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Comparative Law and Religion**

The War On Christmas: The Display of Christmas Décor on Public Property is Being Attacked

With each year that passes, the Holiday season becomes more controversial. The concept of Christmas as the public knows it, is slowly being whittled away by those who either do not partake in the holiday or want to be his or her own version of Ebenezer Scrooge. Whatever their reasons may be, the bottom line is that a war is being waged against Christmas. Specifically, those against the holiday spirit have focused their attack on displays of Christmas décor on public property. This is especially true when the property features religious themed articles such as a nativity scene. The battle has been taken all the way to the Supreme Court of the United States. Whether one is for or against this clash, one cannot deny the fact that select groups of people want to ensure that the government does not acknowledge any religious aspect regarding the Christmas holiday.

This comment will first discuss the history of "The War on Christmas," by exploring its origins and development through the past several centuries. Next, it will explain in legal terms how a suit involving the public display of religious symbolism may be brought in front of a court, along with the various tests and defenses that determine whether or not there has been a Constitutional violation by

the display in question. Following that discussion, the comment will focus on the approach of the Supreme Court in two essential cases involving governmental displays of religious themes. The comment will analyze the Court's reasoning, as well as expressing the view that the attempts by various people to stifle the presentation of religious themes in governmental displays is futile and uncalled for. The comment will then conclude with a discussion of various attempts to bring religious aspects of Christmas back to the forefront, as well as a conclusion of the comment.

Origins of the War on Christmas

The origins of The War on Christmas can be traced back to the seventeenth century.¹ However, one of the most surprising parts about this country is how the war began. Most would assume that some sort of "liberal atheist" declared the first shots of what has become this mainstream controversy.² However, it was actually a religious group which first objected to the so-called "Christmas Spirit." Beginning in 1659, the Puritans banned the holiday because of their belief that that the "yuletide festivities" did not correspond to the teachings found in the Bible. Their effort was so severe, that the Puritans actually banned the holiday for over twenty years.³ Automaker and anti-semite, Henry Ford also blamed the Jewish religion, for quashing the practice of Christmas Caroling and celebrations of the holiday in

¹ Rachel N. Schnepfer, *Yuletide's Outlaws*, NY Times, December 14, 2012, at A23.

² *Id.* at A23.

³ *Id.* At A23.

schools.⁴ Shifting from religious to political beliefs, Communists were also named as adversaries to the Christmas holiday when a pamphlet issued by the John Birch Society blasted the political group by mentioning their intentions, a variation of the now famous slogan, "taking Christ out of Christmas."⁵

A more modern interpretation that the adversary of Christmas is a "left wing political advocate" began to take shape in late twentieth and early twenty first century.⁶ Reasons varied among conservatives for the efforts of left wing advocates to wage war on the Christmas Holiday. Conservative talk show host Bill O'Reilly once stated, "I think it's all part of the secular progressive agenda...to get Christianity and spirituality out of the public square...Because if you look at what happened in Western Europe and Canada, if you can get religion out, then you can pass secular progressive programs like legalization of narcotics, euthanasia, abortion at will, gay marriage."⁷

This war of words and opinions is a result of countless decisions, whether inside or outside of a courtroom, regarding acceptable ways to display Christmas messages on government property. In December 2007, controversy occurred when a public school in Ottawa planned to have its choir students sing the song "Silver Bells" with the word "Christmas" replaced by "festive".⁸ Additionally in 2011, in

⁴ *Id.* At A23.

⁵ *Id.* At A23.

⁶ Alex Altman, *A Brief History Of the War on Christmas-TIME*, TIME Magazine, December 24, 2008.

⁷ *Id.*

⁸ *Concert goes ahead despite controversy over change to Christmas lyrics*, The National Post, (July 28, 2008), <http://www.nationalpost.com/news/story.html?id=0ed31bbd-b93f-488b-8a07-26e0fde358a7>.

