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## Recommended Citation

Alexandra L. Susman, *Strings Attached: An Analysis of the Eruv under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act*, 9 U. Md. L.J. Race Relig. Gender & Class 93 (2009).

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# STRINGS ATTACHED: AN ANALYSIS OF THE ERUV UNDER THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

ALEXANDRA LANG SUSMAN\*

“Now, you have built this eruv in Washington, and the territory it covers includes the Capitol, the White House, the Supreme Court and many other Federal buildings. By permitting Jewish families to spend more time together on the Sabbath, it will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I look upon this work as a favorable endeavor.”<sup>1</sup> — *President George H.W. Bush in 1990 at the inauguration of the Washington D.C. eruv*

“Miami Beach Riddle: What’s held together with string, can turn an eight-square-mile island into a private home, and has civil libertarians tied in knots? Give up? The eruv.”<sup>2</sup> — *Reporter, commenting on the Miami Beach eruv controversy*

## I. INTRODUCTION

There are over one hundred thirty eruvim<sup>3</sup> in the United States,<sup>4</sup> serving many Orthodox Jewish communities in the nation.<sup>5</sup>

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1. Dan Rattiner, *Unconstitutional? A Battle Over Mothers with Baby Carriages in Westhampton Beach*, available at [http://www.danshamptons.com/content/danspapers/issue31\\_2008/01.html](http://www.danshamptons.com/content/danspapers/issue31_2008/01.html).

2. Gaspar Gonzalez, *Orthodox Jews In Miami Beach Consider It a Harmless Symbol, But Others Believe It Violates The U.S. Constitution*, MIAMI NEW TIMES, Feb. 21, 2002.

3. An “eruv” (plural, “eruvim”) is an enclosed space, or legal boundary, that permits Orthodox Jews to carry objects outside their home on the Sabbath, thus avoiding a Rabbinic prohibition against carrying within the public domain. YOSEF GAVRIEL BECHHOFFER, *THE CONTEMPORARY ERUV: ERUVIM IN MODERN METROPOLITAN AREAS 6–9* (1998). For further explanation of an eruv and its place in Jewish law, see *infra* Part I.

4. Marcella Bernhard, *Tangled Up In Eruv*, PALO ALTO WEEKLY, Dec. 15, 1999.

5. See *id.*

Many Americans living in urban areas reside within eruvim and do not even know it.<sup>6</sup> Many others, knowing about the eruv in their neighborhood or an Orthodox Jewish community's desire to erect an eruv, have used the legal system, the press and the street corner to decry the presence, or potential presence, of an eruv in their community. Responses to eruvim conflate religious, political, legal and visceral discourses, oftentimes making it problematic to separate the legal issues at stake from the cultural, social and historical realities of the communities at issue.

An eruv is an enclosed space, or legal boundary, that permits Orthodox Jews to carry objects outside their home on the Sabbath, thus avoiding a Rabbinic prohibition against carrying within the public domain.<sup>7</sup> It also grants disabled or incapacitated people who depend on crutches, canes, walkers or wheelchairs and parents of toddlers who must be wheeled in baby carriages or strollers freedom of movement on the Sabbath, since such activities, absent an eruv, are considered "carrying" and are thus impermissible.<sup>8</sup> In order to satisfy Jewish law, the eruv must be at least forty inches high, roofless, and continuous (without gaps).<sup>9</sup> Traditionally, an eruv would follow the natural features of a city.<sup>10</sup> Today, in creating an eruv, a local government usually allows the Orthodox community to string wires along utility poles to fill the gaps where creek beds or freeway sound walls do not already establish a usable boundary.<sup>11</sup> Constructed eruvim rely on the use of public property such as utility poles and power lines, as they surround both private premises and public streets. Another requirement of an eruv is that its boundaries bear a resemblance to a string of doorways.<sup>12</sup> This is achieved by attaching black rubber-

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6. Diane Wedner, *Kindred Spirits Can Call This Place Home*, L.A. TIMES, Sept. 17, 2006. For example, the Los Angeles Metropolitan eruv stretches across approximately eighty square miles, from Hollywood and the Adams District on the East side of its boundary, to Rancho Park on the South side of its boundary, to Brentwood and Sherman Oaks on the West side of its boundary, and to the 101 Freeway on the North side of its boundary. *Id.* See also Appendix I.

7. BECHHOFFER, *supra* note 3, at 6–9.

8. See Joshua Metzger, Note, *The Eruv: Can Government Constitutionally Permit Jews to Build a Fictional Wall Without Breaking the Wall Between Church and State*, 4 NAT'L JEWISH L. REV. 67, 69 (1989).

9. See Richard T. Foltin, *Smith v. Community Board No. 14: The Rockaway "Eruv" Case*, THE AMERICAN JEWISH COMMITTEE NATIONAL AFFAIRS BACKGROUNDER, Sept. 19, 1985.

10. See Metzger, *supra* note 8, at 68.

11. See <http://en.wikipedia.org/wiki/Eruv>.

12. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142, 146 (D.N.J. 2001).

coated casings, or *lechis*, to horizontal wires, creating the sides of a symbolic doorway.<sup>13</sup>

Besides the physical requirements of the eruv, there is a mandatory legal component that is required as well. In order to create a valid eruv under Jewish law, a secular official with jurisdiction over the area in question must issue a ceremonial governmental proclamation “leasing” the enclosed public and private property to the Jewish community for a small fee.<sup>14</sup> Leasing is essential because it permits Orthodox Jews to treat a whole city, or the portion of a city that is enclosed in an eruv’s space, as if it were a single household, symbolically converting the public domain into private domain.<sup>15</sup>

Since an eruv converts the public space within its boundaries, including the private homes, public schools, parks and shops into private religious space and “property” of the Orthodox Jewish community, its very existence implicitly pervades every aspect of the lives of those who live within its borders. While some see an eruv as “a virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area,”<sup>16</sup> others see it as a personal offense that forces all citizens in the area to live within an Orthodox Jewish religious enclosure.<sup>17</sup> An eruv, then, brings to the fore the conflict between two overlapping legal paradigms: Rabbinic law and American Constitutional law, specifically the First Amendment. The implications of this tension are most apparent when examining whether the erection of an eruv, with all its Rabbinic requirements, violates the Establishment Clause of the First Amendment<sup>18</sup> or stands as a religious freedom right guaranteed by the Free Exercise Clause of the First Amendment.<sup>19</sup> While the clauses work in tandem to protect freedom of religious belief and actions, there is often a tension between the two.<sup>20</sup> As Professor Erwin Chemerinsky has explained,

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13. *Id.* at 142. See also Sherry Colb, *The Boundary Between Neutrality and Hostility Toward Religion: The Recent Third Circuit Decision About the Tenafly Eruv*, Nov. 6, 2002, available at <http://writ.news.findlaw.com/colb/20021106.html>.

14. See BECHHOFFER, *supra* note 3, at 113. See also Colb, *supra* note 13.

15. See Mitchell Zimmerman & Joel Beinin, *Beware of the Symbolism of Approving an Eruv*, PALO ALTO WEEKLY, Mar. 22, 2000.

16. See *Smith v. Cmty. Bd.* No. 14, 491 N.Y.S.2d 584, 587 (Sup. Ct. 1985).

17. See Bernhard, *supra* note 4.

18. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

19. *Id.*

20. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1140 (2002). See generally Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (discussing the tension between the two clauses); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1

“Government actions to facilitate free exercise might be challenged as impermissible establishments, and government efforts to refrain from establishing religion might be objected to as denying the free exercise of religion.”<sup>21</sup> With challenges and objections on both sides of the eruv debate, the “almost invisible” boundary of an eruv has created an impenetrable wall for many communities throughout the United States.

Perhaps the most troubling aspect within the eruv debate is the relative ease with which courts and commentators have either dismissed the constitutional issues surrounding an eruv, utterly ignored the issues of government entanglement necessary for the construction of an eruv, or failed to account for the burdens placed on Orthodox Jews absent an eruv, especially parents with children and the elderly, disabled or incapacitated. The few legal scholars who have written on the subject of an eruv find that it does not violate the Establishment Clause and is a permissible governmental accommodation of religion.<sup>22</sup> This is also echoed in three of the four eruv cases that have been decided in court.<sup>23</sup> Although later overturned by the Third Circuit, only one court to date has found the construction of an eruv unconstitutional.<sup>24</sup>

More frequent are decisions throughout the country, by individual city councils, that either reject or accept the construction of an eruv with little legal debate or reference to the constitutional issues at stake. Even the communities that do struggle with the constitutionality of an eruv, in making their decision as to whether or not to permit it, often find the legal landscape unclear. For example, in Palo Alto, California, the site of a highly contentious eruv struggle, City Attorney Ariel Calonne advised the City Council to “vote with their hearts” when making the decision about whether to grant permission for an eruv, since the legal precedents were so ambiguous.<sup>25</sup> Even more problematic, constitutional historian Professor Jack N. Rakove, a proponent of the Palo Alto eruv, made the

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(1986) (arguing that an accommodation approach brings much needed consistency to the Religion Clauses’ jurisprudence, thus solving the problem of the tension between the clauses). However, in the case of an eruv, there is not a tension between the Clauses, since neither Clause would require a local government to permit an eruv. *See infra* Parts III–IV.

21. CHEMERINSKY, *supra* note 20, at 1140.

22. *See Metzger, supra* note 8, at 91. *See also* Jack N. Rakove, *The Eruv: Constitutionally, the Issues Are Moot*, PALO ALTO WEEKLY, Feb. 9, 2000. *But see* Zimmerman & Bein, *supra* note 15.

23. *See Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (Sup. Ct. 1985); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987); *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002).

24. *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142 (D.N.J. 2001).

25. *Time to Tone Down the Eruv Debate*, PALO ALTO WEEKLY, Dec. 22, 1999.

tautological argument of pointing to the sheer number of eruvim in the United States to support their constitutionality: “[C]ommon sense would suggest that the existence of scores of eruvim elsewhere in the United States would have already tested whether a serious constitutional problem exists.”<sup>26</sup>

It is within this debate that this Article will argue that many of the courts and local governments, in either accepting or rejecting an eruv, have failed to seriously consider the Establishment Clause or the Free Exercise Clause of the Constitution. Since an eruv’s many implications have not been considered by the courts, and a thorough evaluation of an eruv in relation to the Establishment Clause and the Free Exercise Clause has not been developed, Orthodox Jewish communities who seek an eruv, the people who oppose them, and city councils and other local legislative bodies that make the ultimate decision in regard to them, lack a constitutional framework in which they can decide the issue. This Article proposes to articulate this necessary framework. Part II will detail what an eruv is, its place in Jewish law, its importance for Orthodox Jewish communities, and the opposition to it.<sup>27</sup> Part III will examine whether government facilitation of an eruv is a violation of the Establishment Clause of the Constitution.<sup>28</sup> Part IV will examine whether government prohibition of an eruv is a significant burdening of religion, in violation of the Free Exercise Clause of the Constitution or of the Religious Land Use and Institutionalized Persons Act of 2000.<sup>29</sup> Finally, this Article will question whether local governments can constitutionally permit the construction of an eruv, while maintaining its legality under Jewish law, thus bridging the gap between the two legal paradigms.<sup>30</sup>

## II. WHAT IS AN ERUV?

During the 25-hour Sabbath,<sup>31</sup> often called by its Hebrew name, “Shabbat,” which begins each week at sundown on Friday and lasts until nightfall on Saturday, scripture prohibits Orthodox Jews from partaking in a variety of ordinarily routine activities.<sup>32</sup> There are

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26. Rakove, *supra* note 22.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See infra* Part IV.

