American Civil Liberties Union Of New Jersey V. Schundler: Established Endorsement In Need Of "Supreme" Intervention

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The First Amendment of the United States Constitution houses one of the most basic and indispensable concepts of American democracy—the separation of church and state.1 This principle is embodied in the amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion... ." The Framers of the Constitution included this explicit guarantee in order to ensure that religion would be permitted to exist independent of government regulation or intervention.3 While the text of the Establishment Clause is somewhat ambiguous,4 it implicitly demands that

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1 See Shahin Rezai, Note, County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis, 40 AM. U. L. REV. 503, 540 (1990) (“The Court should recognize the first amendment as the guardian of one of the most profound concepts underlying democracy—the separation of church and state.”).
2 U.S. CONST. amend. I.
4 See LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT, at xxi. (2d ed. 1994) (describing the Founding Fathers as "vague if not careless draftsmen"). Despite the Clause's ambiguity, the Supreme Court in Everson articulated what meaning the Clause holds at a minimum, stating:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor
church and state be separate and distinct, and that there be a “wall of separation”\(^5\) dividing the two.\(^6\) Furthermore, the Establishment Clause also prohibits Congress from supporting or sponsoring any religion.\(^7\) The principles embodied by the Establishment Clause reflect one of the core values upon which the republic was founded.\(^8\)

In preserving the protections of the First Amendment, courts have scrutinized carefully any restriction imposed on this fundamental liberty.\(^9\) Despite the significance of the Establishment Clause, the United States Supreme Court has been unable to provide one coherent standard by which to judge government involvement in religion. As a result, Establishment Clause jurisprudence has become one of the most controversial and unsettled bodies of American law.\(^10\)


\(^6\) See Lynch, 465 U.S. at 673 (noting that “[t]he Court has sometimes described the Religion Clauses as erecting a ‘wall’ between church and state”).

\(^7\) It has been argued that the Establishment Clause is primarily concerned with halting potential “government sponsorship” of religion. See Ronald D. Rotunda & John E. Nowak, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.3, at 453 (2d ed. 1992) (noting that the Establishment Clause “is a prohibition of government sponsorship of religion which requires that government neither aid nor formally establish a religion”).

\(^8\) See Levy, supra note 4, at xii. (recognizing that “[t]he Establishment Clause of the First Amendment ... does more than buttress freedom of religion ... [it] functions to depoliticize religion; [and] thereby helps to defuse a potentially explosive situation”).


\(^10\) See ACLU v. Schundler, 168 F.3d 92, 109 (3d Cir. 1999) (recognizing that there is “much confusion and plenty of room for jurisprudential disagreement [concerning the Establishment Clause]”) (Nygaard, J., dissenting); James M. Lewis & Michael L. Vild, Note, A Controversial Twist of Lemon: The
The often enigmatic realm of Establishment Clause jurisprudence has led to review of numerous government initiatives in an attempt to determine the bounds of religious establishment.\textsuperscript{11} Government sponsorship of religious holiday displays has been one such source of controversy.\textsuperscript{12} Whether the government may permit or erect a “holiday” display involving religious symbols, either on government-owned land or by using government funds, has proven to be fertile ground for constitutional debate.\textsuperscript{13} The contemporary standard used to determine the constitutionality of holiday display questions is the “endorsement” test.\textsuperscript{14} According to this analysis, a holiday display is constitutional unless it is found that the government, in permitting or erecting the display, has “engage[d] in a practice that has the effect of promoting or endorsing religious beliefs.”\textsuperscript{15} In defining “endorsement,” a court looks at a number of factors.

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\item \textsuperscript{11} See generally Wallace, 472 U.S. at 38 (involving a state statute allowing a one-minute moment of silence for voluntary prayer and meditation); Lemon v. Kurtzman, 403 U.S. 602 (1971) (prohibiting salary benefit for non-public school teachers); Walz v. Tax Comm’n, 397 U.S. 664 (1970) (upholding tax exemption for church property); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting prayer in public schools); Everson, 330 U.S. at 15 (permitting state reimbursement of bus fare to parents of children who attend non-public schools); see also William B. Lockhart et al., The American Constitution: Cases—Comments—Questions 1024 (8th ed. West Pub.) (noting that “[s]ince 1947, a substantial number of cases have dealt with the meaning of the establishment clause”).
\item \textsuperscript{12} See Gregg Ivers, Redefining the First Freedom: The Supreme Court and the Consolidation of State Power 104 (1993) (“Perhaps no other area of recent church-state conflict generated as much political divisiveness and bruised feelings over such a short period of time as did the several visible and controversial cases involving challenges to state-sponsored displays of religious symbols in public places.”).
\item \textsuperscript{13} See Allegheny, 492 U.S. at 627–32; Lynch, 465 U.S. at 668; Elewski v. Syracuse, 123 F.3d 51 (2d Cir. 1997) (finding that a city’s display of a crèche in a public park does not violate the Establishment Clause); ACLU v. Florissant, 17 F. Supp. 2d 1068 (E.D. Mo. 1998) (finding that a city’s display of a crèche and other religious symbols violated the Establishment Clause), rev’d, 186 F.3d 1095 (8th Cir. 1999); Amancio v. Somerset, 28 F. Supp. 2d 677 (D. Mass. 1998) (finding that a holiday display violated the Establishment Clause).
\item \textsuperscript{14} Allegheny, 492 U.S. at 593 (discussing the meaning of the term “endorsement”).
\item \textsuperscript{15} Id. at 621.
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such as the "context, composition, and location"\textsuperscript{16} of the display to decide its constitutionality.\textsuperscript{17} This test, initially thought of as a solution to the ailing state of Establishment Clause jurisprudence,\textsuperscript{18} is itself flawed and has proven to be difficult to interpret and apply.\textsuperscript{19} These flaws have proven that the endorsement test is an inadequate means by which to resolve holiday display controversies.

Part I of this Note outlines the basic evolution of Establishment Clause jurisprudence through a discussion of United States Supreme Court decisions regarding holiday displays and the analyses applied by the Court in these cases. Part II provides a general overview of the "endorsement test." Part III discusses the problems inherent in the endorsement test, including its misapplication in the recent Third Circuit decision of \textit{American Civil Liberties Union of New Jersey v. Schundler},\textsuperscript{20} which epitomizes the dire state of Establishment Clause jurisprudence. Part IV of this Note discusses the need for the consistent application of a constitutional test in order to resolve controversies concerning holiday displays and offers a revised mode of analysis regarding the resolution of these controversies.

I. Routes of Endorsement: The Evolution of Modern Establishment Clause Law

Due to the significance of the rights guaranteed by the Establishment Clause, the history of cases and controversies surrounding issues of religious establishment is extensive.\textsuperscript{21} The

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  \item \textsuperscript{16} Doe v. Clawson, 915 F.2d 244, 247 (6th Cir. 1990) (breaking the endorsement test down into three primary components, "context, composition, and location").
  \item \textsuperscript{17} See id.
  \item \textsuperscript{18} See IVERS, supra note 12, at 105 (describing pre-Lynch cases as "flawed decisions in this area, none of which outlined the proper constitutional limitations for the lower courts to follow").
  \item \textsuperscript{19} See id. at 112, 116 (describing \textit{Allegheny} as a "resolute failure" and discussing the flaws of Justice O'Connor's endorsement analysis).
  \item \textsuperscript{20} 168 F.3d 92 (3d Cir. 1999).
  \item \textsuperscript{21} See supra note 11 and accompanying text. For an insightful discussion of the Framers' intent and the foundations laid down by the ideals of Jefferson and Madison with regard to the Establishment Clause, see Huleatt, \textit{supra} note 3, at 657. The roots of the Establishment Clause can be traced back to the ideals of America's Founding Fathers. Perhaps two of the most vocal of the Founding Fathers concerned with government establishment of religion were Thomas Jefferson and James Madison. Jefferson suggested that a "wall of separation" be
United States Supreme Court's watershed decision in *Lemon v. Kurtzman*\(^{22}\) ushered in the modern period of Establishment Clause jurisprudence.\(^{23}\)

A. The Supreme Court's "Lemon"

In *Lemon*, the Supreme Court decided the constitutionality of two state statutes that directly provided monetary incentives to private school teachers. The state statutes, in providing such incentives, attempted to balance educational output between private and public schools, thereby securing the optimal level of education for all students enrolled in public and private schools alike.\(^{24}\) In determining that the statutes were unconstitutional, the Court, led by Chief Justice Burger, adopted a three-prong test. This test has yet to be fully abandoned by the present Court.\(^{25}\) While *Lemon* was not a "holiday display" case, the *Lemon* test has been used to resolve a variety of Establishment Clause questions.\(^{26}\)

\(^{22}\) 403 U.S. 602 (1971).