Ontario, a school removed the Christmas pageant for a craft sale and winter concert.⁹

Many large retail corporations such as Sears, Wal-Mart, and Target have been criticized for their decisions to remove the term "Christmas" in their marketing efforts. Specifically, the American Family Association initiated a nation-wide boycott of the Target Corporation, resulting in over 700,000 petition signatures.¹⁰ Within a week of initiating the boycott, the AFA received an official letter from Target indicating that they would begin incorporating the term "Christmas," as well as other seasonal holiday terms, like Hanukkah, in their advertising.¹¹

The most heated battles over related public displays of Christmas have taken place in the courtroom. Supreme Court rulings starting with *Lynch v. Donnelly* in 1984 permit religious themes in government-funded Christmas displays that had "legitimate secular purposes."¹² This has led many such displays to include secular elements such as reindeer, snowmen and elves along with the religious elements.¹³ The Supreme Court's holding in *Lynch*, that a municipal nativity scene erected during the Christmas holiday season did not constitute any real danger of an establishment of religion, seems clear enough. However, *Lynch* was subjected to

⁹ Matthew Pearson, *Multiculturalism's war on Christmas: Principal Mhairi Rowland "Grinch" cancels Christmas concert at Cambridge Public School*, The Ottawa Citizen, (December 1, 2011), <http://www.cireport.ca/2011/12/war-against-christmas-principal-mhairi-rowland-grinch-cancels-christmas-concert-at-cambridge-public-school-this-year.html>.

¹⁰ Stephanie Simon, *A Very Wary Christmas*, The Los Angeles Times (December 9, 2005), <http://articles.latimes.com/2005/dec/09/nation/na-christmas9>.

¹¹ *Id.*

¹² *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 608 (1984).

¹³ George M. Janocsko, *Beyond the "Plastic Reindeer Rule": The Curious Case of County of Allegheny v. American Civil Liberties Union*, 28 Duq. L. Rev. 445, 456 (1990).

many different analyses in the lower federal courts.¹⁴ Other recent court cases raise additional issues such as the inclusion of Christmas carols in public school performances, but none of these cases reached the United States Supreme Court. Specifically, in 2002, the New York City public school system banned the display of Nativity scenes.¹⁵ However, the system still allowed the display of supposedly less blatant religious items, including Christmas trees, menorahs, and the Muslim star and crescent.¹⁶ The school defended its policy successfully in *Skoros v. City of New York*.¹⁷

Requirements for Pleading, Tests, and Defenses

a. Pleadings

The First Amendment provides that: "Congress shall make no law respecting an establishment of religion [Establishment Clause], or prohibiting the free exercise thereof [Free Exercise Clause]; or abridging the freedom of speech [Free Speech Clause]."¹⁸ Normally, a First Amendment challenge to the display of religious symbols on public property will be made under the Establishment Clause.¹⁹ However, the Free Exercise Clause or Free Speech Clause could also be used.²⁰

In order to establish a prima facie case, plaintiffs must plead and prove that they have the standing to bring the action. Standing can be found when a plaintiff

¹⁴ See *Burelle v. City of Nashua*, 599 F. Supp. 792, 793 (D.N.H. 1984); *Am. Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986).

¹⁵ *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ U.S.C.A. Const. Amend. I.

¹⁹ William M. Howard, Annotation, *Cause of Action to Prevent the Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

²⁰ *Id.*

has shown that he has sustained some personal injury as a result of the display; that the symbol displayed is religious in nature; and that the property on which it is situated is owned, occupied, or controlled by some governmental or public entity or agency. Second, plaintiffs must also plead and prove that the particular display of religious symbols on public property contravenes the Establishment Clause under one or more recognized theories of relief.²¹

The public property on which the religious symbol is displayed could be a government building; school; park, square, or mall; courthouse or courtroom; or other public property.²² The particular religious symbol displayed on public property could be the Ten Commandments; a crèche or nativity scene; a menorah; a cross or crucifix; slogans, mottos, emblems or logos; works of art; or other types of religious oriented symbols.²³ In some instances, the display would be permanent and in others just temporary, and may involve the expenditure of public funds or be financially supported privately.²⁴

A suit to prevent the display of religious symbols on public property is typically commenced by one or more individuals and/or organizations who have standing to sue a federal, state, or local governmental entity and/or public officials.²⁵ The action is most often commenced in a United States District Court, seeking a declaratory judgment determining the unconstitutionality of the display

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

and an injunction for its removal.²⁶ Once before the Court, there have been a series of tests created to determine whether or not the display in question is a violation of one's Constitutional rights.

b. Tests

The Court refined the framework for analyzing whether a government's display of religious themes can withstand an Establishment Clause challenge by announcing the three-part test in *Lemon v. Kurtzman*.²⁷ A Plaintiff should focus on the *Lemon* test, which provides that a display of religious symbols on public property can withstand an Establishment Clause challenge only if the display has a secular purpose, does not promote or inhibit religion, and does not foster an excessive government entanglement with religion.²⁸