30. *See infra* Part V.

31. Robert A. Erlandson, *Sabbath Made ‘Freer’ for Orthodox Jews*, THE BALTIMORE SUN, Jan. 16, 1998, at 1B.

32. *See Gonzalez, supra* note 2.

thirty-nine prohibitions in total, ranging from a prohibition against the raising or lowering of a flame, which includes turning lights on and off, to writing with a pen or a computer, to driving.<sup>33</sup> One of the most onerous prohibitions, from a practical standpoint, bars the lifting, carrying or pushing of objects outside of the private space of the home on the Sabbath.<sup>34</sup> The eruv “creates a legal fiction, which converts the public domain to a private domain,” thereby enabling Orthodox Jews to engage in a number of activities on the Sabbath that would otherwise be barred.<sup>35</sup> Commonly used articles that would be prohibited from lifting or carrying without an eruv, but are permitted to be carried outside the home within an eruv, include baby carriages, strollers, canes, walkers, wheelchairs, food, prayer books, handkerchiefs, gloves, rain hats, house keys, and medicines.<sup>36</sup> While observant Jews may live in a place without an eruv, the presence of an eruv clearly enhances the practice of Orthodox Judaism by allowing those members of the community with small children and disabilities to move about freely and to participate in communal worship, and by allowing other members of the community to continue with their everyday activities, which include lifting and carrying.<sup>37</sup>

This is especially true when it comes to the act of worship. Orthodox Jewish law requires Jews to pray as a group.<sup>38</sup> Without a group of ten adult<sup>39</sup> males, “Orthodox Jewish law will not permit the recital of certain prayers nor the public reading of the Torah (Bible) scroll.”<sup>40</sup> Thus, the only way for Orthodox Jews to fulfill their ritual obligations of Sabbath study and prayer is to either attend synagogue or gather together ten adult men in a private home.<sup>41</sup> An eruv allows families with young children (needing to be carried) and the elderly,

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33. *Id.*

34. *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 155 F. Supp. 2d 142, 146 (D. N.J. 2001).

35. *Id.*

36. *See* Los Angeles County Eruv, Eruv Guide, <http://www.laeruv.com/eruv-guide> (last visited Apr. 18, 2009). Some items, for example, an umbrella, are still prohibited, even within an eruv. *Id.*

37. *Tenafly Eruv Ass’n, Inc.*, 155 F. Supp. 2d at 148–49.

38. Brief for Union of Orthodox Jewish Congregations of America, et al., as Amici Curiae Supporting Appellants, *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 155 F. Supp. 2d 142, 148 (D.N.J. 2001), No. 01-3301, available at <http://www.jlaw.com/Briefs/tenafly-ou.html>.

39. In Jewish law, a boy is considered to be an adult at thirteen, while a girl is considered an adult at age twelve. New World Encyclopedia, [http://www.newworldencyclopedia.org/entry/Bar\\_Mitzvah](http://www.newworldencyclopedia.org/entry/Bar_Mitzvah) (last visited February 28, 2009).

40. Brief for Union of Orthodox Jewish Congregations of America, et al., as Amici Curiae, *supra* note 38, at 148.

41. *See id.*

disabled or incapacitated (needing the aid of a walker, wheelchair or cane) who could not otherwise leave the private space of their home, to attend synagogue or to gather at a neighbor's home.<sup>42</sup> Therefore, it is not surprising that many Orthodox synagogues advertise in Jewish journals that they are located within an eruv to increase attendance and membership.<sup>43</sup> As one Rabbi explained, "We want to entice Orthodox Jews to move into our area. We are trying to revive the area for observant Jews. We are trying to advertise that the eruv is here."<sup>44</sup> Further, the presence of an eruv has become a factor in some real estate markets.<sup>45</sup> In some areas, a home's location within an eruv can increase its price by as much as ten percent.<sup>46</sup>

The concept of an eruv dates back to the time of King Solomon.<sup>47</sup> It is not, as some critics of the eruv have argued, a modern day loophole created to get around a Sabbath requirement, but rather, it is a prescribed alternative.<sup>48</sup> Indeed, "a scholar of Jewish law would find it unremarkable that the Talmud<sup>49</sup> contains both a prohibition against carrying on the Sabbath and a procedure for modifying that prohibition."<sup>50</sup> An entire body of Jewish law has developed which delineates in great detail the manner in which an eruv must be erected and maintained in order for it to conform to the requirements of Jewish law.<sup>51</sup> In order to maintain an eruv, members of the observant community must continuously check its boundaries to ensure there have been no breaks so it is intact for Shabbat.<sup>52</sup> Some eruvim have a hotline number that observant Jews can call to make sure that the eruv

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42. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 152 (3d Cir. 2002).

43. *See Metzger, supra* note 8, at 86 n.143.

44. *Erlandson, supra* note 31, at 1B.

45. *See Sarah Schweitzer, When Faith, Real Estate Converge*, THE BOSTON GLOBE, May 29, 2005

46. *Id.*

47. *See BECHHOFFER, supra* note 3, at 7.

48. *Id.* at 10.

49. *See* Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/581644/Talmud/34863/Definition-of-terms> (last visited February 28, 2009). The Talmud is a collection of Jewish law and tradition. *Id.*

50. *See Calvin Trillin, Drawing the Line*, THE NEW YORKER, Dec. 12, 1994, at 51.

51. *See generally* S. EIDER, A SUMMARY OF HALACHOS OF THE ERUV (1968) (outlining in detail Jewish law surrounding an eruv). *See also supra* notes 9–14 and accompanying text (describing the physical requirements of an eruv).

52. *See Erlandson, supra* note 31, at 1B.

is intact and thus operational, before leaving the private home.<sup>53</sup> The hotline operator is the person designated to check the boundary.<sup>54</sup>

In addition to the physical requirements and maintenance of the eruv, the Jewish community must obtain a resolution from the local authorities granting the community the right to the public land.<sup>55</sup> These proclamations usually “delineate the geographic area that will be bounded by the eruv, . . . rent that area to the group seeking to establish the eruv for the sum of \$1.00, . . . [and] clearly state that the rights to the domain encompassed by the eruv are conveyed for the sole or limited purpose of pushing and carrying on the Sabbath and other Jewish holy days.”<sup>56</sup> The governmental proclamation is central to any discussion of whether or not an eruv violates the First Amendment.<sup>57</sup>

Also central to the eruv debate are community perceptions of its presence in a multicultural environment. Secular Jews critical of the eruv contend that it is a “magic schlepping circle” that will “upset the balance of the social mix” by creating a Jewish ghetto.<sup>58</sup> For some, there is a fear that an eruv would allow the Orthodox to “take over” the community and that there would be a “Jewish tipping” effect.

Perhaps one of the best, if not the most extreme, articulations of community discomfort regarding an eruv comes from a Tenaflly, New Jersey resident at the first public forum in the Tenaflly eruv debate that would later end in the Third Circuit Court of Appeals<sup>59</sup>:

This is a very serious concern . . . [a]nd it's a concern that I have . . . that's expressed from, by a lot of people about a change in the community . . . It's become a change in every community where an ultra-orthodox group has come in. They've willed the change. . . .

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53. *Id.*

54. *Id.* *But see* BECHHOFFER, *supra* note 3, at 100–01 (“Most [Rabbis] rule that one should not attempt to notify the population . . . since many people will be skeptical of a declaration that the eruv has become invalid and will carry anyway, better that they remain unaware of their sin than that they be made aware of the possible problem and sin intentionally.”).

55. *See id.* at 113.

56. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142, 148 (D.N.J. 2001).

57. *See infra* Part III.B.2.

58. *See* Trillin, *supra* note 50, at 56, 60.

59. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002).

They've willed it so much so that they've stoned cars  
that drive down the streets on the Sabbath.<sup>60</sup>

The language and sentiments expressed by some opponents of eruvim employ popular stereotypes and anger against a small minority who was viewed as attempting to impose its religious needs on the majority. Whether it was a complaint that the town would turn into a ghetto, that Orthodox Jews would throw stones at cars and block traffic on the Sabbath, that the school system would be adversely affected, that many little synagogues would be established, or there would be a community within a community, the theme was the same: the eruv would change the character of the community by attracting more Orthodox Jews who would, in turn, "take over" the town. Compounding this fear was the notion that the eruv itself was, to some, "more than a little weird."<sup>61</sup>

For proponents of the eruv, the anti-eruv rhetoric has the aura and odor of anti-Semitism. In the mind of many Orthodox Jews, the opposition seems motivated by a fear that an eruv is "the equivalent of neon signs that would blink alternately 'Jewish Neighborhood' and 'Strange Orthodox Jews in Funny Clothes Please Come Live Here.'"<sup>62</sup> One proponent of the eruv was angered by the community's opposition to accommodating the Jewish religion since, to her, the current law in general discriminates against Jews in favor of Christians.<sup>63</sup> She explained: "As a Jew, I cannot go to the post office on Sunday because an accommodation has been made for the Christian Sabbath. I am a teacher, and for me, Christmas and the day of Easter are holidays, while I have to take Yom Kippur and Rosh Hashanah<sup>64</sup> as sick leave."<sup>65</sup>

For other advocates of the eruv, the opposition simply seems bizarre considering an eruv itself is "virtually invisible."<sup>66</sup> As one Rabbi explained, "In our tradition, there is the principle that when one party benefits and the other party loses little or nothing, the first party

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60. *Tenafly Eruv Ass'n, Inc.*, 155 F. Supp. 2d at 153–54.

61. See Trillin, *supra* note 50, at 51.

62. *Id.* at 56.

63. Linda Boroff, *Sparks Still Fly as Palo Alto Mulls Decision on Eruv*, JEWISH BULLETIN OF N. CAL, Feb. 18, 2000.

64. Yom Kippur and Rosh Hashanah are two of the holiest days of the year for the Jewish community, often referred to as the "High Holy Days." High Holidays, [http://en.wikipedia.org/wiki/High\\_Holidays](http://en.wikipedia.org/wiki/High_Holidays) (last visited Feb. 28, 2009).

65. Boroff, *supra* note 63.

66. *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584, 587 (Sup. Ct. 1985).

shall be permitted to proceed.”<sup>67</sup> That sentiment was echoed with a secular twist by a nonobservant Jewish publisher who stated, “Sure it’s absurd and irrational to believe that your life is going to be changed by the presence of a wire, but it’s even more absurd and irrational to oppose it.”<sup>68</sup>

Both sides of the debate have labeled the other irrational and characterized the respective motivations of their opponents as nefarious. Interestingly enough, as the discourse of the debate becomes more contentious, both sides move away from their legal arguments and towards the language of difference, extremism, inclusion and exclusion, insiders and outsiders, and ultimately arrive at opposing visions of what it means to be “American.” The eruv becomes a snowballing signifier for current debates on pluralism, multiculturalism and the place of religion in society. Thus, by reframing the issue in legal terms, and offering a constitutional framework within which the debate can be rearticulated, this Article may offer the communities struggling with the decision of whether to allow the construction of an eruv a way to actually communicate and come to a decision.

### III. ERUVIM AND THE ESTABLISHMENT CLAUSE

Before examining whether an eruv violates the Establishment Clause,<sup>69</sup> it is important to outline the case history of Establishment Clause jurisprudence.

#### *A. Case History of the Establishment Clause*

Although the Supreme Court claims not to be confined to a single analytical framework for Establishment Clause cases, the Court, until 1980, predominantly used an analysis developed in *Lemon v. Kurtzman*.<sup>70</sup> In *Lemon*, the Court confronted the question of whether a state could reimburse church-affiliated schools for teachers’ salaries, instructional materials, and textbooks when those expenses were related to the teaching of secular subjects, or whether those

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67. Trillin, *supra* note 50, at 51.

68. *Id.*

69. The Establishment Clause provides, “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

70. 403 U.S. 602 (1971). See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 239 (1994).

reimbursements would violate the Establishment Clause.<sup>71</sup> The Court explained that the purpose of the Establishment Clause is to protect against three “main evils”: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>72</sup> In order to protect the constitutional guarantees afforded by the Establishment Clause, the Court articulated a three part test to be applied to government action: “First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [act] must not foster ‘an excessive government entanglement with religion’.”<sup>73</sup> Applying the three part test, the Court held that both state statutes at issue violated the entanglement prong of the analysis and declared them unconstitutional.<sup>74</sup>

According to Professor Ira C. Lupu, “By purporting to capture the Establishment Clause in a three-part test for all seasons—including a prohibition not only on governmental practices that advance religion but also on practices that interact significantly with religious institutions—*Lemon* promised that separationism would be the guiding force of Religion Clause adjudication.”<sup>75</sup> That is, according to *Lemon*, church and state are to be strictly separated.

Although there have been instances where the Court decided Establishment Clause cases without applying the *Lemon* test,<sup>76</sup> it has been frequently used.<sup>77</sup> While *Lemon* has not been repudiated—and was recently reaffirmed<sup>78</sup>—a number of the Justices currently on the Court have criticized it.<sup>79</sup> Justice Scalia, the primary advocate for overruling the test, articulates perhaps one of the most colorful critiques of the Court’s use of *Lemon*:

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71. *Lemon*, 403 U.S. at 609–10.

72. *Id.* at 612 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

73. *Id.* at 612–13 (citations omitted).

74. *Id.* at 615.

75. Lupu, *supra* note 70, at 236.

76. *Id.* at 239–40.

77. See *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackman, J., concurring) (listing the 31 Establishment Clause cases decided between 1971 and 1992 where the Court applied *Lemon*).

78. See *McCreary County v. ACLU*, 545 U.S. 844, 861–63 (2005) (specifically declining a request to abandon *Lemon*’s purpose test).

79. *Id.* at 890 (Scalia, J., dissenting) (stating that “a majority of the Justices on the current [2005] Court... have repudiated the brain-spun ‘*Lemon* test...’”); GEOFFREY R. STONE, *THE FIRST AMENDMENT* 525 (1999); Robert C. Stelle, Comment, *Religious Freedom in the Twenty-First Century: Life Without Lemon*, 23 S. ILL. U. L.J. 657, 664 (1999) (detailing various Justices’ criticisms of *Lemon*).

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.<sup>80</sup>

Despite this critique, the Court's uneven use of the *Lemon* test,<sup>81</sup> and its genuine erosion within case law,<sup>82</sup> several of the lower courts in the eruv cases to be litigated have used the test in their determinations.<sup>83</sup>

*Lynch v. Donnelly*<sup>84</sup> has been characterized as a turning point away from the *Lemon* test and as a further step in its erosion.<sup>85</sup> In *Lynch*, the Court confronted the issue of "whether the Establishment Clause of the First Amendment prohibits a municipality from including a crèche, or Nativity scene, in its annual Christmas display."<sup>86</sup> The Christmas display at issue consisted of holiday decorations and figures, including "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant,

80. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (citations omitted).

81. See generally Lupu, *supra* note 70.

82. *Id.*

83. See *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584, 586 (Sup. Ct. 1985); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1295 (D.N.J. 1987); but see *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 175–76 (3d Cir. 2002).

84. 465 U.S. 668 (1984).

85. See Lupu, *supra* note 70, at 239.

86. *Lynch*, 465 U.S. at 670–71.

and a teddy bear, hundreds of colored lights, a large banner that [read] ‘SEASONS GREETINGS,’ and the crèche at issue” in the case.<sup>87</sup> The city owned all of the display’s components.<sup>88</sup> The Court, in an opinion by Chief Justice Burger, held that the nativity scene did not violate the Establishment Clause because it was motivated by the “secular purpose” of celebrating Christmas.<sup>89</sup> The fact that Christmas is a commemoration of the birth of Jesus Christ and is only celebrated by Christians, and not adherents of other religions or nonadherents of any religion, was never addressed in the opinion. Burger’s view seemed particularly problematic to Justice Brennan, a dissenter, who argued that the crèche was a religious symbol and consequently violated all three prongs of the *Lemon* test.<sup>90</sup> Although the majority said it was using the *Lemon* test, it simultaneously refused to apply the test in all Establishment Clause cases.<sup>91</sup>

Perhaps the most significant aspect of the *Lynch* decision is Justice O’Connor’s concurring opinion that “represents the genesis of [her] establishment clause analysis”—the endorsement test—offered as a clarification, or addition, to the *Lemon* test.<sup>92</sup> The endorsement test collapses the “purpose” and “effect” prongs of the *Lemon* test into a single question.<sup>93</sup> According to Justice O’Connor, “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>94</sup> The government violates the Establishment Clause when there is either “excessive entanglement with religious institutions” or when there is an impression of “government endorsement or disapproval of religion.”<sup>95</sup> According to Justice O’Connor, the message of government endorsement or disapproval is

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87. *Id.* at 671.

88. *Id.*

89. *Id.* at 685.

90. *Id.* at 698–704 (Brennan, J., dissenting).

91. *Id.* at 679 (“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”).

92. See Metzger, *supra* note 8, at 77. For favorable readings of Justice O’Connor’s approach, see Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 151 (1986); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151 (1987). But see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987).

93. *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 174 (3d Cir. 2002).

94. *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

95. *Id.* at 687–88.

to be analyzed according to the “objective” observer.<sup>96</sup> The concern, here, is “with the individual alienation, or feelings of exclusion, that an observer of a government-sponsored religious symbol might experience.”<sup>97</sup> As Justice O’Connor explains, “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”<sup>98</sup>

In *County of Allegheny v. ACLU*,<sup>99</sup> the symbolic endorsement test was applied in a highly fractured Court opinion written by Justice Blackmun.<sup>100</sup> The case concerned two different religious displays: a crèche that was placed in a display case in a county courthouse staircase, and a display in front of a government building that included a large Christmas tree, a large menorah, and a sign honoring liberty.<sup>101</sup> Three Justices—Stevens, Brennan, and Marshall—applied the *Lemon* test, and argued that both displays were unconstitutional.<sup>102</sup> Four Justices—Kennedy, Rehnquist, Scalia, and White—found both displays constitutional.<sup>103</sup> Justice Blackmun applied the symbolic endorsement test, articulated by Justice O’Connor in *Lynch*, and found that the menorah was constitutional, but the nativity scene was not.<sup>104</sup> The menorah, in this view, was permissible because it accompanied a Christmas tree and a secular sign concerning liberty.<sup>105</sup> In contrast, the nativity scene was alone on government property and could be perceived by an “objective” observer as a government endorsement of Christianity, thus “mak[ing] religion relevant, in reality or public perception, to status in the political community.”<sup>106</sup>

In *Lynch* and *County of Allegheny*, the Court was responding to governmental placement of religious displays on government property.<sup>107</sup> In *Capitol Square Review & Advisory Board v. Pinette*,<sup>108</sup>

96. *Id.* at 690; Metzger, *supra* note 8, at 77.

97. Lupu, *supra* note 70, at 241.

98. *Lynch*, 465 U.S. at 688.

99. 492 U.S. 573 (1989).

100. *Id.* at 597.

101. *Id.* at 578.

102. *Id.* at 654–55 (Stevens, J., concurring in part and dissenting in part).

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

104. *Id.* at 598–602, 620–21.

105. *See id.* at 613–14, 620.

106. *Id.* at 636 (O’Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

107. *Id.* at 578; *Lynch*, 465 U.S. at 670–71.

108. 515 U.S. 753 (1995).

the issue revolved around the refusal of a state agency to allow the private placement of a cross by the Klu Klux Klan in a park across from the state capitol.<sup>109</sup> The Court, in a plurality opinion by Justice Scalia, emphasized that the First Amendment's protection of speech includes religious expression and held that excluding the cross was impermissible content-based discrimination.<sup>110</sup>

Justice O'Connor, concurring in part and concurring in the judgment, articulated that the central question was whether the cross would be perceived by a reasonable observer as the government's symbolic endorsement of religion.<sup>111</sup> In essence, Justice O'Connor's symbolic endorsement test turns on the perspective of the person that is viewing or judging the government act—the "reasonable observer." Is this person an adherent of the religion in question, an adherent of a different religion, or a nonadherent? Justice O'Connor did not discuss the religious point-of-view of the reasonable observer, but she characterized the reasonable observer as a "hypothetical observer who is presumed to possess a certain level of information that all citizens might not share."<sup>112</sup> That is, the reasonable observer is "aware of the history and context of the community and forum in which the religious display appears" and how the public space has been used by the community in the past.<sup>113</sup> Using this standard, Justice O'Connor found that the erection of the Ku Klux Klan's cross would have been constitutional if it had had a sign disclaiming governmental sponsorship or endorsement.<sup>114</sup> Under these circumstances, a reasonable observer would recognize that there was no state approval of the religious message.<sup>115</sup>

Justice Stevens, in a dissenting opinion, criticized Justice O'Connor's articulation of the reasonable observer<sup>116</sup> and deemed the Klan's cross unconstitutional because:

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109. *Id.* at 758–59.

110. *Id.* at 769–70.

111. *Id.* at 777 (O'Connor, J., concurring in part and concurring in the judgment).

112. *Id.* at 780. What this means in practice, however, is far from clear.

113. *Id.* at 780–81.

114. *Id.* at 776 (O'Connor, J., concurring in part and concurring in the judgment).

115. *Id.*

116. *Id.* at 800 n.5 (Stevens, J., dissenting) ("Her 'reasonable person' comes off as a well-schooled jurist, a being finer than the tort-law model . . . It strips of constitutional protection every reasonable person whose knowledge happens to fall below some 'ideal' standard. Instead of protecting only the 'ideal' observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.").

The very fact that a sign is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself. The “reasonable observer” of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message.<sup>117</sup>

Perhaps the most problematic aspect of Justice O’Connor’s articulation is her refusal to address the fact that the objective observer test “measures objectivity against the backdrop of a Christian society.”<sup>118</sup> As Professor Kathleen M. Sullivan explains: “Majority practices are myopically seen by their own practitioners as uncontroversial; asking predominantly Christian courts to judge the exclusionary message of crèches may be a little like asking an all-male jury to judge a woman’s reasonable resistance in a rape case.”<sup>119</sup>

The inconsistency of the decisions of *Lemon*, *Lynch*, *County of Allegheny* and *Pinette* indicates that there is no agreement on the Court as to when religious symbols are allowed on government property, what standard should apply, or whose perspective should be employed when applying the given standard.<sup>120</sup>

## *B. Does an Eruv Violate the Establishment Clause?*

### *1. The Eruv and the Lemon Test*

Two courts to date have analyzed the eruv under the Establishment Clause of the Constitution.<sup>121</sup> Both courts purported to

117. *Id.* at 801–02.

118. Anjali Sakaria, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483, 492 (2002).

119. *Id.* at 492 n.49 (quoting Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992)).

120. Similar inconsistencies appeared in two cases handed down on the same day concerning public displays of the Ten Commandments. See *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). Because those cases turned upon the special circumstances surrounding the place of the Ten Commandments in American history, their substantive discussions are not addressed herein.

121. See *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (Sup. Ct. 1985); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987).

apply the *Lemon* test and both found the eruv to be constitutional.<sup>122</sup> However, neither court provided adequate analysis or justification for its reasoning. Indeed, the courts' arguments are unpersuasive at best and outcome-determinative at worst. A thorough analysis of the eruv demonstrates that it fails each prong of the *Lemon* test and is thus unconstitutional.

In the first case, *Smith v. Community Board No. 14*, the Plaintiff, Joseph M. Smith, sought a permanent injunction to restrain the local Orthodox Jewish community "from further construction, maintenance and use of an eruv," claiming that his Establishment Clause rights had been violated.<sup>123</sup> Smith's primary claim was that encircling the area by a "religious device . . . will force [him] and other residents to assume special burdens to avoid. The only way to avoid this unwelcomed and unwanted religious device and the resultant religious aura and metaphysical impact in the area would be to move away . . ."<sup>124</sup> The Orthodox Jewish community had been given permission to construct the eruv by the Community Board and by the New York City Department of Parks and Recreation.<sup>125</sup> The eruv encompassed ninety blocks, utilized sixty-three New York City lamp poles, and resulted in the necessary rebuilding of sea walls across ten city streets so they would reach the forty inch height minimum of the eruv.<sup>126</sup> The construction of the eruv cost \$18,000, which the Orthodox community entirely financed.<sup>127</sup>

In the second case, *ACLU v. City of Long Branch*, the facts were similar and the outcome the same, the only difference being that the American Civil Liberties Union (ACLU), rather than a private individual, brought the action.<sup>128</sup> The ACLU also argued that "an eruv constitutes the placement of [a] 'permanent symbol'" of the Jewish

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122. See *Smith*, 491 N.Y.S.2d at 586–87; *Long Branch*, 670 F. Supp. at 1295–97.

123. *Smith*, 491 N.Y.S.2d at 584–85.

124. *Id.* at 585. See also Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 298 (1997) ("[T]o anyone who believes in communitarianism, in a sense of collective purpose and even collective identity, the claim [of "metaphysical impact" and "religious aura"] cannot be dismissed out of hand. The undeniable effect of creating the eruv was not simply to make it more convenient for Orthodox Jews to observe Sabbath; it was also to give the neighborhood an identity as a Jewish community.").

125. *Smith*, 491 N.Y.S.2d at 585.

126. *Id.*

127. *Id.*

128. *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1293 (D.N.J. 1987). The other eruv case that has reached the courts is *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142 (D.N.J. 2001), *rev'd*, 309 F.3d 144 (3d Cir 2002). However, the courts in the Tenaflly case relied more on a free speech rationale. See generally Eli Greenbaum, Note, *First Amendment Inversions*, 111 YALE L.J. 1861 (2002).

religion on public property” thus violating the Establishment Clause.<sup>129</sup>

In applying the first prong of the *Lemon* test—secular purpose—the *Smith* court held that the requirement had been satisfied since, by permitting the erection of an eruv, the City had obtained the benefit of an enlargement of the sea fences.<sup>130</sup> The problem with this argument is that the government obtaining a benefit seems to have little to do with whether the religious symbol had a secular purpose or not. Under the court’s reasoning, if a particular religion wanted to erect a giant statue of its founder in front of the state house, and in the process repainted the building, this would satisfy the secular purpose prong since the government was receiving a benefit. Particular religious groups cannot be permitted to “buy off” constitutional protections in the name of government benefits.

The *Long Branch* court found that the erection of the eruv satisfied the secular purpose prong since an eruv’s function is to allow observant Jews to engage in secular activities—going to the park, pushing a baby carriage, visiting friends—on the Sabbath.<sup>131</sup> The court declared that the secular purpose of the resolution that granted the eruv was that “it allow[ed] a large group of citizens access to public properties.”<sup>132</sup> The court analogized government allowance of an eruv to the government assisting religious organizations in other ways, such as providing police during large outdoor religious gatherings and to direct traffic in synagogue or church parking lots, repairing sidewalks outside of religious organizations, or installing additional streetlights around religious buildings to assist worshipers attending evening services.<sup>133</sup> The court reasoned that “[p]roviding equal access to public facilities to people of all religions and enabling individuals to get to and from their chosen places of worship safely are permissible accommodations by the government.”<sup>134</sup>

While seemingly more convincing than the government benefit analysis of the *Smith* court, the *Long Branch* court mischaracterized its equal access rationale. Fixing sidewalks, directing traffic, and installing street lights are activities devoid of religious significance. They are wholly secular acts provided by the government to religious institutions. Furthermore, when the city fixes sidewalks and directs

129. *Long Branch*, 670 F.Supp. at 1294.

130. *Smith*, 491 N.Y.S.2d at 587.

131. *See Long Branch*, 670 F. Supp. at 1295.

132. *Id.*

133. *Id.*

134. *Id.*

traffic, both adherents and nonadherents to the religious group getting the accommodation benefit. In other words, a better sidewalk aids all people walking on it: those who use it to go to and from the religious institution and those who use it in the course of their daily secular activities. Similarly, directing traffic outside a busy religious building aids those attempting to enter and leave for the purpose of worship and those that are simply driving by. The eruv, in contrast, is a mechanism of Jewish law that gives benefits to Orthodox Jews alone. An eruv facilitates religious worship by making it easier for Orthodox Jews to attend synagogue and move around in general on the Sabbath. However, it does so by the local government employing a Rabbinic legal fiction, a religious tool, only meaningful to Orthodox Jews.

Proponents of the eruv could argue that an eruv is wholly secular in appearance. It is not an object of worship; it is a symbolic wall, not a symbol of anything Jewish in nature or practice. Further, while it may facilitate the disabled, the elderly, or parents with small children in attending synagogue, it plays no active role in religious observance itself. However, the fact that an eruv may be secular in *appearance* has little to do with the first prong of the *Lemon* test which requires that it have a secular *purpose*. The eruv has no secular purpose whatsoever. Its purpose is to enclose and separate a designated area in order to satisfy the religious needs of a particular group of citizens. It is only the religious beliefs of Orthodox Jews that necessitates the erection of the eruv. Thus, an eruv fails the secular purpose prong of the *Lemon* test.

The second prong of the *Lemon* test demands that the eruv's primary effect neither advance nor inhibit religion.<sup>135</sup> The *Smith* court found the eruv was an accommodation and not an advancement of religion since the government granted permission to the Orthodox Jewish community to use public land and poles in just as it had done so for other religious communities in New York.<sup>136</sup> The court based its ruling on the fact that the city granted the permits for the eruv pursuant to its standard rules and regulations, the city did not expend public funds to construct or maintain the eruv, and the city had no intent to advance the Jewish faith in particular, or religion in general, by

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135. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). An analysis of the second prong of the *Lemon* test has often been conflated with a discussion of symbolic endorsement. See, e.g., *Smith*, 491 N.Y.S.2d at 587; *Long Branch*, 670 F. Supp. at 1296. For clarity, the analysis of the eruv under the symbolic endorsement test is separated from its analysis under the *Lemon* test. See *infra* discussion Part III.B.2.

136. *Smith*, 491 N.Y.S.2d at 587.

granting permission for the construction of the eruv which is “virtually invisible.”<sup>137</sup>

The *Long Branch* court focused its analysis on the second prong by asserting that the eruv does not impose any religion or visible religious symbolism on the other residents of the community.<sup>138</sup> The court acknowledged the fact that it is impermissible for a government to construct a religious symbol but concluded that “the eruv itself has no religious significance or symbolism and is not part of any religious ritual.”<sup>139</sup> Finally, as in *Smith*, the court held that the city’s resolution allowing the construction of an eruv did not advance or endorse any religion but instead simply accommodated the religious practices of observant Jewish residents.<sup>140</sup>

Both courts and proponents of eruvim in general make much of the fact that an eruv is practically invisible and is not a visible religious symbol. However, to say an eruv does not have any religious significance, as the *Long Branch* court asserted, is a gross mischaracterization. While an eruv may be a utilitarian device, it is religiously prescribed and only has meaning for Orthodox Jews. Its only significance is religious.<sup>141</sup> At the same time, its wholly secular appearance and the fact that it can barely be distinguished from ordinary telephone wires and poles renders the effects of its physical presence ambiguous.<sup>142</sup> To fully explore the second prong of the *Lemon* test relating to the effect of the religious symbol, courts must go beyond an eruv’s visibility.

Any analysis of effects of an eruv must inquire into whether government allowance of an eruv advances religion. Government allowance of an eruv does serve to advance religion in that it permits people who normally would not be able to leave the private domain of their home, namely parents with small children, the elderly and the disabled, to attend religious services.<sup>143</sup> In *Estate of Thornton v.*

137. *Id.*

138. *Long Branch*, 670 F.Supp. at 1295.

139. *Id.* at 1296.

140. *Id.*

141. See Brief for ACLU of New Jersey as Amicus Curiae at 12 n.4, *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142 (D.N.J. 2001) (No. Civ. 00-6051) (“It is hard to fathom how a concept developed under Jewish law in response to religious prohibitions and administered under careful rabbinical supervision could be described as having no religious significance.”).