\(^{23}\) Traditionally, scholars have argued that the "modern" period of Establishment Clause law began with the Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). See Huleatt, *supra* note 3, at 665 (describing *Everson* as "the first modern Establishment Clause case"). *Lemon*, however, consolidated previous case law and serves as the root of endorsement analysis, the subject of this Note. Therefore, for purposes of this Note, *Lemon* will serve as the starting point of "modern" Establishment Clause jurisprudence.

\(^{24}\) The *Lemon* Court tested the constitutionality of a Rhode Island statute and a Pennsylvania statute. See *Lemon*, 403 U.S. at 607–10. The Rhode Island statute "authorize[d] state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary." *Id.* at 607. Additional restrictions based on "per-pupil expenditure on secular education" requirements were also imposed. *Id.* The Pennsylvania statute similarly allowed the Superintendent of Public Schools to purchase "secular educational services" from nonpublic schools, and in turn the state would reimburse the nonpublic schools for their "actual expenditures for teachers' salaries, textbooks, and instructional materials." *Id.* at 609.

\(^{25}\) See *Agostini v. Felton*, 521 U.S. 203 (1997) (applying the *Lemon* test to resolve an Establishment Clause controversy concerning a program which sent public school teachers into parochial schools to teach disadvantaged children); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (applying the *Lemon* test to resolve a holiday display controversy); see also Huleatt, *supra* note 3, at 672 (noting that "the *Lemon* test has proven functional in numerous cases").
Perhaps of greater significance, *Lemon* was groundbreaking, not merely because of the new test it announced, but because it accurately consolidated prior partial tests hovering above Establishment Clause jurisprudence that were previously used to resolve such issues.\(^{27}\) In *Lemon*, the Court seemed to acknowledge the need for coherence in Establishment Clause law.\(^{28}\) The decision represents the Court’s first real push to attain a functional test. The Court’s three-prong analysis was simply stated and seemingly functional.\(^{29}\) The first prong, appropriately dubbed the “purpose” prong,\(^{30}\) asks whether the purpose of the government’s action, or intent underlying legislation, was in fact secular.\(^{31}\) If the answer is yes, there is a presumption of constitutionality that may be rebutted by inquiry into the next two prongs.\(^{32}\) If the purpose of the legislation is found to have been non-secular, the law fails the first prong of the *Lemon* test and therefore violates the Establishment Clause. The final two prongs consider the issues of entanglement and the effect of the statute.\(^{33}\) The second prong asks whether the primary effect of the action advances or inhibits religion.\(^{34}\) The third prong evaluates whether the action will result in excessive government entanglement with religion.\(^{35}\)

\(^{27}\) The *Lemon* test was pieced together from bits of prior case law. See, e.g., Walz v. Tax Comm’n, 397 U.S. 664 (1970) (giving rise to the entanglement prong of the *Lemon* test); Board of Educ. v. Allen, 392 U.S. 236 (1968) (giving rise to the effect prong of the *Lemon* test).

\(^{28}\) Prior to *Lemon*, the state of Establishment Clause law consisted of random applications of scantily-defined rules. See supra note 11 and accompanying text.

\(^{29}\) See *Lemon*, 403 U.S. at 612–13. In describing the three-prong test, the Court stated that “[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. (citations omitted) (emphasis added).

\(^{30}\) See id.

\(^{31}\) See id. at 613.

\(^{32}\) The statutes facing constitutional challenge in *Lemon* were found to satisfy the purpose prong of the *Lemon* test. See id. Specifically, the Court noted that “[i]nquiry into the legislative purposes of the . . . statutes affords no basis for a conclusion that the legislative intent was to advance religion.” Id.

\(^{33}\) See id. at 612–13.

\(^{34}\) See id. at 612. This prong was satisfied, according to the Court, through a simple inquiry into the legislative intent underlying the statute. See id. at 613.

\(^{35}\) See id. The final prong of *Lemon*, the “entanglement” prong, also contains a consideration of “political divisiveness,” which is less often scrutinized than “entanglement,” yet remains inherent within the analysis. Rezai, supra note 1, at 518–19.
The Court in *Lemon* found that the statutes failed the entanglement prong. In inquiry into the "character and purposes of the institutions" benefiting from the statutes revealed excessive government entanglement with religion. Ultimately, the schools' religious character caused an unconstitutional government entanglement with religion.

The *Lemon* test, while fairly well-received, was terribly inflexible. *Lemon* provided a unique, yet obstinate approach to the resolution of Establishment Clause issues. The rigid three-prong analysis supported the ideals of those favoring strict separation of church and state—"strict separationists." Regardless of *Lemon*'s significance, the Supreme Court, mostly through the efforts of Justice O'Connor, has shifted the focus of its analysis of holiday display cases from the three prongs of *Lemon* to a more relaxed accommodationist approach.

Justice O'Connor introduced her analysis, commonly known as the endorsement test, in *Lynch v. Donnelly,* where the

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36 See *Lemon,* 403 U.S. at 615 (citing the impermissible degree of entanglement). This prong was analyzed in *Lemon* by "examin[ing] the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.*

37 *Id.*

38 See *id.*

39 The Court stated that "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 616.

40 See *Religious Liberty in the Supreme Court* 230 (Terry Eastland ed., 1993) (citing Safeguarding Religious Freedom, *WASH. POST,* June 30, 1971) (noting that the decision in *Lemon* indicated "a strengthening of the traditional wall of separation which shields religion in America from governmental intrusion").

41 See Rezai, supra note 1, at 517 (noting that "[s]trict application of the *Lemon* test, however, would nullify most affirmative actions by government to accommodate religious practices").

42 There exist three primary schools of thought with regard to issues of religious establishment. See *id.* at 503–04. The schools of thought, with somewhat amorphous labels, are the strict separationists, accommodationists, and flexible accommodationists. See *id.* (noting that "commentators discussing these theories often refer to them by different labels such as 'nonpreferentialists' and 'pluralists'"). *Id.* at 506.

43 See *Ivers,* supra note 12, at 116 (recognizing that "[t]he endorsement test does not subject the alleged state sponsorship of religious influences to the same tough standard as *Lemon,* but a less rigorous... establishment clause jurisprudence was the basis for which Justice O'Connor developed it").

Supreme Court decided the constitutionality of a holiday display containing a crèche. Despite the Court's contemporary preference for the endorsement test,\(^45\) it has yet to overrule *Lemon* and continues to make sporadic reference to its test.\(^46\)

**B. Lynch v. Donnelly—Reluctantly Losing Sight of Lemon**

*Lynch* is commonly viewed as one of the most significant Supreme Court decisions regarding the constitutionality of holiday displays.\(^47\) *Lynch*’s significance is twofold. First, it gave rise to the now-dominant endorsement test.\(^48\) Second, by introducing the endorsement test, *Lynch* represented the beginning of the Court’s departure from the *Lemon* standard with respect to the resolution of controversies surrounding holiday displays.\(^49\)

In *Lynch*, the majority found the holiday display, maintained, owned, and erected by the City of Pawtucket, and placed in a privately owned park, was constitutional.\(^50\) The Supreme Court, in deciding the constitutionality of the display, applied the three party test of *Lemon*.\(^51\) Justice O’Connor, in her

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\(^{45}\) See Allegheny v. ACLU, 492 U.S. 573, 592–93 (1989) (noting that in further narrowing what is unconstitutional action, the Court has focused on whether there is endorsement of religion in the purpose or effect of the governmental actions).

