Brennan characterized Burger's majority opinion as reaching "an essentially narrow result which turns largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared." In Brennan's opinion, "Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith."

The "primary effect" of including a nativity scene in the City's display is . . . to place the government's imprimatur of approval on the particular religious beliefs exemplified by

the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views... The effect on minority religious groups, as well as those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit. In this case, when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Brennan attributed "the clear religious effect of the creche" to the City's positioning of the creche "in a central and highly visible location within the Hodgson Park display." In addition, Pawtucket had failed to provide a cautionary message or "explanatory plaques disclaiming any sponsorship of religious beliefs associated with the creche." As described by Brennan, "the City has done nothing to disclaim government approval of the religious significance of the creche, to suggest that the creche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalogue of ethnic and religious celebrations, or to disassociate itself from the religious content of the creche."

According to Brennan, "even in the context of Pawtucket's seasonal celebration, the creche retains a specifically Christian religious meaning." Consequently, Brennan refused to accept "the notion implicit in today's decision [as expressed by Chief Justice Burger and the majority] that non-Christians would find that the religious content of the creche is eliminated by the fact that it appears as part of the City's otherwise secular celebration of the Christmas holiday.

The nativity scene is clearly distinct in its purpose and effect from the rest of the Hodgson Park display for the simple reason that it is the only one rooted in a biblical account of Christ's birth. It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic re-enactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith.

When government appears to sponsor such religiously inspired views, we cannot say that the practice is so separate and so indisputably marked off from the religious function, that it may fairly be viewed as reflecting a neutral posture toward religious institutions. To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment

Clause. . .

To suggest, as the Court does, that such symbol is merely “traditional” and therefore no different from Santa’s house or reindeer is not only offensive to those who for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of “history” nor an unavoidable element of our national “heritage.”

As described by Brennan, when government chooses “to incorporate some arguably religious element into its public ceremonies that acknowledgement must be impartial.” Further, “it must not tend to promote one faith or handicap over another.” Finally, “it should not sponsor religion generally over non-religion.”

Brennan found that the prior Establishment Clause decisions of the Supreme Court identified at least three principles which government acknowledgement of religion must satisfy to be constitutional:

- 1) “Although the government may not be compelled to do so by the Free Exercise Clause [First Amendment freedom of religion guarantee], it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion.” (e.g. declaring December 25th as a public holiday).
- 2) “While a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today for solely secular purposes.” (e.g. Sunday as a uniform day of rest).
- 3) “Government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture.” (e.g. references to God in the Pledge of Allegiance).

Applying these three principles to the Pawtucket creche, Brennan found that this particular governmental acknowledgement of religion did not fit into any of the permissible categories.

Inclusion of the creche is not necessary to accommodate individual religious expression. This is plainly not the case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land. Nor is the inclusion of the creche necessary to serve wholly secular goals; it is clear that the City’s secular purposes of celebrating the Christmas holiday and promoting retail commerce can be fully served without the creche. And the creche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we

accept in ceremonial phrases or in other contexts that assure neutrality. The religious works on display at the National Gallery, Presidential references to God during the Inaugural Address, or the national motto present no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the creche begins and ends with reverence for a particular image of the divine.

#### BLACKMUN AND STEVENS DISSENT

In a separate dissenting opinion Justice Blackmun joined by Justice Stevens echoed Brennan's disfavor with the decision of the majority. "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, [testified on the record of the district court that they] undertook a crusade to "keep Christ in Christmas," [through the use of the creche in the display], the Court has declared that presence virtually irrelevant. The majority urges that the display "with or without a creche" recalls "the religious nature of the Holiday," and "engenders a friendly community spirit of good will in keeping with the season." 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 Christmas spirit, brotherhood, peace, and let loose with their money." The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.

According to Blackmun, such governmental use of the creche represented "misuse of a sacred symbol." "The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence."