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**The Supreme Court that Stole...Christmas?
Measuring the Fallout from *Lynch* and
Allegheny: A Critique of the Establishment
Clause and Religious Displays**

A Capstone Project Submitted in Partial Fulfillment of the
Requirements of the Renée Crown University Honors Program at
Syracuse University

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May 2010

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Abstract

Lynch v. Donnelly in 1984 and *County of Allegheny v. ACLU* in 1989, the only holiday themed religious display cases decided by the Court on the grounds on Establishment Clause violations, demonstrate the inadequacies of the Court's Establishment Clause jurisprudence. The precedent set out by the Supreme Court in *Lynch v. Donnelly* and *Allegheny v. ACLU* compromise lower courts' decision making process. Discrepancy in methods, results, and opinions threatens the credibility of the Court. This not only confuses the idea of religious freedom, but it also threatens its very core.

Lynch and *Allegheny* were intended to clarify Establishment Clause jurisprudence and provide a standard for interpretation for lower courts to follow. However, the Court failed to agree upon a legal doctrine that would achieve these goals. This stems from a deeper conflict over the fundamental principles underlying the Establishment Clause, which prevents the Court from providing the guidance necessary to lower court decision-making. This study examined Circuit Court cases to determine the effect that *Lynch* and *Allegheny* had on lower courts. Compiling circuit court cases involving disputes of religious symbols displayed in the holiday context and analyzing the rulings provides a manageable case set that will accurately depict the way lower courts have responded to the *Lynch* and *Allegheny* decisions. Empirical data shows that cohesiveness within a higher court results in fewer reversals of the lower court's decisions. Therefore, circuit courts' rulings on religious displays lack uniformity because of the Supreme Court's inability to provide consistent guidelines. Evaluation of Circuit Court decisions will provide an accurate representation of the problems that exist within the appellate court system.

I examined the methodology used by courts and the outcome reached. Cases that involved similar displays but resulted in different rulings or cases that employed different doctrines to come to the same ruling supported the claim that the Supreme Court has failed to produce guidelines that the lower courts can effectively apply to a wide range of cases. The 20 cases evaluated in this study were classified according to the type of display. Two categories of cases emerged: displays of a single, unattended religious symbol, such as a solitary crèche or menorah and displays with one or more symbols, such as a menorah and Christmas tree, included as part of a larger display with clearly secular symbols, such as a reindeer, candy cane, or banner.

For combined displays, the inclusion of secular objects mitigated the religious tones of the message perceived by the reasonable observer and were almost always allowed. For unattended displays, the judges are not equipped with a clear rule and case outcomes were inconsistent. The overarching issue still remains that the Court needs to provide better guidance for lower courts.

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1. Introduction

Religious freedom is a defining principle of America's founding: it coursed through the colonies and gave rise to the fight for independence. It originates from the fact that the settlers came to the New World to escape religious persecution and the problems associated with state sponsored religion. Justice Hugo Black best describes these consequences in *Engel v. Vitale* when he states, "A union of government and religion tends to destroy government and degrade religion."¹ As a result, it should come as no surprise that the first article of the Bill of Rights is dedicated to protecting the people from the harms of government involvement in religion.

The First Amendment to the Constitution holds that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."² These phrases guarantee freedom from and of religion; that is, freedom from state or Federal creation of a national church or declaration of a national religion, and freedom to practice religion without interference from state or federal governments.³

Though simple in theory, the application of these principles has not been straightforward. More questions than answers arise from the few words

¹ *Engel v. Vitale*, 370 U.S. 421, at 431 (1962).

² U.S. Constitution, amend. 1.

³ David M. O'Brien, *Constitutional Law and Politics*, 6th ed. Vol. 2, (2005), 688. Daniel Parish, "Private Religious Displays in Public Fora," *The University of Chicago Law Review* 61, no. 1 (1994): 254.

dedicated to provide one of the most important constitutional guarantees. As First Amendment jurisprudence developed, the Supreme Court became increasingly divided over Establishment Clause interpretation. Justices disagree on the principles embodied by the Establishment Clause, as well as the legal doctrine that should be utilized to decide cases. The inability of the Court to agree on an interpretive framework that is reliable and protective of religious freedom has serious consequences for Establishment Clause doctrine.

Religious symbols displayed as a part of holiday scenes is one sect of Establishment Clause case law that has suffered from inconsistent Supreme Court guidance. Discord among the Court has serious implications for the judicial system and for local governments. Discrepancy in methods, results, and opinions threatens the credibility of the Court. This not only confuses the idea of religious freedom, but it also threatens its very core. The precedent set out by the Supreme Court in *Lynch v. Donnelly* and *Allegheny v. ACLU* compromise lower courts' decision making process. They had contrasting outcomes, a bare majority, and multiple opinions were issued, each proposing vastly different theories and tests for Establishment Clause cases. Therefore, the Court's rulings created inconsistency among circuit, district, and local courts across the nation. The focus of this study will analyze the effect *Lynch* and *Allegheny* had on the appellate courts by studying the Circuit Court cases that emerged after *Lynch* and *Allegheny* that caused confusion in the appellate

courts. In turn, this might help the Supreme Court to grapple with the meaning of the Establishment Clause in a way that allows for an improvement in constitutional analyses.

1.1 The Basics: Religious Display Cases

Government sponsorship of religious displays is especially illustrative of the consequences that stem from disagreement over interpretive approaches. Religious symbols are a primary mechanism to convey the beliefs of the religion and are centrally important to the practice of that religion.⁴ Private displays on public property or publicly funded religious displays raise the question of whether the government is endorsing a particular religion. Secularization of religious holidays and the presence of religious pluralism in America make it difficult to ascertain the message emanating from a range of different displays, blurring the line between permissible and impermissible. Nativity scenes, or crèches, that commemorate Christmas, a federal holiday with both religious and secular aspects, are disputed most frequently. In a display with secular elements, such as a Santa Claus, and religious elements, such as a nativity scene depicting the birth of Jesus, it is often hard to establish the overall message emanating from the display. Thus, the issue becomes complicated for cities, town, and private entities that wish to erect displays on public property or using public funds.

⁴ Joshua D. Zarrow, "Of Crosses and Crèches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols," *American University Law Review* 35 (1986): 477.

1.2 Framing the Issue

The Supreme Court's rulings on government sponsorship of religious displays illustrate the consequences that arise from constitutional interpretation that lacks a consistent framework. Reliable methods of interpretation are essential because they facilitate the decision making process of lower courts and help local governments construct religious displays without violating the First Amendment.⁵ *Lynch v. Donnelly* in 1984 and *County of Allegheny v. ACLU* in 1989, the only holiday themed religious display cases decided by the Court on the grounds on Establishment Clause violations, demonstrate the inadequacies of the Court's Establishment Clause jurisprudence. Bare majorities issued opposite rulings for similar displays, opinions were numerous and obscure, and the members of the Court vigorously disagreed with one another.

The Court has failed to adopt a single theory to interpret holiday display cases, relying on a number of different tests, mainly a lax version of the *Lemon* test, the endorsement test, and a neutrality approach. All of these result in different outcomes when applied to the same case, causing confusion for lower courts.

⁵ David Felsen, "Developments in Approaches to Establishment Clause Analysis: Consistency for the Future," *American University Law Review* 38 (1989): 395.

2. Understanding the Meaning of the Establishment Clause

Before examining the Supreme Court precedents and the resulting appellate court cases, a discussion of Establishment Clause theories and fundamentals is essential. Several problems emerge in constitutional interpretation of the religious freedom clauses.

2.1 Tension between the Clauses

First of all, taken together, the clauses point in different directions. The Establishment Clause requires separation of government and religion, prohibiting legislation that sponsors one religion over another, or over irreligion. On the other hand, the Free Exercise Clause protects individuals from government interference with private religious expression.⁶ The Establishment Clause suggests that government should not pass laws that relate to religious practice in any way. However, the Free Exercise Clause seems to demand that the government take action to ensure that people are able to practice their religion freely. As such, the two guarantees are inherently at odds with one another. For example, legislation that grants exceptions for people of a certain religion, whose beliefs are at odds with the law, can be challenged as unconstitutional government endorsement of religion. However, by failing to provide an exemption, the government can be charged with violating the Free Exercise Clause on the grounds that it coerced religious groups to engage in practices contrary to their beliefs.

⁶ O'Brien, *Constitutional Law and Politics*, 689.

2.2 *The Language of the Amendment*

The broad language creates another source of tension and confusion in constitutional interpretation. The language of the clause is vague and poses a multitude of questions: what defines a religion and what constitutes an establishment thereof? What is a law “respecting” such an establishment? To what extent must a law affect a person’s religious practice for it to be considered as infringing on the free exercise guarantee? What are the limits, if any, on a person’s right to practice his or her religion? Is “no law” an absolute ban, or are there exceptions? Examples of exemptions from the requirements of law due to religious reasons considered by the Court extend to jury duty, public education, military drafts, Social Security, payroll taxes for church operated schools, salute of the flag in public schools, provision of chaplains in prison or the military, and a range of others.⁷ Unfortunately, the text of the First Amendment provides little insight on the answers to these questions and the overall unifying meaning of the clauses.⁸ Additionally, the views of the Framers of the amendment do not lend themselves to a decisive method of application to current issues.⁹

⁷ Michael W. McConnell, “Accommodation of Religion,” *The Supreme Court Review* 1985 (1985): 24-26.

⁸ Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (1986), 84.

⁹ See Levy, *The Establishment Clause: Religion and the First Amendment* (1986); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); Stephen M. Feldman, *Please Don’t Wish Me a Merry Christmas: A Critical History of the Separation of Church and State*, (1997).

2.3 Problems with the Historical Approach

Analyzing the historical context of the First Amendment does not aid in deciphering the meaning of the Establishment Clause. Rather, it adds another obstacle to constitutional interpretation. Tension exists because religious elements are a part of many government institutions even though the separation of government and religion formed the backbone of the founding era and is engrained into American culture.

In some instances, the historical record contradicts itself and is unclear. By relying on opposing remarks by the Framers, people can support contrasting theories. James Madison and several others wanted to completely bar Congress from ever passing a law regarding religion. Jefferson agreed with Madison, and believed that there should be a strict divide between church and state. Contrary to Madison, Jefferson conceded that this guarantee is not absolute.¹⁰ Beyond the Framers' specific concern with the establishment of a national church or religion that would use the public's tax money to fund religious activity, it is unclear how religious freedom would be applied in other circumstances.