Although the Court has not overruled the *Lemon* test, it has developed the more narrow "endorsement test." Under the endorsement test, plaintiffs will be required to prove that a reasonable observer of the religious symbols in the context of the particular display would perceive a message of governmental endorsement or sponsorship of religion.²⁹ Under this standard, a violation of the Establishment Clause is found if the result of the government action coerces anyone to support,

²⁶ *Id.*

²⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

²⁸ *Id.*

²⁹ *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).

participate in, any religion, or give a direct benefit to religion in such a degree that it tends to establish religion or religious faith.³⁰

The *Lemon* test, as seen by most authorities, is the contemporary rule governing Establishment Clause challenges.³¹ However, courts now seem to adopt a more liberal attitude by allowing such religious displays to remain standing, in certain circumstances.³² Put differently, "the 'strict separation' posture" has been substituted with a more "secular" approach.³³ However, the approach taken by a Court in any case depends on many factors, including: the Circuit in which it is located, the particular judge interpretation of the Establishment Clause, and of course the facts of the case.³⁴

C. Defenses

Defendants may challenge the plaintiffs' standing to bring the action, if plaintiffs have not sustained a personal injury as a result of the display.³⁵ Even if the plaintiffs have the mandatory standing to bring a suit, defendants may still avoid liability by disproving one or more of the elements of the plaintiffs' prima facie

³⁰ William M. Howard, Annotation, *Cause of Action to Prevent the Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

³¹ See, e.g., *Koenick v. Felton*, 190 F.3d 259, 138 Ed. Law Rep. 100, 139 Lab. Cas. (CCH) ¶58693 (4th Cir. 1999).

³² William M. Howard, Annotation, *Cause of Action to Prevent the Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

³³ *Id.*

³⁴ *King v. Richmond County, Ga.*, 331 F.3d 1271, 1282 (11th Cir. 2003).

³⁵ William M. Howard, Annotation, *Cause of Action to Prevent the Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

case.³⁶ This can be done by showing that the particular display of religious symbols on public property does not violate the Establishment Clause.³⁷ In simpler terms, if the defendants can show that the display of religious symbols on public property has a secular purpose, that the display does not promote or inhibit religion, and that the display does not foster an excessive government entanglement with religion, then the display would be able to stand under the *Lemon* test.³⁸

If it can be shown that a reasonable observer of the display in its particular context would not perceive a message of governmental endorsement or sponsorship of religion, the display could remain on the property. If the display does not coerce one to support or participate in any religion, or to give a direct benefit to religion in such a degree that it tends to establish religion or religious faith, it is permissible under the endorsement test.

In some instances, courts will find that, through tradition, the religious display in question has become secular in nature.³⁹ Additionally, defendants can focus on the public property where the religious display is located. If the property in question is considered a "traditional public forum where individual expression is permitted," then the display will be allowed to stand under the Free Speech Clause of the First Amendment.⁴⁰ Courts have noted that there is a central difference

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Freethought Soc. of Greater Philadelphia v. Chester Cnty.*, 334 F.3d 247, 262 (3d Cir. 2003).

⁴⁰ See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), judgment *aff'd*, 471 U.S. 83, 105 S. Ct. 1859, 85 L. Ed. 2d 63 (1985); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992); and *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993).

between Establishment Clause and the Free Speech and Exercise clauses. The Establishment clause, which prohibits government speech that endorses religion, is not applicable in these cases. The Free Speech and Free Exercise Clauses protect speech that is made on these traditional public properties. Therefore, the displays are protected under these latter clauses.⁴¹

ARGUMENT

Despite the many defenses available to defendants, who could easily defeat a Plaintiff's cause of action for a violation of the establishment clause, one need only look to Supreme Court precedent in order to find many examples of Christmas Displays being held to have not violated the clause. The keystone case regarding the Establishment Clause not being violated begins with the afore mentioned *Lynch v. Donnelly*.⁴²

To provide a brief background for *Lynch*, for over forty years, the City of Pawtucket, Rhode Island erected a lighted Christmas display.⁴³ The display, which was situated in a private park located in the City's downtown shopping district, was comprised of a number of items, many of which were traditional secular Christmas decorations.⁴⁴ Included in the foreground of the City's holiday display was a nativity

⁴¹ *Id.*

⁴² *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).

⁴³ George M. Janocsko, *Beyond the "Plastic Reindeer Rule": The Curious Case of County of Allegheny v. American Civil Liberties Union*, 28 Duq. L. Rev. 445, 456 (1990).

⁴⁴ *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604, 671 (1984).

scene. The nativity scene consisted of life-sized figures of the traditional characters: the Infant Jesus, Mary and Joseph, angels, shepherds, kings and animals. The entire display was not only owned and erected by city workers but also illuminated with lights and electricity paid for by the City and was opened with elaborate ceremonies conducted by the Mayor.⁴⁵

The plaintiffs, several residents of the City and members of the American Civil Liberties Union, sued in federal district court, to require the removal of the nativity scene from the City's holiday display. The district court declared the nativity scene display unconstitutional and permanently enjoined the City from continuing the practice. The First Circuit Court of Appeals⁴⁶, by a vote of two-to-one, affirmed the district court. Although it used a different analysis from the district court, the First Circuit Court of Appeals nevertheless affirmed the district court, holding that the City could not demonstrate any compelling governmental interest in erecting a nativity scene.⁴⁷ The Supreme Court granted certiorari and reversed the decision of the court of appeals.

Writing for the majority, Chief Justice Burger began by emphasizing that the long proclaimed separation between church and state is not so black and white. Pointing to the Constitution, Burger emphasized that there must be accommodation between government and religion. By listing several examples, the Chief Justice

⁴⁵ *Id.* At 672.

⁴⁶ *Donnelly v. Lynch*, 691 F.2d 1029, 1030 (1st Cir. 1982) rev'd, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).

⁴⁷ *Id.* At 1035.

emphasized how the existence of this accommodation is essential in everyday American Life.⁴⁸

When describing how to approach this issue, the Chief Justice stated that it would be beneficial to apply the *Lemon* test, although the Court was not bound to apply *Lemon* in all Establishment Clause cases. In his approach to the secular prong, Chief Justice Burger stated that the district court, by focusing only on the religious aspect of the scene, missed the mark and in doing so, undermined the purpose of the test. The district court's application would basically declare any display to be invalid. The focus of the first prong in this case must be viewed in light of the entire Christmas season. Chief Justice Burger concluded that the secular purpose prong was satisfied because the nativity scene display was sponsored by the City to celebrate the holiday as whole.⁴⁹

Second, the Chief Justice next stated that the scene in *Lynch* did not have a "primary effect of advancing religion." The Court stated that the inclusion of the nativity scene did not provide an advantage or assistance to religion more than past examples that were found to not be a violation of the establishment clause. Although, the scene would advance religion due to the fact that it was on display for all to see, the Court nonetheless found the aid to be "indirect, remote and incidental."⁵⁰

Finally, the majority found that the nativity scene in *Lynch* did not create an "excessive entanglement between government and religion." The government

⁴⁸ *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604, 673 (1984).

⁴⁹ *Id.* At 679-81.

⁵⁰ *Id.* At 683.

simply put on a harmless display to celebrate one of the essential pieces of history involved in the national holiday.

In conclusion, Chief Justice Burger quantified the idea that this scene would be an example of the government establishing religion would be considered farfetched, so much that removing the scene from the park "would be a stilted overreaction."⁵¹

Lynch shows an example of one of the most overlooked concepts within this entire controversy: practicality. To borrow a phrase from Chief Justice Burger, it seems far-fetched that a person would really feel that the government is trying to establish a common religion for its citizens. This country prides itself on being diverse. Diversity is the very foundation the country was built on. The country's citizens need to be able to celebrate their beliefs. It would be impractical to try to censor one another's religions.⁵² As a country, we cannot ignore our history. Christmas is a holiday celebrated by many. Just because a person does not celebrate the holiday does not mean they can ignore history. By acting in a practical manner and acting neutral towards religious displays the government could avoid facing a problem like this is the first place.⁵³

Is it practical to force the government to refuse to acknowledge a longstanding tradition in this country? The display of a nativity scene or a Christmas tree is a celebration of the history of a national holiday. The government is not crying out that Christianity is the truth. They are merely paying homage to the

⁵¹ *Id.* At 686.

⁵² MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 253 (Basic Books eds., 1st ed. 2008).