\(^{46}\) See ACLU v. Schandler, 168 F.3d 92, 97–98 (3d Cir. 1999) (noting that subsequent cases had merged the prongs of the *Lemon* test).

\(^{47}\) See IVERS, supra note 12, at 106 (describing *Lynch* as a “landmark” decision and the first to “open[] the door to this constitutional puzzle house” of religious establishment).

\(^{48}\) The endorsement test arose from Justice O’Connor’s concurrence and was not the test relied on by the majority in resolving the case. See *Lynch*, 465 U.S. at 687–94. Actually, Chief Justice Burger relied on *Lemon* in holding that the “winter wonderland” display was constitutional and permissible within the bounds of the First Amendment. See id. at 681.

\(^{49}\) The next major holiday display case that reached the Supreme Court, *Allegheny*, was decided on endorsement grounds. See *Allegheny*, 492 U.S. at 592–602.

\(^{50}\) See *Lynch*, 465 U.S. at 687 (holding that “notwithstanding the religious significance of the crèche, the city of Pawtucket has not violated the Establishment Clause”).

\(^{51}\) See id. at 681–85. The Court stated that “[w]e are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.” Id. at 685.
concurrence, offered a simpler solution to the puzzle. O'Connor believed that the Court should simply ask whether the government's action of erecting a display "endorse[d]" religion.

The Lynch display, "essentially like those... found in hundreds of towns or cities across the Nation," consisted of a "Santa Claus, house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers,... a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASON'S GREETINGS,' and a crèche." The City of Pawtucket owned all the elements of the display. Perhaps unique to this display, as opposed to other government-funded displays that have met constitutional challenge, was the fact that the display was not located on public property. This factor becomes significant in evaluating the display in its totality. The Court has expressed that displays located on public property are inherently suspect and carry a strong presumption, albeit rebuttable, of unconstitutionality.

In reversing the district court and ultimately upholding the constitutionality of the display, the Court acknowledged the inherent impossibility of erecting a literal "wall of separation" between church and state, effectively "enforc[ing] a regime of total separation." The Court, elaborating on the basis for its

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52 See id. at 687. Justice O'Connor stated that she "wrote] separately to suggest a clarification of our Establishment Clause doctrine." Id. (O'Connor, J., concurring).

53 Id. at 688, 690, 692. Justice O'Connor noted that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Id. at 692.

54 Id. at 671. The relevance of this quote is perplexing. Chief Justice Burger makes reference to a number of like displays, but numbers alone do not make the displays constitutional.

55 Id.

56 See id.

57 See id. "The display [was] situated in a park owned by a nonprofit organization and located in the heart of the shopping district." Id.

58 See Allegheny v. ACLU, 492 U.S. 573, 626–27 (1989) (reciting the risk of making citizens feel that religion is a factor in determining status in the political establishment) (O'Connor, J., concurring).

59 See id. at 627.

60 Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760–61 (1973); see also Lynch, 465 U.S. at 673 (stating that "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government"). In acknowledging the idea of a "wall of separation" as coined by Thomas Jefferson, the Court admitted that "[t]he Court has sometimes
interpretation, acknowledged that it had on numerous occasions declined to impose an absolutionist view of religious establishment. The Court did, however, resolve the issue with an application of the rigid three-prong test of Lemon.

In holding that the display was constitutional, the Court found specifically that the “winter wonderland” displayed in the city’s downtown shopping district, on private land, had a “secular” purpose. The display was “sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday.” The Court concluded that this satisfied the first prong of Lemon. The Court recognized that the “purpose” prong analysis includes reliance upon the context of the display, and determined that the display here would be secular in the context of the Christmas season. The context therefore essentially transformed the display from a semi-establishment of religion into a festive and secular “winter wonderland,” free from constitutional implication.

described the Religion Clauses as erecting a ‘wall’ between church and state.”

Id.

61 See Walz v. Tax Comm’n, 397 U.S. 664, 671 (1970) (discussing the long history of tolerating some aspects of religion in government). Examples included by the Lynch Court were of the colonists celebrating a day “to give thanks for the bounties of Nature as gifts from God,” and President Washington eventually proclaiming Thanksgiving “with all its religious overtones” a national holiday. Lynch, 465 U.S. at 675. The Lynch Court elaborated by running down a long list of examples of government interaction with religion. See id. at 675–678; see also Ivers, supra note 12, at 107 (quoting the Chief Justice in the Lynch case as saying “[T]he Framers never intended for the First Amendment to banish religious celebrations from public life, but rather insisted that their place in the civic culture mandated constitutional accommodation”).


63 Id. at 681.

64 The Court did not go into much depth in justifying its finding that the purpose of the display was secular. See id. This prong is generally regarded as the least important, as evidenced by lower courts’ limited dealing with the prong. See Rezai, supra note 1, at 518 (claiming that “[t]he first prong, which requires that the government’s action have a secular purpose, is relatively easy to satisfy”).

65 See Lynch, 465 U.S. at 679 (stating that “the focus of our inquiry must be on the crèche in the context of the Christmas season”). This concept of “context” is also very important to resolution of holiday display cases in which the endorsement test is applied. See Doe v. Clawson, 915 F.2d 244, 248–49 (6th Cir. 1990). This fact illustrates the endorsement roots in Lemon.

66 See Lynch, 465 U.S. at 680 (noting that the “inclusion of the crèche is [not] a purposeful or surreptitious effort to express . . . advocacy of a . . . religious message”).
The second prong of Lemon asks whether the government action advances religion.67 Here, the Lynch Court acknowledged that there may be an advancement of religion, but only of an "indirect," "remote," and/or "incidental" character that does not violate the essence of the second prong of Lemon.68 This, according to the Court, was because both our nation's history69 and legal precedent suggest that some advancement of religion will be tolerated under the Constitution.70 Thus, the Court's holding that the display was constitutional, in effect, tolerated a minimal "advancement" of religion.71

The final prong of Lemon, the entanglement prong, was applied, satisfied, and clarified in Lynch.72 Similar to the logic employed by the Court in resolving the advancement prong, the Lynch Court determined that "[e]ntanglement is a question of kind and degree."73 Specifically, the Court found that any entanglement which may be present was "de minimis" and insufficient to support a First Amendment violation.74 The "day-to-day" upkeep on the display was nominal.75 Additionally, the display itself was of limited value.76 In a related analysis, the Court also found that the display did not result in political divisiveness.77

Although the Court's holding in Lynch was based on an evaluation of the display in light of the three prongs of Lemon,

69 See id. “[D]isplay of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ's Mass,’ or the exhibition of literally hundreds of religious paintings in governmentally supported museums.” Id.
70 See id. “[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action.” Id.
71 See id.
72 See id. at 683–85.
73 Id. at 684.
74 See id. “In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.” Id.
75 See id. (noting that it did not cost the city anything to maintain the display).
76 See id. (noting that the crèche was only worth approximately two hundred dollars).
77 Political divisiveness has become an implied consideration in the final prong of the Lemon test. See id.
the decisive swing vote came from Justice O'Connor. O'Connor agreed with the majority in that the display was not a violation of the Establishment Clause, but disagreed with its rationale. Justice O'Connor evaluated the display by relying on her own test—the endorsement test. O'Connor felt that Establishment Clause doctrine had become somewhat perverted, and that Lemon had merely provided guidance in resolving these issues. O'Connor believed the Lemon test was a bit ambiguous, and possibly more burdensome than necessary to apply. In response, her concurrence proposed the endorsement test in an attempt to achieve "a clarification of ... Establishment Clause doctrine."

In introducing the endorsement test, Justice O'Connor framed the issue in terms of non-adherent alienation. She viewed the inherent prohibitions of the Establishment Clause as safeguards against the government imposition of religion upon a citizen, which would jeopardize the citizen's status in the political community by making adherence to a particular religion relevant to the citizen's political standing.

To deal with this problem, the endorsement test focuses on the "message" that the government action sent to non-adherents. The message violates the Constitution if it allows

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78 See id. at 687 (O'Connor, J., concurring).
79 See id.
80 See id. at 688–89. "It has never been entirely clear ... how the three parts of the test relate to the principles enshrined in the Establishment Clause." Id.
81 Id. at 687.
82 See id. at 688. Justice O'Connor saw the potential for government to violate the Establishment Clause in two principle ways—government endorsement of religion and excessive governmental entanglement. See id. She considered government endorsement to be the more direct way of violating the Establishment Clause. See id. It is because of the direct nature of this potential infringement that Justice O'Connor chose to use it as the focus for her endorsement standard. See id. at 689–90. The entanglement prong, although not the basis for her analysis, does provide indirect support for resolution through her endorsement test. See id. Justice O'Connor retains this idea from the principles extracted in Lemon. See id. This is evidence of the fact that the endorsement test is a simplified spawn of Lemon, intended to prevent disapproval of minority religions from passing constitutional requirements. See id. at 691–92.
83 See id. at 687. "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Id.
84 See id. at 692.
non-adherents to feel as though they were outsiders, sends the message that those who exhibit their religious beliefs publicly are preferred members of the political community. In essence, such a message would amount to government endorsement of religion, serving to undermine the religious beliefs of minority non-adherents. In an attempt to overcome the often ambiguous undertones of Lemon, Justice O'Connor framed the issue in a rather simple and straightforward manner. O'Connor simply asked whether the government, by granting permission or providing assistance in erecting the display, "endorsed" religion. In resolving this question, O'Connor viewed the inquiry under the purpose and effect prongs of Lemon as indispensable elements of endorsement application. Similar to the majority's finding that total absolutist prevention of minimal advancement may be neither possible nor necessary to pass Establishment Clause limits, O'Connor found that advancement or endorsement may exist on some level, yet still not extend to the point of violating the Constitution. O'Connor, however, framed the question differently than the majority. The majority asked the narrow question of whether there was advancement or endorsement. O'Connor framed the issue more clearly by asking whether the message of endorsement was negated or counterbalanced by the context, or "overall holiday setting," and "what viewers may fairly understand to be the purpose of the display . . . ."

85 See id. at 688. "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." Id.
86 See id. at 692.
87 See id. at 688 (noting that Lemon "has never been entirely clear").
88 See id. at 690. "The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche." Id.
89 See id. "The purpose and effect prongs of the Lemon test represent these two aspects of the meaning of the city's action." Id. Essentially, the first two prongs of Lemon served as the basis for the conception of the endorsement test. See id. at 690–91.
90 See id. at 692–93 (noting that the exempt status for religious organizations, Sunday blue laws, legislative prayers, and the printing of "In God We Trust" on coins do not violate the Establishment Clause).
91 See id. at 692 (noting that an understanding of the "purpose" of the display can negate "any message of endorsement of that content").
92 Id.
Justice O'Connor reasoned that the display at issue in *Lynch* passed the endorsement test because Christmas has long been accepted as a holiday having a secular meaning. The display was merely a commemoration of a “public holiday,” and government participation would not generally be understood to be an endorsement of religion, but rather a commemoration of the secular holiday. O'Connor, therefore, concurred that the display did not represent what would be tantamount to a government endorsement of religion. Since its introduction in *Lynch*, the endorsement test has become the preferred mode of analysis employed by the Supreme Court in resolving holiday display cases.

C. Allegheny's Embrace of O'Connor's Endorsement

In *Allegheny v. American Civil Liberties Union*, the Court simultaneously decided the constitutionality of two displays, one primarily consisting of a menorah and Christmas tree, and the other consisting of a crèche. The Court barely obtained a majority, and a comically split Court left the state of Establishment Clause affairs in shambles.

*Allegheny* represents the first instance where a majority of the Court expressly embraced the endorsement test to resolve a holiday display issue. The first display tested in *Allegheny*...
consisted essentially of a crèche, highlighted by poinsettias. Distinguishing this display from the “winter wonderland” display in *Lynch* was the fact that the crèche was located on public property—specifically the “Grand Staircase of the Allegheny County Courthouse.” The crèche, along with the floral arrangement, was further accompanied by a sign proclaiming “Gloria in Excelsis Deo!”—Glory to God in the Highest. The second display, located outside of the city-county building, also public property, consisted of a Chanukah menorah, a Christmas tree, and a sign saluting liberty.

The Court in *Allegheny* referred to the endorsement test as a “refined” mode of analysis that somehow served to clarify or augment the ideals of *Lemon*. The Court extracted two important concepts from O’Connor’s articulation of endorsement analysis. First, the Court rejected the idea that any toleration of government endorsement of religion may exist. Second, similar to *Lemon*, the Court analyzed the purpose of the display in determining its constitutionality. *Allegheny* synthesized this rule simply by stating that “the government’s use of religious symbolism is unconstitutional if it has the effect of endorsing

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100 See *Allegheny*, 492 U.S. at 580.
101 Id. at 578.
102 See id. at 580.
103 See id. at 592.
104 Here, the majority begins to express its preference for the endorsement analysis, considering it a further refinement in a perpetual evolution of Establishment Clause jurisprudence for which *Lemon* was simply an intermediate stage of developing theory. See id. at 592 (“In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”). The Court sees endorsement analysis as the latest (and possibly final) stage of Establishment Clause evolution. See id. In *Allegheny*, it found the analysis of the *Lynch* Court to be full of conclusions lacking explanation and justification. See id. at 594. The Court went on to refer to Justice O’Connor’s *Lynch* concurrence as “a sound analytical framework for evaluating governmental use of religious symbols.” Id. at 595.
105 See id. at 595.
106 See id. (“[T]he question is ‘what viewers may fairly understand to be the purpose of the display.’”) (quoting *Lynch* v. Donnelly, 465 U.S. 668, 692 (1984)).
religious beliefs, and the effect of the government’s use of religious symbolism depends upon its context.”

The Court held, contrary to Lynch, that the crèche display was unconstitutional. The message conveyed by the crèche was found to be purely religious, and held to have special significance and centralized meaning to the Christian faith. In analyzing the display, the Court broke it down into its particular elements. Specifically, the Court found the words of the sign, the crèche, and the particular arrangement of the flowers to represent a clear endorsement of Christianity.

The unconstitutionality of this display, however, was primarily a result of its “setting.” The context of the display itself did not detract sufficiently from the inherent religious significance of the crèche. The Lynch display contained multiple focal points, each of which created distinct stories, while maintaining visual equality. Unlike the Lynch display, the crèche in Allegheny was the only focal point of the display. The display’s only secular objects—the flowers—served to highlight the religious significance of the crèche. The absence of secular objects that would have detracted from the crèche’s inherently religious message led the Court to find it the focal point of a purely non-secular display. Furthermore, the crèche’s location, on the Grand Staircase of the county courthouse, allowed for further inference of government approval and endorsement.