America's settlement by Protestants escaping religious persecution assured that religious freedom would be a defining principle underlying the

¹⁰ For example, some scholars use original intent to prove that government cannot aid religion in any way, directly or indirectly (*See Philip B. Kurland, Religion and the Law of Church and State and the Supreme Court* (1962); Levy (1986); and Leo Pfeffer, *Church, State, and Freedom* (1967)). Others use historical records to support the claim that government can aid religions in a nondiscriminatory way (*See Cord* (1982); Gerard V. Bradley, *Church-State Relationships in America* (1987)).

new government. However, as a homogenously Protestant society, the settlers did not intend the First Amendment to banish every reference to God or religion by any governmental institution. In fact, many scholars advocate the view that this religious freedom was solely applicable to Christian, and mostly Protestant sects.¹¹ Massachusetts, for example, established the Congregational Church and taxed Quakers, Baptists, and other religious sects.¹² Therefore, government endorsements of Christianity were not questioned as unconstitutional. Scholars that support this view point to discrimination against religious minorities, especially Catholics and Jews that existed well into the late 1800s. They also cite the establishment and protection of Christian practices, such as those implemented in public schools.

Examples of government mixing with religion are widespread: the Declaration of Independence references a “Creator,” George Washington declared that November 26th should be a day to give thanks and pray to the Lord, Thomas Jefferson and James Madison supported “thanksgiving” day and issued religious proclamations, Congress sessions begin with a prayer, Court sessions open with “God save the United States and this honorable Court,” the pledge of allegiance states that the U.S. is “one nation, under God,” the national slogan is “In God We Trust,” and the religious presence in

¹¹ See generally Douglas Laycock, “‘Nonpreferential’ Aid to Religion: A False Claim about Original Intent,” *William and Mary Law Review* (1986); Bruce M. Zessar, “Government Participation in Holiday Religious Displays: Improving on *Lynch* and *Allegheny*,” *DePaul Law Review* (1991); S. Feldman (1997); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

¹² O’Brien, 689.

public schools which were commonplace through the 1950s.¹³ This is not an exhaustive list of governmental endorsements of religion. Plus, most of these practices still occur today. Perhaps the most striking examples of government endorsement of religion come from religious practices in public schools. Bible readings, teachings of the Bible and Christianity, Christmas and Easter celebrations, and other religious practices were commonplace in public schools through the 1950s.

These practices were unchallenged until the 1920s when a massive influx of immigration changed America's religious landscape and increased the presence of religious minorities.¹⁴ It was during the immigration boom that America became characterized as a safe-haven for immigrants seeking freedom from inequities of all kinds. The Statue of Liberty, now a symbol of America, is inscribed with a poem that illustrates this idea when it states, "Give me your tired, your poor, / your huddled masses yearning to breathe free, / the wretched refuse of your teeming shore."¹⁵ First Amendment rulings were scarce before this period. In fact, the development of the constitutional interpretation of the Establishment Clause did not begin until 1947 in the landmark case *Everson v. Board of Education*. Against the backdrop of increased religious pluralism in America and the movement by the Supreme

¹³ Cord, 223-32; S. Feldman, 222.

¹⁴ S. Feldman, 218-30.

¹⁵ Emma Lazarus, "The New Colossus," (1883), 10-12.

Court toward a preferential treatment of certain civil liberties, including religious liberty, Establishment Clause doctrine was developed.

3. Theories for Interpreting the Establishment Clause

The inevitable confusion and disagreement over the precise meaning of the Establishment Clause combined with the importance of religious liberty necessitates a clear, consistent method to determine cases. Establishment Clause doctrine is divided into three main approaches: strict separation, accommodation, and neutrality. Each intends to capture the main principle embodied by the Establishment Clause, creating a theory that lends itself to tests and standards that analyze Establishment Clause cases consistently.¹⁶ All of these approaches are based in constitutional logic, but result in different outcomes when applied to Establishment Clause cases. Criticism of the Court for failing to reach a substantive approach is abounding.¹⁷ The specific tests used for interpretation emerge from these doctrinal approaches and suffer from the same shortcomings by failing to fully capture or protect the guarantees provided by the Establishment Clause.¹⁸

¹⁶ Mark Tushnet, "The Constitution of Religion," *The Review of Politics* (1988): 628.

¹⁷ See Jesse H. Choper, "Religion in the Public Schools: A Proposed Constitutional Standard," *Minnesota Law Review* (1963); Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," *University of Pittsburg Law Review* (1980); Choper, "The Endorsement Test: Its Status and Desirability," *Journal of Law & Politics* (2002); Laycock (1986).

¹⁸ See Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test," *Michigan Law Review* (1987); Noah Feldman, "From Liberty to Equality: The Transformation of the Establishment Clause," *California Law Review* (2002); Andrew Rostein, "Good Faith? Religious-Secular Parallelism and the Establishment Clause," *Columbia Law Review* (1993).

3.1 Separation

Separationists base their argument on Jefferson's "wall of separation between Church and State" and hold that government and religion should be entirely distinct.¹⁹ Separationists are split according to their interpretation of the historical record in regards to the legality of laws that have an indirect or incidental effect of aiding religion. The "softer" view of separation allows legislation that has a secondary effect that aids religions, as long as it does not discriminate between religions.²⁰ Others favor a high wall approach, which bans legislation that has an indirect, incidental, or secondary effect of aiding or inhibiting religion.

Strict separationists base their "no aid" argument on historical analysis and the original intent of the Framers.²¹ Per this approach, laws which have the primary or indirect effect of aiding or inhibiting any religion are prohibited.²² This would create an absolute ban on public displays of religious symbols, government programs in parochial schools, legislative chaplains, Congressional prayer, the Supreme Court's reference to God in its opening statement, and government aid to religious organizations as a part of social

¹⁹ Levy, 181.

²⁰ Frank Guliuzza, III, *Over the Wall: Protecting Religious Expression in the Public Square*, (2000), 66.

²¹ See Pfeffer (1967); Levy (1986); N. Feldman (2002); Norman Dorsen, and Charles Sims, "The Nativity Scene Case: An Error of Judgment," *University of Illinois Law Review* (1985); Daan Braveman, "The Establishment Clause and the Course of Religious Neutrality," *Maryland Law Review* (1986); Steve Gey, "Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause," *Columbia Law Review* (1981); William Van Alstyne, "Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall: A Comment on *Lynch v. Donnelly*," *Duke Law Journal* (1984).

²² Shahin Rezai, "*County of Allegheny v. ACLU*: Evolution of Chaos in Establishment Clause Analysis," *American University Law Review* (1990): 504.

services, health care, and similar programs.²³ This doctrine was written into constitutional history by Justice Black in *Everson v. Board of Education of Ewing Township* when he states, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”²⁴

Proponents of the softer version of separation are against the “no-aid” principle advocated by strict separationists, criticizing it for being too absolute and inflexible. They hold that a wall of separation does not preclude secular legislation that provides nonpreferential aid.²⁵ Nonpreferentialists believe government must be nondiscriminatory and not favor one religion over another when it provides aid.²⁶

Opponents to the separation doctrine argue that some intermingling of government and religion is inevitable, and a strict separation doctrine is unrealistic for Establishment Clause interpretation. Chief Justice Berger supports this view in *Walz v. Tax Commission* in 1970: “No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts -- one that seeks to mark boundaries to

²³ Guliuzza, 66.

²⁴ 330 U.S. 1 at 18.

²⁵ Cord, 15.

²⁶ See Cord (1982); Bradley (1987).

avoid excessive entanglement.”²⁷ Additionally, it is not in accordance with original intent of the Framers.²⁸

3.2 Accommodation

Accommodationists highlight the significance of religion to America in holding that the Establishment Clause permits legislation that benefits religion, as long as the government does not discriminate among different religions.²⁹ They reject the importance given to original intent by separationists and question its relevance in today’s society. They suggest that America is a religious nation and recognizing the significance of faith-based organizations in American culture enhances religious freedom. Michael McConnell embodies this view in his paper “Accommodation of Religion,” when he states:

[A]ccommodation of religion is consistent with the political theory underlying the Constitution...an emphasis on the central value of religious liberty can generate principles for distinguishing between legitimate accommodation and unwarranted benefits to religion.³⁰

A principle of accommodation enhances religion and accounts for the religious pluralism that pervades American society.

Accommodationists oppose strict neutrality because the inherent tension between the two clauses likely results in restriction, and even

²⁷ *Walz v. Tax Commission* 397 U.S. 664, at 670 (1970).

²⁸ See Cord (1982); S. Feldman (1997); Donald Beschle, “The Conservative as a Liberal: The Religion Clauses, Liberal Authority, and the Approach of Justice O’Connor,” *University of Notre Dame* (1987).

²⁹ See McConnell (1985).

³⁰ McConnell, 59.

violation, of the liberties guaranteed by the Free Exercise Clause.³¹ This view was applied in *Walz v. Tax Commission*, evidenced by Chief Justice Berger's when stating, "...the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."³² This approach is favored by Chief Justice Burger, Rehnquist, White, Scalia, and O'Connor. Opponents reject this approach because the increased flexibility it allows results in less consistent and predictable analysis.³³

3.3 Neutrality

The third approach, neutrality, purports that the Establishment Clause requires that government does not discriminate among religions or between religion and irreligion, obliging that government laws that affect religion must be based on secular purposes.³⁴ Justice Black outlined the doctrine in *Everson*: "[T]he First Amendment...requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."³⁵

³¹ Rezai (1990).

³² *Walz*, 397 U.S. 668-69 (1970).

³³ Felsen (1989).

³⁴ See Beschle (1987); Cord (1982); Arnold H. Loewy, "Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight," *North Carolina Law Review* (1986); Ronald Dworkin, *Law's Empire* (1986).

³⁵ *Everson*, 330 US 1 at 18 (1947).

Several variations exist. In its most absolute form, strict neutrality bars laws that aid religious organizations directly or indirectly, except when covering a welfare grant applicable to everyone regardless of their religious beliefs, or lack thereof.³⁶ Professor Kurland is a well known advocate of this position, which prohibits accommodation.³⁷ Benevolent neutrality, on the other hand, tolerates accommodation. Chief Justice Berger describes the benefits of benevolent neutrality over strict neutrality in *Walz*:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.³⁸

Criticisms stem from the lack of precise methods to define the neutral categories.³⁹ Modified versions of these theories, as well as entirely different approaches, have been suggested as well.⁴⁰

³⁶ Gey (1981).

³⁷ Kurland (1962).

³⁸ *Walz*, 397 U.S. at 669 (1970).

³⁹ Tushnet (1988).