142. For further discussion of the principle of symbolic endorsement, see *infra* Part III.B.2.

143. See *supra* Part II.

*Caldor*,<sup>144</sup> the Court invalidated a Connecticut law that provided employees with the absolute right not to work on their chosen Sabbath.<sup>145</sup> The Court held that the law violated the Establishment Clause because it went “beyond having an incidental or remote effect of advancing religion . . . The statute has a primary effect that impermissibly advances a particular religious practice.”<sup>146</sup> Similarly, in the case of the eruv, increased synagogue attendance is a direct result of the government allowing the Jewish community to construct and maintain an eruv.<sup>147</sup> Furthermore, this increased attendance could also result in increased funds for the synagogue.<sup>148</sup>

One proponent of the eruv has argued that increased attendance is merely a “secondary or indirect benefit.”<sup>149</sup> Under this reasoning, the eruv is analogous to mandatory Sunday closing laws, which the Supreme Court upheld in *McGowan v. Maryland* as constitutional despite the fact that “one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services.”<sup>150</sup> The Court found the Sunday closing laws permissible because the “present purpose and effect of most of them is to provide a uniform day of rest for all citizens”<sup>151</sup> which was deemed a “secular goal.”<sup>152</sup> Although *McGowan* was decided before the *Lemon* case, the Court defended its decision in a post-*Lemon* case.<sup>153</sup>

The difference between an eruv and a Sunday closing law is that the former is solely a mechanism of Jewish law and practice, and only has meaning for Orthodox Jews. In contrast, a Sunday closing law provides a uniform day of rest for all citizens. While a Sunday

144. 472 U.S. 703 (1985).

145. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985).

146. *Id.* at 710 (citation omitted).

147. *See Metzger, supra* note 8, at 86 n.143 (“The eruv is often used as an inducement to convince Jews to become members of a certain synagogue. Advertisements of synagogues and communities in Jewish weeklies often stress that their community has or is in the process of constructing an eruv.”).

148. *See id.* at 86 n.144 (“Temples collect annual membership dues from their congregants as a means of supporting the synagogues’ expenses.”).

149. *Id.* at 85.

150. *See id.* (citing *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (citing *McGowan v. Maryland*, 366 U.S. 420 (1961))).

151. *McGowan*, 366 U.S. at 445.

152. *Id.*

153. *See Metzger, supra* note 8, at 85 (citing *Comm. for Pub. Educ.*, 413 U.S. 756). Despite the Court’s reaffirmation of its decision, it is my contention that a Sunday closing law should have been deemed an unconstitutional establishment of religion under the second prong of the *Lemon* test.

closing law may have the incidental effect of facilitating religious practice, the primary purpose of an eruv is to facilitate Orthodox Judaism by making movement on the Sabbath less burdensome for its practitioners. Thus, an eruv impermissibly advances a particular religion thereby violating the Establishment Clause.

The third prong of the *Lemon* test necessitates that the eruv not foster an excessive entanglement between the state and religion.<sup>154</sup> Both courts held that excessive entanglement was not created since the cities in question routinely allowed commercial signs and banners to be hung from utility poles and permitted public lands to be used for various activities, religious and nonreligious.<sup>155</sup> Therefore, the Jewish community applying for the eruv was treated no differently than other groups and given no preferential treatment.<sup>156</sup> Further, the courts reiterated that the eruvim were constructed and maintained entirely at the expense of the Jewish community and the government provided no aid other than the passage of the resolutions permitting the eruvim.<sup>157</sup>

The issue of entanglement is less problematic in the case of an eruv than it is in the case, for example, of kosher food regulation.<sup>158</sup> Unlike some states' kosher fraud statutes that require states to enforce "orthodox Hebrew religious requirements,"<sup>159</sup> the eruv does not require the government to regulate or enforce norms of Jewish law on a continued and sustained basis. However, the eruv does present a unique kind of entanglement in regard to the necessary government proclamation that serves to lease the public land to the Jewish community. The failure on the part of the courts to analyze this aspect of an eruv is notable since it is the proclamation itself that serves to entangle the government with religion.<sup>160</sup>

Entanglement under the *Lemon* test implies an ongoing relationship or an entwinement between secular and religious institutions. Constitutional historian Professor Jack N. Rakove, a proponent of the Palo Alto eruv, claimed in an editorial that a

154. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

155. *See Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584, 587 (Sup. Ct. 1985); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1297 (D.N.J. 1987).

156. *See id.*

157. *See id.*

158. *See generally* Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 (1993) (discussing various states' regulations of kosher food to protect against consumer fraud).

159. *See, e.g., Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2d Cir. 2002).

160. The proclamation may also violate the first and second prong of the *Lemon* test, but it is most relevant to a discussion of the entanglement prong and is thus being solely analyzed in this context.

proclamation recognizing the existence of the eruv is not entanglement because it would be “a one-time action that merely confirms what is otherwise allowed.”<sup>161</sup> In other words, it allows citizens to string wires across utility poles, which was permitted within the city of Palo Alto. Professors Joel Beinin and Mitchell Zimmerman responded to this argument by calling it “wrong both in fact and in law.”<sup>162</sup> For them, a proclamation does not merely grant private individuals permission to string wires between public utility poles and signs,<sup>163</sup> but instead serves to “characterize[] these actions as an event with a legal/religious meaning, which the city is endorsing.”<sup>164</sup> The fact that it is a one-time event is constitutionally irrelevant.<sup>165</sup>

The governmental involvement with an eruv is not simply the granting of permission, but the act of converting public secular space into religious space. Some government proclamations that contain numerous references to the Jewish faith and even quote scripture<sup>166</sup> are intimately involved in this conversion of public space. Other proclamations, while still mentioning the Jewish faith and the Jewish religion, read less as a religious text, and more like a contract.<sup>167</sup> However, even these proclamations involve the government declaring and defining what Orthodox Jewish law requires of its adherents.<sup>168</sup> Former President Bush’s quote<sup>169</sup> at the inauguration of the Washington D.C. eruv exemplifies the fact that any formal government acknowledgement of an eruv both implicitly and explicitly conflates religion and the government. Thus, the eruv likely fails the third prong of the *Lemon* test and should be deemed unconstitutional.

161. Rakove, *supra* note 22.

162. Mitchell Zimmerman & Joel Beinin, *Beware the Symbolism of Approving an Eruv*, PALO ALTO WEEKLY, Mar. 22, 2000, available at [www.paltoaltonline.com/weekly/morgue/spectrum/2000\\_Mar\\_22.GUEST22.html](http://www.paltoaltonline.com/weekly/morgue/spectrum/2000_Mar_22.GUEST22.html).

163. *See id.*

164. *See id.*

165. *See id.*

166. The proclamation for the Bayside eruv in Queens, New York began as follows: “WHEREAS, in accordance with the Jewish religion, the laws of Sabbath contain the Commandment; ‘Let no man go out of his place on the Sabbath day’ (Exodus 17-19); and a man’s place is defined by (1) specifying certain natural or artificial boundaries, and (2) by mutual agreement, letting the use of the common domain . . .” *See Metzger, supra* note 8, at 84 n.136.

167. *See* Appendix II.

168. *See id.* (“WHEREAS, the delineation of an eruv and its construction creates the legal fiction of a private domain in which observant persons of the Jewish faith are permitted to carry or push objects from place to place within the defined area during the Sabbath and other holy days . . .”).

169. *See supra* note 1 and accompanying text.

Based on the analyses above, a court applying the *Lemon* test should find that an eruv fails all three of its prongs. However, the *Lemon* test has been disfavored in recent years, unevenly applied, and often conflated with the symbolic endorsement test developed by Justice O'Connor in *Lynch*.<sup>170</sup> Therefore, any discussion of an eruv's constitutionality under the Establishment Clause must also include an analysis of the eruv under the symbolic endorsement test.<sup>171</sup>

## 2. *The Eruv and Symbolic Endorsement*

Under the symbolic endorsement test, the government violates the Establishment Clause if it symbolically endorses or disapproves of a particular religion, thus making religion seemingly relevant to membership in the political community.<sup>172</sup> Whether the government action is endorsing or disapproving of a particular religion is judged through the eyes of an ordinary observer.<sup>173</sup> The eruv presents a difficult case because, unlike a cross, menorah, Star of David, crescent, crèche or Christmas tree, it does not on its face symbolize religious belief or religious identity. Indeed, a woman or man on the street would presumably not recognize an eruv unless it was pointed out, and then it would appear to be just a string. Nevertheless, to someone who is knowledgeable about the subject, aware of both the history and meaning of an eruv, it is more than just a string.

The analysis of an eruv brings into focus the importance of how the law constructs the "reasonable or ordinary observer." There are essentially two views or definitions of who the "reasonable or ordinary observer" is. If the reasonable observer is defined, in Justice O'Connor's terms, as one "more informed than the casual passerby,"<sup>174</sup> then an eruv would be much more than just a string.<sup>175</sup> However, if an ordinary observer is defined as just that, an average man or woman on the street, the eruv is less problematic since it would

170. See *supra* Part III.A for a discussion of the symbolic endorsement test.

171. See *infra* Part III.B.2.

172. For discussion of the symbolic endorsement test, as developed in case law, see *supra* Part III.A.

173. For a critique of the ordinary observer, see *supra* notes 119–122 and accompanying text. Although generally approving of the endorsement test, William P. Marshall finds the "objective observer" standard "incomprehensible." See William P. Marshall, "We Know It When We See It" *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 537 (1986).

174. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

175. See Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 144, at 15 ("[T]he reasonable observer's knowledge is not limited to what superficial visual inspection of the utility poles would reveal. The observer must also be . . . deemed aware of the religious provenance of the markings that comprise the eruv.").

go practically unnoticed, and even when noticed, it would be devoid of meaning, thus preventing the ordinary observer from believing that government is advancing the practice of religion. How the reasonable observer is defined may determine whether a court would find an eruv constitutional or an unconstitutional endorsement of religion. It is quite clear that Justice O'Connor's view has prevailed: in *Santa Fe Independent School District v. Doe*,<sup>176</sup> the Court articulated that the relevant inquiry is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute [*i.e.*, government act], would perceive it as state endorsement of [religious activity]."<sup>177</sup> That is, O'Connor's reasonable observer assumes knowledge of both the government act in question and the religious significance of the act.

The government proclamation required to set up an eruv in a community presents the most serious problem of government endorsement. In *Pinette*, the Court found that a private placement by the Klu Klux Klan of a cross in a park across from the state capitol would not be perceived by a reasonable observer as government endorsement because a sign accompanied it disclaiming governmental sponsorship or endorsement.<sup>178</sup> In contrast, the government proclamation renting the public space to the Orthodox Jewish community for the eruv serves as a sign of government endorsement to the community at large.