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107 Id. at 597.
108 See id. at 600–01.
109 See id. at 598 (“[T]he crèche itself is capable of communicating a religious message.”).
110 See id. at 598–600 (providing a vivid description and interpretation of the display).
111 See id. at 598 (finding the religious meaning of the set up “unmistakably clear”).
112 See id. (“[T]he effect of a crèche display turns on its setting.”).
113 See id.
114 See id. (stating that the Lynch display had a significant amount of various figures and objects).
115 See id. (“Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.”).
116 See id. at 599 (“The floral frame... serves only to draw one’s attention to the message inside the frame... [It] contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche.”).
117 See id. at 598 (noting that nothing in the context of the display detracts from the crèche’s religious message).
118 See id. at 599–600 (“[T]he crèche sits on the Grand Staircase, the ‘main’ and ‘most beautiful part’ of the building that is the seat of county
For these reasons, the display was held to violate the Establishment Clause.\textsuperscript{119}

The notion that proximity to secular objects can detract from religious significance enabled the Allegheny Court to find the second display constitutional.\textsuperscript{120} The Court reasoned that the menorah, unlike the crèche, was not an entirely religious symbol.\textsuperscript{121} Despite its origin in Judaism, the menorah may be considered a secular symbol of liberty.\textsuperscript{122} Under the Court's theory, this secular perception of the menorah was enhanced when it was positioned among other secular symbols.\textsuperscript{123} The Allegheny Court opined that a Christmas tree, though once considered a religious symbol, is currently considered a secular object.\textsuperscript{124} The Court further found that the secular tree was the dominant element or "focal point" of the second display,\textsuperscript{125} in contrast to the dominant sectarian symbol of the lone crèche in the first display.\textsuperscript{126} Therefore, the message conveyed by the second display was secular and not a violation of the First Amendment.\textsuperscript{127}

II. ENDORSEMENT OVERVIEW

Currently, the Supreme Court applies the endorsement test to resolve issues pertaining to the constitutionality of holiday displays.\textsuperscript{128} Despite the existence of the endorsement test,
numerous alternative approaches and analyses directed at interpreting Establishment Clause limits have been introduced. More accurately, the Supreme Court has been severely divided and inconsistent in its application of the endorsement test to all Establishment Clause cases. Perhaps more unsettling is the fact that the Court has had trouble defining and identifying key elements of the test itself.

The endorsement test is an accommodationist derivative of the first two prongs of Lemon. The test evaluates whether government activity endorses religion in its specific context. Unfortunately, this simplistic formulation is not so easily applied to often complex and varying fact-sensitive legal situations. In applying the endorsement test, a court determines whether an "objective observer, who is familiar with the action in question, would discern [the government action] as state sponsorship of a particular faith or religion in general." Often this rather straightforward application has been misconstrued, twisted, and

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Supreme Court in resolving holiday display issues, alternative tests have been offered by various justices. See id. at 659 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy offered to base the Court's analysis of such cases on a factor of coercion. See id. at 662 (recognizing that "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal"); cf. Rezai, supra note 1, at 537 (noting that "a consistent standard of judicial adjudication can exist" and recommending that "[t]he Lemon test . . . be abandoned and replaced with a reformulation of Justice O'Connor's endorsement test") (footnote omitted). Unfortunately, neither the existing analysis nor the alternatives seem to be without flaw.

129 See Ivers, supra note 12, at 115–18 (discussing the methods of O'Connor and Kennedy); Lewis & Vild, supra note 10, at 694–97 (presenting the theories of Kennedy and Stevens).

130 See Lewis & Vild, supra note 10, at 688 (discussing problems inherent in the endorsement test).

131 See id. at 688 (stating that "among the majority of Justices who do agree that the endorsement test should be used, there is no consistency in application. The Justices have even failed to agree on the definition of essential terms").

132 See Rezai, supra note 1, at 520 (describing the endorsement test as an "alternative" to Lemon and noting that it "combines the purpose and primary effect prongs of Lemon into one element called endorsement").

133 See Allegheny, 492 U.S. at 598.

134 See id. at 629 (noting that "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice"); see also Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (noting that "the [Establishment Clause] inquiry calls for line-drawing; no fixed, per se rule can be framed").

135 Rezai, supra note 1, at 521.
made more complex. 136 Inherent in the reasonable observer inquiry is the question of whether a message is communicated to non-adherents "that they do not fully belong to the community and its political processes, while sending a message to adherents that they are full and preferred participants of the political community." 137

The endorsement test, as it has evolved from Lemon and through sporadic application to holiday display cases, can be broken down into three principle components. 138 The test looks to the "context, composition, and location" 139 of a display in evaluating its constitutionality. 140 Once an evaluation is made of the context, composition, and location, the message of the display is assessed through the eyes of a reasonable observer to determine whether the display ultimately endorses religion. 141 Specifically, with regard to context, the Court is concerned with a display in the "national holiday context." 142 Composition considers a number of factors such as the figures, objects displayed, and the display's focal point. 143 Perhaps similar to the focal point consideration is the issue of the display's location. 144 A display located on public grounds creates a greater presumption of a constitutional violation. 145 It is logical to view a display erected on public property to be an endorsement of religion. 146 As O'Connor noted, "[t]he display of religious symbols in public

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136 See Lewis & Vild, supra note 10, at 688.
137 Rezai, supra note 1, at 520.
138 See Doe v. Clawson, 915 F.2d 244, 247 (6th Cir. 1990).
139 Id.
140 See id.
141 See Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (discussing endorsement and making an inquiry into whether "'a reasonable observer'... fairly [understood] government action to 'send[d] a message to nonadherents that they are outsiders, not full members of the political community' ") (Kennedy, J., concurring in part and dissenting in part); see also Rezai, supra note 1, at 521 ("To determine whether an action by the government amounts to endorsement, an inquiry must be made as to whether an objective observer, who is familiar with the action in question, would discern it as state sponsorship of a particular faith or religion in general.").
142 Clawson, 915 F.2d at 247.
143 See id.
144 See id.
145 See Allegheny, 492 U.S. at 626.
146 See id.
areas of core government buildings runs a special risk of ‘mak[ing] religion relevant, in reality or public perception, to status in the political community.’ \(^{147}\). O’Connor’s underlying intent in conceiving the endorsement test was to loosen the unyielding restrictions of *Lemon* in an attempt to ease the position of minority religions.\(^{148}\) It would seem, however, that as a result of the endorsement analysis, more displays containing Christian and Jewish symbolism, both majority religions, pass constitutional muster under the *Lemon* test.\(^{149}\)

In attempting to bring consistency to the Court, Justice O’Connor offered the textually simplistic endorsement construct, which serves as the basis of holiday display dispute resolution.\(^{150}\) Unfortunately, this construct serves as a source of confusion, resulting in chaotic application by the lower federal courts.\(^{151}\) Epitomizing the confusion created by contemporary Establishment Clause jurisprudence is the recent decision in *American Civil Liberties Union of New Jersey v. Schundler*\(^{152}\).

### III. *American Civil Liberties Union of New Jersey v. Schundler*: Epitomizing Judicial Confusion

In *Schundler*, the United States Court of Appeals for the Third Circuit considered the constitutionality of a publicly-funded display on public land, consisting of secular and religious objects.\(^{153}\) The court, ultimately held that the modified holiday display erected on public property was constitutional despite its inclusion of numerous religious symbols.\(^{154}\) The procedural history underlying *Schundler* is unusually complex. The complex body of procedure in this case and the apparent confusion exhibited by the court in resolving the issue makes *Schundler* a prime example of the chaotic state of Establishment Clause jurisprudence.

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\(^{147}\) *Id.* at 626 (alterations in original) (citing Lynch v. Donnelly, 465 U.S. 668, 692 (1984)).

\(^{148}\) See *Ivers*, *supra* note 12, at 116.


\(^{150}\) See *Lynch*, 465 U.S. at 688.

\(^{151}\) See *Ivers*, *supra* note 12, at 118–20 (discussing the confusion of the lower federal courts).

\(^{152}\) 168 F.3d 92 (3d Cir. 1999).

\(^{153}\) See *id.* at 96.

\(^{154}\) See *id.* at 109.
A. Facts and Procedure

In celebration of the holiday season, Jersey City traditionally erected a display in front of its City Hall. The display consisted primarily of a crèche exhibited on the right side of City Hall, and a menorah and Christmas tree exhibited on the left side. In 1994, the American Civil Liberties Union of New Jersey (ACLU) brought suit against the city, the city council, and the mayor of Jersey City, Bret Schundler (collectively the “City”), claiming that the City’s display violated both the state and federal constitutions. The ACLU sought to have the City enjoined from continuing the display. The district court ultimately found the display to be a violation of the Establishment Clause and permanently enjoined the City from maintaining the traditional display as well as any other “substantially similar scene or display . . .”

