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Greenhalgh: Establishment Clause

THE ESTABLISHMENT CLAUSE AND GOVERNMENT RELIGIOUS DISPLAYS: THE COURT THAT STOLE CHRISTMAS

INTRODUCTION

Each year, around early November, America begins to see displays of the following images strewn across the country's landscape: candy striped poles dispersed among reindeer and snowmen; Christmas trees adorned with festive ornaments; nativity scenes and depictions of Santa Claus on his sleigh; and lighted menorahs. In fact, such displays are so much a part of our culture that they are expected to appear annually in the late autumn season. For example, consider an annual display that is located in the front courtyard of a County Hall of Records building in my home state of New Jersey. The scene consists of a rendition of the Christian nativity, representing the birth of Jesus in a manger in Bethlehem.¹ On the opposite side of the courtyard is a menorah, a symbol widely identified with the Jewish religion. The lighting of the menorah has been recognized as the primary ritual for the Jewish people at Hanukah.² Such common winter scenes have ignited controversy and chaos in the law involving the constitutionality of government displays of religious symbols.³

The annual appearances of winter scenes that contain religious symbols are a part of the American tradition. However, when the government sponsors holiday displays, it may be violative of First Amendment principles. The Establishment Clause of the First Amendment prohibits Congress from making a law "respecting an establishment of religion."⁴ Yet, when the issue involves the

¹ *ACLU v. Schundler*, 104 F.3d 1435, 1438 (3d Cir. 1997) (stating further that the event has "particular significance to the Christian religion, which worships Jesus as the Son of God and the messiah."), *cert. denied*, 117 S. Ct. 2434 (1997).

² *Id.* The menorah is "a nine branched candelabrum used by the Jews to commemorate the Miracle of the Oils, a seminal event in Jewish History that took place during the rededication of the Temple of Jerusalem." *Id.* See *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

³ See *infra* notes 27-150 and accompanying text.

⁴ U.S. CONST. amend. I. The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion." *Id.*

determination of whether a specific government-backed religious display violates the Establishment Clause, the Supreme Court has left a hodgepodge of rules that offer little assistance. Analyzing the legality of these displays has proven to be a painstaking task.⁵

It may seem surprising that reindeers, Christmas trees, and menorahs can be the source of so much conflict. This article illustrates and analyzes continuing problems associated with jurisprudence involving government-backed religious displays. Part I will discuss the five landmark United States Supreme Court decisions that have left inconsistent guidelines with which lower courts and communities struggle when determining the constitutionality of public displays of religious holiday symbols.⁶ Part II will comment on two lower court decisions that illustrate how these inconsistent opinions from the Supreme Court are dealt with by the lower courts.⁷ Part III will explore what commentators deem as probable reasons for the disturbing state of the law pertaining to government-backed holiday displays.⁸ Finally, Part IV suggests an analysis that would better suit jurisprudence involving public holiday displays.⁹

I. FIVE SEMINAL SUPREME COURT CASES

The five modern seminal United States Supreme Court cases most referred to for guidance by courts when determining the constitutionality of public holiday displays are: *Everson v. Board of Education*,¹⁰ *Lemon v. Kurtzman*,¹¹ *Lynch v. Donnelly*,¹² *Allegheny County v. American Civil Liberties Union (ACLU)*,¹³ and *Capitol Square Review & Advisory Board v. Pinette*.¹⁴ These five

⁵ See *infra* notes 27-150 and accompanying text.

⁶ See *infra* notes 10-85 and accompanying text..

⁷ See *infra* notes 86-150 and accompanying text.

⁸ See *infra* 151-27 and accompanying text.

⁹ See *infra* notes 228-282 and accompanying text.

¹⁰ 330 U.S. 1 (1947).

¹¹ 403 U.S. 602 (1971).

¹² 465 U.S. 668 (1984).

¹³ 492 U.S. 573 (1989).

¹⁴ 515 U.S. 753 (1995).

cases provide intriguing insights as to why there exists tremendous controversy when analyzing the constitutionality of these displays.

A. *Everson v. Board of Education*

Everson v. Board of Education,¹⁵ decided in 1947, was the Court's first modern discussion and interpretation of the Establishment Clause.¹⁶ The *Everson* court proclaimed that both the federal government and state governments are prohibited from setting up a church.¹⁷ Moreover, they may not pass laws aimed at aiding religion. *Everson's* most important assertion was that the First Amendment erected a "high and impregnable wall" between Church and State.¹⁸ However, the height of this "wall" remains problematic for the legal community.¹⁹ The *Everson* opinion is also significant for the Court's application of the Establishment Clause to the states via the Fourteenth Amendment.²⁰

¹⁵ 330 U.S. 1.

¹⁶ Kyle D. Freeman, *Robinson v. City of Edmond*, 32 TULSA L.J. 605, 605 (1997). The *Everson* court determined the constitutionality of a New Jersey statute that authorized local school districts to enter into contracts which provided for the transportation of children between their schools and homes. *Everson*, 330 U.S. at 3. Pursuant to the New Jersey statute, a township school board ("Board") allowed cost reimbursement to parents who incurred expenses by paying for their children's transportation to school. *Id.* A portion of these funds was utilized for the payment of some children's transportation to parochial schools. *Id.* The Appellant claimed that the Board's reimbursement for transportation to parochial schools violated the First Amendment. *Id.* at 18. Despite the Court's strong contention that a lofty bulwark between church and state must be maintained, the Court found that the statute passed constitutional muster. *Id.* The Court specifically asserted that New Jersey did not contribute funds directly to the parochial schools. *Id.* Justice Jackson, in his dissent, opined that the majority's conclusion was inconsistent with its "high and impregnable wall" proclamation. *Id.* at 19 (Jackson, J., dissenting).

¹⁷ *Id.* at 15.

¹⁸ *Id.*

¹⁹ See *infra* notes 27-227 and accompanying text.

²⁰ *Everson*, 330 U.S. at 8. The Due Process Clause of the United States Constitution states in pertinent part: "No person shall deprive any person of life, liberty, or property without due process of Law..." U.S. CONST. amend. XIV, § 1.

B. Lemon v. Kurtzman

Although the *Everson* Court announced that the Establishment Clause erected a lofty wall between Church and State,²¹ it was not until 1971, when the Supreme Court decided *Lemon v. Kurtzman*,²² that the Court attempted to provide explicit guidelines pertaining to the Establishment Clause.²³ This decision is noted for the creation of what is called the “*Lemon* test.”²⁴ Most courts use the well-known tripartite test that was developed by the *Lemon* court in determining whether a specific government action is in violation of the Establishment Clause. The test’s three requirements are as follows: “(1) the government activity must have a secular purpose; (2) the activity must have a principal or primary effect that neither advances nor inhibits religion; and (3) the activity must not involve excessive entanglement of government with religion.”²⁵ These criteria, nonetheless, have failed to produce predictable results, especially in the realm of government displays of religious symbols.²⁶

C. Lynch v. Donnelly

The Supreme Court first applied the *Lemon* test to a government display of religious symbols in its 1984 decision in *Lynch v.*

²¹ See *supra* note 18 and accompanying text.

²² 403 U.S. 602.

²³ Freeman, *supra* note 16, at 621.

²⁴ *Lemon*, 403 U.S. at 602.

²⁵ *Id.* at 612-13. The *Lemon* court used its new test to decide the constitutionality of certain provisions of Rhode Island and Pennsylvania. *Id.* at 606. The provisions authorized salary supplements to church-related elementary and secondary schools. *Id.* Pennsylvania’s program entitled financial reimbursement for the cost of salaries of teachers, books, and other teaching material used in secular subjects. *Id.* at 606-07. The Rhode Island statute allowed for a fifteen-percent salary supplement to be paid directly to non-public elementary school teachers. *Id.* at 607. The Court found both statutes unconstitutional under the Establishment Clause for failing the third prong of the test, excessive entanglement. *Id.*

²⁶ See *infra* notes 27-227 and accompanying text.

Donnelly.²⁷ The display at issue in *Lynch* was exhibited annually by the city of Pawtucket, Rhode Island ("City") in a privately owned park located in the center of a shopping district.²⁸ The scene consisted of Santa's house, reindeer, candy-striped poles, carolers, clowns, elephants, a colossal number of colored lights, a large banner containing the words "SEASONS GREETINGS," a Christmas tree, and a creche.²⁹ The *Lynch* court noted that the display resembled those found in hundreds of government sites across the country during the Christmas season.³⁰

City residents and members of the American Civil Liberties Union (ACLU) challenged the constitutionality of the City's inclusion of the creche in the display.³¹ In determining whether the display was constitutional under the Establishment Clause, the Court stressed that when dealing with Establishment Clause issues there must be a balancing between the need to prohibit unnecessary infringement of either Church or State upon the other, and the realization that total distance between Church and State is unrealistic.³² One can see the Court's uncertainty as to the height of the wall between Church and State.

The Court proceeded to cite events in American history and cultural instances, such as President Washington's proclamation of Thanksgiving Day as a public holiday, in support of a more lenient interpretation of the Establishment Clause.³³ In addition, the Court

²⁷ 465 U.S. 668 (1984). In *Lynch*, the Court analyzed a holiday display in light of each prong of the *Lemon* test in ruling the scene was constitutional. *Id.* at 680-85. See *supra* note 25 and accompanying text. This decision is also known for Justice O'Connor's concurrence which deals primarily with the second prong of the *Lemon* test. *Id.* at 687 (O'Connor, J., concurring).

²⁸ *Id.* at 671. The City erected the display in conjunction with the downtown retail merchant's association. *Id.* Expenditures by the City for the creche's maintenance included \$1,365.00 for its purchase, \$20.00 per year for its erection and dismantling, and minor expenses for the creche's lighting. *Id.*

²⁹ *Id.* The creche consisted of the "the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals." *Id.*

³⁰ *Id.*

³¹ *Id.* See *supra* note 29 and accompanying text.

³² *Lynch*, 465 U.S. at 672.