However, there is a concern that the symbolic endorsement test is biased towards the interests of followers of majority religions<sup>179</sup> since the ordinary observer is most likely to come from the majority culture which, in the United States, is Christian.<sup>180</sup> As Professor Lupu explains:

Customary practices are likely to be accommodated; unusual ones are less likely to be so treated. . . . A regime of accommodation, designed at least in part to produce substantive equality between nonreligious and religious interests, is highly likely to privilege mainstream, well-known religions, or locally dominant

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176. 530 U.S. 290 (2000).

177. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (O'Connor, J., concurring in judgment)) (alterations added).

178. For further discussion of *Pinette*, see *supra* notes 108–119 and accompanying text.

179. See Sakaria, *supra* note 118, at 486.

180. See *supra* text accompanying note 89 (discussing Chief Justice Burger's opinion that celebrating Christmas is a secular activity).

ones, and thereby to aggravate conditions of religious inequality.<sup>181</sup>

While religious inequality is a valid concern, it should not be used as a rationale to argue that since an eruv is nearly invisible and not well known to most,<sup>182</sup> it is of de minimis constitutional concern. This interpretation of the doctrine “would discriminate against religious symbols or expressions that were too effective or well-known to be ignored, while at the same time dismissing derisively as “harmless” those practices or displays whose esoteric nature might render them understandable only to a relatively small number of observers.”<sup>183</sup>

The fact that the endorsement test may have the tendency to favor dominant religions at some times and at other times favor minority or lesser known religions underscores the need for courts to be hyper-vigilant when examining majority *and* minority religious practices and symbols to be certain that the reasonable observer standard is that of a nonadherent.<sup>184</sup> Applying this standard, a reasonable observer, acquainted with the religious significance of an eruv, its conversion of the public space into private religious domain, and the government proclamation leasing public land to the Orthodox Jewish community, would find a government endorsement of the eruv.

Under both the *Lemon* test and the symbolic endorsement test, if a government permitted an Orthodox Jewish community to construct and maintain an eruv, it would likely violate the Establishment Clause of the Constitution. However, the inquiry does not end here. The next step in the analysis of the constitutionality of an eruv is to examine whether a government prohibition of an eruv would violate the Free Exercise Clause of the First Amendment.<sup>185</sup>

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181. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 586 (1991).

182. See *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1297 (D.N.J. 1987) (“In all probability residents other than those who actively participated in the initial debate and those observant Jews who are provided with a map of the eruv’s boundaries will never see the eruv nor will they be able to discern its boundaries.”); *Smith v. Cmty. Bd.* No. 14, 491 N.Y.S.2d 584, 587 (Sup. Ct. 1985) (“The eruv is a virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area.”).

183. Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 141, at 16.

184. See generally Sakaria, *supra* note 118, at 492–93 (arguing that the reasonable observer in the symbolic endorsement analysis should be that of a nonadherent).

185. See *infra* Part IV.

#### IV. DOES GOVERNMENT PROHIBITION OF AN ERUV VIOLATE THE FREE EXERCISE CLAUSE OR THE LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000?

A Free Exercise Clause claim could arise if an Orthodox Jewish community applied to their local government for permission, and the necessary proclamation, to construct an eruv, and the government either rejected the request or prohibited the Orthodox community from building or maintaining an eruv.<sup>186</sup> Depending upon the reasoning and context of the government's action, the Orthodox Jewish community could prevail in their claim. Before examining whether government action prohibiting an eruv violates the Free Exercise Clause, it is important to first outline the Court's jurisprudence surrounding the Clause and Congress' reaction to that jurisprudence through the Religious Land Use and Institutionalized Persons Act of 2000.

##### *A. Case History of the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act of 2000*

Although the Free Exercise Clause could be, and has been, interpreted differently in the past, today it protects only against government actions that "target religious practice for regulation."<sup>187</sup> In 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court, in an opinion by Justice Scalia, held that the Free Exercise Clause only requires that religion practices not be unfairly signaled out for different treatment.<sup>188</sup> Accordingly, if a particular religious practice is barred based on a neutral law, which applies to everyone equally, that neutral law will stand, even if it burdens a particular religion or religious practice.<sup>189</sup> Thus, the present scope of the Free Exercise Clause is quite narrow.<sup>190</sup>

The Supreme Court did not formulate a test for the Free Exercise Clause until the 1960s, although prior to that time, it did find laws that proscribed solicitation for religious purposes or that taxed solicitation to be unconstitutional because they infringed on the

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186. See *infra* Part IV.B for an example of an Orthodox community bringing a Free Exercise claim after a local government ordered it to dismantle its eruv.

187. See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71-72 (2001).

188. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990).

189. See *id.* at 879.

190. See Tushnet, *supra* note 187, at 72.

freedoms of speech and religion.<sup>191</sup> However, in 1963 case of *Sherbert v. Verner*, the Court articulated a test for the Free Exercise Clause.<sup>192</sup> In *Sherbert*, a woman was denied unemployment benefits when she was discharged from her job for refusing to work on the Sabbath.<sup>193</sup> The Court held that strict scrutiny should be used in evaluating laws burdening the free exercise of religion and declared the denial of unemployment benefits unconstitutional under the facts.<sup>194</sup> As Professor Lawrence G. Sager explains, “Taken at face value, *Sherbert* thus gave persons motivated by their religious beliefs a presumptive right to disregard laws they deemed to obstruct religiously-motivated conduct, laws that all other persons were required to obey.”<sup>195</sup>

For the next twenty-seven years, the Court usually asserted that it was applying strict scrutiny to Free Exercise Clause claims,<sup>196</sup> while paradoxically finding for the government when individuals challenged laws that allegedly infringed on their right to freely exercise their religion.<sup>197</sup> The reason for this unusual judicial posture is that the rule of *Sherbert*,<sup>198</sup> if applied, would have “give[n] religiously motivated persons a presumptive right to disregard otherwise valid laws” and it would have “privileged religious commitments over other deep and valuable human commitments.”<sup>199</sup> Thus, the Court did not consistently (or often) apply the rule of *Sherbert*.<sup>200</sup> As Sager explains, the rule of *Sherbert* was not consistently applied because it “was always an unattractive constitutional norm—so unattractive that the Supreme Court could never really abide [by] it.”<sup>201</sup>

Despite the uneven history of the Court’s Free Exercise Clause jurisprudence, when it decided *Employment Division* in 1990, the legal community was shocked by the scope of the decision.<sup>202</sup> In *Employment Division*, two members of a Native American Church were denied unemployment compensation benefits because they had been dismissed from their positions as drug and alcohol rehabilitation

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191. See CHEMERINSKY, *supra* note 20, at 1201.

192. 374 U.S. 398, 403 (1963).

193. *Id.* at 399–401.

194. *Id.* at 406, 409.

195. Lawrence G. Sager, *Panel One Commentary*, 57 N.Y.U. ANN. SURV. AM. L. 9, 9 (2000).

196. CHEMERINSKY, *supra* note 20, at 1201.

197. *Id.*

198. See *supra* notes 192–194 and accompanying text.

199. Sager, *supra* note 195, at 10.

200. See *id.*

201. *Id.*

202. Lupu, *supra* note 70, at 251.

counselors after they ingested peyote at a Church ceremony.<sup>203</sup> The relevant state agency denied them benefits as a result of a state law disqualifying persons dismissed for “work-related ‘misconduct.’”<sup>204</sup> The Oregon Supreme Court overturned the agency on the ground that the statute on which the agency relied impermissibly burdened individual rights under the Free Exercise Clause.<sup>205</sup>

The Supreme Court reversed the decision of the Oregon Supreme Court, rejecting the Free Exercise claim and declaring that regardless of the degree of hardship that a general law may impose upon religious practice, it would not be declared unconstitutional if it is a “neutral law of general applicability.”<sup>206</sup> As Justice Scalia explained, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>207</sup> Thus, a law or regulation that infringes upon religious liberty need not serve a compelling state interest by the means least restrictive to religious liberty, but is instead only required to meet rational basis and demonstrate an absence of anti-religious intent.<sup>208</sup> However, the Court suggested in dictum that “although exemptions from neutral laws of general applicability are not required, they can be granted through the political process.”<sup>209</sup> The Court acknowledged that “‘leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in,’ but preferred this to ‘judges weigh[ing] the social importance of all laws against the centrality of all religious beliefs.’”<sup>210</sup>

Congress attempted to reinstate the pre-*Employment Division*, strict scrutiny standard of protection of religious exercise by enacting the Religious Freedom Restoration Act (RFRA) of 1993.<sup>211</sup> RFRA was criticized by one scholar as “attempt[ing] to make the nominal rule of *Sherbert* the actual rule and thereby purport[ing] to ‘restore’ a regime

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203. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 874 (1990).

204. *Id.*

205. *Id.* at 876.

206. *See id.* at 878–79, 890.

207. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

208. *See id.* at 890. For example, the Court found a city ordinance that prohibited ritual sacrifice unconstitutional since it was directed solely at a particular religious sect, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

209. Sakaria, *supra* note 118, at 484 n.6.

210. Masoudi, *supra* note 158, at 679 n.72 (quoting *Employment Div.*, 494 U.S. at 890).

211. 42 U.S.C. § 2000bb (2000).

of religious liberty that had never existed.”<sup>212</sup> In the 1997 case of *City of Boerne v. Flores*,<sup>213</sup> the Court reasserted itself by holding that RFRA was unconstitutional, at least with regard to the states, because it exceeded the scope of congressional power under Section 5, the Enforcement Clause, of the Fourteenth Amendment.<sup>214</sup>

In 2000, Congress again tried to reinstate the strict scrutiny standard in relation to religious liberty.<sup>215</sup> The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibits any substantial burden on land use for religious purposes and on the religious exercise of institutionalized people unless the government can demonstrate that the burden served a compelling government interest and was the least restrictive means of advancing that interest.<sup>216</sup> Congress enacted the law pursuant to its power under the Spending Clause.<sup>217</sup> The most important aspect of RLUIPA, for the case of an eruv, is the land use provision. That provision mandates that strict scrutiny applies when

[T]he substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.<sup>218</sup>

That is, strict scrutiny will apply when the government imposes a burden on religion based on the way in which the government is regulating the use of land (*e.g.*, through zoning requirements) or if the government creates a procedure by which it makes ad hoc determinations about the way in which the land can be used.

While the Supreme Court has yet to decide a case ruling on the constitutionality of RLUIPA, the Ninth Circuit Court of Appeals has upheld the law as constitutional.<sup>219</sup> In *Mayweathers v. Newland*,

212. Sager, *supra* note 195, at 12.

213. 521 U.S. 507 (1997).

214. *See id.* at 536. However, the Court’s opinion did not declare RFRA unconstitutional as applied to the federal government. *See id.* at 529–36.

215. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

216. *See* 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a).

217. *See* 42 U.S.C. §§ 2000cc(a)(2)(A), 2000cc-1(b)(1).

218. 42 U.S.C. § 2000cc(a)(2)(C).

219. *See* *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002).