⁵³ RICHARD M. ESENBERG, *MUST GOD BE DEAD OR IRRELEVANT: DRAWING A CIRCLE THAT LETS ME IN*, 18 WM. & MARY BILL RTS. J. 1, 15 (2009).

same traditions that the men and women who helped build this country celebrate with their families. By not allowing our states to acknowledge these long standing traditions, the very principles in which our country is founded on would be contradicted. However, this was not the first time the Supreme Court seems to have contradicted itself.

In *County of Allegheny v. American Civil Liberties Union*⁵⁴, in 1989, the Court considered the constitutionality of two holiday displays located on public property in downtown Pittsburgh. The first was a nativity scene located on the staircase of the Allegheny County Courthouse. The second display was an 18-foot Hanukkah menorah, located outside the City-County Building next to the city's 45-foot decorated Christmas tree.

Starting 1981, the Holy Name Society of Pittsburgh placed the nativity scene in the Courthouse. In 1986, the county added poinsettia plants and two Christmas trees to the display, as well as banner over the manger with the words: *Gloria in Excelsis Deo!*

The Council building is separate from the courthouse, and is jointly owned by the city and county. The city has placed a 45-foot Christmas tree in front of the building for a number of years. In 1986, the city placed a plaque beneath the tree with the mayor's name, entitled "Salute to Liberty." Below the title, the sign stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of

⁵⁴ *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578, 109 S. Ct. 3086, 3093, 106 L. Ed. 2d 472 (1989).

freedom." Subsequently in 1982, the city has also placed a menorah with the Christmas tree in front of the City-County Building.

On December 10, 1986, the Greater Pittsburgh Chapter of the ACLU and seven local residents sued the city of Pittsburgh and the county of Allegheny. The lawsuit sought to enjoin the county from displaying the crèche in the courthouse, and the city from displaying the menorah in front of the city-county building. The plaintiffs argued that the displays violated the Establishment Clause, applicable via the Fourteenth Amendment.⁵⁵ On May 8, 1987, the District Court denied the injunction to remove either the crèche or the menorah. The Court of Appeals for the Third Circuit reversed the district court's ruling, stating that the two displays each violated the Establishment Clause.⁵⁶

In his opinion Justice Blackmun addressed two issues initially. First, he addressed the question of whether the Lemon test should still be used in deciding Establishment Clause cases. Second, he discussed whether *Lynch* was applicable to the case. The Justice noted that when discussing an issue like "endorsement," the Court's purpose is to determine whether the government is promoting or showing preference or favoritism to religion. According to Justice Blackmun, all of these concepts expressed a similar principle: "The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or

⁵⁵ *Id.* At 586-89.

⁵⁶ *Am. Civil Liberties Union, Greater Pittsburgh Chapter v. Allegheny Cnty.*, 842 F.2d 655, 657 (3d Cir. 1988) *aff'd in part, rev'd in part sub nom. Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

from making adherence to a religion relevant in any way to a person's standing in the political community."⁵⁷

Next, discussing the applicability of *Lynch v. Donnelly* to this case, Blackmun rejected using the rationale of the majority opinion in *Lynch*. Stating that the majority's approach was not clear, Blackmun instead looked to Justice O'Connor's concurring opinion in *Lynch*. In Justice Blackmun's view, the concurring and dissenting opinions in *Lynch* contained a superior analysis to the majority opinion. Justice Blackmun stated that both the concurrence and the dissents in *Lynch* determine whether the government is in fact endorsing religion by looking at the physical aspect of the religious symbol.

Justice Blackmun first analyzed the nativity scene display. He concluded that the display endorsed Christianity.⁵⁸ The Justice made specific reference to four physical features of the Courthouse display. First, the angel holding a banner reading "Glory to God in the Highest" endorsed only the religious notion of the display. Second, he noted that the display in *Lynch* consisted of several objects with separate focal points, where in this case, the scene stood alone with nothing to lessen the focus from its religious message. Justice Blackmun additionally stated that the flowers surrounding the scene brought a greater focus on the display's religious message.

The Justice declared that a religious display could simply not be located in a prominent area such as the Courthouse's Grand Staircase for an extended period of

⁵⁷ *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578, 109 S. Ct. 3086, 3093, 106 L. Ed. 2d 590-92 (1989).

⁵⁸ *Id.* at 599.

time without creating an impression of governmental support and approval.