On December 13, 1995, the City erected a modified display that consisted of the components of the unconstitutional display, as well as figures of Santa Claus and Frosty the Snowman; a sled; Kwanzaa symbols; and two signs claiming that the display was a celebration of ethnic diversity. The ACLU and other

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155 See id. at 95. The court notes that the city had been erecting a display “[f]rom at least 1965 until 1995 . . . .” Id.
156 See id. The size of the objects varied. The crèche included an 11 foot 9 inch manger, and figures of Mary, Joseph, Jesus, and the Three Wise Men, each varying in height, the smallest of which was 12 inches and the largest 27 inches. See id. The menorah was 19 feet tall and the Christmas tree 13 feet. See id.
157 The ACLU and four residents of Jersey City were the plaintiffs in the action. See ACLU v. Schundler, 931 F. Supp. 1180, 1181 (D.N.J. 1995).
158 Prior to the actual commencement of the suit, the ACLU wrote a letter to the City requesting that the City “discontinue its practice of displaying religious symbols on public property.” Schundler, 168 F.3d at 95. In response to the letter, the City did not remove its display, but instead placed a sign next to the display maintaining that the display was simply a part of an “ethnic” celebration regarding Jersey City’s “cultural” diversity. Id. The action was originally brought in state court, citing challenges to both the federal and state constitutions. See id. The City removed the case to federal district court. See id. at 96.
159 See id. at 95.
160 Id. at 96. On November 28, 1995, the district court granted the ACLU’s motion for summary judgment, finding that the display violated both the federal and state constitutions. See id.
161 See id. The figures of Santa and Frosty were 4 feet and 3 feet 10 inches respectively. See id. The sled was 4 feet tall and the signs were each 2 feet by 3 feet. See id. The signs stated: “Through this display and others throughout the
plaintiffs promptly moved to hold the City "in contempt of the district court's injunction" and "sought a preliminary injunction against the modified display." The district court denied these requests, stating that the addition of the secular objects had sufficiently "demystified" the religious nature of the display, thereby making it constitutional and free from Establishment Clause implications. The case was appealed, and a panel of the Court of Appeals for the Third Circuit held that the district court's demystification analysis was desperately flawed and inconsistent with Supreme Court precedent. On remand, the district court found, based on an endorsement test analysis, that the modified display was unconstitutional. The City appealed and the case was again brought before the Third Circuit.

The court of appeals, finding that the district court had misinterpreted the Supreme Court's endorsement analysis, again reversed the district court's decision, holding that the modified display was indeed constitutional. It is apparent from this decision that the circuit court itself misconstrued and misapplied the endorsement test and undermined the integrity of its own court by wholly disregarding dicta found in its prior panel decision.

year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." Id.

162 Id.
163 See id.
164 See ACLU v. Schundler, 104 F.3d 1435, 1450-51 (3d Cir. 1997).
165 See Schundler, 168 F.3d at 97 (discussing the district court holding and stating that "the District Court granted summary judgment for the plaintiffs and held that the modified display violated the Constitution"). The district court found specifically that the display, even after the addition of the secular objects, would still fail Supreme Court endorsement analysis. See id. In so finding, the court relied heavily on the Circuit Court panel's discussion of the context of the display. See id. The district court was convinced that "discussion of the context of the display after the addition of Frosty the Snowman, Santa and a red sled leaves little doubt that... the display communicates the City's endorsement of Christianity and Judaism in violation of the Establishment Clause." Id. (internal quotations omitted).
166 See id.
167 See id. at 108-09. The appeal also included a Federal Rule of Civil Procedure 60(b)(5) motion. See id. at 109. The Third Circuit affirmed the part of the district court's decision that denied the defendant City relief under Rule 60(b)(5). See id. The 60(b)(5) motion is beyond the scope of this Note.
B. Rationale of the Court

In determining the constitutionality of the display, the court of appeals purported to have applied the endorsement test.\textsuperscript{168} In dealing with the context aspect of the analysis, the court found that a reasonable observer would not conclude that the display was meant to endorse religion, but instead to celebrate the cultural and ethnic diversity of Jersey City residents.\textsuperscript{169} Moreover, the court held the display constitutional because it was “unable to perceive any meaningful constitutional distinction between the display at issue here and those that the Supreme Court upheld in \textit{Lynch} and \textit{Allegheny County}.”\textsuperscript{170}

The dissent, on the other hand, found that there were many distinctions between the present case and \textit{Lynch-Allegheny}.\textsuperscript{171} Acknowledging the “confusion” and abundance of “jurisprudential disagreement” surrounding the Establishment Clause, the dissent argued that an analysis of the context of the display, required by the endorsement test, led to its conclusion.\textsuperscript{172} Essentially, it is the position of this author, that the “message” of the modified display was the same as the original.\textsuperscript{173}

C. Analysis

\textit{Schundler} is unique in that the court was testing the constitutionality of a “modified” display whose predecessor had been declared unconstitutional.\textsuperscript{174} Therefore, the question before the court should have been somewhat different than the question before a court evaluating the constitutionality of an “original” display.\textsuperscript{175} In testing the constitutionality of an original display,

\begin{footnotesize}
\textsuperscript{168}See id. at 103–04 (“Accordingly, in considering how the modified Jersey City display now before us fares under \textit{Allegheny County}, we will focus on Justice O'Connor's opinion.”).

\textsuperscript{169}See id. at 106 (“Moreover, although this factor is not necessary to our decision, we are convinced that in evaluating the message conveyed by the modified Jersey City display to a reasonable observer, the general scope of Jersey City’s practice regarding diverse cultural displays and celebrations should be considered.”).

\textsuperscript{170}Id. at 107.

\textsuperscript{171}See id. at 109–13 (Nygaard, J., dissenting).

\textsuperscript{172}See id. at 109.

\textsuperscript{173}See id. at 114.

\textsuperscript{174}See id. at 98.

\textsuperscript{175}See id. at 96 (noting that based on an evaluation of the original display, the City was “permanently enjoined . . . from erecting its traditional display or any substantially similar scene or display”).
\end{footnotesize}
courts are concerned with whether the display itself violates the Establishment Clause. In cases concerning a modified display, the question becomes whether the display is the same or “substantially similar” to the display previously held to be unconstitutional. Although the modified display in Schundler changed physically, some important elements remained. These elements allowed the focal points of the first and modified displays to remain wholly unchanged. Therefore, the message of the modified display was essentially the same as that of the original, and thus, the modified display should have been deemed unconstitutional as well. The Schundler court completely disregarded and failed to analyze the message of the display in resolving the issue. Had the court addressed these issues, logic would dictate a contrary holding.

The primary concern of the endorsement test is an evaluation of the message of the display. This primary concern weakens the validity of the test when applied to cases evaluating modified displays. The Supreme Court’s analyses of holiday display cases make random and inconsistent reference to the standard of a “reasonable observer” when determining whether the display endorses religion. This concept, essential to an accurate evaluation of the display’s message, has been scantily

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176 See, e.g., Allegheny v. ACLU, 492 U.S. 573, 594–97 (1989) (discussing cases that have addressed the application of the Establishment Clause to displays with religious meaning).
177 Schundler, 168 F.3d at 96.
178 See id. Certain elements were added, such as plastic figures of Santa Claus and Frosty the Snowman, a sled, Kwanzaa symbols, and signs which recognized the diverse cultural and ethnic heritage of the people. Yet, the focal points of the display remained, namely the crèche and the menorah. See id.
179 See id.
180 See id. at 114 (Nygaard, J., dissenting) (concluding that “the message of this display remains the same as that of the original display”).
181 See infra notes 191–204 and accompanying text.
182 See Rezai, supra note 1, at 533 (noting that the “primary concern” of endorsement analysis is the effect a display may have on “minorities and nonadherents”).
183 See Schundler, 168 F.3d at 109 (Nygaard, J., dissenting) (arguing that the real question in a modified display case is whether the additions to the display sufficiently change the display’s context so as to negate the message that was conveyed by the original unconstitutional display).
184 See Lewis & Vild, supra note 10, at 690–94 (discussing the problems inherent in applying a “reasonable observer” analysis to the situation, the misapplication of the term, and the disagreement among the Justices as to what it actually means).
defined and has proven to be a source of confusion.\textsuperscript{185} Moreover, in the realm of religion, there is no universal standard for a reasonable observer because people of different religions are likely to disagree on what constitutes an endorsement of religion.\textsuperscript{186} A reasonable observer, aware of the circumstances, “history and ubiquity,”\textsuperscript{187} would make changing the message of a display originally held to be unconstitutional virtually impossible. A reasonable observer would know of the history of the unconstitutional display and presuppose the message of the display to have remained despite the addition of secular objects.\textsuperscript{188} Therefore, the endorsement test becomes relatively useless in evaluating modified displays previously held to be unconstitutional.