⁴⁰ For example: the political equality theory (N. Feldman 2002); the symbolic approach (William Marshall 1986); two track approach, (Laurence Tribe 1988); unitary reading of both clauses with less emphasis on the Establishment Clause, (Choper 1980 and Kurland 1962); no solution is possible and the quest for such an approach degrades religious freedom (Smith 1995); pluralist approach (Mark de Wolfe Howe 1965).

3.4 Interpretive Tests

Over the past sixty years, the Court has regularly heard Establishment Clause cases, producing a number of tests to guide constitutional interpretation. However, they failed to steer decision making because they were used erratically and frequently changed.⁴¹ This is evidenced by the *Lemon* test, a three prong test that emerged from the majority opinion in *Lemon v. Kurtzman* in 1971. *Lemon v. Kurtzman* involved a challenge to a Pennsylvania state law that the Court struck down for violating the principle that government should not endorse religion.⁴² The *Lemon* test holds that a law must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion.⁴³ It allowed the Burger Court to move away from a principle of strict separation, a doctrine that the Court felt was unsound.⁴⁴ Instead, the Court moved toward accommodating religion, which is highlighted by Justice Burger's opinion: "Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."⁴⁵ However, *Lemon* has not been used steadily, as justices disagree on its application. As a result, an ad hoc approach has emerged and

⁴¹ Felsen, 395; Rezai, 503.

⁴² *Lemon v. Kurtzman* 403 U.S. 602 (1971).

⁴³ *Id.* At 612-13.

⁴⁴ *Id.* at 615.

⁴⁵ *Id.* at 614.

rulings are often contradictory. In response to this, a number of variations to *Lemon* have been proposed by the Court.

3.4.1 The Endorsement Test

Justice O'Connor's Endorsement Test is the most influential test put forth from the bench in response to *Lemon*. The test modifies the purpose and effect prong of the *Lemon* test and "requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."⁴⁶ O'Connor advocates the practicality of this test when she states:

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine.⁴⁷

She warns against reliance on *Lemon* because although it is useful, it does not fully embrace the constitutional principles at the heart of the Establishment Clause. She purports that the Endorsement Test *does* embody religious liberty because it "does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."⁴⁸

⁴⁶ *Wallace v. Jaffre* 472 US 38, at 69 (1985).

⁴⁷ *Id.* at 69.

⁴⁸ *Id.* at 70.

Despite the Court's increased use of O'Connor's test, especially in religious symbol cases, Establishment Clause jurisprudence lacks standardization and continually receives criticism from legal scholars.⁴⁹ This failure is especially evident in the Court's rulings on religious displays in the public forum.

4. The Establishment Clause and Religious Display Cases

4.1 Lynch v. Donnelly

4.1.1 Facts of the Case

Lynch v. Donnelly, decided in 1984, considered the constitutionality of the City of Pawtucket's Christmas display, located in a park not owned by the City. The display consisted of the crèche, a Christmas tree, a "Seasons Greetings" banner, a Santa Claus House, reindeer pulling a sleigh, candy-striped poles, carolers, colored lights, and cut-outs of clowns, teddy bears, and an elephant, and other figures associated with the Christmas season.⁵⁰ The crèche included the traditional figures, such as baby Jesus, Mary, and Joseph.⁵¹ The figures, which were owned by the city and ranged from five inches to life size, had been included in the display for over 40 years and no

⁴⁹ See Braveman (1986); Choper (1963); Choper (1980); Carole Kagan, "Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause," *Northern Kentucky Law Review* (1995); Kurland (1962); Kurland (1985); Levy (1986); W. Marshall (1986); Rostein (1993); Tushnet (1988); Tribe (1988); Cord (1982); Laycock (1986); Van Alstyene (1984); Gey (1981); N. Feldman (2002); Dorsen and Sims (1985); Beschle (1987); Smith (1987).

⁵⁰ *Lynch v. Donnelly* 465 U.S. 668 at 671 (1984).

⁵¹ *Lynch*, 465 U.S. at 671 (1984).

longer created expenses for the City.⁵² Its inclusion was challenged as a violation of the Establishment Clause. The Supreme Court, reversing the decision of the First Circuit Court of Appeals, held that the display did not violate the Establishment Clause.⁵³

4.1.2 The Decision

In a bare 5-4 majority, written by Chief Justice Burger, the Court held that the nativity scene was constitutional due to the physical context of the scene as part of a display celebrating the holiday season. Chief Justice Burger argued against the separation of church and state, citing the many instances of official acknowledgements of religion. He argued that “If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.”⁵⁴ Instead, he wrote that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”⁵⁵ Though evaluating the display using the *Lemon* test, Chief Justice Burger noted the Court’s “unwillingness to be confined to any single test of criterion in this sensitive area.”⁵⁶ He argued that the crèche had a secular purpose because the scene must be viewed in the context of the holiday season as a depiction of the history of Christmas.⁵⁷ In

⁵² Id. at. 671.

⁵³ Id. at 668, 672.

⁵⁴ Id. at 679.

⁵⁵ Id. at 673.

⁵⁶ Id. at 679.

⁵⁷ Id. at 668, 679.

viewing the scene in this manner, the primary purpose did not advance any religion, but rather celebrated the historical aspect.⁵⁸ Finally, the scene did not create excessive government entanglement because there was little administrative interaction and a minor cost. With the *Lemon* test satisfied, the Chief Justice concluded by saying, “Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.”⁵⁹

Justice O’Connor wrote a concurring opinion suggesting a new way to view Establishment Clause doctrine, unsure that the *Lemon* test embodies its fundamental principles. She held that it “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”⁶⁰ Government violates the Establishment Clause under this modified doctrine by “communicating a message of government endorsement or disapproval of religion.”⁶¹ As applied to the crèche in *Lynch*, she argues that its inclusion in the display does not promote religion, but rather the “celebration of the public holiday through its traditional symbols.”⁶²

The dissent, written by Justice Brennan, argued that neutrality, not accommodation, is at the heart of the Establishment Clause. He criticized the application of the *Lemon* test by the majority, and showed that the display would not pass a vigorous application of the test.⁶³ The crèche did not have a

⁵⁸ Id. at 668, 681.

⁵⁹ Id at 687.

⁶⁰ Id. at 668, Justice O’Connor’s concurrence

⁶¹ Id. at 692

⁶² Id. at 691.

⁶³ Id. at 703.

secular purpose, and the goals of the City with regards to celebrating the holiday could be accomplished with the other secular Christmas symbols.⁶⁴ The primary effect of the crèche promoted Christianity. Finally, the display fostered excessive government entanglement with religion by potentially causing other religions to push to have their symbols included, leading the City to become intertwined with many religious groups.⁶⁵ Justice Brennan also criticized the majority's historical argument and the link to official acknowledgements of religion to justify the crèche.⁶⁶ He asserts that official acknowledgements of religion, such as Congressional prayer, which have existed since the founding, might be legitimate, but "the development of Christmas as a public holiday is a comparatively recent phenomenon."⁶⁷

4.1.3 Problems for Future Analysis

The use of such a detail-specific analysis without providing an overarching doctrinal approach to interpretation led to confusion. Though the majority made clear that the holiday context made the *Lynch* display permissible, they failed to address the constitutionality of displays in other contexts, a wide range of which were bound to appear in lower court cases.

⁶⁴ Id. at 699.

⁶⁵ Id. at 703.

⁶⁶ Id. at 718.

⁶⁷ Id. at 718.

4.2 *County of Allegheny v. ACLU*

In an attempt to elucidate the *Lynch* ruling, the Court heard *County of Allegheny v. ACLU* in 1989.⁶⁸ Unfortunately, this only added to existing confusion.

4.2.1 Facts of the Case

Allegheny involved two privately owned holiday displays located on public property in Pittsburgh. The first was a crèche located on the Grant Staircase of the Allegheny County Courthouse.⁶⁹ The display included two banners, one noting ownership by the Holy Name Society and the other featuring a Latin phrase which translates to “Glory to God in the Highest.”⁷⁰ The second display was an 18’ tall Menorah, located outside the City-County Building next to a 45’ tall Christmas tree decorated with lights and ornaments, and a sign reading “Salute to Liberty.”⁷¹ A photograph of the displays can be seen below, in Figures 4.1 and 4.2.

⁶⁸George M. Janocsko, “Beyond the ‘Plastic Reindeer Rule’: The Curious Case of *County of Allegheny v. American Civil Liberties Union*,” *Duquesne Law Review* 28 (1990): 451.

⁶⁹*County of Allegheny v. ACLU* 492 U.S. 573, 579 (1989).

⁷⁰*Alleghney*, 492 U.S. at 585 (1989).

⁷¹*Id.* at 573.



Figure 4.1. Crèche found to violate the Establishment Clause in *Allegheny*.
Source: Hampton Dellinger, "Words Are Enough" (1997): 1722, Image 4.



Figure 4.2. Menorah found *not* to violate the Establishment Clause in *Allegheny*.
Source: Hampton Dellinger, (June 1997): 1722, Image 4.

4.2.2 The Decision

The Court was even more divided in the *Allegheny* decision, ruling 5-4 that the crèche violated the Establishment clause and 6-3 that the Menorah was permissible. Five separate opinions were written for the crèche case, each providing different frameworks for interpretation. No majority opinion was given for the Menorah display. With only a partial majority opinion written for the crèche display and each opinion offering different interpretive approaches, the *Allegheny* precedent becomes exceedingly confusing.

Justice Blackmun wrote the partial majority opinion, joined by Justices O'Connor and Stevens, adopting Justice O'Connor's endorsement test first laid out in her concurrence in *Lynch*.⁷² He emphasized the primary effect prong of the *Lemon* test, holding that the core of the Establishment Clause "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"⁷³ As applied to the displays in the case, the majority found that the crèche, especially when accompanied by the banner, served as a government endorsement of Christianity. Justice Blackmun was not joined by other justices for his opinion on the Menorah. Focusing on the context of the Menorah, next to the Christmas tree and the "Salute to Liberty" sign, he argued that the display

⁷² 465 U.S. 668 (1984).

⁷³ *Allegheny*, 492 U.S. at 593 (1989).

“recognizes that Christmas and Chanukah are part of the same holiday season, which has attained a secular status in our society.”⁷⁴

Though a majority agreed that the endorsement analysis was the correct principle and signed on to Justice Blackmun’s opinion for the crèche, they disagreed on how to apply the test. Justice O’Connor’s concurrence emphasized the need to view the circumstances of a certain action to determine whether it endorses or disapproves of religion.⁷⁵ She focuses on the effect for a “reasonable observer” viewing the scene, and agrees that the crèche endorsed religion while the Menorah scene provided a message of “cultural diversity...and tolerance.”⁷⁶ In her concurrence, she develops and justifies her “endorsement test.” She claims that a government action that endorses religion or disapproves of other beliefs or non-belief has the “impermissible effect of ‘mak[ing] religion relevant, in reality or public perception, to status in the political community.’”⁷⁷

Justices Stevens and Brennan argued for invalidation of both displays. Justice Stevens concurred with the crèche and dissented with the Menorah, arguing for a “strong presumption against the display of religious symbols on public property.”⁷⁸ This prohibits displays with a non-secular context, providing a strict interpretation of the endorsement test. Following a neutrality

⁷⁴ 109 S. Ct. 3114.