Because of the press releases about the scene, the government indeed created an impression that they endorsed the religion. Additionally, the Justice stated that the sign indicated governmental adoption of the religious message. In conclusion, Justice Blackmun stated that government could “acknowledge Christmas as a cultural phenomenon, but not observe the occasion as a Christian holy day.”

Regarding the Menorah display, the issue was whether the display, consisting of a Christmas tree and a menorah, was a government endorsement of Christmas and Hanukah as religious holidays. After examining each item included in the City's display, the Court concluded that the display did not have an endorsement effect.⁵⁹

Finally, Justice Blackmun stated that the sign accompanying the City's display served as disclaimer by acknowledging the salute to liberty and the theme of lights.⁶⁰ Therefore, the sign simply established “cultural diversity” and was not a religious endorsement.⁶¹ In sum, Justice Blackmun stated that a reasonable person would not feel as though the City's display endorsed the Christian and Jewish religions, but rather a recognition or celebration of traditions during the current holiday season. Therefore, the menorah display did not violate the “effect” prong of the *Lemon* test.⁶²

Because of the confusion caused by the Supreme Court's analysis and conclusion in *Lynch v. Donnelly*, the Court provided an unspecified analytical

⁵⁹ *Id.* At 613-21.

⁶⁰ *Id.* At 619.

⁶¹ *Id.* At 620.

⁶² *Id.* At 621.

framework where everything is pertinent but no bright line test confirms whether or not the Government is endorsing religion.⁶³

Rather than continuing to confuse members of communities and municipalities regarding what is and is not an acceptable way to celebrate the holiday season as a community, the Supreme Court needs to stick to an approach that allows the display of Christmas themed decorations.⁶⁴ It is juvenile to hide behind a veil of willful blindness and refuse to acknowledge the overall feel of an entire season.⁶⁵ One of the most prominent ideals in this country is that people identify and bond together as a community, whether it is as small as a 2,000-person town in rural New Jersey or as an entire country. If people cannot identify with their communities then where can one turn to find harmony outside their own homes? One of the larger roadblocks, which impede this type of bonding among a collection of citizens, is the inability of a local government to acknowledge the traditions of its loyal residents.

By being forced to turn a blind eye as a government to the celebration and history of the people of its community, the government will lose the bond that brought this country together in the first place. Just because someone does not celebrate Christmas, does not mean that it will be forced because his or her government acknowledges its existence. Many people oppose War. Do they oppose the government's acknowledgement of those who served during veteran's day as well? In this day and age, people do not. So why would acknowledging a pure-

⁶³ GEORGE M. JANOCKSKO, *BEYOND THE "PLASTIC REINDEER RULE": THE CURIOUS CASE OF COUNTY OF ALLEGHENY V. AMERICAN CIVIL LIBERTIES UNION*, 28 DUQ. L. REV. 445, 487 (1990).

⁶⁴ *Id.* At 450.

⁶⁵ *Id.* At 451.

hearted, good-willed tradition during a specific time of the year, that many celebrate whether they are Christian or not, be deemed to have the effect that people believe the government is forcing a particular religion upon him or her? In the era of political correctness, it seems as though neutrality and refusal to acknowledge the history or culture is substituting the innocent recognition or nod to tradition.

Martha Nussbaum expanded further on Holiday displays and how they should viewed in context with the entire surrounding area. Nussbaum first focuses on the reasons why the government would put up a display in the first place. When the government features a display it is as if they are saying, "this is what we believe is important for you to look at."⁶⁶ The message of the display has some value or significance that the government wants people of its community to recognize. The issue however, is whether that message is voluntary or not. On one hand, no person is actually required to be at a public place, especially children, unless it is school. Therefore, the same issues that arise with, for instance prayer in school, do not arise when the government erects a holiday display.⁶⁷ On the other hand however, public property is free to use, but anyone who wants to avoid the message while using the property will have a difficult time doing so.⁶⁸ While this is true, Nussbaum points to a concept, which was stressed earlier: Reason.

It would be rather unreasonable to say that no government shall construct a display during the holiday season that has no hint of a religious reference.

⁶⁶ MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 252 (Basic Books eds., 1st ed. 2008).