The Court has recognized the fact-sensitive nature of holiday display cases.\textsuperscript{189} It would appear that in a case concerning a “modified” holiday display, certain areas of endorsement analysis may become more crucial to the resolution of the issue than others. For example, the endorsement test recognizes that “the government’s use of religious symbolism is unconstitutional if it has the effect of \textit{endorsing} religious beliefs, and the effect of the government’s use of religious symbolism \textit{depends upon its context}.”\textsuperscript{190} It would seem that in a case where the constitutionality of the display has been previously decided, the issue of context demands a more careful look.

It becomes apparent that although the symbols associated with holidays may have religious origins, many have evolved into something more secular.\textsuperscript{191} The winter holiday season has become an almost entirely commercial endeavor.\textsuperscript{192} The holidays

\textsuperscript{185} See id.
\textsuperscript{186} See id. at 692.
\textsuperscript{187} Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring) (stating that “history and ubiquity” are factors in determining the perspective of a “reasonable observer”).
\textsuperscript{188} See Schundler, 168 F.3d at 114–15 (Nygaard, J., dissenting) (arguing that the dominant message of the modified display remains an endorsement of religion).
\textsuperscript{189} See, e.g., Lee v. Weisman, 505 U.S. 577, 597 (1992) (noting that these cases are “fact sensitive”); Allegheny, 492 U.S. at 607–08 (commenting on the “fact-specific nature” of the issue).
\textsuperscript{190} Allegheny, 492 U.S. at 597 (emphasis added).
\textsuperscript{191} See supra notes 121–27 and accompanying text.
\textsuperscript{192} See Interview with Thomas F. Shea, Professor of Law, St. John’s University School of Law, in Jamaica, N.Y. (Sept. 14, 1999) (on file with
have become a means for government, through the vehicle of city-organized displays and the promotion of holiday glee, to profit by transforming an originally religious "holiday" into an almost secular and nationally recognized excuse to spend money. The fact that the holidays may have become more secular, however, does not defeat the contention that a reasonable observer, an outsider, or non-adherent to Christianity or Judaism would view displays such as these, including two very sectarian symbols, as an endorsement of religion.

The endorsement test was intended to be easier to satisfy than the Lemon test. Consistent with this approach, Jersey City's display was clearly an endorsement of religion. Furthermore, the Third Circuit applied the same logic in resolving the issue that the district court originally applied, which the circuit court had condemned as an incorrect analysis. Essentially, the Third Circuit held that the presence and size of a few token secular symbols "demystified" the sanctity

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author). Professor Shea offered insight into potential justifications for the varying interpretations of the Supreme Court. He proposed a possible balancing test based on the idea of "rough proportionality" in the law of takings. See id.; see also Dolan v. Tigard, 512 U.S. 374, 391 (1994) (discussing "rough proportionality"). The idea is that, similar to the constitutional demand employed in the law of takings, there be a rough proportionality between what the government takes and what is to be given as retribution. With regard to holiday display cases, there should be a "rough proportionality" of secular objects as compared to religious objects. See Interview with Thomas F. Shea, Professor of Law, St. John's University School of Law, in Jamaica, N.Y. (Sept. 14, 1999).


194 See Rezai, supra note 1, at 538 ("An adherent of the religion being endorsed will not be inclined to view the action as endorsement by the government, but a nonadherent may perceive the same act as a blatant endorsement of religion.").

195 See Ivers, supra note 12, at 116 (describing the endorsement test as "less rigorous" than Lemon).

196 The Schundler court reasoned that the addition of objects secularized the religious display. See ACLU v. Schundler, 168 F.3d 92, 104-05 (3d Cir. 1999). The court did not find that the modified display was constitutional because of the subtraction of certain religious symbols. See id. Therefore, the court essentially reasoned that the addition of secular symbols demystified the sacred notion of the display.
of the display, albeit without using those words.\textsuperscript{197} The court placed slight emphasis on the non-adherent/outsider aspect of the endorsement test.\textsuperscript{198}

Furthermore, \textit{Schundler} may be distinguished from \textit{Lynch} and \textit{Allegheny} in a number of ways.\textsuperscript{199} In \textit{Lynch}, the Supreme Court was deciding the constitutionality of a display erected on private land, consisting of a “winter wonderland,” in which one of the elements happened to be a crèche.\textsuperscript{200} The message displayed was purely secular, intent on acknowledging and promoting the holiday season.\textsuperscript{201} In \textit{Allegheny}, the Court evaluated two distinct displays.\textsuperscript{202} The \textit{Allegheny} Court recognized that a menorah can be secular in the proper context, coupled with the proper symbols.\textsuperscript{203} In the present case, the court was deciding the constitutional validity of a display, the primary objects of which were a crèche and a menorah.\textsuperscript{204}

The Supreme Court has recognized that, unlike a menorah, the “crèche itself is capable of communicating a religious message.”\textsuperscript{205} The Court has also acknowledged that, in the United States, the menorah, although typically associated with Judaism, reflects a secular dimension.\textsuperscript{206} The Court, however, has never stated that the menorah is inherently secular. In fact, although Justice Blackmun subscribed to the view that the menorah was secular, at least in \textit{Allegheny}'s particular context,\textsuperscript{207} his opinion in \textit{Allegheny} also noted indirectly that the menorah

\begin{itemize}
  \item \textsuperscript{197} See id.
  \item \textsuperscript{198} See id. at 106 (noting that “the message conveyed by the modified Jersey City display to a reasonable observer” was in fact a consideration in evaluating the display's constitutionality).
  \item \textsuperscript{199} See id. at 109–13 (Nygaard, J., dissenting) (distinguishing \textit{Schundler} from \textit{Lynch} and \textit{Allegheny}).
  \item \textsuperscript{200} See \textit{Lynch} v. Donnelly, 465 U.S. 668, 671 (1984). The display also included a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, and colored lights. See id.
  \item \textsuperscript{201} See Interview with Thomas F. Shea, \textit{supra} note 192.
  \item \textsuperscript{202} See \textit{Allegheny} v. ACLU, 492 U.S. 573, 578 (1989).
  \item \textsuperscript{203} See id. at 585–87 (describing the menorah as both a religious and secular symbol).
  \item \textsuperscript{204} See \textit{Schundler}, 168 F.3d at 95.
  \item \textsuperscript{205} \textit{Allegheny}, 492 U.S. at 598.
  \item \textsuperscript{206} See id. at 582–86.
  \item \textsuperscript{207} The menorah in \textit{Allegheny} was displayed alongside a Christmas tree. The display essentially consisted of a towering Christmas tree and a much smaller menorah displayed to its side. See id. at 587.
\end{itemize}
may be viewed as a purely religious symbol.\textsuperscript{208} If the same logic Blackmun used in applying the endorsement test in Allegheny is used to resolve the issue in Schundler, and the same factors are considered—namely, context and configuration—as well as religious significance, the Schundler modified display cannot pass constitutional muster. The City Hall of Jersey City is located on land owned by the government and the display is therefore inherently suspect.\textsuperscript{209} Upon approaching the Hall, a reasonable observer would find a large menorah on one side, garnished delicately with a Christmas tree and a similarly sized crèche on the other, surrounded by plastic secular symbols. It is doubtful that upon approaching the building, a reasonable observer would not perceive the display as a whole, configured as described, as a display of governmental approval and endorsement of religion. In such a scene, the menorah’s religious significance would be heightened by the crèche’s purely religious message. The menorah then becomes a religious symbol and therefore the display as a whole would become an overwhelming endorsement of religion, with Judaism and Christianity serving as the focus of the display.\textsuperscript{210} Surely, an outsider or non-adherent would feel as though the government was endorsing religion in the display. The non-adherent would not feel like a “full member[] of the political community,” the message having been sent that Christians and Jews are the “favored members of the political community.”\textsuperscript{211}