⁷⁵ *Allegheny*, 492 U.S. at 624 (1989).

⁷⁶ *Allegheny*, 492 U.S. at 593 (1989).

⁷⁷ *Id.* at 692.

⁷⁸ *Id.* at 639-41.

approach, Justice Stevens' test looks at the object itself and bars all religious symbols from being displayed by the government.

Justice Kennedy, writing for the dissent and joined by Justices Scalia, Rehnquist, and White, advanced a "non coercion" principle.⁷⁹ He states that government accommodation is part of America's cultural and political heritage, but that it is limited such that government cannot coerce support of religion and government cannot benefit religion in a way that benefits are great enough to establish a state church.⁸⁰ Under this non-coercion principle, both displays were constitutional because the City was participating in the "tradition of government accommodation and acknowledgement of religion that has marked our history from the beginning."⁸¹

4.2.3 Problems for Future Analysis

This is striking and demonstrative of the deficiencies in Establishment Clause understanding and analysis. A 5-4 division speaks measure by itself, but in addition, five justices put forth approaches for analysis that rest on opposing constitutional principles and highlight different meanings of religious freedom. Further still, the analysis used resulted in opposite rulings for seemingly similar displays. Instead of providing a rule for interpretation, the Court established an "indeterminate analytical framework where everything is relevant but nothing is singularly decisive."⁸² In effect, the Court

⁷⁹ 109 S. Ct. 3114, 3116.

⁸⁰ Id. at 659.

⁸¹ Id. at 663.

⁸² Janocsko, 487.

has guaranteed confusion among judges and local governments, which causes increased litigation and inconsistency in lower court rulings.

5. Data and Research Design

5.1 Questions of Study

Do *Lynch* and *Allegheny* actually produce the degree of lower court chaos that many scholars depict? Does variance come from a small number of courts issuing conflicting decisions or are all courts similarly confused? When courts issue rulings that conflict with the precedent of the Supreme Court or of other lower courts, what causes the clash? That is, what parts of the *Lynch* and *Allegheny* decisions are most perplexing? In this analysis, I intend to embark on a review of the *Lynch* and *Allegheny* progeny in order to provide substantive answers to these questions.

5.2 Judicial Theory

As the highest authority in the judicial system, the Supreme Court plays an important role in deciding many of America's most divisive issues. However, it is important to remember that the Supreme Court is part of a three-tiered federal judicial system that includes thirteen courts of appeals and ninety-four district courts.⁸³ The Supreme Court can hear a limited number of cases each year, so it relies heavily on lower courts to enforce its decisions and comply with its opinions when deciding cases. Appellate courts play a

⁸³Evan H. Caminker, "Why Must Inferior Courts Obey Supreme Court Precedents?" *Stanford Law Review* 46 (1994): 821.

key role in ensuring implementation and consistency of federal law.

Understanding the way these courts interact and its influence on judicial decision making is essential in order to analyze the effects of *Lynch* and *Allegheny* on lower courts and determine the causes for inconsistent rulings in circuit and district Courts.

Traditionally, legal scholars explain the relationship between the Supreme Court and the Circuit and District Courts using the hierarchical model, based from the principal-agent theory, in which the Supreme Court is the principal and enacts policies which the lower courts, as the agents, must implement.⁸⁴ More basically, the system is a pyramid and the Supreme Court sits on the top, with circuit courts in the middle and the district forming the base.⁸⁵ The doctrine of vertical precedent, that lower courts are obliged to follow the decisions and methods of higher courts, is especially powerful in this model.⁸⁶ There is considerable research that supports this model, showing lower courts implement precedent set out by the Supreme Court based on the fear that the Court can review and overturn their decisions.⁸⁷ The Court

⁸⁴See Elise Borochoff, "Lower Court Compliance with Supreme Court Remands," *Touro Law Review* 24 (2008); Donald Songer, Jeffrey Segal, and Charles Cameron, "The Hierarchy of Justice: Testing a Principle Agent Model of Supreme Court-Circuit Court Interactions," *American Journal of Political Science* (1994).

⁸⁵ Borochoff, 850.

⁸⁶ See Caminker (1994); Susan Haire, Donald Songer, and Sefanie Lindquist, "Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective," *Law & Society Review* 37, no. 1 (2003).

⁸⁷ See Lawrence Baum, "Implementation of Judicial Decisions: An Organizational Analysis," *American Politics Quarterly* 4, no. 1 (1976); Lawrence Baum, "Responses of Federal District Judges to Court of Appeals Policies: An Exploration," *Western Political Quarterly* 33 (1980); Sara Benesh and Malia Reddick, "Overruled: An Event History Analysis of Lower Court

monitors rulings of circuit courts, which monitor district courts in order to ensure consistency. Reversal corrects an errant ruling and signals the preferences of the superior court to lower courts. But in the case of religious displays, the Supreme Court's precedent has not served to signal the justice's preferences regarding Establishment Clause interpretation.

The research conducted by a group of scholars in support of the interaction model, which focuses on the Supreme Court's dependence on the lower courts to enforce federal law, help to explain the effect of cohesiveness.⁸⁸ The Supreme Court can decide a small number of cases each year, leaving the circuit court as the highest authority for the majority of litigation. Empirical data shows that cohesiveness within a higher court results in fewer reversals of the lower court's decisions.⁸⁹ For example, when a circuit issues consistent rulings, district courts are less likely to issue an errant decision. However, circuit courts' rulings on religious displays lack uniformity because of the Supreme Court's inability to provide consistent guidelines. Per this theory, this leads to increased litigation and the possibility for significant discrepancies across the U.S. based on a particular circuit's interpretation of the *Lynch* and *Allegheny* precedent.

Reactions to Supreme Court Alteration of Precedent," *Journal of Politics* 64 (2002); Songer, Segal, and Cameron (1994).

⁸⁸ See Howard Woodford, "Litigation Flow in Three United States Courts of Appeals," *Law & Society Review* 8, no. 1 (1973); Kenneth Vines, "The Role of Circuit Courts of Appeals in the Federal Judicial Process: A Case Study," *Midwest Journal of Political Science* 7 (1963); Richard Richardson and Kenneth Vines, *The Politics of Federal Courts: Lower Courts in the United States* (1970).

⁸⁹ Haire et. al. (2003)

In order to analyze the effects of *Lynch* and *Allegheny* lower courts, it is important to understand the way incoherency and confusion in the Supreme Court affects the decision making process of lower court judges. Judicial decision making is described by the legal model, which asserts that judges are neutral decision makers who make decisions based on precedent, the Constitution, and relevant statutes.⁹⁰ In general, research shows that lower court compliance with precedent is correlated to coherency, persuasiveness, and support by the Court.⁹¹ This is crucial to an analysis of the effects of *Lynch* and *Allegheny* on lower court rulings because it suggests that when faced with inconsistent precedent and confusion regarding the Constitutional principles, judges will have to decide cases on other grounds. The legal model does not account for the outcomes in Establishment Clause cases, in which there is a high level of judicial discretion because judges need determine how to interpret the vague text of the First Amendments. Judicial preferences and ideologies will govern the doctrinal method chosen to interpret a case, which has a considerable effect on the case's outcome.

In response to the legal model's shortcomings, scholars began questioning its validity as early as the 1930s, criticizing its disregard for

⁹⁰ See Edward Levi, *An Introduction to Legal Reasoning* Chicago: (1949), John Drobak and Douglass North., "Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations," *Journal of Law & Policy* 26 (2008); Frank Cross and Blake Nelson, "Strategic Institutional Effects on Supreme Court Decisionmaking," *Northwestern University Law Review* 95 (2001), 1438.

⁹¹ See Levi (1949); John Gruhl, "The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts," *The Western Political Quarterly* 33, no. 4 (1980); Charles Johnson, "Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions," *Law & Society Review* 21, no. 2 (1987); Stephen Wasby, *The Impact of the United States Supreme Court: Some Perspectives*, (1970).

judicial discretion in many cases.⁹² Scholars created the attitudinal model, which maintains that judges make decisions to further their own political or ideological goals and maximize their utility.⁹³ The Attitudinal Model purports that the values held by a judge play an important role in the decision. It was originally formulated by Glendon Schubert and applied by Jeffrey Segal and Harold Spaeth.⁹⁴

5.3 Research Design

This study analyzes circuit court cases to determine the extent to which disagreement exists in the lower courts and the reasons for confusion. I will examine the methodology used by courts and the outcome reached. Cases that involved similar displays but resulted in different rulings or cases that employed different doctrines to come to the same ruling will support the claim that the Supreme Court has failed to produce guidelines that the lower courts can effectively apply to a wide range of cases. Then, a detailed case study will seek to explain the most problematic aspects of the Court's rulings.

The ninety four district courts, thirteen circuit courts, Supreme Court, and state court systems create the universe of religious display cases, a set too

⁹² See Glendon Schubert, *Judicial Policy Making*, (1965), Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values: 1937-1947*, (1948); Jeffery Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (1993); Emerson Tiller and Frank Cross, "What is Legal Doctrine?" *Northwestern University Law Review* (2006).

⁹³ Glendon Schubert (1965) created the first quantifiable model; Rohde and Spaeth (1976) stressed that individual policy preference is most influential in judicial decision making; Segal and Spaeth (1993) provided an example of Schubert's model and held that justices of the Supreme Court are able to decide cases in a manner that entirely follows their policy preferences and almost always do this, pointing to their life tenure, their position in the hierarchy and lack of reversal fear in supporting this claim.

⁹⁴ Segal and Spaeth (1993); Schubert (1965).

large for this analysis. Compiling circuit court cases involving disputes of religious symbols displayed in the holiday context and analyzing the rulings provides a manageable case set that will accurately depict the way lower courts have responded to the *Lynch* and *Allegheny* decisions. This is the most reliable way to narrow down the data because of the nature of the judicial system. That is, the Supreme Court can decide only a small number of cases each year, leaving the circuit courts as the highest authority for the majority of litigation. Therefore, circuit courts become the court of last resort for most litigation due to the restrictions of the Supreme Court. As such, the ruling of the Circuit Court are the final say on almost all cases involving displays of religious symbols in the holiday context. Evaluation their decisions will provide an accurate representation of the problems that exist within the appellate court system.