³³ *Id.* at 675 (stating that Thanksgiving has retained its theme of expressing thanks for Divine aid just as Christmas has retained its religious significance). The Court also referred to the first week of the First Session of the First

cited to *Stone v. Graham*³⁴ and *Abington School District v. Schempp*³⁵ and concluded that it was necessary to look at the creche “in the context of the Christmas season.”³⁶ Accordingly, the Court looked at the first prong of the *Lemon* test and decided there was a secular purpose behind the City’s display of the creche.³⁷ The Court found the creche was erected for the secular purpose of celebrating Christmas and illustrating the origins of the holiday.³⁸ As for the second prong of the *Lemon* test, the Court held that the City’s inclusion of the creche in the exhibit did not give rise to the appearance that the City endorsed Christianity.³⁹ Finally, the Court concluded that the City’s display was not offensive to the test’s third prong; the display did not foster excessive entanglement by the government with religion.⁴⁰

Congress in 1789. *Id.* at 674 (noting specifically that during the week that Congress approved the Establishment Clause as part of the Bill of Rights it passed legislation allowing for paid chaplains in the House and Senate). The Court additionally referred to the national motto “In God We Trust.” *Id.* at 676 (citing 36 U.S.C. § 186). The Court also referred to government subsidized art galleries exhibiting religious displays and the City’s display. *Id.* at 677 (noting the National Gallery in Washington displays works carrying primarily Christian connotations, such as the Last Supper and the Crucifixion).

³⁴ 449 U.S. 39 (1980) (holding the posting of the Ten Commandments on public classroom walls as Establishment Clause violations because the posting had no secular purpose, whereas “the Bible may constitutionally be used in an appropriate study of history.”).

³⁵ 347 U.S. 203 (1963) (holding a requirement of daily Bible readings as unconstitutional, but noting that such study “when presented objectively as part of a secular program of education, may not be effected consistently with the first amendment”).

³⁶ *Lynch*, 465 U.S. at 679.

³⁷ *Id.* at 681.

³⁸ *Id.* The Court asserted that even though there may be religious undertones to a display, as long as some secular purpose behind the display exists there is no Establishment Clause violation. *Id.* at 680.

³⁹ *Id.* at 682 (stating “We are unable to discern a greater aid to religion deriving from inclusion of the creche than from benefits and endorsement previously held not violative of the Establishment Clause.”). The *Lynch* court did concede that the display had the effect of advancing religion to an extent; however, the Court justified its holding and claimed that precedent case law anticipated the occasional advancement of religion from government action. *Id.* at 683.

⁴⁰ *Id.* at 684. “There is nothing here, of course, like the ‘comprehensive, discriminating, and continuing state surveillance’ or the ‘enduring

In a concurring opinion, Justice O'Connor agreed with the majority on the constitutionality of the display.⁴¹ However, Justice O'Connor proposed a modification of the *Lemon* test, now known as the "endorsement test."⁴² In essence, Justice O'Connor framed the issues as whether the government intends to disseminate a message endorsing or disapproving of religion and whether the government action has the effect of sending a message of endorsement or disapproval.⁴³

When applying the "endorsement test" to the display in *Lynch*, Justice O'Connor recognized that holiday displays have historical significance; therefore, they are not understood to represent government endorsement of religion.⁴⁴ In other words, Justice O'Connor believes the historical context of the display must be analyzed in detail to decide its constitutionality effectively under the Establishment Clause.⁴⁵ Justice O'Connor's endorsement analysis appeared again in later decisions involving religious displays. In fact, the Court in *Allegheny County v. ACLU* incorporated the endorsement test into its analysis.⁴⁶

D. Allegheny County v. ACLU

The next major Supreme Court decision involving the constitutionality of a government-backed religious display was *Allegheny County v. ACLU*.⁴⁷ *Allegheny County* like *Lynch*, exemplifies the Court's departure from a strict application of the

entanglement' present in *Lemon*." (citations omitted). Specifically, the Court noted there was no contact with church authorities concerning the exhibit and no lofty expenses for maintenance. *Id.*

⁴¹ *Id.* at 687 (O'Connor, J., concurring).

⁴² *Id.* (O'Connor, J., concurring). Justice O'Connor proclaimed that "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688 (O'Connor, J., concurring).

⁴³ *Id.* at 691 (O'Connor, J., concurring).

⁴⁴ *Id.* at 693 (O'Connor, J., concurring).

⁴⁵ *Id.* (O'Connor, J., concurring).

⁴⁶ See *infra* notes 47-64 and accompanying text.

⁴⁷ 492 U.S. 573 (1989).

tripartite *Lemon* test, specifically when dealing with government-backed displays of religious symbols.⁴⁸

At issue in *Allegheny County* were two holiday displays situated on public property in the City of Pittsburgh, Pennsylvania and owned by the County of Allegheny ("County").⁴⁹ The first display consisted of a creche located on the Grand Staircase of the County Courthouse.⁵⁰ In contrast to the *Lynch* scene, no other figures, such as Santa Claus and reindeer, were included in the holiday exhibit.⁵¹

Following Justice O'Connor's endorsement analysis, the Court looked at whether the display in its setting had the effect of "endorsing or disproving religious beliefs."⁵² Consequently, the Court held that the creche exhibit was offensive to the Establishment Clause.⁵³ The Court opined that the context of the creche sent a message of governmental endorsement.⁵⁴

⁴⁸ In fact, Justice Blackmun, the author of the majority opinion in *Allegheny County* proclaimed the decision as a departure from *Lemon* and a move toward a "refined definition of governmental action that unconstitutionally advances religion." *Id.* at 592.

⁴⁹ *Id.* at 578. Recall that the display at issue in *Lynch* was located in a privately owned park. *See supra* note 28 and accompanying text.

⁵⁰ *Allegheny County*, 492 U.S. at 580. In addition, the County placed a fence around the creche with a plaque attached that proclaimed: "This Display is Donated by the Holy Name Society." *Id.* Some greenery, such as poinsettias circled the fence. *Id.* Furthermore, an angel occupied the display's pinnacle. *Id.*

⁵¹ *Id.* at 580-81; *see supra* note 29 and accompanying text.

⁵² *Allegheny County*, 492 U.S. at 597.

⁵³ *Id.* at 621 (stating the creche display has "an unconstitutional effect.").

⁵⁴ *Id.* The *Allegheny County* court saw the creche display as different from the scene in *Lynch*; the creche stood alone on the Hall's Grand Staircase, unaccompanied by objects that diluted the scene's religious elements. *Id.* at 598. The Court stated that "unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." *Id.* According to Justice Blackmun, the flowers that surrounded the creche added to the appearance of the government's endorsement of Christianity, whereas the figures in the *Lynch* scene detracted from the appearance of religious endorsement. *Id.* at 621 (stating the "floral decoration surrounding the creche cannot be viewed as somehow equivalent to the secular symbols in the overall *Lynch* display."). Furthermore, the Court found it noteworthy that the creche was located on the Grand Staircase, one of the most prominent locations in the County. *Id.*

The Court arrived at a contrary conclusion as to the constitutionality of the second display. The second display located outside the City-County Building consisted of a menorah adjacent to a Christmas tree.⁵⁵ The large size of the Christmas tree adjacent to the menorah and the widely accepted view of the Christmas tree as a secular symbol, conveyed a secular message that recognized Christmas and Hanukah traditions as contemporaneous alternative customs.⁵⁶

In his concurring and dissenting opinion, Justice Kennedy agreed that the County's manifestation of the menorah was constitutional, further disagreeing that the creche display was an Establishment Clause violation.⁵⁷ Justice Kennedy sharply criticized the Court's use of the endorsement test and proposed what is known as the "coercion test."⁵⁸ Justice Kennedy expressed that applying an endorsement analysis to holiday displays exudes an unfounded belligerence towards religion.⁵⁹ According to Kennedy, the government cannot coerce one to believe in or exercise any religion and the government cannot directly benefit any religion in a manner that would establish a State Church.⁶⁰

Kennedy applied the coercion test to the two displays at issue and concluded that in allowing the displays on government premises the County simply recognized the celebratory nature of the season;

⁵⁵ *Id.* at 578. The scene also contained a sign saluting liberty. *Id.* The Court framed the issue as whether the display sent a message of endorsement of Christianity and Judaism, or whether the display appeared secular in nature as a celebration of the winter holiday season. *Id.* at 616.

⁵⁶ *Id.* at 620.

⁵⁷ *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

⁵⁸ *Id.* at 655-79 (Kennedy, J., concurring in part and dissenting in part).

⁵⁹ *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

⁶⁰ *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy gave an example of a coercive government act under the Establishment Clause – a city permitting a large Latin Cross on the roof of a government hall. *Id.* at 661 (Kennedy, J., concurring in part and dissenting in part). He contrasted this to "passive and symbolic" acts of governmental religious accommodation that gives merely and incidental benefit to religion, such as the display in *Lynch*. *Id.* at 662 (Kennedy, J., concurring in part and dissenting in part); see *supra* note 39 and accompanying text.

the County did not use governmental authority to proselytize.⁶¹ The Justice described the creche and menorah as “passive symbols” that a viewer can disagree with.⁶² Furthermore, he stated that whether a creche be adjacent to poinsettias and wishing wells is irrelevant; rather, the seasonal context is what makes the creche lawful under the Establishment Clause.⁶³ The next section will illustrate a decision in which the Court used the context of a display to formulate a per se rule for government sponsored religious exhibits.⁶⁴

E. Capitol Square Review Board v. Pinette

In the 1995 decision of *Capitol Square Review Board v. Pinette*,⁶⁵ the Supreme Court determined whether a state offends the Establishment Clause when, under a religiously neutral state policy, a state authorizes a private party to erect an unaccompanied religious symbol in a public plaza.⁶⁶ The park at issue in *Capitol Square* was owned by the state of Ohio (“State”) and encompassed the government’s Statehouse.⁶⁷ As a “traditional public forum,” the park was used regularly for a variety of public events, such as speeches and festivals.⁶⁸ The Capitol Square Review and Advisory Board (“Board”) had the responsibility of regulating public access to the park.⁶⁹ Litigation arose from the Board’s denial of the Klu

⁶¹ *Allegheny County*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

⁶² *Id.* (Kennedy, J., concurring in part and dissenting in part) (citing *Lynch*, 465 U.S. 668).

⁶³ *Id.* at 668. (Kennedy, J., concurring in part and dissenting in part) (citing *Lynch*, 465 U.S. 668).

⁶⁴ See *infra* notes 65-85 and accompanying text.

⁶⁵ 515 U.S. 753 (1995).