⁶⁷ *Id.*

⁶⁸ *Id.*

Nussbaum⁶⁹ makes crucial points regarding public reaction if any religious reference were forbidden in displays erected by governments. As a country, Americans love nothing more than Freedom, and in some instances loath nothing more than censorship.⁷⁰ As Nussbaum stresses, an attempt by the Government to block any and all aspects of religion within in displays during the Holiday season would undoubtedly cause issues.⁷¹ It would also seem ignorant on the part of the Government to refuse to acknowledge so predominant in American's lives during this particular time of the year. First, by ignoring something so principal within America's culture the Government either looks incompetent for failing to recognize the holiday season, or worse, in that they seem repressive by trying to hide the religious aspect of the holiday season from the public.⁷²

Second, as Nussbaum makes clear, the Government would essentially be promoting a negative message to the public by censoring religious aspects within Holiday displays. By only allowing the commercial aspect of the holiday season to

⁶⁹ It seems quite unreasonable, however, to suggest that no state may erect any display at the holiday season that has any religious reference at all. If the establishment clause meant that Santa and Rudolph and Barbie would be the only acceptable symbols at the holiday season, and that nothing with religious content could even accompany them, that would suggest to most Americans the 'relentless and all-pervasive attempt to exclude religion from every aspect of public life' that could pose a constitutional problem, establishing secularism as France has chosen to do. It would also be unfortunate, giving commercial and non-ethical values priority over ethical and spiritual values. In this area, then, the Justices are aware not only of an equality issue on the other side, but also a danger to civil peace, since it is likely that Americans would rise up, in some manner, against such an attempt, were one made. This sensitivity has meant that the Court typically bends over backward to give a monument the most generous possible construal, approving some displays that strict academic analysis might find problematic on equality grounds.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

be present within displays, the Government is only acknowledging and promoting the commercial value of the holiday.⁷³ A proponent of the War on Christmas might argue that this proves that Government displays have a coercive effect on the public, since the commercial message would have the same promotional effect as a religious display. However, as Nussbaum argues, even if the display does have an effect on the public, at least the inclusion of religious themes will counteract the commercial themes within the display. Therefore, the public will receive a message that not only promotes the commercial aspect of the Holiday, but the moral and ethical messages that underlie the religious elements as well.⁷⁴ Whether or not somebody celebrates Christmas, it would still be hard to argue against the inclusion of a message that is rooted in virtue and moral teachings.

Nussbaum also finds the theme of practicality when analyzing *Allegheny*. When discussing the idea that displays must be viewed within the context they are placed in, she states:

On the side of practical reason, the case makes progress by showing how crucial context is to the judgment about the state's message intended and received...The menorah is next to the huge Christmas tree, not, today, a religious symbol. This placement contextualizes it, creating a Pawtucket-like impression that the city is celebrating the holiday season.⁷⁵

Context and reason continue to arise as themes within this issue as it continues to develop. In the end Nussbaum favors using reason rather than a strict academic

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* At 255-56.

approach to decide what is an appropriate way to display religious symbols within holiday décor.

Further Attempts to rectify War on Christmas

Recently, efforts have been made, including members of the Government, to put an end to the censorship of Christmas celebrations. One of the most significant events occurred within the last year. In Texas, Governor Rick Perry signed into law a bill that would protect public schools from legal actions if they chose to say “Merry Christmas.”⁷⁶ Perry stressed the importance of avoiding censoring the very concept of religion itself. “Religious freedom does not mean freedom from religion,” Perry stated. Perry emphasized that, echoing the analysis found within the *County of Allegheny* decision, religious holiday symbols are also protected under the law, so long as more than one religion and a secular symbol, such as Santa Claus, are also represented. Houston Rep. Dwayne Bohac sponsored the legislation, stating it will protect schools from “ridiculous” lawsuits that seek to stifle the First Amendment. The bill was passed through both chambers of the legislature. Fittingly, Santa Claus impersonators flanked the governor as he signed the new law.⁷⁷

There has also been a battle over whether traditional Christmas trees could be called just that. Efforts have been made to cease calling the tradition Christmas tree, a “Holiday tree.” A bill was introduced in the California Senate in 2002, in order

⁷⁶ Jessica Chasmar, *Gov. Rick Perry signs ‘Merry Christmas’ bill into law*, The Washington Times (June 13, 2013), <http://www.washingtontimes.com/news/2013/jun/13/gov-rick-perry-signs-merry-christmas-bill-law/>.