The case sets to be examined were created using *Sheppard's Citations*, a service available through the LexisNexis database that uses the code given to federal decisions to generate a list of all cases that reference the decision. It also gives prior and subsequent history of the case and provides a “Signal Legend” that aids in choosing cases for review and then classifying and organizing cases. After doing a key word search for Appellate and Supreme Court cases that involved religious displays disputed under the Establishment Clause, I acquired a substantial list of cases. I removed cases that did not involve displays of religious symbols in the holiday context. I inputted the

codes into the Sheppard Citation service to expand my list of cases. I also read through each case looking for cases that the majority and dissent cited as support that involved displays of religious symbols in the holiday context.

In this way, I generated a list of cases out of the entire universe of religious symbol Establishment Clause cases. I initially organized and examined the cases into three sets of Circuit Court rulings on religious displays: the first included Circuit Court rulings on religious display cases prior to the *Lynch* ruling in 1984; the second included religious display cases decided by Circuit Courts between the *Lynch* ruling in 1984 and the *Allegheny* ruling in 1989; the third included religious display rulings after the *Allegheny* ruling in 1989. I eliminated cases that were decided before *Lynch* because they are not relevant to a discussion of how *Lynch* and *Allegheny* affected lower court rulings. Although the courts were unsure as to how to decide these types of cases before *Lynch*, they were similarly confused after the *Lynch* ruling. Instead of providing clarification, the Court further confused Establishment Clause doctrine, resulting in even more problems for lower courts.⁹⁵

⁹⁵ It is usually this type of division that leads to a case's review by the Supreme Court. Lower courts issued rulings on displays of religious symbols contested on Establishment Clause grounds in the following cases: *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla 1972) (50-foot permanent Latin cross, sponsored by Council of Churches, on public fairgrounds and maintained at public expense); *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973) (monument inscribed with Ten Commandments on courthouse grounds); *Paul v. Dade County*, 202 So. 2d 833 (lights in shape of Latin cross on courthouse during Christmas season); *Allen v. Morton*, 495 F.2d 65 (DC Cir. 1973) (nativity scene in federal park adjacent White House during Christmas season); *Lawrence v. Buchmueller*, 40 Misc 2d 300, 243 NYS.2d 87 (S. Ct. Westchester County 1963) (nativity scene on public school property); *Baer v. Kolmorgen*, 14 Misc 2d 1015, 181 NYS2d 230 (S. Ct. Westchester County 1958) (nativity

Then, I considered the details of the display, the outcome of the case, unanimity or lack thereof by the panel of judges, and the opinion(s) issued. The details leading to the litigation and the outcome itself often determine the source of inconsistency and how often rulings contradict those of other circuits. Most circuit cases consist of a panel of three judges and most opinions that circuit courts issue are unanimous. The number of opinions and issuance of more than one opinion reveal the level of disagreement among that particular circuit's judges. A high presence of split decisions will speak to the confusion across one geographical region, or possibly across several, stemming from the Supreme Court's rulings. The opinion itself will uncover the parts of the Court's precedent that are most problematic.

The list of cases examined can be found in Appendix 1.

scene on public school property); *Opinions of the Justices*, 108 NH 97, 228 A.2d 161 (1967) (plaques with the words "In God We Trust" in public schoolrooms); *State ex rel Singlemann v. Morrison*, 57 So. 2d 238 (La Ct App) (statue of nun in public park); *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (city's design and construction of platform, including large Latin cross, for papal visit found to have religious purpose); *Citizens Concerned for Separation of Church and State v. Denver*, 481 F. Supp. 522 (D.C. Colo. 1979), (nativity scene on county property erected with religious purposes); *Fox v. City of Los Angeles*, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978) (lighted cross on city hall found to have religious purpose); but see *Eugene Sand and Gravel Company v. City of Eugene*, 276 Or. 1007, 558 P.2d 338 (1976) (cross erected as veteran's war memorial had secular purpose); *Allen v. Hickel*, 138 U.S. App. D.C. 31, 424 F.2d 944, 948 (D.C. Cir. 1970) (crèche in Christmas pageant on federal parkland).
Case list compiled from: *Eugene Sand & Gravel, Inc. v. City of Eugene* 558 P.2d 338, (Or. 1976) and *ACLU of Georgia v. Rabun* 698 F.2d 1098; (11th Cir. 1983).

5.4 *Limitations of the Study*

In no way is this study a comprehensive review of Establishment Clause case history, or even Establishment Clause doctrine with regards to religious symbols. I seek to analyze one sub-section of Establishment Clause cases, religious displays in the holiday context, in order to determine the effects of the unclear precedent of *Lynch* and *Allegheny*; the areas of the Supreme Court precedent are most troublesome for appellate courts, and the issues that the courts disagree with across circuits. By using a case study method, I will focus on analyzing opinions. This is not an empirical study of a large number of cases. That being said, the case set represents most, if not all, holiday display cases between 1984 and 2007, and the findings will be broadly applicable to other areas of Establishment Clause dispute.

6. Results and Findings

Lynch and *Allegheny* were intended to clarify Establishment Clause jurisprudence and provide a standard for interpretation for lower courts to follow. However, the Court failed to agree upon a legal doctrine that would achieve these goals. This stems from a deeper conflict over the fundamental principles underlying the Establishment Clause, which prevents the Court from providing the guidance necessary to lower court decision-making. The data confirms that the Circuit Courts are divided regarding how to apply the detail-specific rulings of *Lynch* and *Allegheny* to the wide range of displays

that are brought to the Appellate Courts. Justice Brennan predicted this problem in his dissent in *Lynch* when he stated:

[T]he Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the city of Pawtucket's nativity scene appeared. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone, or the public display of other distinctively religious symbols such as a cross.⁹⁶

Indeed, there is no consistency across circuits. Often, nearly identical displays are allowed by some courts and prohibited by others.

6.1 The Big Picture

The data confirms that the circuits issue inconsistent rulings for similar displays. Table 6.1 presents the data that provides evidence of this pattern. It lists the cases chronologically and includes a variety of information on the background of the case and the ruling. The “Rulings” Column immediately shows this disjointedness; with decisions flip flopping back and forth from permissible to impermissible.

⁹⁶ *Lynch*, 492 U.S. at 694.

Table 6.1. Circuit Court Rulings, Compiled by Year.

Case	Year	Circuit	Description of the Display	Ruling	Doctrine
<i>McCreary v. Stone</i>	1984	Second	Crèche in public park decorated with lights, ornaments, and Christmas music	Crèche allowed	<i>Lemon</i>
<i>ACLU v. Birmingham</i>	1986	Sixth	Crèche on lawn of City Hall	Crèche prohibited	<i>Lynch</i>
<i>ACLU v. St Charles</i>	1986	Seventh	Cross on top of the fire department, 35 feet high and 75 feet above street level (as part of a Christmas display including lit trees, snowflakes, reindeer, Santa Clause)	Cross prohibited	<i>Schempp</i> , historical analysis of the Cross
<i>AJC v. Chicago</i>	1987	Seventh	Crèche in city hall (argued as part of bigger scene-but court saw it as self contained)	Crèche prohibited	<i>Lemon</i>
<i>Kaplan v. City of Burlington</i>	1989	Second	16 ft Menorah in front of city hall (unattended, solitary)	Menorah prohibited	<i>Allegheny</i> (reasonable observer)
<i>Mather v. Mundelein</i>	1989	Seventh	Nativity scene on public park with Christmas tree, Santa, snowmen, etc	Crèche allowed	<i>AJC v. Chicago, Lynch</i>
<i>Smith v. Albemarle</i>	1990	Forth	Crèche on front lawn of County Office Building with sign reading "Sponsored by Charlottesville Jaycees"	Crèche prohibited	<i>Allegheny</i>

Case	Year	Circuit	Description of the Display	Ruling	Doctrine
<i>ACLU v. Wilkinson</i>	1990	Sixth	Stable and manger without figurines located on capitol grounds (30ft decorated Christmas tree 100 located yards away, along with decorated street lamp posts, lighted trees, and ribbons)	Stable allowed	<i>Allegheny</i> (reasonable observer), <i>Lemon</i>
<i>Doe v. Clawson</i>	1990	Sixth	Crèche on front lawn of city hall with evergreen trees with lights, gifts, bows, Santa, and a "Noel" sign	Crèche allowed	<i>Allegheny</i> (Blackmun)
<i>Chabad-Lubavitch of Vermont v. Burlington</i>	1991	Second	Menorah in park at city hall alongside a secular display as part of a combined holiday display	Menorah allowed	<i>Allegheny</i> , <i>Kaplan</i>
<i>Americans United v. Grand Rapids</i>	1992	Sixth	20 ft Menorah in a downtown public plaza	Menorah allowed	Reasonable observer
<i>Kreisner v. San Diego</i>	1993	Ninth	8 religious scenes from the New Testament accompanied by biblical passages, in a public park	Scene allowed	<i>Lemon</i> , <i>Allegheny</i>
<i>Chabad-Lubavitch of Georgia v. Miller</i>	1993	Eleventh	15 foot tall Menorah in plaza in front of State Capital building with sign "Happy Chanukah from Chabad of Georgia"	Menorah permitted	No-preference, reasonable observer, <i>Widmar</i>
<i>Creatore v. Trumbull</i>	1995	Second	Crèche next to Christmas tree and menorah on town green	Crèche allowed	<i>Allegheny</i>

Case	Year	Circuit	Description of the Display	Ruling	Doctrine
<i>AJC v. Beverly Hills</i>	1996	Ninth	27 ft Menorah in public park near city hall with a sign saying "This Menorah is Sponsored by Chabad of California. It is Not Funded or Sponsored by the City of Beverly Hills"	Menorah prohibited	Unclear-references numerous precedents
<i>Elewski v. Syracuse</i>	1997	Second	Crèche with a banner that says "Glory to God in the Highest" at base of a 50 foot illuminated tree in a downtown public square decorated with ornaments. Across from this square is a Menorah display.	Crèche allowed	<i>Allegheny</i> (reasonable observer)
<i>ACLU v. Schundler</i>	1999	Third	Crèche and menorah on city land in front of city hall modified to include secular symbols	Modified display allowed	<i>Allegheny</i> (reasonable observer)
<i>ACLU v. Florissant</i>	1999	Eighth	Crèche at City Civic Center (part of display with "Seasons Greetings" sign, reindeer, candy canes, presents, snowman	Crèche allowed	<i>Allegheny</i>
<i>Wells v. City and County of Denver</i>	2001	Tenth	Poem (against religion) petitioned to be included in a display of a Crèche, tin soldiers, Christmas tree, Santa, snowmen on steps of City and County building	Not require to display poem	<i>Citizens Concerned, Lemon</i>
<i>Skoros v. NY</i>	2006	Second	Crèche (in school where menorah and star and crescent were allowed)	Not required to display crèche	<i>Lemon</i>

To interpret these apparent inconsistencies and evaluate their cause, the 20 cases evaluated in this study can be classified according to the type of display. Two categories of cases emerge from the data presented in Table 6.1. The first group includes displays of a single, unattended religious symbol, such as a solitary crèche or menorah. The second group encompasses displays with one or more symbols, such as a menorah and Christmas tree, included as part of a larger display with clearly secular symbols, such as a reindeer, candy cane, or banner. These groups are distinctly different and provide crucial insight into analyzing the effects of *Lynch* and *Allegheny*.