⁶⁶ *Id.* at 757.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* The Board’s regular conduct had been to allow a wide range of diverse people to sponsor events in the plaza. *Id.* at 758. In addition, the Board had allowed unattended exhibits to be erected in the park, such as a lighted Christmas tree sponsored by the State and a privately owned menorah. *Id.*

Klux Klan's ("KKK") application to place a cross in the plaza from December 8, 1993 to December 24, 1993.⁷⁰

In its review of the Sixth Circuit's decision that the exhibit of the Cross did not violate the Establishment Clause, the Court recognized that the symbolic display was a form of private expression and the park had a long-standing tradition of sponsoring a broad variety of expression.⁷¹ Nevertheless, the Court noted that a state's need to abide by the Establishment Clause is sufficient to justify "the imposition of content-based regulations" on speech.⁷² The Court determined the issue of whether the government's interest in adhering to the Establishment Clause was implied in the instance of the cross display. The Court concluded that the plaza was a traditional public gathering place; therefore, any benefit to religion arising from an activity in the plaza was merely incidental.⁷³

Contrary to the Board's argument that an endorsement test should be used here, the Court established that a privately sponsored display in a public forum is constitutional *per se*.⁷⁴ Viewers of the cross were aware that the park had a history of

⁷⁰ *Id.*

⁷¹ *Id.* at 759; see also *Knights of the Klu Klux Klan v. Capitol Square Review and Advisory Board*, 30 F.3d 675 (6th Cir. 1994).

⁷² *Capitol Square*, 515 U.S. at 757.

⁷³ *Id.* at 759, 762. In its analysis, the Court cited to *Lamb's Chapel v. Center Moriches Union Free School Dist.* *Id.* at 761-62. See also *Lamb's Chapel v. Center Moriches Free School Dist.*, 508 U.S. 384 (1983). *Lamb's Chapel* involved a school district's authorization of private groups to use school-premises during after-school hours. *Id.* at 386. The school district did not allow the school facilities to be used for religious purposes. *Id.* at 387. Accordingly, suit was brought against the school district when a church was forbidden to use the facilities to show a series of films. *Id.* at 388. The Court held that the film series was not an Establishment Clause violation under the *Lemon* test. *Id.* at 395. In applying the *Lamb's Chapel* holding to the KKK's Cross, the Court in *Capitol Square* held that since the plaza is traditionally a public gathering place like the school in *Lamb's Chapel*, any benefit to religion arising from an activity in the plaza is merely incidental and not a constitutional violation. *Capitol Square*, 515 U.S. at 762. "The *Lamb's Chapel* reasoning applies *fortiori* here, where the property at issue is not a school, but a full-fledged public forum." *Id.*

⁷⁴ *Id.* at 770 (stating that religious expression cannot be violative of the Establishment Clause "where it (1) is purely private and (2) occurs in a traditional or designated public forum.").

being a neutral public forum for the diverse expression of private groups. Therefore, it was not necessary to subject the exhibit to an endorsement analysis. In sum, the *Capitol Square* court held that the erection of the KKK cross in a public plaza was not an Establishment Clause violation.⁷⁵

Justice O'Connor's concurring opinion disagreed that a privately sponsored display in a public forum is constitutional per se.⁷⁶ Justice O'Connor indicated that the endorsement test is the appropriate analysis for private symbols in a public plaza.⁷⁷ In addition, Justice O'Connor described the "reasonable person" used in an endorsement analysis.⁷⁸ She asserted that the reasonable observer in the endorsement inquiry is one who is mindful of the "history and context of the community and forum in which the display appears."⁷⁹ Consequently, the Justice concluded that the reasonable observer would not view the State's allowance of the KKK's exhibit as religious endorsement.⁸⁰

Conversely, Justice Stevens, in his dissenting opinion, defined the reasonable observer as one who is unknowledgeable of the

⁷⁵ *Id.*

⁷⁶ *Id.* at 772 (O'Connor, J., concurring).

⁷⁷ *Id.* (O'Connor, J., concurring). Justice O'Connor feels that an impermissible communication of endorsement could be transmitted even where the speech does not involve direct government involvement. *Id.* at 774 (O'Connor, J., concurring). O'Connor did recognize that the private ownership of the cross, along with the symbol's location in a public square, is valuable to Establishment Clause scrutiny under an endorsement analysis. *Id.* at 775 (O'Connor, J., concurring). She noted that such factors as ownership and location are to be considered when deciding if the reasonable observer would see the government action as religious endorsement. *Id.* (O'Connor, J., concurring). However, these factors should only be considerations, not triggers, for a "fixed per se rule." *Id.* at 778 (O'Connor, J., concurring).

⁷⁸ *Id.* at 780 (O'Connor, J., concurring).

⁷⁹ *Id.* (O'Connor, J., concurring). O'Connor noted that the reasonable observer should be deemed as possessing the knowledge that the cross is a religious sign and the park is government owned. *Id.* (O'Connor, J., concurring). She further stated that the reasonable observer should be deemed aware of the nature of the park as a forum for diverse activities. *Id.* (O'Connor, J., concurring).

⁸⁰ *Id.* at 782 (O'Connor, J., concurring).

history and context of the community.⁸¹ Justice Stevens' definition extends constitutional protection to the average passerby.⁸²

The conflicting rationales that characterize the *Capitol Square* court follow the pattern of the four other previously discussed decisions.⁸³ These five seminal cases illustrate that the issue of the constitutionality of public religious displays is, as one commentator suggests, "an area of jurisprudence beset by judicial difficulties."⁸⁴ In addition to these Supreme Court decisions, lower court cases further exemplify the precarious status of the law in this area.⁸⁵

II. TWO LOWER COURT DECISIONS

The splintered majorities, fact-sensitive inquiries, and complex plurality opinions that characterize the Supreme Court decisions involving the constitutionality of public religious displays are problematic for lower courts and communities: Which displays offend the Constitution?⁸⁶ The Second and Third Circuits are examples of two courts that have had to decipher the potpourri of painstaking tests and inconsistencies left by the Supreme Court. This next section will delve into two lower court decisions relating to government-backed religious displays - *American Civil Liberties Union (ACLU) v. Scundler*⁸⁷ and *Elewiski v. City of Syracuse*.⁸⁸

⁸¹ *Id.* at 807 (Stevens, J., dissenting).

⁸² *Id.* (Stevens, J., dissenting).

⁸³ See *supra* notes 15-64 and accompanying text.

⁸⁴ Steven B. Goodman, *Constitutional Law-Public Display of Religious Symbols And The Establishment Clause-Doe v. Small*, 65 TEMP. L. REV. 259, 274 (1991).

⁸⁵ See *infra* notes 86-150 and accompanying text.

⁸⁶ See *infra* notes 89-150 and accompanying text; see also Recent Cases, *Constitutional Law-Establishment Clause-Second Circuit Holds That City's Display Of A Creche In A Public Park Does Not Unconstitutionally Endorse Religion-Elewiski v. City of Syracuse*, 111 HARV. L. REV. 2462, 2462 (1998); Kathryn R. Williams, *Constitutional Law-Squeezing Lemon*, 69 TEMP. L. REV. 1609, 1609 (1996).

⁸⁷ 104 F.3d 1435, 1438 (3d Cir. 1997), *cert. denied*, 117 S. Ct. 2434 (1997).

⁸⁸ 123 F.3d 51 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1186 (1998).

A. ACLU v. Schundler

For many years, the city of Jersey City ("City") displayed a creche and a menorah during the winter holiday season.⁸⁹ In 1994 Hanukkah ended before the arrival of Christmas; therefore, the City removed the menorah before the creche was erected,⁹⁰ and displayed a decorated Christmas tree adjacent to the creche.⁹¹

Subsequently, the American Civil Liberties Union ("ACLU") transmitted a letter to the City's mayor asking the City to reevaluate its annual tradition of erecting religious symbols on public property.⁹² Two days later, the City erected a sign next to the display that read, "Through this display and others throughout the year, the City of New Jersey is pleased to celebrate the diverse cultural and ethnic heritages of its peoples."⁹³

Notwithstanding an injunction from the district court, which deemed the 1994 display a constitutional violation,⁹⁴ the City erected the annual display in front of City Hall on December 13, 1995.⁹⁵ Accordingly, the ACLU applied to the district court for a

⁸⁹ *Schundler*, 104 F.3d at 1438.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* At the time the ACLU filed its action with the court, the display was comprised of the creche, the evergreen tree, and the sign. *Id.* The United State District Court for the District of New Jersey decided in favor of the ACLU, based on the ACLU's claims that the City's display of the symbols violated the Establishment Clause of the United States Constitution and the Religious Preference Clause of the New Jersey Constitution. *Id.* at 1439 (citing *ACLU v. Schundler*, 931 F. Supp. 1180, 1187 (D. N.J. 1995)).

⁹⁴ See *ACLU v. Schundler*, No. 95-206 (D.N.J. Nov. 28, 1995). The court granted an injunction having the effect of permanently prohibiting the City from displaying the creche and menorah, or any comparable display. *Id.*

⁹⁵ *Schundler*, 104 F.3d at 1439. This display not only included the menorah and the creche, but also a wooden sled, a plastic Santa Claus, and a Plastic Frosty the Snowman. *Id.* Additionally, the figures that were previously inside the manger were removed and placed on the sides of the creche. *Id.* Added to the branches of the evergreen tree were Kwanza symbols. *Id.* Two signs were adjacent to the display which contained the same wording as the sign erected the previous year. *Id.*

preliminary injunction and a judgment of civil contempt, but the requests were denied.⁹⁶

On appeal, the *Schundler* court first looked briefly at the *Everson* and *Lemon* opinions.⁹⁷ The court referred to the *Lemon* test as “maligned.”⁹⁸ However, the *Schundler* court proclaimed its obligation to heed the test “until instructed otherwise by a majority of the Supreme Court.”⁹⁹ The court then looked at *Lynch*, *Allegheny County*, and *Capitol Square* to determine that the endorsement test was the correct analysis for the City’s display.¹⁰⁰ Therefore, the court did not apply the *Lemon* test in its true form; rather, the endorsement test is one of the test’s modified versions.¹⁰¹

First, as to the 1994 display, the *Schundler* court noted that the creche is the primary religious emblem for the Christmas tradition.¹⁰² Consequently, the court determined that the government-owned creche erected on City property violated the endorsement test by sending a message that the City supported Christianity.¹⁰³ Furthermore, the court concluded that the use of public funds to exhibit and maintain a religious scene directly triggers the Establishment Clause.¹⁰⁴ Indeed, the City’s display was exhibited and maintained with public expenditures. As a result, City taxpayers had no choice but to support the display.¹⁰⁵

⁹⁶ *Id.* The court found that the figures of Santa Claus and Frosty, along with the sled and Kwanza symbols, detracted from the intensity of the display, making the scene lawful under the Establishment Clause. *Id.* Accordingly, the court changed its November, 1995 order to mandate that the City erect secular holiday symbols in addition to the creche and menorah in order to prevent its exhibit from offending the Establishment Clause. *Id.* (citing *ACLU v. Schundler*, No., 95-206 (D. N.J. Dec. 21, 1995)). Both the City and the ACLU filed timely Notices of Appeal with the Third Circuit. *Id.* at 1439-40.