⁷⁷ *Id.*

rename the State Holiday Tree the California State Christmas Tree. It ultimately failed. However, at the official lighting of the tree on December 4, 2007, California Governor Arnold Schwarzenegger referred to the tree as a Christmas tree in his speech and press release.⁷⁸ Additionally, Governor Schwarzenegger had previously referring to the tree as a "holiday tree" in 2004.⁷⁹ The name change was in honor of Senator William "Pete" Knight, who Schwarzenegger promised to change the name while at his funeral.⁸⁰ Knight had unsuccessfully petitioned to change the name after the previous Governor, Gray Davis brought about the name, "holiday tree."⁸¹

In 2005, the Michigan Senate debated about the same issue. The Senate argued whether the festive tree, located in front of the Michigan Capitol building, would continue to being referred to as a holiday tree or re-named as a Christmas tree.⁸² The question was reassessed again in 2006, when the Michigan Capitol Committee voted unanimously to use the term "Christmas tree."⁸³ The state House proposed to the committee the idea of creating a joint display of the Christmas tree and a Hanukkah menorah, much like the display in the *Pawtucket* case.⁸⁴ The committee rejected the idea, named the "Christmas Tree and Hanukkah Menorah Holidays Display," after a Jewish group said that the Menorah was a religious symbol and

⁷⁸ *Governor plugs Christmas back into state tree-lighting ceremony*, Lodi-News-Sentinel, December 3, 2004, at 5.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Mich. Capitol conifer re-christened 'Christmas tree'*, Associated Press Wire Report, (November 30, 2006)

<http://www.firstamendmentcenter.org/mich-capitol-conifer-re-christened-christmas-tree>.

⁸³ *Id.*

⁸⁴ *Id.*

would violate the separation of church and state.⁸⁵ However, it seems as though this rationale only furthers the argument that these displays are only present to celebrate the tradition and history of the holiday, rather than an endorsement of religion.

Another major player in the political realm has also joined in the defense of the Christmas holiday. Former Alaska governor Sarah Palin has recently published a book titled, "Good Tidings and Great Joy: Protecting the Heart of Christmas." The books overall theme is that "the gravest threats to the seriousness of the season are atheists who sue over public displays of the crèche and shopkeepers who call out 'Happy Holidays' instead of 'Merry Christmas.'"⁸⁶

II. Conclusion

Battle lines have been drawn in this country over many issues. Politics, race, religion all take a front seat in the proverbial consciousness of this nation. However, what seemingly gets people riled up even more so than violence or unfair policymaking, is the display of a religious theme on government property during the holiday season. Whether one wants to admit it or not, "The War on Christmas" is a very real thing. One could spend a lifetime trying to figure out why people rush to attack and tear down the very hint of religious symbolism or reference within a particular display. It could be that he or she feels left out because he or she does not

⁸⁵ *Id.*

⁸⁶ Cynthia Tucker, 'War' on Christmas ignores holiday's history, Wisconsin State Journal, (November 23, 2013) http://host.madison.com/wsj/news/opinion/column/guest/cynthia-tucker-war-on-christmas-ignores-holiday-s-history/article_4a243b26-8d11-58cc-b7e0-faa0fc0b62fb.html.

believe in or celebrate the holiday in question. It could be because the anti-Christmas proponent feels as though the government is promoting a particular religion, and even going as far as to make that person feel unwelcome or incorrect for not buying into the religious aspect of the holiday themselves. There also seems to be a refusal to buy into the idea that context matters. A city displaying a cross at on the town hall lawn is one thing. However, featuring a nativity scene along with lights, signs, and Santa's sleigh during the month of December has a much different connotation. Context and practicality seems to be thrown out the window when arguing against the displays. No matter what a person's reasoning may be, two truths seem evident regarding "The War on Christmas." The first truth is that it is a real thing. People are singling out this Holiday in an effort either censor it all together, or at least make sure that no religious aspect of the Holiday is ever present, especially in a government display. The second truth is that no matter what the person's reasoning is for attacking the holiday, it will always seem to be an unwarranted and superfluous attack. As stated though the many examples listed in this comment, by censoring the religious aspect of the Christmas holiday, one only devalues the history of this great country and the traditions its people take part in. The only thing one can hope is that proponents of the "War on Christmas" begin to use reason and practicality in their approach and realize that they are only doing a disservice to themselves and their fellow citizens by attacking something as innocent and wholesome as the Christmas holiday.