6.2 Unattended Displays

Twelve cases fall under the category of unattended displays, as listed below by circuit. Table 6.2 displays these cases in chronological order and reveals that a vast portion of the reported inconsistency comes from this group.

McCreary v. Stone (2nd Cir. 1984) 739 F.2d 716
Elewski v. City of Syracuse (2nd Cir. 1997) 123 F.3d 51
Smith v. County of Albemarle (4th Circuit 1989) 895 F.2d 953
ACLU v. Birmingham (6th Cir. 1986) 791 F.2d 1561
Americans United v. City of Grand Rapids (6th Circuit 1992) 980 F.2d 1538
American Jewish Congress v. City of Chicago (7th Cir. 1987) 827 F.2d 120
American Jewish Cong. v. City of Beverly Hills (9th Cir. 1996) 90 F.3d 379
Kaplan v. City of Burlington (2nd Cir. 1989) 891 F.2d 1024
Skoros v. New York (2nd Cir. 2006) 437 F.3d 1
Kreisner v. City of San Diego (9th Cir. 1993) 1 F.3d 775
Chabad-Lubavitch of GA v. Miller (11th Cir. 1993) 5 F.3d 1383
ACLU v. Wilkinson (6th Cir. 1990) 895 F.2d 1098

Table 6.2. Circuit Court Rulings on Unattended Displays Religious Symbols.

Case	Year	Circuit	Vote	Description of the Display	Ruling	Doctrine
<i>McCreary V. Stone</i>	1984	Second	3:0	Crèche in public park decorated with lights, ornaments, and Christmas music (seen at single self contained)	Crèche allowed	<i>Lemon</i>
<i>ACLU v. Birmingham</i>	1986	Sixth	2:1	Crèche on lawn of City Hall	Crèche prohibited	<i>Lynch</i>
<i>AJC v. Chicago</i>	1987	Seventh	2:1	Crèche in city hall (argued as part of bigger scene-but court saw it as self contained)	Crèche prohibited	<i>Lemon</i>
<i>Kaplan v. City of Burlington</i>	1989	Second	2:1	16 ft Menorah in front of city hall	Menorah prohibited	<i>Allegheny</i> (reasonable observer)
<i>Smith v. Albemarle</i>	1990	Forth	2:1	Crèche on front lawn of County Office Building with sign reading "Sponsored by Charlottesville Jaycees"	Crèche prohibited	<i>Allegheny</i>
<i>ACLU v. Wilkinson</i>	1990	Sixth	2:1	Stable and manger without figurines located on capitol grounds (30ft decorated Christmas tree 100 located yards away near decorated street lamps, lighted trees)	Stable allowed	<i>Allegheny</i> (reasonable observer), <i>Lemon</i>
<i>Americans United v. Grand Rapids</i>	1992	Sixth	14:1	20 ft Menorah in a downtown public plaza	Menorah allowed	Reasonable Observer

Case	Year	Circuit	Vote	Description of the Display	Ruling	Doctrine
<i>Kreisner v. San Diego</i>	1993	Ninth	2:1	8 religious scenes from the New Testament accompanied by biblical passages, in a public park	Scene allowed	<i>Lemon, Allegheny</i>
<i>Chabad-Lubavitch of Georgia v. Miller</i>	1993	Eleventh	11:0	15 foot tall Menorah in plaza in front of State Capital building with sign "Happy Chanukah from Chabad of Georgia"	Menorah allowed	No-preference, reasonable observer, <i>Widmar</i>
<i>AJC v. Beverly Hills</i>	1996	Ninth	11:0	27 ft Menorah in public park near city hall with a sign saying "This Menorah is Sponsored by Chabad of California. It is Not Funded or Sponsored by the City of Beverly Hills"	Menorah prohibited	Unclear-references numerous precedents
<i>Elewski v. Syracuse</i>	1997	Second	2:1	Crèche with a banner that says "Glory to God in the Highest" at base of a 50 foot illuminated tree in a downtown public square decorated with ornaments. Across from this square is a Menorah display.	Crèche allowed	<i>Allegheny</i> (reasonable observer)
<i>Skoros v. NY</i>	2006	Second	2:1	Crèche (in school where menorah and star and crescent were allowed)	Not required to display crèche	<i>Lemon</i>

Table 6.2 illuminates the erratic rulings in this category of cases. Examining several of these cases sheds light on the problems judges faced and the areas where they disagreed. In *McCreary v. Stone* in 1984, the Second Circuit upheld a crèche that was privately owned and located in a public park.⁹⁷ The Village refused to allow a private group to construct a nativity scene in the public park as it had done in past years.⁹⁸ The Second Circuit held that permitting the display would not violate the Establishment Clause, referencing *Lynch* and refuting the Village’s claims that the displays in *Lynch* and *McCreary* could be distinguished based on the physical context (the inclusion of other objects).⁹⁹ Rather, it focused on the “context of the Christmas season.”¹⁰⁰ In this way, the Second Circuit interpreted *Lynch* in the broad sense, a pattern which continued with other cases.

Whereas the Second Circuit upheld the crèche in *McCreary*, in 1987 the Seventh Circuit ruled in *American Jewish Congress v. Chicago* that a crèche located inside City Hall was unconstitutional.¹⁰¹ The display included a nativity scene and a banner that stated “On Earth peace-Good Will toward Men.”¹⁰² About 10-90 feet away the city displayed other objects, such as a Christmas tree, Santa, reindeer, and disclaimer signs saying that the display

⁹⁷ *McCreary v. Stone* 739 F.2d 716 (2nd Cir. 1984).

⁹⁸ *Id.* at 719.

⁹⁹ *Id.* at 728-29.

¹⁰⁰ *Id.* at 728.

¹⁰¹ *American Jewish Congress v. Chicago* 827 F.2d 120 (7th Cir. 1987).

¹⁰² *Id.* at 122.

was not endorsed by the government.¹⁰³ The Seventh Circuit, viewing only the crèche and not the other symbols, struck down the crèche.

Unlike the Second Circuit, which adopted a broad view of *Lynch*, the Seventh Circuit Judges in *City of Chicago* distinguished the display from *Lynch* due to its location, inside the City Hall, and its solitary placement.¹⁰⁴ Rather than part of the display located some feet away, the Court viewed the crèche as solitary.¹⁰⁵ After satisfying that the display was clearly different than *Lynch* and therefore not subject to its precedent, the Court used *Lemon* to judge the scene as a violation due to its message of government endorsement of religion.¹⁰⁶

Judge Easterbrook, dissenting in *American Jewish Congress v. Chicago*, discusses the problems that *Lynch* created by forcing judges to look at the contextual placement of the symbol. The issue with viewing the context is that it turns a constitutional rule, which “identifies cases of concern and prescribes outcomes for them” into a standard, which “identifies an objective...and transfers to some other body the decisions about how much of that value to achieve.”¹⁰⁷ Therefore, the outcome of a case becomes dependent on a judge’s view of the facts at hand. He criticizes Justice O’Connor’s

¹⁰³ Id at 122-23.

¹⁰⁴ Id. at 126.

¹⁰⁵ Id. at 126.

¹⁰⁶ Id. at 126-28.

¹⁰⁷ *AJC v. Congress*, 827 F.2d 120 (1987), Easterbrook dissenting.

“reasonable observer” test as a standard that changes the meaning of the text by allowing judges to rule using their own prejudices. The real question is not if “the members of this panel see this crèche as part of an integrated secular display, but whether the reasonable people could see it so.”¹⁰⁸

As an advocate for strict separation whose views fall in line with those of Levy and Kurland, Easterbrook believes that government should have no involvement with religion. Instead, judges should defer these issues to the legislative branch. Although his position is on the far end of the spectrum, the issue he presents is valid and encapsulates the fundamental problems with judicial line-drawing. Easterbrook criticizes the *Lynch* majority for “...requiring scrutiny more commonly associated with interior decorators than with the judiciary.”¹⁰⁹

These two cases illustrate the broader pattern and lack of consistency representative of cases involving a solitary symbol. In six cases, a crèche or menorah on public land was upheld as constitutional (*McCreary, Elewski, Grand Rapids, Kreisner, Wilkinson, Miller*). In six cases, the crèche or menorah was viewed as violating the Establishment Clause (*Kaplan, Smith, Birmingham, City of Chicago, Beverly Hills, and Skoros*).

¹⁰⁸ 827 F.2d 120 (1987), Easterbrook dissenting.

¹⁰⁹ 827 F.2d 120 (1987), Easterbrook dissenting.

6.3 Combined Displays

The remaining eight cases are classified as combined displays, which are presented in Table 6.3.

Doe v. Clawson (6th Circuit 1990) 915 F.2d 244

ACLU v. City of St. Charles (7th Cir. 1986) 794 F.2d 265

Mather v. Village of Mundelein (7th Cir. 1989) 864 F.2d 1291

ACLU v. City of Florissant (8th circuit 1999) 186 F.3d

Wells v. City and County of Denver (10th Circuit 2001) 257 F.3d 1132

Chabad-Lubavitch v. City of Burlington (2nd Cir. 1991) 936 F.2d 109

Creatore v. Town of Trumbull (2nd Cir. 1995) 68 F.3d 59

ACLU v. Schundler (3d Cir. 1999) 168 F.3d 92/104 F.3d 1435

Table 6.3: Circuit Court Rulings on Combined Displays of Religious Symbols.