⁹⁷ *Id.* at 1440; see *supra* notes 15-26 and accompanying text.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1444; see *supra* notes 27-85 and accompanying text.

¹⁰¹ See *supra* note 42 and accompanying text.

¹⁰² *Schundler*, 104 F.3d at 1445 (citing *Allegheny County*, 492 U.S. at 627).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

According to the *Schundler* court, one of the constraints of the Establishment Clause is the prohibition of the utilization of public funds for religious activities.¹⁰⁶

As for the inclusion of the menorah with the creche, the *Schundler* court asserted that the menorah is also a religious symbol and the menorah did not dilute the appearance of government religious endorsement, nor did the City's "token" erection of the Christmas tree.¹⁰⁷ The City, nonetheless, contended that its display was constitutional because the City celebrates a variety of religious holidays throughout the year; so that, the year as a whole should be the "context" against which the creche and menorah are measured.¹⁰⁸ According to the City, the display's message became the recognition of diversity, not religious endorsement.¹⁰⁹

The *Schundler* court rejected the City's diversity argument for three different reasons.¹¹⁰ First, the court asserted that the law mandates a prohibition on government endorsement of any number of religions.¹¹¹ Second, a reasonable observer cannot be defined as one who has knowledge of the cultural and religious celebrations

¹⁰⁶ *Id.* Referring to Justice O'Connor's concurrence from *Allegheny County*, the court opined that the City's use of public money to exhibit and upkeep the display heightened the "risk of making religion relevant...to status in the community." *Id.* at 1446 (quoting *Allegheny County*, 492 U.S. at 627 (O'Connor, J. concurring)).

¹⁰⁷ *Id.* (stating that a "menorah is a religious symbol. And when displayed with a creche, the menorah's religious significance is emphasized. Moreover, the token inclusion of the Christmas tree does little to mitigate the religious message of the creche and menorah.").

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1446-47. The court opined that the City's dependence on Justice O'Connor's *Allegheny County* concurrence was invalid. *Id.* at 1447. Unequivocally, the court stated that the City misunderstood O'Connor's assertions about diversity and pluralism. *Id.* Although O'Connor did stress that the menorah placed next to the secular symbol of the Christmas tree gave the appearance of a recognition of diversity, rather than religious endorsement, the application of her reasoning to the City's display is erroneous according to the *Schundler* court. *Id.*

that occur in the City throughout the year.¹¹² In other words, the court adopted Justice Stevens' view that a reasonable observer should not be deemed aware of the display's history and context. As a result, the court concluded that the reasonable observer of the City's scene could not be deemed aware of the City's religious and cultural events.¹¹³ Finally, the court asserted that the City's use of religious symbols to commemorate an abundance of religions constituted excessive entanglement.¹¹⁴ In sum, the court concluded that the City's 1994 display amounted to nothing less than an unconstitutional endorsement of Christianity and Judaism.¹¹⁵

As for the 1995 display, including the sled, Frosty, and Santa, the court decided that the display did not pass muster under the Establishment Clause.¹¹⁶ The court established that the *Allegheny County* opinion did not set a "per se rule" that non-religious symbols placed adjacent to religious symbols are constitutionally permissible.¹¹⁷ Rather, the context of each display must be taken into account.¹¹⁸ Therefore, overruling the district court, the Third

¹¹² *Id.* In rejecting the City's argument that the "reasonable informed observer" of the 1994 display should be taken as knowing the City's year-round celebrations of various religions and cultures, the *Schundler* court looked at the definitions of the reasonable observer that were depicted in the *Capitol Square* decision. *Id.* at 1448. The court disagreed with Justice O'Connor's definition of the reasonable observer and chose to adopt the definition of Justice Stevens. *Id.*

¹¹³ *Id.* at 1449.

¹¹⁴ *Id.* (quoting *Lemon*, 403 U.S. at 630 (1971)). The court noted that even if the City could prevent the appearance of government endorsement through the celebration of many different religions and cultures, the plan amounts to excessive entanglement by the government with religious affairs. *Id.* Such a policy, for example, would lead the City to render decisions about which holidays to recognize, along with decisions about which symbols are sufficiently secular to display. *Id.* In turn, the *Schundler* court indicated that these decisions would yield political divisiveness in the community, in that religious groups that were not recognized in a display would feel alienated. *Id.* at 1450.

¹¹⁵ *Id.* at 1446.

¹¹⁶ *Id.* at 1451.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1451 (stating "the Supreme Court, in its myriad of approaches in the display cases, has repeatedly emphasized the importance of examining the context of the display at issue to determine whether it has the effect of endorsing religion.").

Circuit held that the City's addition of the secular figures to the display did not sufficiently dilute the scene's religious nature.¹¹⁹

The *Schundler* decision illustrates a lower court's eagerness for clear rules and longing for clarity in holiday display case law. In its effort to replace the subjective, fact sensitive nature of display jurisprudence, the Third Circuit attempted to create a rule for public holiday displays.¹²⁰ Consequently, the court relied upon *Lynch*,¹²¹ *Allegheny County*,¹²² and *Capitol Square*¹²³ to arrive at "generalized rules" from the "fact-specific precedents."¹²⁴

Commentator Laura Ahn suggested that the working definition of "context" is at the crux of the pedagogic difference between *Allegheny County* and *Schundler*.¹²⁵ She noted that the Third Circuit strictly narrowed the display's relevant context by excluding the year-round celebrations from the symbols' relevant context and by holding that the plastic secular figures were merely tokens, not focal points of the scene.¹²⁶ Ahn indicated that the *Schundler* court dispensed with Justice Blackmun's philosophy that the meaning behind a symbol can be determined by its overall context and proclaimed that symbols have innate meanings.¹²⁷ According to Ahn, the creche's innate meaning is religious and this religious significance and cannot be altered.¹²⁸

¹¹⁹ *Id.* at 1452.

¹²⁰ Laura Ahn, *This Is Not A Creche*, 107 YALE L.J. 1969, 1971-72 (1998).

¹²¹ See *supra* notes 27-46 and accompanying text.

¹²² See *supra* notes 47-64 and accompanying text.

¹²³ See *supra* notes 65-85 and accompanying text.

¹²⁴ Ahn, *supra* note 120, at 1971. Ahn commented, "For example, after observing that the Allegheny Court found a privately owned creche on the staircase of the county courthouse to constitute a violation of the Establishment Clause, the Third Circuit determined that the government may not place a creche on government property." *Id.* (citing *ACLU v. Shundler*, 104 F.3d at 1435 (3d Cir. 1997)).

¹²⁵ Ahn, *supra* note 120, at 1971.

¹²⁶ *Id.* (citing, *Schundler*, 104 F.3d at 1435).

¹²⁷ *Id.* See *supra* notes 56, 118-19 and accompanying text.

¹²⁸ *Id.* See *supra* note 102 and accompanying text; see also generally, Calvin R. Massey, *Pure Symbols and The First Amendment*, 17 HASTINGS CONST. L.Q. 369.

The Third Circuit's disdain for applying the *Lynch* and *Allegheny County* fact sensitive approach to holiday displays is apparent in the *Schundler* decision.¹²⁹ A religious symbol is simply religious. This was the court's way of taking a first stride towards a bright-line law. Yet, not all the circuit courts are in agreement with the Third Circuit. The Second Circuit, for instance, takes the entirely opposite route and interprets "context" extremely liberally.¹³⁰

B. Elewiski v. City of Syracuse

The Second Circuit Court of Appeals was called upon to decide the constitutionality of a public religious display located in the city of Syracuse, New York ("City").¹³¹ During the holiday season the City bedecks its downtown area with holiday decorations. For about eighty-five years the City displayed a government-owned creche in a downtown public park called Clinton Square.¹³² In 1995, statues of Jesus, Mary, a shepherd, a donkey, a lamb, and an angel grasping a banner containing the words "Gloria in Excelsis Deo," or "Glory to God in the Highest," were a part of the creche exhibit.¹³³ In addition, an adorned Christmas tree was situated behind the creche.¹³⁴ In affirming a decision of the district court, the Second Circuit Court of Appeals held that the exhibit was constitutional.¹³⁵

The court framed the issue as whether a reasonable observer of the scene in its specific context would perceive a message of

¹²⁹ See *supra* notes 89-128 and accompanying text.

¹³⁰ *Elewiski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1186 (1998).

¹³¹ *Id.*

¹³² *Id.* at 55.

¹³³ *Id.* at 52. The phrase "Glory to God in the Highest" comes from the Gospel of Luke. *Id.* at 58 (Cabrenes, J., dissenting).

¹³⁴ *Id.* at 52. Barricades with the name of the City's mayor, Roy A. Bernardi, and the name of a City department, Department of Public Works, encompassed the creche and tree. *Id.*

¹³⁵ *Id.* See also *Elewiski v. City of Syracuse*, No. 95-CV-1830, 1996 WL 31169, at 6. (N.D.N.Y. Jan. 19, 1996).

governmental religious endorsement.¹³⁶ Adopting Justice O'Connor's definition of the "reasonable observer," the court asserted that the reasonable observer is one who is aware of the context and history of the community and forum in which the religious display is situated.¹³⁷ As a result, the court concluded that the reasonable observer of the display in its particular context would not perceive a message of government endorsement.¹³⁸ According to the court, the creche was a part of the City's overall secular holiday exhibit; in addition, this broad "context - like the context of the creche in *Lynch* or that of the menorah in *Allegheny County* - neutralize[d] the message of governmental endorsement."¹³⁹ The fact that the City bedecked its downtown with secular holiday decorations would lead a reasonable observer to conclude that the City was merely acknowledging the secular nature of the holiday season. The court also found the creche constitutional under the *Lemon* test.¹⁴⁰

The *Elewiski* decision has ignited sharp criticism by at least one commentator who described the decision as "egregious."¹⁴¹ Furthermore, Judge Cabranes in his dissent in *Elewiski*, asserted that the City's creche was not a part of the larger downtown exhibit; rather, the symbol was a "separate, clearly demarcated exhibit," not religiously diluted by the other downtown decorations.¹⁴²

Another commentator opined that the Second Circuit "misapplied relevant case law."¹⁴³ Specifically, the commentator

¹³⁶ *Elewiski*, 123 F.3d at 53.