Muslim prison inmates sued state prison officials, alleging that prison rules penalized attendance at Muslim religious services in violation of RLUIPA.<sup>220</sup> The Ninth Circuit upheld the constitutionality of RLUIPA and found that “RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty. *Smith* explicitly left heightened legislative protection for religious worship to the political branches.”<sup>221</sup> Thus, “the only recourse for individuals holding religious beliefs that conflict with such laws [of general applicability] is to petition the legislature for an exemption, or sect-specific legislative accommodation.”<sup>222</sup>

### *B. The Eruv and the Free Exercise Clause*

Under *Employment Division*, a neutral law of general applicability that prohibited the attachment of any item to a utility pole would not be deemed unconstitutional if it resulted in prohibiting a Jewish community from constructing an eruv. As long as the law was applied to all citizens and organizations equally, even if its effects were to burden the practice of Orthodox Judaism, a court would uphold the law as constitutional under the current Free Exercise regime. In *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, the Tenaflly Borough Council voted to force the Tenaflly Eruv Association, an Orthodox Jewish group, to remove the *lechis* (plastic strips) that it had placed on utility poles in order to construct an eruv.<sup>223</sup> The Council said that it was enforcing Ordinance 691 which mandated: “No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.”<sup>224</sup>

Although the ordinance did not allow officials to make exceptions to the rule on a case-by-case basis, they often did so.<sup>225</sup> For example, the Council had given its permission to the Chamber of Commerce for it to attach holiday displays to utility poles, and it had

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220. *Id.* at 1065–66.

221. *Id.* at 1070 (quoting *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 890).

222. Sakaria, *supra* note 118, at 483–84.

223. *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d 142, 145 (D.N.J. 2001).

224. *Id.* at 160 n.15.

225. *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 151 (3d Cir. 2002).

allowed residents to nail their house number signs to utility poles.<sup>226</sup> The Council had also tacitly consented to allow two churches' directional signs, bearing crosses, to be attached to the poles.<sup>227</sup> The district court found these inconsistent ad hoc determinations unproblematic since "the mere fact that some private expression has occurred in a forum either as the result of government inaction or limited governmental permission does not open a nontraditional forum to the public for discourse."<sup>228</sup> Thus, the district court held the Council's refusal to permit the eruv was constitutionally permissible.<sup>229</sup>

The Third Circuit reversed and ordered the trial court to issue a preliminary injunction against the Borough on the ground that it had likely violated the Free Exercise Clause.<sup>230</sup> The court held that the Council's "selective, discretionary application of Ordinance 691 against the [eruv] violate[d] the neutrality principle" and was "sufficiently suggestive of discriminatory intent" such that strict scrutiny must be applied.<sup>231</sup> The court held that the Borough's justifications for prohibiting the eruv—that the eruv was permanent and religious in nature—failed to meet strict scrutiny and thus its actions violated the Free Exercise Clause.<sup>232</sup> Under *Smith*, this is clearly appropriate since the law prohibiting attachments appeared neutral, but was not applied equally.

Furthermore, given the animus directed towards Orthodox Jews throughout the Tenafly eruv debate and many residents' fears that the eruv would lead to their "take-over" of the town, it appeared as if the Borough's intent was to discriminate against Orthodox Jews.<sup>233</sup> Even if the individual Council members were not engaged in stereotyping or discrimination, it is clear that a large part of the determination to deny permission to construct the eruv was based on the fact that it was unpopular with the residents.<sup>234</sup> "Allowing for [] a 'hecklers' veto' in deciding which [religious] groups will have there [sic] religious beliefs accommodated, and which will not, would present serious concerns regarding the rights of religious minorities," and clearly violates the

226. *Id.* at 151–52.

227. *See id.* at 151.

228. *Tenafly Eruv Ass'n, Inc.*, 155 F. Supp. 2d at 174.

229. *See id.* at 191.

230. *See Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 151..

231. *See id.* at 168 (internal quotation marks omitted).

232. *See id.* at 172, 178.

233. For a discussion of the community reaction, *see supra* notes 59–65 and accompanying text.

234. *See* Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 141, at 24.

Free Exercise Clause.<sup>235</sup> As the Supreme Court stated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>236</sup> Thus, under *Employment Division*, forcing the Orthodox Jewish community to take down their eruv violated the Free Exercise Clause.

Since a local government’s allowance of an eruv would likely violate the Establishment Clause,<sup>237</sup> it becomes highly problematic for a court to remedy a Free Exercise violation. That is, when a court determines there is a Free Exercise violation, it should not simply order a local government to allow the construction of an eruv or permit the community to maintain an eruv that is already intact; one violation of a constitutional principle should not be remedied at the expense of another. Instead, a court should rectify the situation by ordering the local government to enforce its laws equally. In the case of the Tenafly Borough Association, for example, the association should be ordered to apply Ordinance 691 to all residents and order the removal of church signs, holiday decorations and house numbers.

What is less clear under *Employment Division* is if a local government intending to prohibit an eruv created a neutral law of general applicability, which prohibited the attachment of any objects to utility poles, and equally applied it, would the Council’s decision to deny the eruv be constitutional? It would be quite startling if a local government could effectively outlaw the presence of an eruv by simply enacting a seemingly neutral law, regardless of the intent that may have motivated it. Senators Orrin Hatch and Edward Kennedy have noted that the Senate and House Committees on the Judiciary have received extensive testimony documenting the use of ostensibly neutral ordinances by municipal authorities to discriminate against and exclude religious individuals and institutions from a particular locality.<sup>238</sup>

*Church of the Lukumi Babalu Aye* seems to provide an answer to this question by declaring that seemingly neutral laws with a discriminatory purpose would violate the Free Exercise Clause.<sup>239</sup> In

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235. See *id.* at 24–25.

236. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (striking down a ban on animal sacrifice that was targeted at the Santeria faith).

237. See *supra* Part III.B.

238. See 146 CONG. REC. S7774-01 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

239. See *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534.

that case, the Court found that the legislative and historical background of the statute, combined with recent statements made by the city council and residents at public hearings, indicated that the ban on animal sacrifice was not enacted as a neutral law, but was instead enacted to discriminate against individuals who adhere to the Santeria faith.<sup>240</sup> The Court stated:

The Free Exercise Clause . . . extends beyond facial discrimination. The Clause ‘forbids subtle departures from neutrality,’ and ‘covert suppression of particular religious beliefs.’ Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.<sup>241</sup>

When religious animus or stereotyping seems to play a dispositive role in the decision-making process, courts should find a violation of the Free Exercise Clause.

Here, too, there is the problem of an appropriate remedy since the Court could not order the local government to permit construction of an eruv in violation of the Establishment Clause.<sup>242</sup> In this sense, the law would seem to reward discriminating and stereotyping on the part of local governments since, in the end, they would ultimately get what they want: no eruv. However, this is not entirely true. If a local government was found to have violated the Free Exercise Clause by discriminating or stereotyping against Orthodox Jews, there would likely be recourse through the political process and the press. While not an ideal situation, a court cannot order a remedy for one constitutional violation by ordering a violation of another constitutional provision.

Under *Employment Division and Church of the Lukumi Babalu Aye*, a local government’s decision to disallow an eruv after applying a neutral law of general applicability that is equally enforced and is not motivated by religious animus or stereotyping is constitutional even though, undeniably, severe consequences for some Orthodox Jews would inevitably ensue. Since Orthodox Jewish tradition necessitates

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240. Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 141, at 30–31 (discussing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540–42).

241. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534 (internal citations omitted).

242. See *supra* note 237 and accompanying text.

congregational worship for its fullest expression, those unable to attend temple, absent an eruv, are not permitted to worship in a manner consistent with Jewish law.<sup>243</sup> Thus, families with small children, the disabled, or the elderly are bound to the private space of their homes, unable to fully exercise their religion.

While this is a clear and unfortunate burden upon the practice of Orthodox Judaism, it is one that the religion has put upon itself. The ACLU explained that “[h]ere, the lack of an eruv is not government coercion for observant Orthodox Jews to violate their beliefs, it simply makes adhering to those beliefs more onerous because of the tenets of the religion itself.”<sup>244</sup> Surely, the government should not be in a position to alleviate religious burdens internal to religions themselves. “Government should only be required to alleviate burdens placed on religion that [it] initially imposed through legislation or action”<sup>245</sup> and not those restrictions that religious practice, history, or belief places on its adherents.

The New Jersey Superior Court in 1996 case reached a similar conclusion when, in a divorce proceeding, it refused to order a husband to provide his ex-wife with a “get,” a bill of Jewish divorce necessary if the wife were to remarry under Jewish Law.<sup>246</sup> The court stated:

It may seem “unfair” that Henry may ultimately refuse to provide a “get.” But the unfairness comes from Sondra’s own sincerely-held religious beliefs. When she entered into the “ketubah” [marriage contract] she agreed to be obligated to the laws of Moses and Israel . . . . That was Sondra’s choice and one which can hardly be remedied by this court.<sup>247</sup>

The purpose of American law is not to accommodate Rabbinic law or to bridge a gap between the two. Thus, government denial of an eruv under a neutral law of general applicability, equally enforced without religious animus or stereotyping, would not be a violation of the Free Exercise Clause.

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243. For further discussion of Jewish practice, *see supra* notes 39–43 and accompanying text.

244. Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 141, at 23.

245. *See Metzger, supra* note 8, at 88.

246. Brief for ACLU of New Jersey as Amicus Curiae, *supra* note 141, at 21 (discussing *Aflalo v. Aflalo*, 295 N.J. Super. 527 (N.J. Super. Ct. Ch. Div. 1996)). *See also Metzger, supra* note 8, at 87 n.151 (discussing the New York get statute and the debate surrounding it).

247. *Aflalo*, 295 N.J. Super. at 542.

### C. *The Eruv and RLUIPA*

If an Orthodox Jewish community were denied permission to build an eruv, it could bring a claim under RLUIPA stating that the local government was imposing a substantial burden on Orthodox Judaism by not allowing them to use public land to construct their eruv. A court analyzing the claim would first need to determine if an eruv should be seen as regulating land use for the purposes of the Act. When a local government either allows or disallows the use of power lines and utility poles on public land, and leases, or refuses to lease, public property to any group, it is regulating land use.<sup>248</sup> Because an eruv requires the use of public property and a government proclamation in order to be valid under Jewish law,<sup>249</sup> an eruv would fall within the realm of RLUIPA.

A court analyzing a RLUIPA claim would then need to determine if RLUIPA applies to the particular government decision. RLUIPA only applies when a government “makes, or has in place formal or informal procedures or practices that permit [it] to make, individualized assessments of the proposed uses for the property involved.”<sup>250</sup> That is, RLUIPA addresses any land use restrictions that involve discretionary judgments by local officials. If the government were merely applying a neutral law of general applicability that disallowed any attachments on utility poles, RLUIPA would not apply and a traditional *Employment Division* rationale would deem the denial of the eruv constitutional.<sup>251</sup> However, if the local government were making ad hoc decisions regarding the use of utility poles or was purporting to apply a neutral law, but was in fact selectively applying it, as was the case with the Tenafly Borough Association,<sup>252</sup> RLUIPA would apply because the officials were making discretionary judgments. The local government would then have the burden of demonstrating that its decision was necessitated by a compelling government interest and that its actions aimed to further the government interest in the least restrictive means.<sup>253</sup>

Since the Free Exercise Clause would be violated if a local government were engaging in ad hoc determinations motivated by

248. See 146 CONG. REC. S7774-01 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

249. See *supra* notes 9–16 and accompanying text.

250. 42 U.S.C. § 2000cc(a)(2)(C) (2000).