Case	Year	Circuit	Vote	Description of the Display	Ruling	Doctrine
<i>ACLU v. St Charles</i>	1986	Seventh	3:0	Cross on top of the fire department, 35 feet high and 75 feet above street level (as part of a Christmas display including lit trees, snowflakes, reindeer, Santa Clause)	Cross prohibited	<i>Schempp</i> , historical analysis of the Cross
<i>Mather v. Mundelein</i>	1989	Seventh	2:1	Nativity scene in public park with Christmas tree, Santa, snowmen	Crèche allowed	<i>AJC v. Chicago, Lynch</i>
<i>Doe v. Clawson</i>	1990	Sixth	3:0	Crèche on front lawn of city hall with evergreen trees with lights, gifts, bows, Santa, and a "Noel" sign	Crèche allowed	<i>Allegheny</i> (Blackmun)
<i>Chabad-Lubavitch of Vermont v. Burlington</i>	1991	Second	3:0	Menorah in park at city hall alongside a secular display as part of a combined holiday display	Menorah allowed	<i>Allegheny, Kaplan</i>
<i>Creatore v. Trumbull</i>	1995	Second	3:0	Crèche next to Christmas tree and menorah on town green	Crèche allowed	<i>Allegheny</i>
<i>ACLU v. Schundler</i>	1999	Third	2:1	Crèche and menorah on city land in front of city hall modified to include secular symbols	Display allowed	<i>Allegheny</i>
<i>ACLU v. Florissant</i>	1999	Eighth	3:0	Crèche at City Civic Center part of a display with "Seasons Greetings" sign, reindeer, candy canes, presents	Crèche allowed	<i>Allegheny</i>
<i>Wells v. City and County of Denver</i>	2001	Tenth	2:1	Poem (against religion) petitioned to be included in a display of a Crèche, tin soldiers, Christmas tree, Santa, snowmen on steps of City and County building	Not required to display poem	<i>Citizens Concerned, Lemon</i>

These cases seem to support that a religious symbol combined with secular objects will, by and large, pass constitutional evaluation. As seen by *Burlington*, *Creatore*, and *Schundler*, these displays can include both crèches and menorahs and still pass constitutional muster. The idea is that the inclusion of secular objects mitigates the religious tones of the message perceived by the reasonable observer. The result is a message of religious pluralism, tolerance, and celebration of the history of the season, rather than a government endorsement of religion. Judge Nelson aptly describes and critiques this so called “St. Nicholas too” test or “plastic reindeer too” rule, in his dissent in *ACLU v. City of Birmingham*, holding:

[A] city can get by with displaying a crèche if it throws in a sleigh full of toys and a Santa Claus, too. The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full compliment of eight? Or is it now nine.¹¹⁰

The ridiculousness of his questions embodies the sentiment of those against such a rule, who question where to draw the line between secular and religious. Critics also doubt that the presence of a Santa negates the religious message inherent in a display like the crèche. As Daniel Parish maintains in his article *Private Religious Displays*, “...more becomes better, or at least safer...groups seeking to pass on a religious message are encouraged to cloak it in quasi-secular trappings.”¹¹¹

¹¹⁰ *ACLU v. Birmingham*, 791 F.2d 1561, 1569.

¹¹¹ Parish, 282.

Supporters of this rule, such as George Janocsko, hold that it provides a clear analytical framework, whereas the *Allegheny* precedent requires that judges use an ad-hoc, case by case, line drawing method to decision making.¹¹² Justice Kennedy denounces the endorsement approach supported by the majority in *Allegheny*, criticizing it as:

[J]urisprudence of minutiae. A reviewing court must consider whether the city has included Santa's, talking wishing wells, reindeer, or other secular symbols as 'a center of attention separate from the crèche'.¹¹³

This depicts the views of the many critics of this rule, who view it as a way to pass constitutional scrutiny for a display that does actually endorse religion. Justice Kennedy, though especially judgmental of this approach, accurately describes shortfalls of this method when he mocks the *Allegheny* majority and says, "This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure."¹¹⁴

Despite the clear constitutional disagreement over this method, the case data shows that it yields consistent results for combined religious-secular displays. This could reasonably result from the fact that the importance of the context of the display was emphasized in both *Lynch* and *Allegheny*. Both cases stress that the physical setting and surroundings of the display are fundamental to determining whether a reasonable passerby would view the

¹¹² Janocsko, 487.

¹¹³ 492 U.S. 573 at 674.

¹¹⁴ *Id.* at 673.

scene as a governmental support of religion. Therefore, when a panel of judges is presented with a case involving a scene that unambiguously includes secular objects like snowmen, Santa Claus, and reindeer, they employ the reasonable observer test, or the “Plastic Reindeer Too” Test, without difficulty. Although the merits of this method may be disputed, it nonetheless provides a clearer rule for judicial scrutiny. This diminishes the effect that judicial preferences have on the outcome.

On the other hand, when a panel is required to determine the validity of a claim against a free-standing Menorah, the judges are not equipped with as clear a rule. They must embark on a distinction process to determine whether the case at hand can be determined under the *Lynch* or *Allegheny* precedent, or if a wholly different standard must be used. The various methods result in different outcomes and allow judicial preferences to play a more significant role in the decision making process. Whether the panel has judges that favor a separation, accommodation, or neutral approach will play a bigger part in the decision. Suddenly, the Christmas lights 100 yards away may be included as part of the scene, but the Menorah across the street may be excluded. The question of what a “reasonable observer” would perceive from the scene is much harder to answer. By nature, it allows for judicial opinion to enter into the decision. With panels randomly selected from a large pool of diverse judges, it makes sense that the two groups vary so widely in terms of consistency.

The issue then, is whether this variance can be resolved. An obvious solution is to abandon the ad hoc approach currently utilized and create a single, unifying theory for religious freedom cases. This does not seem feasible considering the current division on the Court, and it may not be desirable either. Even if the different ideologies of the justices could be reconciled and a single test agreed upon, there will still remain significant disagreement because of the Constitutional text itself. Beyond establishing a national church, the Establishment Clause is devoid of absolutes. The issues that the justices will have to resolve are not explicitly stated by an undisputable source.

Further, a justice's approach is inextricably tied to their preferences and background. This division is portrayed by Justice White in his opinion in *Public Education v. Regan* when he acknowledges, "But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."¹¹⁵ For example, the extent to which a law affects religious practice enough to be unconstitutional depends on where that judge draws the line between belief and practice and how much of a hindrance it takes to cross the line into the impermissible. Similarly, what counts as coercion will vary based on how a judge perceives the effects of the law as well as the amount of

¹¹⁵ *Everson v. Education* 444 U.S. 646 (1980), 662.

coercion necessary to invalidate a law. This applies to the definition of religion and what could be considered to endorse a certain religion.

However, a single test may sacrifice liberty for consistency, which is not desirable either. The Court recognizes that “There are always risks in treating criteria discussed by the Court from time to time as ‘tests’ in any limiting sense of the term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics.”¹¹⁶ Justice O’Connor agrees with this and argues for an approach that does “more than erect a constitutional ‘signpost,’ to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be ‘to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.’”¹¹⁷ A test that is capable of changing as times change, as O’Connor points out, shows a positive progression toward a theory that fully embodies the First Amendment guarantees.

¹¹⁶ *Tilton v. Richardson* 403 U.S. 672 (1970), 679.

¹¹⁷ *Wallace v. Jaffre* 72 US 38 (1985), 69.

7. Conclusions

The key issue that creates diverging rulings in these cases centers on lack of a consistent means of interpretation. Neither the *Lemon* test nor the endorsement test nor neutrality, non-coercion, nor strict separation provides consistent results. Further, the precedent, especially the *Allegheny* opinions, actually serve to create more variance across courts as different circuits adopt different rules. Though this study cannot speak to other symbolic Establishment Clause cases, it is reasonable that the troubles presented by cases involving religious displays in the holiday context carry over to other religious symbol cases. These include postings of the Ten Commandments, public display of the cross, religious statutes, religious symbols on money, city seals, and similar markings, and a range of others.

This underlines the shortcomings of the Establishment Clause and its applicability to current day issues. The inability to develop methods for interpreting holiday display cases, not to mention other types of religious displays, has serious consequences. Without a clear test or doctrine to apply, the lower courts decide cases based on their best interpretation of the majority's ruling. In the case of *Allegheny*, with at least four different opinions offering four tests, lower courts have discretion regarding which test to apply. The result has been incoherency across the circuits. This creates a different standard of law across the nation. In some areas, a freestanding crèche is permitted. In other areas, this fails to hold true, making it difficult for city

leaders trying to plan the holiday display without incurring law suit fees that can cripple its operations.

Lower courts have had the most disparity in cases that involve a solitary display of a religious symbol. They tend to divide on what counts as part of the display that will affect the viewer's perceived message. On the other hand, when presented with cases that combine secular and religious symbols, they tend to uphold the display using the reasonable observer test. This presents the question of whether this test adequately protects Establishment Clause guarantees, calling into question whether a single approach is possible. Justices in several cases have spoken to whether this is feasible. The Court has refused to formally adopt any concrete test, which "sacrifices clarity and predictability for flexibility [and] promises to be the case until the continuing interaction between the States...produces a single, more encompassing construction of the Establishment Clause."¹¹⁸ The need for the Supreme Court to elucidate a standard that is more substantive is becoming increasingly important as the lower courts fracture in their interpretations. While a single approach may not be likely, this analysis points to the importance of making the First Amendment guarantees applicable to a modern society in a way that upholds religious freedom while ensuring uniformity in judicial outcomes across the United States.

¹¹⁸ *Regan* 444 U.S. 646 (1980) 662.