¹³⁷ *Id.* at 54 (quoting *Capitol Square*, 515 U.S. at 780 (1995) (O'Connor, J., concurring)).

¹³⁸ *Id.* at 53.

¹³⁹ *Id.* at 54. See *supra* notes 29, 55 and accompanying text.

¹⁴⁰ *Id.* (stating that the City's goal of promoting business downtown and encouraging community unity satisfied the purpose prong of the test, the finding of no appearance of endorsement satisfied the second prong and the claimant did not claim excessive entanglement.).

¹⁴¹ Burton Caine, "The Liberal Agenda": *Biblical Values and The First Amendment*, 14 TOURO L. REV. 129, 157 (1997).

¹⁴² *Elewiski*, 123 F.3d at 58-59 (Cabranes, J., dissenting).

¹⁴³ Recent Cases, *supra* note 86, at 2465. (stating that under the Supreme Court decisions in *Lynch*, *Allegheny County*, *Capitol Square*, and "its own precedents,

argued that the Second Circuit ignored the *Allegheny County* decision which did not consider holiday decorations in other areas of the County Courthouse to decide the creche standing alone was unconstitutional.¹⁴⁴ Furthermore, the commentator noted that the *Elewiski* court misinterpreted the *Allegheny County* court's holding and analysis as to the menorah.¹⁴⁵ In *Allegheny County* the menorah was next to a Christmas tree which served as an acknowledgment of Christmas and Hanukkah as contemporaneous holidays, whereas the City's scene in *Elewiski* acknowledged one holiday, Christmas.¹⁴⁶ This commentator also suggested that unlike the *Allegheny County* menorah and the *Capitol Square* cross, the creche in *Elewiski* was publicly owned.¹⁴⁷ Moreover, the City's creche was not erected on private property, unlike the creche in *Lynch*.¹⁴⁸

The *Elewiski* decision illustrates a liberal interpretation of the Supreme Court guidelines for religious displays,¹⁴⁹ whereas the *Schundler* decision exemplifies a conservative approach.¹⁵⁰ The two lower court cases demonstrate the inconsistency and chaos in the circuit courts when dealing with government religious scenes. The Supreme Court has not formulated a solid method for deciding the constitutionality of public religious displays.

III. REASONS FOR THE CONFUSION

The Supreme Court decisions involving public religious displays are inconsistent and the current state of the law for deciding the constitutionality of these scenes is in complete disarray. Commentators are spellbound by the disparity that has resulted from *Lemon* and its progeny.

the Court of Appeals should have examined only the creche display, not the rest of downtown Syracuse, and should have found this free-standing exhibit unconstitutional.”).

¹⁴⁴ *Id.* at 2465-66 (quoting *Allegheny County v. ACLU*, 492 U.S. 573, 598).

¹⁴⁵ *Id.* at 2467.

¹⁴⁶ *Id.* (citing, *Allegheny County*, 592 U.S. at 618).

¹⁴⁷ *Id.* at 2467 (citing *Elewiski*, 123 F.3d at 52).

¹⁴⁸ *Id.* (citing *Elewiski*, 123 F.3d at 52).

¹⁴⁹ See *supra* notes 131-40 and accompanying text.

¹⁵⁰ See *supra* notes 89-128 and accompanying text.

A. *The Two Schools of Thought*

Two opposing doctrinal interpretations have developed from a lack of agreement as to the meaning of the Establishment Clause.¹⁵¹ The lack of consensus as to the proper interpretation of the Clause is reflected in the Supreme Court's inharmonious decisions of government-backed religious displays.¹⁵² Two primary schools of thought over the meaning of the Establishment Clause have developed – separationists and accommodationists.¹⁵³

Separationists urge that the Establishment Clause requires a strict division between government and religion. The doctrine calling for strict separation derives from the Jeffersonian notion of the “wall of separation between Church and State.”¹⁵⁴ As documented support for their view, separationists cite to Thomas Jefferson's Letter to the Danbury Baptists, in which Jefferson declared that the Establishment Clause erected a “wall between Church and State.”¹⁵⁵ Separationists interpret the Establishment

¹⁵¹ See *infra* notes 154-166 and accompanying text.

¹⁵² See *supra* notes 16-75 and accompanying text.

¹⁵³ Raymond Mitchell, *A Small Departure From The Truth: When Private Religious Speech Runs Afoul Of The Establishment Clause*, 23 LOY. U. CHI. L.J. 867, 869 (1992) (citing Donald L. Drakerman, *Church-State Constitutional Issues 97-106* (1991); John White, *The Theology And Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 491 (1991)).

¹⁵⁴ Shanin Rezai, *County of Allegheny v. ACLU: Evolution of Chaos In Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 507 (1990) (citing 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb ed. 1904) (declaring that religious matters belong solely “between man and God.”)).

¹⁵⁵ Mitchell, *supra* note 153, at 869 (noting that Thomas Jefferson wrote the following:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State . . . I reciprocate your kind

Clause as requiring a broad wall between government and religion. In other words, they advocate the prohibition of the government's preference of religion over nonreligion, not only the prohibition of government preference of one religion over another.¹⁵⁶

In contrast, accommodationists contend that the Establishment Clause mainly prohibits the establishment of a national religion or church. In referring to such examples as legislative prayer, Thanksgiving Day, and Sunday closing laws, accommodationists urge that the Establishment Clause was not meant to "forbid neutral government support for religion as a whole."¹⁵⁷

Applying both schools of thought inconsistently, the Supreme Court has been unable to arrive at a clear framework for the analysis of government displays of religious symbols.¹⁵⁸ For example, the *Everson* opinion, which is frequently cited by courts deciding the constitutionality of government religious displays, illustrates the Court's adoption of the separationist viewpoint.¹⁵⁹ In retrospect, the *Everson* court proclaimed that the Establishment Clause has erected a lofty wall between Church and State.¹⁶⁰ However, as one commentator indicated, by concluding that the reimbursement program to parochial school students was constitutional, the *Everson* court did not adhere to the fundamental principles of strict neutrality.¹⁶¹ For instance, the Court asserted

prayers for the protection and blessing of the common Father and Creator of man.

Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist Association, in the state of Connecticut (Jan. 1, 1802), reprinted in JOHN T. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* 130-31 (1987)).

¹⁵⁶ Dawn Brewer, *Constitutional Law: Religious Symbols On Government Property: Where Do We Stand?*, 43 OKLA. L. REV. 375, 378 (1990).

¹⁵⁷ *Id.* (quoting Note, *Lynch v. Donnelly: Breaking Down The Barrier to Religious displays*, 71 CORNELL L. REV. 185, 202 (1985)). Brewer noted that "an accommodationist might not find unconstitutional a tax exemption for all religious organizations, but a separationist might view the exemption as an unconstitutional preference for religious groups over nonreligious groups and thus unconstitutional." *Id.*

¹⁵⁸ See *supra* notes 16-85 and accompanying text.

¹⁵⁹ See *supra* note 18 and accompanying text.

¹⁶⁰ *Id.*

¹⁶¹ Rezai, *supra* note 154, at 510.

that the Establishment Clause does not require the government to be an antagonist of religion.¹⁶² Notwithstanding the *Everson* court's proclamation that a broad wall divides Church and State, it simultaneously authorized financial subsidies to parochial schools.¹⁶³

Similarly, the tripartite test that was developed by the *Lemon* Court originally warranted a strict division between Church and State as well.¹⁶⁴ Nevertheless, the *Lemon* test's separationist framework became transformed into a vehicle for more accommodationist outcomes.¹⁶⁵ As one commentator noted, while a strict separationist test seemed to provide the courts with an unambiguous standard for Establishment Clause issues, the doctrine's rigidity yielded inconsistent outcomes. Courts began to apply the *Lemon* test in a more flexible manner¹⁶⁶ which caused the test to be a source of unpredictability, especially for government religious display jurisprudence.

B. The Lemon Test and Its Modifications

When the Supreme Court created the *Lemon* test,¹⁶⁷ its intention was to elucidate Establishment Clause jurisprudence by furnishing a uniform vehicle of analysis.¹⁶⁸ However, the *Lemon* test has been unable to propagate predictable results from the day of its creation.¹⁶⁹ The outcome of the test's application depends upon the

¹⁶² *Id.* (citing *Everson v. Board of Education*, 330 U.S. 1, 18 (1947)).

¹⁶³ See *supra* note 16 and accompanying text.

¹⁶⁴ See *supra* note 25 and accompanying text.

¹⁶⁵ Rezaei, *supra* note 154, at 511 (footnotes omitted).

¹⁶⁶ See *supra* notes 37-40 and accompanying text.

¹⁶⁷ See *supra* note 25 and accompanying text.

¹⁶⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁶⁹ Freeman, *supra* note 16, at 621. The commentator remarked that Justice Rehnquist

best described these inconsistencies by noting, for example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in a geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector in a history class. A State

doctrinal structure within which a court chooses to apply it. In fact, one critic remarked that accommodationists “have manipulated, or even ignored, the *Lemon* standard in order to impose a different doctrinal viewpoint.”¹⁷⁰

1. *Lynch*’s manipulation of the *Lemon* test

The *Lynch* decision is a primary example of the Court’s loose application of the *Lemon* test.¹⁷¹ By asserting that the analysis of the government holiday display must be measured against the overall context of the government action, the Court eradicated the test’s effectiveness in religious display cases.¹⁷² In adding the aspect of observing the display against the context of the winter holiday season, the Court effectively manipulated the purpose and effect prongs of the *Lemon* test.¹⁷³ The Court did not analyze the government action by itself; instead, it combined the action with additional practices to guarantee a holding of constitutionality. Furthermore, by incorporating a historical continuum aspect into the effect prong of the test, the Court was able to conclude that the effect of the creche was no more harmful than past government aid to religion that was upheld in the past.¹⁷⁴ The *Lynch* decision marked the Supreme Court’s transformation of what was a strict separationist approach into an accommodationist approach toward Establishment Clause issues.

The *Lynch* court’s twisting of the *Lemon* test was a result of the Court’s frustration with the inflexible nature of the test in its true form. The first prong of the *Lemon* test is easy to satisfy. The

may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonresusable. A State may pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.

Id. (citing *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted)).

¹⁷⁰ Rezai, *supra* note 154, at 505 (footnotes omitted).

¹⁷¹ See *supra* notes 27-40 and accompanying text.