\textbf{D. Confusion Below}

Further illustrating the complexity and confusion of holiday display cases are the varying applications of the endorsement

\textsuperscript{208} See id. at 582–86.
\textsuperscript{209} See id. at 626 (“The display of religious symbols in public areas of core government buildings runs a special risk of ‘mak[ing] religion relevant, in reality or public perception, to status in the political community.’”) (citing Lynch v. Donnelly, 465 U.S. 668, 692 (1984)).
\textsuperscript{210} See id. at 599. Similar to the poinsettias that served to highlight the crèche display in Allegheny, the religious objects in Schundler are highlighted by secular items. See id.; see also Laura Ahn, Note, \textit{This is Not a Crèche}, 107 YALE L.J. 1969, 1972 (1998) (discussing generally the problems with the Court’s application of the “context” factor and the role secular symbols play in that context).
\textsuperscript{211} Allegheny, 492 U.S. at 626.
test throughout the federal circuits. For example, in Amancio v. Somerset, the United States District Court for the District of Massachusetts resolved a case involving a holiday display quite similar to the Schundler display. The court applied the endorsement test, focusing more on some aspects of the test than others. The court in Amancio relied heavily on the dominance of the objects, the composition, and focal point of the display, borrowing ideas articulated in Allegheny. The court was able to distinguish the display from that of Lynch because each object in Lynch had its own focal point, and therefore a reasonable observer would not perceive the display as a government endorsement of religion. If this focal point consideration was applied in Schundler, the display, as perceived by a reasonable non-adherent, would be unconstitutional. In Schundler, the focal points of the display were two highly religious symbols garnished with secular nostalgia. The display in Lynch passed constitutional muster because each object of the “winter wonderland” consisted of its own focal point. These varying and random considerations have significantly contributed to confusion in the courts below and the inconsistent application of the endorsement test. One constant in this constitutional mess seems to be that the fate of the display as a whole is dependent upon the nature of the potentially sectarian object displayed.

IV. ALTERNATIVE ANALYSES

The Supreme Court has a few options. One option would be to adopt a new test—possibly based on Justice Kennedy’s “coercion test” or Justice Stevens’s more “separationist” test—or
allow the courts below to continue to issue varying and subjectively motivated opinions. considering the varying philosophies on the bench, it is difficult to imagine that the recalcitrant court will subscribe to an entirely new test. another solution may be to redefine the endorsement test and apply it consistently. the greatest problem with establishment clause analysis is the fact that the court has unsuccessfully attempted to find a functional test. the court has attempted to maintain a standard that allows a holiday display to contain religious symbols as long as there are enough secular symbols to detract from the inherent undertones of the sectarian symbols. the court risks offending those whose very religious freedom they are purporting to protect by forcing the secular symbols upon them. specifically, it is highly unlikely that a devout jew would be comfortable subscribing to the court's idea that a menorah is a secular symbol. similarly, it is likely that a dedicated christian would be offended by the notion that christmas is a "national" and no longer a "religious" holiday. in maintaining this balance, the court has been forced to employ wholly subjective logic. this has led to reliance upon swing votes and semantic persuasion in an attempt to convolute the meaning and intent of the establishment clause, perpetuating a masquerade of constitutionality despite the dictates of logic.

to solve this problem, the court should simplify its test to either allow more religious symbolism or provide stricter enforcement of separation of church and state amounting to a reversion to perceived archaic ideals of erecting a wall of separation between church and state. the solution is to employ a test that will allow for consistent application, comprehension in the courts below, and uniformity of decisions. this test would have to be a simple one, so as to guarantee the aforementioned goals.

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220 See allegheny v. aclu, 492 u.s. 573, 659 (1989) (kennedy j., concurring in part and dissenting in part) (introducing the concept of coercion); see also supra note 185 and accompanying text.
221 See lewis & vild, supra note 10, at 698.
222 See id. at 688 (noting that sharp philosophical divisions exist among the justices of the supreme court).
223 See id. at 672 (discussing the everson court's "strict separationist" view of the establishment clause").
Two existing ideals provide the framework for potential new tests capable of resolving holiday display cases. These tests would result in either greater flexibility and use of greater religious symbolism, or stricter enforcement of separation of church and state and allowance of fewer religious symbols in displays. On one side of the spectrum is Justice Kennedy’s “coercion” analysis, which finds support in the ideals of Chief Justice Rehnquist. Kennedy’s test would find Establishment Clause violations only when holiday displays, complete with sectarian symbols, serve to coerce one into adopting the exhibited religious beliefs. Such a test connotes that the display itself would essentially need to be a display of numerous symbols, with no attempt to include secular symbols or detract at all from the religious ones. Therefore, application of such a test would likely result in allowing a greater number of religious displays, essentially loosening the requirements of the Establishment Clause.

On the other side of the spectrum would be a test that allows less religious symbolism to be tolerated in holiday displays. Such a test would carry a “[p]resumption of [i]invalidity” for all those displays in which a religious symbol was found. Such a test was offered by Justice Stevens in Allegheny. This test would consist of a preliminary determination of whether a symbol is religious in nature and then allow for rebuttal. Presuming a violation because of the mere inclusion of a religious symbol would clearly place stricter requirements on a holiday display, but allow for easier application and more consistent decisions. Stevens intended this test to be a modification of the

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224 See id. at 690 (discussing generally “reasonable” alternatives to the endorsement test).
225 See id. at 694–97 (discussing Justices Kennedy’s and Stevens’s alternatives to the endorsement test).
226 See id. at 694.
228 See id. (noting that both the religious and the secular need to be accommodated).
229 See Lewis & Vild, supra note 10, at 694–96 (noting that it would be difficult to draw the line at where religious displays become unconstitutional).
230 Id. at 696.
231 See id.
232 See Allegheny, 492 U.S. at 650.
233 See Lewis & Vild, supra note 10, at 697.
234 See id. at 696 (noting that this test is a “workable tool”).
endorsement test while still allowing for evaluation of the display in light of its context.\textsuperscript{235} Therefore, although the inclusion of a religious symbol in a display would create a presumption of unconstitutionality, that presumption would be rebuttable, allowing an exploration into the context of the display.\textsuperscript{236}

CONCLUSION

It is clear that the endorsement analysis has escaped its original bounds and is growing more incomprehensible with each new application. It is applied inconsistently, with different aspects of the analysis relied on more or less in each court. It was originally offered by Justice O'Connor to clarify the state of Establishment Clause law. Practical application of the endorsement test has served only to confuse the lower courts, and has bred inconsistency. The test attempted to foster a feeling of greater acceptance among minority religions by smoothing the rigidity imposed by \textit{Lemon}. Unfortunately, the test only serves to uphold a greater number of Christian and Jewish displays, the two major religions in the United States. The test has proven to be a failure in resolving holiday display cases, specifically those involving a "modified" display.

Therefore, in an attempt to clarify the state of Establishment Clause law, the United States Supreme Court should re-evaluate its prior conclusions and either modify their endorsement analysis or propose an entirely new test.

\textsuperscript{235} See id.

\textsuperscript{236} See id. at 697.