Appendix 1: Case Set for Analysis

2nd Circuit:

McCreary v. Stone (2nd Cir. 1984) 739 F.2d 716 **June 21, 1984**
Board of Trustees v. McCreary 471 U.S. 83 **March 27, 1985**
Kaplan v. City of Burlington (2nd Cir. 1989) 891 F.2d 1024 **December 12, 1989**
Chabad-Lubavitch v. City of Burlington (2nd Cir. 1991) 936 F.2d 109 **July 21, 1991**
Creatore v. Town of Trumbull (2nd Cir. 1995) 68 F.3d 59 **October 17, 1995**
Elewski v. City of Syracuse (2nd Cir. 1997) 123 F.3d 51 **August 14, 1997**
Skoros v. New York (2nd Cir. 2006) 437 F.3d 1 **February 2, 2006**

3rd Circuit:

ACLU v. Schundler (3d Cir. 1999) 168 F.3d 92/104 F.3d 1435 **February 16, 1999**

4th Circuit:

Smith v. County of Albemarle (4th Circuit 1989) 895 F.2d 953 **February 8, 1990**

6th Circuit:

ACLU v. Birmingham (6th Cir. 1986) 791 F.2d 1561 **June 11, 1986**
ACLU v. Wilkinson (6th Cir. 1990) 895 F.2d 1098 **February 8, 1990**
Doe v. Clawson (6th Circuit 1990) 915 F.2d 244 **October 1, 1990**
Americans United for Separation of Church and State v. City of Grand Rapids (6th Circuit 1992) 980 F.2d 1538 **November 16, 1992**

7th Circuit:

ACLU v. City of St. Charles (7th Cir. 1986) 794 F.2d 265 **June 6, 1986**
American Jewish Congress v. Chicago (7th Cir. 1987) 827 F.2d 120 **August 18, 1987**
Mather v. Village of Mundelein (7th Cir. 1989) 864 F.2d 1291 **January 4, 1989**

8th Circuit:

ACLU v. City of Florissant (8th circuit 1999) 186 F.3d **August 16, 1999**

9th Circuit:

Kreisner v. City of San Diego (9th Cir. 1993) 1 F.3d 775 **August 2, 1993**
American Jewish Cong. v. City of Beverly Hills (9th Cir. 1996) 90 F.3d 379 **July 19, 1996**

10th Circuit:

Wells v. City and County of Denver (10th Circuit 2001) 257 F.3d 1132 **July 2, 2001**

11th Circuit:

Chabad Lubavitch of GA v. Miller (11th Cir. 1993) 976 F.2d 1386 **October 18, 1993**

Supreme Court:

Lynch v. Donnelly (S.C 1984) 465 U.S. 668 **March 5, 1984**
County of Allegheny v. ACLU (S.C. 1989) 492 U.S. 573 **July 3, 1989**

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Written Capstone Summary

This project explored one sub-sect of the First Amendment: religious symbols displayed during the holiday season. Religious symbols are protected as part of the religious freedom granted by the First Amendment to the Constitution, which states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”¹¹⁹ These phrases guarantee freedom from and of religion; that is, freedom from state or Federal creation of a national church or declaration of a national religion and freedom to practice religion without interference from state or federal governments. Taken together, the establishment clause and free exercise clause point in opposite directions. The establishment clause calls for a separation of government and religion, requiring that government does not sponsor one religion over another, or over irreligion. Whereas the free exercise clause protects individuals from government interference with private religious expression.¹²⁰ For example, laws that grant exceptions for certain religious practices are often challenged as government endorsements of religion. However, denying such exemptions can result in prohibiting the free exercise of religion. The result is a clash of the two clauses.

¹¹⁹ U.S. Constitution, amend. 1.

¹²⁰ O’Brien, 688. Parish, 254.

The broad language of the establishment clause, combined with the importance of religion in American culture and government provide an inherent source of tension and confusion in constitutional interpretation. The language of the clause is vague: Congress may not establish a religion, but what defines a religion, what constitutes an establishment thereof, and what is a law “respecting” such establishment? The role of religion historically compounds this issue. Though America was founded on the principle of religious freedom, government and religion have been intertwined throughout American history. This is especially evident in the founding period: The Declaration of Independence references a “Creator,” George Washington declared that November 26th should be a day to give thanks and pray to the Lord, Thomas Jefferson and James Madison supported such a “thanksgiving” day and issued religious proclamations, Congress sessions begin with a prayer, Court sessions open by saying “God save the United States and this honorable Court,” the pledge of allegiance states that the U.S. is “one nation, under God,” the national slogan is “In God We Trust.”¹²¹ This is not an exhaustive list of governmental endorsements of religion from the founding period. Plus, most of these practices still occur today.

These practices are a direct result of the fact that America was settled by Protestants escaping religious persecution. As such, religious freedom was a defining principle underlying the new government. However, in banning

¹²¹ Braveman 353, Cord 223-32, S. Feldman 222

Congress from passing laws that sponsor or prohibit religious activities, the settlers did not intend to banish every reference to God or religion by any governmental institution. As a homogenously Protestant society, the religious activities detailed above were not considered congressional legislation.

The inevitable confusion and disagreement over the precise meaning of the Establishment Clause combined with the importance of religious liberty calls for a clear, consistent method to determine Establishment Clause cases. Regardless, the Court has failed to develop a reliable approach to analyze the constitutionality and bounds of government involvement in religion. For over sixty years the Court has regularly heard cases that claim violations of the guarantees of the Establishment Clause, yet it has failed to produce a framework for analysis that is generally applicable, gives coherent decisions, and is agreed upon by the majority of the Court. Instead, Establishment Clause doctrine is inconsistent with frequent changes in viewpoints, methodology, tests, and defining principles underlying the clause.¹²²

Government sponsorship of religious symbols is one area of Establishment Clause jurisprudence that has fueled substantial controversy and constitutional debate. Private displays of religious symbols on public property or publicly funded religious displays call into question whether the government is endorsing a particular religion. This arises from the character of religious symbols themselves, a central aspect of religious practice and a

¹²² Felsen 395, Rezai 503, Acri 165.

primary mechanism of conveying the beliefs of the religion. The issue is most commonly seen in the inclusion of religious relics in displays that celebrate official observances of holidays that have a religious origin.¹²³ Nativity scenes, or crèches, that celebrate Christmas, a federal holiday with religious origins, are disputed most frequently. Christmas, and several other holidays of religious origin, present problems because they have both secular and religious elements. In a display with secular elements, such as a Santa Claus, and religious elements, such as a nativity scene depicting the birth of Jesus, it is often hard to establish the overall message emanating from the display. Even displays of a Menorah without any secular objects can be viewed as a secular celebration of the holiday depending on its placement. Thus, the issue becomes complicated for cities, town, and private entities that wish to erect displays on public property or using public funds.

Lynch v. Donnelly in 1984 and *County of Allegheny v. ACLU* in 1989, the only religious display cases decided by the Court on the grounds on Establishment Clause violations, demonstrate the inadequacies of the Court's Establishment Clause jurisprudence. Bare majorities issued opposite rulings for similar displays, opinions were numerous and obscure, and the members of the Court vigorously disagreed with one another.

¹²³ Rostein 1767.

Discord among the Court has serious implications for the judicial system and for local governments. Discrepancy in methods, results, and opinions threatens the credibility of the Court. This not only confuses the idea of religious freedom, but it also threatens its very core. Additionally, it creates inconsistency among circuit, district, and local courts across the nation. The Supreme Court can hear a limited number of cases each year, so appellate courts play a key role in ensuring implementation of the Court's decisions and consistency of federal law. With a narrow majority, varying results between the two main cases, and multiple opinions all proposing substantially different theories and tests, lower courts' decision making process is compromised. Considering that circuit and district courts are divided geographically and that the Supreme Court can hear a miniscule fraction of the number of cases it receives for appeal, there will be different standards across the nation for religious displays based on the rulings of the courts in those regions.

Scholars and judges are highly critical of the Court's rulings and agree that they have resulted in conflicting rulings among the district and circuit courts. However, there is scarce literature examining a large number of the cases that have emerged in lower courts due to *Lynch* and *Allegheny*. This leaves many important questions unanswered. Do *Lynch* and *Allegheny* actually produce the degree of lower court chaos that many scholars depict? Does variance come from a small number of courts issuing conflicting decisions or are all courts similarly confused? When courts issue rulings that

conflict with the precedent of the Supreme Court or of other lower courts, what causes the clash? That is, what parts of the *Lynch* and *Allegheny* decisions are most perplexing? In this thesis, I intend to embark on a review of the *Lynch* and *Allegheny* progeny in order to provide substantive answers to these questions.

The ninety four district courts, thirteen circuit courts, Supreme Court, and state court systems create the universe of religious display cases. Compiling circuit court rulings and analyzing the rulings provides a manageable case set that will accurately depict the way lower courts have responded to the *Lynch* and *Allegheny* decisions. This is because the Supreme Court can decide a small number of cases each year, leaving the circuit court as the highest authority for the majority of litigation. Circuit Courts become the court of last resort for most disputes. Therefore, the rulings of the Circuit Court provide the final say on cases involving displays of religious symbols in the holiday context. A Sheppard's Citation Search and LexisNexis Search produced a set of 20 cases.

The 20 cases evaluated in this study were classified according to the type of display. Two categories of cases emerged: displays of a single, unattended religious symbol, such as a solitary crèche or menorah and displays with one or more symbols, such as a menorah and Christmas tree, included as part of a larger display with clearly secular symbols, such as a reindeer, candy cane, or banner.

There is clear inconsistency among Circuit Courts regarding cases of a solitary symbol. In six cases, a crèche or menorah on public land was upheld as constitutional (*McCreary, Elewski, Grand Rapids, Kreisner, Wilkinson, Miller*). In six cases, the crèche or menorah was viewed as violating the Establishment Clause (*Kaplan, Smith, Birmingham, City of Chicago, Beverly Hills, and Skoros*). The results from combined cases support that a religious symbol combined with secular objects will, by and large, pass constitutional evaluation. For combined displays, the inclusion of secular objects mitigates the religious tones of the message perceived by the reasonable observer. The result is a message of religious pluralism, tolerance, and celebration of the history of the season, rather than a government endorsement of religion. This results from the importance of the context of the display that was emphasized in *Lynch* and *Allegheny*. Therefore, when a panel of judges is presented with a case involving a scene that unambiguously includes secular objects like snowmen, Santa Claus, and reindeer, they employ the reasonable observer test, or the “Plastic Reindeer Too” Test, without difficulty.

For unattended displays, the judges are not equipped with a clear rule. They must embark on a distinction process to determine whether the case can be decided under the *Lynch* or *Allegheny* precedent, or if a wholly different standard must be used. Not only do these result in different outcomes, but they also force the judges to investigate the display with more scrutiny. By nature, it allows for judicial opinion to enter into the decision. Whether the panel has

judges that favor a separation, accommodation, or neutral approach will play a bigger part in the decision. And with panels randomly selected from a large pool of diverse judges, it makes sense that the two groups vary so widely in terms of consistency. The overarching issue still remains that the Court needs to provide better guidance for lower courts.

This project is significant because it is the first of its kind to compile all of the case data together and organize it to show meaningful patterns. Though other scholars have discussed and compared some of these cases, I have yet to come across a paper that systematically analyzes all of the holiday-context religious display cases. Further, this study sheds light on the reasoning behind the Supreme Court's seemingly erratic decisions and seeks to explain them in a way that validates the Court's decisions. Hopefully, this renews faith in the judicial process, which some people believe is broken, by showing that discrepancies are a part of constitutional evolution and are necessary as our country modernizes. There is a natural "lag time" between societal changes and constitutional catch up. This project can be expanded in the future to a wider Establishment Clause analysis which has the potential to provide even more insight to understanding and protecting religious freedom.