¹⁷² See *supra* note 36 and accompanying text.

¹⁷³ *Id.*

¹⁷⁴ See *supra* notes 34-35 and accompanying text.

legislature simply must announce a secular purpose for the display.¹⁷⁵ The second prong of the test, however, is theoretically more problematic to apply.¹⁷⁶ As one commentator indicated, the Establishment Clause cases always deal with a state act which affects religious activities or institutions; therefore, if stringently applied, the effect prong would find most of these actions offensive.¹⁷⁷ Accordingly, the Supreme Court abandoned a strict application of the *Lemon* test which in turn yielded inconsistent and unpredictable results.¹⁷⁸

As one commentator suggested, the *Lynch* Court's accommodationist method of analyzing a public religious display provided a stimulus for courts to create their own versions of what constitutes a permissible religious display.¹⁷⁹ *Lynch's* expansive holdings, broad language in its application of the *Lemon* test, and utilization of subjective standards paved the way for the havoc and confusion that haunt public religious display jurisprudence.¹⁸⁰

In failing to comment on other types of religious displays, courts were left with limited guidance. For example, the *Lynch* Court did not comment on a cross or menorah standing alone. As a result, courts have had to develop tests suitable for specific displays at issue, as exemplified in the *Allegheny County* opinion.¹⁸¹

2. The endorsement analysis – any help?

Justice O'Connor proclaimed that the crucial matter involves a person's right not to feel politically alienated in our religiously diverse community.¹⁸² Few commentators are convinced that Justice O'Connor's viewpoint is the solution to the problems

¹⁷⁵ Rezaei, *supra* note 154, at 518 (footnotes omitted).

¹⁷⁶ *Id.* (footnotes omitted).

¹⁷⁷ *Id.* (footnotes omitted).

¹⁷⁸ See *supra* note 36 and accompanying text.

¹⁷⁹ Brewer, note 156, at 381 (stating "*Lynch* provided an impetus for courts to construe and define their own versions of constitutional displays.").

¹⁸⁰ Brewer, note 156, at 381-82 (footnotes omitted); see also *supra* notes 36-39 and accompanying text.

¹⁸¹ See *supra* notes 52-56 and accompanying text.

¹⁸² See *supra* note 42 and accompanying text.

involving the jurisprudence of public religious displays.¹⁸³ One commentator praised the Justice's alternative analysis and asserted that she appropriately acknowledged that in some instances a government action may support religion "without endorsing it."¹⁸⁴ Most commentators on this area, however, have expressed dissatisfaction with the effectiveness of the endorsement test when determining the constitutionality of government-backed religious displays.¹⁸⁵

Commentator Dawn Brewer, noted that the *Allegheny County* court's use of the endorsement test does little to remedy *Lynch*'s deficiencies.¹⁸⁶ She suggested that while an endorsement analysis renders several factors significant when considering government-backed religious displays, no concrete guidance really exists.¹⁸⁷ Similar to the *Lynch* analysis, the endorsement test used by the *Allegheny County* court is very fact-sensitive.¹⁸⁸ In fact, Brewer suggested that the *Allegheny County* decision "may have created a 'reindeer rule'"¹⁸⁹ by focusing on the characteristics of holiday decorations to determine the constitutionality of a display.¹⁹⁰

¹⁸³ See, e.g., E. Gregory Wallace, *When The Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1218 (1994) (calling Justice O'Connor's alternative "a welcome refinement of the *Lemon* test.").

¹⁸⁴ *Id.* Wallace quoted Justice O'Connor: "Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion." *Id.* n. 177 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring)); see generally Williams, *supra* note 86 (discussing the benefits of the endorsement analysis when deciding the constitutionality of public religious displays).

¹⁸⁵ See *infra* notes 186-206 and accompanying text.

¹⁸⁶ Brewer, *supra* note 156 at 388 (noting "this 'refinement' offers no more a measure of permissibility than did the *Lynch* decision.").

¹⁸⁷ *Id.* (footnotes omitted).

¹⁸⁸ See *supra* note 54 and accompanying text.

¹⁸⁹ Brewer, *supra* note 156 at 387.

¹⁹⁰ See *supra* notes 54, 56 and accompanying text; Brewer, *supra* note 156 at 387 (noting that "the menorah's splintered opinions indicate that the Court is actually undecided as to the proper context in which to evaluate religious displays."). Brewer also blamed the opinion's flaws in part on the plurality's split as to doctrinal beliefs. *Id.* at 388. Therefore, the opinion reflects both separationist and accommodationist viewpoints. *Id.* Brewer noted that

As illustrated by the *Schundler* opinion, this emphasis on the specific factual situations surrounding holiday displays has frustrated the efforts of courts in the quest for a clear rule of law.¹⁹¹ Moreover, commentator Calvin Massey proposed another potentially serious flaw in the endorsement analysis – overlooking the government’s purpose of a display.¹⁹² Massey described a hypothetical city exhibit of “a creche, a menorah, an image of Buddha, a copy of the Koran, and a sign exhorting atheism.”¹⁹³ He asked, “Aside from the effect on the observer of this exhibit, what is the purpose of the government’s choice of this compilation of symbols?”¹⁹⁴ “Was it to ridicule religion or express neutrality about any particular religion?”¹⁹⁵ Furthermore, Massey indicated that a government may genuinely have intended to express neutrality, but the message to observers may be one of hostility.¹⁹⁶

In addition, the endorsement analysis formulates the notion of establishment as a role of personal sentiments and perceptions rather than an abuse of government authority.¹⁹⁷ Therefore, the test calls for the inference that “felt disabilities” are “real disabilities.”¹⁹⁸ This inference is a far-fetched assumption.

Allegheny County’s creche plurality consists of three judges, separationist in stance: Marshall, Stevens, and Brennan; while, the menorah plurality consists of four judges accommodationist in stance: Kennedy, White, Scalia, and Rehnquist. *Id.* n. 120.

¹⁹¹ See *supra* notes 97-119 and accompanying text; Ahn, *supra* note 120 at 1974 (stating “[a]s subsequent cases continue to develop the full meaning of the *Allegheny* principle, proponents of clear rules may find their best efforts frustrated by the sheer variety of factual situations in holiday display cases.”).

¹⁹² Massey, *supra* note 128, at 379-80 (1990) (stating “It is unfortunate that the Court chose to focus solely on the effect prong of *Lemon*, since employment of pure symbols, especially when diluted by association with other pure symbols, raises troublesome questions about the purpose of such display.”).

¹⁹³ *Id.* at 380.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Wallace, *supra* note 183, at 1221 (noting “the purpose of the endorsement inquiry is to protect the sensibilities of nonadherents.”).

¹⁹⁸ *Id.* at 1222 (asserting that “[w]hen the government speaks religiously, ‘no one loses the right to vote, the freedom to speak, or any other state or federal right.’”) (footnotes omitted).

Moreover, which sentiments and perceptions should courts use when deciding if a display is offensive to Establishment Clause principles?¹⁹⁹ Justice O'Connor's reasonable observer "assumes that there is a single impartial perspective from which to judge whether government has 'endorsed religion.'"²⁰⁰ As commentators have asserted, however, there is no one unbiased perception from which to determine whether a government action has the effect of religious endorsement.²⁰¹

Whether a court adopts the view of Justice O'Connor²⁰² or the definition of Justice Stevens' reasonable observer,²⁰³ there is still a question as to the religious attributes of the reasonable observer. Is the observer a religious outsider or devoutly faithful? What religion does the observer practice? A commentator suggested that the objective observer is really the judge.²⁰⁴ Accordingly, since a judge often carries the beliefs of the majority culture, the observer standard is almost never from the outsider's point of view.²⁰⁵ The endorsement test, however, is aimed at protecting outsiders from feeling alienated from the political community.²⁰⁶ Consequently, a primary aspect of the endorsement test is inherently flawed.

In sum, the endorsement test calls for a court's analysis of which combination of religious symbols and secular symbols have

¹⁹⁹ *Id.* at 1220 (footnotes omitted).

²⁰⁰ *Id.*

²⁰¹ Freeman, *supra* note 16, at 624 (stating "If the court desires a finding of constitutionality, the court may use an informed observer who is familiar with the community's history, politics, and setting. However, if the court desires a finding of unconstitutionality, it may utilize a simple passerby who 'hypothetically has just stepped off the bus when he or she observes the display.'") (quoting Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 479); Wallace, *supra* note 183, at 1221 (stating "In the end, of course, most would agree that it is the judge's own perception that counts."). See, e.g., *supra* notes 112-13 and accompanying text; *But see also, supra* notes 137-38 and accompanying text.

²⁰² See *supra* note 79 and accompanying text; see also *supra* notes 137-38 and accompanying text.

²⁰³ See *supra* note 82 and accompanying text; see also notes 112-13 and accompanying text.

²⁰⁴ Wallace, *supra*, note 183 at 1221.

²⁰⁵ Wallace, *supra*, note 183 1220-21 (footnotes omitted).

²⁰⁶ See *supra* note 42 and accompanying text.

appropriate effects under the Establishment Clause. Such an approach does not provide a solid rule of law. By the time the Supreme Court decided *Capitol Square*, it was obvious that a more consistent standard for public displays was necessary.

3. *Capitol Square's* "per se" rule

In an effort to uproot the tedious case-by-case evaluation of privately owned holiday displays on public property, the Supreme Court in *Capitol Square* endeavored to create a per se rule only with respect to privately sponsored religious displays in public fora.²⁰⁷ The Court dispensed with the *Lemon* and endorsement tests.²⁰⁸

The per se rule, that a privately sponsored display erected in a traditionally public forum is constitutional,²⁰⁹ may do away with litigation and provide a more consistent framework for courts dealing with privately owned holiday displays. Nevertheless, at least one commentator has noted that this rule also has shortcomings.²¹⁰ Commentator Kathryn Williams indicated that a viewer of such a display may believe the exhibit is somehow related to the owner of the property on which it stands.²¹¹ Specifically, she asserted that the plurality failed to acknowledge that a viewer of the cross against the backdrop of the Statehouse could reasonably perceive government sponsorship of the religious symbol.²¹² This commentator opined that the *Capitol Square* per se analysis "is an oversimplification of the endorsement test."²¹³

C. Religious Symbols, History, and The Season

²⁰⁷ See *supra* note 74 and accompanying text. A commentator remarked that the *Capitol Square* plurality created a bright line rule to allow for quick dispute resolution, thereby discouraging litigation. Williams, *supra* note 86 at 1612.