251. See *supra* Part IV.A for a discussion of *Employment Div.*

252. See *supra* Part IV.B for a discussion of the Tenafly eruv debate.

253. See 42 U.S.C. § 2000cc(a)(1) (2000).

religious discrimination or stereotyping under the guise of applying neutral laws regulating land use,<sup>254</sup> a RLUIPA claim would appear to be redundant. However, RLUIPA has real power if one reads it as forcing local governments to allow religious land use, specifically, the construction of an eruv, in the absence of a neutral law of general applicability. For those local governments that have no law restricting use of utility wires or poles, or for those jurisdictions that often permit variances or special use permits, the language of RLUIPA would require local governments to establish an eruv because RLUIPA would not allow individualized determinations that burden religious practice, even if that burdening was not the intent of the local government.

A controversy over an eruv in Palo Alto, California is illustrative in highlighting the power of RLUIPA. In that case, after a prolonged eruv debate within the community between proponents and opponents of the eruv, the city proposed a compromise in which it would allow the eruv supporters to paint white lines on the utility poles to represent the continuous enclosure of the eruv to circumvent the ban on any foreign pole attachments.<sup>255</sup> However, the Council had always permitted a variance from this ban in the shopping district for purposes of decoration during the holiday season.<sup>256</sup> The Palo Alto rabbi heading the movement for an eruv said the compromise was unworkable under Jewish law and that his congregants ““will look with pretty bitter irony on other attachments on lampposts from season to season.””<sup>257</sup>

If the Orthodox Jewish community in Palo Alto decided to bring an RLUIPA claim, it would likely succeed. The Council would likely argue that the holiday decorations are temporary, while an eruv is permanent, and that the decorations enhance commerce during the holidays and have no religious significance. Nevertheless, a court would not likely find these compelling under the stringent RLUIPA standard, which requires strict scrutiny for ad hoc determinations regarding land use that burdens a particular religion.<sup>258</sup> That the eruv has religious significance in fact privileges it in an RLUIPA analysis.

However, what if a local government denied the Orthodox Jewish community’s request for permission to construct and maintain an eruv on the grounds that granting such permission would be a

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254. See *supra* Part IV.A.

255. Marcella Bernhard, *City Council: Rabbi Blasts Eruv Compromise*, PALO ALTO WEEKLY, July 28, 2000.

256. See *id.*

257. *Id.*

258. See 42 U.S.C. § 2000cc(a)(1) (2000).

violation of the Establishment Clause? It is uncertain whether a local government could satisfy strict scrutiny if it claimed its compelling interest was to avoid a violation of the Establishment Clause. RLUIPA states that “[n]othing in this chapter shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion.”<sup>259</sup> Thus, it would appear that since the eruv is a violation of the Establishment Clause under both the *Lemon* test and the symbolic endorsement test,<sup>260</sup> RLUIPA would not mandate a local government to allow the construction and maintenance of an eruv.

If RLUIPA did necessitate an eruv, despite its violation of the Establishment Clause, it would create a significant legal dilemma for local governments deciding whether or not to allow an eruv. That is, if a local government allowed an eruv, it would open itself to an Establishment Clause claim, but if it disallowed it, an Orthodox Jewish community could sue under an RLUIPA claim.<sup>261</sup> In order to avoid this paradox, courts should analyze RLUIPA as if it is consistent with the Establishment Clause, thereby avoiding the dilemma of requiring an eruv despite the fact that it is an unconstitutional establishment. If a local government denies a request for an eruv because it violates the Establishment Clause, the courts should find this to be a compelling government purpose that satisfies strict scrutiny.<sup>262</sup>

## V. CONCLUSION

A local government’s allowance of an eruv, which converts the public domain into the private domain and into the property of the Orthodox Jewish community, is a violation of the Establishment Clause of the Constitution. A local government that disallows an eruv

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259. 42 U.S.C. § 2000cc-4 (2000).

260. *See supra* Part III.B.

261. This tension is usually discussed in relation to the Establishment Clause and the Free Exercise Clause. *See supra* notes 19–22 and accompanying text. However, in the case of the eruv, this tension is not present unless a local government was selectively applying a neutral law to disallow an eruv or was motivated by animus or stereotyping. *See supra* Part IV.B. Where a local government is simply applying its neutral law of general applicability, there is no Free Exercise violation. *See id.*

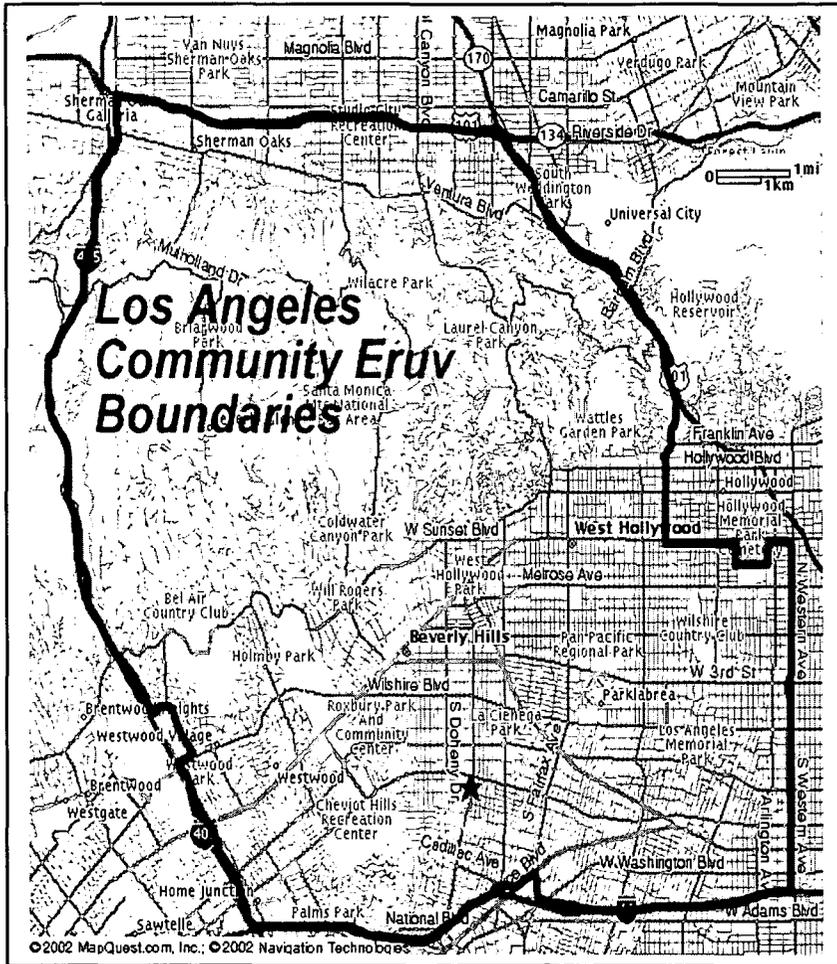
262. Needless to say, this is probably not the case since strict scrutiny is almost always fatal to the law under examination. This is particularly troubling since RLUIPA’s strict scrutiny itself is, in effect, a violation of the Establishment Clause. That is, through its privileging of religion, it fails the second prong of the *Lemon* test. *See Sager, supra* note 196, at 15 (“[RLUIPA] is a bald and rather extreme privileging of churches for which no justification is available . . . . [It] is wholly inconsistent with the best understanding of religious liberty, which centers on the norm of equal regard.”).

under a neutral law of general applicability, consistently applied, does not violate the Free Exercise Clause of the Constitution or RLUIPA. If, however, a local government disallows an eruv by applying a seemingly neutral law in an unequal manner, or is motivated by religious discrimination or stereotyping, it violates the Free Exercise Clause and RLUIPA.

Since courts and commentators have failed to thoroughly analyze eruvim or articulate a consistent legal framework, local governments, opponents and proponents of them have had little guidance in making their decisions. Although it is understandable that courts, local governments, and scholars have been sensitive to the burdens imposed on Orthodox Jewish worship absent an eruv, their analyses have glossed over the problematic constitutional aspects of eruvim, thus appearing to be results-oriented in holding that an eruv is constitutionally permissible. It is not the role of American law to alleviate the internal burdens of Orthodox Judaism or any religion. It is the role of the courts and local governments to uphold the Constitution and safeguard all citizens' rights to be free from religion.

*Appendix I*

Los Angeles Community Eruv Boundaries



*Appendix II*

(From *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 155 F. Supp. 2d 142, 147–48 (D.N.J. 2001))

## PROCLAMATION

WHEREAS, in accordance with the Jewish Orthodox faith the law of the Sabbath contains commandments prohibiting the pushing and carrying of articles on the Sabbath and other Jewish holy days in the public domain except within certain specified conditions; and

WHEREAS, the delineation of an eruv and its construction creates the legal fiction of a private domain in which observant persons of the Jewish faith are permitted to carry or push objects from place to place within the defined area during the Sabbath and other holy days; and

WHEREAS, the office of the Bergen County Executive has been petitioned by the Tenaflly Eruv Association, Inc., on behalf of those of the Jewish faith who reside within the County of Bergen, bounded by Booth Avenue and Tenaflly Road in Englewood; the Borough of Tenaflly; Madison Avenue, Knickerbocker Road and Truman Drive in Cresskill; to rent according to Jewish law, to the Tenaflly Eruv Association, Inc, for a period of 30 (thirty) years at a rental rate of one dollar (\$ 1.00), in hand paid, the rights to the aforesaid area for the sole purpose of carrying and/or pushing articles on the Sabbath and Jewish holy days; and

WHEREAS, the office of the Bergen County Executive deems it to be in the public interest of those of its residents for whom the petition has been presented be granted the rights described in the petition; Now therefore,

I, WILLIAM P. SCHUBER

Executive of the County of Bergen, New Jersey do hereby proclaim  
Wednesday, December 15, 1999 as,

A GRANT OF RIGHTS IN BERGEN COUNTY

The said eruv shall not be valid or binding for any other purpose and

this proclamation creates no rights, duties or obligations enforceable in any court whether in law or in equity. This proclamation shall not diminish, increase or affect any other rights granted under New Jersey law, nor shall it be deemed to authorize any physical construction that would otherwise require permission from any local municipal, county or state boards.

The Bergen Proclamation is typical of the ceremonial proclamations establishing *eruv*s in other municipalities, such as: Washington, D.C.; Philadelphia, Pennsylvania; Baltimore, Maryland; Cincinnati, Ohio; Charleston, South Carolina; and Jacksonville, Florida.