²⁰⁸ See *supra* note 74 and accompanying text.

²⁰⁹ *Id.*

²¹⁰ Williams, *supra* note 86 at 1640.

²¹¹ *Id.*

²¹² *Id.* at 1638.

²¹³ *Id.*

The *Lemon* test and the endorsement analysis for religious displays have yielded inconsistent conclusions based on subjective interpretations. In addition to the conflict between the accommodationists and separationists, it has been proposed that the chaotic nature of holiday display jurisprudence particularly as it relates to holiday displays, may be due to the nature of the winter season, the symbols, and the holiday scenes themselves.²¹⁴ For example, commentator Gregory Blackburn explained that the secular nature of the holiday season and its symbols has intertwined with their sectarian meanings.²¹⁵ A menorah, for instance, is both an important religious symbol and a reference to a historical event.²¹⁶

Accordingly, it has been suggested this dual nature of holiday symbols has been the impetus for the tedious case-by-case analysis employed by the Supreme Court.²¹⁷ The Court's failure to create a consistent test for deciding whether a symbol is solely religious or whether one has secular meaning as well may be a significant reason for the difficulty encountered in holiday display cases.²¹⁸ The Court has not necessarily addressed the issue of the dual nature of holiday symbols.²¹⁹ As a result, we are left with a

²¹⁴ See generally, Gregory J. Blackburn, *Government, The Holiday Season, And The Establishment Clause: A Perspective On The Issues*, 20 STETSON L. REV. 217 (1990) (discussing the seminal Supreme Court decisions dealing with public religious displays and the problems with the current guidelines); see also Joshua Zarrow, *Of Crosses and Creches: The Establishment Clause And Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477 (1986) (discussing the flaws in the *Lynch* analysis).

²¹⁵ Blackburn, *supra* note 214 at 217-18. Blackburn asserted that over time "the secular aspects of the holiday seasons and symbols have commingled with the religious aspects, so that the seasons and symbols have become equivocal in their true meaning and purpose." *Id.*

²¹⁶ See *supra* note 2 and accompanying text.

²¹⁷ Blackburn, *supra* note 214 at 218. Blackburn suggested that "the many symbols associated with the holiday season incorporate at once varying degrees of historical, religious, and popular significance. The pervasive ambiguity of these symbols significantly affects substantive establishment clause analysis and has caused the Supreme Court to use a distinct case-by-case approach in deciding holiday displays." *Id.* (footnotes omitted).

²¹⁸ *Id.* at 240.

²¹⁹ *Id.* (noting that the Supreme Court "has not yet comprehensively examined the duality issue, but must do so before an appropriate standard can be

colossal number of confused lower courts left to decide if a candy cane or a poinsettia has enough secular meaning to dilute the religious component of a creche.

Moreover, as exemplified by the Supreme Court decisions in *Schundler* and *Elewski*, the Court has neglected to delineate the boundaries of the "context" in which symbols are to be evaluated.²²⁰ Should the relevant context of the symbols be the seasonal backdrop²²¹ or the context of the isolated display?²²² With this question unanswered, a court has the ability to come to the conclusion that suits its fancy. If a court is separationist in its thinking, it will naturally characterize relevant context as a display's immediate surroundings.²²³ On the other hand, if a court is accommodationist in nature, it will define the relevant context in a broader manner.²²⁴

Public religious display cases are also plagued with what one commentator characterized as the Court's discriminating and sporadic use of historical arguments to reinforce its interpretation of the Establishment Clause.²²⁵ He commented that the Court must delineate a more concrete historiography.²²⁶ As the next section of this discussion will illustrate, the history of the Establishment Clause is concrete and that history mandates that the Court immediately reevaluate the current state of public religious display jurisprudence.²²⁷

articulated."); Zarrow, *supra* note 214 at 507 (stating the *Lynch* historical continuum approach "does not account for the dual nature, and dual effects, of religious symbols.").

²²⁰ See *supra* notes 118, 136-39 and accompanying text.

²²¹ See *supra* notes 36, 118 and accompanying text.

²²² See *supra* notes 54-56, 136-39 and accompanying text.

²²³ See *supra* note 118 and accompanying text.

²²⁴ See *supra* notes 136-39 and accompanying text.

²²⁵ John Witte, Jr., *The Theology And Politics of The First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 506 (noting that the Supreme Court's "habit of selectively and sporadically invoking historical arguments to bolster its interpretation of the religion clauses has distorted the historical data and diluted the Court's arguments.").

²²⁶ *Id.*

²²⁷ See *infra* notes 228-282 and accompanying text.

IV. PROPOSAL

This author agrees firmly with the commentators who hold in disdain the Court's methods for dealing with public religious displays. The Supreme Court's guidelines for determining the constitutionality of public religious displays are completely flawed. The *Lemon*, test as reformulated by the *Lynch* court, and the endorsement test²²⁸ both leave too much wiggle-room for courts to make subjective and intellectually dishonest opinions. The unclear definitions of the "reasonable observer," "context," and "religious symbol" are confusing for lower courts and yield inconsistent opinions. Yet, most commentators have not discussed the primary cause of the preposterous state of the law for government religious displays. This is where most commentators and I part company.

I propose that the problem is right in front of our eyes; and the solution lies right in the text of the Establishment Clause itself.²²⁹ Our nation's founders incorporated a law into our Bill of Rights that prohibits the government from creating any law "respecting an establishment of religion."²³⁰ The Establishment Clause does not forbid the neutral advancement of religion; nor does the Clause prohibit incidental benefits to religion.²³¹ Neutral government activities, like displays that recognize the festive sentiments of the winter holiday season, are not establishments of religion.

If our founders intended to prohibit neutral religious activities that only incidentally implicate religion, they would have incorporated such language into the text of the constitution. In fact, James Madison, the primary designer of the Clause's structure, made it a point to reassure skeptical parties to a Senate debate by asserting the Clause meant that "Congress should not establish a religion, and enforce the legal observation of it by law."²³² Furthermore, during the Senate debates, Madison declared that Congress could not "compel men to worship."²³³ Madison

²²⁸ See *supra* notes 172-74 and accompanying text.

²²⁹ See *supra* note 4 and accompanying text.

²³⁰ *Id.*

²³¹ *Id.*

²³² 1 ANNALS OF CONGRESS, 730, 758 (J. Gales ed. 1834) (Aug. 15, 1789).

²³³ *Id.* at 730.

further made the Clause's purpose clear when he contended that "he believed that the people feared one sect might obtain preeminence, or two combine together, and establish a religion to which they would compel others to conform."²³⁴ It does not seem that James Madison, the principal author of the First Amendment, intended the Establishment Clause to mean that a city courthouse cannot decorate its steps or front lawn with holiday decorations that are a part of our nation's culture. Madison referred to a prohibition on governmental preference for one religious sect over others, not a preference for irreligion in general.

In addition to Madison's declarations, perhaps even more significant, are two decisions from our nation's Supreme Court: *Zorach v. Causon*²³⁵ and *Marsh v. Chambers*.²³⁶ The *Zorach* decision involves a "release time" program for the religious teaching of children attending public school.²³⁷ In its analysis the *Zorach* court proclaimed that the First Amendment does not require a separation of Church and State in every respect.²³⁸

The *Zorach* court established that if there were to be a complete separation of Church and State, "the state and religion would be aliens to each other, hostile, suspicious, and even unfriendly."²³⁹ Indeed, deeming a holiday scene containing a creche with some festive poinsettias as unlawful sends a message of hostility toward religion in general.²⁴⁰ Subjecting holiday displays to demeaning analysis, like that of comparing the secular meaning of an evergreen tree to the message of the creche or menorah, or

²³⁴ *Id.* at 731.

²³⁵ 343 U.S. 306 (1952).

²³⁶ 463 U.S. 783 (1983).

²³⁷ *Zorach*, 343 U.S. at 308. The case involved a New York City program that permitted its public schools to release students during school hours so they could leave the school premises to attend religious centers for religious instruction. *Id.* On written request from parents, students were released from school. *Id.* The Court found the program constitutional under the Establishment Clause. *Id.* at 312.

²³⁸ *Id.* at 312 (stating that the First Amendment "within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.").

²³⁹ *Id.*

²⁴⁰ See *supra* note 54 and accompanying text.

analyzing the secular meaning of greenery, is degrading to religious people in general.²⁴¹ As commentator Philip Kurland rightfully noted, there is no evidence showing the founders' concern for freedom of irreligion.²⁴²

This point was also recognized by the *Zorach* Court.²⁴³ In deciding the constitutionality of the release time program, the Court declared that "[W]e are a religious people whose institutions presupposes a Supreme Being."²⁴⁴ The *Zorach* Court supported its proposition by citing such practices as prayers in the legislature, appeals to God in messages from the President, the presidential proclamations deeming Thanksgiving as a national holiday, and the language "So help me God" in the country's courtroom oaths.²⁴⁵ The Court further asserted that if these practices were deemed as being offensive to the First Amendment, the government would be expressing a "callous indifference" to religious sects.²⁴⁶ We would be undermining the sacred meanings of some of our nation's oldest rituals and traditional practice.²⁴⁷

The *Zorach* Court clearly delineated what constitutes an Establishment Clause violation: (1) the government may not impose any sect on a person and (2) the government cannot force anyone to attend a church, recognize a religious holiday, or participate in religious instruction.²⁴⁸ Moreover, the Supreme Court declared "[W]e cannot read into the Bill of Rights such a philosophy of hostility to religion."²⁴⁹ The *Zorach* Court did not consider neutral activities with incidental religious effects as

²⁴¹ See *supra* notes 49-56 and accompanying text.

²⁴² Philip B. Kurland, *The Origins of The Religion Clauses of The Constitution*, 27 WIM. & MARY L. REV. 839, 855 (1985/1986). Kurland stated, "Quite to the contrary, they sought to protect man's relation to his god. . . am hard put to find any evidence in the development of legal protection for religious freedom that indicates any attention to protect atheists." *Id.*

²⁴³ *Zorach*, 343 U.S. at 313.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 312-13.

²⁴⁶ *Id.* at 314.

²⁴⁷ *Id.* The *Zorach* court asserted "we find no constitutional requirement which makes it necessary for government to be hostile to religion." *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 315.

unconstitutional.²⁵⁰ Rather the Court interpreted the Establishment Clause as mandating a flexible wall between Church and State.²⁶⁰

Like *Zorach*, the *Marsh* decision, which deals with legislative prayer before Nebraska legislative sessions, reaffirmed the idea that the Establishment Clause was not intended to mandate the government favoritism of irreligion over religion.²⁵² The Court held that legislative prayer is not an Establishment Clause violation.²⁵³ The Court described the practice of legislative prayer as “part of the fabric of our society.”²⁵⁴ Therefore, legislative prayer is only a permissible recognition of beliefs expansively possessed by the nation’s people.²⁵⁵

The *Marsh* court specifically indicated that from the colonial period through the creation of the nation, and since then, legislative prayer has existed simultaneously with the ideals of disestablishment.²⁵⁶ For instance, the Court indicated that three days after Congress approved the designation of paid legislative chaplains,²⁵⁷ the final text of the Bill of Rights was agreed upon.²⁵⁸ The drafters of the Establishment Clause did not consider legislative prayer as offensive to the Establishment Clause.²⁵⁹

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Marsh v. Chambers*, 463 U.S. 783, 784 (1983). The litigation involved chaplains paid by the state of Nebraska to lead prayers at the beginning of each legislative session. *Id.*

²⁵³ *Id.* at 792. “To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment of religion.’” *Id.*

²⁵⁴ *Id.* “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.” *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 757.

²⁵⁷ *Id.* at 758.

²⁵⁸ *Id.* (footnotes omitted).

²⁵⁹ *Id.* “Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment.” *Id.* (footnotes omitted).

Just as legislative prayer is considered part of “the fabric of our society,”²⁵⁹ the annual appearance of winter holiday scenes throughout the country is deeply rooted in our nation’s history and tradition. Just like legislative prayer, a government-backed religious display is “a permissible recognition of beliefs expansively possessed by the nation’s people.”²⁶⁰

The *Zorach* and *Marsh* decisions are clearly relevant to public religious display jurisprudence.²⁶¹ The *Zorach* court strongly advised that the Establishment clause was not intended to foster “callous indifference” to religion.²⁶² Likewise, the Court reiterated that we cannot enforce the Establishment Clause to the point that we would undermine the value of our nation’s oldest traditions.²⁶³ Public holiday displays containing religious symbols are like legislative prayers, the practice of reciting “So help me God” in the courtroom oath, and the government’s recognition of Thanksgiving as a national holiday.²⁶⁴ These instances all have meaning beyond religion. Like the examples cited by the *Zorach* court, public religious displays in recognition of the holiday season are normal aspects of society; they remind us of tradition, democracy, accomplishment, and hope. As the *Zorach* Court suggests, to remove a traditional aspect from our culture because it has incidental religious connotations, would alienate religious institutions from the government to a dangerous extent.²⁶⁵

The Supreme Court, in the *Zorach* decision, established what constitutes an Establishment Clause violation.²⁶⁶ Public displays of winter holiday symbols do not constitute direct imposition of a sect on a person, nor do they force anyone to attend a church, recognize a religious holiday, or participate in religious instruction.²⁶⁷ If anyone does feel forced to follow a religious practice because of a

²⁵⁹ See *supra* note 254 and accompanying text.

²⁶⁰ See *supra* note 255 and accompanying text.

²⁶¹ See *supra* notes 235-60 and accompanying text.

²⁶² See *supra* note 246 and accompanying text.

²⁶³ See *supra* note 247 and accompanying text.

²⁶⁴ See *supra* note 245 and accompanying text.

²⁶⁵ See *supra* note 239 and accompanying text.

²⁶⁶ See *supra* note 249 and accompanying text.

²⁶⁷ *Id.*

scene recognizing the festive cheer and historical significance of the holiday season, the reason derives from that person's own insecurities, not government coercion.

As for the *Marsh* decision, the Court not only noted instances which evidence the framers' intent for a low wall between Church and State,²⁶⁸ the Court also asserted that the content of legislative prayer is not the concern of judges where there is no evidence that the prayer has been used to proselytize or advance a belief.²⁶⁹ The Court concluded that legislative prayer is not a proselytizing device.²⁷⁰ A holiday display with religious symbols can be compared to the legislative prayer in *Marsh* because the expression's content contains references to religion, but the expression is not intended to be a proselytizing device. Rather, a legislative prayer and a public holiday display recognize the inspirational and historical traditions of society. Moreover, the *Marsh* court asserted that since the legislative prayer does not evidence intent to proselytize or advance religion (it advances history and tradition), it is "not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."²⁷¹

This author is disheartened that the Supreme Court neglected the precedent of *Zorach* and *Marsh*. The Court's insistence on applying the modified *Lemon* test to government holiday displays violates Supreme Court precedent and our founders' intent.

Justice Kennedy's coercion test comes closest to what *Zorach*, *Marsh*, and the nation's founders require.²⁷² Justice Kennedy wrote that applying an endorsement analysis to holiday displays exudes an unfounded belligerence towards religion.²⁷³ Moreover, Kennedy's views that a religiously neutral State requires that the government not coerce one to believe in or exercise any religion and that the government cannot directly benefit any religion in a manner that would establish a State Church, are directly in sync

²⁶⁸ See *supra* notes 256-59 and accompanying text.

²⁶⁹ *Marsh v. Chambers*, 463 U.S. 783, 798 (1983).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² See *supra* note 59 and accompanying text.

²⁷³ *Id.*

with the proper interpretation of the Establishment Clause.²⁷⁴ Justice Kennedy is correct in that a constitutional standard that uses “coercion” as the main focal point best promotes the existence of a neutral state. The *Lemon* test and its endorsement alternative reflects the Court’s ignorance of its own precedents.²⁷⁵

This author finds it abhorrent that a court deemed a City’s display of a menorah, a creche, a Christmas tree, Santa, and Frosty the Snowman as unlawful,²⁷⁶ but found a cross standing alone in a public park lawful under the Establishment Clause.²⁷⁷

How could a neutral recognition of a nation’s cultural tradition be unconstitutional but a cross erected in a public park by the KKK be held lawful? The answer is that the wrong test has been formulated for determining the constitutionality of religious displays. In ignoring Supreme Court precedent,²⁷⁸ the statements by our founders²⁷⁹ and the secular nature of certain religious symbols,²⁸⁰ the Court refused to abandon the *Lemon* test when deciding the constitutionality of public holiday displays.

The Supreme Court and the nation’s founders have proclaimed that the Establishment Clause prevents the government from coercing or forcing one to believe in a particular faith.²⁸¹ In defiance of the established meaning of the Establishment Clause, the courts, in dealing with holiday displays, continue to cite the strict separationist language from *Everson* and *Lemon*. As a result of the Supreme Court’s defiance of the announced neutral policy of the Establishment Clause, the *Lemon* test, which is a strict separationist framework, was deemed the standard for weighing the constitutionality of all government actions relating to religion.²⁸² Consequently, the Court applied the strict separationist framework and its modifications to neutral government actions

²⁷⁴ See *supra* note 60 and accompanying text.

²⁷⁵ See *supra* notes 245-47, 260, 268 and accompanying text.

²⁷⁶ See *supra* note 119 and accompanying text.

²⁷⁷ See *supra* note 75 and accompanying text.

²⁷⁸ See *supra* notes 248-49 and accompanying text.

²⁷⁹ See *supra* notes 272-74 and accompanying text..

²⁸⁰ See *supra* notes 215-16 and accompanying text.

²⁸¹ See *supra* notes 232-34, 248 and accompanying text.

²⁸² See *supra* note 25 and accompanying text.

with incidental religious connotations, like holiday displays. In turn, this led to the tedious case-by-case grinding, ambiguous rules, and superficial distinctions to circumvent the strict separationist mandates of *Everson* and *Lemon*.

The Supreme Court must redeem the sad state of holiday display jurisprudence and recognize that the Establishment Clause was only meant to prohibit a State Church. An adoption of Justice Kennedy's test would be a welcomed change. Even this standard, however, has room for improvement. For instance, the Court would need to define exactly "coercion."

My proposal for a more intellectually honest, consistent, and fair standard for courts to utilize when analyzing government religious displays is more in sync with the intended meaning of the Establishment Clause. First, it must be asked if the type of display has cultural and historical meaning beyond religion. If the display is understood to be of the type that recognizes a national tradition at the "fabric of our society," the scene is constitutional per se. If the display contains symbols that have only pure and blatantly religious meaning, it must be decided if the meaning is so strong that it has a coercive impact.

Creches and menorahs have two meanings, secular and religious. When the government chooses to display these symbols, it is acknowledging a secular tradition that is embedded in our culture – similar to legislative prayer. The government is not mandating the following of the Judeo-Christian practices. My proposal is to reinstate what our founders, precedent, and the Bill of Rights mandate – a nation that is neutral toward religion and not hostile toward religious traditions that have secular meaning.

CONCLUSION

My proposal for improving religious display guidelines primarily involves the idea that some symbols and some forms of expression have two meanings. Symbols displayed during the winter holiday season have secular and religious significance. Their secular meanings have taken on possibly even more importance than their religious meanings.

Consider once again a display that is located in the front courtyard of a County Hall of Records building in the state of New Jersey.

The scene consists of a rendition of the Christian nativity, a menorah, and a Christmas tree. Every winter I pass this display and see children from diverse backgrounds stare at the winter scene. The young observers and their parents are smiling. They smile because the scene reminds them of our nation's heritage, the joy of giving, and the value of forgiveness. The display does not proselytize the observers. The display reminds them that another winter in this great nation has arrived. James Madison and our founders did not intend for the Establishment Clause to eradicate such joyous moments. Rather, our founders intended to preserve annual rituals to remind us of nation's progress and heritage.

The observers of the New Jersey holiday display reminds me of a group of curious viewers I once saw at the National Gallery in Washington D.C. The artistic beauty and religious portrayals of Renaissance artists particularly fascinated these observers. When I think about the Courts' practice of dissecting the content of holiday displays to decide their lawfulness, I become frightened. Is the Court next going to dissect the contents of religious paintings in government museums to decide if they constitute impermissible religious endorsement? How far will the Court go in distorting the original intent of our founders?

The *Marsh* Court quotes Justice Goldberg who said, "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." In its jurisprudence of government holiday displays, the Court has falsely characterized a "mere shadow" (public holiday displays) as a "real threat."²⁸³

*Jennifer H. Greenhalgh**

²⁸³ *Marsh*, 463 U.S. at 794 (quoting *Abington*, 347 U.S. at 308 (Goldberg, J., concurring)).

* This Comment is dedicated to the memory of my late grandfather, Murray Greenhalgh. With special thanks to: Professor Gary Shaw, Esther Schonfeld and Erin Sidaras.

